No.: 22-6546

ORIGINAL

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SUPREME COURT, U.S.

In The
Supreme Court of the United States
_____ Term, _____

ARTY MARCEL v. TIM HOOPER, Warden

On Petition for a Writ of Certiorari to

U. S. FIFTH CIRCUIT COURT OF APPEALS

Arty Marcel #187005
MPEY/Cypress-3
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

January 4, 2023

QUESTION PRESENTED

1. **Reasonable jurists would determine that Mr. Marcel was denied his right to a fair and impartial trial when the Court erred in allowing other crimes evidence.**

2. **Reasonable jurists would determine that the State failed to meet their strict burden of proof beyond a reasonable doubt in obtaining Marcel's conviction;**

3. **Reasonable jurists would determine that Mr. Marcel was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.** *Strickland v. Washington*.

4. **Reasonable jurists would conclude that the State improperly amended the Bill of Information to reflect a charge that was not a lesser included offense of Simple Burglary of an Inhabited Dwelling; and counsel was ineffective for failing to object.**

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows.

District Attorney's Office
32nd Judicial District Court
7856 Main St., Ste. 220
Houma, LA 70360

Attorney General's Office
P.O. Box 94005
Baton Rouge, LA 70805

Tim Hooper, Warden
Louisiana State Penitentiary
General Delivery
Angola, LA 70712

RELATED PROCEEDINGS

On August 19, 2014, the State filed a Bill of Information charging Mr. James Marcel with Simple Burglary of an Inhabited Dwelling. On April 17, 2015, the State amended the Bill to charge Mr. Marcel with Simple Burglary of a shed belonging to Todd Robichaux, in violation of LSA-R.S. 14:62, for an incident that allegedly occurred on July 26, 2014.

The matter was tried before a jury on April 20 – 22, 2015. The jury returned a verdict of guilty as charged of Simple Burglary. The State filed a Multiple Offender Bill of Information. Mr. Marcel plead not guilty. On July 15, 2015, the Court found that Mr. Marcel to be a Fourth Felony Habitual Offender and sentenced him to life imprisonment at hard labor without the benefit of Probation, Parole, or Suspension of Sentence, consecutive to any other sentence he is serving.

Mr. Marcel timely filed his Application for Post-Conviction Relief. On October 24, 2018, testimony concerning Mr. Marcel's PCR was heard during an evidentiary hearing. On November 26, 2016, Judge Bethancourt denied Mr. Marcel's PCR with written reasons.

On August 5, 2019, the First Circuit Court of Appeal denied Mr. Marcel's Application. The Louisiana Supreme Court denied Writs on July 24, 2020. Mr. Marcel was timely with his pleadings in the U.S. Eastern District Court.

On October 13, 2022, Mr. Marcel filed his Certificate of Appealability to the U.S. Fifth Circuit Court of Appeal, which was denied on December 5, 2022. On December 14, 2022, Mr. Marcel filed his Application for Panel Re-Hearing, but was denied as untimely.

At this time, Mr. Marcel is timely filing for Writs of Certiorari to this Honorable Court, and respectfully requests that this Honorable Court exercise its Supervisory Authority of Jurisdiction over the lower courts for the following reasons to wit:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Appellant respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished, but the Docket Number is 22-30541

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at 2022 WL 3226765; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix __ to the petition and is the Louisiana Supreme Court in Docket Number _____.

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 5, 2022.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. .

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, _____

No.: _____

ARTY MARCEL v. TIM HOOPER, Warden

Petition for Writ of Certiorari to the U.S. Court of Appeal

Pro Se Petitioner, Arty Marcel respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the U.S. Fifth Circuit Court of Appeal, entered in the above entitle proceeding on December 5, 2022.

NOTICE OF PRO-SE FILING

Mr. Marcel requests that this Honorable Court view these Claims in accordance with the rulings of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Mr. Marcel is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court. Therefore, he should not be held to the same stringent standards as those of a trained attorney.

OPINIONS BELOW

The U.S. Fifth Circuit Court of Appeal denied relief on December 5, 2022.

Mr. Marcel's federal petition to the U.S. Eastern District of Louisiana was denied on November 4, 2019. Mr. Marcel's Certificate of Appealability in the U.S. Fifth Circuit Court of Appeal was denied on December 5, 2022.

JURISDICTION

The U.S. Fifth Circuit Court of Appeal denied Mr. Marcel's Request for COA on December 5, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE FACTS

When Todd Robichaux returned from work on July 26, 2014, he noticed that the window screen of his shop was on the ground. He also noticed that the tin on the side of the shop had a kink in it, and some screws were missing. The back door to the shop was opened. Because he had been burglarized twice in the past few weeks, he had set up surveillance cameras and had set a trap outside the shed. The trap consisted of a bucket filled with clothes dye and a half gallon of diesel. The trap was sprung. He called 911 (Rec.pp. 455, 462, 476).

The surveillance video showed a person going back and forth several times, carrying something from the shed to property behind the shed. Although the video is not clear, Mr. Robichaux is the *only person* who identified the person in the video as his neighbor, Arty Marcel (Rec.pp. 466, 470, 479).[1]

REASONS FOR GRANTING THE WRIT

In accordance with this Court's *Rule X, § (b) and (c)*, Mr. Marcel presents for his reasons for granting this writ application that:

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a

[1] The other neighbors who had viewed the video informed the officers that the person in the video was not Arty Marcel even though Mr. Robichaux stated that he identified him with his walk. In fact, testimony adduced during trial proves that the video was "grainy," and the person in the video could not be positively identified.

way that conflicts with relevant decisions of this Court.

The Courts have erred in failing to review this case for fairness. He has informed the courts that the video surveillance of the incident clearly proves that he is not the perpetrator of the burglary. Also, the footprints obtained at the scene also proves that Mr. Marcel is not the perpetrator. However, the courts have failed to review the evidence which proves that Mr. Marcel is actually innocent.

LEGAL ARGUMENT

Reasonable jurists would determine that Mr. Marcel was denied a fair and impartial trial; and that his convictions are in violation to the United States Constitution. Reasonable jurists would also agree that: (1) Mr. Marcel was denied his right to a fair and impartial trial when the Court erred in allowing other crimes evidence; (2) the State failed to meet their strict burden of proof beyond a reasonable doubt in obtaining Mr. Marcel's conviction; (3) Mr. Marcel was denied effective assistance of counsel when counsel failed to: (a) obtain an expert; (b) failed to investigate; (c) failed to object to prosecutor misconduct; (d) failed to object to the amendment of the Bill of Information; and, (e) failed to interview witnesses; (4) Mr. Marcel was denied his right to a fair and impartial trial when the State amended the Bill of Information to reflect a charge that was not a lesser included offense.

WHEREFORE, for the arguments in Mr. Marcel's original State pleadings and the arguments above, Mr. Marcel requests that this Honorable Court Grant him the necessary relief.

REQUEST FOR JUDICIAL NOTICE

Mr. Marcel respectfully requests that this Honorable Court request the surveillance video and the video (reenactment of the incident) which were introduced during his trial. Mr. Marcel has attempted to obtain a copy of the videos in order to meet his burden of proof during the Issue of Insufficient Evidence, but his request has fallen upon deaf ears.[2] Had Mr. Marcel been able to obtain the video, he would have met proved to the courts that he was not the individual seen removing Mr. Robichaux's

[2] According to Mr. Marcel's memory, Jimmy Rivera could be seen in the video watching the person remove the items from the shed, and also Mrs. Robichaux smoking a cigarette at that time. Yet, neither one of them had called 911 to report a burglary.

personal property from his shed. The footage from the surveillance video fails to show that *anyone* had actually crossed the threshold of the shed; and that the shoes that were worn by the actual perpetrator[3] did not match the shoes confiscated from Mr. Marcel's residence, as the shoes confiscated from Mr. Marcel were white, and the shoes worn by the perpetrator were dark in nature (according to the video).

