In the

Supreme Court of the United States

TRACY LEE HUDSON,	)	
	)	
PETITIONER,	)	
	)	
V.	)	No. 79-5688
	)	
STATE OF LOUISIANA,	)	
	)	
RESPONDENT.	)	

Washington, D.C.
December 1, 1980

Pages 1 through 35

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

TRACY LEE HUDSON,

Petitioner,

v. No. 79-5688

STATE OF LOUISIANA,

Respondent.

Washington, D. C.

Monday, December 1, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:01 o'clock p.m.

APPEARANCES:

RICHARD O. BURST, SR., ESQ., 209 E. Oklahoma, P.O. Box 578, Guthrie, Oklahoma 73044; on behalf of the Petitioner.

JAMES M. BULLERS, Assistant District Attorney, 26th Judicial District, State of Louisiana; Bossier Parish Courthouse, Benton, Louisiana 71006; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Hudson v. Louisiana. Mr. Burst.

MR. BURST: Yes, Your Honor.

ORAL ARGUMENT OF RICHARD O. BURST, SR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. BURST: Mr. Chief Justice, and may it please the Court:

The case that I present to the Court today, I think, is limited in issue and scope, and briefly stated, simply involves where a trial court in Louisiana after hearing the evidence, sustained a motion for a new trial on the basis of insufficient evidence and the defendant was retried. Subsequently, before appeal became final, this Court rendered a decision in Burks v. United States. The case was taken to the Louisiana Supreme Court on a writ, first by writ of habeas corpus to the district court, and then by writ of habeas corpus to the Louisiana Supreme Court on certiorari.

The Supreme Court issued an opinion denying our relief after accepting cert. and that's what brings us to this Court. We take issue with the ruling of the Supreme Court of Louisiana basically on two areas where I feel that they have based their opinion on two faulty premises.

QUESTION: Did that court have Burks before it when it decided the case?

MR. BURST: It did when it decided the writ of certiorari on the specific issue. The issue before them was limited, as it is now, precisely and only to the double jeopardy question.

QUESTION: Justice Dennis begins his dissent with a citation to Burks, does he not?

MR. BURST: That is correct. And I argued Burks completely. Now, Jackson had not been issued, but Burks was before them.

QUESTION: Well, we take our State procedure and state procedural remedies as we find them in this Court. And it would appear to me that from Justice Tate's opinion and from the majority opinion, they treat the motion that was made as a 13th-juror type of motion, which Burks left open.

MR. BURST: They do treat it, but they treat it on the same basis as this Court discussed in Jackson v. Virginia. In other words, they applied it on a no evidence versus insufficient evidence. In fact, in the first page, the first two pages of the opinion of the Supreme Court of Louisiana, they set forth the issue of Burks as rendered by the Chief Justice of this Court and then they set forth the issue before them and they use exactly the same language, only they rule contrary to what this Court did. I can point that out. It's in the Appendix, 49a. Justice Blanche quoted it in the Supreme Court of Louisiana. In the first paragraph he uses the term,

"solely for lack of sufficient evidence to sustain the jury's verdict."

Then, on page 48, in reference to discussing Burks, he states that this Court decided and reversed on the issue of solely for lack of sufficient evidence to sustain the jury's verdict.

QUESTION: Well, then you would have to disavow Justice Tate's concurring opinion, wouldn't you?

MR. BURST: Yes, I would. I further -- I feel that also in Justice Tate's concurring opinion that he simply states facts that were not mentioned by the trial judge in his ruling. I think the trial judge's ruling is concise and if there is any ambiguity at all in the trial judge's ruling, it would be by virtue of the precise language he used where he said that "I viewed the same evidence, that in the present case I heard the same evidence the jury did. I am convinced that there was no evidence, certainly not evidence beyond a reasonable doubt to sustain the verdict of homicide committed by the defendant on this particular victim" and the only ambiguity there is whether he was applying a no-evidence rule or insufficient evidence beyond a reasonable doubt. And I think that that's really a difference without a distinction, that he --

QUESTION: Well, wasn't he saying in the alternative I see no evidence whatever, but if I'm wrong on that then my fallback position is, there was not evidence beyond a

reasonable doubt?

MR. BURST: That's correct. And I feel --

QUESTION: Mr. Burst, isn't that even ambiguous, because can't one read that to mean, either not sufficient evidence from which a jury could have no reasonable doubt, on the basis of which a jury could find guilt beyond a reasonable doubt, or not sufficient evidence to convince me, the judge, beyond a reasonable doubt?

