No. ___________________

IN THE

SUPREME COURT OF THE UNITED STATES

JACQUELINE LYNNE ORTIZ – PETITIONER

vs.

COMMONWEALTH OF VIRGINIA – RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court held that the Due Process Clause requires the following standard of review for appellate claims of insufficient evidence of a criminal conviction: whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The Jackson Court explicitly rejected a standard that asked whether "no evidence" supported a conviction. Setting itself apart from every other state and federal jurisdiction in the nation, Virginia has continued to apply its own standard of review: a pre-Jackson relic that asks only whether a criminal conviction is "without evidence to support it." Does this standard, applied in Ms. Ortiz's case, violate the Due Process Clause as interpreted by this Court in Jackson?

PARTIES TO THE PROCEEDING

Petitioner Jacqueline Lynne Ortiz was the defendant/appellee below.

Respondent Commonwealth of Virginia was the state/appellant below.

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PETITION FOR A WRIT OF CERTIORARI AND/OR TO SUMMARILY REVERSE AND REMAND

Ms. Ortiz, Petitioner, respectfully petitions this Court for a writ of certiorari, and to consider summary reversal and remand, of the judgment of the Supreme Court of Virginia in this case, for reconsideration of Ms. Ortiz's direct appeal under the correct constitutional standard of review.

OPINIONS BELOW

Commonwealth v. Ortiz, No. CR23-567 (Va. Cir. Ct. Oct. 11, 2023), Sentencing Order (Final Order)	A-001
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Commonwealth v. Ortiz, No. 250679 (Va. June 11, 2026) (per curiam)	A-012

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

The Supreme Court of Virginia decided petitioner's case on June 11, 2026. A copy of that decision appears in the Appendix at A-003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Amendment XIV to the United States Constitution: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

- Virginia Code § 8.01-680 (Code of Virginia Ann. 2020):

> When a case, civil or criminal, is tried by a jury and a party objects to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case is decided by a court without the intervention of a jury and a party objects to the decision on the ground that it is contrary to the evidence, 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.

STATEMENT OF THE CASE

Jacquline Ortiz's abusive husband, Deshawn Whitaker, manipulated and sex-trafficked her. Her presence in the passenger seat of a stolen car that Whitaker chose to drive on December 1st, 2022, and *Whitaker's* use of the car that day, did not support a rational inference that *she* had any control whatsoever over that car.

Whitaker died that day, shot to death by a police officer just outside the stolen car for which he was solely responsible. For her role in those tragic events, Ms. Ortiz was charged with joint possession of the car, assault of a law enforcement officer, and brandishing. She waived jury. The Circuit Court for the City of Virginia Beach found her guilty of both felonies, as well as brandishing the firearm (a misdemeanor, which she did not appeal). The Court of Appeals, in an unpublished decision, affirmed her conviction for assault; but found insufficient evidence to support possession of stolen property. *Ortiz v. Commonwealth*, No. 1918-23-1 (Va. Ct. App. June 24, 2025) (unpub.), at A-003.[1] The Supreme Court of Virginia then granted the Commonwealth's Petition to review the vacatur of the possession conviction, but refused Ms. Ortiz's Petition to review the affirmance of the assault conviction.

The Supreme Court of Virginia reversed the Court of Appeals' vacatur of the possession conviction, applying a purely-factual standard of review: viewing the record in the light most-favorable to the Commonwealth, including all inferences to

[1] Specifically, the Court of Appeals found that the Commonwealth failed to present evidence suggesting Ortiz exercised dominion and control over the stolen vehicle during the time she knew it was stolen; and determined that the Commonwealth improperly relied on Ortiz's "status as the wife of the driver of the stolen vehicle and that she knew the few passengers who were driven in the car by her husband" to establish dominion and control. No. 1918-23-1, A-003.

be drawn therefrom. No. 250679, at A-015. Nowhere in its opinion did the Supreme Court of Virginia even acknowledge the federal constitutional standard this Court set out over 45 years ago in *Jackson v. Virginia*, 443 U.S. 307 (1979).

This constitutional deficiency is endemic in Virginia appellate jurisprudence. Virginia has *never* implemented *Jackson*, nor even attempted to reconcile its state-law sufficiency doctrine (partially governed by a statute) with *Jackson*. Virginia is long-overdue for a constitutional course-correction from this Court.

REASONS TO GRANT THE PETITION, AND/OR SUMMARILY REVERSE, AND REMAND

I. Virginia's courts are operating in direct conflict with this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979).

A. Virginia's courts apply a standard of review to sufficiency claims that is effectively identical to the one *Jackson* rejected.

i. The Due Process Clause, as interpreted by Jackson*, forbids appellate courts from affirming a criminal conviction unless a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."*

The Due Process Clause protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970). The reasonable doubt standard is so fundamental that it "'symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.'" *Jackson*, 443 U.S. at 315 (quoting *Winship*, 397 U.S. at 372 (Harlan, J., concurring)).

For that reason, this Court held in *Jackson v. Virginia* that due process entitles those convicted of a crime to appeal the sufficiency of the evidence supporting their convictions, and requires an appropriately-high standard of review for those claims: whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319 (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)). Only this standard can prevent unconstitutional convictions, as guilt should rest upon a "subjective state of near certitude of the guilt of the accused[.]" *Id*. at 315.

ii. A lesser "no evidence" standard does not comply with due process.

