IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARILYN KAYE FREEMAN,

Defendant and Appellant.

S150984

OPENING BRIEF ON THE MERITS

San Diego County Superior Court No. SCD171601
The Honorable Robert F. O'Neill, Judge

OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MARILYN KAYE FREEMAN,** Defendant and Appellant.	S150984 **OPENING BRIEF ON THE MERITS**

ISSUES PRESENTED

This Court granted respondent's Petition for Review, which presented the following question: "Absent a showing of actual judicial bias, prejudice, or conflict of interest, does a mere appearance of bias, as found by a reviewing court, that might undermine the public's confidence in an impartial judiciary violate a party's personal due process rights requiring reversal of the judgment in an otherwise error-free trial?"

INTRODUCTION

During the early stages of the proceedings in appellant's criminal case, Judge O'Neill disqualified himself because he heard a rumor that appellant had been stalking his friend, a fellow judge. A year and a half later, the supervising judge of the superior court deemed the rumor to be utterly baseless in light of new information from the District Attorney's Office and re-assigned the case back to Judge O'Neill, who also concluded he could be impartial. Appellant filed a motion to recuse Judge O'Neill, but later withdrew the motion. On the eve of trial, appellant personally renewed the motion, but Judge O'Neill disallowed it. Appellant sought no pre-trial writ review and instead went to trial and was convicted.

Although never questioning that Judge O'Neill in fact was unbiased, the Court of Appeal held that appellant's due process right to an unbiased tribunal had been violated because the stalking rumor and the judge's prior recusal created an appearance of bias that could undermine public confidence in the judicial system. The court therefore reversed appellant's conviction.

This Court should uphold the conviction and hold that, to establish a deprivation of the constitutional right to an impartial judge, a litigant must show either actual bias or implied bias based on the judge's financial interest or personal embroilment in the case. A lesser showing, such as the mere appearance of potential bias found by the appellate court in this case, might justify pre-trial relief under the prophylactic recusal statutes; however, such a showing is insufficient to justify overturning the judgment of conviction in the post-trial appeal on constitutional due process grounds.

STATEMENT OF THE CASE

Facts Relating To The Offense

Appellant's daughter, E., was placed in foster care because appellant had regularly abused her. Appellant, an attorney, then engaged in an aggressive campaign to disrupt the foster placement and terrorize her daughter's foster parents. She burglarized the foster parents' home, chased them at high speeds on the freeway, followed them in her car on city streets, glared at them "in [an] evil manner," spied on them at their residence and elsewhere, took pictures of them, sprayed her perfume in their car, and solicited one of her clients to kidnap E. from them. (Slip Opn. at 3-4.)

Procedural History

Based upon appellant's conduct, the San Diego District Attorney charged her with stalking (counts 1 and 2; Pen. Code, § 646.9, subd. (a)), first degree burglary (count 3; Pen. Code, §§ 459/460), solicitation to kidnap (count

4; Pen. Code, § 653f, subd. (a)), misdemeanor child endangerment (counts 5 and 6; Pen. Code, § 273a, subd. (b)), and misdemeanor battery (count 7; Pen. Code, § 242). (1 CT 1-3.)

On December 19, 2002, after appellant was arrested and taken into custody, Judge O'Neill presided over a readiness conference and heard the first of four *Marsden*[1/] new-counsel motions appellant made in this case. The court granted appellant's request for new counsel. (1 RT 3-4, 9-11.) At the conclusion of the *Marsden* hearing, Judge O'Neill turned to the bail issue and stated he wanted to set a bail review with the judge who regularly heard bail reviews. (1 RT 11-12.) Appellant personally asked Judge O'Neill to conduct a bail review hearing immediately and inquired whether the judge believed house arrest was a viable alternative to bail in light of rumors she had been stalking another superior court judge, Judge Elias. (1 RT 12.) The stalking rumors apparently arose from matters observed on appellant's computer, which had been seized by the authorities in connection with the current case. (4 RT 302-303.)

Judge O'Neill stated that he had heard the rumor and explained that he had known Judge Elias for 23 years, that they had worked together in the district attorney's office, and that they were friends. (1 RT 12.) Judge O'Neill opined that the rumor appellant was stalking Judge Elias could potentially preclude any active judge on the San Diego County Superior Court bench from hearing the bail motion. (1 RT 17.) Appellant 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]." (1 RT 17.) Despite this representation and regardless of appellant's insistence that he conduct a bail

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

review, Judge O'Neill stated that he was not "the person [who] should hear" appellant's bail motion and that he was "recusing [himself]" from the bail issue. (1 RT 18.)

Between January and early September 2003, Supervising Criminal Judge Deddeh and several other San Diego judges presided over additional hearings related to appointment of counsel, bail review, discovery, and other matters. (3 CT 531-549.) 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 Jones for all purposes. (3 CT 550.) Judge Jones presided over the preliminary examination, bound appellant over for trial, and presided over various other pretrial matters until May 2004. (PHT 173-177; 3 CT 550-561.)

At a May 14, 2004, status conference, the deputy district attorney advised Judge Jones that "the reason [for the assignment of the case to him] no longer exist[ed]." (1 AUG RT 1.) Judge Jones stated he would "transfer the matter back to [Judge Deddeh] ... and let him decide" which judge should be assigned to the case. (1 AUG (May 14, 2004) RT 1.) 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 [appellant'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 back to Judge O'Neill for all purposes. (3 CT 628; 4 RT 302-303, 310.)

At this point, appellant 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 that the Judge Elias matter had been resolved and that Judge O'Neill could decide for himself whether this was "an issue for him." (4 RT 310.) That same day, appellant personally filed a handwritten challenge "for cause" against Judge O'Neill, citing the circumstances of Judge O'Neill's recusal in December 2002 as to the bail issue. Appellant's counsel did not join in the challenge. (3 CT 562.) On May 20, 2004, Judge O'Neill and Judge Deddeh evaluated the motion in a series of hearings wherein appellant ultimately withdrew her challenge. (3 CT 565-568; AUG (May 20, 2004) RT 1.)

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, Judge O'Neill denied appellant's request to substitute new counsel and denied her fourth and final *Marsden* motion. (6 RT 719-721; 6A RT 741.) Appellant again raised the issue of Judge O'Neill's earlier recusal from her case in December 2002, and moved to disqualify Judge O'Neill for cause. Appellant asserted that 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." (6A RT 727, 741) Judge O'Neill responded that the issue had already been resolved by Judge Deddeh, noted that appellant's disqualification motion had been withdrawn and further pointed out that the motion must be brought by appellant's attorney, not appellant herself. (6 RT 772-773.)

Appellant did not file a petition for writ of mandate challenging the rejection of her disqualification motion. Instead, she proceeded to trial. The jury convicted appellant of all counts. (1 CT 209-215, 3 CT 605-613; 18 RT 3073-3074.) The court sentenced her to six years in prison. (3 CT 512, 627; 18 RT 3123-3124.)

