

# 19-7888

REHEARING PETITION

IN THE SUPREME COURT OF THE UNITED STATES

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Dr. JOSEPHINE H. BANKS, *Petitioner*,

v.

WAFFLE HOUSE, INC., *Respondent*.

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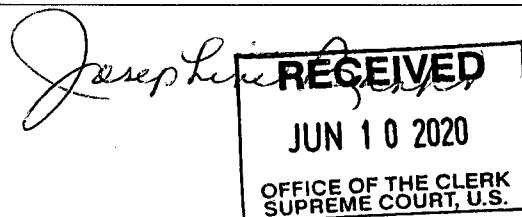
On Petition for A Writ of Certiorari to  
the Office of the United States Supreme Court

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PETITION FOR REHEARING

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Come now, Petitioner, Josephine Banks, ProSe and submits this petition for a rehearing of this Court's order dated May 18, 2020, Case No. 19-7888 that denied petition for a Writ of Certiorari in Josephine Banks v. Waffle House, Inc.

### **Certification Statement**

**Petitioner submits this Rehearing Petition in good faith and not to delay or reargue the case.**

### **INTRODUCTION**

Petitioner brings to the court's attention important points, facts and law that deserve attention. The following issues are presented in support of this Rehearing Petition:

- a. Unexpected Illness and Death of Petitioner's Child as "excusable neglect" for late filing
- b. Case Decided with Unaddressed Issues by Respondent
- c. Infringement of Petitioner's Right to Effective Council

### **PETITION FOR REHEARING**

Pursuant to Supreme Court Rule 44, Josephine H. Banks respectfully submits this petition for a rehearing.

## REASONS FOR GRANTING THE PETITION FOR REHEARING

The Petitioner comes forth with an understanding that a request for a rehearing might bear fruit. The need exists for Justices of the United States Supreme Court to rehear the denial of Petitioner's request to file an appeal with the Georgia Supreme Court determined as late. In accordance with *Supreme Court Rule 44*, Petitioner asserts that "intervening circumstances with substantial grounds" prevailed at a critical time that frustrated Petitioner's efforts to complete timely filing of an appeal. Issues to be considered includes child's illness, child's death, Petitioner's grief-stricken state, bereavement period, infringement of right to effective council and issues unaddressed by the Respondent.

For good of the public, it is worthwhile to extend the life of this case based on controlling effects of serious intervening circumstances that were out of Petitioner's control, which could be the plight at any time of any U.S. citizen. Petitioner asks the Supreme Court of the United States to rehear this case and dissolve all potential errors that can be remedied by notifying the Supreme Court of Georgia of new information that the court should consider.

It is a fact that Petitioner's diligent pursuit of an appeal was interrupted by child's sudden illness, quick hospitalization, and unexpected lung surgery followed by child's death due to an aggressive form of lung cancer plus failure of a newly hired attorney trusted to complete processing of the GA appeal petition at a vulnerable time for Petitioner (See Exbs. 1 & 2). The question that requires an answer follows: After consideration of the impact of these new variables, will the

appellate court's decision change, be altered or remain the same? Failure to inform the Georgia Court of Appeals of these new circumstances would result in an error of law. The question stated above should be answered before it is considered safe to say that state remedies have ran its course and exhausted the possibilities of further review. Supportive law is presented in *Carlsen v. State*, 129 Neb. 84, 94-8, 261 N. W. 339.). In this case, Petitioner's attorney successfully exercised different state legal procedures to pursue and protect the right of Due Process of Petitioner to appeal.

Most importantly, Petitioner emphasizes that her case has never been heard by any Appellate court. The presiding judge's factual and legal determinations subjected to review by an appellate court never took place. This is a correctable error. Petitioner seeks this court's agreement with her asserted position that this case should have a place with the tiny number of petitions that are granted a rehearing.

Using the new information presented in this document, the United States Supreme Court should be well able to give the lower court (Georgia Supreme Court) the opportunity to consider the impact of intervening circumstances of substantive control, and recommend revision of its decision accordingly. Presented herein are causes that justify the Supreme Court of Georgia's reconsideration of its order. Petitioner asks the United States Supreme Court to rehear this case. Support is found in the conclusions drawn from *the matter of Michael B.*, 604. N.E. 2d 122 (N.Y. 1992) that made clear, when in court, the need exists to avoid abuse of

discretionary power that can be accomplished when new facts are addressed not ignored.

