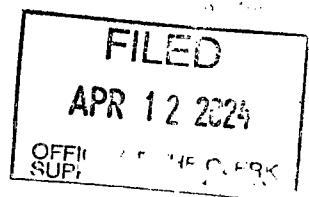


ORIGINAL

No. 23-7253



IN THE  
SUPREME COURT OF THE UNITED STATES

CALVIN KING, PETITIONER

VS.

TIM HOOPER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI FROM THE  
LOUISIANA STATE COURTS

Prepared on behalf of:  
Calvin King

Respectfully submitted

Calvin King  
Mr. Calvin King, Pro se  
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TABLE OF CONTENTS	PAGES:
TABLE OF CONTENTS.....	2
QUESTION OF LAW PRESENTED FOR REVIEW.....	3
LIST OF PARTIES.....	4
PETITION.....	8
OPINIONS BELOW.....	8
JURISDICTION.....	9
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	9
STATEMENT OF THE CASE.....	9
REASONS FOR GRANTING THE PETITION.....	9
CONCLUSION.....	30
PROOF OF SERVICE.....	32

#### INDEX TO APPENDICES

- APPENDIX "A" Fifth Circuit Court of Appeals Decision**
- APPENDIX "B" Louisiana Supreme Court Decision**
- APPENDIX "C" Louisiana Supreme Court Re-hearing Decision**

**TABLE OF AUTHORITIES****PAGES:**

State v. King, 14-389 (La. App. 5 <sup>th</sup> Cir. 12/16/14), 167 So. 3D 117.....	9
Ashe v. Swenson, 397 U.S. 436, (1970).....	7
Husdon v. Louisiana, 450 U.S. 40 (1981).....	7
State v. Matthews, 375 So.2d 1165 (La. 1979).....	13
State v. Dixon, 620 So.2d 904 (La. App. 1 <sup>st</sup> Cir 1993).....	13
State v. Addison, 788 So. 2d 608 (La. App. 5 <sup>th</sup> Cir. 2001).....	14
State v. Thetford, 445 so.2d 128 (La. App. 3 <sup>rd</sup> Cir. 1984).....	16
United States v. Upshaw, 448 F.2d 1218 (5 <sup>th</sup> Cir. 1971) 405 U.S. 934,92 .....	17
United States v. Bonfascio, 443 F.2d 914 (5 <sup>th</sup> Cir. 1971);.....	17
United States v. Atilus, 425 F.2d 816 (5 <sup>th</sup> Cir. 1970).....	17
Flowers v. Blackburn, 779 F.2d 1115, (5th Cir. 1986).....	24

**CONSTITUTIONAL LAW**

LSA-Const. Art. 1 § 15U.S.....	9
Const. Amends V. XIV.....	16
La. Const. Art. 1, § 19 (1974).....	17

## ISSUES PRESENTED FOR RELIEF

### ASSIGNMENT OF ERROR NO. 1.

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION OF SECOND DEGREE MURDER.

### ASSIGNMENT OF ERROR NO. 2.

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION OF ARMED ROBBERY

### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 1.

APPELLANT CONTENDS THAT HIS TRIAL RECORD IS INCOMPLETE, AND HIS ATTORNEY ON APPEAL IS INEFFECTIVE BECAUSE HE CAN NOT PROPERLY PREPARE AN EFFECTIVE APPEAL BRIEF BASED UPON REVIEW OF THE ENTIRE RECORDS

### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 2.

APPELLANT CONTENDS THAT THE INDICTMENT WAS NOT BROUGHT INTO OPEN COURT BY AN JEFFERSON PARISH GRAND JURY WHICH IS A VIOLATION OF APPELLANT'S SIXTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND LSA-CONST, ART. 1 § 2 AND ART, 1 § 13 (1974), AND ALL RELEVANT STATUTES THEREOF.

### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 3.

APPELLANT CALVIN KING CONTENDS THAT THE TRIAL JUDGE PROVIDED AN UNCONSTITUTIONAL JURY INSTRUCTION ON THE LAW OF PRINCIPLES AS TO SECOND DEGREE MURDER AND ARMED ROBBERY

### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 4.