MR. BURST: I think that --

QUESTION: I mean, you could read it either way, couldn't you?

MR. BURST: I have to just take the words as they're spoken. I was not --

QUESTION: Well, which way does it mean? Does it mean he doesn't think there's enough evidence to convince him beyond a reasonable doubt, or not enough to have submitted to the jury, and if he means the latter why did he submit it to the jury?

MR. BURST: Well, I have two answers to that question. Louisiana laws that existed then did not permit a trial judge to withhold the submission to the jury. In 1975, and prior to that time -- and I have both sections cited in my brief -- prior to '75 there was an ability of the trial judge to, in effect, sustain a motion for directed verdict.

QUESTION: Did they have authority to enter a

judgment notwithstanding verdict at that time?

MR. BURST: In '75. Not at the time of this trial they did not.

QUESTION: Well, at the time of this trial, couldn't the judge at the end of the trial have said what he said to himself here, and therefore I am entering judgment for the defendant of acquittal notwithstanding the verdict? Could he do that at that time?

MR. BURST: No, sir. The first and only vehicle that a defendant has in Louisiana to raise the issue of insufficient evidence is a motion for new trial, and that's it. And that was the law at the time this was tried, that is subsequent --

QUESTION: But Justice Tate had been a member of that Court for many years. Wouldn't you expect him to have known that if that were in fact the case?

MR. BURST: I'm not sure I understand your question.

QUESTION: Well, I mean, it seems to me he is saying that what the trial judge did is to say that the question the trial judge answered was the one posed by Justice Stevens or by the Chief Justice. But there was not enough evidence here to satisfy me, had I been sitting as a juror, beyond a reasonable doubt?

MR. BURST: Well, that would be the second part of my answer to Justice Stevens. And that would be that even if

that's what he was saying, that's what the law required him to do, and specifically, precisely that. In other words, if at that point in time, if in his opinion there was insufficient evidence, then he was to so hold. And by so holding he has placed the case in a position where it cannot be retried under our Constitution.

QUESTION: Well, then you're saying, I take it, that a statute which required a judge to submit this question to the jury when there was in fact no evidence, would in itself be unconstitutional. Is that your position?

MR. BURST: No, sir. It would not be, because I feel that there is no constitutional guarantee of a motion for directed verdict, or even for an appeal for that matter. I feel that as long as all people are treated alike, it makes no difference. All I'm saying is that in this case, in Louisiana law, there is no motion for directed verdict available to the defendant in a jury trial and the first time, by their law, that he can raise the issue of insufficient evidence is on motion for new trial. I don't think that that in and of itself is unconstitutional, but I do feel that in this case that the ruling of the trial judge could not have been clearer. Indeed, the entire ruling which is transcribed for the Court, it sets the basis for his ruling, what he observed, and the factual basis.

QUESTION: You have to treat his statement, then,

as Mr. Justice Stevens pointed out, as a statement that no reasonable juror could reasonably find guilt on the evidence, don't you?

MR. BURST: Yes, sir. I do. And I feel that-- when I say the double, I say that, doubly, that what I feel is the faulty premises that the Louisiana court bases its decision on, is that is one, is that certainly one cannot read the trial judge's statement, his opinion, and it is clear what he is ruling. At the very outside he is saying there was insufficient evidence beyond a reasonable doubt to convict this man. That would be taking his statement most favorably to the State's position. I say he still, even with that finding, that there is no retrial, or should be none.

QUESTION: But he granted a new trial.

MR. BURST: Yes, sir, and the existing law, at that time, in even the State I'm from, that was the law. If they -- in effect, what they were saying was, if you move for a new trial, you waive the argument to your constitutional double jeopardy. But I think that is particularly innocuous here, because under Louisiana law it was the only vehicle he had. You know, if you're requiring a man, he can't waive that issue until a motion for a new trial, and then at the same time, you're saying, but if you do raise it you waive your double jeopardy argument. And that's why I think that this particular statutory system is possibly unconstitutional.

If it were applied in a meaning where you said, because I asked for a new trial, I do waive my right to raise double jeopardy, then I think it's unconstitutional, as requiring him to choose between two constitutional safeguards.

QUESTION: Well, in a motion for a new trial for error in the admission or rejection of evidence, is there a waiver of any double jeopardy claimed there?