The *Jackson* Court rejected a lower standard in reaching its holding: that of *Thompson v. Louisville*, 362 U.S. 199, 199 (1960), which only required a sufficiency claim to be granted if supported by "no evidence." *Jackson*, 443 U.S. at 320 ("That the *Thompson* 'no evidence' rule is simply inadequate… is readily apparent."). Under *Thompson*, due process was satisfied unless "there [was] no support for these convictions in the record," 362 U.S. at 204, "the record [was] entirely lacking in evidence to support any of the charges," *id*., and there was "no evidence whatever in the record to support the[] convictions." *Id*. at 206.

This "no evidence" standard was not good enough. It "could lead to absurdly unjust results," 443 U.S. at 320 n.14, for under such a standard "a defendant against whom there was but one slender bit of evidence" could not prevail on appeal. *Id.* "Such results would be wholly faithless to the constitutional rationale of *Winship*." *Id*. It "is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt[.]" *Id.* at 320. Under that inadequate standard, a conviction may be upheld on the basis of even a slight piece of relevant evidence,[2] even though "it

[2] *Id.* (evidence "that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence").

could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id*.

Finally, the "no evidence" rule was unconstitutional because, in failing to enforce the heightened standard of proof that due process required in criminal cases, it failed to honor the significant constitutional difference between criminal and civil verdicts: "Proof beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability." *In re Winship,* 397 U.S. at 358-362; *see also Jackson*, 443 U.S. at 315 ("proof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability.") (citing cases).

iii. Virginia courts are acting contrary to the clear holding of Jackson.

And yet, the Virginia courts *routinely* uphold convictions pursuant to Va. Code § 8.01-680, and parallel state-law doctrine, "unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." *Id*. The ubiquitousness of this appellate practice is detailed *infra* with historical data, legislative history, and state caselaw. The practice clearly violates the Due Process Clause and *In re Winship*, *supra*, precisely in the way the *Jackson* Court prohibited.

Virginia's "without evidence" standard is no different from the "no evidence" standard the *Jackson* Court rejected. Forty-seven years later, the Commonwealth's jurisprudential practice is still plainly deficient – despite Mr. Jackson himself having been a Virginia inmate.[3] And the byproduct of Virginia's recalcitrance is troubling:

[3] James A. Jackson was convicted of first-degree murder in 1975 following a bench trial in Chesterfield County, Virginia. He unsuccessfully petitioned to the Supreme Court of Virginia, raising a sufficiency of the evidence claim. *Jackson*, 443 U.S. at 311 n.4. The standard of review for sufficiency claims was at that time found under Section 8-491 of Virginia's code, and was identical to the "without evidence" standard used now. Jackson filed a habeas petition in the U.S. District Court for the Eastern District of

appellants in the Commonwealth apparently must still meet the "no evidence" standard to win relief from constitutionally-insufficient convictions. When reviewing cases in which Virginia courts have actually granted sufficiency claims, it appears that they most-often result when "no evidence" supports an element or conviction.[4]

The Virginia courts find sufficient records for all other defendants, including those (like Ms. Ortiz) "against whom there was but one slender bit of evidence," 443 U.S. at 320 n.14, without considering whether it rationally proved their guilt beyond a reasonable doubt. These Virginians lose because their records are not entirely "without evidence," Va. Code § 8.01-680, a standard "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt" and "wholly faithless to the constitutional rational rationale of *Winship*." 443 U.S. at 320 & n.14.

B. State courts are bound by *Jackson*'s Due Process Clause interpretation.

Virginia, which granted relief under *Thompson*'s "no evidence" standard. *Id*. at 312. The U.S. Court of Appeals for the Fourth Circuit reversed, finding "some evidence" under *Thompson*. *Id*. This Court, reviewing the Court of Appeals' holding, rejected *Thompson*'s "no evidence" standard, but nonetheless found sufficient evidence to convict Jackson because a "rational factfinder could readily have found the petitioner guilty beyond a reasonable doubt of first-degree murder under Virginia law." *Id*. at 324.

[4] *See, e.g., Farhoumand v. Comm.*, 764 S.E.2d 95, 102 & 104 (Va. 2014) (under "without evidence to support it" standard, evidence insufficient where "no evidence" of exposure); *Jordan v. Comm.*, No. 071559, 2008 Va. LEXIS 150 at *1, *3 (Mar. 21, 2008) (evidence insufficient "because there was no evidence introduced at trial" in support of furthering robbery, and "no evidence introduced at trial to establish" Jordan knew controlled substance present); *McCoy v. Comm.*, No. 0858-01-02, 2002 Va. App. LEXIS 457 at *5 (Aug. 6, 2002) (evidence insufficient where "no evidence tended to show the heroin was subject to McCoy's dominion and control"); *Wilson v. Comm.*, No. 1072-00-1, 2001 Va. App. LEXIS 121, at *10-11 (Mar. 13, 2001); *Dotson v. Comm.*, No. 1541-99-3, 2000 Va. App. LEXIS 493, at *17-18 (July 5, 2000) (evidence insufficient where "no evidence proved that [the injury] was caused by a willful act"); *Person v. Comm.*, No. 1897-98-1, 1999 Va. App. LEXIS 494, at *9 (Aug. 10, 1999) (evidence insufficient where "no evidence to prove that appellant was that person"); *Adsit v. Comm.*, No. 0882-98-2, 1999 Va. App. LEXIS 86, at *5 (Feb. 9, 1999) (evidence insufficient where "[t]here is no evidence in this record to support" conviction); *Harris v. Comm.*, No. 2078-98-2, 1999 Va. App. LEXIS 683, at *2, *6 (Dec. 21, 1999) (record insufficient under "without evidence" standard because "[t]here was no evidence in the record to suggest that appellant's speed and intoxication caused him to drive in a manner which of itself endangered . . . another person").