## **PETITION FOR REHEARING**

Presented to the United States Supreme Court are the following intervening events: (a) Sudden Illness & Death of Petitioner's Child (b) Case Decided with Issues Unaddressed by the Respondent and (c) Infringement of the Right to Effective Council.

### **Illness and death of Petitioner's child an "intervening circumstance" of "excusable neglect"**

During the month of April 2019, child's mild cough progressed. Surprisingly, daughter had to undergo lung surgery. On May 17, 2019, daughter succumbed to an aggressive illness (pleiomorphic lung cancer) and was funeralized on May 25, 2019. Only six weeks passed after the date of the unexpected cancer diagnosis and the child's death.

This death led to a significant decline in Petitioner's ability to handle cognitive demands. Petitioner, as involuntary ProSe, became engulfed in a valley of grief. The Georgia Supreme Court should be provided the opportunity to acknowledge this major interruption and maintain consistency with *Supreme Court rule 44.2*. The events of the child's illness and death were serious intervening circumstances faced by Petitioner that were out of Petitioner's control. The United States Supreme Court should allow the Supreme Court of Georgia to acknowledge and assess the

reported impact of the factors on Petitioner's ability to maintain which might rouse the Georgia Supreme Court to reverse and allow Petitioner's appeal to move forward.

The death of Petitioner's child was devastating and is referred to by professionals as the worst experience any parent can endure. *"The death of a child is considered the single worse stressor a person can go through,"* says Deborah Carr, Chair of the Sociology Department at Boston State University. This is precisely what happened. This sudden death caused a profound and overwhelming family crisis with suffering and intense emotions that continued for days, weeks and months. The unexpected death resulted in Petitioner becoming quiet and withdrawn. In the face of immeasurable pain, Petitioner's response was one of shock, denial, disbelief and numbness – all typical grief responses.

Petitioner had no choice but to remain at daughter's bedside for the duration of her illness and rushed cancer treatment. Overwhelmed with stress, Petitioner began to display serious signs of grief and depression such as inconsolable crying, sobbing, and trembling. Dr. Carr described Petitioner's shock as particularly profound because daughter's death was sudden, tragic and unforeseen.

*See The Compassionate Friends Supporting Families after a Child Dies, online community support, emailed packet information and news conference briefs sent around the Globe with lighting of the Candles in memory of all children who have gone too soon. National website at [www.compassionatefriends.org](http://www.compassionatefriends.org). More than three dozen grief-related brochures, books and award-winning online magazine, We Need Not Walk Alone. 877-969-0010 pgs. 1-17. Requested information- Received via Emailed.*

Related stress caused Petitioner to stay home and avoid interact with the outside world in fear that something else terrible would happen. Triggers such as remembering the child's voice, seeing the child's face and remembering special times spent together were impossible to escape. The Petitioner struggled to accept the feelings that resulted from the loss of her child that evoked sadness, depression, fatigue, confusion and disorganization. Naturally, business tasks piled up, and needs went unmet. Plaintiff struggled with difficulty sleeping, diminished appetite and frequent headaches – reactions all caused by grief.

### **Infringement of Right to Effective Counsel**

The longtime problem of lack of diversity on the Gwinnett County Court's bench gave way to racial disparity that harmed Petitioner when evidence was allowed to be suppressed by the presiding judge and the judge's refusal to recuse that resulted in the withdrawal of litigant's attorney. Petitioner's attorney finally shared that in past years he had openly campaigned against the judge's re-election in a failed effort to diversify the bench. The failed recusal motion asserted that a conflict of interest or retaliation could be a factor. Petitioner was innocent of any political association and suffered unfairly from past affiliations between Petitioner's lawyer and the presiding judge who refused to recuse herself. Regardless, the presiding judge should not have allowed Petitioner's attorney to withdraw at such a critical time and finds support in *Cannon 3 of the Judicial Code*. The damage to Petitioner's case was irreparable. New attorneys listened but did not come on board as litigation that had already covered several years and was a key concern. The

judge's actions created a conflict and denied Petitioner the right to effective counsel.

Petitioner asserts that the judge's actions require the Justices' full attention.

*According to King v. State, 246 Ga. 386, 390 (7), 271 S.E. 2d 630 (1980); see also Sears v. State, 262 Ga. 805 (1)(a) 426 S.E. 2d 553 (1993)* their conclusion states that "The fact that this (judge's) impartiality might reasonably be questioned suffices for his disqualification." Petitioner made no agreement. Thus, the judge violated Petitioner's constitutional right to an impartial judge by ignoring set precedents and recusal law. The United States Supreme Court is the only entity that can correct the judge's actions in favor of the Petitioner. Without legal training, Petitioner was forced into an involuntarily ProSe role.

