No. 23-5654

IN THE

SUPREME COURT OF THE UNITED STATES

DAQUAIL RAMON JOHNSON – PETITIONER

vs.

COMMONWEALTH OF VIRGINIA – RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Request for Summary Remand

In his pending Certiorari Petition, Daquail Johnson asks this Court to summarily vacate and remand his *Jackson v. Virginia* claim for application of the correct constitutional standard of review. 443 U.S. 307 (1979). Although Mr. Johnson alternatively asks to fully brief and argue the merits of his claim to this Court, the clear, entrenched practice of the Virginia appellate courts can be corrected with a summary remand.

II. The Propriety of This Court's Intervention at This Time

In addition to Virginia's status as an outlier from *all other jurisdictions* on this issue, this is precisely the right time to course-correct Virginia's appellate courts away from ignoring *Jackson*.

The Court of Appeals of Virginia is the state's intermediate appellate court. This is where the vast majority of Virginia appellants' *Jackson* claims are litigated, and those numbers are about to get higher. Virginia recently – for the first time – created an appeal-of-right from criminal convictions to the Court of Appeals. Va. Code sec. 17.1-406(A). (Previously, there were only discretionary appeals.) With this impending influx of *Jackson* claim adjudications, this is the appropriate time to course-correct the Virginia jurisprudence that fails to apply this Court's precedent.

III. The Virginia Court of Appeals Failed to Apply *Jackson* In This Case.

In Mr. Johnson's case, as in many cases, the Court of Appeals paid nothing more than lip-service to the *Jackson* standard. Instead of applying *Jackson*, it analyzed and upheld Mr. Johnson's conviction because: "We will not reverse the trial court's

judgment unless its decision "is plainly wrong or without evidence to support it."; and because "The jury's verdict was not plainly wrong or without evidence to support it. Accordingly, we affirm the conviction." *Johnson v. Commonwealth*, No. 1176-121-1, at p.4 & 8 (Va. Ct. App. Oct. 25, 2022) (App. A-4, A-8). This final statement of the state court betrays its true process here, despite reciting *Jackson*'s language in a *pro forma* manner earlier. *Jackson* requires more than "simply a . . . ritual," 43 U.S. at 316-17; that is why it has two distinct components: first the factfinding must have rationality; and second, the factfinding must be beyond a reasonable doubt. *Id*.

The statutory standard in Virginia – which the Court of Appeals applied to Mr. Johnson's case – predates and fails to comport with either prong of *Jackson*. It states: "the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." Va. Code sec. 8.01-680. The "without evidence" standard is a remnant of the pre-*Jackson* jurisprudence that permitted it. *See Thompson v. Louisville*, 362 U.S. 199 (1960). And Respondent is incorrect that the statute's alternative basis (that a judgment is "plainly wrong") saves it from constitutional infirmity. No Virginia case interprets that language in that way, nor could it; it contains absolutely none of the language *Jackson* commands.

To the contrary, the "plainly wrong" standard is a simple mainstay of Virginia appellate review in general, serving as a highly-deferential rule of respecting trial court fact-finding across the board. It is used for claims of every sort, and incorporates no beyond-a-reasonable-doubt component whatsoever. *See, e.g., Schmuhl v. Clarke*, No. 211114, 2023 Va. LEXIS 61 at *20 (Va. Dec. 14, 2023) ("Whether a defendant 'is

entitled to habeas relief is a mixed question of law and fact, which we review de novo.' [] In conducting such a review, the habeas court's findings of fact 'are entitled to deference and are binding upon this Court unless those findings are plainly wrong or without evidence to support them.' [] 'However, the court's legal conclusions are reviewed de novo.'") (internal citations omitted); *Da'mes v. Da'mes*, 74 Va. App. 138, 145 (2022) ("Father contests both the court's interpretation of the term 'income' as used in the child support statute and the court's treatment of certain funds as income when calculating his support obligation. 'The issue of a party's income is a question of fact that we will not disturb unless it is plainly wrong or without evidence to support it.' [] However, '[i]nterpreting a statute is a pure question of law that the Court reviews de novo.'") (internal citations omitted); *Barkley v. Commonwealth*, 39 Va. App. 682, 689-90 (2003) ("Though the ultimate question whether the officers' conduct violated the Fourth Amendment triggers de novo scrutiny on appeal, we defer to the trial court's findings of 'historical fact' and give 'due weight to the inferences drawn from those facts by resident judges and local law enforcement officers.' [] We examine the trial court's factual findings only to determine if they are plainly wrong or devoid of supporting evidence.") (internal citations omitted).