Even though *Jackson* addressed federal habeas review of a state court judgment, this Court's Fourteenth Amendment standard applies equally to the state courts directly. *See Wright v. West*, 505 U.S. 277, 290 (1992) ("[In *Jackson* we] indicated that the habeas court itself should apply the *Jackson* rule, *see* [*Jackson*] at 324, rather than merely reviewing the state courts' application of it for reasonableness."). *See also McDaniel v. Brown*, 558 U.S. 120, 131 n.4 (2010) (finding Nevada's appellate sufficiency standard not "contrary to" *Jackson* under 28 U.S.C. § 2254(d)).[5]

As *Jackson* explicitly held, sufficiency of the evidence is a federal constitutional claim: "a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim." 443 U.S. at 321. And state supreme courts are bound to follow this Court's ruling on matters of the federal Constitution. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 382 n.12 (2012) ("The Supremacy Clause declares federal law the 'supreme law of the land,' and state courts must enforce it 'in the absence of a valid excuse.'") (quoting *Howlette v. Rose*, 496 U.S. 356, 371 (1990)).

C. Virginia courts reflexively apply the "plainly wrong or without evidence to support it" standard to appellate claims of insufficient evidence, as they have in both civil and criminal cases alike for over a century.

[5] *See also Tibbs v. Fla.*, 457 U.S. 31, 45 (1982) (discussing state court appellate review and noting: "We held in *Jackson* that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt. The Due Process Clause, in other words, sets a lower limit on an appellate court's definition of evidentiary sufficiency. This limit, together with our belief that state appellate judges faithfully honor their obligations to enforce applicable state and federal laws, persuades us that today's ruling will not undermine *Burks*.").

The phrase "plainly wrong or without evidence to support it" appears in the vast majority of Virginia's sufficiency reviews of convictions.[6] It comes from a statutory relic in the state's civil procedural code,[7] which applies to any motion to disturb a verdict on sufficiency grounds. Va. Code § 8.01-680.[8] Under that statute, relief is prohibited "unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." *Id*. This has been the law in Virginia since passage of the 1919 Code,[9] consistent with state practice for decades prior.[10] In the telling of one storied Virginia legal publisher, T.J. Michie, Jr., in 1921: "Judge Burks in his authoritative work on Pleading and Practice thus explains the effect of the old rule: '. . . the verdict and the judgment thereon of the trial court will not be disturbed unless it is plainly contrary to the evidence, or is 'without evidence to support it.''"[11]

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[6] *See infra* for a quantitative survey of its prevalence in Virginia appellate decisions.

[7] Va. Code § 8.01-680 is housed within title 8.01 of the Code of Va. (Civil Remedies and Procedure), Ch. 26.2 (Appeals Generally). Section 8.01-680 governs review of denials of motions for new trial or to set aside a verdict of a jury (or judge) on the ground that it is contrary to the evidence. This standard of appellate review is applied to all higher court review of factfinding in both civil and criminal cases.

[8] Va. Code § 8.01-680 provides in full: "When a case, civil or criminal, is tried by a jury and a party objects to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case is decided by a court without the intervention of a jury and a party objects to the decision on the ground that it is contrary to the evidence, 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."

[9] Va. Code § 6363 (1919) ("When a case at law, Civil or Criminal, is tried by a jury and a party excepts to the judgement or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that it is contrary to the evidence and the evidence (not the facts) is certified, the judgement of the trial court **shall not be set aside unless it appears from the evidence that such judgement is plainly wrong or without evidence to support it.**") (emphasis added).

[10] See *Dennis v. Comm.*, 823 S.E.2d 490, 501 (Va. 2019) ("Virginia has enshrined this tradition of appellate deference to trial-level factual findings in a statutorily mandated standard of review since 1887, when the General Assembly enacted Code § 3484. The statute persisted through several reenactments of the Code of Virginia, and its current form, Code § 8.01-680[.]").

[11] T. J. Jr. Michie, Rule of Decision in Appellate Court under Sec. 6363, 7 Va. L. Reg. n.s. 321, 323 (1921).

Virginia's basic deference to trial-level fact-finding is not atypical, originating from the maxim *ad questionem facti non respondent judices; ad questionem juris non respondent juratores*.[12] Virginia has a long-demonstrated commitment to this principle: contingent to ratifying the Constitution, Virginia joined a handful of states demanding inclusion of an amendment prohibiting appellate fact-finding in civil cases.[13] Older caselaw in the Commonwealth is replete with this "essential rule in the administration of justice," and fear that its erosion would "lead to constant invasion in the province of the jury to pass upon the facts of the case, and whose conclusions upon questions of fact are entitled to great weight, and ought not to be lightly disturbed."[14]

But in modern practice, Virginia erroneously elevates this principle in *criminal cases* above *Jackson*'s recognition of something more supreme: the constitutional role appellate courts must play to enforce *In re: Winship* in criminal cases. 443 U.S. at 320. *Jackson* was explicit in recognizing its primacy over historical deference to a jury's fact-finding: "The [standard of review required by this holding] thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319.

This Court spoke with clarity in *Jackson*. And yet, a Virginia conviction still stands unless it is "without evidence to support it." Historical commentary on Virginia's

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[12] *Dennis,* 823 S.E.2d at 50); *Jones v. U.S.,* 526 U.S. 227, 247, n. 8 (1999) (quoting 1 E. Coke, Institutes of the Laws of England 155b (1628). The Latin phrase translates similarly to: judges do not answer to a question of fact; juries do not answer to a question of law.

