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

Fourth Appellate District, Division One, No. D046394
San Diego County Superior Court No. SCD171601
The Honorable Robert F. O'Neill, Judge

REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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I.

BY ESTABLISHING A CONSTITUTIONAL FLOOR RATHER THAN A UNIFORM STANDARD, DUE PROCESS REQUIRES JUDICIAL DISQUALIFICATION IN MORE LIMITED CIRCUMSTANCES THAN WOULD OTHERWISE BE REQUIRED UNDER CALIFORNIA'S STATUTORY DISQUALIFICATION STANDARDS

The United States Supreme Court has never held that a mere appearance of judicial bias is sufficient to violate constitutional due process (*Johnson v. Carroll* (3d Cir. 2004) 369 F.3d 253, 260, 263), and appellant points to no case that holds otherwise. Instead, appellant urges this Court to become the first to hold that the federal Constitution embraces the statutorily created right to a trial free from the mere appearance of bias. Her position is untenable because it seeks to define constitutional due process beyond the outer boundaries established by the federal high court.

As explained in Respondent's Brief on the Merits, the United States Supreme Court has clearly stated that "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications." (*Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 828 [106 S.Ct. 1580; 89 L.Ed.2d 823] (*Aetna*).) In fact, "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 v. Gramley* (1997) 520 U.S. 899, 904 [117 S.Ct. 1793; 138 L.Ed.2d 97] (*Bracy*).) Instead, most questions concerning judicial disqualification are "answered by common law, statute, or the professional standards of the bench and bar" such as the canons of judicial ethics. (*Ibid*; see also *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.*)

Yet, this is precisely what appellant would have this Court do -- use statutory or canonical schemes to define the requirements for constitutionally mandated judicial disqualification. In her Answer Brief on the Merits (ABOM), appellant asserts that constitutional due process embraces the same concerns as those targeted by the statutory disqualification scheme. (ABOM 15-22.) Indeed, she urges that the United States Supreme Court's jurisprudence in this area tends to show that the Constitution guards against the appearance of judicial bias more jealously than against actual bias. (ABOM 21.) Perhaps recognizing the apparent weakness in this assertion, appellant further argues that Judge O'Neill was actually biased and thus unequivocally barred from presiding over her trial. (ABOM 5-15.) Additionally, appellant asserts that even if Judge O'Neill did not harbor actual bias, a constitutionally intolerable appearance of such bias persisted such that she was denied due process. (ABOM 23-25.)

Appellant's contentions have no merit and fail to squarely address any of respondent's arguments. Her insistence that constitutional due process embraces the statutorily required disqualification for an appearance of judicial bias finds no support in the case law. Her related argument that she is entitled to relief under the statutory disqualification scheme is baseless because she forfeited her statutory claim. Her assertion that Judge O'Neill was actually biased wholly ignores his unequivocal statements that he could be impartial.

Finally, appellant points to nothing that shows the circumstances of this case amounted to a deprivation of her due process rights.

Contrary to appellant's assertions, the record here shows that Judge O'Neill was impartial and that appellant received precisely that which she was due under the Constitution – a fair trial in a fair tribunal. Any conclusion otherwise would recognize a constitutional right that has never been established.

A. Most Questions Of Judicial Disqualification Are Resolved By Statutory Or Canonical Schemes Rather Than By The Constitution

As stated above, the United States Supreme Court has clearly explained that constitutional due process demarcates "only the outer boundaries of judicial disqualifications" (*Aetna*, *supra*, 475 U.S. at p. 828) and that judicial disqualification issues "are not constitutional ones, because due process "establishes a constitutional floor," rather than a uniform standard. (*Bracy*, *supra*, 520 U.S. at p. 904.) Accordingly, most judicial disqualification issues will be resolved, not by the Constitution, but by statutory or canonical schemes. (*Ibid*; see also *Aetna*, *supra*, 475 U.S. at p. 820.)