APPELLANT CONTENDS THAT BASED ON THE LACK OF EVIDENCE AS TO ALL ESSENTIAL ELEMENT OF THE OFFENSES AND DOUBLE JEOPARDY PROHIBIT RETRIAL ON THE SAME OFFENSES VIOLATES CALVIN KING CONSTITUTIONAL RIGHTS

SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 5.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST  
VERDICT JUDGMENT OF ACQUITTAL

SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 6.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO QUASH  
THE INDICTMENT BASED ON A SECOND TRIAL VIOLATES HIS FIFTH  
AMENDMENT RIGHTS

## LIST OF PARTIES

Clerk of Court  
Twenty-Fourth Judicial District Court  
Parish of Jefferson  
P.O. Box 10  
Gretna, La. 70054

Paul Connick  
District Attorney  
200 Derbigny Street  
Gretna, La. 70053

Clerk of Court  
Fifth Circuit Court of Appeal  
200 Derbigny Street  
Gretna, La. 70054

Clerk of Court  
Louisiana Supreme Court  
400 Royal Street  
New Orleans, La. 70130-2104

## QUESTION OF LAW

1.) Did the State of Louisiana violate the defendant United States Const. By not bringing the Grand Jury Indictment into open court which is a violation of defendant Fifth, Sixth and Fourteen Amendment under the U.S. Const. And L.S.A. Const. 1§2 and Art 1§13, (1974, And all Relevant Statutes thereof?

*Petitioner affirmatively answers: Yes.*

2.) Did the State of Louisiana violate the defendant U.S. Const. And Louisiana Const. right under Double Jeopardy, when LSA-Const. Art. 1 § 15 U.S. Constitution? (*Collateral Estoppel*)

*Petitioner affirmatively answers: Yes.*

3.) Did the State of Louisiana violate defendant right for denying defendant Motion to Quash the Indictment based on a 2nd trial violation of his 5 Amendment right under the U.S. Const?

*Petitioner affirmatively answers: Yes.*

4.) Whether appellant counsel was ineffective for failure to obtain a complete copy of the full trial transcript in violation of *United States v. Upshaw*, which violates Petitioner's right to a fair appeal?

*Petitioner affirmatively answers: Yes.*

5.) Did the State of Louisiana provided an unconstitutional Jury Instruction on the Law of Principle as to Second Degree Murder and Arm Robbery?

*Petitioner affirmatively answers: Yes.*

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

CALVIN KING, PETITIONER

VS.

TIM HOOPER, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

Petitioner Calvin King is a state prisoner incarcerated at the Louisiana State Penitentiary, Angola, who respectfully presents that the Court ruled "there is no basis in law or fact as demonstrated by this record that Petitioner is entitled to the relief he seeks." Petitioner avers that the Twenty-Fourth Judicial District Court, the Fifth Circuit, Court of Appeal, the Louisiana Supreme Court, has denied Petitioner relief as to the holding of this Honorable United States Supreme Court ruling as to double jeopardy prohibit re-trial of the offense violates Calvin King constitutional rights in *Ashe v. Swenson*, 397 U.S. 436, (1970) and *Hudson v. Louisiana*, 450 U.S. 40 (1981). Now Mr. Calvin King represents this Petition for a Writ of Certiorari into this Honorable United States Supreme Court for a full review on the

merits presented herein.

### JURISDICTION

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

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The denial of Petitioner's Direct Appeal proscribes that Mr. King rights to assert non-frivolous claims as guaranteed, to-wit: "[a]nd to petition the Government for a redress of grievances."

The Fifth Amendment assures *any person...* No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law ..."

#### **LSA-Const Art. 1 § 15: Institution of Prosecution.**

"Prosecution of a felony shall be initiated by indictment or information, *but no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury....*"

If counsel for defense is ineffective it violates the Sixth Amendment, as stated in part:

"[a]nd to have the assistance of counsel for his defense."

The Fourteenth Amendment binds all States to conform with the privileges and immunities guaranteed by the constitution of the United States as stated in the Bill of Rights, to-wit:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

### **REASONS FOR GRANTING THE PETITION**

This case deserves original supervisory jurisdiction by the United States Supreme Court, because throughout the State of Louisiana the trial courts have proscribed fair appellate review for some inmates, and for others they have granted relief. The Louisiana Courts has overlooked the Petitioner claims for relief.

### **STATEMENT OF THE CASE**

On February 10, 2011, a Jefferson Parish Grand Jury indicted defendant Calvin King, with second degree murder in violation of La. R.S. 14:30.1 (count one) and armed robbery with a firearm in violation of La. R.S. 14:64 and La. R.S. 14:64.3 (count two) Defendant pled not guilty at this arraignment the next day.

On January 30 and 31, and February 1, 2013, the case was tried before a twelve person jury that found defendant guilty as charged. On September 13, 2013, the trial judge granted defendant's motion for new trial under Article 851 (1) and denied his motion for post-verdict judgment of acquittal.