[13] *Dennis,* 823 S.E.2d at 500 (citing Edward Dumbauld, *The Bill of Rights and What it Means Today 76,* 181-82, 183-84, 188, 190-92, 200, 204 (1957)). This effort led to the ratification of the Seventh Amendment. *Id*.; U.S. Const. amend. VII (governing federal civil trials).

[14] *Finchim v. Comm.,* 83 Va. 689, 690 (1887) (citing *Grayson v. Comm.*, 47 Va. 712 (1849); *Dean v, Comm.,* 73 Va. 912 (1879); *Cluverius v. Comm.*, 81 Va. 787 (1886)).

standard paraphrased the practice in starker terms: a conviction is not overturned in Virginia's unless "the overwhelming weight of evidence is in [the appellant's favor] and the trial court has failed in its duty of setting aside the verdict";[15] or "if there was any evidence to support a verdict against him in the trial court[.]"[16] These characterizations are still accurate today. The 1919 statute's "'plainly wrong or without evidence to support it" standard has survived all subsequent iterations of the Code; in 1950 when Section 6363 became Section 8-491, and again in 1977 when Section 8-491 became the modern-day Section 8.01-680.[17] And, as demonstrated in the next subsection, Ms. Ortiz's case is but one example of many in the Commonwealth: a survey of actual practice by Virginia appellate courts confirms widespread reliance on this standard.

D. Virginia's appellate courts use a constitutionally-inadequate standard 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*, undersigned attempted to identify all post-*Jackson* sufficiency reviews by Virginia courts between 1979 and 2020, and the appellate standards of review employed in those cases. 2,296 cases were identified, using a variety of search methods. Their review supports two strong conclusions. The first conclusion is:

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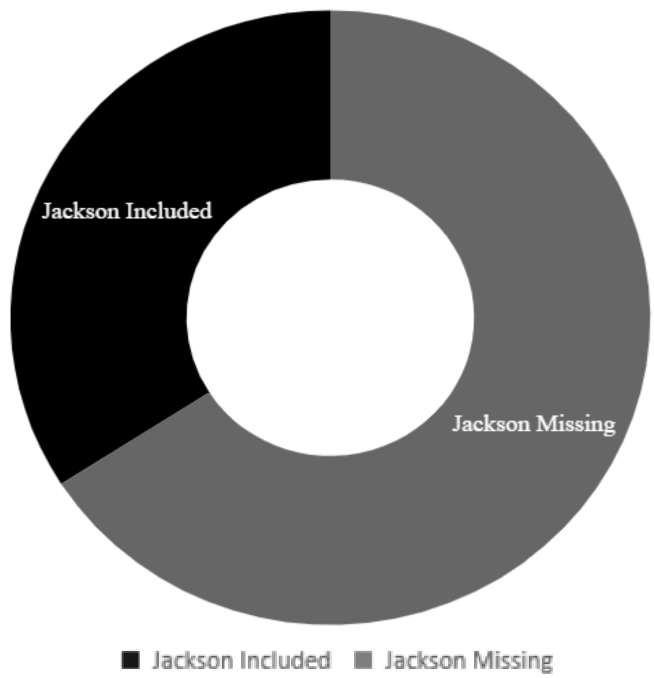
[15] Michie, 7 Va. L. Reg. at 336 (analyzing Va. Code § 6363 (1919)).

[16] Pollard's Code, § 3484 (1908), at 356 ("When the evidence (and not the facts) is certified, a plaintiff in error stands in this court as on a demurrer to the evidence, and if there was *any evidence to support a verdict against him in the trial court*, it will not be set aside.") (emphasis added), https://books.google.com/books?id=RBUSAAAAYAAJ&pg=PA356&lpg=PA356&dq=Pollard%E2%80%99s+Code+Section+3484+(1908)&source=bl&ots=RxfOf7lAWo&sig=ACfU3U3BEqB9qo1_nhxZxcBa7h7a7hT2qA&hl=en&sa=X&ved=2ahUKEwjxmMbMrb7qAhVhhHIEHTTPDhkQ6AEwAHoECAcQAQ#v=onepage&q=Pollard%E2%80%99s%20Code%20Section%203484%20(1908)&f=false (last visited September 11, 2023).

[17] The only modifications throughout this time were minor. Section 8-491(1950) was identical to its predecessor, Section 6363 (1919). Section 8.01-680 (1977) removed the phrase "at law," and moved the location of the statute, but is otherwise identical to its predecessors.

1) **Low prevalence of the *Jackson* standard:** Under the most deferential interpretation,[18] at most one-third (34.1%) of sufficiency-review cases included *Jackson*'s standard of review, *see* Chart 1:

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



The second conclusion is:

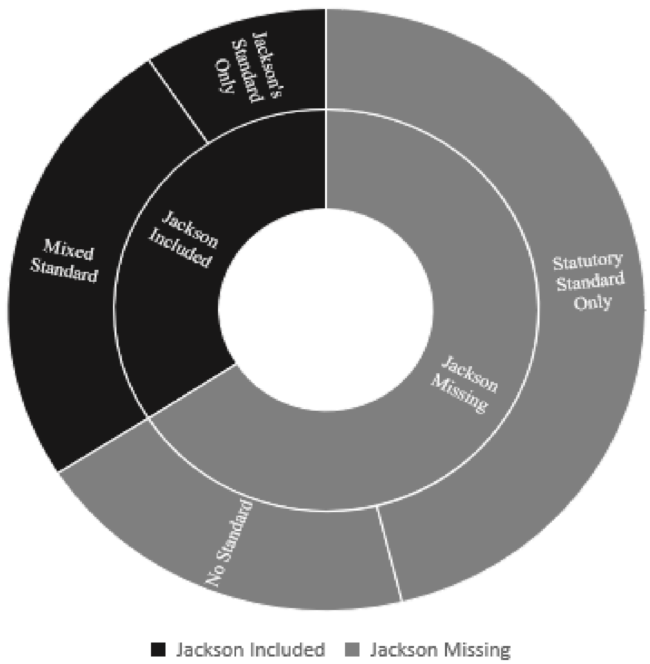
2) **High prevalence of the "plainly wrong or without evidence to support it" standard:** Well over two-thirds (**70.9%**) of cases included the constitutionally-deficient "plainly wrong or without evidence to support it" standard of review,[19] with an additional 19.7% of cases identifying no governing standard at all[20] -- totaling **90.6% of cases that employ either an unconstitutional standard or no standard**. *See* Chart 2:

[18] 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*.

[19] 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*.

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

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



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

- "**Jackson's Standard Only**": Only 216 (**9.4%** of total) apply the *Jackson* standard alone, either by exclusively citing *Jackson*, or exclusively applying *Jackson*'s test.[21] The statutory standard is not referenced in these cases.

- **Deficient Standard Alone or Included**: 1,628 cases (**70.9%** of total) cite the "without evidence" standard of Virginia Code § 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),[22] and

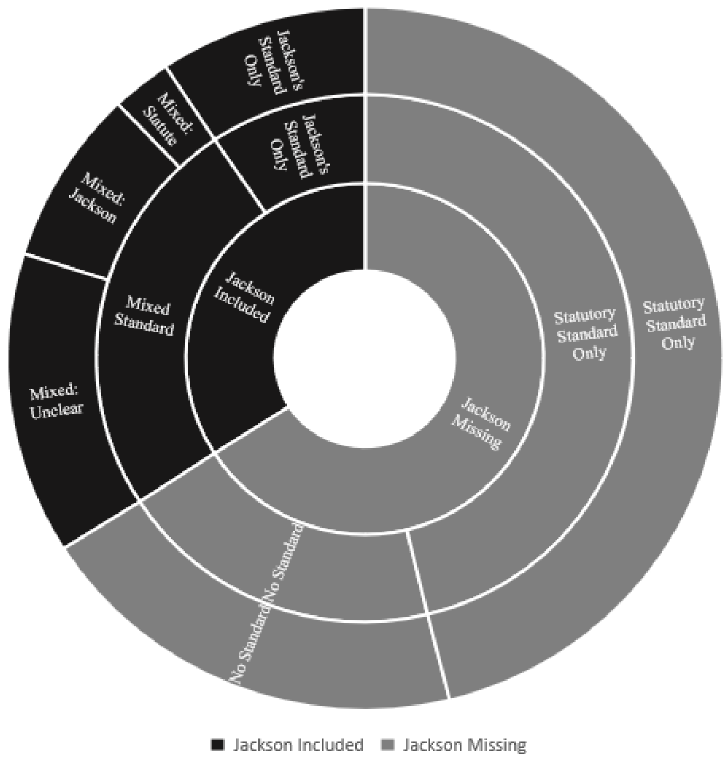
[21] *See, e.g., Yerling v. Comm.,* 838 S.E.2d 66, 68 (Va. Ct. App. 2020) (citing *Jackson*, 443 U.S. at 318-19) (evidence insufficient for rational trier of fact to find guilt beyond reasonable doubt); *Lambert v. Comm.*, 840 S.E.2d 326, 328-29 (Va. 2020) (evidence sufficient for rational trier of fact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

[22] 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).

- “**Mixed Standard**”: 568 cases cite the statutory standard *and* the standard from *Jackson* (**24.7%** of total).[23] The “Mixed Standard” cases from Chart 2 include both statutory language and *Jackson* in some way, but vary greatly in terms of how they ultimately apply *Jackson* (if at all). Chart 3 below adds additional detail for these cases.

- “**No Standard**”: 452 cases (**19.7%** of total) set no standard of review at all.[24]

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



Additional conclusions from Chart 3:

- “**Mixed: Jackson**”: 185 of the “Mixed Standard” cases (8.1% of total) clearly apply *Jackson*’s full test, despite also including the deficient test’s language;[25]

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

[24] *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).

[25] 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.

- "**Mixed: Unclear**": 320 of the "Mixed Standard" cases (13.9% of total) leave it unclear which standard they ultimately applied;[26] and
- "**Mixed: Statute**": 63 of the "Mixed Standard" cases (2.7% of total) clearly apply the statutory language *only*.[27]

Overall, the vast majority (**70.9%**, or 1,628/2,296) of post-*Jackson* Virginia cases include the deficient "without evidence" standard. And that jumps to a stunning **90.6%** when combined with cases identifying no standard at all. Chart 2, *supra*. Of those using the statutory standard, most rely on it exclusively, while some throw in *Jackson* to varying degrees of success. Charts 2 & 3, *supra* (examining "mixed"-standard cases).

Virginia courts simply do not use the standard of review this Court required in *Jackson* in the vast majority of cases. **They apply *Jackson* exclusively only 9.4% of the time**, Charts 2 & 3, *supra*, **and include *Jackson* to even the most minimal degree[28] only 34.1% of the time, at most**. Chart 1, *supra*. They are instead stuck on their "without evidence" standard, which pre-dated (and was rejected by) *Jackson*.

