

No. _____

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

—◆—
JEFF MERCER, LLC,

Petitioner,

v.

STATE OF LOUISIANA, THROUGH THE DEPARTMENT
OF TRANSPORTATION AND DEVELOPMENT, WILLIS
JENKINS, JOHN H. EASON, PAM HIGGINBOTHAM,
MICHAEL MURPHY, AND BARRY LACY,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The Louisiana Court Of Appeal**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

This Court has stressed the importance of two fundamental principles of Constitutional Due Process: (1) a fair trial before an impartial judge and (2) notice and an opportunity to be heard. The present case involves violations of both of these principles. A Louisiana appellate Chief Judge wrote the opinion for the court reversing a \$20 million unanimous twelve (12) person jury verdict in favor of Petitioner. Prior to hearing this civil conspiracy case involving the Louisiana DOTD and some of its civil engineers and inspectors, this Chief Judge failed to disclose that his deceased father had been a civil engineer in the same area for the Department of Transportation for almost fifty (50) years. Only after the judgment, Petitioner learned of this fact and filed a Motion to Recuse the Chief Judge, to Vacate the judgment and for a rehearing. The court of appeal never gave notice to Petitioner or its counsel of a hearing on the motions and never gave Petitioner the opportunity to present evidence to demonstrate bias. Rather, the court of appeal, sitting en banc, decided the matter summarily without notice and without a hearing. Thus, the case raises an important question never addressed by this Court, but one that arises frequently throughout our nation's federal and state court systems:

Whether the failure of a court of appeal to give notice or conduct a hearing on a motion to recuse one of its judges, who failed to disclose his family relationship to one party, violates the constitutional due process rights of the other party.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

Petitioner is not a nongovernmental corporation.
Petitioner does not have a parent corporation or shares
held by a publicly traded company.

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OPINIONS BELOW

On February 10, 2016, District Judge Wilson Rambo signed a judgment recognizing the unanimous twelve person jury verdict of \$20 million rendered in the Fourth Judicial District Court, Parish of Ouachita. (App. 71-73). The June 7, 2017 opinion of the Louisiana Second Circuit Court of Appeal, written by Chief Judge Henry N. Brown, Jr.¹ reversing the jury verdict is reported as *Jeff Mercer, LLC v. State*, 51,371 (La. App. 2d Cir. 06/07/17); 222 So.3d 1017. Petitioner's timely application for rehearing, motion to recuse, and to vacate the panel's opinion was filed June 16, 2017. (App. 76-80). The Court of Appeal's order denying the motion to recuse was filed August 3, 2017. (App. 1-2). On August 4, 2017, the Second Circuit denied the rehearing action. (App. 9-10). The Louisiana Supreme Court denied a writ application on December 5, 2017. (App. 74-75).

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JURISDICTION

Petitioner seeks review of the denial of writ application of the Louisiana Supreme Court filed December 5, 2017 and the June 7, 2017 decision of the Louisiana Second Circuit Court of Appeal and its denial of the motion to recuse Chief Judge Henry N. Brown, Jr. on August 3, 2017. This Court's jurisdiction is based on 28 U.S.C. § 1257(a).

¹ See App. 11-68.

STATUTORY PROVISION INVOLVED

Fourteenth Amendment Due Process Clause:

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.

**STATEMENT OF THE CASE**

Jeff Mercer, LLC, brought an action against the State of Louisiana, Department of Transportation and Development (DOTD), and some of its civil engineers and inspectors alleging a civil conspiracy, bribery and other illegal activities in destroying its business. After Jeff Mercer had reported bribery and other illegal activities of the LA DOTD, its inspectors, and civil engineers, the State destroyed Mercer's relationship with its prime contractors, falsely and maliciously reported Jeff Mercer to the FBI as having committed federal crimes on his work on Interstate 49 in Shreveport, and withheld payment of millions of dollars owed to the company on various DOTD projects.

On December 4, 2015, a unanimous twelve (12) person jury of Ouachita Parish citizens held the LA DOTD and civil engineers Michael Murphy, John Eason and Barry Lacy and inspector Willis Jenkins liable for a civil conspiracy to destroy Jeff Mercer, LLC,

awarding a total verdict of \$20 million. This was one of the most important civil conspiracy cases against the state government in recent Louisiana history. Judgment was rendered in the case on February 10, 2016. (App. 71-73).

