

No. _____

In the
Supreme Court of the United States

MICHELLE HERCZEG,

Petitioner,

v.

CITY OF DALLAS, TEXAS,

Respondent.

**On Petition for a Writ of Certiorari to the
Texas Court of Appeals, Fifth District**

PETITION FOR A WRIT OF CERTIORARI

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BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Is it repugnant to the Constitution and laws of the United States when the rights of a decorated police officer, who was a victim of sexual assault and sexual harassment by her superiors, is denied the opportunity to receive a fair trial or is denied her rights to appeal?

LIST OF PROCEEDINGS

Supreme Court of Texas

No. 21-0537

Michelle Herczeg v. City of Dallas, Texas

Date of Final Order: December 10, 2021

Date of Rehearing Denial: February 11, 2022

Court of Appeals Fifth District of Texas at Dallas

No. 05-19-01023-CV

Michelle Herczeg, *Appellant*, v.

City of Dallas, Texas, *Appellee*.

Date of Final Opinion: March 29, 2021

Date of Rehearing Denial: May 11, 2021

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PROCEEDINGS.....	ii
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND JUDICIAL RULES INVOLVED	2
PRELIMINARY STATEMENT	3
STATEMENT OF THE CASE.....	4
A. Petitioner Earns Her Position Within the Elite CRT Unit	5
B. Petitioner Is Assaulted by Another Office (“Banks”).....	5
C. Petitioner Files an Internal Complaint and Is Threatened with Her Job and Future Career	5
D. Banks Is Charged with Assault and the City of Dallas’ Prosecutor Intentionally Botches the Case Resulting in Dismissal.....	6
E. The Officer Who Assaulted Petitioner Keeps His Job While Petitioner Is Demoted, Reassigned and Her Salary Is Reduced	7
F. Petitioner Files Suit and the City Continues Retaliation	8

TABLE OF CONTENTS – Continued

	Page
G. Suit Filed; the City Files a Plea to the Jurisdiction	8
H. Trial Court Grants Plea and Dismisses Case	9
I. PetitionerAppealed and Raised Three Issues	9
J. The Court of Appeals Misapplies Well-Settled Precedent and Further Denies Petitioner Her Basic, Due Process Rights.....	9
REASONS FOR GRANTING THE PETITION.....	10
I. THE APPELLATE COURT OF APPEALS FOUND A REASON TO DENY PETITIONER'S DUE PROCESS RIGHTS	10
II. THE COURT OF APPEALS MISAPPLIES THE BRIEFING STANDARDS	11
III. PETITIONER'S BRIEFING WAS MORE THAN SUFFICIENT	12
IV. THE CITY AND COURT OF APPEALS MISCONSTRUED CURRENT BRIEFING STANDARDS.....	13
V. THE CITY'S "FACTS" ARE MALICIOUS AND WITHOUT MERIT.....	14
VI. EXPLANATION FOR DECLINING TO DECIDE A CASE ON THE MERITS SHOULD BE REQUIRED..	14
VII. PETITIONER'S RIGHT TO DUE PROCESS AND FUNDAMENTAL FAIRNESS WAS VIOLATED.....	15
CONCLUSION.....	17

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS**OPINIONS AND ORDERS**

Order of the Supreme Court of Texas (December 10, 2021).....	1a
Memorandum Opinion of the Court of Appeals Fifth District of Texas at Dallas (March 29, 2021).....	2a
Dissenting Opinion by Justice Schenck (March 29, 2021).....	9a
Judgment of the Court of Appeals Fifth District of Texas at Dallas (March 29, 2021)	17a
Order on Defendant City of Dallas's Plea to the Jurisdiction (July 30, 2019)	18a