II. Virginia's ingrained practice of reflexively applying its pre-*Jackson* standard in sufficiency cases is in direct conflict with all other state and federal jurisdictions.

Other state courts comply with *Jackson*, many explicitly. Like Virginia, many used a "no evidence" standard prior to *Jackson*.[29] Unlike Virginia, however, all of the others

[26] *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).

[27] *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).

[28] 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.

[29] *See, e.g., Eubanks v. State*, 242 S.E.2d 41, 43 (Ga. 1978) (conviction upheld "[s]o long as there [was] any evidence to support the jury's verdict"); *State v. Coleman*, 257 So.2d 652, 653 (La. 1972) (applying "no evidence" standard to sufficiency claim); *People v. Vail*, 227 N.W.2d 535, 536 (Mich. 1975)

updated their practice after *Jackson*, most abandoning the "no evidence" standard altogether.[30] Those that used other standards abandoned them, too, adopting *Jackson*'s in their place; or at least examined whether their standards complied.

In total, twenty-three states and territories explicitly adopted *Jackson*'s standard,[31] and have been affirmed by federal courts as compliant.[32] Nineteen more

(examining if there was "any evidence upon which a jury could predicate a finding of guilty"), *overruled on other grounds*, *People v. Graves*, 581 N.W.2d 229 (Mich. 1998).

[30] *See Boyd v. State*, 259 S.E.2d 71, 73 (Ga. 1979) (applying *Jackson* standard); *State v. Brown*, 421 So.2d 854, 856 (La. 1982) (same); *People v. Wolfe*, 489 N.W.2d 748 (Mich. 1992) (citing *People v. Hampton*, 285 N.W.2d 284, 288 (Mich. 1979)) ("[A]n appellate court is required to apply the standard adopted by this Court in *Hampton*. There, we stated that a reviewing court must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt."). Two jurisdictions (W.Va. and D.C., *infra*) still use the "no evidence" phrase, but combine it with other language from *Jackson*.

[31] Those jurisdictions are Alabama, Connecticut, Delaware, Florida, Georgia, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Nebraska, Oklahoma, New Hampshire, New York, Ohio, Oregon, Tennessee, Texas, Vermont, Washington, the Virgin Islands, and Guam. *See Ex parte* G.G., 601 So. 2d 890, 892 (Ala. 1992) (applying *Jackson*'s standard); *State v. Brown*, 505 A.2d 690, 695–96 (Conn. 1986) (same); *Boyer v. State*, 436 A.2d 1118, 1122 (Del. 1981) (same); *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002) (same); *Boyd v. State*, 259 S.E.2d 71, 73 (Ga. 1979) (same); *People v. Cruz,* 1998 Guam 18 (Guam Sept. 11, 1998) (same); *State v. Voiles*, 601 P.2d 1121, 1125 (Kan. 1979) (same); *Brown*, 421 So.2d at 856 (La. 1982) (same); *State v. Van Sickle*, 434 A.2d 31, 34–35 (Me. 1981) (same); *Tichnell v. State*, 415 A.2d 830, 842 (Md. 1980) (same); *People v. Hampton*, 285 N.W.2d 284, 288 (Mich. 1979) (same); *Magee v. State*, 966 So.2d 173, 179 (Miss. Ct. App. 2007) (same); *State v. Myers,* 603 N.W.2d 378, 388 (Neb. 1999) (same); *State v. Kiluk*, 410 A.2d 648, 650 (N.H. 1980) (same); *People v. Contes*, 454 N.E.2d 932, 932–33 (N.Y. 1983) (same); *State v. Thompkins*, 678 N.E.2d 541, 546 (Ohio 1997) (same); *Spuehler v. State*, 709 P.2d 202, 203–04 (Okla. Crim. App. 1985) (same); *State v. Harris*, 609 P.2d 798, 807-08 (Or. 1980) (same); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982) (same); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2009) (same); *State v. Derouchie*, 440 A.2d 146, 148 (Vt. 1981) (same); *Davis v. People*, 69 V.I. 619, 631 (V.I. 2018) (same); *State v. Green*, 616 P.2d 628, 632 (Wash. 1980) (same).

[32] See e.g. *Bates v. Workman*, 311 F. App'x 125, 128 (10th Cir. 2009) (unpub.) (Oklahoma court "applied the *Jackson* standard as identified and described in *Spuehler*"); *Wiggins v. Corcoran*, 288 F.3d 629, 637 (4th Cir. 2002) ("Maryland Court of Appeals identified these controlling principles of law correctly."), *rev'd on other grounds, sub nom*., *Wiggins v. Smith*, 539 U.S. 510 (2003); *Shaw v. Davis,* No. 4:17-CV-261-O, 2018 WL 6068787 at *4-5 (N.D. Tex. Nov. 9, 2018) (quoting extensively from the Texas opinion, which "appl[ied] the *Jackson* standard"); *Rice v. Parnell*, No. 315CV05381BHSJRC, 2016 WL 1638078 at *10 (W.D. Wash. Jan. 6, 2016), report and recommendation adopted, No. C15-5381 BHS, 2016 WL 1626747 (W.D. Wash. Apr. 25, 2016) ("Washington's test for determining the sufficiency of evidence is identical to that set forth by the Supreme Court in *Jackson*."); *Brooks v. Pierce*, No. 12-466-GMS, 2015 WL 5793922 at *4 (D. Del. Sept. 30, 2015) ("The governing sufficiency of the evidence standard in Delaware is identical to the standard articulated in *Jackson*.") (internal citation omitted); *Jackson v. Hill,* No. CV. 08-895-KI, 2009 WL 5066648 at *7-8 (D. Or. Dec. 15, 2009) (("Oregon state and federal constitution standards for insufficiency of the evidence are identical"), aff'd, 405 F. App'x 142 (9th Cir. 2010); *Hammell v. Cattell,* No. CIV. 03-422-SM, 2004 U.S. Dist. LEXIS 17415 at *6 (D.N.H. Aug. 31, 2004) ("[S]tate sufficiency-of-the-evidence rule [is] the functional equivalent of the rule established in *Jackson*.").