On September 24, 2013, the State filed a timely motion for appeal that was granted. In *State v. King*, 14-389 (La. App. 5<sup>th</sup> Cir. 12/16/14), 167 So. 3d 117, the

Court dismissed the appeal, but granted the State thirty days from the date of its opinion within which to file a writ application with this Court seeking review of the trial court's ruling granting a new trial.

On May 13, 2015, the Louisiana Fifth Circuit Court of Appeal granted the writ application filed by the State, reversed the court's ruling granting defendant's motion for new trial, and reinstated defendant's convictions and sentences. *State v. King*, 15-KH-39(La. App. 5<sup>th</sup> Cir. 5/13/15)(unpublished writ disposition). On September 18, 2017, the Louisiana Supreme Court granted defendant's writ application, reversed this Court's judgment, and reinstated the trial Court's judgment granting defendant's motion for new trial. *State v. King*, 15-1283(La. 9/18/17), 232 So. 3d 1207.

On January 22, 2018, defendant filed a motion to Quash the indictment on the basis of double jeopardy, and the trial court denied the motion to quash on March 15, 2018. Defendant filed a writ application with the 5<sup>th</sup> Circuit Court of Appeal denied on July 26, 2018. *State v. King*, 18-K-194( La. App. 5<sup>th</sup> Cir. 7/26/18) (unpublished writ disposition). Defendant filed a writ application with the Louisiana Supreme Court that was denied on November 20, 2018. *State v. King*, 18-1429 (La. 11/20/18). On October 25, 2021, the case proceeded to trial before a twelve-person jury, and on October 29, 2021, the jury unanimously found

defendant guilty as charged. Defendant filed a Motion for a New trial and a motion for post-verdict judgment of acquittal, both of which were denied on December 15, 2021.

On that same date, the trial court sentenced defendant to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence on count one, and imprisonment at hard labor for thirty years without the benefit of parole, probation, or suspension of sentence on count two, with the sentences to run concurrently. The Fifth Circuit, Court of Appeal affirmed Petitioner's conviction and vacated his sentence and remanded for re-sentencing. *State v. King, 22-KA-371, \_\_\_ So. 3d \_\_\_* (La. App. 5<sup>th</sup> Cir. 5/24/23). The Petitioner filed a writ application to the Louisiana Supreme Court and was denied on January 17 2024. Petitioner filed a timely re-hearing to the Louisiana Supreme Court and the Supreme Court denied the re-hearing on March 19, 2024.

Now, Mr. Calvin King is filing this timely application for Writ of Certiorari into this Honorable United States Supreme Court on the merits. Consequently, Mr. King request this Court reverse his conviction and remand this matter to the State of Louisiana for a new trial.

#### ASSIGNMENT OF ERROR NO. 1.

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION OF SECOND DEGREE MURDER.

#### ARGUMENT

Mr. King presents: Maria Abreu was not a witness to the murder. In fact, there were no witnesses to the murder. There were no witnesses who testified or any other evidence presented by the State that Calvin King committed the murder, was present when the murder occurred or was even aware that a murder had been committed. No evidence was presented by the State to establish that Calvin King was ever present at the scene of the murder. At trial the State's theory against Mr. King was that Mr. King and two other men kidnapped Javier Sanchez from his apartment, and Mr. King is guilty of second degree murder under the felony murder doctrine.

Not only is there no evidence that Mr. King committed or was principle to a murder, there is no evidence that Javier Sanchez was kidnapped and did not leave his apartment voluntarily. At trial Maria Abreu testified that she did not know if Javier Sanchez was taken from his residence against his will and further testified that he could have left voluntarily, her answer was "Yes."

There is no evidence that Mr. King went to New Orleans East with the murderer. It is a great stretch to assume that even if he was in the car with Javier on Clear view Parkway in Jefferson Parish, that he was in New Orleans East in

Orleans Parish later that night when a murder occurred. A defendant challenging the sufficiency of the evidence to support his conviction may do so through either a motion for post-verdict judgment of acquittal, under *Jackson v. Virginia*,<sup>1</sup> the United States Supreme Court set out the standard by which appellate courts are to review the sufficiency of the evidence in criminal prosecutions.

...the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of the fact could have found the essential elements of the crime beyond a reasonable doubt.

