

No.

**In The
Supreme Court of the United States**

CHESLEY EUGENE SAUNDERS,
Petitioner,
v.

SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS
Respondent.

**On Petition For A Writ Of Certiorari To The
United States Court of Appeals for the
Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the United States Constitution and the Constitutional Guarantees of a Fundamentally Fair Trial permit a criminal trial to be presided over by a judge who was the defendant's former attorney, who the client had discharged for professional misconduct, on a substantially related case, and where the trial judge issued a ruling concerning the admissibility of the underlying facts of the prior case, with which the court had confidential information by virtue of the prior representation, that negatively impacted the defendant?

2. Whether the Sixth Amendment guarantee of effective assistance of counsel permits a defense lawyer, who had worked in the same office as the trial judge, who knew and had reason to know that the trial judge had previously represented the defendant on a substantially and closely related matter, to fail to move to recuse the judge and fail to present a defense?

PARTIES TO THE PROCEEDING

The original parties to this case were Chesley Eugene Saunders v. Secretary of the Florida Department of Corrections. Rule 14.1(b) of the Supreme Court Rules.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. State of Florida v. Chesley Eugene Saunders, Fifth Judicial Circuit Court, Lake County, Florida, Docket # 2010-CF-000982 (conviction entered September 13, 2011)
2. Chesley Eugene Saunders v. State of Florida, Florida Fifth District Court of Appeal, Docket # Docket # 5D11-3658 (conviction per curiam affirmed March 5, 2013)
3. State of Florida v. Chesley Eugene Saunders, Fifth Judicial Circuit Court, Lake County, Florida, Docket # 2010-CF-000982 (post-conviction relief denied April 21, 2015)
4. Chesley Eugene Saunders v. State of Florida, Florida Fifth District Court of Appeal, Docket # Docket # 5D15-1744 (denial of post-conviction relief per curiam affirmed March 8, 2016)
5. Chesley Eugene Saunders v. Secretary, Florida Department of Corrections, United States District Court, Middle District of Florida, Docket # 5:16-CV-00060 (§ 2254 habeas petition denied March 6, 2019)
6. Chesley Eugene Saunders v. Secretary, Florida Department of Corrections, United States Court of Appeals for the Eleventh Circuit, Docket # 19-11305 (certificate of appealability denied July 8, 2019)
7. Chesley Eugene Saunders v. Secretary, Florida Department of Corrections, United States Supreme Court, Docket # 19A356 (application for extension of time granted October 2, 2019)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Chesley Eugene Saunders, respectfully prays that a writ of certiorari be issued to review the judgment of United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case on July 8, 2019 and, derivatively, the judgment of the United States District Court for the Middle District of Florida, entered on March 7, 2019.

DECISIONS BELOW

The July 8, 2019 order of the United States Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition, page App. 1. Additionally, the underlying order dismissing Petitioner's 28 U.S.C. § 2254 petition from the United States District Court for the Middle District of Florida dated March 6, 2019 is reprinted in Appendix, pages App. 4-32.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit to be reviewed was entered July 8, 2019. The instant Petition is filed within 90 days of the date of decision and within any extension granted by this Court. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254.

**CONSTITUTIONAL PROVISIONS,
TREATIES, STATUTES, RULES
AND REGULATIONS INVOLVED¹**

U.S. Const. Amend V (App. 83-89)
U.S. Const. Amend VI (App. 83-89)
U.S. Const. Amend XIV (App. 83-89)
28 U.S.C. § 2254 (App. 83-89)

STATEMENT OF THE CASE

In 1999, Saunders was convicted of a sex offense in the State of Florida, for which he was required to register as a sex offender. He relocated to North Carolina for several years, and North Carolina relieved him of the registration requirement. After that, he moved back to Florida, unaware that Florida still required him to register. In 2005, he was arrested and charged with the felony offense of failing to register as a sex offender as a result of the 1999 conviction. Mark A. Nacke, then an Assistant Public Defender in Lake County, Florida was assigned to represent Saunders.