MR. BURST: No, sir, because double jeopardy does, as this Court clearly set out in Burks, that that is not a jeopardy question, where it's an error of law, and where it's simply both sides need a different, or a new chance to put on and correct that error. But this Court has, I think, clearly said in Burks that where there's a failure to muster sufficient evidence the state doesn't get a second chance. And in this case is what they got, and indeed they came forth at the second trial with an eyewitness, ten months later.

The second position, I think, that is -- again, I will use this term "faulty premise" that the Louisiana Supreme Court is using, is simply that they are attempting to apply the no evidence rule on both ends. On one end they're saying the trial judge says, merely insufficient evidence. And I would say, and my argument is that that is, when you say it's insufficient beyond a reasonable doubt, you've said it all. But then, on the other hand, to try to apply the no evidence rule under existing Louisiana procedure, and say, because we

have a dichotomy between no evidence and insufficient evidence that we are not going to apply, in essence, the Burks decision of the standard of reasonable doubt, as In Re: Winship. I think there, from both ends, that their premise is faulty. And I would assert that as recently as 1980, May of 1980, the court of Louisiana, the Supreme Court of Louisiana, has maintained their position, and that is, they have said that in the case of -- if I may have a drink of water. In May of 1980, in the State v. Custard -- it's the state court of Louisiana, they stated then that "This court has yet fully to embrace Jackson v. Virginia." And that's where this Court, I think, laid to rest the dichotomy between the no evidence rule and the application of the rule of insufficient evidence beyond a reasonable doubt, and adopted, and indeed said that even on federal, and I recognize that Jackson is a very limited opinion, and it's limited to habeas corpus review by federal district judges.

Now, I think this case that is now before this Court here is the next logical sequence, or logical step, in applying that standard in requiring the states through the Fourteenth and the Fifth Amendments to adhere to that standard. And the footnotes in this case by the Louisiana Supreme Court fully state that they haven't made up their mind whether or not they're going to follow that standard. And I think that's what we're asking this Court to do is to give direction

to the Supreme Court of Louisiana and advise them that they will have to embrace the reasonable doubt standard.

QUESTION: Mr. Burst, what if the trial judge had explicitly relied on Subsection, Subparagraph 5 of Article 851 in granting the new trial? You would not then claim that there was denial of -- ?

MR. BURST: That is accurate; yes, sir. I would not claim double jeopardy. Let me get to my section here and make --

QUESTION: But you do disavow the concurring opinion in the rehearing?

MR. BURST: It's totally in the brief. I think the wording of the trial judge could not have been clearer on what he was deciding it under.

QUESTION: Well, as Justice Stevens suggests, that his statement can be understood to mean that he as a so-called 13th juror was not convinced beyond a reasonable doubt.

MR. BURST: Well, the -- at page 8a of the Appendix, I believe it is, he starts out, the trial judge fixes the issue himself. He says, "I believe I'm paraphrasing those grounds." However, "The argument was. . . "

QUESTION: Where are you reading now?

MR. BURST: Oh, I'm sorry. I'm on 8a of the Appendix.

QUESTION: Okay.

MR. BURST: And this is where the trial judge is discussing the motion for a new trial. And about midway down, it begins, "The argument was, however, that there was no evidence presented that would have justified the jury in finding the defendant guilty as charged because there was no evidence beyond a reasonable doubt before the jury of the essential elements to prove the essential elements of the crime."

So he fixed the issue he was determining it on. His discussion thereafter discusses that basis and his final statement is precisely, again, on it. And I -- perhaps I'm missing the direction of questioning, but I really feel that whether he's sitting as a 13th juror or what, at a point in time where a reviewing court, whether it be the trial judge or an appellate court, cites that the evidence was insufficient beyond a reasonable doubt and at the point in time that becomes final, I believe that the man is acquitted.

QUESTION: Well, if the trial judge didn't do it here, certainly the Supreme Court of Louisiana didn't do it here.

MR. BURST: The Supreme Court of Louisiana takes the position that under their laws that exist, they cannot review a decision unless there's a finding of no evidence at all.

QUESTION: Well, so you have to rely on the trial judge's conclusion to support your hypothesis that when a

judge declares that no reasonable person could have found guilt beyond a reasonable doubt, that is the end of the case as far as double jeopardy, because certainly it is not the position of the Supreme Court of Louisiana.

MR. BURST: At this point, that is accurate. But if this Court were to require the Supreme Court of Louisiana to adhere to the standard of not guilty or of insufficient evidence beyond a reasonable doubt, then it's only by case law that they have interpreted into their cases the standard of no evidence.