The Court may consider that the dye could have been washed out of the clothes, Mr. Marcel's choice of shoes are not of high quality. Therefore, there would be *no way* that the dye could be washed out of the material; and would be saturated in the shoes. Mr. Robichaux had added diesel to the dye in order to ensure that the mixture would soak into any material that it came in contact with.

According to the video, Mr. Robichaux's father-in-law (Jimmy Rivera) could be seen entering and leaving the shed at the time of this allegation, and Sandy Robichaux (Mr. Robichaux's wife) could be seen coming out of the house. The Record fails to reflect that Mr. Robichaux's father-in-law or wife had given a statement, or testified in this matter.[4]

Mr. Marcel was able to view the video and pictures prior to trial, he has *never* been allowed to obtain the video or pictures during collateral review in order to meet his burden of proof, and has not been able to compare to the footprints left at the scene of the crime. During the evidentiary hearing in this matter, Mr. Marcel's attorney, Kerry P. Byrne, committed perjury to the Court; informing the Court that the shoes that were collected from Mr. Marcel had dye on them (See: evidentiary hearing tr. p. 8); and that the detectives had stated that the print of Mr. Marcel's shoe "fit to a fair degree" (What is "to a fair degree?") of the pattern left by the perpetrator. Mr. Marcel is respectfully requesting that this Honorable Court have the District Attorney's Office forward the photographs of the shoes and the prints

[3] The shoes that were worn by the perpetrator were a dark color on the video, and the shoes that were worn by Mr. Marcel, and the shoes being washed were gray and black.

[4] This Court must note that Mr. Robichaux's father-in-law, Mr. Jimmy Rivero, was one of the State's witnesses that was released prior to the conclusion of the trial. It was vital to Mr. Marcel's case that Mr. Rivero testify during trial due to the fact that he would be able to testify to the fact that the person in the surveillance video ***was not*** Mr. Marcel. Furthermore, Mr. Marcel had requested the video during collateral review because Mr. Rivero could be seen entering and leaving the view of the camera during the time of the incident. Also, Mr. Robichaux's wife could be seen in the video, and would have testified that Mr. Marcel ***was not*** the perpetrator. Hence, neither of these were called by the State even though they were listed as witnesses.

left at the scene for a comparison; and to show that there is no dye or diesel on the shoes collected from Mr. Marcel, and that the shoes collected from Mr. Marcel do not match the prints left at the scene.

Mr. Marcel actually "begged" his attorney to have the jury view the clothes that were confiscated from his residence at the time of his arrest, along with the clothes that he was wearing at the time of his arrest in order to prove that the clothes that he was wearing at the time of his arrest ***did not match*** the clothes in the video. According to the State's theory, Mr. Marcel was washing clothes when he was arrested.[5] Accordingly, if the clothes had been compared to the attire that the actual perpetrator had been wearing, defense counsel could have shown the jury that the clothes did not match the clothes worn by the perpetrator. This Court must note that the clothes that were confiscated from Mr. Marcel's home, and the clothes that he was wearing at the time of his arrest ***did not match*** the clothes of the perpetrator in the video.

REQUEST FOR EXPERT WITNESS

Mr. Marcel is requesting that this Honorable Court appoint an expert to view the evidence in this matter (surveillance video, footprints, pictures of the shoes alleged to have been used during the commission of this offense), and submit a report to the Court prior to its ruling.[6]

As defense counsel informed the district court during the course of the evidentiary hearing, there was no request for an Expert during these proceedings. It was imperative that Mr. Marcel's counsel retain an Expert in order to prove that the shoes which were presented as evidence in this matter could not have been the shoes used during the commission of this crime due to the fact that there were no traces of diesel or dye in, or on, the shoes. An Expert would have informed the jury that the pattern of the shoe presented as evidence did not match the print left by the actual perpetrator.

If the Court is unable to appoint an Expert, Mr. Marcel requests that this Court inform him of their

[5] It must be noted that the officers testified to the fact that they had "dumped" the water and clothes from the tub, and did not note any type of dye in the water (Rec.p. 102).

[6] Or, in the alternative, allow Mr. Marcel's family to retain an investigator for such.

decision, and allow him to have his family retain an Expert to review the evidence in this case. Mr. Marcel avers that this will, in no way, delay these proceedings, as he is quite certain that a report from an Expert could be returned in a timely manner.

LAW AND ARGUMENT

ISSUE NO. 1

Reasonable jurists would determine that Mr. Marcel was denied his right to a fair and impartial trial when the Court erred in allowing other crimes evidence.

Mr. Marcel was denied his right to a fair and impartial trial when the Court erred in allowing an excessive amount of "other crimes" evidence during trial. As the evidence in this case was weak, in order to convict Mr. Marcel, the State portrayed him as a "bad person" to obtain this conviction. Had the Court denied the State the right to submit these "other crimes" evidence, the State could not have met their burden of proof.

The Court allowed the State to call nine witnesses regarding eight other crimes. These witnesses included: David LeBoeuf (Rec.p. 337); Kody Voisin (Rec.p. 345); Karl Ubbehagen (Rec.p. 349); Norma Donaldson (Rec.p. 354); Troy Boquet (Rec.p. 364); Cornelius Davis (Rec.p. 370); Thomas Novak (Rec.p. 374); Andrea Guilfou (Rec.p. 378); Chris Dehart (Rec.p. 385).

This parade of witnesses served no purpose other than to prove that Mr. Marcel had committed prior burglaries and acted in conformity therewith. This evidence was much more prejudicial than probative.

LSA-C.E. Art. 404 B(1) provides:

> (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, in tent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of the trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

This general rule ensures that a defendant who has committed other crimes will not be

convicted of a present offense simply because he is perceived as a "bad person," irrespective of the evidence of his guilt or innocence. A conviction should be based on guilt and not on character ***State v. Hamilton***, 478 So.2d 123 (La. 1985), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986)."

When considering the erroneous admission of evidence, the test is "whether there is a reasonable probability that the evidence might have contributed to the verdict, and whether the reviewing court is prepared to state beyond a reasonable doubt that it did not." ***Chapman v. California***, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Calling nine witnesses to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident was more prejudicial than probative when a selection of a few of the more similar crimes would have accomplished the same purpose without prejudicing the jury. It was error for the court not to require a more selective presentation of this evidence. Clearly, the prejudicial effect outweighed the probative effect.

ISSUE NO. 2

Reasonable jurists would determine that the State failed to meet its burden of proof beyond a reasonable doubt in obtaining the conviction of Simple Burglary in this case.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects persons accused of a crime against conviction unless the State proves every element of the offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970).[7]

The United States Supreme Court set the standard in ***Jackson v. Virginia***, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 60 (1979). In ***Jackson***, the United States Supreme Court reached the legal standard of review, *i.e.*, ". . . whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt ..."

[7] This type of error has been recognized as patent error preventing conviction for the offense, La.C.Cr.P. art. 920(2), see indicative listing at ***State v. Guillot***, 200 La. 935, 9 So.2d 235, 239 (1942). Quoting: ***State v. Crosby***, 338 So.2d 584, 588 (La.1976).

In the court's view, the fact-finder's role as weigher of evidence was preserved by considering all of the evidence in the light most favorable to the prosecution: ". . . The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson*, 443 U.S. at 319, 99 S.Ct., at 2790, 61 L.Ed.2d at 573-574. This standard is applied with "explicit reference to the substantive elements of the criminal offense as defined by state law." *id. at* 324 n. 16, 99 S.Ct. at 2791 n. 16. *Dupuy v. Cain*, 210 F.3d 582 (5th Cir. 2000).