On appeal, appellant claimed, among other things, that Judge O'Neill was disqualified from presiding over her case because he had previously recused himself on the bail issue almost two years before trial. In a published opinion, the Court of Appeal reversed the judgment. The court acknowledged that appellant's statutory claim had been foreclosed by her failure to file a writ of mandate as required under Code of Civil Procedure[2/] section 170.3, subdivision (d). (Slip Opn. at 9-10.) Nevertheless, in addressing her constitutional claim, the court concluded that appellant's trial before Judge O'Neill was tainted by the appearance of judicial bias. Although the court appeared to accept that Judge O'Neill was not actually biased against appellant, the court opined that an appearance of bias persisted because of the stalking rumor and the prior recusal. (Slip Opn. at 14.) These circumstances, the court opined, gave rise to an appearance of judicial bias that could undermine the public's confidence in an impartial judiciary. (Slip Opn. at 13-16.) The court looked to the statutory disqualification scheme to guide its constitutional analysis and concluded that appellant suffered a deprivation of her due process right to an impartial judge. (Slip Opn. at 16-18, fn. 8.) In the unpublished portion of its opinion, the court rejected all of appellant's remaining claims, thereby concluding that the trial was otherwise error-free and that there was no bar to retrial. (Slip Opn. at 19-47.)

Both appellant and respondent filed Petitions for Review in this Court. This Court denied appellant's petition and granted respondent's on May 23, 2007.

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2. All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

ARGUMENT

Introduction

Although the Court of Appeal acknowledged that the United States Supreme Court and this Court have never held the Due Process Clause to be so far reaching, it nonetheless concluded that, where an appearance of judicial bias "could undermine the public's confidence in a fair judiciary," the judgment in an otherwise error-free trial should be set aside on the grounds of a due process violation. (Slip Opn. at 13-14, 17-18.) The Court of Appeal thus extended the constitutional right to a fair trial far beyond the scope of the United States Supreme Court's and this Court's due process jurisprudence. The court's reasoning improperly incorporated concerns over the public's perception of the judiciary into the inquiry as to whether a litigant received a trial that was fair in fact. Further, in equating a statutory prophylactic concern for the public's perception of the judiciary with a party's personal due process right to a fair trial, the court confused the narrower constitutional standard with statutory standards that are inapplicable in this appeal. (See Slip Opn. at 8-9, 16 fn. 8.) Consequently, despite her failure to seek a pre-trial writ of mandate under the statutory standards, appellant incongruously received the maximum relief to which she allegedly might have been entitled had she filed a pre-trial writ and was thus allowed to gamble on an acquittal in the criminal trial that took place in the meantime.

The Court of Appeal was wrong. Appellant received precisely what she was due under the due process clause: a fair trial before a fair judge. The due process clause affords a narrower scope of protection than the statutory disqualification statutes. It protects fundamental personal liberty interests and guarantees litigants the right to a trial that is fair in fact. Mere appearances of possible bias, therefore, have never been held sufficient to implicate due process concerns. To make out a due-process violation, a litigant either must

show actual bias or implied bias based on the judge's financial interest or personal embroilment in the case. In any event, even if due process embraced the right to a trial free from the appearance of potential bias, the facts of this case do not demonstrate such an appearance.

I.

CONSTITUTIONAL DUE PROCESS FOCUSES ON THE INDIVIDUAL AND PERSONAL RIGHT TO ACTUAL FAIRNESS IN THE COURTS RATHER THAN UPON KEEPING UP MERE APPEARANCES FOR THE BENEFIT OF THE PUBLIC

Due process of law, under both the state and federal Constitutions, protects personal and individual liberty interests and fundamental rights. The Fourteenth Amendment of the United States Constitution provides that no state "shall . . . deny any person of life, liberty, or property without due process of law." Likewise, Article I , Section 7, of the California Constitution ensures that "a person may not be deprived of life, liberty, or property without due process of law. (See also Cal. Const. Art. I, Secs. 24 and 29 [guaranteeing due process of law to both the defendant and the People of the State of California in a criminal action].) Constitutional due process "principally serves to protect the *personal* rights of litigants to a full and fair hearing." (*Miller v. French* (2000) 530 U.S. 327, 350 [120 S.Ct. 2246; 147 L.Ed.2d 326] italics added, see also *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610 [93 S.Ct. 2908; 37 L.Ed.2d 830] ["constitutional rights are *personal* and may not be asserted vicariously"]; *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 280 ["the right to due process is a *personal* one"].)

The United States Supreme Court has clearly articulated that the due process clause protects fundamental fairness in a trial by requiring "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; 138 L.Ed.2d 97] (*Bracy*), italics added.) Generally, judges are presumed to be fair and impartial; they are clothed in a heavy presumption of honesty and integrity. (See *Withrow v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456; 43 L.Ed.2d 712] (*Withrow*).) In light of this presumption of honesty and integrity, only "a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (*Bracy, supra*, 520 U.S. at pp. 904-905 quoting *Tumey v. Ohio* (1927) 273 U.S. 510, 532 [47 S.Ct. 437; 71 L.Ed. 749] (*Tumey*).)

A party has the absolute constitutional right to a trial free from actual judicial bias; in other words, the party has a right to a trial that is fair in fact. (*Withrow, supra*, 421 U.S. 46; *People v. Harris* (2005) 37 Cal.4th 310, 346-347; see also Flamm, Judicial Disqualification (2d ed. 2007), Bases for Disqualification § 2.5.1, pp. 33-34.) In defining the scope of this due process right to a trial before a judge who is fair in fact, the Supreme Court has explained that constitutionally intolerable situations exist only when judges have an actual stake in the outcome of the litigation, or the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow, supra*, 421 U.S. at p. 47.) The high court has found such constitutional violations only in cases where the judge has a financial stake in the outcome or has become personally embroiled or involved in the litigation. (*Crater v. Galazza* (9th Cir. July 9, 2007, No. 05-17027) 2007 U.S. App. LEXIS 16182, *32-34; *Del Vecchio v. Illinois Dep't of Corrections* (7th Cir. 1994) 31 F.3d 1363, 1371-1373 (*Del Vecchio*); see also Flamm, Judicial Disqualification, *supra*, § 1.4, p. 9, § 2.5.2, p. 38.)