REHEARING ORDERS

Order of the Supreme Court of Texas Denying Motion for R hearing En Banc (February 11, 2022)	23a
Order of the Court of Appeals Fifth District of Texas Denying Motion for R hearing En Banc (May 11, 2021)	24a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	15
<i>Harris Cty. v. Annab</i> , 547 S.W.3d 609 (Tex. 2018)	12
<i>Huston v. FDIC</i> , 663 S.W.2d 126 (Tex. App.—Eastland 1983)	12
<i>Lindsey v. Normet</i> , 405 U.S. 56 (1972)	16
<i>Lion Copolymer Holdings, LLC v. Lion Polymers, LLC</i> , 614 S.W.3d 729 (Tex. 2020)	13
<i>Perry v. Cohen</i> , 272 S.W.3d 585 (Tex. 2008)	13
<i>Texas Dept. of Parks & Wildlife v. Miranda</i> , 133 S.W.3d 217 (Tex. 2004)	12, 13
<i>Univ. of Tex. Med. Sch. at Houston v. Than</i> , 901 S.W.2d 926 (Tex. 1995)	15
CONSTITUTIONAL PROVISIONS	
Tex. Const. art. I, § 19	2, 15
U.S. Const. amend. XIV	2, 15
STATUTES	
28 U.S.C. § 1257(a)	2

TABLE OF AUTHORITIES – Continued

Page

JUDICIAL RULES

Tex. R. App. P. 38.1(i)	12
Tex. R. App. P. 38.9	10, 11, 12, 13

OTHER AUTHORITIES

W. Wendell Hall & Ryan G. Anderson, <i>Standards of Review in Texas</i> , 50 ST. MARY'S L. J. 1099 (2019).....	12, 13
--	--------



INTRODUCTION

This is a Suit on claims for employment discrimination, wrongful termination, and retaliation. In a 2-1 decision, authored by newly-elected Justice Denise Garcia, the court of appeals affirmed the judgment without regard to the merits. The Majority concluded that Herczeg failed to challenge all independent bases for the trial court's judgment. Newly-elected Justice Craig Smith joined the majority.

Justice David Schenck authored a dissent complaining that the majority failed to reach the merits and relied upon a line of authority contrary to the current appellate rules and authority of the Texas Supreme Court to hold that Appellant Herczeg waived error.



OPINIONS BELOW

The Order of the Supreme Court of Texas, dated December 10, 2021, is reproduced in the appendix at App.1a. The Memorandum Opinion of the United States Court of Appeals for the Fifth District of Texas, dated March 29, 2021, reproduced at App.2a. The Order of the District Court of Dallas County, Texas, 191st Judicial District, dated July 30, 2019 is reproduced in the appendix at App.18a.



STATEMENT OF JURISDICTION

The Supreme Court of Texas denied Petitioner's motion for rehearing on February 11, 2022. The petition was timely filed on May 12, 2022. The clerk of court allowed Petitioner until July 12, 2022, to file this petition. This petition is timely and this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).



CONSTITUTIONAL PROVISIONS AND JUDICIAL RULES INVOLVED

U.S. Const., amend. XIV § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

Tex. Const. art. I, § 19

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land

Tex. R. App. P. 38.9

Because briefs are meant to acquaint the court with the issues in a case and to present argument that will enable the court to decide the case, substantial compliance with this rule is sufficient.

**PRELIMINARY STATEMENT**

The City of Dallas knowingly included false testimony without an adequate investigation to which Petitioner objected. Specifically, the City of Dallas offered affidavits from several officers which claimed various and wholly untrue conduct on the part of Petitioner. These purported violations by Petitioner were never mentioned during her exemplary career at the City.

Finally, this case is important as the facts demonstrate how the City's antiquated "Police Culture" is and which has long-standing biases and prejudice against women in law enforcement. In this case, the City went to great lengths to vilify Petitioner by introducing false or unsubstantiated testimony by the male police officers in the department. Granting certiorari in this case will have a profound effect on the ongoing, daily struggles that women in law enforcement deal with on a daily basis.



STATEMENT OF THE CASE

In this lawsuit, Plaintiff seeks damages for claims of alleged Violations of the TCHRA, which arise from her former employment as an officer in Dallas Police Department (“DPD”). CR 59.

Petitioner completed her undergraduate career in 2007 with a major in Criminal Justice Studies and a minor in Legal Studies. She also earned her graduate degree in 2012 in Public Administration Science at the University of West Florida and graduated with honors for a 3.2 GPA.