The deferential standard of review, whereby reviewing courts must affirm a conviction if, after viewing the evidence and all reasonable inferences in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, does not permit the type of fine-grained factual parsing necessary to determine that the evidence presented to the factfinder was in "equipoise," and that therefore reversal of the conviction is warranted; abrogating *United States v. Jaramillo*, 42 F.3d 920, *United States v. Ortega Reyna*, 148 F.3d 540, *United States v. Penaloza-Duarte*, 473 F.3d 575, and, *United States v. Stewart*, 145 F.3d 273. **Criminal Law Key 110k1159.2(1).**

Courts reviewing a conviction are empowered to consider whether the inferences drawn by a jury were rational, as opposed to being speculative or insupportable, and whether the evidence is sufficient to establish every element of the crime. **Criminal Law Key 110k1159.2(8).**

The *Jackson* standard, which has been repeatedly reaffirmed by the Supreme Court, may be difficult to apply to specific cases but is theoretically straightforward. In contrast, the "equipoise rule" is ambiguous. At one level, whether it applies only to cases ungirded by circumstantial evidence, as opposed to direct or circumstantial evidence, is not entirely clear. Moreover, no court opinion has explained how a court determines that evidence, even when viewed most favorably to the prosecution, is "in equipoise." Is it a matter of counting inferences or of determining qualitatively whether inferences equally support a theory of guilt or innocence?

In any event, when appellate courts are authorized to review verdicts of conviction for evidentiary "equipoise," they must do so on a cold appellate record without the benefit of the dramatic insights gained from watching the trial. The potential to usurp the jury's function in such circumstances is inescapable. *Jackson*'s "deferential standard" of review, however, "does not permit the type of fine-grained parsing" necessary to determine that the evidence presented to the factfinder was in "equipoise." *Compare*: *Coleman v. Johnson*, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012).

Jackson also "unambiguously instructs that a reviewing court, 'faced with a record of historical facts that supports conflicting inferences must presume - - even if it does not affirmatively appear in the record - - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Cavazos v. Smith*, 132 S.Ct. 2, 6, 181 L.Ed.2d 311 (2011).

When the conviction rests upon circumstantial evidence, that evidence must exclude every reasonable hypothesis except guilt. LSA-R.S. 15:438. When, as here, the conviction rests upon circumstantial evidence, that evidence must exclude every reasonable hypothesis except guilt. Whether circumstantial evidence excludes every reasonable hypothesis of innocence presents the following question of law:

> **In all cases where an essential element of the crime is not proven by direct evidence, LSA-R.S. 15:438 applies.** As an evidentiary rule, it restrains the factfinder [in the first instance, as well as the reviewer on appeal, to accept as proven all that the evidence tends to prove and then to convict only if every reasonable hypothesis of innocence is excluded. **Whether circumstantial evidence excludes every reasonable hypothesis of innocence presents a question of law.** *State v. Hammontree*, 363 So.2d 1364, at 1373 (La. 1978); *Smith v. Schwander*, 345 So.2d 1173, at 1175 (La. 1977); *State v. Smith*, 339 So.2d 829, at 833 (La. 1976). **In applying LSA-R.S. 15:438, all the facts that the evidence variously tends to prove on both sides are to be considered, disregarding any choice by the factfinder favorable to the prosecution.** The reviewer as a matter of law can affirm the conviction only if the reasonable hypothesis is one favorable to the State and there is no extant reasonable hypothesis of innocence.[8]

In order to convict Mr. Marcel of Simple Burglary, the State had to prove, beyond a reasonable doubt that: Mr. Marcel had committed an unauthorized entering of any dwelling, vehicle, watercraft, or

[8] *State v. Shapiro*, pp. 19-20, 431 So.2d 372 (La. 1982)[emphasis added].

other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in LSA-R.S. 14:60."

In this case, the State failed to support the identification of the actual perpetrator of this offense. Although there was footage from a surveillance camera, the image of the perpetrator was "blurry at best" which has prevented any "*positive*" identification. When the officers showed the video to the surrounding neighbors, none of them were able to identify the person in the video. It appears that Mr. Marcel had *only* been convicted due to the "over-abundance" of "Other Crimes Evidence" submitted to the jury.

Although many of the missing items were recovered *behind* Mr. Marcel's property,[9] it appears as though everyone is overlooking the fact that some of the items which were stolen from Mr. Robichaux's shed were found on the porch Ms. Kendall's residence (where "Mike" was residing; directly across the street from Mr. Robichaux's residence).[10] Although Mike is similar in stature, and resembles Mr. Marcel, the investigators only focused on Mr. Marcel during their investigation.

None of the fingerprints found at the scene, or on the items which were removed from the property could be linked to Mr. Marcel, and it appears that since the investigators believed they had their perpetrator, there was no attempt to find a match to the fingerprints.

Mr. Robichaux also testified that he was familiar with "Mike," but he explained that he had not seen him during the previous four to five days prior to the burglary. That would be quite natural due to the fact that although "Mike" used to take Mrs. Robichaux to the doctor's office and on errands as she was unable to drive herself anywhere, as her medical condition prohibited it, "Mike" had been banned from Mr. Robichaux's home four to five days prior to the burglary.[11]

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[9] According to the testimony items from the burglary had been found in the woods, which is adjacent to Mr. Marcel's property, and not actually on his property. The property in question belongs to Nick and Donna, Mr. Marcel's neighbors.

[10] The police found a leaf blower, fishing tackle box, and a drill on the front porch of Ms. Kim Kendall's residence.

[11] "Mr. Robichaux and "Mike" had an argument which led to "Mike" being banned from the home. As "Mike" was no longer welcome at Mr. Robichaux's home, surely Mr. Robichaux could be mistaken that "Mike" was no longer "around," just that he was not coming to his home.

This entire case was based upon circumstantial evidence. "The rule as to circumstantial evidence is that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. LSA-R.S. 15:438. However, this statutory rule is not a purely separate test from the *Jackson* standard to be applied instead of a sufficiency of the evidence test whenever the state relies on circumstantial evidence to prove an element of the crime. *State v. Wright*, 445 So.2d 1198 (La. 1984); *State v. Eason*, 460 So.2d 1139 (La. App. 2nd Cir. 1984), *writ denied* 463 So.2d 1317 (La. 1985). Although the circumstantial evidence rule may not establish a stricter standard of review than the more general reasonable juror's reasonable doubt formula, it emphasizes the need for careful observance of the usual standard and provides a helpful methodology for its implementation in cases which hinge on the evaluation of circumstantial evidence. *State v. Chism*, 436 So.2d 464 (La. 1983); *State v. Sutton*, 436 So.2d 471 (La. 1983). Ultimately, all evidence, both direct and circumstantial, must be sufficient under *Jackson* to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *State v. Wright*, supra; *State v. Eason*, supra." *State v. Copes*, 566 So.2d 652, 654 (La. App. 2nd Cir. 1990).

The State has failed to meet its burden of proof of beyond a reasonable doubt in obtaining these convictions. The "blurry" images from the video fail to support the State's theory that Mr. Marcel was the perpetrator who had committed Simple Burglary on Mr. Todd Robichaux's property.

These "blurry" images had been shown to the neighbors, with none of the neighbors being able to identify Mr. Marcel,[12] except Mr. Robichaux. Both of the officers testified to the fact that the perpetrator could not be identified in the video (Day 2; pp. 103, 146). The officers had stated that they had interviewed all of the adjoining neighbors.