Also see *State v. Matthews*, 375 So.2d 1165 (La. 1979). In reviewing the sufficiency of the evidence to support a criminal conviction, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the court to determine whether the evidence is minimally sufficient. A complete reading of the transcript of this trial shows that the state failed to meet the burden of proof enunciated by the Supreme Court in *Jackson v. Virginia*. In *State v. Dixon*, 620 So.2d 904 (La. App. 1<sup>st</sup> Cir 1993), the First Circuit explained:

“The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt.”

In this case all reasonable hypotheses of innocence were not excluded. A

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<sup>1</sup> 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)

reasonable hypothesis of innocence is that Calvin King was not present when the murder occurred or even knew that a murder had occurred. There is no evidence that Mr. King went to New Orleans East with the murderer.<sup>1</sup>

#### ASSIGNMENT OF ERROR NO. 2.

##### THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION OF ARMED ROBBERY

The only evidence that Marie Abreu was the victim of an armed robbery was her self-serving testimony which was replete with contradictions and irreconcilable conflicts. No reasonable person could have or should have believe her. In the absence of internal contradiction or irreconcilable conflict the testimony of one witness, if believe by the trier of fact, is sufficient to convict. *State v. Addison*, 788 So. 2d 608 (La. App. 5<sup>th</sup> Cir. 2001).

Armed Robbery is defined as the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidating, while armed with a dangerous weapon. LSA-R.S. 14:64. There is no evidence that Calvin King took anything of value from Marie Abreu. The duct tape with his fingerprint proves that he was in the apartment when the three men were looking for cocaine which they did not find. It does not prove that anything of value was taken from Marie's person or belonging to her. Nothing

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<sup>1</sup> *State v. Perow*, 616 So. 2d 1336 (La. App. 3<sup>rd</sup> Cir. 1993)

belonging to Marie or in her possession was found in Calvin King's possession even after a search of his residence.

The evidence is insufficient to support the convictions of second degree murder and armed robbery. When there is a reversal for insufficient evidence, the double jeopardy provisions of La. Const. Art. 1, 15 and U.S. Const. Amends V. XIV prohibit a retrial of the defendant. Thus, Mr. King should be discharged on the basis of both assignment of errors.

#### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 1.

APPELLANT CONTENDS THAT HIS TRIAL RECORD IS INCOMPLETE, AND HIS ATTORNEY ON APPEAL IS INEFFECTIVE BECAUSE HE CAN NOT PROPER PREPARE AN EFFECTIVE APPEAL BRIEF BASED UPON REVIEW OF THE ENTIRE RECORDS.<sup>1</sup>

Appellant contends that he is being denied his due process and equal protection of law under the Fourteenth Amendment based upon his denial of right to full judicial review, and his appellate counsel is ineffective for not being able to properly prepare him an effective appeal. After appellant's conviction, the Court appointed the Louisiana appellate project to represent petitioner on direct appeal.

The appellate project assigned Attorney Bertha M. Hillman, to prepare Appellant's appeal in this case. Appellant asserts that Attorney Bertha M. Hillman did not have a full record from which to research and prepare a meaningful appeal brief on his behalf. Attorney Hillman obtained only the records transcribed by the

<sup>1</sup> *Equal protection of the Law article 1 § 3 of Louisiana Constitution*

court reporter from the courthouse to research and prepare the assignment of errors and presented them to this Honorable Fifth Circuit, Court of Appeal for review.

Truly, Attorney Bertha M. Hillman was not the trial attorney in this case and he could not have known if any errors existed in the untranscribed portions of the trial transcripts. In *State v. Thetford*, 445 So.2d 128 (La. App. 3<sup>rd</sup> Cir. 1984), the Court stated:

"Without a complete record from which a transcript for appeal may be prepared, a defendant's right of appellate review is rendered meaningless. A slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal would not cause us to reverse defendant's conviction. But where a defendant's attorney is unable, through no fault of his own, to review a substantial portion of the trial record for errors so that he may properly perform his duty as appellate counsel, the interest of justice requires that a defendant be afforded a new, fully recorded trial. *State v. Ford*, 338 So.2d 107 (La. 1976); *State v. Jones*, 351 So.2d 1194 (La. 1977)."

Moving on: La.C.Cr.P. art. 843, and its official revision comments to the Article indicate that the legislature's intent here was to effectuate the constitutional guarantee of an appeal in felony cases based upon a review of the full record in the proceedings. La.Const. Art. 1, § 19 (1974) provides:

"No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based."

The due process clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as a matter of right.