In defining the outer boundaries demarcated by constitutional due process for judicial disqualification, the high 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 v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456; 43 L.Ed.2d 712] (*Withrow*).) The Supreme Court has only found such constitutionally intolerable situations under a narrow set of circumstances that are limited to when the judge has a personal financial or pecuniary interest in the outcome of the litigation, or has become personally embroiled with the parties or attorneys to the litigation. (*Crater v. Galazza* (9th Cir. 2007) 491 F.3d 1119, 1131; *Del Vecchio v. Illinois Dep't of*

Corrections (7th Cir. 1994) 31 F.3d 1363, 1373-1374 (*Del Vecchio*).)[1/] Thus, constitutional due process requires disqualification when a judge harbors actual bias or such bias is implied under the circumstances. (See *Withrow*, *supra*, 421 U.S. at p. 47.)

Although due process demarcates only the outer boundaries as to when disqualification is constitutionally required, "Congress and the states... remain free to impose more rigorous standards for judicial disqualification...." (*Aetna*, *supra*, 475 U.S. at p. 828.) The California Legislature has enacted an extensive judicial disqualification scheme designed to protect the rights of the litigants and attorneys, and to preserve public confidence in the judiciary. (Code Civ. Proc.[2/], § 170 et seq.) In addressing this latter need to protect public confidence in an impartial judiciary, the Legislature enacted section 170.1, subdivision (a)(6)(A)(iii), which requires judicial disqualification when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Because this provision focuses upon what third parties may believe about a judge's impartiality, it is designed to protect public confidence in the courts as forums of integrity, fairness, and justice. (See e.g. *Liljeberg v. Health Services Acquisition Corp.* (1988) 486 U.S. 847, 859-860 [108 S.Ct. 2194; 100 L.Ed.2d 855] [interpreting the parallel federal provision, 28 U.S.C., section 455, subdivision (a)]; see also Flamm, Judicial Disqualification (2d ed. 2007), Bases for Disqualification, § 5.3 at p. 108-109 [primary rationale for allowing disqualification on the basis of an appearance of bias "stems from the recognized need for an unimpeachable judicial system in which the public has

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1. The Ninth Circuit in *Crater* subdivided the personal embroilment category into two parts - personal embroilment in a running controversy and becoming involved in both the judicial and accusatory processes. (*Crater v. Galaza*, *supra*, 491 F.3d at p. 1131.)

2. Unless otherwise stated, all further statutory references are to the Code of Civil Procedure.

unwavering confidence."].) Therefore, the interest in a trial free from the appearance of bias is rooted, not in a litigant's personal and individual due process right to a trial before a judge who is fair in fact, but rather, in concerns for public perceptions about the judiciary in general. Accordingly, any attempt on appellant's part, to equate the constitutional concerns with the statutory disqualification scheme necessarily fails because the two are fundamentally different. Where circumstances may justify disqualification under the statutory scheme, such will not necessarily rise to a constitutional violation.

B. Appellant Cannot Invoke The Statutory Disqualification Scheme For Relief

Appellant attempts to invoke the protections of the statutory disqualification scheme. She correctly points out that under sections 170 et seq., Judge O'Neill was disqualified from presiding over her case when he recused himself from deciding the bail issue. In fact, appellant is correct that the statutory disqualification scheme barred Judge O'Neill from being reinstated to preside over her trial. (ABOM 9-13.) However, none of these points helps appellant's position because she forfeited the protections under the legislative scheme when she failed to challenge Judge O'Neill's reinstatement into her case by way of writ proceedings. In order to preserve her statutory claim, it was incumbent upon appellant to file a writ of mandate in the Court of Appeal under section 170.3, subdivision (d). (*People v. Brown* (1993) 6 Cal.4th 322, 333.) Her failure to do so bars review under California's disqualification statutes. Instead, the question as to Judge O'Neill's qualifications to preside over her trial after his initial recusal must be answered by invoking the protections afforded by the Due Process Clause of the Fourteenth Amendment. (*Id.* at p. 334.)