Furthermore, the State elicited testimony from Johnathan Matheme, of the Terrebonne Parish Sheriff's Office, that while he was discussing the situation of the Burglary at Mr. Marcel's neighbor's

[12] Some of these neighbors had been listed as witnesses, but defense counsel had dismissed them when the State had amended the Bill of Information.

home, he had noticed that a pair of tennis shoes had been recently washed (Day 2; p. 94). Mr. Bourg testified that the shoe pattern fits to a fair degree to the footprints which were found at Mr. Robichaux's shed (Day 2; p. 121). It must be noted that "to a fair degree" had not been defined by the State or the witnesses. No one has been able to explain whether the rectangular patterns are in the same pattern; or whether the patterns were the same size; or, if the patterns were in the same order on both shoes. That was the purpose of Mr. Marcel requesting that his defense counsel have an expert view the patterns of the shoes; and, the pictures be presented during his evidentiary hearing.

Testimony during the trial shows that Mr. Robichaux had "set a trap" in his shed[13] which consisted of a bucket of diesel with some purple dye; along with placing a hunting camera (which was used as a surveillance camera) in the near vicinity of his shed in order to capture any footage of anyone breaking into his shed.

The officers opined that after Mr. Marcel had broken into the shed, "tripped" the "trap," he had walked through the liquid combination in his shoes. Then, when Mr. Marcel returned to his home, he then cleaned the shoes to remove any evidence of the purple dye. What ***must be considered*** in this theory is the fact that the shoes that Mr. Marcel allegedly wore during the Burglary, were made of leather and synthetic leather. Had Mr. Marcel walked through the liquid substance (diesel fuel and dye), no amount of cleaning would have removed the substance from the shoes. The diesel fuel would have soaked into the shoe, allowing the purple dye to be present, even after a thorough cleaning.

Most amazingly, there were no fingerprints obtained from the scene that could identify Mr. Marcel of this crime. It should be noted that the actual perpetrator of the burglary was not wearing gloves according to the video that was presented during trial.

The State also submitted evidence of a prior alleged "***unreported***" Burglary of Mr. Robichaux's home, which was a Bose® remote which had been found in Mr. Marcel's pocket when he had been

[13] The "trap" in this instance had been set "outside" of the shed according to the photos of the scene.

questioned by the officers. Mr. Marcel had informed the officers that he owned a Bose® radio which was in his gazebo at the time of the questioning. The officers and Mr. Marcel's counsel failed to look in the gazebo to see if there was, in fact, a Bose® radio.

The State has used this Bose® remote in order to ensure Mr. Marcel's conviction in this matter, as it was used as an "unreported other crimes" evidence to show that Mr. Marcel had previously stolen from Mr. Robichaux. There was no evidence presented that the Bose® remote found on the person of Mr. Marcel during the questioning had ever been proven the one and same Bose® remote that had allegedly been stolen from Mr. Robichaux's home. No serial numbers, no pictures, no testing on the component. Just the word of Mr. Robichaux.

The State had also submitted evidence that Mr. Marcel had some clothes in a washbasin in his backyard. The officers determined that the clothes were not important to the case, and decided not to process such for these proceedings as the clothes ***did not match*** the clothing on the video. Also, when the officers viewed the clothing, there were no signs of the diesel fuel and dye mixture from Mr. Robichaux's "trap" that had been set. Had Mr. Marcel been the perpetrator there would have been some coloring in the clothes that he had been washing.

WHEREFORE, for the reasons above, Mr. Marcel requests that after a thorough review of the Record of this case, this Honorable Court finds that his conviction was obtained with insufficient evidence to convict beyond a reasonable doubt, and grant any and all remedies due him.

ISSUE NO. 3

Reasonable jurists would determine that Mr. Marcel was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*.

Mr. Marcel was denied effective assistance of counsel during the course of these proceedings, a violation of the Sixth and Fourteenth Amendments to the United States Constitution; thereby denying him a fair trial.

In one of the most well-noted cases decided by the United States Supreme Court concerning ineffective assistance of counsel was *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), where Gideon had hand-written the Supreme Court complaining of his attorney's assistance in his case. The United States Supreme Court did not hold Mr. Gideon to the same standards as a professional attorney at that time. Mr. Marcel is requesting the same from this Honorable Court.

Standard of Review:

The Sixth Amendment guarantees those accused of crimes to have the assistance of counsel for their defense. The purpose of this Sixth Amendment right to counsel is to protect the fundamental right to a fair trial. *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The skill and knowledge counsel is intended to afford a Defendant "ample opportunity to meet the case of the prosecution." *Strickland*, 466 U.S. at 685 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S. Ct. 236, 240, 87 L.Ed. 268 (1942)).

Acknowledging the extreme importance of this right, the United States Supreme Court has held: That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland v. Washington, 466 U.S. at 685. Thus, the Court has recognized that "the right to counsel is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U. S. 759, 771 n. 14, 90 S. Ct. 1441, 1449 n. 14, 25 L. Ed. 2D 763, 773 (1970). See also: *United States v. Otero*, 848 F.2d 835, 837, 839 (7th Cir. 1988); *Deutscher v. Whitley*, 884 F.2d 1152, 1162 (9th Cir. 1989);

Duckworth v. Dillon, 751 F.2d 895 (7th Cir. 1984); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982) (ineffective assistance found where counsel failed to: (1) investigate; and, (4) interview crucial witnesses; *Blake v. Zant*, 513 F. Supp. 772 (S.D.Ga. 1981)(ineffective Counsel in capital cases; standards applied with particular care; showing of prejudice not always required);

"Counsel's ineffectiveness cries out from a reading of this transcript." *Douglas v. Wainwright*, 714 F.2d 1532, 1557 (11th Cir. 1983). Most notably, the evidentiary hearing proves that Mr. Marcel was denied effective assistance of counsel during these proceedings (See: argument below).

> While a defendant must ordinarily show that counsel's ineffective assistance resulted in actual prejudice, such a showing may be exempted where counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary.

Frett v. State, 378 S.E.2d 249, 251 (S.C. 1988)(citing *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984)).

"At the heart of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982); accord *Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir. 1986); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983), *vacated*, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1984), *adhered to*, 739 F.2d 531 (1984). As the Court held in *Wade v. Armontrout*, 798 F.2d 304 (8th Cir. 1986): Investigation is an essential component of the adversary process. "Because [the adversarial] testing process generally will not function properly unless counsel has done some investigation into the prosecution's case and into various defense strategies . . . 'counsel has a duty to make reasonable investigations. . . .'" *Id.* at 307 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 305 (1986) (quoting *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). It appears as though Mr. Marcel's defense attorney failed to investigate these allegations due to the fact that he had him "pegged" as guilty when he read about the incident in the newspaper.

Defense counsel failed to impeach the State's witnesses due to the lack of investigating the

allegations. The State had presented testimony which would have been impeached had counsel properly investigated and interviewed the witnesses prior to the commencement of trial.

Deficient Performance:

Mr. Marcel contends that he was denied effective assistance of counsel from counsel due to the following to wit:

Failure to Notify of Plea Agreement:

Although Mr. Byrne testified that he had informed Mr. Marcel of the plea agreement offered by the State, the Record fails to support that such ever occurred. Mr. Marcel received his attorney file and was surprised to find that the State had offered him such a plea.

The plea agreement had not been signed by Mr. Marcel or Mr. Byrne, nor does the record reflect that he had been informed of such in Open Court. There was no evidence submitted (except the testimony of Mr. Byrne) that Mr. Marcel had actually been informed of such. Had Mr. Marcel been informed of such prior to the commencement of trial, he would have personally informed the Court and the State his opinion of such.

Mr. Byrne's testimony at the hearing fails to support the district court's determination that Mr. Marcel had been informed of such, and that he had declined such.

