

Supreme Court, U.S.
FILED

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No. 17-_____

In the

Supreme Court of the United States

MARILYN KAYE FREEMAN

Petitioner,

v.

MATTHEW CATE and EDMUND G. BROWN, Jr.,

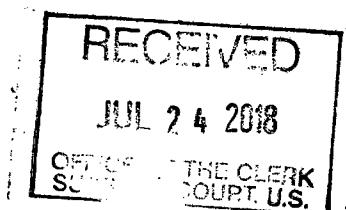
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner



QUESTIONS PRESENTED

1. Whether reinstatement of a previously disqualified judge deprived appellant of due process and a fair trial?
2. Whether trial or appellate counsel rendered ineffective assistance in connection with the reinstatement of the previously disqualified judge?
3. Whether the California Supreme Court unreasonably applied this Court's precedent when it held that the reinstatement of a disqualified judge does not violate due process?

LIST OF PARTIES

In the court of appeals, the petitioner/appellant was Marilyn Kaye Freeman and the respondents/appellees were Matthew Cate, in his official capacity as a former Secretary of California Department of Corrections and Rehabilitation and Edmund G. Brown, Jr., in his official capacity as the Governor of the State of California. The State of California is the real party in interest.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
INTRODUCTION.....	1
OPINIONS BELOW.....	3
JURISDICTION.....	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	4
STATEMENT OF THE CASE.....	5
A. Facts Giving Rise To This Case.....	5
B. The State Proceedings.....	12
C. The Federal Habeas Proceedings.....	12
D. The Federal Appellate Proceedings.....	13
REASONS FOR GRANTING THE PETITION.....	13
I. Review Is Warranted Because The Panel Of The Ninth Circuit Upheled The California Supreme Court Unreasonably Applied This Court's Precedents When They Held The Reinstatement Of A Disqualified Judge(s) Does Not Violate Due Process.....	13
II. Review Is Warranted Because The Federal Courts and the California Supreme Court Unreasonably Applied This Court's Precedents When They Held The ReinstateMENT Of A Disqualified Judge(s) Does Not Violate Due Process.....	16
III. Review Is Warranted Because The ReinstateMENT Of A Previously Disqualified Judge Deprived Petitioner Of Due Process And A Fair Trial.....	22

TABLE OF CONTENTS – Continued

	Page
IV. Review Is Warranted Because The Panel And The California Supreme Court Misapplied This Court’s Precedents When They Held Trial And Appellate Counsel Rendered Effective Assistance In Connection With The Reinstatement Of The Previously Disqualified Judge(s).....	23
V. Review Is Warranted Because Of The National Importance of Determining Whether The Reinstatement Of A Disqualified Judge Violates Due Process.....	25
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE.....	27
APPENDICES VOLUME I	
APPENDIX A: Order on rehearing and rehearing en banc of the United States Court of Appeals for the Ninth Circuit, dated January 12, 2018.....	1a
APPENDIX B: Memorandum decision of the United States Court of Appeals for the Ninth Circuit, dated July 27, 2017.....	5a
APPENDIX C: Order granting of the United States Court of Appeals for the Ninth Circuit granting a certificate of appealability, dated February 6, 2015.....	17a
APPENDIX D: Order denying petitioner’s motion to reconsider of the United States District Court for the Southern District of California, dated April 18, 2013.....	21a
APPENDIX E: Judgment in a Civil Case adopting the Magistrate’s Report and Recommendation of the United States District Court for the Southern District of California, dated December 11, 2012.....	25a
APPENDIX F: Magistrate’s Report and Recommendation of the United States District Court for the Southern District of California, dated July 31, 2012.....	29a
APPENDIX G: Evidence of Orders denying petition for review and petitions for writ of habeas corpus of the Supreme Court of California, dated August 11, 2010.....	105a

TABLE OF CONTENTS – Continued

	Page
APPENDIX H: Unpublished opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, dated April 12, 2010.....	109a
APPENDIX I: Unpublished opinion of the Supreme Court of California, dated January 21, 2010.....	133a
APPENDIX J: Published in part and unpublished in part opinion of Court of Appeal of the State of California, Fourth Appellate District, Division One, dated February 5, 2007.....	145a
APPENDIX K: Transcript of hearing wherein Robert F. O'Neill disqualified <i>sua sponte</i> himself from case due to inability to be fair to petitioner, dated December 19, 2002.....	157a
APPENDIX L: Minute order, December 19, 2002, Department 56, Judge Robert F. O'Neill.....	183a
APPENDIX M: Hearing transcript, January 6, 2003, 8:15 a.m., Department 56, Judge Robert F. O'Neill.....	187a
APPENDIX N: Minute order, January 6, 2003, 8:15 a.m., Department 56, Judge Robert F. O'Neill.....	193a
APPENDIX O: Minute Order, May 14, 2004, 9:00 a.m., Department 56, Judge Charles Jones.....	197a
APPENDIX P: Hearing transcript, May 14, 2004, 10:00 a.m., Department 11, Judge Peter C. Deddeh.....	201a
APPENDIX Q: Minute order, May 14, 2004, 10:00 a.m., Department 11, Judge Peter C. Deddeh.....	215a
APPENDIX R: Hearing transcript, May 14, 2004, 1:45 p.m., Department 56, Judge Robert F. O'Neill.....	219a
APPENDIX S: Hearing transcript, May 20, 2004, 9:00 a.m., Department 56, Judge Robert F. O'Neill.....	229a
APPENDIX T: Petitioner's October 14, 2004 motions to remove Judge Robert F. O'Neill from the case, to substitute counsel and to change venue.....	235a