C. Judge O'neill Harbored No Bias Against Appellant

Perhaps recognizing that her failure to seek writ relief has forfeited her statutory claim, appellant further asserts the judge was actually biased against

her. (ABOM 5-8, 13-15.) However, the Court of Appeal resolved this question of fact against appellant by concluding that Judge O'Neill did not harbor "any actual bias towards" her. (Slip Opn. at 14 ["Although we can accept the validity of Judge O'Neill's belief that he could be fair and impartial and that he did not have any actual bias towards [appellant], we conclude the *appearance of bias* persisted despite these beliefs."]; see also *Austin v. Lambert* (1938) 11 Cal. 2d 73, 76-77 [question of judicial bias is one of fact]; *Robinson v. Superior Court of Los Angeles County* (1960) 186 Cal.App.2d 644, 648 [same].)

A contrary conclusion on the part of the Court of Appeal would have ended the inquiry because 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*, *supra*, 520 U.S. at pp. 904-905, italics added.) Because the Court of Appeal could find no actual bias, it had to resolve appellant's claim by evaluating whether an appearance of bias sufficient to implicate due process concerns existed.

Appellant can show nothing that calls the Court of Appeal's conclusion that Judge O'Neill was actually impartial into question. In fact, appellant argues that reviewing courts give deference to a judge's statements on his or her own qualifications to preside over a matter and that Judge O'Neill's earlier recusal is dispositive as to his qualifications. (ABOM 9, relying on *People v. Guerra* (2006) 37 Cal.4th 1067, 1112.) In so arguing, appellant ignores that Judge O'Neill specifically stated he believed he could be impartial and fair when he was later reinstated; the alleged stalking rumor had been dispelled and therefore could not impact his ability to be neutral. Thus, even under appellant's own reasoning, the record amply demonstrates Judge O'Neill harbored no actual bias against her.

That Judge O'Neill recused himself previously is of no consequence under the Constitution. Appellant asserts that once disqualified, Judge O'Neill was constitutionally barred from ever presiding again. (See ABOM 3-4, 12-13) Notably, appellant cites no authority for this proposition of law.[3/] While appellant is correct that under California's statutory scheme Judge O'Neill could not be reinstated after his initial recusal, the federal Constitution does not compel the same conclusion. Indeed, a judge can be constitutionally reinstated if the prior recusal was based upon mistaken facts or if a change in circumstances removed the disqualifying grounds. (See *Luce v. Cushing* (2004) 177 Vt. 600, 604-605 [868 A.2d 672] and cases cited therein for the growing majority view that reinstatement is constitutionally permissible under a change of circumstances that removes the disqualifying basis of if the initial recusal was based upon a mistake.) Thus, Judge O'Neill's prior recusal is of no constitutional significance.

Furthermore, even if there were some residual significance to the earlier recusal, its remote import is thoroughly dispelled in light of Judge O'Neill's later pronouncement that he could be impartial and fair. In fact, it is noteworthy that Judge O'Neill recused himself when he believed the rumor created a potential appearance of judicial impropriety. When he learned the rumor was baseless, he concluded he could be impartial. Judge O'Neill's recusing himself when he believed a statutory basis barred him from presiding over the case necessarily compels an objective conclusion that he would have continued to recuse himself if he believed such a basis continued to exist upon his later reinstatement. Because there was no statutory disqualifying basis that Judge

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3. In fact, appellant's citation to *Aetna* (ABOM 13), supports respondent's position, argued more fully *infra*, that the disqualifying bases under the Constitution are significantly more limited than under the statutory scheme. (*Aetna*, *supra*, 475 U.S. at p. 820.)

O'Neill believed precluded his presiding over the case, there could be no constitutional basis compelling his disqualification.

D. The Constitutional Protection Against An Appearance Of Judicial Bias Is Limited To Those Circumstances That Conclusively Rebut The Presumption Of Judicial Neutrality

Appellant argues that the Constitution protects litigants more vehemently against appearances of judicial bias than actual bias. (ABOM 15-22.) However, appellant misunderstands the high court's jurisprudence on the subject. As stated earlier, the Constitution establishes a floor rather than a uniform standard for judicial disqualification. (*Bracy*, *supra*, 520 U.S. at p. 904.) That constitutional floor requires disqualification only under circumstances demonstrating actual judicial bias or in situations where the appearance of bias is so strong so as to overcome the presumption of impartiality such that actual bias can be implied. (*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* (2002) 27 Cal.4th 1017, 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].)