QUESTION: Well, that's true of 49 other states too.

MR. BURST: Yes, sir. Well, in Oklahoma -- that might be accurate, I don't know. I know, in Oklahoma, we never use the new evidence v. the insufficient evidence split. In other words, it's strictly and always has been whether or not the evidence was sufficient beyond a reasonable doubt. But --

QUESTION: Mr. Burst, you did not try this case? Did you try this case?

MR. BURST: No, sir, I did not. In fact, I was not retained until after, or brought into the case until after the appeal.

QUESTION: What if this truly were -- and I think you have just told us you don't think there's any difference if it's a 13th juror basis on which a new trial was granted,

or a basis of a finding that there was insufficient evidence to convince any reasonable triers of fact beyond a reasonable doubt. But I thought -- isn't that inconsistent with your answer to my question when I asked you if the court had, the trial court had explicitly relied on Subparagraph 5?

MR. BURST: Perhaps I am confused with this Subparagraph 5 --

QUESTION: That you would not be making this claim? Subparagraph 5 of Article 851.

MR. BURST: That's correct. If he had strictly relied on Subparagraph 5, then I would say I would not be before this Court.

QUESTION: In other words, one can imagine a state -- I doubt that there is one, but there may be -- which said that anybody convicted of a criminal offense in a trial court is entitled to a new trial as his right, just to entitle them to two bites at the apple. And so a person is convicted and he makes his motion for a new trial and he's granted a new trial. There's no double jeopardy attached to that, is there?

MR. BURST: I would say that that would, one, that they'd have to determine, and I'm not --

QUESTION: He simply relies on that state law that entitles him to a second trial if he's convicted at the first trial.

MR. BURST: No double jeopardy?

QUESTION: None at all.

MR. BURST: That's correct.

QUESTION: And wouldn't the same thing be true if the new trial were granted under Subparagraph 5?

MR. BURST: I thought that was the question.

QUESTION: Yes, it was. And I thought you answered, yes, it would be.

MR. BURST: In Subparagraph 5, the court made a finding, "It is of the opinion the ends of justice would be better served by granting a new trial although defendant may be entitled to a new trial as a matter of. . ."

QUESTION: "May not be entitled to a new trial."

MR. BURST: "May not be." Then I would not be before this Court.

QUESTION: Right. Or, if a state -- and some states do do this -- empower the trial judge to grant a new trial, if he, the trial judge, as a juror sitting in the box was not convinced beyond a reasonable doubt of the defendant's guilt, regardless of any finding as to what 12 other reasonable men might have been convinced of.

MR. BURST: I would have to look at that specific statute, Your Honor. I feel that if it were worded similar to this, that double jeopardy would not be an issue unless it were used as a subterfuge. Then I think it could still be raised.

QUESTION: Well, the defendant would hardly use it as a subterfuge.

MR. BURST: That's correct. If the defendant moved on, if he specifically said, I want a new trial on number five, then yes, I totally agree with you.

QUESTION: Unless, in fact, there were no evidence in the record of guilt. Say the judge just put it on Section 5, but then the defendant argued, well, he granted it for that reason, but they didn't offer any evidence of guilt at all, and on review of the record you concluded that was right. Could there be a new trial?

MR. BURST: If the trial judge concluded that there was no evidence at all --

QUESTION: He doesn't conclude anything. The trial judge says, I'm going to grant a Section 5 new trial; in the interest of justice, I wasn't persuaded. But supposing a federal judge looking at the case later or the reviewing court finds there's absolutely no evidence of guilt in the record at all; they didn't even put a witness on the stand. Could he be retried? Is the test what the record shows or what the judge says?

MR. BURST: I think the test often is what the finding, the ultimate finding of the court, is.

QUESTION: You mean, if the judge says, it's a new trial under Section 5 in the interests of justice, there could

be a new trial, even if the state put in no evidence of guilt at all, didn't put a single witness on the stand?

MR. BURST: No, that's what I would -- that was my point in answering. If the Rule 5 grant were, in my words, a subterfuge, or actually what the motion was that there was insufficient evidence, then I don't think there could be a new trial.

QUESTION: So the test is what the record shows, not what the judge says?

QUESTION: And it's up to this Court to independently examine the record, is that it?

MR. BURST: No, I didn't say that.

QUESTION: Well, what did you say?