WHEREFORE, Mr. Marcel states that it is clear that he was denied constitutional rights guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I § 2 and § 13 of the Louisiana Constitution of 1974. This Honorable Court should grant this claim as it has merit, by reversing the conviction and sentence with the granting of a new trial.

Prejudicial Effect:

Had counsel performed as counsel guaranteed by the Sixth Amendment to the United States Constitution, and in accordance with *Strickland v. Washington*, the outcome of this trial would have been different due to the fact that additional evidence would have been presented to the jury which

would have proven Mr. Marcel's innocence in this matter.

The testimony from the October 24, 2018 evidentiary hearing fully supports Mr. Marcel's contention that he was denied effective assistance of counsel during the course of his trial.

Mr. Marcel had properly filed a Motion for Subpoena Duces Tecum for the "surveillance video" and picture of the shoes in order to support these Claims, which was either denied by the district court, or never ruled on, as the crime scene photographs, the pictures of the shoes, and the surveillance video were not made available during the hearing.

Mr. Byrne was adamant about his dislike of having to represent Mr. Marcel. Mr. Byrne had determined that Mr. Marcel was guilty of the charge prior to even reading the discovery which was provided by the State. On p. 8 of the hearing, Mr. Byrne testified that, "I actually remember seeing when this incident first occurred, there was an article about it on the front page of the paper. And I remember, you know, having previously dealt with Mr. Marcel, hoping that I didn't get it (*admitted that he didn't want the case*) because it seemed to me just from what I read in the article that he was, you know, there was, you know, basically caught red-handed for the most part (*Predetermined Mr. Marcel's guilt*).

Furthermore, during of the evidentiary hearing, Mr. Byrne informed the Court that Mr. Marcel was a "royal pain-in-the-ass" (p. 8, hearing). Mr. Byrne also informed the Court that "Mr. Marcel is probably No. 1, or at least in the top 3, of, and forgive my expression, pain-in-the-ass clients that I've had over 27 years. He ranks like right there, probably No. 1" (p. 13, hearing). It appears as though Mr. Byrne had testified to such in order to cover up his incompetent representation. The professionalism, or in this case, the lack of professionalism, shown by Mr. Byrne during the evidentiary hearing shows his lack of desire to represent Mr. Marcel during the trial proceedings.

Expert Witness:

The purpose of Mr. Marcel's request for an expert to review the photographs (especially the shoes)

was the fact that the shoe print left at the crime scene was not even Mr. Marcel's size. However, the Subpoena Duces Tecum was either denied, or never ruled on by the district court.

Mr. Byrne explicitly testified that Mr. Marcel was the one requesting that the shoes be tested by an expert, and that he and his supervisor actually laughed at the request even though they were aware that the State would be attempting to prove to the jury that they had the shoes that had been worn during the burglary by Mr. Marcel.

Furthermore, Mr. Byrne committed perjury during the course of his testimony concerning the shoes when he stated, "But getting to the issue of hiring the expert, the problem with hiring an expert to identify tread patterns in this particular case is because of traces of the purple dye the neighbor set up as a trap were inside the inner treads of the fricking shoe (*No testimony or reports of such*). So hiring an expert would have been absolutely an insane waste of money. And to be quite honest with you, I actually recall Mr. Champagne laughing when I discussed it with him. I mean it was a request from him" (p. 8, hearing). It must not be considered "laughable" when a defendant is requesting his attorney to review a viable defense.

Mr. Byrne had perjured himself during the course of his testimony. Mr. Byrne had testified that, "The only problem is he didn't get all the purple dye off them (p. 10, hearing)(***there is NOTHING in the Record to support this. According to the testimony at trial, there were no traces of purple dye anywhere on the shoes, not even in the tread***)(See: Tr.t., day 2, p. 94; testimony of Jonathan Matherne).[14]

This Court must also note that the testimony during the trial concerning the shoes was by Det. Bourg who testified that that the shoe pattern fits "to a fair degree" to the footprints which were found at Mr. Robichaux's shed (Day 2; p. 121). It must be noted that "to a fair degree" had not been defined

[14] It was stated during trial that Mr. Marcel had cleaned the shoes prior to the officers questioning him concerning the burglary. However, as the alleged victim testified, diesel was mixed with the dye in order to "soak" the dye into anything it came into contact. A washing, or scrubbing of the shoes would not have removed all remnants of the dye.

by the State or the witnesses. There was no testimony as to why the officer had determined that the prints "fit to a fair degree."

Had counsel obtained an expert witness during these proceedings, the jury would most likely have been informed of the fact that the shoes confiscated from Mr. Marcel ***were not*** the same shoes which were responsible for the footprints found at the scene of the crime.

Furthermore, had counsel consulted with and/or retained an expert in this matter, there would have been testimony that there was no trace of dye in (or on) the shoes which were confiscated from Mr. Marcel. Therefore, the outcome at trial would have been different, and Mr. Marcel would not be serving a life sentence for a crime for which he was wrongly convicted.

Failure to Investigate:

Mr. Marcel's counsel was ineffective for failing to investigate. During the course of the pre-trial proceedings, Mr. Marcel's counsel informed him that the State was intending to introduce a Bose® remote which had been found in his pocket when he had been questioned by the officers. This remote seems to be a linchpin to the State's case even though is was improperly admitted into evidence as "other crimes" evidence against Mr. Marcel. According to the transcript, Mr. Robichaux ***never*** reported a prior burglary where his remote had been stolen.

Mr. Marcel informed him that he had several Bose® radios, and that the remote that was found in this pocket was for the Bose® radio located in his gazebo, which he had actually been listening to prior to the officers arrival at his home. The State introduced this remote in order to prejudice Mr. Marcel to the jury by informing them that, "Look, Mr. Marcel has ***already*** robbed Mr. Robichaux once. Here's the proof of such. Now, this is the second time that Mr. Marcel has ***robbed*** Mr. Robichaux."[15]

Failure to have an expert witness examine the shoes and the footprints:

Counsel was also ineffective for failing to investigate the shoes found at Mr. Marcel's home and the

[15] There was ***never*** any Report made of the first alleged robbery.

footprints which were left by the perpetrator of the alleged Burglary of Mr. Robichaux's shed. The jury was allowed to view these shoes at the close of the arguments.

Defense counsel's failure to have an expert compare the shoes to the footprints found at the scene of the crime allowed the State to submit testimonial evidence from Mr. Bourg that, "the shoe pattern fits to a fair degree." Since the State's witness failed to testify as to the definition of, "to a fair degree," the jury was led to believe that the shoes introduced as evidence was actually a "match" to the prints that were found on the scene from the "trap" that had been set by Mr. Robichaux.[16]

As the State had alleged that the shoes that were presented to the jury were, in fact, the shoes worn by the perpetrator during the Burglary, an expert would have been able to determine if the shoes had been "soaked" in diesel fuel;[17] and the possibility of the diesel fuel and purple dye being removed from the shoes with a mere cleaning. An expert would have examined the shoes to determine if there was any "residual" effects from the diesel fuel and dye.

There was no evidence presented that would even substantiate that the shoes found at Mr. Marcel's were even the same size, or brand, as the footprints found at the scene of the crime. An expert would have been able to determine such. The shoes that had been entered into evidence were a larger size than the footprints found at the scene.

An expert would have been able to examine the footprints with the actual shoes to determine if the shoes had, in fact, been the shoes and the footprints and the shoe pattern had "fit to a fair degree," or with more certainty whether they matched or not.

Standard of Review:

In *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985), the Supreme Court recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to

[16] The "trap" that had been set by Mr. Robichaux consisted of diesel fuel and purple die.
[17] The purpose of the diesel fuel was to ensure that the purple dye would actually "soak" into any of the material which it came into contact with.

assure that the defendant has a fair opportunity to present his defense. Likewise for counsel to effectively represent his client he must ensure that those steps are taken and obtain independent experts to assist in preparing and presenting a proper defense on behalf of his client.