The United States Fifth Circuit Court of Appeals has been especially vigilant in requiring a reversal even if no particular prejudice has been alleged, when defendant's counsel on appeal is a different person from trial counsel and a portion of the transcript is unavailable. *United States v. Upshaw*, 448 F.2d 1218 (5<sup>th</sup> Cir. 1971) cert. *Denied*, 405 U.S. 934, 92 S.Ct. 970, 30 L. Ed.2d 810; *United States v. Bonfascio*, 443 F.2d 914 (5<sup>th</sup> Cir. 1971); *United States v. Attilus*, 425 F.2d 816 (5<sup>th</sup> Cir. 1970). In the *United States v. Attilus*, supra, the Fifth Circuit reversed a conviction where counsel on Appeal was not counsel at trial, and no trial transcript was available stating:

“Through no fault of the defendant a transcript of the trial proceedings is no longer available. Under these circumstances this court has no choice but to reverse the conviction. The supreme court has made it clear beyond question that a criminal defendant has a right to a complete transcript of the trial proceedings. Particular where, as here counsel on appeal was not counsel at trial.” *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1963); 425 F.2d at 816.

The Louisiana Supreme Court has reversed convictions because of infirmities in the record available to the court for review. In *State v. Bizette*, 334 So.2d 392 (La.1976), the court remanded for a new trial when the recording equipment used at the trial malfunctioned, and they were unable to adequately review the trial court's denial of defendant's motion for acquittal. See also, *Ross v. Moffatt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

Likewise, in *State v. Rooney*, 187 La. 256, 257, 174 So. 348, the conviction was reversed due to an insufficient record. See also, *United States v. Benton*, 700 F.2d 154 (1983), a Fifth Circuit Case, where the court held that: "when a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the trial records even absent a specific showing of prejudice or error, is sufficient to mandate reversal." In the present case, appellant argues that his appeal counsel can not provide a meaningful effective representation without first obtaining a complete transcript in this case. Counsel can not possibly know if errors existed in the missing portions of the records.

Pressing this argument, failure to do so amounts to ineffective assistance of counsel. Additionally, counsel should obtain a copy of the entire trial record, any and all pre-trial proceedings. First Mr. King showed on October 22, 2022, Mr. King filed a pro se motion for and extension of time to file pro se supplemental brief and motion for missing portions of the trial transcript and records (*See Exhibit "A"*).

On December 16, 2022, an order to electronically transmit a copy of the supplemental record to Calvin King was ordered. On December 19, 2022, Mr. King received a box of his records for the second time, and still the following transcripts are missing. On October 27, 2021, the state called four witnesses to

testify. These four witnesses were, Dana Troxclair, Christopher Bassil, Kevin Burns, and Frank Renaudin testimonies are missing from the transcripts.

On October 28, 2021, state called four more witnesses to testify. These witnesses are Sgt. Troy Bradberry, Timothy Scanlan, Deputy Todd Rivere, and key witness Maria Abreu. This whole trial trial was not transcribed and Mr. King has not received these transcripts. On October 29, 2021, the defense presented expert witness Keith Labrano. The whole testimony of this expert witness is missing out of the transcripts. To proper rule on appellant *Jackson v. Virginia*,<sup>1</sup> claim before this Honorable Court of Appeal this Court must review all of the testimony of witnesses who testified at trial to issue fair ruling on the claim present herein.

This clearly shows that counsel did not have a complete transcript and could not possibly know if any errors existed in the record. *State v. Alford*, 765 so.2d 1120 (La. App. 4<sup>th</sup> Cir. 2000). The standards for evaluating the effective assistance of counsel at trial are far less workable when applied to the appellate process. Indeed in *Evitts v. Lucey*, 469 U.S. 387 (1985), the Supreme Court expressly recognized that it need not decide the content of appropriate standards for judging claims for ineffective assistance of counsel on appeal in light of *Strickland v. Washington*, 466 U.S. at 392. It was virtually conceded in *Evitts* that appellate counsel was ineffective. The issue crystallized as to whether that entitled the

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<sup>1</sup> 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed.2d 560 (1979)

defendant to a new appeal. The court concluded that it did.

Nonetheless, a careful reading of *Evitts* strongly suggest that *Strickland* applies only to the standards for evaluating ineffective assistance of counsel at trial. Although a defendant making this complaint must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different, the same standard should not be required where he complains that the merits of his claims were not considered due to ineffective assistance of counsel. The Fourteenth Amendment requires the states to ensure through due process of law. Fundamental to due process is the effective safeguarding of the defendant's federal constitutional rights. Some of the defendant's rights may be waived by his counsel, but fundamental guarantees may be given up only with the intelligent consent of the defendant himself.