A. "Due Process" Provides Limited Grounds For Judicial Disqualification

Ancient law recognized significantly broader grounds for judicial disqualification than did Anglo-American common law. For example, under

early Jewish or Talmudic law, a judge was proscribed from participating in "any case in which a litigant was his friend, a kinsman, or someone whom he personally disliked" because such relationships constituted biasing influences that would deny a litigant a fair trial. (Flamm, Judicial Disqualification, *supra*, § 1.2, p. 5.) The Romans took an even more expansive view on judicial disqualification. Under the Sixth century Roman Code of Justinian, judges could be disqualified, not only on the basis of familial relationships, but even on a mere *suspicion* of bias. (*Ibid.*) In his 13th century treatise *De Legibus et Consuetudinibus Anglie* (On the Laws and Customs of England), Bracton recognized that a judge could be disqualified for good cause. (*Ibid.*) He advanced the Roman notion that good cause should include a "suspicion of bias" and that such a suspicion could arise as a result of the judge's relationship to the parties (*Ibid.*)

Despite Bracton's endorsement of rather expansive grounds for judicial disqualification, the English courts never adopted such a fluid standard. (Flamm, Judicial Disqualification, *supra*, § 1.2, pp. 5-6.) Anglo-American common law adhered to a rigid standard that limited the grounds for judicial disqualification only to those instances where the judge had a "pecuniary interest in a cause." (*Id.* at § 1.2, pp. 5-6, and fns. 5 and 6.) This common law tradition was passed on to the American colonies and survived after the Revolution. (*Id.* at § 1.4, p. 8.) Thus, under Anglo-American common law, the only basis for judicial disqualification was an adjudicator's personal pecuniary interest in the proceedings. (*Id.* at § 1.2, pp. 5-6 ["the common law notion of what constituted good grounds for seeking a judge's disqualification was straightforward and simple: A judge would be disqualified for possessing a direct financial interest in the cause before him, and for absolutely nothing else.") All other bases for judicial disqualification required statutory

enactments that Congress and the state legislatures adopted over time. (*Id.* at § 1.4, pp. 8-9.)

Although Congress and the states adopted additional grounds for judicial disqualification within their statutory frameworks, the United States Supreme Court has cautioned that the due process right to an impartial judge is to be carefully circumscribed. (See *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 828 [106 S.Ct. 1580; 89 L.Ed.2d 823] (*Aetna*) ["The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today"].) As will be demonstrated below, the high court has found that due process requires disqualification of a judge only in situations where the judge has a pecuniary interest in the outcome of the litigation or is somehow personally embroiled or involved in the litigation. (See e.g. *Tumey*, *supra*, 273 U.S. at p. 532-533; *Aetna*, *supra*, 475 U.S. at p. 825; *Crater v. Galazza*, *supra*, 2007 U.S. App. LEXIS 16182, *32-34; see also Flamm, Judicial Disqualification, *supra*, § 1.4, p. 9.) Only in such instances is the heavy presumption of judicial impartiality rebutted.

1. A Judge's Financial Interest In A Case Rebuts The Presumption Of Judicial Neutrality

The Supreme Court has established that, at a minimum, the constitutional due process right to an impartial judge embraces the common law disqualification standard. Therefore, due process requires disqualification of a judge who has a pecuniary interest in the outcome of the proceedings. (*Tumey*, *supra*, 273 U.S. at pp. 532-533.) In the seminal case of *Tumey*, the mayor-judge personally received compensation for each conviction he obtained in the mayor's court. In analyzing whether such an arrangement violated due process, the Supreme Court first recognized that not all questions of judicial

qualification were of constitutional dimension. "Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." (*Id.* at p. 523.) Indeed, this comports with the historical background wherein Congress and the state legislatures have been left free to expand the bases and grounds for judicial disqualification. The high court went on to explain, however, that a defendant in a criminal case is deprived of due process of law when his liberty or property is subjected "to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." (*Id.* at pp. 523, 532.) The court reasoned that such a pecuniary interest overcame the presumption of honesty and integrity. (*Id.* at p. 532.) In *Tumey*, the high court simply reaffirmed that the due process clause embraces the common law notion that a jurist with a direct personal pecuniary interest in the litigation is barred from presiding over the case.

Nearly a half century after *Tumey*, the high court refined the scope of the due process clause to include a jurist's *official* financial interest in the case as a disqualifying basis. (*Ward v. Monroeville* (1972) 409 U.S. 57, 60 [93 S.Ct. 80; 34 L.Ed.2d 267] (*Ward*).) In *Ward*, just as in *Tumey*, the judge was a village mayor who presided over the mayor's court. However, unlike the *Tumey* mayor-judge, the *Ward* mayor-judge did not receive any direct *personal* compensation from the convictions he obtained in his court. Instead, the fines were paid to the village treasury and provided a substantial portion of the municipality's funds. (*Id.* at pp. 58-59.) The Supreme Court concluded that as the village's financial executive officer, the mayor had a compelling interest to ensure continued monetary contributions to the village fisc from the convictions in his court. Even though the mayor did not personally receive the funds derived from the convictions, his presiding over cases in the mayor's court was constitutionally intolerable because his interest as executor of the

village's financial affairs directly conflicted with the interests of the parties before him. (*Id.* at p. 60.) Thus, the pecuniary interest, though not *personally* direct to the mayor in his private life, was *officially* direct to him in his public role as mayor.

Aetna provides the high court's most recent affirmation that constitutional due process requires disqualification of a judge with a personal stake in the outcome of the litigation. (*Aetna*, *supra*, 475 U.S. at p. 825.) There, a justice on a state's supreme court authored a 5-4 *per curiam* majority opinion resolving an issue between an insurance company and claimant. However, the authoring justice was a party to a pending private lawsuit and had further brought a class action suit on behalf of all state employees raising similar insurance claims in a lower court. (*Id.* at pp. 817-818.) In resolving the insurance issue in the state's supreme court, the authoring justice directly affected his cases in the lower courts because those tribunals would be bound by the decision of his court. (*Id.* at pp. 822-824.) In fact, the United States Supreme Court observed that the justice's opinion "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." (*Id.* at p. 824.) Thus, the justice had a personal and substantial pecuniary interest in the outcome of the case in which he authored the majority opinion. This violated the insurance company litigant's due process right to an impartial judge. (*Id.* at pp. 824-825.)

However, the Supreme Court explained that its holding did not extend to further disqualify the remaining justices of the state supreme court who were included by default in the class action. The court opined that these justices' interests were too speculative and that, accordingly, any biasing influence was "too remote and insubstantial to violate the constitutional constraints." (*Aetna*, *supra*, 475 U.S. at pp. 825-826; see also Flamm, *supra*, Judicial Disqualification, § 6.3, pp 151-152 ["indirect, attenuated, contingent, incidental,

remote, speculative, insubstantial, conjectural, or inconsequential'" interests are "generally not the kind of interest that would... warrant disqualifying the judge"].) Indeed, as to these other justices, it can be said that there only existed a mere appearance of bias and that without more, their involvement in the case did not offend due process.

Tumey, *Ward*, and *Aetna* demarcate the contours of the due process right to an impartial judge within the context of a personal financial stake in the outcome of the litigation. As the court in *Aetna* explained, "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification...." (*Aetna*, *supra*, 475 U.S. at p. 828.) These cases demonstrate that it takes circumstances as powerful as those in which a judge has a pecuniary interest in the outcome of the litigation to overcome the presumption of judicial impartiality and to mandate his or her disqualification as a matter of constitutional due process. (*Tumey*, *supra*, 273 U.S. at p. 532.)