IV. Respondent Offers No Defense to Petitioner's Exhaustive Research Study

Respondent cites to certain cases from the Supreme Court of Virginia that appear to apply the correct *Jackson* standard. As reflected in the study results Mr. Johnson put forth in his Petition, there are indeed a minority of cases (34.1%) in which Virginia appellate courts do include *Jackson* in some way, *see* Pet. at 13 n.20, and an even smaller minority (17.5%) in which they actually apply that standard in their

analysis. *See* Pet. at 15 (describing "Jackson Standard Only" cases) & 16 (describing "Mixed Jackson" cases). But that does nothing to cure the clear majority of cases that do not incorporate *Jackson*'s test at all; or those (like Mr. Johnson's) that may recite it, yet apply the statutory standard only.

Furthermore, far-greater credit for serial oversight of *Jackson* is owed the Court of Appeals, rather than the Supreme Court, of Virginia. In the vast majority of these cases, it is the Court of Appeals that actually adjudicates; and the Supreme Court thereafter rejects its discretionary review of that decision. That is what happened in Mr. Johnson's case, as it does to most *Jackson* claims in Virginia, and – as explained in Section I of this Brief, *supra* – as it soon will to even more.

V. Reprint of Section I(D) of Petition Due to Printing Error in Graphics

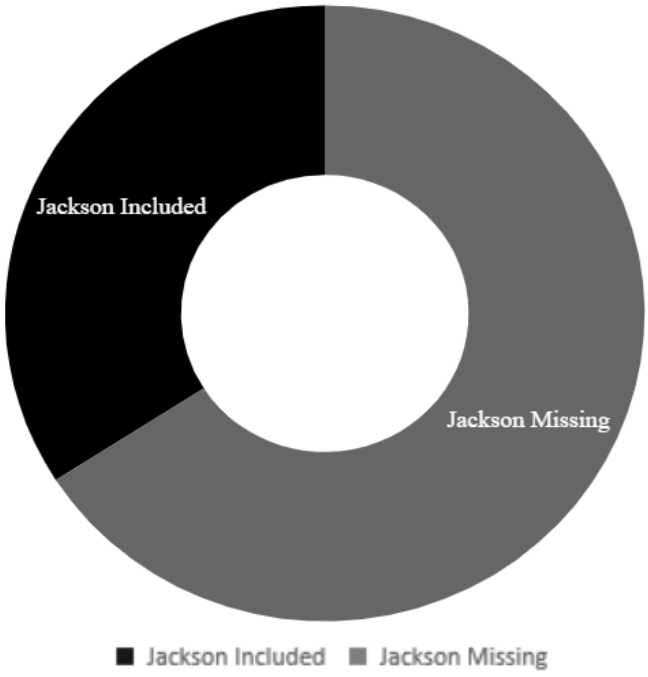
Finally, Petitioner noticed a printing error in his Certiorari Petition that may have affected Charts 1, 2, and 3, making it difficult to differentiate between the black and gray tones of those graphics. Beginning on the next page, and with apologies for the redundancy, Petitioner reprints Section I(D) of his Certiorari Petition.

D. Virginia's appellate courts use constitutionally-inadequate standards - most often "plainly wrong or without evidence to support it" - to review the vast majority of sufficiency claims from criminal appellants.

In an effort to understand the breadth of Virginia's failure to apply *Jackson*, we attempted to identify all post-*Jackson* sufficiency reviews by the Commonwealth's appellate courts, and separated them by the standards of review they employed for those claims. 2,296 cases were identified, using a variety of search methods. Their review supports two strong conclusions. The first conclusion is:

1) **Low prevalence of the *Jackson* standard:** under the most deferential interpretation,[1] at most one-third (34.1%) of cases included *Jackson*'s standard of review, *see* Chart 1:

Chart 1: How many of Virginia's post-*Jackson* sufficiency cases include *Jackson*?