Counsel should obtain independent experts for consultation and to help in understanding the scientific and technical information presented by the State. Independent experts for the defense should be used for such things as going to the Crime Lab or expert's office and "eye-balling" the evidence, asking the expert to review the case and results of the testing with him, viewing the techniques used in testing the evidence, ensuring that the equipment used in testing the evidence is properly calibrated and meets all appropriate standards, examine the client, conduct testing on the client, and for an abundance of other issues dealing with the defense's case that counsel can gain only with the assistance of an expert knowledgeable in the specific applicable fields.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. *See* LSA-C.E. Art. 702.

This was because, while jurors may disregard a defendant's testimony or a lawyer's argument, experts "assist lay jurors, who generally have no training in" scientific or medical matters "to make a sensible and educated determination about" the contested issues. *Id.*, 470 U.S. at 81. "By organizing . . . [data], interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the [expert] for each party enable[s] the jury to make its most accurate determination of the issue before them." *Id.* at 81 (emphasis added). See also: ***Cowley v. Stricklin***, 929 F.2d 640 (11th Cir. 1991); ***Kordenbrock v. Scroggy***, 919 F.2d 1091 (6th Cir.)(en banc); ***Blake v. Kemp***, 758 F.2d 523 (11th Cir.); ***Smith v. McCormick***, 914 F.2d 1153 (9th Cir. 1990).

Because jurors do listen to, are influenced by, and will rely upon the testimony of such experts, a

trial may be fundamentally unfair when a party is left without expert assistance. *Ake*, 472 U.S. at 80.

The expert must be the defendant's, *i.e.*, independent of the State. *Cowley*, *supra*, 929 F.2d at 644; *McCormick*, *supra*, 914 F.2d at 1157; *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) ("essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution").

While *Ake* involved the right to a mental health expert, its reasoning compels that states provide other competent and independent experts for the defense when such expertise is necessary, *i.e.*, psychologists, forensic pathologists, serologists, hypnotists, firearms and toolmark examiners, ballistics, and others (such as a footprint expert).

Counsel was ineffective in failing to ask for and retain the funds for experts to assist in preparing and presenting a viable defense for his client. Any counsel acting under the wide range of professional norms, knowing that the State would be proffering expert testimony against his client, would have comparable experts to aid in defending his client.

There is no reasonable trial strategy for not having an expert for the defense to aid in challenging the testimony of the State's witnesses. Without the aid of an expert for the defense the opinion evidence of the State's witnesses goes before the jury unchallenged, and ultimately carries great weight in determining guilt or innocence of the accused.

In order to effectively deal with expert testimony and evidence presented defense counsel must, at a minimum, ask the questions derived from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).[18]

Counsel must be able to contest the expert testimony provided by the prosecution's witnesses. To cross examine these witnesses effectively and to present rebuttal evidence in the defense case, counsel must consult frequently with independent defense experts, who can determine the validity of results

[18] *See also* ***State v. Foret***, 638 So.2d 1116. Note: See ***Daubert*** questioning, infra.

reached by the State's witnesses. Often independent testimony is necessary. Without proper assistance, completely erroneous conclusions reached by the State's expert witnesses may be accepted as uncontested facts by the jury. Assistance in proper cross-examination of the prosecution's witnesses may be absolutely critical to the defense's case. *See, e.g.*, ***Moore v. Kemp***, 809 F.2d 702 (11th Cir. 1987) (en banc) (holding that ***Ake*** implies a constitutional right to other experts for various functions. In that case, the experts were to review tests performed by the State crime laboratory).

It is deficient performance on behalf of counsel not to investigate and form a viable defense. Counsel's strategic choices made after "less" than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation.[19]

In this case, the State was allowed to introduce the "opinion" testimony of Officer Bourg that the shoe print pattern at the crime scene "fit to a fair degree" to a pair of shoes that the officers had located at Mr. Marcel's residence. Had defense counsel called an expert, the jury would have been notified that "to a fair degree" fails to meet the criteria for a positive match.

This "opinion" testimony from an officer of the law, who has NO formal training in footprint identification greatly prejudiced Mr. Marcel during these proceedings. During the testimony of Bourg, there was NO explanation as to what the actual range of accurateness "a fair degree" entailed.

Releasing Witnesses Prior to the Defense's Case:

The U.S. Second Circuit Court of Appeal has held that, "Not calling witnesses is not tactical," as was done in this case.

In ***Pavel v. Hollins***, 261 F.3d 210, 216 (CA2 2001), the Court held that:

> "[Atty Meltzer's] representation of Pavel was flawed in three distinct ways. Because we conclude, that the cumulative weight of these flaws deprived Pavel of this Sixth Amendment rights, see post at 225, see e.g., ***Lindstandt***, 239 F.3d at 199 (holding that for Sixth Amendment purposes attorney errors must be considered 'in the aggregate'), we do not consider whether some of these with one another - - could adequately support our conclusion that Meltzer's representation of Pavel was constitutionally deficient.

[19] Sixth and Fourteenth Amendments; LSA-Const. art. 1, § 13; ***Moore v Johnson***, 194 F.3d 586 (5th Cir. 1999).

> First Meltzer decided not to prepare a defense for Pavel solely because he was confident that, at the close of the prosecution's presentation of its evidence, the trial judge would grant Meltzer's Motion to Dismiss the government's charges against Pavel. That Meltzer opted not to prepare a defense based entirely on this rationale militates strongly in favor of the conclusion that his representation of Pavel was constitutionally deficient.
>
> Therefore, although Meltzer's decision was 'strategic' in some senses of the word, it was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefiting his client that the federal courts have denominated 'strategic' and been especially reluctant to disturb.

As to "conscious" decisions: See, for example, ***Moore v. Johnson***, 194 F.3d 586, 610 (5th Cir. 1999) (holding that a particular decision could not be labeled "strategic" where, *inter alia*, the attorney had "no idea" why the decision had been taken); ***Bean v. Calderon***, 163 F.3d 1073, 1079 (9th Cir. 1998) (noting that a decision cannot be characterized as "strategic" where it was a result only of "confusion"); and, ***Loyd v. Whitley***, 977 F.2d 149, 158 and n.22 (5th Cir. 1992)(distinguishing between "strategic judgment calls" and "plain omissions"). See also: ***United States v. Grayab***, 878 F.2d 702, 712 (3rd Cir. 1989)(counsel's behavior was not colorably based on tactical considerations but merely upon a lack of diligence).

See also: ***Heard v. Addison***, 731 F.3d 666 (10th Cir. 2013), where the Court held that: 1) criminal defense lawyer has a duty to conduct reasonable investigations into her client's case, which extends to law as well as facts; and, 2) defense counsel's decision not to investigate cannot be deemed reasonable if it is uniformed; and, ***Thomas v. U.S.***, 737 F.3d 1202 (8th Cir. 2013), where the court held that, "To provide effective assistance of counsel, an attorney must conduct more than a cursory investigation."

The Record shows that defense counsel had informed the Court that he would be releasing his witnesses from the trial (See: Tr., Day 2, p. 179). Although there was a Bench Conference concerning the releasing of the witnesses, there was no rational explanation from counsel as to why the witnesses had been released. The ***only explanation*** that was given to Mr. Marcel was that the State had amended the charge to Simple Burglary, and this case was no longer a case of Simple Burglary of an Inhabited Dwelling.