The DOTD and individual defendants appealed the verdict to the Second Circuit Court of Appeal located in Shreveport, Louisiana. Chief Judge Henry N. Brown, Jr. sat on the panel and, in fact, wrote the opinion of the Court, reversing the unanimous jury verdict and rendering the case on a cold record, dismissing Mercer's claims. (App. 11-68). Chief Judge Henry N. Brown, Jr. failed to disclose to the parties, prior to oral argument and prior to writing the opinion overturning the unanimous jury verdict, that his father, Henry N. Brown, Sr., had been a civil engineer for forty-four (44) years for the State of Louisiana in the same Shreveport area where much of the activity in the case had occurred.

Only after the decision was issued did Mercer learn of Chief Judge Henry N. Brown, Jr.'s family connection to the DOTD and its civil engineers. Once Petitioner learned of these facts, it filed a motion to recuse Chief Judge Henry N. Brown, Jr., vacate the judgment and asked for a rehearing of the appeal, based on the appearance of impropriety. (App. 76-80). The Second Circuit Court of Appeal never notified Mercer of a hearing on the motions to recuse and vacate, and failed to give Mercer the opportunity to be heard or even present any evidence concerning Chief Judge Henry N. Brown, Jr.'s alleged bias. The motion to

recuse was summarily denied, en banc, without a hearing on August 3, 2017 at 10:23 a.m. (App. 1-2). The application for rehearing of the appeals was also denied (with Chief Judge Henry N. Brown, Jr. sitting on the panel) on August 4, 2017. (App. 9-10). Mercer timely filed for a writ of certiorari to the Louisiana Supreme Court, which was denied on December 5, 2017. (App. 74-75).

The Second Circuit Court of Appeal and its Chief Judge Henry N. Brown, Jr. violated Petitioner's constitutional right of due process to a fair trial before an impartial tribunal, and failed to give Mercer notice or an opportunity to be heard on the motion to recuse and motion to vacate. As a result, the decision of the Second Circuit Court of Appeal is void, and this honorable United States Supreme Court should reinstate the original jury verdict.



REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW OF THE STATE COURT DECISION BECAUSE IT IS CONTRARY TO THE FOURTEENTH AMENDMENT DUE PROCESS PROTECTIONS OF THIS COURT DUE TO THE COURT OF APPEAL'S FAILURE TO GIVE NOTICE OR AN OPPORTUNITY TO BE HEARD ON THE MOTION TO RECUSE CHIEF JUDGE HENRY N. BROWN, JR. AND HIS FAILURE TO DISCLOSE HIS FAMILY RELATIONSHIP TO THE DOTD.

A. THIS COURT SHOULD GRANT CERTIORARI TO REVERSE THE SECOND CIRCUIT COURT OF APPEAL'S VIOLATIONS OF MERCER'S CONSTITUTIONAL DUE PROCESS RIGHTS BY FAILING TO GIVE HIM NOTICE OF A HEARING OR THE OPPORTUNITY TO BE HEARD ON THE MOTION TO RECUSE CHIEF JUDGE HENRY N. BROWN, JR.

There is no dispute in this case that the Second Circuit Court of Appeal never gave notice of a hearing or actually conducted a hearing on Mercer's motion to recuse Chief Judge Henry N. Brown, Jr. The court summarily denied the motion to recuse without a hearing on August 3, 2017 and without prior notice to Mercer.

The Fourteenth Amendment of the U.S. Constitution provides as follows:

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.

Under the Fourteenth Amendment to the U.S. Constitution, a judgment is void when a court fails to give constitutionally required due process notice and an opportunity to be heard. *Earle v. McVeigh*, 91 U.S. 503, 509 (1875). It is a fundamental doctrine of law that a party being affected by a judgment must have

its day in court, and an opportunity to be heard. *Re-naud v. Abbott*, 116 U.S. 277, 288 (1886). Every person is entitled to an opportunity to be heard in a court of law upon every question involving his rights or interests, before he is affected by any judicial decision on the question. *Earle*, 91 U.S. at 510. A judgment of the court without hearing the party or giving him the opportunity to be heard is not a judicial determination of his rights. *Sabariego v. Maverick*, 124 U.S. 261, 292-293 (1888).