Therefore, the convictions and sentences of appellant should be set aside and this case remanded to the trial court for further proceedings.

#### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 2.

**APPELLANT CONTENDS THAT THE INDICTMENT WAS NOT BROUGHT INTO OPEN COURT BY AN JEFFERSON PARISH GRAND JURY WHICH IS A VIOLATION OF APPELLANT'S SIXTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND LSA-CONST, ART. 1 § 2 AND ART, 1 § 13 (1974), AND ALL RELEVANT STATUTES THEREOF.**

Appellant argues that the indictment for second degree murder of Javier Sanchez and armed robbery of Maria Abreu was not brought in open court by a

Jefferson Parish grand jury. In the present case there are no minute entry of February 10, 2011 or a transcript of the proceedings to show that both the minute clerk of court, the Foreperson of the grand jury, and the District Attorney, was present, in open Court.

The minutes further does not reveal the Presiding Judge, and the official Court Reporter for the illegal findings of the grand jury indictment to be filed. What is more, however, the minute entry does not show that the other Grand Jury members were there attending the *return* or *presentment* or the Jefferson Parish, Clerk of Court minutes does not reflect "at least nine grand jurors constitute a quorum, and nine grand jurors concurred a (vote) to find an indictment on Calvin King.<sup>1</sup> The grand jury vote is not recorded." The minutes does not reflect the indictment was proper returned into open court. The Clerk of Court records provided to Petitioner does not show equal protection of the law of least nine grand jurors who voted to find an indictment.

Finally, the minute Clerk, failed in there duty twice. First he or she did not poll the grand jurors to learn if they established a quorum for a true bill of indictment for Second Degree Murder or Armed Robbery on Calvin King. And, second, he or she did not sign their name on the line were it say the word's Minute Clerk. Third, there is no return of a true bill show that the foreperson did

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<sup>1</sup> *Office of the Attorney General, State v. Louisiana, Opinion No. 80-465, (April 8, 1980)*

not write down as to what was the charge returned on appellant Calvin King this day and further the true bill does not show the foreperson put the date of that return on record. *State v. Johnson*, 129 So. 2d 684 (La. 1930). Likewise, in *State v. Pitts*, 3 So. 118 (La. 1887), the Supreme Court of Louisiana Held:

Where the record exhibits no showing whatever of the return and presentation of the indictment by the grand jury into open court, the defect is fatal.

The Court went on to conclude: An assignment of errors is filed, one ground of which is absolutely fatal, viz., that the record does not show the finding of the indictment, nor the return and presentation of the indictment by the grand jury in open court. The first entry on the minutes of the court begins: In this case, the accused, being present in court, was arraigned, pleaded not guilty." Bishop say: "when the grand jury is the body to take the first step in the court against the prisoner, it presents to the court a written accusation of crime, and this presentation after being duly returned into court and made part of the record is called an indictment." This illustrates the importance of the presentation into open court as essential to the very existence of an indictment in its consummated force and effect. We have heretofore held that entire absence from the record of any showing of such return into open Court is fatal. *State v. Johnson*, 129 So. 684 (La. 1930); *State v. Willis*, 84 So. 514 (La. 1920), and *State v. Starr*, 26 So. 998 (La. 1900).

However, it remains, if the minutes fail to reflect that the indictment was returned in open court, the remedy is to remand the case to correct the minutes contradictorily with the accused. In *State v. Williams*, 828 So. 2d 188 (La. App. 2<sup>nd</sup> (7/18/02), the Court stated: "the indictment must be endorsed "a true bill" signed by the foreman and returned into the district court. *State v. Trimble*, 589 So. 2d 1164 (La. App. 4<sup>th</sup> Cir. 1991); *State v. Van Dyke*, 856 So. 2d 197 (La. App. 3<sup>rd</sup> Cir. 10/1/03) and *State v. Lee*, 868 So. 2d 265 (La. App. 2<sup>nd</sup> Cir. 3/3/04).

Remember, the court in *Pitts*, held that: "when the grand jury is the body to take the first step in the court against the prisoner, it presents to the court a written accusation of crime, and this presentation after being duly returned into court and made part of the record is called an indictment." In the instant case, a contradictory hearing is needed, because the factual basis for the allegations made in this supplemental brief appear from the record, confirming the grand jury did not make a legal finding as to second degree murder and armed robbery. Therefore, it is now necessary for the State of Louisiana to provided record evidence to the contrary.