QUESTION: You can't have it both ways.

MR. BURST: No, I don't ask for it both ways. I don't ask; this is not my role.

QUESTION: Well, what do you say? Is it what the judge says or what the record says?

MR. BURST: What I say is, when at some point, when the judge of whatever system it is, in this case the State of Louisiana, when the judge who sits on the issue makes his finding and that finding becomes final through either appeal or lack thereof, that that's what we have here at this Court and that this Court is not to review the record.

QUESTION: No, but what if his finding is, I'm

granting this motion under Section 5 in the interest of justice. Is there always permitted to be a new trial? You see, the other side of the coin is, here he used the language you like. There's no evidence. But Justice Tate said, no, but I've looked at the record and there is evidence in the record that was sufficient to go to the jury. Do you agree with Justice Tate when he says that? He doesn't turn on what the judge says. He says there was enough evidence in the record to be submitted to the jury.

MR. BURST: First of all, I would take exception, and I do take exception, to Justice Tate's going into the record on an issue of law.

QUESTION: Well, I understand. Your opinion is, we just look at what the trial judge says and we don't pay any attention to the record.

MR. BURST: It's final.

QUESTION: But you conceded that the judge's comment was somewhat ambiguous, did you not?

MR. BURST: Only to the point of whether or not he was finding no evidence, or on insufficient evidence beyond a reasonable doubt.

QUESTION: Let me pursue that with one more question. Are you telling us that whenever a judge, a trial judge -- forget the old Louisiana statute -- any trial judge, who disagrees with the jury's verdict of guilt because as a juror he

would have voted the other way, then, that gives rise to a double jeopardy problem?

MR. BURST: Yes, sir.

QUESTION: Just because he disagrees?

MR. BURST: If he is willing to make the ruling under the then law -- as he did in this case, and that is subject to appeal; you know, it couldn't in this case but in future cases it could be -- I realize that Louisiana has a problem right now, if this Court follows my ruling, but that's Louisiana's problem if their structure is not in line with the U.S. constitutional requirements.

QUESTION: Well, that's not what Burks said, is it?

MR. BURST: No, sir. Burks was not a state case. I recognize that.

QUESTION: Presumably the double jeopardy requirements since Benton v. Maryland have been the same for purposes of state and federal courts.

MR. BURST: Not in Louisiana, I don't think, because -- I don't know that. Again, Louisiana's been using the no evidence versus insufficient evidence. They've been saying, unless the trial judge will say there's no evidence of either the crime or an element of the crime, then we don't review it. If there is -- however, if it's merely insufficient evidence, then they will not review it. Only if there's no evidence. And that's where we -- you know, the problem of review in Louisiana

law lies --

QUESTION: But [illegible] ing only one question, namely, that the evidence does not support the verdict with evidence beyond a reasonable doubt. Then, what is the test? If there's a motion for a new trial on that ground, what's the test that the trial judge should apply?

MR. BURST: I think he should apply the test of whether or not that any trier of fact could find --

QUESTION: Could reasonably find?

MR. BURST: Could reasonably find.

QUESTION: In other words, that's Justice Tate's -- it would follow Justice Tate's theory?

MR. BURST: I don't read that into Justice Tate's theory. I think what Justice Tate did was, he did not like what the trial judge said. He inserted his opinion. Let's point out that the Louisiana Supreme Court denied the [illegible] appeal from the trial judge is sustaining of the motion for a new trial. In other words, the trial judge made his ruling and the State took writs and the writs were denied. And they were denied because of this Louisiana dichotomy. Then, two years later, Tate comes behind -- or Justice Tate goes behind that and says he examined the records and he's speaking for himself only, not the majority of the court. He says that we would have affirmed, but he's speaking for himself only.

And he's going behind the record which, I'm told time and time again I can't do, when I come on appeal. And I do take issue with that in the concurrent opinion; yes, sir.

QUESTION: Well, but his opinion is not inconsistent with the action of the Supreme Court the first time around in refusing to reverse the order granting a new trial, because his theory of the order granting a new trial was that there was enough evidence to go to the jury, but that the interests of justice made it appropriate to grant a new trial. There's nothing inconsistent with his view in affirming the -- in other words, he says the order was right.

MR. BURST: It's inconsistent in that the standard applied is identical to the standard this Court has laid down in In Re: Winship, whereas the standard where, which the State of Louisiana is saying was merely insufficient evidence, is identical to the standard that this Court has laid down in In Re: Winship and recognized in Burks and later in Jackson v. Virginia.