The constitutional requirements of due process are notice and an opportunity to be heard before an impartial tribunal. An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978). Due process also requires the opportunity for confrontation and cross-examination, in almost every setting where important decisions turn on questions of fact. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

In *Johnson v. Mississippi*, 403 U.S. 212 (1971), a civil rights worker was charged with criminal contempt by a state district judge. The civil rights worker filed a motion to recuse the judge and sought removal of the contempt hearing to federal court. *Id.* No hearing was ever held on the recusal and Johnson was denied the opportunity to show that the judge should have recused himself. *Id.* In discussing the contempt

hearing, the United States Supreme Court held that due process requires notice and a hearing. *Id.* at 215. The court further held that the judge should have recused himself, holding that an “unbiased judge is essential to due process.” *Id.* at 216.

Other jurisdictions have held that the failure to give notice of a hearing on a motion to recuse a judge violates due process. In *Brosseau v. Ranzau*, 28 S.W.3d 235 (Tex. App. 2000), a party filed a motion to recuse a judge, but was given notice of the hearing less than 24 hours prior to it. As a result, the movant’s due process rights were violated by the inadequacy of the notice of hearing date on the motion to recuse. The appellate court voided the decision on the motion to recuse. *Id.* The appellate court also held that a hearing on a motion to recuse was needed to provide the movant with an opportunity to develop a record to support its motion. *Id.* at 239; *see also Winfield v. Daggett*, 846 S.W.2d 920, 922 (Tex. App. 1993).

Under Louisiana Code of Civil Procedure Article 160, where a motion is filed to recuse a judge of the Court of Appeals, he may either recuse himself or the motion shall be “**heard**” by other judges on the panel or by all of the judges of the court except the judge sought to be recused, sitting en banc. (*Emphasis added*). This Article inherently speaks of a “hearing,” but Petitioner did not receive one.

A hearing on a motion to recuse is an important decision that turns on factual issues of whether there is actual bias or if the perceived bias rose to such a

level to justify recusal. Thus, a hearing on a motion to recuse is necessary to develop a record.

In the present case, Petitioner filed an application for rehearing, motion to recuse and vacate the panel's opinion with the Second Circuit Court of Appeal, once Petitioner learned of Chief Judge Henry N. Brown, Jr.'s family affiliation with the DOTD. Said motion to recuse was filed on June 16, 2017. On August 3, 2017 at 10:23 a.m., the Second Circuit Court of Appeal, acting en banc without Chief Judge Henry N. Brown, Jr., denied the motion to recuse, but did so without any type of hearing or opportunity for Petitioner to present any evidence. Absolutely no notice whatsoever was given to Petitioner or even the DOTD that the matter would be decided that day. Neither party was present.

The failure to give notice or have an evidentiary hearing in these circumstances was simply a blatant violation of Mercer's due process rights. As such, the decision on the denial of the motion to recuse should be vacated and the matter remanded for further proceedings.

B. CHIEF JUDGE HENRY N. BROWN, JR.'S FAILURE TO DISCLOSE HIS FAMILY CONNECTION TO THE LA DOTD AND ITS CIVIL ENGINEERS RESULTED IN DENIAL OF CONSTITUTIONAL DUE PROCESS RIGHTS TO A FAIR TRIAL BEFORE AN IMPARTIAL JUDGE, ESPECIALLY WHERE NO RECUSAL HEARING WAS GIVEN TO PRESENT EVIDENCE.

Chief Judge Henry N. Brown, Jr. wrote the panel's decision, reversing a unanimous twelve (12) person jury verdict in favor of Mercer. Only *after* the June 7, 2017 appellate decision written by Chief Judge Henry N. Brown, Jr. did Petitioner or its counsel learn that Chief Judge Henry N. Brown, Jr. had failed to disclose that his father, Henry N. Brown, Sr., had been a civil engineer for the State of Louisiana in the same Shreveport area for forty-four (44) years.