Petitioner served honorably as a Staff Sergeant in the United States Air Force for eight years as a front-line supervisor from 1999 to 2007. Her military included direct support of Operation Enduring Freedom and Operation Iraqi Freedom at the 1st Air Force Special Operation Wing, Medical Group, Hurlburt Field Florida. CR 815.

In August of 2008, Petitioner was hired on as Police Officer Recruit with the Dallas Police Department. Petitioner successfully completed her basic academy in the top five percent of her class. Petitioner continued and successfully completed all field training requirements. Petitioner continued to successfully work as a single officer patrol unit at Northwest Substation and North Central Substation with a wide variety of working knowledge in all types of criminal arrests and activities.

A. Petitioner Earns Her Position Within the Elite CRT Unit.

In 2015, Petitioner was assigned to the North Central Patrol Division. CR. 59. Within North Central, Petitioner was assigned to a deep night shift, known as the first watch, on the North Central Patrol Division's Crime Reduction Team ("CRT"). CR 59-60.

B. Petitioner Is Assaulted by Another Officer ("Banks").

On May 23, 2015, Petitioner and several other officers, including Senior Corporal Derrick Banks ("Banks"), responded to a disturbance call at an apartment complex. CR 60. While Petitioner was searching a female suspect, Banks walked up behind her and reached in the area of her weapon that she carried on the side of her body, and in doing so, touched her breast. CR 60.

C. Petitioner Files an Internal Complaint and Is Threatened with Her Job and Future Career.

Within 24 hours of the incident with Banks, Petitioner contacted her supervisor, Sergeant Matthew Peebles ("Peebles"), and told him that she wished to file a complaint because she felt that she had been assaulted by Banks. CR 60.

Petitioner's superiors advised that she should not make the report, that they would bring an Internal Affairs investigation against her for a claimed violation of procedure. Sgt. Peebles stated that 'If you move forward with this complaint you could receive disciplinary action for not having a mic.' Sgt. Peebles reminded Petitioner that Police Officer Bryan Herr

received disciplinary action for not wearing a mic in the Officer [name omitted] and Officer [name omitted] Internal Investigation.” CR 28.

“On May 28, 2015, Lt. Ruiz-Diaz and Sgt. Peebles had a meeting with Petitioner and asked her where she wanted to be transferred. Petitioner immediately referenced she liked her position at the CRT Unit, and she did not want to be punished or isolated from her work group. Ruiz-Diaz referenced the “Bid Process” making a reference to going back to regular patrol. CR 29.

During this meeting, Sgt. Peebles also requested a letter of resignation from Petitioner. When Petitioner denied the request, Sgt. Peebles stated ‘Fine, I’ll work around it. CR 32. Despite her protests, Petitioner was transferred out of her unit.

Officer Banks was not transferred, despite the assault allegation and pending investigation. Petitioner made multiple requests not to be transferred, but Sgt. Peebles told Petitioner, ‘I’ll see what I can do, it’s out of my control’ and ‘Don’t feel the need to hang around the phone. Chief Watson is waiting on people to call him back, so I don’t know when we will have an answer. CR 33.

Following the completion of PIU’s criminal investigation, IAD conducted an investigation to determine whether Banks had committed any administrative violations. CR 61.

D. Banks Is Charged with Assault and the City of Dallas’ Prosecutor Intentionally Botches the Case Resulting in Dismissal.

The assault was investigated, and the City of Dallas charged Banks with civil assault and a criminal

prosecution began. CR 332. Banks' employee file shows a long history of violations and disciplinary actions. CR 1236-1242. These records were admitted by the Appellee and made part of the record. CR 1245-1246. Despite this, Petitioner was reassigned and moved out of her CRT unit. Appellee does not dispute that it reassigned Petitioner from the CRT unit. CR 323.