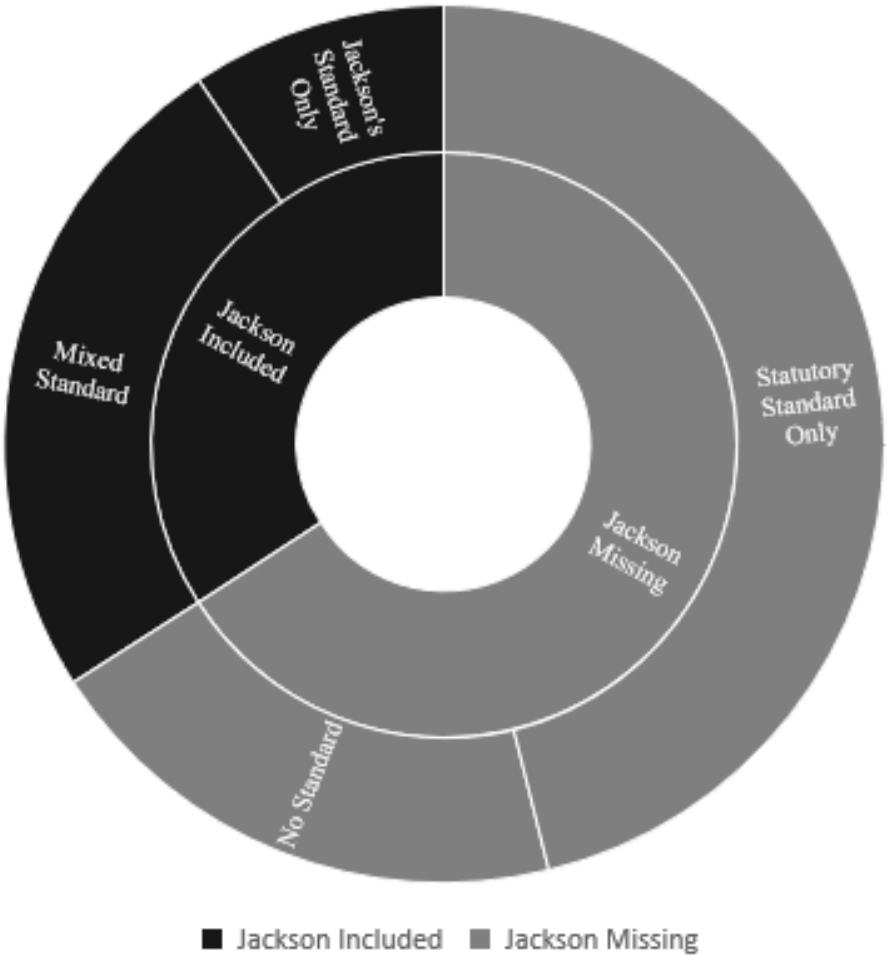
[1] In cataloging the 34.1% of cases that include *Jackson*'s standard ("Jackson included" in Chart 1), we included the following: cases that apply the *Jackson* standard, either by exclusively citing *Jackson* or exclusively applying *Jackson*'s test without attributing it to *Jackson* (labeled "Jackson Standard Only" in Chart 2); and that cite the statutory standard *and* the standard from *Jackson* (labeled "Mixed Standard" in Chart 2). The "Mixed Standard" cases are further broken down in Chart 3. Numbers and percentages are detailed in the discussion of Chart 2, *infra*.

See also Chart 2 (further breaking down Chart 1), *infra*.

The second conclusion is:

2) **High prevalence of the "plainly wrong or without evidence to support it" standard:** well over two-thirds (70.9%) of cases included the constitutionally-deficient "plainly wrong or without evidence to support it" standard of review,[2] with an additional 19.7% of cases identifying no governing standard at all[3] -- totaling *90.6% of cases that employ either an unconstitutional standard or no standard. See* Chart 2:

Chart 2: Breakdown of Virginia Sufficiency Cases that Do or Do Not Include *Jackson*



[2] This group includes two of the labels in Chart 2: "Statutory Standard Only"; and "Mixed Standard." Details about these categories are found in the discussion of Chart 2, *infra*.

[3] This group is labeled "No Standard" in Chart 2.

Adding context to Chart 2, out of the 2,296 total cases identified:

- "**Jackson's Standard Only**": 216 (9.4% of total) apply the *Jackson* standard alone, either by exclusively citing *Jackson*, or exclusively applying *Jackson*'s test without attributing it to *Jackson*.[4] The statutory standard is not referenced.

- 1,628 cases (70.9% of total) cite the "without evidence" standard found in Virginia Code Section 8.01-680, whether or not explicitly citing the statute. These cases are comprised of two groups in Chart 2:

    - "**Statutory Standard Only**": 1,060 cases cite the statutory standard of review exclusively (46.2% of the total),[5] and

    - "**Mixed Standard**": 568 cases cite the statutory standard *and* the standard from *Jackson* (24.7% of total).[6]

- "**No Standard**": 452 cases (19.7% of total) appear to set no standard of review whatsoever.[7]

The "Mixed Standard" cases from Chart 2 warrant a closer look. While they all include both statutory language and *Jackson* in some way, they vary greatly in terms of how they ultimately apply *Jackson* (if at all).