Under the Due Process Clause of the Fourteenth Amendment, Mercer has a constitutional right to a fair trial before an impartial judge. The United States Supreme Court has held that trial before an unbiased judge is essential to due process. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). In that case, a West Virginia Supreme Court Justice refused to recuse himself from a case involving a corporation that paid for advertising on his Supreme Court campaign. *Id.* Without questioning the lower court's finding of no actual bias, impartiality or impropriety, the Supreme Court found that the *risk of perceived bias* was so

great that due process required recusal. *Id.* at 883-884 (*emphasis added*). The inquiry is not whether the judge was actually biased, but whether the average judge in his position is likely to be neutral or whether there is an unconstitutional “potential for bias.” *Id.*

This Court has repeatedly found that recusal is required under the Due Process Clause even when the judge has no actual bias, but where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017). In that case, the trial judge in Rippo’s first degree murder case was under criminal investigation that involved the local DA’s office. *Id.* at 906. The Nevada Supreme Court held that Rippo, on his post-conviction relief pleading, was not entitled to discovery or an evidentiary hearing because his allegations did not show actual bias. *Id.* at 906-907. The Supreme Court reversed, finding that due process demanded that the Nevada Supreme Court judgment be vacated and remanded for further proceedings. *Id.* at 907. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), an Alabama Supreme Court justice violated an insurer’s constitutional due process rights by authoring a decision that affected a personal lawsuit that the justice had against other insurers on a similar issue. The Supreme Court concluded that the “appearance of justice” was best served by vacating the decision in which the justice participated and remanded for further proceedings. *Id.* at 828.

In the present case, Chief Judge Henry N. Brown, Jr. authored the decision overturning a civil conspiracy

of DOTD engineers and inspectors when his deceased father had been a civil engineer for the DOTD for nearly fifty (50) years. The appearance of justice in this case requires that the Second Circuit decision be vacated. The probability that the son of a DOTD civil engineer finding in favor of the DOTD civil engineers is too high to be constitutionally tolerable.

Chief Judge Henry N. Brown, Jr. was bound to act in accordance with the Code of Judicial Conduct. *In re Lemoine*, 96-2116 (La. 01/14/97); 686 So.2d 837, 840. Louisiana Code of Judicial Conduct Canon 2(A) requires a judge to act in such a manner “that promotes public confidence in the integrity and impartiality of the judiciary.” Louisiana Code of Judicial Conduct Canon 3(C) states that a judge should disqualify himself or herself in a proceeding in which the judge’s impartiality “might be reasonably questioned.” The Louisiana Supreme Court has used Canon 3 as a basis for recusing judges in situations where the judge’s impartiality might be “reasonable questioned.” *Folse v. Transocean Offshore USA, Inc.*, 04-1096 (La. 05/07/04); 872 So.2d 467, 467-468. Also, in situations where the Louisiana Supreme Court has remanded cases in which they felt an appellate court improperly denied a motion to recuse, they have used Canon 3 as a reason to remand the case to a different appellate jurisdiction than the one it was originally tried in. *Tolmas v. Par. of Jefferson*, 12-0555 (La. 04/27/12); 87 So.3d 855, 856.

In order to avoid impropriety and the appearance thereof, judges are “required to disclose those instances and relationship in which he/she could not be

impartial, those which are improper under the law, ***as well as those that appear to be.***” *O’Neill v. Thibodeaux*, 97-1065 (La. App. 3d Cir. 03/06/98); 709 So.2d 962, 968 (*emphasis added*). A judge should disclose information in circumstances even where disqualification is not required, but that the parties or their lawyers might consider relevant to the disqualification issue. *Inquiry Concerning a Judge (Frank)*, 753 So.2d 1228, 1239 (Fla. 2000) (citing *O’Neill*). Thus, the standard for disclosure is lower than the standard for disqualification. *Id.* at 1239.

The federal standard to avoid “even the appearance of impropriety” also holds that considering all relevant facts, where the issue of disqualification is a close one, *the balance tips in favor of recusal*. *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 484-485 (5th Cir. 2003) (*emphasis added*); *In re Chevron U.S.A.*, 121 F.3d 163, 165 (5th Cir. 1997); *Nicholas v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995). To hold otherwise would destabilize the public faith in the judicial system because people who don’t serve on the bench sometimes indulge in suspicions and doubts concerning judicial integrity. *Patterson*, 335 F.3d at 485.