Meanwhile, City Attorney Robin Ogbonna violates his professional and ethical obligations by intentionally mishandling the case. did not attempt to procure any witnesses or other evidence in order to prosecute the case. On the day of Banks' criminal trial, Robbin Agobona had no witnesses or evidence ready and asked for another continuance. Petitioner, who was sitting in the courtroom, was shocked and morally destroyed because the Dallas City Attorney's professional misconduct.

E. The Officer Who Assaulted Petitioner Keeps His Job While Petitioner Is Demoted, Reassigned and Her Salary Is Reduced.

When Petitioner was reassigned from first to the third watch, her shift pay was reduced from 6.5% of her base pay to 3.5% of her base pay. CR 63. She was also ineligible to work bike shifts when she was able to before, and thus earn additional, compensatory time. CR 63.

Petitioner is placed on "special assignment" and reassigned a second time to a "desk job" in Fusion and denied access to necessary resources, and her position is immediately given to an inexperienced, male officer. Later, Petitioner had to re-interview for her old job. All the While, Banks kept the same position, same pay and benefits, and was allowed to stay on his chosen

career path. All of that was taken away from Petitioner.

F. Petitioner Files Suit and the City Continues Retaliation.

As mentioned above, the City’s plea to the jurisdiction and appeal briefing contained false testimony from other male officers about Petitioner. Issues that the City was required to address at the time Petitioner allegedly engaged in such conduct, but which never happened.

Later, in the City’s appeal briefs, they continued to offer false, defamatory allegations against Petitioner to malign her reputation and punish her from pursuing her right to be free from sexual assault and constant harassment and retaliation by her superiors in law enforcement.

G. Suit Filed; the City Files a Plea to the Jurisdiction.

Petitioner filed this employment discrimination suit against the City on December 28, 2016. 1CR15; *see also* 1CR32. The City filed a plea to the jurisdiction that asserted numerous “grounds” for its immunity. The grounds asserted were either elements of a substantive claim or defenses to the substantive claim, which the City used as a “proxy” for governmental immunity. The plea had 670 pages of evidence attached. 1CR47-800.

Petitioner filed a robust response and evidence in support. 2CR811-1569. She also filed an objection to the City’s evidence. 2CR1570-75.

H. Trial Court Grants Plea and Dismisses Case.

The trial court granted the City's plea to the jurisdiction and dismissed it with prejudice. In doing so, the court signed a checklist-style order that amounted to a general order since it failed to identify the specific ground or grounds from the City's plea to the jurisdiction on which the order was based. 2CR1576.

I. Petitioner Appealed and Raised Three Issues.

Petitioner appealed from the trial court's final order and raised three issues in her Appellant's Brief, including one broad issue complaining that the granting of the plea to the jurisdiction was improper due to the existence of numerous fact issues. *Appellant's Brief* at p.6.

J. The Court of Appeals Misapplies Well-Settled Precedent and Further Denies Petitioner Her Basic, Due Process Rights.

The majority opinion holds that Petitioner failed to challenge all independent grounds supporting the trial court's judgment because she failed to brief two grounds: untimeliness and failure to exhaust administrative remedies. Majority Op. at 6. This holding is flawed because the trial court's order does not adopt either of these two alleged grounds.

As the dissent points out, the trial court's order is in a check-list format and contains some 30 separately-listed grounds. Untimeliness and failure-to-exhaust administrative remedies are not among the grounds listed in the order.

To be sure, Appellee raised these two grounds in the trial court in its plea to the jurisdiction, I CR 47, but the trial court did not include these two grounds

in the list of grounds on which the court granted the plea to the jurisdiction.

The trial court did not sign a general order, such as “the plea to the jurisdiction is granted” without specifying the ground or grounds. Rather, the trial court signed a specific, checklist order that lays out multiple, specific grounds and the order omits any mention of untimeliness or failure to exhaust remedies. The majority erred by construing the trial court’s order to include untimeliness and failure-to-exhaust administrative remedies.



REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT OF APPEALS FOUND A REASON TO DENY PETITIONER’S DUE PROCESS RIGHTS.