states and territories that already used standards similar to *Jackson*'s have since found them equivalent;[33] and federal courts too have found them compliant.[34]

[33] Those jurisdictions are Alaska, California, Colorado, Idaho, Illinois, Kentucky, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Northern Mariana Islands, Puerto Rico, South Dakota, Wisconsin, Wyoming. *See Esmailka v. State*, 740 P.2d 466, 470 (Alaska Ct. App. 1987) ("The Alaska rule regarding sufficiency of the evidence is also consistent with the United States Constitution as interpreted in *Jackson*."); *People v. Johnson*, 606 P.2d 738, 750 (Cal. 1980) (holding that the "substantial evidence" standard is "an identical standard" to that in *Jackson*); *People v. Gonzales*, 666 P.2d 123, 127 (Colo. 1983) (connecting the Colorado standard to *Jackson's*); *State v. Merrifield*, 704 P.2d 343, 346–47 (Idaho Ct. App. 1985) (stating that *State v. Filson*, 613 P.2d 938, 943 (Idaho 1980) "implicitly adopted" *Jackson* while preserving the "competent and substantial evidence" standard); *People v. Ehlert*, 811 N.E.2d 620, 625 (Ill. 2004) ("The *Jackson* equivalent applied by appeals courts in Indiana states that '[a] reversal is warranted only if the evidence is so improbable or unsatisfactory that it leaves a reasonable doubt as to defendant's guilt.'"); *Beaumont v. Comm.*, 295 S.W.3d 60, 66-68 (Ky. 2009) (state standard for reviewing denial of direct verdict, analyzed as a sufficiency claim, complies with *Jackson*); *Comm. v. Latimore*, 393 N.E.2d 370, 374–75 (Mass. 1979) (state standard is "substantially comparable" to *Jackson*); *State v. Grim*, 854 S.W.2d 403, 405 (Mo. 1993) (state standard "echoes the due process standard announced by . . . *Jackson*"); *State v. Wilson*, 631 P.2d 1273, 1278–79 (Mont. 1981) ("[T]he standard of review applied in Montana since before 1979 does not fall short of the standard mandated in *Jackson* . . . [and] [i]ndeed, the *Jackson* test has previously been applied by this Court."); *Hern v. State,* 635 P.2d 278, 279 (Nev. 1981) (citing state cases and *Jackson*) ("The issue is not whether this court would have found beyond a reasonable doubt that appellant was guilty of first degree murder, but whether the jury, acting reasonably, could have been convinced to that certitude by the evidence it had a right to consider."); *State v. Brown*, 404 A.2d 1111, 1113 (N.J. 1979) (state standard is "consistent with that articulated by the United States Supreme Court . . . in *Jackson*"); *State v. Sutphin,* 753 P.2d 1314, 1319 (N.M. 1988) (state standard "is the same as [the standard] annunciated in *Jackson*"); *State v. Kringstad*, 353 N.W.2d 302, 306 (N.D. 1984) (state standard satisfies *Jackson*); *State v. Holzer*, 611 N.W.2d 647, 650, 654 n.6 (S.D. 2000) (applying the standard "whether there is sufficient evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt," and appearing to find it compatible with *Jackson*); *State v. Poellinger*, 451 N.W.2d 752, 755 (Wis. 1990) (applying *Jackson* to articulate the standard: "so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt"); *Broom v. State*, 695 P.2d 640, 642 (Wyo. 1985) (applying *Jackson* to articulate the standard: "[n]ot whether or not the evidence was sufficient to establish guilt beyond a reasonable doubt, but whether or not the evidence could reasonably support such a finding by the factfinder"). Minnesota courts have not explicitly held their standard equivalent to *Jackson*, but a federal district court has. *See Strother v. Minnesota*, No. CV 15-488 (PAM/JJK), 2016 WL 861294, at *3 (D. Minn. Feb. 10, 2016), report and recommendation adopted, No. CV 15-488 (PAM/JJK), 2016 WL 868175 (D. Minn. Mar. 7, 2016) (holding that when applying its general sufficiency of the evidence standard, the Minnesota Supreme Court "engaged a standard of review that is identical to *Jackson*'s requirement"); *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004) (citing *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978)) ("we are limited to ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged."). Puerto Rico applies a standard very similar to *Jackson*, and appears to implicitly find it consistent therewith. *See Pueblo v. Vega de Jesus*, No. KDB2014-G0030, 2016 WL 5349666, at *8 (P.R. Cir. June 10, 2016) ("whether the factual judge could reasonably conclude that the Appellant was guilty beyond reasonable doubt with the evidence before him") (citing *Jackson* and other cases).