In the *Patterson* case, the Fifth Circuit Court of Appeals was balancing the issue of a judge who had once practiced law with an attorney tempered with the fact that he had not done so in over three decades. *Id.* at 484. When a close question is involved, the court held that the “balance tips in favor of recusal.” *Id.* at 484. That’s important in the present case. The son of a DOTD civil engineer for nearly fifty (50) years hearing

a case involving the DOTD and its civil engineer is tempered by the fact that the judge's father had been dead for many years.² However, the balance should tip in favor of recusal.

To have an impartial trier of fact unconnected to the DOTD, especially its civil engineers, at both trial and appellate levels, was of utmost importance to the Petitioner in this case. Counsel for Mercer repeatedly asked each jury venire panel "have any of your family or friends been employed by the DOTD, Louisiana Department of Transportation and Development?". The counsel for DOTD asked similar questions as well. That's because it is a matter of common sense that someone whose family is so deeply connected to the DOTD or its employees should not hear the case out of fundamental fairness. Under the *Caperton* and *Rippo* decisions, whether Chief Judge Henry N. Brown, Jr. was actually biased or not is irrelevant. The perceived bias for a judge to fail to disclose this information prior to writing an opinion in favor of DOTD employees (civil engineers) when his father had worked for the DOTD for almost fifty (50) years as a civil engineer in the same area is overwhelming. Mercer's constitutional due process rights to have an impartial judge have been violated and the underlying decision written by Chief Judge Henry N. Brown, Jr. should be vacated in the interest of justice.

² Based on information and belief, Henry N. Brown, Sr. passed away in 1968.

Unfortunately, Mercer never had an opportunity to present evidence or even cross-examine Chief Judge Henry N. Brown, Jr. as to his relationship to the DOTD and its employees. Was he or his family currently receiving any pension/retirement payments from the DOTD? Had he received any election contributions from DOTD employees? Had anyone from the State spoken to him about the Mercer case? Does he hold a personal bias or prejudice in favor of civil engineers of the DOTD?

Also of great importance was Chief Judge Henry N. Brown, Jr.'s assignment to this particular case. Rule 1-5 of the Louisiana Uniform Rules of the Courts of Appeal states, "The court ordinarily will sit in rotating panels, each composed of 3 Judges, *as may be directed by the Chief Judge.*" (*Emphasis added*).

Mercer attempted to find out the "secret" method of assignment of cases at the Second Circuit Court of Appeals, with Mr. Mercer personally making a public records request on July 27, 2017 for information related to the "assignment of the Judges on the panel" for the case. Pursuant to this request, the Second Circuit provided its Appeal Docket Procedure, which stated, "The law requires that notice of the setting of cases must be given thirty (30) days prior to the date of argument or submission." Nothing was provided as to how the three-judge panel was assigned to the Mercer case and whether Chief Judge Henry N. Brown, Jr. assigned himself to it.

However, despite this thirty (30) days' notice requirement, no notice of the motion to recuse or motion to vacate was ever given to Mercer or the DOTD. Thus, the Second Circuit violated its own policy, state law, and the United States Constitution, as it never gave counsel for Petitioner notice of the hearing on the motion to recuse. Nor did the Second Circuit Court of Appeal allow Petitioner to present evidence and cross-examine Chief Judge Henry N. Brown, Jr. at a hearing.



CONCLUSION

Accordingly, the actions of the Second Circuit violated Mercer's constitutional right to due process, and the judgment of the Second Circuit Court of Appeals should be overturned and the original jury verdict reinstated. If the case is remanded for further proceedings, Petitioner requests that the case be assigned to another Circuit Court of Appeal, other than the Second Circuit. This is similar to what the Louisiana Supreme Court did in *Tolmas*, where to "avoid even the appearance of impropriety" the case was transferred to

another Court of Appeal to be heard anew. *Tolmas*, 87 So.3d at 856.

Respectfully submitted,

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