Following the lead of the federal high court, this Court has enunciated that due process compels disqualification of an administrative law judge who has a financial interest in the proceedings. In *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1024, this Court considered whether "a temporary administrative hearing officer ha[d] a pecuniary interest requiring disqualification when the government unilaterally select[ed] and pa[id] the officer on an *ad hoc* basis and the officer's income from future adjudicative work depend[ed] entirely on the government's goodwill." Relying upon the federal high court's disqualification jurisprudence, this Court recognized that most bases for judicial disqualification, such as "kinship, personal bias, state policy, remoteness of interest" are matters of legislative discretion. (*Id.* at p. 1025.) This Court further explained that

> while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality [citations], adjudicators challenged for financial interest have not. Indeed, the law is emphatically to the contrary. The high court has "ma[de] clear that [a reviewing court is] not required to decide whether in fact [an adjudicator challenged for financial interest] was influenced, but only whether sitting on the case . . . '"would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'"

(*Ibid.*, citations omitted.)

This Court further acknowledged that requiring disqualification of a judge on the basis of pecuniary interests has its roots deep in the common law. (*Haas*, *supra*, 27 Cal.4th at p. 1026, fn. 11; see also Flamm, Judicial Disqualification, *supra*, § 1.2, pp. 5-6.) By barring an adjudicator with pecuniary interests in the case from presiding, due process, like the common law, erects a rigid disqualification standard. The standard is impervious in that it requires disqualification regardless of whether the adjudicator actually was able to be fair. (*Haas*, *supra*, 27 Cal.4th at p. 1026.) Thus, even when an adjudicator may be unaware of his or her pecuniary interest in the outcome of a pending case, due process compels disqualification. (*Ibid.*, citing, *Liljeberg v. Health Services Acquisition Corp.* (1988) 486 U.S. 847, 865, fn. 12 [108 S.Ct. 2194; 100 L.Ed.2d 855] (*Liljeberg*) [although cited for the proposition that due process may compel disqualification even for unknown pecuniary interests, *Liljeberg* actually dealt with disqualification under the more demanding federal statutory disqualification framework].)

The foregoing cases from both the federal high court and this Court, represent a judicial pronouncement that the due process clause mandates disqualification in those cases where the adjudicator has an *actual* and *real* interest in the outcome of the case. In such instances, the prevailing presumption of judicial honesty and integrity is conclusively rebutted and the adjudicator is constitutionally barred from presiding over the proceedings.

2. A Judge's Personal Embroilment In The Case Rebuts The Presumption Of Judicial Neutrality

The federal Supreme Court has also held that the due process right to a fair trial may be violated when the judge becomes personally embroiled in the litigation. This type of situation occurs most commonly within the context of contempt charges and adjudications. For example, *In re Murchison* (1955) 349 U.S. 133 [75 S.Ct. 623; 99 L.Ed. 942] (*Murchison*), involved a judge who served as a one-man-grand-jury, calling witnesses as he investigated alleged crimes. Subsequently, the judge charged two of the witnesses with contempt because he believed one had lied to him during the grand-jury proceedings and the other had refused to answer questions. The judge then presided over their contempt trials, found them guilty and sentenced them accordingly. (*Id.* at p. 134-135.) The Supreme Court held that the judge could not preside over the subsequent contempt trials because he would then serve as both a prosecutor and adjudicator in the same proceeding and therefore would harbor a personal interest in the outcome of the case. (*Id.* at 137.) The court observed that a judge who has been a part of the accusatory process

> cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

(*Ibid.*, footnotes omitted.)

Murchison recognized that a judge cannot constitutionally preside over a matter in which he or she has played a role in the actual presentation or prosecution of the action. As James Madison put it, "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time...."

(Madison, The Federalist No. 10 (Modern Library Ed. 2000) p. 56; see also *Murchison*, *supra*, 349 U.S. at p. 136.)

Similarly, in another contempt case, *Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 465-466 [91 S.Ct. 499; 27 L.Ed.2d 532], the Supreme Court explained that a judge who has been the victim of a party's vitriolic insolence at trial cannot adjudicate whether that party has engaged in criminal contempt. In *Mayberry*, a self-represented defendant cast numerous recalcitrant, insolent, and unbridled vilifying insults at the judge during the course of trial. (*Id.* at pp. 456-462.) Although the judge maintained commendable composure throughout the onslaught, at the sentencing hearing, he found the defendant guilty of 11 counts of contempt and sentenced him accordingly. (*Id.* at p. 455.) In concluding that due process compelled the judge's disqualification from passing upon the defendant's contempt, the Supreme Court observed that he had become "embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." (*Id.* at p. 465; see also *Taylor v. Hayes* (1974) 418 U.S. 488, 501-503 [94 S.Ct. 2697; 41 L.Ed.2d 897] (*Taylor*) [during a criminal trial, the judge had become so embroiled in a running controversy with the defense lawyer that he exhibited a mounting display of personal animus against the counsel and therefore demonstrated that he could not remain impartial in adjudicating the contemptuous conduct of that attorney]; *Offutt v. United States* (1954) 348 U.S. 11, 17 [75 S.Ct. 11; 99 L.Ed. 11] (*Offutt*) ["the record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two."].)

Murchison, *Mayberry*, *Taylor*, and *Offutt* illustrate a bright line constitutional rule of disqualification within the context of cases where the judge became personally embroiled with the parties or their attorneys. In such cases, as in the pecuniary interest cases, the judge gains an *actual* and *real* vested interest in the outcome of the litigation. (See *Taylor*, *supra*, 418 U.S at p. 503, citing *Mayberry*, *supra*, 400 U.S. at p. 464 [noting that "'marked personal feelings were present on both sides' and that the marks of 'unseemly conduct [had] left personal stings'"].) Notably, the judges in these contempt cases were constitutionally disqualified because they were directly involved in the conflict or litigation, or were the *direct* victims of the parties' injurious behavior. By contrast, their fellow colleagues would be permitted to preside over the contempt hearings because the injury to those judges would be too speculative, remote, or insubstantial to violate due process. (*Mayberry*, *supra*, 400 U.S. at p. 466; see also *Aetna*, *supra*, 475 U.S. at pp. 825-826.) Unlike the involved judges, such other judges would still be clothed with the presumption of impartiality.

In sum, the high court's judicial disqualification jurisprudence has applied the due process clause to require disqualification only in limited situations. Under the high court's cases, due process requires disqualification when a jurist has either a personal pecuniary stake in the outcome of the case or has become embroiled in the battle. Such circumstances rebut the presumption of judicial impartiality and it becomes constitutionally intolerable to permit the affected jurist to continue to preside over the matter. Significantly, in no case has the Supreme Court ever found a due process violation on the basis of mere appearances. Instead, the high court has emphasized that due process is violated only upon a showing of actual bias or presumed bias in well-defined circumstances.