Petitioner's relationship with his public defender was strained from the start. Saunders complained that Nacke refused to investigate the facts of the 2005 case, prepare a defense, file any motions, or communicate with him. Nacke insisted that

¹ Aforementioned provisions are reproduced in the appendix.

Saunders accept a twenty-one-month plea offer, something Saunders was opposed to. During the course of his representation, Nacke discussed the facts of the underlying 1999 conviction with Saunders.

Saunders ultimately discharged Nacke after approximately 8 months, alleging professional misconduct. After Saunders terminated Nacke's representation, his newly retained counsel was able to obtain a six-month plea offer, with which Saunders was satisfied

On April 17, 2010, Saunders visited his then-girlfriend, Samantha Valdes at her home. Valdes' friend, V.B., was spending the night. V.B. had starting consuming alcohol before Saunders arrived, and continued drinking after Valdes went to sleep. At some point in the evening, there was sexual contact between V.B. and Saunders. The central question at trial was whether the sexual contact was consensual; V.B. told police it was not because she was inebriated, and Saunders told police it was, that V.B. was alert and a willing participant. The statement was recorded by police. There were no other witnesses to the actual incident. Over the course of several months, V.B. gave conflicting accounts of the sexual encounter to various individuals, including when she testified at a pre-trial deposition.

As a result of the allegation, Saunders was arrested and charged with sexual battery in Lake County, Florida. The case was assigned to the

Honorable Mark A. Nacke, Saunders' former attorney, who was now a Circuit Court Judge in Lake County.

Wanda Treniece Greene and Mark Jackson, both Assistant Public Defenders who had worked alongside Judge Nacke in the same public defender's office when Judge Nacke was a public defender, were assigned to represent Saunders.

Prior to trial, Saunders filed a motion to suppress Saunders' statement to police, which was denied by Judge Nacke. Saunders also filed a motion in limine to preclude any evidence regarding the underlying facts of the 1999 and 2005 convictions.

Judge Nacke heard the motion and entered an order that "[e]vidence concerning the facts of the Defendant's 1999 sexual battery offense may be entered into evidence in this case only to rebut any allegation by the Defendant that he believed the victim in this case consented to having sexual activity with him." This ruling effectively precluded Saunders from testifying.

Despite investigating the prior convictions, having access to court records and the files, and actually knowing that Judge Nacke had previously represented Saunders in the 2005 case, neither Saunders' counsel moved to recuse Judge Nacke. Nor did Judge Nacke recuse himself.

The trial commenced on September 6, 2011 before Judge Nacke. The complainant testified at trial that Saunders sexually assaulted her without her consent.). Based upon Judge Nacke's ruling, Saunders' counsel did not present a defense, leaving his attorney to argue to the jury that the complainant was "dreaming" about the sexual encounter – despite Saunders' admission to police that voluntary sexual contact had occurred. Saunders was convicted on September 7, 2011, and ultimately sentenced by Judge Nacke to 25 years imprisonment.

Saunders directly appealed his conviction to the Florida Fifth District Court of Appeal which affirmed the conviction on March 5, 2013 without a written opinion. (App. 50). Under Florida law, because the conviction was affirmed without opinion, Saunders was precluded from seeking discretionary review in the Florida Supreme Court.

Thereafter, Saunders filed a motion for post-conviction relief in the trial court. In his motion, he raised the following claims: defense counsel and sentencing counsel were ineffective when they failed to file a motion to recuse the presiding judge who had previously represented Saunders and was discharged for professional misconduct; trial counsel failed to confront and cross-examine the complaining witness with numerous, repeated and material inconsistencies; trial counsel failed to properly investigate a defense, and misadvised Saunders as to his right to testify in his own defense, and; Saunders

was denied due process and a fair trial for Judge Nacke's failure to recuse himself as a matter of law.