Instead, counsel had called Robert Brown, the District Public Defender's Office Investigator, to testify as to, "the witnesses testimony would not help Mr. Marcel." Mr. Marcel's family has been in contact with the witnesses that had originally be subpoenaed to testify in Mr. Marcel's behalf. Mr. Marcel had informed his trial counsel that the following persons were willing to testify for him:[20]

1. Craig, 2023 Bull Run Road, Schriever, LA 70395;
2. Sandy Robichaux (Mr. Robichaux's wife), 2024 Bull Run Road;
3. Jimmy Rivero (Mr. Robichaux's father-in-law), 2024 Bull Run Road;
4. Ms. Grace, 2024 Bull Run Road;
5. Mr. Lawrence Berthelot, 2026 Bull Run Road;
6. Mr. Steve and his wife, 2027 Bull Run Road;
7. Nick and Donna, 2100 Bull Run Road; and,
8. Mr. Marcel wanted to testify for himself.

All of these neighbors had viewed the surveillance video, and informed the officer that they could not identify the person.[21] Surely, as these neighbors have known Mr. Marcel for years, at least one of them should have been able to identify him on the video, *if* Mr. Marcel was in the video.

This Court must also note that defense counsel had properly filed to have defense witnesses present during these proceedings, but for some reason, all of the witnesses had been dismissed prior to the presentation of the defense's witness.

Although Mr. Robert Brown[22] testified that the witnesses' testimony would not help Mr. Marcel in this matter, Mr. Marcel's family members have informed him otherwise. Mr. Marcel would respectfully request that this Court allow them to testify at any evidentiary hearing held in this matter.

WHEREFORE, counsel's performance was deficient, and the deficiency denied Mr. Marcel a fair and impartial trial in this matter. Absent counsel's deficient performance was a violation of the Sixth Amendment to the United States Constitution and ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct.

[20] As argued above, defense counsel dismissed ***all*** of Mr. Marcel's witnesses prior to the presentation of the defense's case.
[21] This Court **must note** that the neighbors who viewed the video have known Mr. Marcel for at least 25 years.
[22] Mr. Robert Brown is the Investigator for the District Public Defender's Office.

2052, 80 L.Ed.2d 676 (1984). Had counsel been protected Mr. Marcel's right to a fair and impartial trial, the outcome of the proceedings would have been different.

FURTHERMORE, it is clear that he was denied his constitutional rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; and Louisiana Constitution of 1974, Art. I, § 2 and 13. This Honorable Court should Grant this Claim as it has merit by reversing the conviction and sentence and the Granting of a new trial.

ISSUE NO. 4

Reasonable jurists would conclude that the State improperly amended the Bill of Information to reflect a charge that was not a lesser included offense of Simple Burglary of an Inhabited Dwelling; and counsel was ineffective for failing to object.

Improper amendment of Bill of Information:

The district court abused its discretion in allowing the State to amend the Bill of Information to a nonresponsive, lesser included offense prior to the commencement of Mr. Marcel's trial, in violation of the Fourteenth Amendment to the United States Constitution. Mr. Marcel's counsel was ineffective for failing to object to the State's amendment of the Bill of Information to a nonresponsive verdict which is not a lesser included offense. See: Sixth and Fourteenth Amendments to the United States Constitution.

The courts have failed to consider the fact that the right to a fair and impartial trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. As the State had proceeded to trial for a charge of Simple Burglary of an Inhabited Dwelling, Mr. Marcel was prepared to defend against such as the State was presenting evidence that Mr. Marcel had broken into a shed, which does not meet the requirements of an inhabited dwelling.

Once the Bill of Information is amended, Mr. Marcel's defense is moot. However, in looking at the responsive verdicts of both Simple Burglary of an Inhabited Dwelling and Simple Burglary, neither of these charges are responsive to each other. In fact, Mr. Marcel was not even re-arraigned on the Simple Burglary charge before commencement of trial. Defense counsel simply agreed to such without

objecting to the fact that neither of the charges are responsive, and that Mr. Marcel should have been arraigned on the Simple Burglary charge.

In *State v. Baptiste*, 209 So.3d 321 (La. App. 5th Cir. 12/14/16), the Court held that, "Although both distribution of heroin and possession with intent to distribute heroin are prohibited by the same statute and subsection, they are separate and distinct crimes; similarly, possession with intent to distribute heroin is not a responsive verdict to the charge of distribution of heroin." **Criminal Law 110k881(2).**

"Defendant's conviction for possession with the intent to distribute marijuana was not a responsive verdict to the charged offense of distribution of marijuana, and thus, defendant's conviction would be vacated." *State v. Jones*, 156 So.3d 126 (La. App. 4th Cir. 1/30/14). **Criminal Law 110k881(2) and 110k1181.5.**

A nonresponsive verdict is an error which constitutes grounds for reversal. See: *State v. Norman*, 848 So.2d 91 (La. App. 5th Cir. 5/28/03). **Criminal Law 110k1175.**

Guilty verdict of simple assault against defendant charged by Bill of Information with Second Degree Battery, LSA-R.S. 14:34.1, was a nonresponsive verdict requiring reversal for new trial. See: *State v. Foret*, 479 So.2d 526 (La. App. 1st Cir. 1985). **Criminal Law k881(2) and k1175.**

Rendition of verdict unresponsive to charge is error patent; such error requires that conviction and sentence be reversed and case remanded for new trial. See: **Criminal Law k881(2).**

Mr. Marcel relies on a plethora of cases which support his contention that the State should not have been allowed to amend his Bill of Information with a nonresponsive, lesser included offense prior to the commencement of his trial.

LSA-R.S. 14:5 states in pertinent part:

§ 5. Lesser and included offenses.

An offender who commits an offense which includes all the elements of other lesser offenses, may be prosecuted for and convicted of either the greater offense or one of the lesser and included offenses. In such case, where the offender is prosecuted for the greater offense, he may be convicted of any one of the lesser and included offenses.

LSA-R.S. 14:62.2 states in pertinent part:

§ 62.2. Simple Burglary of an inhabited dwelling.

A. simple burglary of an inhabited dwelling is the unauthorized entry of any inhabited dwelling, house apartment, or other structure used in whole or in part as a home or place of abode by a person or persons with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60.

B. Whoever commits the crime of burglary of an inhabited dwelling shall be imprisoned at hard labor for not less than one year, without the benefit of Probation, Parole, or Suspension of Sentence, nor more than twelve years.

LSA-R.S. 14:62 states in pertinent part:

§ 62. Simple burglary.

A. Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60.

B. Whoever commits the crime of simple burglary shall be fined not more than two thousand dollars, imprisoned with or without had labor for not more than twelve years, or both.

La.C.Cr.P. Art. 814 states in pertinent part:

§ 814. Responsive verdicts; in particular.

A. The only responsive verdicts which may be rendered when the indictment charges the following offenses are:

42. Simple Burglary:

Guilty.

Guilty of attempted simple burglary.

Guilty of attempted unauthorized entry of a place of business.

Not guilty.

42.1 Simple Burglary of an Inhabited Dwelling.

Guilty.

Guilty of attempted simple burglary of an inhabited dwelling.

Guilty of unauthorized entry of an inhabited dwelling.

Not guilty.

As shown above, Simple Burglary is not a responsive, lesser included verdict to Simple Burglary of an Inhabited Dwelling, and the district court abused its discretion in allowing the State to amend the Bill of Information to a nonresponsive charge; and defense counsel was ineffective for failing to object to such.

WHEREFORE, for the reasons above, this Honorable Court must find that the State had improperly amended the Bill of Information to a nonresponsive charge, and should remand this matter.

Ineffective assistance of counsel:

Mr. Marcel's counsel was ineffective for failing to object to the State's amendment of the Bill of Information prior to the commencement of trial. Counsel knew, or should have known, that the State's amendment failed to charge Mr. Marcel with a lesser included offense of Simple Burglary of an Inhabited Dwelling. See: La.C.Cr.P. Art. 814.