TABLE OF CONTENTS – Continued

	Page
APPENDIX U: Transcript of hearing on Marsden motion October 18, 2004.....	249a
APPENDIX V: Ex parte minute order, January 4, 2005, Department 11, Judge Peter C. Deddeh.....	275a
APPENDIX W: Declaration of Susan M. Freeman, August 21, 2005.....	279a
APPENDIX X: Declaration of Marilyn K. Freeman, September 5, 2005.....	283a
APPENDIX Y: Letter from Virgil Christenson, September 6, 2005.....	287a
APPENDIX Z: Letter from Judge Robert F. O'Neill, September 20, 2005.....	291a
APPENDIX AA: Letter from Judge Robert F. O'Neill, September 29, 2005.....	295a
APPENDIX BB: Portion of probation report, January 2005.....	299a
APPENDIX CC: Portion of CDC report, 2005.....	305a
APPENDIX DD: Conditions of parole, September 25, 2007.....	309a
APPENDICES VOLUME II	
APPENDIX EE: Application for Certificate of Appealability and Brief in Support of Application for Certificate of Appealability filed in the United States Court of Appeals for the Ninth Circuit on February 17, 2013.....	313a

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Aetna Life Insurance Co. v. Lavoie</i> , 475 U.S. 813 (1986).....	15
<i>Arizona v. Fulminante</i> , 499 US 279 (1991).....	14
<i>Bracy v. Gramley</i> , 520 U.S. 899 (1997).....	<i>passim</i>
<i>Capperton v. A. T. Massey Coal Co.</i> , 566 U.S. 868 (2009).....	14
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	14
<i>Cheney v. United States Dist. Court</i> , 541 U.S. 913 (2004).....	14
<i>In re Murchison</i> , 349 U.S. 133 (1955).....	<i>passim</i>
<i>Lisenba v. California</i> , 314 U.S. 219 (1942).....	15
<i>Liteky v. United States</i> , 510 U.S. 540 (1994).....	14
<i>McMann v. Richardson</i> , 397 U.S. 759, 771 n.14 (1970).....	24
<i>Mayberry v. Pennsylvania</i> , 400 U.S. 455 (1971).....	14
<i>Offutt v. United States</i> 348 U.S. 11 (1954).....	14
<i>People v. Freeman</i> , (2007) 47 Cal.4 th 933.....	3
<i>Republican Party of Minn. v. White</i> , 536 U.S. 765 (2002).....	14
<i>Strickland v. Washington</i> , 466 U.S. 688 (1984).....	24,25
<i>Taylor v. Hayes</i> (1974) 418 U.S. 488.....	22
<i>Tumey v. Ohio</i> , 273 U.S. 510, 523 (1927).....	14
<i>Twining v. New Jersey</i> , 211 U.S. 78 (1908).....	15
<i>Williams v. Pennsylvania</i> , 59 U.S. ____ (2016).....	14,21
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	14

TABLE OF AUTHORITIES – Continued

	Page(s)
Cases	
<i>Withrow v. Larkin</i> , 421 U.S. 46 (1975).....	14

CONSTITUTIONAL AND STATUTORY PROVISIONS**Federal**

U.S. Const. Amend. V.....	24
U.S. Const. Amend. VI.....	24
U.S. Const. Amend. XIV.....	4,24

28 U.S.C.

§1254.....	
§2254.....	

California

Code of Civil Procedure §995.....	<i>passim</i>
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OTHER AUTHORITIES

American Bar Association Resolution 107, adopted August 8-9, 2011.....	25
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PETITION FOR WRIT OF CERTIORARI

Marilyn Kaye Freeman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

The decisions in case undermine our due process right to a fair and impartial judge and a fair and impartial trial. In an era when the majority of Americans, including both those on the right and the left, believe our courts and criminal justice system are not fair and impartial with

different rules for different tiers of society, review of this case is the perfect way to affirm the Fourteenth Amendment to the U.S. Constitution is the law of the land.

In this case, a trial judge and a county bench disqualified themselves, *sua sponte*, due to their inability to be fair and impartial toward petitioner. When no evidence was found to support the charges against petitioner and petitioner refused to plead guilty to any felony, the disqualified bench took further judicial action in the case, reinstated itself and assigned the case to the trial judge who had individually disqualified himself. Nothing about the proceedings and trial was fair or lawful. Petitioner was convicted on all charges in November 2004. *See Application for Certificate of Appealability and Brief in Support of Application for Certification of Appealability, Appendix M, App., pp. 313.*

In 2007, Court of Appeal for the State of California, Fourth Appellate District, Division One reversed Petitioner's convictions due to the disqualification of the trial judge, stating the appearance of bias violated constitutional due process. Much of the unpublished part of the opinion bore little resemblance to the evidence at trial. This decision was reversed by the California Supreme Court because the circumstances in this case did not meet new standards set forth in *Capperton v. Massey*, 566 U.S. 868 (2009) requiring "exceptional" or "extreme facts" for judicial disqualification issues to violate due process.

The California Supreme Court's misinterpretation and misapplication of *Caperton* to the facts in this case was affirmed by the U.S. District Court of the Southern District of California and the U.S. Court of Appeals for the Ninth Circuit contrary to, and in contradiction of, clearly established Federal law as determined by this Court.

Review is warranted because of the national importance of determining whether due process assures a right to a fair trial before a fair and impartial judge. Review is warranted because of

the national importance of determining whether the reinstatement of a disqualified judge violates due process. Review is warranted because further guidance is needed by the courts in regarding due process and the disqualification of judges.

OPINIONS BELOW

The Ninth Circuit's January 12, 2018 order denying rehearing and en banc rehearing is reprinted as Appendix A at App. p. 1a. The Ninth Circuit's unpublished July 27, 2017 panel decision is reprinted as Appendix B hereto at App. p. 5a. The Ninth Circuit's February 6, 2015 order granting a certificate of appealability is reprinted as Appendix C at App. p. 17a.