B. Reversal Based On A Due Process Violation For Judicial Bias Requires A Showing Of Demonstrable Facts That Rebut The Presumption Of Judicial Impartiality

As explained above, in defining the contours of the due process right to an impartial judge, the Supreme Court has only found that constitutional due process requires judicial disqualification in limited situations -- situations where the adjudicator has either a direct personal pecuniary interest in the outcome of the litigation or is personally embroiled or involved in the matter. These cases demonstrate that reversal on due process grounds is warranted only upon a showing of actual bias or implied bias based on those two well-established categories. Such a showing is sufficiently great so as to overcome the presumption of judicial honesty and integrity. (See *Withrow*, *supra*, 421 U.S. at p. 47; but see *Peters v. Kiff* (1972) 407 U.S. 493, 502 [92 S.Ct. 2163; 33 L.Ed.2d 83] [in discussing the systemic exclusion of African-Americans from serving as jurors, which violates Equal Protection, deprives a litigant of due process "even if there is no showing of actual bias in the tribunal[;] due process is denied by circumstances that create the likelihood or the appearance of bias."].)

Thus, the due process right to an impartial judge cannot embrace the notion that the trial must be free from the mere appearance of bias. To establish a due process violation, an aggrieved party must demonstrate something more than a mere appearance. Reversal is warranted only if there is a strong showing of actual bias or the classical forms of implied bias. The defendant must show demonstrable facts that would conclusively rebut the heavy presumption of judicial impartiality.

In *Offutt*, the Supreme Court observed that the judge, who had been the victim of an attorney's contumacious behavior at trial, could not rule on the attorney's contempt because "justice must satisfy the appearance of justice." (*Offutt*, *supra*, 348 U.S. at p. 14.) At first blush, this statement might suggest

that a due process violation is established upon a mere appearance of judicial bias. However, despite this pronouncement, the court went on to explain how the judge had become personally embroiled in a running conflict with the attorney based on the record's demonstration that he exhibited a continuous animus toward that lawyer throughout the trial. (*Id.* at pp. 16-18.) Thus, the high court recognized that although justice must satisfy the appearance of justice, there must be some showing beyond a mere appearance alone.

In *Offutt*, that showing came through the repeated statements the judge made to the contemptuous attorney on the record. While the high court recognized that judges are human and are permitted "a rare flare-up," an occasional "show of evanescent irritation," or even "a modicum of quick temper," the court further observed that judges must maintain an "atmosphere of austerity" in the trial court and preside with "impersonal authority of law" despite their human frailties. (*Offutt, supra*, 348 U.S. at p. 17.) The manner in which the trial judge presided in *Offutt* was wholly devoid of the necessary impartiality due process demands of adjudicators; thus, the record demonstrated facts that rebutted the presumption of judicial neutrality and due process was plainly offended. (*Ibid.*)

Indeed, in the contempt cases, *Murchison*, *Mayberry*, and *Taylor*, discussed earlier, the judges actually displayed their mounting displeasure with either counsel or the parties. Therefore, the high court found due process violations for far more than a mere appearance of bias. Rather, the records in those cases established sufficient demonstrable facts that conclusively rebutted the presumption of judicial impartiality. (See *Murchison, supra*, 349 U.S. at p. 137; *Mayberry, supra*, 400 U.S. at p. 465; *Taylor, supra*, 418 U.S. at pp. 501-503.) Requiring anything less would permit that "rare flare up," "evanescent irritation," or "modicum of quick temper" to constitute a basis for reversal on due process grounds.

In California, the Courts of Appeal have, until the instant matter, reversed cases on the basis of judicial bias only upon a showing of actual bias or facts that rebut the presumption of judicial honesty and integrity. For example, in *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 247, the trial judge, who sat as finder of fact in a sexual harassment case, made numerous and repeated comments on the record demonstrating his bias against women in sexual harassment cases. Similarly, in *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 461-463, the judge, who presided over an undocumented immigrant plaintiff's tort claim, showed his animus against the plaintiff by making numerous disparaging remarks throughout the record about the burdens undocumented immigrants place upon society. Likewise, in *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841-843, the judge exhibited his preconceived notion that the plaintiff's malicious prosecution case had merit because he dropped frequent denigrating remarks about attorneys and their abuses of the judicial system. (*Id.* at pp. 842-843.)

In each of these cases, like the high court's contempt cases, the record demonstrably established that the judges harbored some form of animus against the parties, their attorneys, or the cause of action. In each case, the aggrieved litigants could show *actual* facts that rebutted the presumption of judicial impartiality. These cases were thus reversible on due process grounds, not because of a mere speculative appearance or allegation of bias, but because there was actual, real, and demonstrable bias on the part of the trial judges. Indeed, "[a] court must be convinced that a particular influence, 'under a realistic appraisal of psychological tendencies and human weakness,' poses 'such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" (*Del Vecchio, supra*, 31 F.3d at p. 1375, quoting *Withrow, supra*, 421 U.S. at p. 47.)

Recently, this Court left open the question of the distinction between the statutory right to a trial free from the appearance of bias and the constitutional right to a trial before an impartial judge. (*People v. Chatman* (2006) 38 Cal.4th 344, 363.) In *Chatman*, the defendant in a capital case urged that the judge, whose daughter had been the victim of a violent crime, was disqualified from presiding over the case because of an appearance of bias. Although the defendant had forfeited his statutory claim as to the appearance of bias, this Court observed that he could raise the claim of bias as a constitutional claim. However, this Court declined to address the distinction between the statutory right to a trial free from the appearance of bias and the scope of the due process protection of a fair trial because it concluded that not even an appearance of bias existed. (*Ibid.*)

Here, the Court of Appeal erroneously filled the lacuna left by this Court in *Chatman* by concluding that the due process right to an impartial tribunal requires disqualification when "an appearance of bias . . . could undermine the public's confidence in a fair judiciary." (Slip Opn. at 13.) In reaching this conclusion, the court relied upon the statutory disqualification statutes to guide its constitutional analysis. (Slip. Opn. at 16, fn. 8 ["Although [appellant] 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.]) The court opined that in light of "the totality of the circumstances, a reasonable person might still harbor doubts as to whether [the judge remained impartial.]" (Slip Opn. at 15.)

Given the statutory language of section 170.1, subdivision (a)(6)(A)(iii), that a judge should be disqualified if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial," it is readily apparent that the court concluded a party's due process right to a fair

trial is coextensive with its view of the systemic concerns for public confidence in the judiciary. (Slip Opn. at 10, 17-18.) In other words, under the court's rationale, a party's personal and individual constitutional due process right is essentially coterminous with the statutory right to a trial free from the appearance of judicial bias. (See slip opn. at 10, 13, 15, 17-18.)

Contrary to the Court of Appeal's analytical approach, the statutory disqualification scheme is not the proper yardstick by which to assess whether appellant's due process rights were violated. Instead, the proper guide is the United States Supreme Court's constitutional jurisprudence to evaluate what the due process clause requires as the constitutional floor for a claim of judicial bias. (See *Bracy*, *supra*, 520 U.S. at pp. 904-905.) The difference is especially significant here because appellant forfeited her statutory claim, and gambled on an acquittal, by failing to file a pre-trial writ of mandate under section 170.3.