On March 25, 2015, the court held a hearing on the motion. At the hearing, Saunders, his aunt Lorilei Hickman, his former attorneys, and Judge Nacke testified. Following the hearing, the motion was denied on the basis that Saunders failed to meet his burden that his attorneys were ineffective when they failed to file a motion to recuse Judge Nacke because it was a classic "he said – they said" case. The court ruled that Wanda Greene's failure to confront and cross examine the complaining witness with numerous, repeated and material inconsistencies was a strategic decision that was reasonable, and further ruled that counsel's trial defense of mistake was reasonable; thus, Greene did not misadvise Saunders as to his right to testify in his own defense. Finally, the court ruled Saunders was not denied due process or a fair trial based on Judge Nacke's failure to disqualify himself as a matter of law because he based his rulings on the evidence before him and the law. (App. 35-49).

Following Saunders' unsuccessful appeal of the post-conviction relief motion to the Florida Fifth District Court of Appeal, he filed a petition in the United States District Court for the Middle District of Florida for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In that petition, he argued that the State courts' determinations that he received effective assistance of counsel and that he was not denied due

process were contrary to clearly-established Federal Constitutional law.

The petition was denied in a written decision dated March 6, 2019, which also denied a Certificate of Appealability. (App. 4-32). In denying relief on the grounds that Petitioner was deprived Due Process when Judge Nacke, his former attorney, presided over his case, the District Court relied upon the State court's decision denying post-conviction relief, ruling "Petitioner has failed to show any actual or appearance of impartiality so as to demonstrate a violation of the Constitution, or that the or that the state court's decision was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court."² As for Petitioner's ineffectiveness claims, the District Court found that Petitioner failed to demonstrate that the state court's denial of post-conviction relief was an unreasonable application of Strickland or an unreasonable determination of the facts.

Petitioner moved for a Certificate of Appealability in the Eleventh Circuit. The Court of

² The entirety of the State court's analysis of Petitioner's Due Process claim rested upon the testimony of Petitioner's prior attorneys at the post-conviction hearing, in which they expressed their opinion that Judge Nacke was an impartial judge. Other than these opinions, neither the State court nor the District Court applied any analysis of binding Supreme Court precedent to the facts of the case.

Appeals denied his petition in a single-sentence order on July 8, 2019. (App. 1-2).

This timely Petition follows.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY FOR THIS COURT TO DETERMINE WHETHER THE DUE PROCESS AND FUNDAMENTAL FAIRNESS GUARANTEES OF THE UNITED STATES CONSTITUTION REQUIRE THAT A CRIMINAL DEFENDANT'S TRIAL BE PRESIDED OVER BY A NEUTRAL, DETACHED ARBITER OR PERMIT A DEFENDANT'S FORMER ATTORNEY WHOM HE FIRED FOR INCOMPETENCE TO PRESIDE OVER HIS TRIAL AND SENTENCING

The law is well-established that a fundamental tenet of due process is a fair and impartial tribunal. Marshall v. Jerrico, Inc., 446 U.S. 238 (1980). The Due Process guarantees of the United States Constitution assures every litigant, civil or criminal, of a trial by an impartial court, free of bias or the appearance of bias. Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972); Tumey v. Ohio, 273 U.S. 510, 532 (1927).

“A fair trial in a fair tribunal is a basic requirement of due process.” In Re Murchison, 349 U.S. 133 (1955). A fair tribunal necessarily means that there are boundaries for how far a presiding judge may involve themselves in the proceedings. It requires that “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.” See Murchison, 349 U.S. at 136.

In the criminal context, this right continues through the trial, including the sentencing, if the defendant is convicted or pleads. Gardner v. Florida, 430 U.S. 349, 358 (1977). Any lack of neutrality or impartiality by the presiding judge is considered a fundamental error during trial and sentencing. Tumey v. Ohio, 273 U.S. 510, 535 (1927) (Where bias or appearance of partiality existed at the trial level, this Court will always reverse a defendant's conviction.); Chapman v. California, 386 U.S. 18, 23 n.8 (1967) (error concerning judicial impartiality is never harmless).

“[T]he protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system.” Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir.) (quoting United States v. Columbia Broadcasting Sys., Inc., 497 F.2d 107, 109 (5th Cir. 1974)); see also Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 865 (1988) (“it is critically important...to identify the facts that might reasonably cause an objective observer to question [a judge's] impartiality”). The “appearance of impartiality is virtually as important” to the smooth functioning of a fair judicial system as is the fact of impartiality.

Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977).

Nor is a judge allowed to preside over any trial whose neutrality is shadowed or questioned.

In light of the Canons governing judicial conduct, we do not believe that an attorney conducting a reasonable investigation would consider it appropriate to question a judge, or the court personnel in the judge's court, about the judge's lack of impartiality. Canon 3E(1) requires a judge to sua sponte disqualify himself if his impartiality might reasonably be questioned. The Commentary to Canon 3E(1) provides that a judge should disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification. We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges

before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process—all to the detriment of the fair administration of justice.

Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995).

Similarly, to preserve the integrity and independence of the judiciary, a judge must maintain and enforce high standards of conduct, promote public confidence, perform without bias or prejudice, and shall not hear or decide matters in which disqualification is required. See Model Code of Judicial Conduct Canon 1-3; Potashnick, 609 F.2d at 1111 (“[a]ny question of a judge's impartiality threatens the purity of the judicial process and its institutions”). Any of the described appearances of impropriety violates state and Federal constitutional due process rights. In re Murchinson, 349 U.S. 133 (1955).

A defendant who is not afforded the "cold neutrality of an impartial judge" is not afforded a fair trial. See In re Murchison, 349 U.S. at 136 (“[O]ur system of law has always endeavored to prevent even the probability of unfairness”); Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) (“[T]he appearance of even-handed justice...is at the core of due process”). A biased

tribunal is a structural defect for which prejudice is presumed. See Brecht v. Abrahamson, 507 U.S. 619 (1993); Williams v. Taylor, 529 U.S. 362 (2000).

There were several undisputed facts that were established in the state post-conviction court: First, Chesley Eugene Saunders had, in fact, been represented by Mark A. Nacke in Case # 2005-CF-001754; Second, Case # 2005-CF-001754 was directly related to and derivative of Petitioner's 1999 conviction; Third, Mark A. Nacke, by virtue of his representation of Petitioner for eight months, had confidential information concerning both the 2005 case and the 1999 conviction; Fourth, Petitioner fired Mark A. Nacke as his counsel after Petitioner accused him of professional misconduct; Fifth, six years after discharging Mark A. Nacke for professional misconduct, Petitioner was tried before Judge Mark A. Nacke; Sixth, Judge Mark A. Nacke issued an evidentiary ruling that directly concerned Petitioner's 1999 prior conviction, of which Judge Mark A. Nacke had confidential information; Seventh, Judge Mark A. Nacke's evidentiary ruling significantly negatively impacted Petitioner's defense; Eighth, Petitioner was convicted after trial and sentenced by Judge Mark A. Nacke to twenty-five years' imprisonment.

The state post-conviction court denied relief; the entirety of the state court's analysis on this issue is as follows:

This Court finds this argument is without merit. Significantly, the testimony of Defendant's prior attorneys support the conclusion Judge Nacke was an impartial judge. Ms. Green, Mr. Jackson and Mr. Sirianni testified they believed Judge Nacke to be an impartial judge. Mr. Sirianni stated he had argued motions before Judge Nacke and the judge never showed any bias or prejudice. Ms. Green also testified she did not observe any evidence of bias or prejudice. Judge Nacke testified at the hearing and stated he did not remember representing the Defendant in 2005 or the case. He stated that all his rulings in the 2010 case were based on the evidence before him and the law. This Court finds issue five must be DENIED.

The District Court used the above as a basis for its denial of habeas relief, ruling "Petitioner has failed to show any actual or appearance of impartiality so as to demonstrate a violation of the Constitution, or that the or that the state court's decision was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court."

What each of the foregoing courts have done is to create a new rule of Constitutional law in direct conflict with this Court's clearly-established precedent. That new rule of law is that prejudice is no

longer presumed even if there is judicial bias or the appearance of partiality, such an error must be subject to the harmless error analysis. This is directly in conflict with this Court's rulings in Tumey v. Ohio, 273 U.S. 510, 535 (1927) and Chapman v. California, 386 U.S. 18, 23 (1967) which clearly state the polar opposite.