Immediately, after death of child, Petitioner experienced some difficulty making decisions. With the Georgia Supreme Court, Petitioner was mentally unable to adequately manage the demands of an appeal. An attorney was hired to assist with the appeal process. With the fee paid upfront, the attorney failed to complete the job timely in accordance with the law (See Exb. #4).

### **Death of Petitioner's Child as Intervening and Substantial Circumstance**

Petitioner had to face the reality that her daughter had died and living without her was unbearable. Involvement in the planning of daughter's funeral and burial arrangements were necessary and tedious. The burden existed to manage daughter's remaining finances and estate. Related legal complexities did not leave clear direction. These complexities were overwhelming, expensive, immediate and

could not wait until the initial raw trauma had subsided. Petitioner faced a challenge to manage her own physical disabilities. To help, an anti-depressant medication was prescribed (See Exb. 5).

Petitioner calls upon the legal wisdom and legal experience of the United States Supreme Court Justices to understand a child's death and all other uninvited grief issues that became priorities. Petitioner asks that the U.S. Supreme Court recognize these intervening facts that were life-changing and the effects on Petitioner that were out of the Petitioner's control and grant a rehearing of this case. Supporting law is established in the *Pioneer Investment Co. v. Brunswick Associated Ltd. Partnership*. This United States Supreme Court case set forth that a court can permit a late filing if the Petitioner shows that the failure was the result of an excusable event. This pre-established standard, is the Petitioner's exact plea in this rehearing request. The impact of the illness and sudden death of Petitioner's child was never presented to the Georgia Supreme Court. With the information herein, should the United States Supreme Court give the lower court (Georgia Supreme Court) the initial opportunity to consider the possible impact of these events on the Petitioner and the opportunity to revise its ruling in light of these newly presented circumstances?

### **Impact of Ineffective Council**

On June 24, 2019, Petitioner hired an attorney to file the Petition for Writ of Certiorari with the Georgia Supreme Court. Petitioner's attempt to proceed

with her case occurred only thirty days after daughter's May 25th funeral. On June 27, 2019, Petitioner discovered (through much searching) a "fees unpaid" letter sent to the hired attorney who had received the required fee from Petitioner. However, this letter was not shared with the Petitioner. The letter stated that the GA Supreme Court did not file the Writ Petition. Petitioner was baffled. The United States Supreme Court should give the lower court the opportunity to consider these intervening events that could change the outcome in Petitioner's case and revise decisions accordingly?

### **Infringement of Right to Effective Council**

To preserve Petitioner's case, on September 28, 2019, Petitioner did request permission to refile the appeal with the Georgia Supreme Court and informed the court of the attorney's breach of duty. Following review of this presentation of impactful issues such as an attorney's withdrawal in absence of a requested recusal, a newly hired attorney's breach of duty, grief expression that was vital, and unresolved and Respondent's lack of response to critical issues the United States Supreme Court should find justified cause to require that the Georgia Supreme Court reconsider.

According to the *Holland v. Florida* case (United States Supreme Court case) a Petitioner is entitled to equitable tolling if Petitioner shows (a) he had been pursuing his rights diligently and that (b) some extraordinary circumstance stood in his way and prevented timely filing. This is precisely what happened in Petitioner's case. In addition, this request for rehearing would lead to a review of the trial court

judge's factual and legal determinations never subjected to review by any appellate court. The need exists for this court to safeguard the checks and balance system aimed to ensure justice.

Although the Georgia Supreme Court rules state, the clerk will not accept an untimely filing due to (in this case) nonpayment of fees, the Court's precedent shows that the Court may, in extraordinary circumstances (like Petitioner's) entertain an untimely petition. Precedent was set in the following cases: *Roberson v. State*, 782 S. E. 2d 671 (2016) and *Buckler v. DeKalb Board of Commissioners*, conclusions reached said that the untimely filing of a Brief is not automatically grounds for dismissal. Denial of due process of law by dismissal of an appeal has been successfully argued in courtrooms with reversal and ordering of a new trial (See *McAuliffe v Rutledge*, 200 SE 2d 100(GA Supreme Court 1973).