Additionally, to support its proposition, the Court of Appeal relied upon *Catchpole*, *Hernandez*, and *Hall* – cases where the trial records conclusively established actual or presumed bias. The court's reliance on these cases to fashion its new constitutional rule is misplaced because, as discussed, these cases involved judicial conduct that colored the record so strongly that *actual bias* against the parties was manifest and the presumption of judicial neutrality conclusively rebutted. Here, there was nothing in Judge O'Neill's conduct that even remotely called his impartiality into question. (See Arg. II, *post.*) Thus, the Court of Appeal's reliance on these cases is questionable given its observation that there was no showing of actual bias here.

As the Seventh Circuit explained in *Del Vecchio*, disqualification is not required unless "the biasing influence is strong enough to overcome" the presumption of impartiality. (*Del Vecchio*, *supra*, 31 F.3d at p. 1375.) The appearance must be "so strong that we may presume actual bias" – a presumption that automatically rebuts the presumption of judicial impartiality.

(*Ibid.*; *Withrow*, *supra*, 421 U.S. at p. 47 [probability of bias too high to be constitutionally tolerable].)

Accordingly, a party must make a showing of demonstrable facts that rebut the presumption of judicial honesty, integrity, and impartiality before a due process deprivation can be established. Such demonstrable facts include displays of actual bias, prejudice, embroilment, or interest in the outcome of the case. (See *Withrow*, *supra*, 421 U.S. at p. 47; *Del Vecchio*, *supra*, 31 F.3d 1363, 1375; *Haas v. County of San Bernardino*, *supra*, 27 Cal.4th 1033-1034.) The record in the instant matter simply does not provide any basis for overcoming that heavy presumption of judicial neutrality.

C. The Right To A Trial Free From The Mere Appearance Of Bias Is Grounded In Statutory Concerns For Preserving Public Confidence In The Judiciary Rather Than Constitutional Due Process

Although the right to a trial free from actual judicial bias is absolute, the Supreme Court has never explicitly held that a party has a due process right to a trial free from the mere appearance of judicial bias. (See *Johnson v. Carroll* (3rd Cir. 2004) 369 F.3d 253, 263 ["the Supreme Court's case law has not held, not even in dicta, let alone 'clearly established,' that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause"].) Admittedly, the high court has stated that "justice must satisfy the appearance of justice" (*Offutt*, *supra*, 348 U.S. at p. 14) and has suggested that due process "'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" (*Aetna*, *supra*, 475 U.S. at p. 825, quoting from *Murchison*, *supra*, 349 U.S. at p. 136.) However, the high court made these observations within the context of cases involving the classical forms of implied bias -- where the judges had either a pecuniary interest in the outcome of the litigation or had become personally embroiled in the action. As discussed

above, such cases warrant disqualification because of the historical importance of barring an adjudicator from being "a judge in his own case." (*Murchison*, *supra*, 349 U.S. at p. 136; Flamm, Judicial Disqualification, *supra*, § 1.4, p. 7.) Such circumstances overcome the heavy presumption of judicial impartiality and thus lead to the constitutionally required disqualification of the judge. Notably, the high court has never suggested that due process compels disqualification in circumstances that fall outside such personal financial interest or embroilment contexts.

Significantly, in *Bracy*, the high court reaffirmed that "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor," rather than a uniform standard. (*Bracy*, *supra*, 520 U.S. at p. 904) The court observed that usually such questions are "answered by common law, statute, or the professional standards of the bench and bar" such as the canons of judicial ethics. (*Ibid.*) *Bracy* relied upon *Aetna*, where the high court observed that the question whether kinship or personal bias disqualified a judge was best answered by the state legislatures or drafters of judicial ethics canons rather than compelled by constitutional rules. (*Aetna*, *supra*, 475 U.S. at p. 820.) Thus, statutory or canonical disqualification schemes do not define the constitutional requirements for disqualification under the due process clause. (*Ibid.*) Indeed, the Constitution requires judicial disqualification only in the most extreme cases. (*Id.* at p. 821; see also Flamm, Judicial Disqualification, *supra*, § 2.5.2, p. 38 ["it is only in extreme circumstances that it is necessary for courts to address the constitutional dimensions of judicial disqualification"].) Additionally, "general allegations of bias and hostility do not rise to a due process violation." (*United States v. Couch* (5th Cir. 1990) 896 F.2d 78, 81 (*Couch*), relying on *Aetna*, *supra*, 475 U.S. at p. 824-825.)

Recently, this Court re-articulated the notion that personal bias does not trigger constitutional concerns. (*People v. Vasquez* (2006) 39 Cal.4th 47, 63-64 [comparing the judicial disqualification standards within the context of a claim for prosecutorial recusal].) Like the federal high court in *Aetna*, this Court observed that

> according "matters of kinship [and] personal bias" [citation] dispositive constitutional importance [within the context of personal influences] would import into constitutional law a set of difficult line-drawing problems. As neither judges nor prosecutors can completely avoid personal influences on their decisions, to constitutionalize the myriad distinctions and judgments involved in identifying those personal connections that require a judge's or prosecutor's recusal might be unwise, if not impossible. *The high court's approach to judicial conflicts generally leaves that line-drawing process to state disqualification and disciplinary law, with only "the most extreme of cases" being recognized as constitutional violations.* [Citation.]

(*Id.* at p. 64, added italics, relying on *Tumey*, *supra*, 273 U.S. at p. 523 and *Aetna*, *supra*, 475 U.S. at p. 821.)

Instead of being rooted in the individual liberty interests guaranteed by the due process clause, the right to a trial free from the appearance of judicial bias is a legislatively-created or non-constitutional right. (Flamm, Judicial Disqualification, *supra* §§ 5.1-5.2 at pp. 103-108.) Such a right is designed to protect the public's perception of and confidence in an impartial judiciary; the primary rationale for it "stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence." (*Id.* § 5.3 at p. 108-109.) The interest in a trial free from the appearance of bias is not rooted in a party's personal and individual due process right to a trial before a judge who is fair in fact.

In the federal courts, the right to a trial free from the appearance of bias is provided in 28 U.S.C. section 455, subdivision (a), which states that "[a]ny justice, judge, or magistrate [magistrate judge] of the United States shall

disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In California, section 170.1, subdivision (a)(6)(A)(iii), articulates the parallel provision, stating that a judge should be disqualified when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Because these statutes focus upon what third parties may believe about a judge's impartiality, they are designed to protect public confidence in the courts as forums of integrity, fairness, and justice. (See *Liljeberg*, *supra*, 486 U.S. at pp. 859-860.)