Accordingly, this Court should grant review because the decisions from both the state court and the District Court below were directly in conflict with this Court's clearly-established precedent on the most fundamental of Constitutional protections – the right to a fair and unbiased tribunal.

II. REVIEW IS NECESSARY FOR THIS COURT TO DETERMINE WHETHER THE SIXTH AMENDMENT'S GUARANTEES OF THE EFFECTIVE ASSISTANCE OF COUNSEL PERMITS A DEFENSE LAWYER WHO WAS A FORMER CO-WORKER OF THE TRIAL JUDGE AND KNEW OR HAD REASON TO KNOW THAT THE TRIAL JUDGE HAD PREVIOUSLY REPRESENTED THE DEFENDANT ON A SUBSTANTIALLY AND CLOSELY RELATED MATTER, TO FAIL TO MOVE TO RECUSE THE JUDGE AND TO FAIL TO PRESENT A DEFENSE?

By now, the standard of ineffective assistance of counsel under the Sixth Amendment as set for by this Court in Strickland v. Washington, 466 U.S. 668 (1984) is firmly rooted in American Constitutional jurisprudence. However, the contours of effective assistance are constantly being defined by this Court and the lower Federal courts, as well as the State courts.

This case brings up for review an issue concerning the parameters of effective assistance: whether an attorney is ineffective when they have actual or constructive knowledge that the judge who is presiding over their client's trial was the client's

former attorney, whom the client had discharged alleging professional misconduct.

Here, the evidence at the post-conviction hearing was clear. Petitioner testified that he immediately made his public defenders aware that Judge Nacke had been assigned to represent him in case # 2005-CF-001754, in which he ultimately discharged, then Assistant Public Defender Nacke for professional misconduct, alleging incompetency.

At the post-conviction hearing, one of the public defenders testified that it was possible Petitioner had informed him that Judge Nacke had previously represented him, and even if he did not document this in the file, he would have investigated Saunders' prior criminal history. Counsel acknowledged that investigation of the circumstances of Petitioner's prior case would have been particularly important since there was an issue in the case concerning the admissibility of prior criminal acts to prove intent, identity, and modus operandi, akin to a Rule 404(b) motion under the Federal Rules of Evidence.

The other public defender testified at the post-conviction hearing that she was aware that Judge Nacke was previously employed by the Public Defender's Office at the time of Petitioner's 2005 conviction. She also acknowledged that because Petitioner's previous convictions were an important aspect of his case. She did investigate the 1999 case and the 2005 case, which affected the way she

prepared for this case, and clearly knew Judge Nacke previously represented Petitioner.

However, neither moved to disqualify the trial judge, who then issued a ruling regarding the admissibility of Petitioner's prior that negatively impacted his case.

Whatever justification Petitioner's trial attorneys had for failing to move to disqualify Judge Nacke before the ruling on the motion in limine evaporated the moment the trial court hobbled the defense by ruling that the underlying facts of the 1999 conviction would be admissible under certain circumstances. This constituted both deficient performance with demonstrable prejudice.

Crippled by this ruling, the defense then embarked on an unreasonable defense strategy, failing to cross-examine the complainant with numerous material, prior inconsistent statements regarding the nature of the alleged sexual assault, the setting of the alleged assault, and to then claim the "it was just a dream" defense.

All told, the cumulative failures resulted in deficient performance that deprived Petitioner of his right to effective assistance of counsel. The courts below dealt with this issue in the same fashion as the first issue raised in post-conviction proceedings – a shrug of the shoulders and essentially "so what?" by repeating the well-worn excuse: "In light of the

overwhelming evidence of guilt, any deprivation of the Defendant's Constitutional rights was harmless..."

The problem is that this was not a case involving overwhelming evidence. Nor should overwhelming evidence be an excuse to deprive a criminal defendant of something so fundamental as the right to counsel, or the right to a fair and impartial judge. This is precisely the reason for this Court's intervention.

CONCLUSION

For the reasons set forth above, this Court should grant the instant petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted on this 5th day of November, 2019.

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