Accordingly, Chart 3 adds the following detail:

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[4] *See, e.g., Yerling v. Comm.*, 838 S.E.2d 66, 68 (Va. Ct. App. 2020) (citing *Jackson*, 443 U.S. at 318-19) (evidence insufficient for rational trier of fact to find guilt beyond reasonable doubt); *Lambert v. Comm.*, 840 S.E.2d 326, 328-29 (Va. 2020) (evidence sufficient for rational trier of fact to find guilt beyond reasonable doubt, not citing *Jackson*).

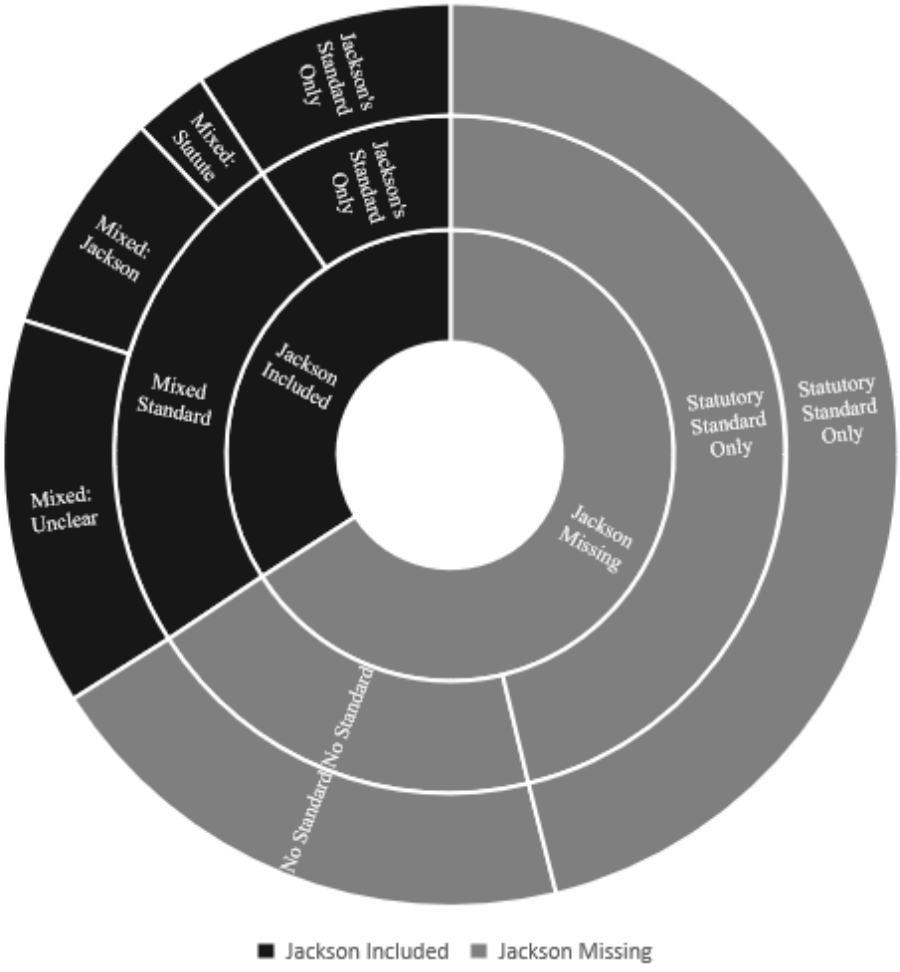
[5] 594 cases use the statutory standard (with or without citing statute) and exclude reference to *Jackson* or its test, *see, e.g., Murray v. Comm.*, 837 S.E.2d 85, 90-91 (Va. Ct. App. 2020)(evidence sufficient because not plainly wrong or without evidence to support it); *Carlson v. Comm.*, 823 S.E.2d 28, 37 (Va. Ct. App. 2019) (same); *Bolden v. Comm.*, 654 S.E.2d 584, 586 (Va. 2008) (same). 466 cases use the statutory standard (with or without citing statute) and exclude *Jackson*, though at some point in analysis use either the phrase "beyond a reasonable doubt" to describe the burden of proof or the word "rational" to describe the factfinder (but not both). *See, e.g., Falls v. Comm.*, No. 1161-07-3, 2008 WL 4773943, at *3 (Va. Ct. App. Nov. 4, 2008) (relying on statutory standard, but including phrase "beyond a reasonable doubt" to describe burden of proof at trial).