However, such systemic concerns for public confidence do not rise to the level of constitutional proportions in the absence of a stake in the case on the part of the adjudicator. (*Couch*, *supra*, 896 F.2d at p. 82; see also *Liljeberg*, *supra*, 486 U.S. at p. 864-865.) In *Couch*, the Fifth Circuit explained that statutory standards for disqualification are more exacting than those required under the due process clause of the Constitution. (*Couch*, *supra*, 896 F.2d at p. 81.) Unlike the due process clause, statutes may require recusal when an objective outside observer would reasonably harbor a doubt as to the judge's impartiality. (*Ibid.*; see also *In re United States* (1st Cir. 1981) 666 F.2d 690, 694-695 [discussing policies for systemic concerns but explaining judges must ignore rumors, innuendos, and erroneous information when determining whether to step aside].)

Courts in other jurisdictions have also concluded that the right to a trial free from the appearance of judicial bias is not based upon due process, but rather upon statutory concerns in maintaining confidence in the judiciary. (See *Johnson v. Carroll*, *supra*, 369 F.3d at p. 261-263, and cases cited therein; see also *Tennant v. Marion Health Care Found.* (1995) 194 W.Va. 97, 110-111 ["a claim of an appearance of impropriety does not rise to the level of a fundamental defect in due process requiring a new trial."]; *In re Muller* (1987) 72 B.R. 280, 288, relying on *Margoles v. Johns* (7th Cir. 1981) 660 F.2d 291,

296 [appearance of partiality or "circumstances 'which might lead one to speculate as to a judge's impartiality' is not enough" for due process. Instead, 'a litigant is denied due process if he is in fact treated unfairly.'].) Indeed, as Judge Posner has stated, "[t]he right to a judge who is free from the mere appearance of partiality is not part of due process at all, let alone a fundamental part." (*Tyson v. Trigg* (7th Cir. 1995) 50 F.3d 436, 442.)

In *Del Vecchio*, a capital case, the Seventh Circuit, sitting *en banc*, considered whether the defendant was denied his right to a fair trial based upon an appearance of bias. There, the defendant had been prosecuted by Louis Garippo in 1965 for a murder he committed as a teenager. Fourteen years later, Garippo presided as the judge over the defendant's capital trial for a 1977 murder he committed shortly after his release from custody for the 1965 murder. (*Del Vecchio*, *supra*, 31 F.3d at p. 1367-1369.) Seeking habeas relief, the defendant claimed Judge Garippo's presiding over the later case created an unconstitutional appearance of judicial bias. (*Id.* at p. 1370.)

In rejecting the defendant's claim that he was denied a fair trial, the Seventh Circuit observed, "judges are subject to a myriad of biasing influences; judges for the most part are presumptively capable of overcoming those influences and rendering evenhanded justice; and only a strong, direct interest in the outcome of a case is sufficient to overcome that presumption of evenhandedness." (*Del Vecchio*, *supra*, 31 F.3d at p. 1373) The Seventh Circuit analyzed the Supreme Court's jurisprudence for constitutionally compelled judicial disqualification and explained,

> [t]he question is not whether some possible temptation to be biased exists; instead, the question is, when does a biasing influence require disqualification? Consistent with the common law, we begin in answering this question by presuming "the honesty and integrity of those serving as adjudicators." [Citations.] Disqualification is required only when the biasing influence is strong enough to overcome that presumption, that is, when the influence is so strong that we may

> presume actual bias. This occurs in "situations . . . in which experience teaches that the possibility of actual bias is too high to be constitutionally tolerable." [Citation.] A court must be convinced that a particular influence, "under a realistic appraisal of psychological tendencies and human weakness," poses "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." [Citation.]

(*Id.* at p. 1375.)

Thus, only if the appearance of bias is so strong so as to overcome the presumption of impartiality can such an appearance rise to the level of a constitutional violation. (*Del Vecchio*, *supra*, 31 F.3d at p. 1375; see also *Withrow*, *supra*, 421 U.S. at p. 47.) In other words, due process is implicated only when the appearance leads to an ineluctable and objective conclusion that the presumption of judicial honesty and integrity has been rebutted. (See e.g. *Haas v. County of San Bernardino*, *supra*, 27 Cal.4th at pp. 1033-1034 [when an adjudicator has a financial interest in the litigation, due process is violated even without a showing of actual prejudice because the enticement of financial gain rebuts the presumption of judicial integrity].) For this reason, the pecuniary interest and personal embroilment cases present constitutionally intolerable situations. Such conflicts on the part of an adjudicator rebut the presumption of honesty and integrity and the judge is constitutionally barred from presiding over the matter. (*Del Vecchio*, *supra*, 31 F.3d at p. 1375.)

Applying the above principles, the Seventh Circuit concluded that Judge Garippo was not constitutionally required to disqualify himself. He did not face any of the biasing influences or temptations the Supreme Court had deemed to be disqualifying. "Judge Garippo had no financial interest -- direct or indirect -- in the outcome of Del Vecchio's trial. He had never been subject to any personally insulting, abusive, or even disrespectful remarks by Del Vecchio or his attorneys. He did not serve the dual role of prosecutor and judge in the [instant] trial." (*Del Vecchio*, *supra*, 31 F.3d at p. 1375.)

In his concurring opinion in *Del Vecchio*, Judge Easterbrook reiterated that the defendant's claim of an appearance of impropriety was not of constitutional dimension. Judge Easterbrook explained that the concerns for public confidence in the judiciary were not of constitutional origin, but rather outgrowths of legislative prerogative, judicial canons, and the common law. (*Del Vecchio*, *supra*, 31 F.3d at pp. 1389-1390.) He further observed that the Supreme Court's jurisprudence in the area of judicial disqualification tracked the common law - the constitution compelled disqualification only if the judge had an interest in the outcome of the pending case. (*Id.* at p. 1390-1392.) The Seventh Circuit, sitting *en banc*, approved and adopted Judge Easterbrook's historical analysis "to support the position that the Supreme Court has never rested due process on appearance." (*Id.* at p. 1372, fn. 2.)

In this case, the Court of Appeal did precisely what the Seventh Circuit in *Del Vecchio* properly refused to do. The court's holding unequivocally stated that due process is violated when there exists an appearance of bias that could undermine the public's confidence in the impartiality of the judiciary. (Slip Opn. at 13-15.) It rested the venerable principles of due process upon appearances. The appellate court's approach in this case improperly equated the due process standard with the legislative disqualification standards. (See Slip. Opn. at 16, fn 8.)

In fact, without any showing in the record of improper behavior on Judge O'Neill's part, the Court of Appeal went so far as to announce that the rumor and the judge's prior recusal created "an appearance of bias that *could* undermine the public's confidence in a fair judiciary" which amounted to a constitutional deprivation. As explained, this notion is not grounded in the high court's constitutional jurisprudence, but rather in the systemic concern for

public confidence in the judiciary -- a concern quite apart from a party's personal due process right to a fair trial. (See *Couch, supra*, 896 F.2d at p. 81-82 and cases cited therein.)

II.