The district court's April 18, 2013 order denying petitioner's motion to reconsider its judgment is reprinted as Appendix D at App. p. 21a. The district court's December 11, 2012 judgment adopting the magistrate's recommendation is reprinted as Appendix E at App. p. 25a. The July 31, 2012 Magistrate's Report and Recommendation is reprinted in Appendix F hereto at App. p. 29a. The California Supreme Court's August 11, 2010 orders denying review are reprinted as Appendix G at App. p. 105a.

The Court of Appeal for the State of California, Fourth Appellate District, Division One's April 12, 2010 unpublished opinion is reprinted as Appendix H at App. p. 109a. The California Supreme Court's January 21, 2010 unpublished opinion reversing the California Court of Appeals decision is reprinted as Appendix I at App. p. 133a. The Court of Appeal for the State of California, Fourth Appellate District, Division One's February 5, 2007 partially published and partially unpublished opinion reversing all convictions is reprinted as Appendix J at App. p. 145a and reported at *People v. Freeman*, 47 Cal.4th 933.

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JURISDICTION

The court of appeals issued a memorandum decision on July 27, 2017. The court of appeals denied the petition for rehearing and rehearing en banc on January 12, 2018. On May 21, 2018, this Court granted petitioner an extension of time to file this petition for writ of certiorari until May 12, 2018. The Court gave petitioner until July 20, 2018 to file a corrected petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. §1254(1).

The federal courts have jurisdiction because Petitioner filed the writ of habeas corpus in the U.S. District Court for the Southern District of California on or about September 9, 2010 while under parole supervision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides in relevant part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; orA
- (2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

In September 2002, Petitioner's 14 year ten month old daughter was taken into protective custody by the County of San Diego when she falsely informed authorities that she had been seriously abused her entire life. The claims of abuse would have been determined to be untrue had the county social workers investigated the accusations as required by California law. Instead, they became hysterical, believed everything petitioner's daughter said and encouraged her to say more.

Petitioner, a family law attorney whose practice emphasized child custody litigation in divorce courts, contested jurisdiction over her daughter in the San Diego juvenile court, provided evidence of her daughter's history of mental health problems and insisted that her daughter receive psychiatric care. The juvenile court judge, Harry Elias, and all the San Diego County employees involved were extremely adversarial toward petitioner.

On December 6, 2002, just prior to the juvenile court trial, petitioner was arrested on a slew of charges for which the state had no evidence. The main witness was a client of petitioner who had offered to help petitioner prepare for the juvenile court trial. She was no help but read some of the juvenile court case file. Petitioner's client subsequently reconciled with her husband and demanded her \$2,000 retainer back. Petitioner refused because she owed several thousand additional dollars. Petitioner's client contacted authorities to claim petitioner admitted to everything. Petitioner's client also made up things.

Appellant's bail was enhanced to \$250,000 (it should have been around \$60,000) and her home and computers were searched because the county counsel, James Wellman, speculated that

petitioner was stalking the juvenile court judge, Harry Elias. Petitioner lost the jurisdictional trial in juvenile court in December 2002 and was released on \$150,000 bail in January 2003.

Despite having no evidence, the Deputy District Attorney, Fiona Khalil, loudly and repeatedly proclaimed at every hearing that petitioner was stalking Judge Elias. On December 19, 2002, Judge Robert F. O'Neill disqualified himself, *sua sponte*, from petitioner's criminal case because he was good friends with Judge Elias and couldn't be fair and impartial toward petitioner. I.e. he couldn't fairly review petitioner's bail because he worried she might harm his good friend, Judge Elias. *See Appendix K* at pp. 12-18, App. pp. 170-176. Judge O'Neill recommended the bench disqualify itself as well. Petitioner was trying to be polite when she called the DDA's loud assertions "rumors." Judge Elias had assured petitioner that he did not believe that she had stalked him or was any threat to him so petitioner did not attempt to disqualify him. He lied. *See Appendices BB* at App. p. 229a, *CC* at App. p. 305, and *DD* at App. 309a.

In January 2003, the San Diego County bench was disqualified by Peter C. Deddeh, the presiding judge of the criminal department. *See Appendix M* at p. App. 187a. Non-ministerial judicial duties were to be performed by Judge Charles E. Jones, a retired judge from Imperial County.

The prosecution was granted a six month extension of time in which to search petitioner's computers and to further look for evidence to support the crimes charged.

In early spring 2003, a different, more experienced, more educated county social worker realized petitioner's daughter had mental health problems and had not told the truth. Custody of petitioner's daughter was soon returned to petitioner and the county terminated jurisdiction over petitioner's daughter in July 2003. Petitioner's daughter recanted all her accusations.

Petitioner's daughter was diagnosed with having had a brief psychotic break resulting in a dissociative fugue state. Petitioner's daughter was subsequently diagnosed with severe bulimia, anorexia, substance abuse disorders and borderline personality disorder.

No evidence was ever found related to any stalking of Judge Elias and no such charges were ever filed. The only evidence there had ever been was that Judge Elias's nephew had seen an unoccupied light blue Toyota or Nissan parked in the Elias neighborhood. Petitioner owned a dark blue Chevrolet Cavalier that could not have been confused with a light blue car. No evidence was ever found to support the outrageous criminal charges filed against petitioner.

The case was postponed for many months due to the health problems of petitioner's counsel, Joseph Cox. Petitioner had appointed counsel as her money was tied up in her home which was uninhabitable due to toxic mold that developed after a septic tank backup.

There was insufficient evidence to support any of the felony charges against petitioner during the September 2003 preliminary hearing. One or more elements of each crime was missing. The most serious charge was dismissed by Judge Jones but was re-filed by the state. Appellant's Penal Code §995 motion should have resulted in the dismissal of all charges.

In January 2004, petitioner's bail was reduced to \$75,000. In or around April 2004, Judge Deddeh acted in excess of his jurisdiction as a disqualified judge when he assigned the §995 motion to a Judge Montes from Los Angeles County. Judge Montes summarily dismissed the §995 motion and no transcript of the hearing was ever available.