The pecuniary interest and personal embroilment cases present constitutionally intolerable situations precisely because they raise such a strong inference of actual bias that the presumption of judicial neutrality is conclusively rebutted. (*Withrow*, *supra*, 421 U.S. at p. 47; *Del Vecchio*, *supra*, 31 F.3d at p. 1375.) Only under such circumstances does an "appearance" of bias sufficiently undermine the presumption of judicial honesty and integrity to require disqualification of the judge under the Constitution. (*Del Vecchio*, *supra*, 31 F.3d at p. 1375.)

Under appellant's interpretation, far less would be required to trigger constitutionally mandated judicial disqualification. Indeed, under appellant's rubric, rumor, suspicion, or public sentiment would be sufficient to constitutionally bar judges from presiding over a matter. Appellant seeks to expand the scope of the implied bias cases to include a much broader set of circumstances than previously adopted by the United States Supreme Court. In effect, she urges this Court to conclude, as the Court of Appeal erroneously did, that the statutory disqualification standards are coterminous with the constitutional standards.

Such an expansive view, however, does not comport with the high court's judicial disqualification jurisprudence which, as explained above, has purposely left the intricate nuances and contours of judicial disqualification requirements to Congress, the state legislatures, and the judicial canon drafters. (*Bracy*, *supra*, 520 U.S. at p. 904; see also *Aetna*, *supra*, 475 U.S. at p. 828.) As this Court observed, "according 'matters of kinship [and] personal bias' [citation] dispositive constitutional importance in this context would import into constitutional law a set of difficult line-drawing problems." (*People v. Vasquez* (2006) 39 Cal.4th 47, 64.) Thus, the bright line provided by the Constitution is that judicial disqualification is required for actual bias or implied bias that arises from a judge's pecuniary or financial interest in the matter or personal embroilment or involvement in the case.

Here, there is nothing in the record that shows Judge O'Neill had a pecuniary or financial interest in the outcome of the case. He never became embroiled or personally involved in the litigation. Additionally, the record discloses no inappropriate statements that could remotely call Judge O'Neill's impartiality into question. (See e.g. *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 247 [judge's comments showed bias against women]; *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 461-463 [comments

demonstrated bias against undocumented immigrants]; and *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841-843 [comments revealed bias against attorneys].) Rather, the record demonstrates that Judge O'Neill was impartial, fair, and even-handed.

In sum, the circumstances of this case utterly fail to raise an inference of judicial bias sufficiently strong to overcome the presumption of Judge O'Neill's impartiality. (*Withrow*, *supra*, 421 U.S. at p. 47; *Del Vecchio*, *supra*, 31 F.3d at p. 1375.)

CONCLUSION

Accordingly, respondent respectfully requests this Court reverse the Court of Appeal's decision and affirm the judgment of the trial court.

Dated: November 1, 2007

Respectfully submitted,

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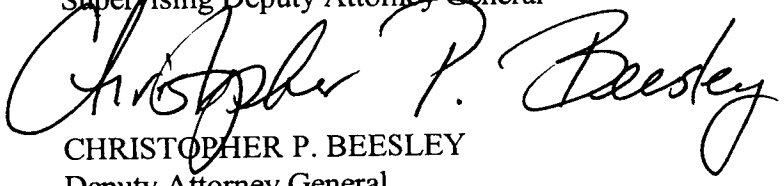

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CERTIFICATE OF COMPLIANCE

I certify that the attached DOCUMENT TITLE uses a 13 point Times New Roman font and contains 3331 words.

November 1, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

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

No.: **S150984**

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 1, 2007, I served the attached **Reply Brief On The Merits**, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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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 November 1, 2007, at San Diego, California.

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