On April 14, 2016, the State informed the parties that they would be amending the Bill of Information to reflect a charge of Simple Burglary rather than Simple Burglary of an Inhabited Dwelling.

Mr. Marcel was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution; and ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 676 (1984).

SUMMARY

Other Crimes Evidence:

The State's use of these priors were **only** to present Mr. Marcel as a "bad person" to the jury in order to obtain a conviction in a case where the identification was a "**maybe**" of the person in the surveillance video as to that of Mr. Marcel. Surely, the State was of the notion that the jury would be influenced by the testimony of these alleged victims of Mr. Marcel's prior crimes.

Mr. Marcel contends that the court allowed the State to call nine witnesses regarding eight other crimes. This parade of witnesses served no purpose other than to prove Mr. Marcel had committed prior burglaries, had acted in conformity therewith, and was generally a "bad person" with the propensity to commit burglaries.

This evidence was much more prejudicial than probative. Evidence of other crimes is generally

inadmissible in the guilt phase of a criminal trial unless the probative value of the evidence outweighs its prejudicial effect and unless other safeguards are met. Calling nine witnesses to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident was more prejudicial than probative when a selection of a few of the more similar crimes would have accomplished the same purpose without prejudicing the jury. It was error for the Court not to require a more selective presentation of this evidence.

Ineffective Assistance of Counsel (trial counsel):

The testimony from the October 24, 2018 evidentiary hearing fully supports Mr. Marcel's contention that he was denied effective assistance of counsel during the course of his trial (See: transcript of October 24, 2018.

From the onset of the hearing, Mr. Byrne was adamant about his dislike of having to represent Mr. Marcel. It appears as though Mr. Byrne had determined that Mr. Marcel was guilty of the charge prior to even reading the discovery which was provided by the State. On p. 8 of the hearing, Mr. Byrne testified that, "I actually remember seeing when this incident first occurred, there was an article about it on the front page of the paper. And I remember, you know, having previously dealt with Mr. Marcel, hoping that I didn't get it (***admitted that he didn't want the case***) because it seemed to me just from what I read in the article that he was, you know, there was, you know, basically caught red-handed for the most part (***Predetermined Mr. Marcel's guilt***).

Furthermore, during the course of the evidentiary hearing, Mr. Byrne informed the Court that Mr. Marcel was a "royal pain-in-the-ass" (p. 8, hearing). Mr. Byrne also informed the Court that "Mr. Marcel is probably No. 1, or at least in the top 3, of, and forgive my expression, pain-in-the-ass clients that I've had over 27 years. He ranks like right there, probably No. 1 (p. 13, hearing). It appears as though Mr. Byrne had intentionally testified to such in order to cover up his incompetent representation.

The professionalism, or in this case, the lack of professionalism, shown by Mr. Byrne during the evidentiary hearing shows his lack of desire to represent Mr. Marcel during the trial proceedings.

Mr. Marcel has shown this Court that he must be Granted relief in these proceedings. During the course of the evidentiary hearing which was held on October 24, 2018, defense counsel *admitted* that he did not desire to represent Mr. Marcel in this matter. Subsequently, the testimony adduced during the course of the evidentiary hearing allows Mr. Marcel to meet his burden of proof that he was denied a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; and the district court and the Court of Appeal abused their discretion in denying Mr. Marcel relief in this matter.

It was quite remarkable that Mr. Kerry Byrne committed perjury during the course of the evidentiary hearing. Mr. Byrne specifically testified that he did not think that an expert needed to be consulted on the shoes due to the fact that there were traces of purple dye in the treads of the shoes (hearing tr.p. 8).

However, the testimony during the trial adduced that there were no traces of the dye found anywhere on the shoes (Day 2 of 3, pp. 94, 121). How could a *professional attorney* testify to such when the evidence presented during the trial proves otherwise? Did Mr. Byrne believe that Mr. Marcel would not refer back to the transcript of the trial?

Expert Witness:

This Court must note that the purpose of Mr. Marcel's request for an expert to review the photographs (especially the shoes) was the fact that the shoe print left at the crime scene were not even the same size as Mr. Marcel's shoes. It is completely unbelievable that the district court denied Mr. Marcel relief in this matter. Mr. Byrne explicitly testified that Mr. Marcel was the one requesting that the shoes be tested by an expert.

Furthermore, Mr. Byrne committed perjury during the course of his testimony concerning the shoes

when he stated, "But getting to the issue of hiring the expert, the problem with hiring an expert to identify tread patterns in this particular case is because of traces of the purple dye the neighbor set up as a trap were inside the inner treads of the fricking shoe (*No testimony or reports of such*). So hiring an expert would have been absolutely an insane waste of money. And to be quite honest with you, I actually recall Mr. Champagne laughing when I discussed it with him. I mean it was a request from him" (p. 8, hearing). It cannot be considered to be "laughable" when a defendant is requesting his attorney to review a viable defense.

It is also quite unbelievable that Mr. Byrne had perjured himself during the course of his testimony. Mr. Byrne had testified that, "The only problem is he didn't get all the purple dye off them (p. 10, hearing)(*there is NOTHING in the Record to support this. According to the testimony at trial, there were no traces of purple dye anywhere on the shoes, not even in the tread*)(See: Tr.t., day 2, p. 94; testimony of Jonathan Matherne).[23]

This Court must also note that the testimony during the trial concerning the shoes was by Det. Bourg who testified that that the shoe pattern fits "to a fair degree" to the footprints which were found at Mr. Robichaux's shed (Day 2; p. 121). It must be noted that "to a fair degree" had not been defined by the State or the witnesses. There was no testimony as to why the officer had determined that the prints "fit to a fair degree."

Had counsel obtained an expert witness during these proceedings, the jury would most likely have been informed of the fact that the shoes confiscated from Mr. Marcel *were not* the same shoes which were responsible for the footprints found at the scene of the crime. Therefore, the outcome at trial would have been different, and Mr. Marcel would not be serving a life sentence for a crime for which he was wrongly convicted.

[23] It was stated during trial that Mr. Marcel had cleaned the shoes prior to the officers questioning him concerning the burglary. However, as the alleged victim testified, diesel was mixed with the dye in order to "soak" the dye into anything it came into contact. A washing, or scrubbing of the shoes would not have removed all remnants of the dye.

Sufficiency of the Evidence:

Although the district court failed to hear the Claim concerning the sufficiency of the evidence, Mr. Marcel has fully supported this Claim in the Original PCR.[24]

Improper Amendment of the Bill of Information to a Non-Responsive charge:

The courts have abused their discretion in denying relief in this Claim. The Courts have erroneously determined that Simple Burglary is a lesser responsive verdict to Simple Burglary of an Inhabited Dwelling. They have also erroneously determined that Mr. Marcel was prepared to defend himself against the Simple Burglary. However, the best defense against the Simple Burglary of an Inhabited Dwelling was the fact that a ***shed*** was burglarized; not an inhabited dwelling. Had the State proceeded with such, the jury could not have found Mr. Marcel guilty of the allegation as the ***essential element*** of "an inhabited dwelling" could not have been proven.

WHEREFORE, for the reasons above, Mr. Marcel has shown this Honorable Court that the State knowingly presented perjured testimony to the jury during this trial; and this Court must determine that Mr. Marcel was denied his right to a fair trial in accordance with the Fifth and Fourteenth Amendments to the United States Constitution, and remand this matter for a new trial.

CONCLUSION

As Mr. Marcel was denied the right to a fair and impartial trial, this Court should grant the petition for Writ of Certiorari.

Respectfully submitted this 4th day of January, 2023.

Arty Marcel

Arty Marcel #187005

[24] The surveillance video was also needed to support Mr. Marcel's Claim of insufficient evidence.