DDA Eugenia Ehryabide (Ehryabide) demanded that petitioner plead guilty to one – any one – felony. Petitioner did not. DDA Ehryabide asked Judge Deddeh to reinstate the bench. Deddeh reinstated the bench and assigned the case to O'Neill for trial. *See Appendices P, App. 201 and Q, App. p. 215a.* Petitioner objected strenuously to no avail. Petitioner's written objection to

O'Neill disappeared from the court file but is mentioned in hearing transcripts. *See Appendices R at App. 219a and S at App. 229a.*

The clerk in Judge Jone's courtroom told Petitioner that the judges reinstated themselves because the County of San Diego could not afford to pay her a settlement for their mistakes in the juvenile court case. A guilty plea by petitioner supposedly would have meant petitioner could not sue San Diego County for mishandling the situation with her daughter. Petitioner never threatened to sue the county during 2002-2005.

On May 14, 2004, O'Neill ordered a transcript of the hearing wherein he disqualified himself (*See Appendix R at App. p. 222*), placed it under seal and refused to give it to Appellant. *See Appendices W at p. 279a, X at App. p. 283a, Y at p. 287a , Z at App. p. 295a, and AA at App. 295a.* The only such transcript Appellant ever received was transcribed in 2005 as part of the appellate record. If it was transcribed in May of 2004, it disappeared from the case file.

Petitioner repeatedly objected to the reinstatement of the disqualified judges. Newly appointed trial counsel, William Apgar, argued against Petitioner and in favor of the reinstatement of the disqualified judges. Trial counsel failed to a file writ of mandate on the reinstatements or the §995 motion denial.

Petitioner did not waive the disqualifications. Under California law, any waiver must be knowingly and intelligently made in writing after full disclosure of the reason(s) for the disqualification. California law (and constitutional due process) forbids waiver of a disqualification based on personal bias toward the litigant.

In July 2004, petitioner's daughter's mental health problems worsened. Her bulimia and anorexia were extremely severe. She did not want to go to the eating disorder program in which petitioner enrolled her. Petitioner's daughter was not swallowing her antidepressant pills; saving

them to take all at once to get high. Petitioner's daughter physically attacked petitioner from the back seat of her mini-van while petitioner was driving, claimed petitioner attacked her, said her earlier abuse allegations were true, and went to stay with her paternal grandfather in Orange County. Petitioner gave photos to Mr. Apgar of petitioner's injuries and of her daughter which were taken immediately after the incident. Petitioner was bruised and bitten and her daughter had not a hair out of place.

DDA Ehryabide told Judge O'Neill that everything petitioner was originally accused of in September 2002 was true. Judge O'Neill believed DDA Ehryabide and believed petitioner was a threat to his friend Judge Elias. He immediately raised petitioner's bail from \$75,000 to \$500,000 and ordered petitioner into custody. Judge O'Neill sent paperwork to the jail which erroneously stated that petitioner was charged with assault on a police officer and refused to correct it.

Additional misdemeanor charges were filed against petitioner with a total additional bail of \$5,000. Appellant posted \$505,000 bail in September 2004.

Petitioner's daughter recanted her latest accusations and re-recanted her 2002 accusations. Throughout the proceedings, Judge O'Neill repeatedly berated petitioner for things related to the juvenile court proceeding. Judge O'Neill erroneously accused petitioner of violating juvenile court orders. Judge O'Neill should have had no knowledge of those proceedings or used any such information, erroneous or not, in this case.

Petitioner's subsequent motions to disqualify and remove Judge O'Neill were ignored or improperly denied because Mr. Apgar refused to "join in" petitioner's motions. California law does not require counsel to "join in" a litigant's disqualification motion.

On October 18, 2004, Judge O'Neill raised petitioner's bail to \$1,000,000 and asked petitioner whether "that will keep you in jail?"

Petitioner was tried before Judge O'Neill. Mr. Apgar was unprepared and never read the court file or the case file. Mr. Apgar did not call or subpoena or interview petitioner's witnesses. He did not subpoena or call the witnesses he had subpoenaed for an earlier trial date. The state's witnesses testified to different facts than they did at the preliminary hearing. There was still insufficient evidence for conviction of the crimes charged. Judge O'Neill's hostile attitude toward petitioner and the tones of voice used by Judge O'Neill influenced the jury. Judge O'Neill said everything favorable to petitioner in a low monotone that went unheard and unnoticed by the jury. Judge O'Neill sustained the many objections made by the prosecution which included objections to anything favorable to petitioner. Petitioner was convicted on all counts.

Petitioner's first probation report recommended probation. During the sentencing hearing in January 2005, Judge O'Neill angrily yelled as he waived a copy of a writ of habeas corpus petitioner had filed in the California Supreme Court around in the air. The writ raised the issue of Judge O'Neill's disqualification. Judge O'Neill sent petitioner to the California Institution for Women for a sentencing evaluation and told the probation officer (as he stood to leave the room) that he wanted her next report to say "six years." Judge O'Neill sent a pervasively factually incorrect report to CIW. Judge O'Neill and Mr. Apgar refused to correct it. (It even included the inflammatory and erroneous charge of assault on a police officer.) Judge O'Neill denied petitioner's motion to correct it because Mr. Apgar did not join in the motion.

The California Supreme Court denied petitioner's petition stating that the decision to reinstate the disqualified judges should have been appealed by writ of mandate within ten days of

the decision. This was an erroneous application of the law as only denials of motions to disqualify a judge must be so appealed. California law states that any judicial action by a disqualified judge is void.

On April 25, 2005, despite numerous irregularities in the sentencing proceedings, O'Neill sentenced petitioner to six years in prison and she was sent to the California Institution for Women.