THE RECORD IN THIS CASE IS DEVOID OF DEMONSTRABLE FACTS THAT COULD REBUT THE PRESUMPTION OF JUDICIAL IMPARTIALITY

Under the foregoing principals, appellant suffered no due process violation. In this case, the record shows no actual bias on the part of Judge O'Neill, and no "implied bias" based on any financial interest or any personal embroilment in the case. The record shows nothing that could rebut the presumption of Judge O'Neill's impartiality. Nor does the record show anything that created a significant risk of undermining public confidence in the judiciary.

Here, Judge O'Neill originally recused himself from deciding a bail issue nearly two years before trial because he had heard the rumor appellant was stalking his friend, Judge Elias. Although the record is somewhat ambiguous, it appears that Judge O'Neill likely decided to recuse himself so as to avoid any appearance of impropriety, given his friendship with Judge Elias.[3/] A year and a half after the original recusal, the supervising judge concluded there was no merit to the rumor and reassigned the case to Judge O'Neill. At that point, Judge O'Neill concluded that the new information eliminated the problem of actual and/or appearance of bias. (See Slip Opn. at 14.) In fact, the Court of Appeal recognized and accepted as true Judge O'Neill's belief that he was not actually biased or prejudiced against appellant. (Slip Opn. at 14.)

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3. Despite Judge O'Neill's disclosure that he had heard the rumor and was friends with Judge Elias, appellant continued to press him to conduct the bail review. She evidently did not consider him to be biased against her at that time.

At no point was Judge O'Neill's recusal constitutionally compelled. He lacked any pecuniary interest in the outcome of the case, was not personally embroiled in the action, and displayed no form of animus against appellant. (See *Withrow*, *supra*, 421 U.S. at p. 47; *Del Vecchio*, *supra*, 31 F.3d 1363, 1375; *Haas v. County of San Bernardino*, *supra*, 27 Cal.4th 1033-1034.) Certainly, appellant has made no showing that the judge was actually biased. Indeed, the Court of Appeal implicitly acknowledged that Judge O'Neill was actually impartial and unbiased and that he believed himself to be neutral. (Slip Opn. at 14.) Moreover, as the Court of Appeal observed in the unpublished portion of its opinion, appellant's trial was essentially error free. (Slip Opn. at 19-47.) In sum, appellant has made no showing of demonstrable facts that could rebut the presumption of Judge O'Neill's neutrality and impartiality. She received that which she was due under the due process clause.

Even if this Court were to conclude that an appearance of judicial bias amounts to a due process deprivation, appellant has failed to establish that such an appearance existed when Judge O'Neill presided over her trial. Judicial disqualification for an appearance of bias under section 170.1, subdivision (a)(6)(A)(iii), is required only when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Here, the question is whether the judge's earlier recusal of himself and a mere rumor about stalking a fellow judge constitutes sufficient facts that would lead a reasonable person to a entertain such a doubt as to the judge's impartiality.

In *Briggs v. Superior Court* (2001) 87 Cal.App4th 312, 319, the Court of Appeal held that mere rumors are insufficient to constitute a disqualifying basis under section 170.1, subdivision (a)(6)(A). There, the trial judge disqualified himself because of a rumor that the District Attorney's Office believed he was biased against the People in his interpretation of the Sexually Violent Predator law. (*Ibid.*) The Court of Appeal observed, "a reasonable

member of the public at large, knowing these 'facts' (rumors), would [not] on those facts alone reasonably entertain a doubt about [the judge's] impartiality...." (*Ibid.*) Rumors are not facts and "'[j]udicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge appears to be biased.'" (*Ibid.*, quoting *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.) So too here. Just because there was a rumor appellant was stalking Judge Elias, and just because Judges O'Neill and Elias were friends would not lead a reasonable person to entertain a doubt as to Judge O'Neill's impartiality.

Moreover, Judge O'Neill's actions dispel any notion that an appearance of bias existed when he presided over appellant's trial. Judge O'Neill believed that an appearance of bias existed on the basis of the rumor. Rather than preside, he recused himself so as to maintain the appearance of neutrality. However, when he learned, upon his reinstatement, that the rumor was groundless, he concluded there was no problem for him in presiding over the matter. The rumor's baselessness constituted a change in circumstances that then permitted him to properly preside over the case.

Other jurisdictions have held a previously disqualified judge can be constitutionally reinstated when a change in circumstances has removed the disqualifying basis. This is often the case when the disqualification was based upon misinformation or mistake. (See *Morrison v. District of Columbia Board of Zoning Adjustment* (1980) 422 A.2d 347, 350-351; *Luce v. Cushing* (2004) 177 Vt. 600, 604-605 [868 A.2d 672].) Here, the original disqualifying basis was Judge O'Neill's belief that the stalking rumor might be true. When that rumor was deemed to be baseless nearly two years later, Judge O'Neill could properly be reinstated without offending constitutional due process.

Additionally, Judge O'Neill was prepared to disqualify himself on the basis of a potential appearance of bias and did so. This demonstrates that he

would have disqualified himself if he continued to believe such an appearance persisted even after he learned that the rumor was without merit.

In sum, there was no appearance of bias and therefore, even if this court concludes that due process embraces such a concept, there was no due process deprivation.

CONCLUSION

Accordingly, respondent respectfully requests this Court reverse the Court of Appeal's decision.

Dated: July 24, 2007

Respectfully submitted,

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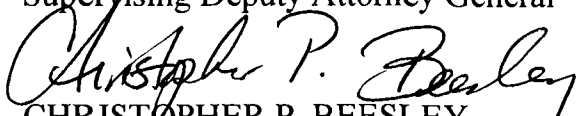

CHRISTOPHER P. BEESLEY
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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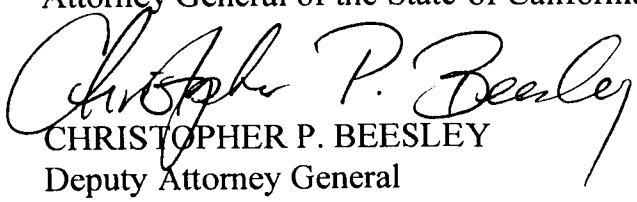
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 11380 words.

Dated: July 24, 2007

Respectfully submitted,

EDMUND G. BROWN
Attorney General of the State of California



CHRISTOPHER P. BEESLEY
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Marilyn Kaye Freeman**

No.: **D046394**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On July 24, 2007, I served the attached **Opening Brief on The Merits,** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

Carl M. Hancock
Pacific Law Center
4225 Executive Square, Ste. 1500
La Jolla, CA 92037
2 copies

Appellate Defenders, Inc.
555 W. Beech Street, Suite 300
San Diego, CA 92101

San Diego County District Attorney's Office
330 West Broadway, Suite 1320
San Diego, CA 92101

The Honorable Robert F. O'Neill
San Diego County Superior Court
Main Courthouse
Department SD-56
220 West Broadway
San Diego, CA 92101

The Honorable Peter C. Deddeh
San Diego County Superior Court
Main Courthouse
Department SD-11
220 West Broadway
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 24, 2007, at San Diego, California.

B. Trigueros
Declarant

B. Trigueros
Signature

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