And, you know, if they can say the same words and say they mean something else, then I would concur with the Court, with you. But they're not. I mean, they're using the same words, and particularly the majority of the court, they're using the exact same words as did the Chief Justice in saying they mean different things. And I can't agree with that as a matter of law. That's semantics.

MR. CHIEF JUSTICE BURGER: If you wish to save any time for rebuttal, you have your --

MR. BURST: I would like to, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Bullers.

ORAL ARGUMENT OF JAMES M. BULLERS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BULLERS: Thank you, Mr. Chief Justice, and may it please the Court:

I agree with Mr. Burst that this really is limited and involves interpretation of the particular statutes that our Code of Criminal Procedure has dealing with new trials.

The State's position is that the trial judge, when he made the comment, he said that "I heard the same evidence the jury did." Then he went on to say, "I'm convinced."

It does appear somewhat ambiguous, of course. As I said, the State's position is that he was stating his opinion after he had heard the same evidence that the jury heard. Now, the trial judge at that time didn't have the benefit of Burks and Jackson v. Virginia. The problem that we run into is that in commenting on the evidence it would seem to the State that the best answer is, what does the record really reflect? We have an article for a new trial which deals with five subsections, and though the judge may call up one subsection or another, he could be in error. And really, it does appear that the test would be, what does the record really reflect?

Of course, the State's position was, we agree with Judge Tate that, although because the trial judge did not have the benefit of Burks and Jackson, he didn't articulate particularly and he did not assign one particular subsection or another. But even if he had, isn't it really what the record reflects?

But at any rate, the -- in the Supreme Court --

QUESTION: Do you agree, Mr. Bullers, that at the time of this trial the trial judge had no power whatever to direct a judgment of acquittal?

MR. BULLERS: Yes, I agree with that, Your Honor. I do. At that time --

QUESTION: Even if he did find that there was no evidence whatsoever, the extent of his power was to grant a new trial as a matter of judgment of the court.

MR. BULLERS: Yes, sir, that's correct. At that point, that's what it was. That particular provision for directed verdict had been deleted prior to this trial, so that in essence the Louisiana Legislature had taken away that judge's authority to interject himself into the jury trial process.

QUESTION: Could a defendant after the receipt of a guilty verdict, without moving for a new trial, appeal his conviction?

MR. BULLERS: Yes. That remedy would be to take an

appeal. I think the issue comes down to what extent should the trial judge interject himself or be required to interject himself into the trial by jury process? We have a jury of 12 peers that felt the evidence was sufficient was beyond a reasonable doubt. The trial judge differed. So, the only way that I could see logically would be to see what the record really shows. Somebody -- obviously, there's a difference there; that's obvious. But the key is, how -- to what extent should the trial judge interject himself into this process? Should he be required to evaluate the evidence that the jury hears and then make a decision?

QUESTION: You keep saying the trial judge injected himself in. I thought he sat there by right of the Constitution of the State of Louisiana.

MR. BULLERS: Pardon?

QUESTION: You keep saying the trial judge injected himself into the trial.

MR. BULLERS: Well, what I said was --

QUESTION: Do you really mean that word "injected"?

MR. BULLERS: Interjected.

QUESTION: Do you mean that?

MR. BULLERS: No, I said, what I meant was, to what extent should he be required to get into the decision process when you have a jury trial? Should he be required to evaluate the evidence and to what extent should he interject himself

into it? I didn't say he did in this case. I'm just saying this is what it's going to boil down to. You understand as, in other words, in the future --

QUESTION: No, I heard you.

MR. BULLERS: Right. In the future the procedure that we have now just says that at the conclusion of the trial then you have a right, if he's found guilty, as in this case, then he can take an appeal or ask for a new trial, because the section pertaining to directed verdicts was deleted. I concede that, so that throughout this time was simply to raise it on appeal or request a new trial. In this case it was by a new trial. So the issue would be in the future, then, to what extent does the judge have to evaluate the evidence in the jury process, trial by jury process?

I'm not saying that he interjected himself in it in this case. He followed the law that since he didn't have the -- since Burks had not been rendered at that time, he didn't articulate much further. He just had the one little paragraph of -- one little excerpt that Mr. Burst talked about, and that was,"I heard the same evidence the jury did." -- "I'm convinced that it doesn't show," et cetera. As he said, "I'm convinced."