[6] For further breakdown of these cases, and examples, see discussion of Chart 3, *infra.*

[7] *See,e.g.,Clarkv.Comm.*,676 S.E.2d332 (Va.Ct.App.2009)(en banc); *Allard v. Comm.*, 480 S.E.2d 139, 141-42 (Va. Ct. App. 1997); *Williams v. Comm.*, 450 S.E.2d 365, 376-77 (Va. 1994); *Essex v. Comm.*, 442 S.E.2d 707, 711 (Va. Ct. App. 1994). *See also Lavalliere v. Comm.*, No. 1709-17, 2019 Va. App. unpub. LEXIS 81 (Apr. 9, 2019) (asking if verdict was "plainly wrong"); *Berger v. Comm.*, No. 0731-06, 2006 Va. App. LEXIS 609 (Nov. 17, 2006) (same).

- "**Mixed: Jackson**": 185 of the "Mixed Standard" cases (8.1% of total) clearly apply *Jackson*'s full test;[8]
- "**Mixed: Unclear**": 320 of the "Mixed Standard" cases (13.9% of total) leave it unclear which standard is ultimately applied;[9] and
- "**Mixed: Statute**": 63 of the "Mixed Standard" cases (2.7% of total) clearly only apply the statutory language.[10]

Chart 3: Breakdown of Sufficiency Cases that Include Both *Jackson* and the Statute



[8] 86 cases cite statutory language and *Jackson*, and apply both prongs of *Jackson*, *see, e.g. Girard v. Comm.*, 783 S.E.2d 561, 564-65 (Va. Ct. App. 2016). 99 cases cite statutory language, and not *Jackson*, but use *Jackson*'s full test. *See, e.g., Walker v. Comm.*, 622 S.E.2d 282, 285 (Va. Ct. App. 2005). When referring to *Jackson*'s two "prongs," we mean the "rational trier of fact" phrase, and the "beyond a reasonable doubt" phrase. When reviewing this category for inclusion of the first prong, we included related terms such as "rational factfinder," "rational juror," etc.

[9] *See, e.g., Clark v. Comm.*, No. 0980-17-1, 2018 Va. App. LEXIS 204 (Ct. App. July 24, 2018) (cites *Jackson* and statutory standards, but application unclear as neither appears again).

[10] *See, e.g., Moore v. Comm.*, 2020 Va. Unpub. LEXIS 13, at *5-10 (May 14, 2020) (cites *Jackson* and statutory standard in standard of review, but applies only statute later).

In conclusion, the vast majority (70.9%, or 1,628/2,296) of post-*Jackson* sufficiency cases in the Commonwealth explicitly include a constitutionally-deficient standard ("without evidence to support it"). That statistic jumps to a stunning 90.6% when combined with cases in which no apparent standard was applied at all. Chart 2, *supra*. Of those cases using the statutory standard, most rely on it exclusively, while some add *Jackson*'s standard to varying degrees of success. Charts 2 & 3, *supra* (detailing "mixed"-standard cases).

Virginia courts simply do not use the standard of review required by this Court in *Jackson*. They are relying on *Jackson*'s standard exclusively only 9.4% of the time, Charts 2 & 3, *supra*, and relying on *Jackson* to even the most minimal degree[11] only 34.1% of the time, at most. Chart 1, *supra*. The majority of the time the Commonwealth's courts use a "without evidence" standard, with origins dating long before *Jackson* and directly contrary to its holding.

[11] As detailed *supra*, this group includes: 216 cases (9.4% of the total) that apply the required *Jackson* standard, either by exclusively citing *Jackson*, or exclusively applying *Jackson*'s test without attributing it to *Jackson* (labeled "Jackson Standard Only" in Chart 2); and 568 cases (24.7% of the total) citing the statutory standard *and* the standard from *Jackson* (labeled "Mixed Standard" in Chart 2). The "Mixed Standard" cases are further broken down in Chart 3.

CONCLUSION

The petition for a writ of certiorari should be granted, to allow this Court to summarily reverse and remand Mr. Johnson's case to the Supreme Court of Virginia for application of *Jackson v. Virginia*.

Respectfully submitted this 28th day of December, 2023,

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