Faced with the choice between writing a lengthy opinion addressing the merits of Petitioner’s appeal, and writing a short opinion based upon a court determination of briefing waiver, the majority below chose the latter course. The appellate court never requested that Petitioner supplement her brief as TRAP 38.9(b) contemplates.

Instead, the court affirmed despite Petitioner’s broad issue encompassing all grounds, despite a checklist trial court order that did not include the defenses of failure-to-exhaust administrative remedies and limitations as grounds for jurisdictional dismissal, and despite more than 600 pages of trial court pleadings asserting that failure-to-exhaust remedies and limitations are not jurisdictional defenses.

The opinions below and the City’s Response to the Petition for Review highlight a continuing state of confusion with respect to Malooly and standards of appellate briefing. The City’s Response also highlights the inherent biases that appealing parties face to having appeals decided on the merits. Everyday trial court judges are asked to read voluminous pleadings and evidence and make rulings. According to the City, asking the appellate court to undertake a (de novo) review of the same pleadings and evidence and write an opinion is “wholly unreasonable.” And if we’re being honest about it, appellate courts all too frequently give in to the temptation of taking the easy way out by declaring “waiver”, as the court did here.

II. THE COURT OF APPEALS MISAPPLIES THE BRIEFING STANDARDS.

The standard by which briefs are measured is whether the briefs are sufficient to “acquaint the court with the issues” and “enable the court to decide the case.” Tex. R. App. P. 38.9. Perhaps the best proof that Petitioner’s briefing was sufficient to decide the issues raised can be found in the specific, merits-based exchanges between the justices and counsel during the oral argument.

Petitioner’s brief satisfied the applicable standard. Her first issue broadly challenged the granting of the City’s Plea to the Jurisdiction. Appellant’s Brief at 6. The Brief contained five pages of detailed recital of the facts, with record citations, and these were the facts she relied upon to create a fact issue. *See* Appellant’s Brief at 9-12. Petitioner’s argument recited the de novo standard of review, and the standard applicable to review of a plea to the jurisdiction in a case such as this, which requires the trial court to ascertain whether

Petitioner has raised a fact question. *See* Appellant's Brief at 14 (*citing Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004); *see also* W. Wendell Hall & Ryan G. Anderson, *Standards of Review in Texas*, 50 ST. MARY'S L. J. 1099, 1243 (2019) (requiring reviewing court to review submitted evidence and to accept as true all evidence favorable to nonmovant). The appellate court was required to take a fresh look at the trial court pleadings and ascertain whether a fact issue had been raised. *Huston v. FDIC*, 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e.); *see Harris Cty. v. Annab*, 547 S.W.3d 609, 613 (Tex. 2018). If the trial court was able to resolve the dispute based upon the pleadings, so could the court of appeals. Nevertheless, the City argues that it is "wholly unreasonable" to ask the court of appeals to do precisely what it is required to do. Response p.15.

III. PETITIONER'S BRIEFING WAS MORE THAN SUFFICIENT.

The Majority opinion applies the wrong standard to Petitioner's brief. Significantly, the majority opinion does not cite the controlling standard contained in Appellate Rule 38. Rule 38 is not cited at all.

Rule 38.9 sets out the standard by which the adequacy of a brief is measured:

Because briefs are meant to acquaint the court with the issues in a case and to present argument that will enable the court to decide the case, substantial compliance with this rule is sufficient.

Tex. R. App. P. 38.9; *see also* Tex. R. App. P. 38.1(i).

Simply put, does the brief give the court enough to decide the case? Further, to achieve the goal of ensuring that cases are decided on their merits rather than procedural waiver, the briefing rules are to be liberally construed. Tex. R. App. P. 38.9; *Lion Copolymer Holdings, LLC v. Lion Polymers, LLC*, 614 S.W.3d 729, 732 (Tex. 2020); *see also Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam) (“[A]ppellate courts should reach the merits of an appeal whenever reasonably possible.”). The Majority makes no mention of this standard.