Petitioner's appellate counsel, Carl Hancock, stated in his appellate brief that nearly all of Judge O'Neill's rulings were legally incorrect. Because Mr. Hancock grew up with Judge Deddeh, he refused to raise the issue of the disqualification of the Bench or anything related to Judge Deddeh.

The Court of Appeal of the State of California, Fourth Appellate District, Division One reversed petitioner's convictions on February 5, 2007 stating due process was violated by the appearance of bias caused by the reinstatement of Judge O'Neill. The California Supreme Court granted the California attorney general's petition for review.

One of the conditions of petitioner's parole, in 2007, was that petitioner not return to San Diego County and that she stay away from Judge Elias. Someone, presumably Judge Elias, made that request.

In 2010, the California Supreme Court reversed the appellate court stating the facts in this case did not rise to a violation of due process based on the analysis and standards set forth by this Court in *Caperton v. A. T. Massey Coal Co.*, 566 U.S. 868 (2009).

This Court has jurisdiction because Petitioner filed the writ of habeas corpus in the U.S. District Court for the Southern District of California on or about September 9, 2010 while under parole supervision

B. The State Proceedings

Petitioner was convicted on all charges on December 18, 2004 and sentenced to six years in prison on April 25, 2005. Petitioner filed a notice of appeal on or about April 25, 2005. Petitioner's convictions were reversed by the Court of Appeals of the State of California, Fourth Appellate District on February 5, 2007

The Court of Appeal for the State of California, Fourth Appellate District, Division One reversed the convictions because of the appearance of bias due to the reinstatement of Judge O'Neill. *See* Appendix J at App. p. 145a. The California Supreme Court granted the state's petition for review and, on January 21, 2010, reversed the lower court's decision stating that the facts of this case did not rise to the level of required in *Caperton* violation of due process. *See* Appendix I at App. p. 133a. The appeals court filed a new decision on April 12, 2010 *See* Appendix H at App. p. 109a. The California Supreme Court denied review on August 11, 2010. *See* Appendix G at App. p. 105a.

C. The Federal Habeas Proceedings

Petitioner filed a petition for writ of habeas corpus on the U.S. District Court for the Southern District of California on or about September 9, 2010, while she was under parole supervision. On July 31, 2012, Magistrate Judge Mitchell D. Dembin reported his findings and recommended the entry of a judgment of denial of the petition and request for evidentiary hearing. *See* Appendix F at App. p. 29a. These findings and recommendations were adopted on December 11, 2012 by District Judge Dana M. Sabraw of the United States District court for the Southern District of California. *See* Appendix E at p. 25a. The motion to reconsider was denied on April 18, 2013. *See* App. D at App. p. 21a.

D. The Federal Appellate Proceedings

Petitioner filed a timely notice of appeal and, on February 16, 2015, was granted a certificate of appealability on questions one and two above. *See Appendix C at App. p. 17a.* On July 27, 2017, the panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision. *See Appendix B at App. p. 5a.* Petitioner's motion for rehearing and rehearing en banc was denied on January 12, 2018. *Appendix A at App. p. 1a.*

Petitioner raised the issues of the disqualification of Judge O'Neill and the bench numerous times in the trial court, in the state appellate court and the state supreme court. Appellate raised all disqualification issues, as well as many other issues, in the petition for review and habeas petitions denied by the California Supreme Court on August 11, 2010. *See Appendix G at App. p. 105a.* Petitioner then raised these issues, and many other issues, in the U.S. District Court for the Southern District of California and in the U.S. Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE PETITION

I.

Review is warranted Because The Opinion By The Panel Of The Ninth Circuit Conflicts With This Court's Holdings

The Fourteenth Amendment to the U.S. Constitution forbids states to "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Due process requires a fair trial before a fair and impartial judge.

The Supreme Court stated in *In re Murchison*, 349 U.S. at 136:

"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. This Court has said, however, that

“Every procedure which would offer 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.”

“*Tumey v. Ohio*, 273 U.S. 510, 273 U.S. 532. Such a stringent rule 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. But to perform its high function in the best way, “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 348 U.S. 14.”

This Court has held that litigants are entitled to due process of law which includes a fair trial before a fair and impartial judge. Some of this Court’s decisions with which the panel decision is in conflict are: *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Offutt v. United States* 348 U.S. 11 (1954); *In re Murchison*, 349 U.S. 133 (1955); *Chapman v. California*, 386 U.S. 18 (1967); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971); *Withrow v. Larkin*, 421 U.S. 46 (1975); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Arizona v. Fulminante*, 499 US 279 (1991); *Liteky v. United States*, 510 U.S. 540, 548 (1994); *Bracy v. Gramley*, 520 U.S. 899 (1997); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *Cheney v. United States Dist. Court*, 541 U.S. 913 (2004); *Caperton v. Massey*, 566 U.S. 868 (2009).

Justice Kennedy wrote in *Williams v. Pennsylvania*, 59 U.S. ____ (2016):

“This court’s precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of a judge is too high to be constitutionally tolerable.” *Caperton* (quoting *Withrow v. Larkin*, 41 U.S. 35, 47 (1975)).

and:

“Due process entitles Terrence Williams to “a proceeding in which he may present his case with assurance” that no member of the court is “predisposed to find against him.”

and:

“Due process guarantees “an absence of actual bias: on the part of a judge. *In re Murchison*, 349 U.S. 133, 136.”

Petitioner was a criminal defendant and is entitled to all due process protections. *See* the dissent by Justice Thomas in *Williams v. Pennsylvania*.

Chief Justice Roberts wrote in his dissent to *Williams*:

“In the context of a criminal proceeding, the due Process Clause requires States to adopt those practices that are fundamental to principles of liberty and justice, and which inhere “in the very idea of free government” and are “the inalienable right of a citizen of such a government.” *Twining v. New Jersey*, 211 U.S. 78, 106 (1908). A fair trial and appeal is one such right. *See Lisenba v. California*, 314 U.S. 219, 236 (1942); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

It is well established that there can be no fair trial without a fair and impartial judge.