### **Impact of Ineffective Council**

Personal receipts on record show that Petitioner paid the required fee. Non-payment of the fee to the court was the fault of another, not the Petitioner. See *Foster v. Texas*, 131 S.CT. 2011. *Gondeck v. PanAm. World Airway*, 382, US v., *United States v. Ohio Power Company*, 353 U.S.98 (1957). "The interest in finality of litigation must yield when the interests of justice would make unfair the strict application of the rules of this Court" p. 353. US 99. An error made in this respect will not only damage Petitioner's case, but thousands of others in the public who could face similarly situated legal proceedings. Thus, the U. S. Supreme Court should expeditiously accept Petitioner's request for rehearing.

Will the United States Supreme Court recommend that Petitioner be allowed to file an appeal with the Georgia Supreme Court? Emphasis Added that the case waits to be heard by an appeals court. If never heard, an infringement of Petitioner's constitutional right exists? By allowing the case to be heard, the benefit of full briefing and arguments safeguards and makes fair legal proceedings (due process) not just for the Petitioner but also for the public. Most importantly, in the *Mays v. State case (Georgia Appeals Court)* it was ruled that the court was not required to refuse to consider an untimely brief. The absence of a meaningful appellate review could have a deleterious effect on the public knowing discretionary power can be exercised. The Supreme Court of GA can exercise discretion to uphold justice for the public at large knowing that similar legal situations to Petitioner's are likely to reoccur. (See *Foster v. Texas* 131 S. Ct. 2011. *Gondeck V. Pan Am World Airway*, 382, U.S. v *United States v Ohio Power Company*, 353 U.S. 98 (1957). This court should resolve the substantial and important factual issues now presented in this case because this court has the authority to prevent an error. This new knowledge should facilitate a worthwhile discussion that could yield an alteration of a previous order and grant Petitioner the right to an Appeal at the Georgia Supreme Court.

#### **Case was Decided with Issues Unaddressed by the Respondent**

Issues of importance were not addressed by the Respondent. One unaddressed issue is the impact of the death of Petitioner's child. For completion, this issue should be addressed. Respondent should respond to the impact of a recusal that

was refused by the presiding judge. The impact of the death of Petitioner's child makes worthy the rehearing of this case. Petitioner asserts that there is a reasonable possibility of reinstatement of an appeal by means of this rehearing petition.

### **In Summary**

On May 17, 2019, Petitioner faced the illness and sudden death of her child due to lung cancer. At a time of exhaustion, Petitioner later learned that a hired attorney neglected to submit the required fee paid in advance to the state court. Although grieved, Petitioner did request an extension to file a late appeal that was denied by the GA Supreme Court.

New evidence is presented to this court in support of a rehearing. Justices of the United States Supreme Court have been provided facts and supportive law of Petitioner's request that the case (*Josephine Banks v. Waffle House, Inc.*) be reheard. Petitioner acknowledges that these shared intervening events do not necessarily change the outcome of the case, just that they might. On occasions, this court has granted a rehearing based on controlling circumstances. The United States Supreme Court is reminded of the two cases where a rehearing was granted. Specifically, *United States vs. Allen- Bradley Co. and National Lead Co. v. Commissioner*. It is understandable that these sensitive and traumatizing events were beyond Petitioner's control. Thus, Petitioner's case status as unreviewed should not remain unreviewed.

Petitioner asks that the United States Supreme Court require that the Georgia Supreme Court not ignore the impact the intervening issues presented herein and issues unaddressed by the Respondent. Petitioner requests a rehearing of the case hoping that an appeal, that is long over-due, can move forward expeditiously.

The attached exhibits validate Petitioner's suffering in support of her child and the timing of events that occurred around the same time (Make Reference to the dates) shows exceptional importance that should excuse untimely filing. Therefore, legal grounds are clear by which this case should not remain unreviewed by an appellate court. The United States Supreme Court can restore Petitioner's right of due process to be heard, and most importantly can also resolve the question presented by Petitioner, one of many disabled U. S. citizen, by giving the Georgia Supreme Court a second chance. The specific Question is Presented follows:

#### Question Presented

When a lower court overlooks a required legal document that is in the record, fails to correct their error and proceeds to deny a litigant the right to an appeal, how can this denial of due process be remedied.

#### CONCLUSION

For these foregoing reasons, Petitioner-Josephine Banks, urges this Honorable court to rehear this case.

**Certification Statement**

**Petitioner certifies that this Rehearing Petition is submitted in good faith and not to delay or reargue the case.**

See Exhibits 1 – 5 attached.

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