*See also* La. C.Cr.P., arts. 383, 435, and 444. At last, from this position, it has become increasingly clear that a thoroughgoing reading of appellant's original appeal brief and supplemental appeal brief evinces that he has made a substantial showing that the indictment was not brought in open court. Let there be no

mistake, this is a violation of appellant right to due process, equal protection and all relevant statutes thereof and for these reasons along his convictions and sentences must set aside.

#### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 3.

APPELLANT CALVIN KING CONTENDS THAT THE TRIAL JUDGE PROVIDED AN UNCONSTITUTIONAL JURY INSTRUCTION ON THE LAW OF PRINCIPLES AS TO SECOND DEGREE MURDER AND ARMED ROBBERY<sup>1</sup>

Appellant Calvin King show: as a starting proposition, the errors above were compounded with the trial judge's defective principal charge, which was read to the jury, absent of an objection by the defense.

Petitioner is asserting challenge to the statute application as applied unconstitutional on the law of principals as to his case. At no point did the trial judge explain that Mr. King, personally had to have the specific intent to kill to be found guilty of second degree murder or inflict great bodily harm.

A similar challenged instruction was in *State v. Holmes*, the trial judge carefully explained the law of principals, in order to convict for [second] degree murder the jury must find that the defendant had a specific intent to kill. *Id.*, 388 So.2d 725 (La. 1980).<sup>2</sup> In King case, the trial judge denied even charging the jury

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1 In order to pass muster under the state and federal equal protection clauses, a law must assure "that all persons similarly circumstanced shall be treated alike." *Clark v. Singer*, 250 Ga. 470, 298 S.E. 2d 484, 486 (1983) (quoting *Reed v. Reed*, 404 U.S. 71, 76, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971)).

2 *State v. West*, 568 So.2d 1019 (La. 1990).

as to specific intent to the law of principals, that in order to convict Mr. Calvin King for second degree murder or armed robbery the jury must find that he had specific intent to kill. *Flowers v. Blackburn*, 779 F.2d 1115, (5th Cir. 1986).

In the present case, the trial judge's defective principal charge on the principals as follows:

All person concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime are principals in that crime. However, a principal may be convicted of a higher or lower degree of the crime charged, depending upon the mental element proven at trial.  
(*See Trial Judge Jury Charge*).

Moving on: In *State v. Green*, 493 So. 2d 588 (La. 1986), on appeal the defendant "challenged the statute as unconstitutional" for failing to require such an instruction an error that was not urged at trial, but can be raised on appeal by an inspection of the pleadings. By framing the issue that way, the defendant avoided "the apparent bar raised" by the failure to object to the lack of an instruction. The Louisiana Supreme Court found the statute constitutional on its face. The Court went on to find that the failure of the trial judge to give a proper instruction was reversible error, despite the lack of a contemporaneous objection. The Court found the error fell below the minimum standards required by due process.

On the other hand, the case of *State v. Taylor*, 683 So.2d 1309, 1316 (La. App 3<sup>rd</sup> Cir. 1996) was reversed because the district court did not clearly convey to

the jury that attempted manslaughter requires a finding that defendant possessed a specific intent to kill. The Court reversed despite defense counsel not contemporaneously objecting to the erroneous and clearly confusing nature of the jury charge. Justice Sullivan cited their prior decision in *State v. Pyke*, 640 So.2d 460 (La. App. 3rd Cir. 1994) noting: "defendant's failure to contemporaneously object to the erroneous definition instruction [as in the case of Calvin King] did not preclude him from raising it the first time on appeal.

In sum, the trial judge's instruction to the jury was improper as to the law of principals as to second degree murder, armed robbery and Mr. Calvin King, convictions and sentences shall be reversed for these reasons.

#### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 4.

APPELLANT CONTENDS THAT BASED ON THE LACK OF EVIDENCE AS TO ALL ESSENTIAL ELEMENT OF THE OFFENSES AND DOUBLE JEOPARDY PROHIBIT RETRIAL ON THE SAME OFFENSES VIOLATES CALVIN KING CONSTITUTIONAL RIGHTS<sup>1</sup>

#### Double Jeopardy-Collateral Estoppel

Mr. Calvin King presents the doctrine of collateral estoppel was set forth by the United States Supreme Court in *Ashe v. Swenson*.<sup>2</sup> It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

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1 Louisiana Constitution Art. 1 § 15

2 *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed 2d 469 (1970)

Appellant asserts that double jeopardy clause precludes a second trial once the trial judge or reviewing Court has found the evidence legally insufficient to support the guilty verdict. See *Hudson v. State of Louisiana*, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30(1981). Even if two offenses are sufficiently different to avoid a double jeopardy prohibition under the standard tests the second prosecution could be barred if it required re-litigation of factual issues resolved in the first case. In *Swenson*, the accused was acquitted of robbing a specific person at a poker game which acquittal established he was not present at the time. The prosecution was estoppel from trying him on charges of robbing anyone else at the poker game.