There can be no greater proof of actual bias on the part of a judge than when that judge disqualifies himself from a case. Judge O’Neill knew he could not be fair to petitioner so he properly recused himself from her case. Judge O’Neill did not disqualify himself because he thought charges would be filed with his friend as a victim. He recused himself because he could not be fair and impartial toward petitioner. The fact that no charges were filed with Judge Elias as a victim does not mean that anyone ceased believing that petitioner stalked Judge Elias.

There is ample evidence Judge O’Neill continued to believe petitioner stalked his friend. There is ample evidence that Judge O’Neill acted with bias toward petitioner. There is ample evidence the bench was reinstated to assure petitioner’s conviction. The fact they reinstated themselves is evidence they were biased. If they had evidence of crimes they wouldn’t have needed biased judges.

The question is whether the reinstatement of a disqualified judge violates due process. It clearly does in light of this Court’s previous holdings. As explained by this Court in the cases cited above, bias on the part of a judge is constitutionally intolerable. It matters not that there

was a jury since juries, like other judges on a panel, can be influenced by the biased judge. It follows that a judge cannot be reinstated to a case once he declares himself to be biased.

Review is warranted because the rulings in this case are contrary to this Court's decisions. Review is warranted because there is confusion as to whether a disqualified judge can be reinstated.

II.

Review Is Warranted Because The Federal Courts and the California Supreme Court Unreasonably Applied This Court's Precedents When They Held The Reinstatement Of A Disqualified Judge(s) Does Not Violate Due Process

There are two types of judicial disqualifications: (1) *Sua sponte* and (2) upon motion by a party. It is important not to confuse the two types of disqualifications. In the first category, the judge disqualifies himself. In the second category, a party requests a judge be disqualified. Category Two motions give rise to many issues related to when a judge should be disqualified. Those are the cases that usually come before this Court.

All judicial canons and statutes require a judge to act no further in a case once he is disqualified. There can be no contingent or conditional recusals. In cases of unintentional judicial action by a disqualified judge, the judicial actions are void. There is an exception in California when only the litigant knew of the disqualification and says nothing. Petitioner immediately and repeatedly requested that O'Neill and the bench be removed from her case.

At Page 12, L17-26 of the transcript at Appendix K, Judge O'Neill stated the following regarding the prosecution's claims that petitioner was stalking Judge Elias:

I WAS TOLD ABOUT THE ALLEGATION. JUDGE ELIAS AND I WORKED IN THE DISTRICT ATTORNEY'S OFFICE. I HAVE KNOWN JUDGE ELIAS FOR

23 YEARS. HE IS A FRIEND OF MINE, AND THAT IS ANOTHER REASON I WANT TO SET THE BAIL REVIEW BACK IN FRONT OF JUDGE SZUMOWSKI WHO ORIGINALLY SET BAIL.

THERE IS NO GOOD CAUSE TO CHANGE BAIL, AND I REALLY THINK BASED ON WHAT I HAVE BEEN TOLD I WOULD RECUSE MYSELF FROM THE BAIL ISSUE. YOU NEED TO HAVE EITHER JUDGE SZUMOWSKI OR SOME OTHER JUDGE ADDRESS THAT ISSUE.

The panel unreasonably concluded that this did not create a constitutionally intolerable “risk of actual bias or prejudgment.” This is a Category One disqualification. There can be no question that a judge is biased once he has disqualified himself because he is a friend of someone a litigant is accused of stalking. A biased judge is a violation of due process.

Judge Deddeh stated that there was no reason for the bench to continue to be disqualified as no charges were filed with Judge Elias as victim. The judges did not disqualify themselves merely because they believed additional charges would be filed against petitioner for stalking Judge Elias. Judge O’Neill and the bench could not be fair to petitioner because of the district attorney’s inflammatory assertions that petitioner was stalking Judge O’Neill. Judge O’Neill recused himself because he was a good friend of Judge Elias and could not fairly review petitioner’s bail due to his fear that petitioner would harm his friend if petitioner were released on bail. When Judge Deddeh reinstated the bench he stated that there was no reason for continued recusal because no charges were filed with Judge Elias as victim. The disqualified judges continued to believe petitioner was a threat to Judge Elias after they were reinstated. For instance, petitioner was not permitted to parole to San Diego County and petitioner was required to stay away from Judge Elias as a condition of parole. *See Appendix DD at App. p. 309a.*

The California courts unreasonably applied *Caperton v. Massey* to the facts in this case. In *Caperton*, this Court affirmed all its earlier decisions that constitutional due process requires a fair and impartial judge. This Court stated in *Caperton*:

“actual bias, if disclosed, no doubt would be grounds for appropriate relief.”

Judge O’Neill clearly disclosed his actual bias toward petitioner when he disqualified himself on December 19, 2002. The panel’s analysis should have stopped there. It was a violation of due process for Judge O’Neill to have acted further in this case.

No statute, precedent or legal theory allows for judges to change their mind as to whether or not they are biased toward a litigant. Contingent or conditional disqualifications are not allowed. They would always give rise to, at a minimum, the appearance of bias. All Federal and California statutes, case law and judicial canons require judges to remain disqualified and, once disqualified, any further judicial action to be void.