IV. THE CITY AND COURT OF APPEALS MISCONSTRUE CURRENT BRIEFING STANDARDS.

The standard by which briefs are measured is whether the briefs are sufficient to “acquaint the court with the issues” and “enable the court to decide the case.” Tex. R. App. P. 38.9. Proof that Petitioner’s briefing was sufficient to enable the court to decide the issues raised can be found in the Petitioner’s brief satisfied the applicable standard. Her first issue broadly challenged the granting of the City’s Plea to the Jurisdiction. *Petitioner’s Brief* at 6. The Brief contained five pages of detailed recital of the facts, with record citations, and these were the facts she relied upon to create a fact issue. *See Petitioner’s Brief* at 9-12. Petitioner’s argument recited the *de novo* standard of review, and the standard applicable to a plea to the jurisdiction in a case such as this, which requires the court to ascertain from the trial court filings whether Petitioner has raised a fact question. *See Petitioner’s Brief* at 14 (citing *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004); *see also* W. Wendell Hall & Ryan G. Anderson, *Standards of Review in Texas*, 50 ST. MARY’S L. J. 1099, 1243.

V. THE CITY’S “FACTS” ARE MALICIOUS AND WITHOUT MERIT.

Petitioner’s brief gave a thorough discussion of the facts and highlighted the arguments from the trial court briefs such that it was possible for the court of appeals to reach the merits. The Majority below erred because it applied the wrong standard to assess the adequacy of Petitioner’s briefs. Facts that highlight that she is a decorated veteran of the U.S. Air Force. Has an exemplary career and currently works at one of the oldest and most elite federal law enforcement agencies in the U.S.; charged with protecting the representatives and dignitaries of the United States.

Opposite to this, the City’s plea and Response relied on character attacks, contradictory testimony, and conjecture which are not relevant to the issues here and that malign Petitioner and harm her career.

Such spurious evidence includes accusations of improper use of force complaints with a juvenile suspect. The affidavit of Sergeant Jeffery Wilson relied on by the City, in fact, contradicts his own written statements contained in his original processing paperwork.

VI. EXPLANATION FOR DECLINING TO DECIDE A CASE ON THE MERITS SHOULD BE REQUIRED.

Whether an appellate panel exercises its discretion in one case to require more briefing but refuses to do so in another shouldn’t turn on inscrutable or unreviewable principles. Nor should it turn on who the particular panel or appealing parties are. As the Dissent urges, the Majority should have explained why it refused Petitioner the opportunity to supplement so that the appeal could be decided on the merits. Such

a requirement might deter appellate courts from being so quick to find waiver. And in a case such as this one where Petitioner submitted exhaustive trial court briefing on limitations and exhaustion of remedies and where the trial court’s checklist order does not include either defensive ground in the checklist, the appellate court would be hard-pressed to explain its inability to decide these issues on the merits, much less its failure to call for additional briefing.

VII. PETITIONER’S RIGHT TO DUE PROCESS AND FUNDAMENTAL FAIRNESS WAS VIOLATED.

The Fourteenth Amendment to the United States Constitution protects against deprivation of life, liberty, or property by the State “without due process of law.” U.S. Const. amend. XIV; *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The Texas Constitution provides that “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” Tex. Const. art. I, § 19. The Texas “due course” and federal “due process” provisions have been interpreted to be “without meaningful distinction.” *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). Therefore, in matters of procedural due process, Texas courts have traditionally followed contemporary federal due process interpretations of procedural due process issues. *See id.*

Procedural due process guarantees the right to a fair procedure. Petitioner maintains that she was denied fair procedure due to the trial court’s erroneous grant of the plea to the jurisdiction and the appellate court’s misapplication of relevant precedent.

If a full and fair trial on the merits is provided, due process does not require a state to provide appellate review. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (citing cases). But, if an appeal is afforded, the state must not so structure it as to arbitrarily deny to some persons the right or privileges available to others. *Id.* at 74-79.

Because of the trial court's and appellate court's failure to follow state law and established precedent, Petitioner's due process rights have been violated for which this Court should consider.



CONCLUSION

Petitioner prays that the Court grant her petition for writ of certiorari and for any such other and further relief to which she is entitled.

Respectfully submitted,

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