Mr. King was denied his due process and equal protection right when the State's evidence was insufficient and the trial judge allowed a re-trial on the same witnesses with the same inconsistencies testimony and circumstantial evidence presented that failed to prove both offenses charged beyond a reasonable doubt in the first trial. Appellant alleges that collateral estoppel does apply to this case before this Honorable Court of Appeal for review. Mr. Calvin King, convictions and sentences shall be reversed and he should be released for these reasons.

#### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 5.

#### **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST VERDICT JUDGMENT OF ACQUITTAL**

Appellant presents: in a motion hearing on appellant motion for post-

judgment verdict of acquittal the trial judge denied the motion. Appellant strongly disagrees, with the Honorable trial judge's ruling. Appellant asserts that the judge is merely circumvent his motion, substituting them with an unattainable process, when in fact appellant has made a substantial showing. A clear reading of the ruling show the judge ignored the applicable law, in regard to appellant assignment of errors. In addition, the judge ignored the argument of appellant motion for trial. But that is not all, the judge rambled on claiming that the motion is denied.

"At the trial of this case (and in prior trials and sworn deposition testimony), Maria Abreu testified that she did not know if Javier Sanchez was taken against his will from his residence. She further testified that he could have left the residence voluntarily. Given this testimony, no reasonable person could or should believe that the State proved beyond a reasonable doubt that Mr. Sanchez was forcibly seized from his residences. Given that the evidence of the killing was 100% circumstantial, every reasonable hypothesis of innocence must be excluded.

Appellant submit that the record sufficiently supports appellant's allegation of substantial error; therefore, this Honorable Court should find, that in the interest of justice, appellant Motions should be reviewed on the merits. Additionally, motions seeks relief and he has stated the grounds, specifying, with reasonable particularity the factual basis for such relief. *State v. Mallette*, 164 So. 3d 814 (La.

4/2/15). The trial judge erred in denying appellant's motion for post-judgment verdict of acquittal based on the evidence presented and for these reasons his convictions and sentences should be reversed.

Therefore, the conviction and sentence of appellant should be set aside and this case remanded to the trial court for further proceedings.

#### SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 6.

##### **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO QUASH THE INDICTMENT BASED ON A SECOND TRIAL VIOLATES HIS FIFTH AMENDMENT RIGHTS**

Appellant submit that the trial judge denied his motion to quash the bill of indictment filed against him by the State of Louisiana on the basis that a second trial will place the defendant in doubt jeopardy in violation of his rights under the Fifth Amendment to the United States Constitution. (*See Motion*) The question is whether the indictment charges a valid offense. *State v. Legendre*, 362 So. 2d 570, 571(La. 1978). Pursuant to La. C.Cr. P., art. 532 (6), a motion to quash may be based on the ground that trial for the offense charged would constitute doubt jeopardy, as is the case here. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. U. S. Const. Amend. V. The U.S. Supreme Court has held that the Fifth Amendment guarantee against doubt jeopardy is enforceable against the states through the Fourteenth Amendment. See *Benton v. Maryland*, 395 U.S. 784, 787(1969).

That guarantee is said to consist of three separate protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. Indeed, the Louisiana State Constitution also affords such protection. La. Const. art. 1, § 15.

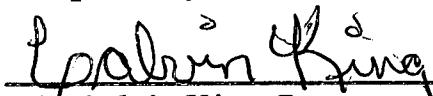
Truly, appellant motion to quash the indictment should have been granted, because to re-try him under these circumstances is to place him in peril of life and limb in violation of the Fifth Amendment. Mr. Calvin King should be released from custody.

#### CONCLUSION

Considering the foregoing, Petitioner respectfully prays that this Honorable United States Supreme Court grant his Petition for a Writ of Certiorari for reasons stated, and remand this case back to the Louisiana Supreme Court for further proceedings. Petitioner further request that the Court grant such further relief as may be deemed just and proper.

Executed on this 11<sup>th</sup> day of April 2024.

Respectfully submitted,

  
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