The panel of the U.S. Court of Appeals for the Ninth Circuit stated at pages 3-4 of their decision:

“A state court decision is contrary to federal law if the court either “applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases,” or if it “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different . . . precedent.” *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The California Supreme Court surveyed decades of Supreme Court precedent analyzing judicial bias, and found that Freeman’s case did “not implicate any of the concerns – pecuniary interest, enmeshment in contempt proceedings, or the amount and timing of campaign contributions – which were the factual bases for the United States Supreme Court’s decisions in which it found that due process required judicial disqualification.” The state court acknowledged that these decisions did not preclude the possibility that other types of conduct might also require judicial disqualification under the Due Process Clause. However, it also observed that the Supreme Court had emphasized that judicial bias implicates due process only in “extraordinary” circumstances and in the context of “extreme facts,” and so declined to extend existing precedent to novel factual scenarios. Accordingly, the state court concluded that the facts of Freeman’s case did not create a constitutionally intolerable “risk of actual bias or prejudgment.” *Caperton v. A.T. Massey Coal Co., Inc.*, 566 U.S. 868, 884 (2009). We decline to hold that the state court’s decision was “contrary to” federal law, because it

arrived at neither a legal conclusion that “contradicts” governing law nor a different result on facts “materially indistinguishable” from a relevant precedent.

The panel stated at page 5 of their decision:

“when Judge O’Neill believed that Freeman was possibly stalking Judge Elias, Judge O’Neill’s colleague and close friend, he appropriately recused himself because his concern for Judge Elias’s safety may have created an intolerable risk of judicial bias. However, once he realized that the basis for recusal was untrue, the intolerable risk of bias was nullified. Therefore, it was not “objectively unreasonable” for the California Supreme Court to conclude that Freeman’s claims did not rise to the level of “extreme facts” that would require judicial disqualification under the Fourteenth Amendment.

“We recognize, as did the California Supreme Court, that Judge O’Neill’s reinstatement likely violated California’s judicial disqualification statutes. However, this fact alone does not warrant a conclusion that Freeman’s due process rights were violated. ... Accordingly the California Supreme Court’s holding was not an unreasonable application of federal law.”

The lower courts misapprehend the facts in this case. This is an unreasonable conclusion and an unreasonable application of this Court’s precedent to the facts in this case.

Judicial disqualification cases arise when judges refuse to disqualify themselves in circumstances where the judge’s impartiality might reasonably be questioned. In these Category Two cases, this Court remedies wrongs, gives guidance and sets objective standards for judicial disqualifications. Review should be granted to give guidance regarding how *Caperton* should be interpreted and applied. Review should be granted to clarify whether *Caperton* applies to the reinstatement of disqualified judges.

Caperton v. Massey added campaign contributions to the list of situations possibly requiring judicial disqualification pursuant to rights pursuant to constitutional due process. *Caperton* was an appeal from a \$50,000,000 in favor of Caperton. West Virginia Supreme Court Justice Benjamin refused to disqualify himself upon Caperton’s motion though he’d received a \$3,000,000 campaign contribution from Massey Coal Company’s chairman which was more

than all other contributions combined and, without which, he probably would not have won the close election.

This Court said that not every campaign contribution would implicate due process. Only extraordinary circumstances and extreme facts such as those in *Caperton* would. This Court said states were free to require disqualification under less extreme circumstances. This Court never said that “judicial bias implicates due process only in “extraordinary” circumstances and in the context of “extreme facts.” This Court said that not every situation involving campaign contributions would implicate due process. The *Caperton* facts were extraordinary and extreme due to the high dollar amounts and other facts. The courts in petitioner’s case used the *Caperton* language to rule the reinstatement of a disqualified judge is not an “extraordinary” circumstance or “extreme fact” that would violate due process. This is a misapplication of this Court’s precedent to the facts of this case.

Violations of due process are not limited to pecuniary interest, enmeshment in contempt proceedings, or the amount and timing of campaign contributions. It’s just that those are the types of cases in which judges have improperly refused to disqualify themselves and which have reached this Court. Violations of due process occur whenever a biased judge sits in a case.

For the sake of argument, O’Neill’s actions showed emotional embroilment in this case as well as his actual bias toward petitioner. The bench had a pecuniary interest in preventing petitioner from being able to sue the County of San Diego over the case involving petitioner’s daughter.

This case involves a novel factual scenario only because judges rarely knowingly reinstate themselves to a case in which they are disqualified. Appellant has found no appellate cases wherein a judge or judges intentionally returned to a case after any disqualification except for the

Casey Anthony case. Casey Anthony was one of the most reviled people in the country during her murder trial and there was an outcry over her not receiving probation for the minor charges she was convicted of at the time she was acquitted of murdering her daughter. A disqualified judge reinstated himself to order her probation. That judge was eventually removed from Ms. Anthony's case. Petitioner was equally reviled by the County of San Diego employees who were involved in this case.

This Court assumed judges will follow their state disqualification statutes and the codes of judicial conduct concluding at page 889 of *Caperton*:

"Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances."

When judges do not follow state disqualification laws and judicial canons, litigants must rely on constitutional due process.

It is well established that reversal is required when the disqualified judge is part of a panel of judges or the disqualified judge presides over a jury trial. "The court holds that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote. *Williams v. Pennsylvania. Bracy v. Gramley*, 520 U.S. at 904-905, states the existence of actual bias violates constitutional due process and requires reversal.

The cases discussed above show the Ninth Circuit panel, the district court and the state courts arrived at legal conclusions that "contradict" governing law. The law regarding disclosed bias is well established and requires reversal. Review is warranted because the rulings of the lower courts conflict with this Court's previous holdings.

III.

Review Is Warranted Because The Reinstatement Of A Previously Disqualified Judge(s) Deprived Petitioner Of Due Process And A Fair Trial

Judge O'Neill never said he no longer believed petitioner had not been stalking Judge Elias. Judge Deddeh said the Bench reinstated itself because no charges had been filed with Judge Elias as victim. Judge O'Neill certainly continued to believe it. He also made highly inflammatory statements about what he'd heard about the juvenile court case. One example is that petitioner violated juvenile court orders. Petitioner did not.