QUESTION: Mr. Bullers, can I ask you another question about Louisiana procedure? As I understand it, you've just confirmed he could not have granted a judgment of not guilty notwithstanding the verdict of the jury?

MR. BULLERS: That's correct, Your Honor.

QUESTION: And he also had a duty in advance of -- he had to submit the case to the jury even if he thought there was insufficient evidence to go to the jury?

MR. BULLERS: The way that our Code of Criminal Procedure, Article 778, was at that time, it would only be by trial judge alone, of course. If there was a jury trial, it would have to be submitted to the jury.

QUESTION: And what about at the end of the prosecutor's case, could he have granted directed verdict at that point in the proceeding?

MR. BULLERS: No, he couldn't, Your Honor.

QUESTION: So if he thought there was no evidence of guilt and that there'd been a total failure of proof, he would have had to do exactly what he did in this case?

MR. BULLERS: Exactly. He would have to grant a new trial. Then we get back to, did he grant it under Subsection 1, which was -- as the grounds for that is that the verdict was contrary to the law and evidence, or was it some other grounds? And of course, Justice Tate in his opinion felt that it was more in the interest of justice. The State from our point of view gave the defendant a fair trial and he was convicted by a jury of his peers, and the judge said, in his language, "I'm not convinced" -- that's our interpretation of it -- and granted a new trial, which was the procedure at that

time, that was his remedy. We agree to that.

QUESTION: Is there anything at all in the record that supports Judge Tate's view that -- and I know he's an awfully good judge and usually is pretty careful about what he does -- but is there anything in the record to support his view that the judge relied on Section Five?

MR. BULLERS: No, Your Honor, the judge didn't state that. Obviously, Judge Tate in his reviewing the entire case felt that's what it was. He obviously differed in the opinion of the judge -- that when the judge said there was no evidence then he clarified that and said, at least, or certainly not beyond a reasonable doubt. Judge Tate obviously disagreed with that because he said he felt that the record showed sufficient evidence to give it to the jury.

So that, in his opinion, it should have been five instead of one, and it goes back to, since the trial judge didn't articulate, and even if he had it still seems that it's actually what the record shows. I don't see any other way, unfortunately.

QUESTION: What is the status of your procedure now? Is there an option open to the judge to grant a directed verdict notwithstanding --

MR. BULLERS: Well, it's still as it is now, is my understanding also.

QUESTION: It's still the same way?

MR. BULLERS: That's right.

QUESTION: If your procedure allowed a directed verdict, and the district and the trial judge entered a verdict of not guilty notwithstanding the judgment, would you say that would bar another trial? That would clearly bar another trial, even if there was a --

MR. BULLERS: There would be a finding of not guilty and in essence it would bar another trial.

QUESTION: So we just look at the judge's ruling in that case, and we wouldn't really look at the evidence at all?

QUESTION: That's right.

MR. BULLERS: Do you have any other questions?

QUESTION: Then the State has no appeal from an order granting a new trial?

MR. BULLERS: No, Your Honor, there is no appeal or review by the State, once the judge orders a new trial then we'd have to proceed on with a new trial. There was no higher court to review what had gone on and why, and to make a ruling whether the judge was right or wrong. So once he said that the new trial should be held, then we'd have to proceed on with the new trial.

QUESTION: But then you defended -- after the second trial you got in your licks on whether the new trial order was right?

MR. BULLERS: Well, after the second trial, he was

convicted again.

QUESTION: Then he appealed.

MR. BULLERS: And then he appealed and raised this issue. And, of course, his position, I think, was that we get another bite at the apple. I'm not sure that's accurate, of course, but that would satisfy the jury.

QUESTION: Was there new evidence presented in the second trial that was not present at the first?

MR. BULLERS: Yes; yes. I didn't handle the trial. The record shows that there was another witness that was not available or not found that didn't testify at the first trial, that did testify at the second.

QUESTION: Well, are you defending the Supreme Court of Louisiana's rationale for its decision? Are you just asking, or not?

MR. BULLERS: I think that Judge Tate's rationale was probably the most accurate.

QUESTION: Under Burks or what?

MR. BULLERS: Yes, sir. I think that, as I understand Burks, it would be, is there sufficient evidence to give it to the jury? And I think that Judge Tate considered that, and determined that there was. But of course, he had to look at the record to determine that, obviously. He had to know what the evidence was.

QUESTION: Do you agree with him?

MR. BULLERS: Yes, I do.

QUESTION: Shouldn't we remand it, then, for the Supreme Court to apply the right standard and determine whether there was double jeopardy?

MR. BULLERS: That is a possibility. As I understand the majority opinion, what they were saying was that --

QUESTION: Well, if you agree with Tate, what else can you do except remand?

QUESTION: In other words, you're saying that the -- are you saying? -- that the Louisiana Supreme Court judgment cannot stand except on Judge Tate's theory?

MR. BULLERS: His theory, as I said, appears to be the most accurate. The majority opinion, I think, when they were sorting through Burks and applying it here, got into a difficult position.

QUESTION: They just misread Burks, you think?

MR. BULLERS: Well --

QUESTION: Or do you agree with that, or not?

MR. BULLERS: Of course, that is our Supreme Court, and those are learned gentlemen down there, Your Honor.

QUESTION: And you hesitate to appear before them after having -- ?

QUESTION: Of course, even Judge Tate isn't there anymore.

MR. BULLERS: No, that's correct, Your Honor.

He's with the 5th Circuit Court of Appeals now. But if it does come down to the fact that this constitutes double jeopardy, then I think that as you read our statutes, then, Article 851, which sets out the various subdivisions, the judge is going to have to articulate particularly which one and why. And as I said, the trial judge didn't have that benefit at the time. So that's why we're sort of at a loss here. I think that puts us in a difficult position. I think that's true of the appellant as well as the State.

Does the Court have any other questions?

MR. CHIEF JUSTICE BURGER: I think not. Do you have anything further, Mr. Burst? You have two minutes remaining.

MR. BURST: They will be very brief, indeed.

ORAL ARGUMENT OF RICHARD O. BURST, ST., ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. BURST: First of all, I think if this Court looks at the entire opinion of the trial judge, that the trial judge -- here is where I take issue with Justice Tate -- in no way does the trial judge in any way state anything similar to the fifth provision of the Louisiana Code.

QUESTION: But did he say any more than that, if he had been a member of the jury, he would have voted the other way?

MR. BURST: He certainly did.

QUESTION: Oh, you think so?

MR. BURST: I certainly think he did and I specifically refer the Court to his reasoning.

QUESTION: But an experienced trial judge should have articulated it more precisely if he meant what you say he meant?

MR. BURST: Well, I think he did. Because he went on to quote --

QUESTION: The Supreme Court of Louisiana certainly agreed with you.

MR. BURST: Excuse me, Your Honor?

QUESTION: The Supreme Court of Louisiana agreed with you.

MR. BURST: Yes, they did.

QUESTION: Agreed with your reading of what the trial judge says.

MR. BURST: The majority did, yes.

QUESTION: Rightly or wrongly.

MR. BURST: But I -- you know, I think he does say more than that, and in fact he does specifically reference three of the other grounds and -- as I recall. But that's in the Appendix for the Court to read, and that is, certainly, you know, where he ended up. But I would point out that at the time that the trial -- at the pleadings -- we had it today -- if the trial judge makes a ruling, then the motion for retrial

on grounds of insufficient evidence beyond a reasonable doubt, that the State of Louisiana is in the same position it was then unless it is reversed in this Court. And that is, that if there is an appeal by the State on a writ, they'll deny it because they're still applying the no evidence test and saying, we can't review it unless there's no evidence.

QUESTION: Or as a matter of state law, the Supreme Court has, never reviews the sufficiency of the evidence, I gather.

MR. BURST: That's right.

QUESTION: That's a matter of the state statute, isn't it?

MR. BURST: That's a matter of -- I think it is statute by interpretation of the Constitution.

QUESTION: I just read it here; yes.

MR. BURST: That is correct. They're saying, what they're saying is, it doesn't arrive to a legal issue until you can point out that there's no evidence.

QUESTION: In other words, the Supreme Court of Louisiana has no power to review the sufficiency of the evidence, as a matter of state law.

MR. BURST: They could, by interpretation, though. See, they've interpreted -- they themselves have interpreted the Constitution to say that. In other words, their Constitution says says they can only review matters of law.

QUESTION: If they say that's what their Constitution means, that's what their Constitution means, as far as we're concerned.

QUESTION: We can't say differently.

MR. BURST: I understand. Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you. The case is submitted.

(Whereupon, at 1:43 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

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No. 79-5688

TRACY LEE HUDSON

V.

STATE OF LOUISIANA

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BY: Bill G. Gr