It is clear from the circumstances in this case that Judge O'Neill and the bench remained biased. They violated California statutes and judicial canons by acting further in a case in which they were disqualified. Weeks prior to the reinstatement of the bench, Deddeh acted beyond his jurisdiction as a disqualified judge when he chose a juvenile court judge from Los Angeles to improperly and summarily deny Appellant's §995 motion with no transcript. The Administrative Office of the California Supreme Court maintains a list of judges for appointment in such circumstances. Judge Deddeh assigned the case to Judge O'Neill instead of a judge who was not individually disqualified for disclosed bias.

The bench and Judge O'Neill violated the California disqualification statutes and all canons of judicial conduct when they reinstated themselves. Their bias toward petitioner was the true reason for their reinstatement. Had there been sufficient evidence to convict petitioner, the biased judges would not have needed to return to this case. The goal of their reinstatement was petitioner's conviction.

In February 2007, the state appellate court reversed petitioner's convictions because the reinstatement of O'Neill created an intolerable appearance of bias pursuant to *Bracy v. Gramley*; *In re Murchison*; and *Taylor v. Hayes* (1974) 418 U.S. 488. See Appendix J at App. p. 145a.

Review is warranted because the reinstatement of biased judges violated due process of law. Fair and impartial judges are necessary for public trust in the integrity of the judiciary. The reinstatement of disqualified judges and, even, the appearance of bias undermine the public's trust in the integrity of the judiciary. Review is warranted because litigants must rely on due process when judges violate state statutes and judicial ethical canons.

IV.

**Review Is Warranted Because The Panel And The California
Supreme Court Misapplied This Court's Precedents When They Held
Trial And Appellate Counsel Rendered Effective Assistance In
Connection With The Reinstatement Of The Previously Disqualified Judge(s)**

William Apgar argued against petitioner's interests each time petitioner objected to the reinstatement of the disqualified judges. Mr. Apgar never read the court file or the case file. He was completely unprepared to go to trial. He looked to Judge O'Neill for the answers to Judge O'Neill's questions. When Judge O'Neill asked Apgar a question, Judge O'Neill shook or nodded his head to indicate which answer Mr. Apgar should give for the record. Some of the questions Mr. Apgar looked to Judge O'Neill for answers to were whether or not he should join in petitioner's motions to disqualify Judge O'Neill. This is ineffective assistance of counsel *per se*.

The panel misapprehended the facts and the law when they stated that the statement of petitioner's former counsel, Joe Cox ("Cox"), (while Cox and Apgar were bullying Appellant) that that the other judges would be worse than Judge O'Neill indicated an acceptable trial tactic. First, all the judges were disqualified and petitioner wanted the case transferred to a county where there were qualified judges. Mr. Apgar refused to argue that the judges were disqualified and that the case should be transferred to another county where there were qualified judges. Instead, Mr. Apgar argued only that there was pretrial publicity. Second, not all the

other judges would have been worse. Only Judge O'Neill had individually disclosed his bias toward petitioner. Third, it was Apgar's duty to know what had happened previously in the case. The fact that Apgar didn't believe Judge O'Neill was really biased toward petitioner until well into the trial is no excuse for arguing in favor of, and allowing trial before a judge who had disclosed his bias when he disqualifyed himself. Both Mr. Apgar and Judge O'Neill repeatedly refused to provide petitioner with a transcript of the December 19, 2002 hearing wherein Judge O'Neill disqualifyed himself. *See Appendices Y at App. p. 279a, X at App. p. 283a, Y at App. p. 287a, Z at App. p. 291a, and AA at App. 295a.*

There is no reasonable argument that trial counsel satisfied *Strickland's* "deferential standard." *Strickland v. Washington*, 466 U.S. 688 (1984).

Appellate counsel Hancock refused to raise any issue related to the disqualification of the Bench because he grew up with Deddeh and was still good friends with him. Hancock refused to raise IOC issues or that O'Neill was actually biased though he mentioned that nearly all of O'Neill's rulings were incorrect. During oral argument, Hancock refused to answer the California Supreme Court's repeated requests for examples of O'Neill's actual bias.

Petitioner had a right pursuant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States to the effective assistance of counsel. The Sixth Amendment right to counsel is "The right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). If not for Apgar's errors and ineffective assistance, biased judges would not have been reinstated to this case. Error upon error compounded to deprive petitioner of her liberty, her livelihood, her property and her family in violation of petitioner's constitutional rights. But for Apgar's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different and more favorable to petitioner. This

reasonable probability is sufficient to undermine confidence in the outcome of this case. The standards set in *Strickland v. Washington*, 466 U.S. 688 (1984) relating to a finding of ineffective assistance of counsel are met in this case.

Review is warranted because the lower courts misapplied this Court's precedents in their holdings regarding the effectiveness of Mr. Apgar and Mr. Hancock.

V.

Review Is Warranted Because Of The National Importance of Determining Whether The Reinstatement Of A Disqualified Judge Violates Due Process

This is a question of exceptional importance as it diminishes public respect for judicial independence, integrity, impartiality, and fairness which are lynchpins of the legitimacy of the judicial branch of government. (American Bar Association Resolution 107, adopted August 8-9, 2011.)

Review is warranted to ensure that the panel decision does not gut long established constitutional due process rights to a fair and impartial judge. The panel decision substantially affects a rule of national application in which there is an overriding need for national uniformity.

Review is warranted to give guidance regarding the importance of fair and impartial judges. Review is warranted to insure the reinstatement of disqualified judges does not become commonplace. Nothing is more violative of due process than a biased judge presiding over a criminal trial.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted. The court may wish to consider summary reversal of the decision

of the Ninth Circuit Court of Appeals.

Dated: July 20, 2018

Respectfully submitted,



Marilyn Kaye Freeman
Petitioner

CERTIFICATE OF COMPLIANCE

This petition for writ of certiorari contains 7586 words.



Marilyn Kaye Freeman
Petitioner