[34] *See McDaniel*, 558 U.S. at 131, n.4 (Nevada sufficiency standard not contrary to *Jackson*); *Morgan v. Dickhaut*, 677 F.3d 39, 49 (1st Cir. 2012) (Massachusetts standard "consistent with *Jackson*"); *Coluccio v. Montana*, 469 F. App'x 650, 652 (9th Cir. 2012) (Montana courts "have correctly identified the governing

Only 11 states and territories stuck with pre-*Jackson* standards that differed from the language of *Jackson*, concluding after their own analyses that they were still constitutional.[35] Those reviewed by federal courts for compliance with *Jackson* have been considered "at least as protective," "reasonable," "equivalent" to, and functionally "the same" as *Jackson*, and left undisturbed.[36]

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rule of *Jackson* [] for sufficiency of the evidence claims"); *Adams v. Bertrand,* 453 F.3d 428, 432 (7th Cir. 2006) (Wisconsin's *Poellinger* standard "effectively duplicates the Supreme Court standard for sufficiency challenges"); *Clark v. Carey*, 100 F. App'x 623, 624–25 (9th Cir. 2004) ("California courts use the *Jackson* standard when reviewing claims of insufficient evidence."); *Cabrera v. Hinsley,* 324 F.3d 527, 533 (7th Cir. 2003) ("Illinois court was using the right burden of proof even though the phrase from *Jackson* was not parroted. We do not see this standard as contrary to *Jackson*."); *Strother*, 2016 WL 861294 at *3 (federal court finding Minnesota's standard "identical to Jackson's requirement"); *Heard v. Kemna,* No. 403CV793CASMLM, 2005 WL 1474123 at *14 (E.D. Mo. June 22, 2005) (Missouri's standard "a reasonable interpretation of federal law and that it is not contrary to federal law").

[35] Those jurisdictions are Arizona, Arkansas, Hawaii, Indiana, Iowa, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Utah. *See State v. Tison,* 633 P.2d 355, 362 (Ariz. 1981) ("In Arizona, the substantial evidence test applied to reviews on appeal is consistent with the constitutional principles enunciated in *Jackson v. Virginia.*"); *Jones v. State*, 598 S.W.2d 748, 749 (Ark. 1980) ("the language in the *Jackson* case [does not] require[] [the courts] to abandon" their "substantial evidence" standard); *State v. Robinson,* 288 N.W.2d 337, 339-340 (Iowa 1980) (state's "substantial evidence rule" is "generally consistent" with *Jackson*, with one modification); *State v. Brown*, 308 S.E.2d 346, 348 (N.C. Ct. App. 1983) (state test of "substantial evidence of each essential element of the offense charged" is constitutional if applied alongside *Jackson* standard); *Commonwealth v. Brown*, 52 A.3d 1139, 1164 (Pa. 2012) (finding its state standard of review higher than that of *Jackson*, and compliant); *State v. Perkins*, 460 A.2d 1245, 1247 (R.I. 1983) ("[N]o rational factfinder could have found the defendant guilty beyond a reasonable doubt, that is, the state failed as a matter of law to prove its case despite a fair opportunity to do so"); *State v. Scott,* 497 S.E.2d 735, 132 (S.C. 1998)(applying a "substantial evidence" test and observing it comports with *Jackson*); *State v. Gardner*, 789 P.2d 273, 285 (Utah 1989) (applying state test very similar to *Jackson*, and citing *Jackson*). Indiana has explicitly declined to adopt the *Jackson* standard, but its own is a parallel, as confirmed by federal courts. *Crittenden v. Butts*, No. 117CV02279JMSDLP, 2018 WL 6019593, at *9 (S.D. Ind. Nov. 16, 2018) (Indiana standard is an "analog" of, and "comports" with, *Jackson*); *Norris v. State,* 419 N.E.2d 129, 134 (Ind. 1981) (declining to adopt the *Jackson* standard); *Loyd v. State*, 398 N.E.2d 1260, 1264 (Ind. 1980) ("only to the evidence most favorable to the State and all reasonable inferences to be drawn therefrom" to ensure that the existence of each element of the crime charged may be found therefrom, beyond a reasonable doubt"). Hawaii courts have not explicitly found their standard complies with *Jackson*, but federal courts have. *See Yamada v. Thomas*, No. CIV. 09-00298 LEK, 2012 WL 3150262 at *13–14 (D. Haw. July 31, 2012) (Hawaii's sufficiency reviews are "consistent with the principles set forth in *Jackson*"); *State v. Batson*, 831 P.2d 924, 931 (Haw. 1992) ("Substantial evidence as to every essential element of the crime charged is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion.").

[36] *See, e.g., Dansby v. Hobbs,* 766 F.3d 809, 817–18, 818–19 (8th Cir. 2014) (Ark. standard "not an unreasonable way for a state court to ensure that a rational trier of fact could have found the requisite elements beyond a reasonable doubt[,]" and "not contrary to" *Jackson*) (internal citation omitted); *Runningeagle v. Ryan*, 686 F.3d 758, 763 n.1 (9th Cir. 2012) ("Arizona standard is equivalent to the

Five states including Virginia have chosen to apply a separate and distinct standard to circumstantial-evidence cases: probing whether the prosecution failed to disprove any "reasonable hypotheses of innocence," sometimes alongside the *Jackson* standard.[37] Four of these five states use *Jackson* exclusively for direct-evidence cases;[38] Virginia is the only one that applies the "reasonable hypothesis" standard to circumstantial cases,[39] and also fails to apply *Jackson* in direct-evidence

standard for sufficiency of the evidence federal courts"); *Rivera v. Wall*, 333 F. Supp. 3d 47, 64 (D.R.I. 2018) ("Rhode Island Supreme Court did not mention *Jackson.* However . . . [its] standard is at least as protective of the defendant's rights as the federal counterpart.'"); *Crittenden*, 2018 WL 6019593 at *9 (Ind. standard "analog" of, and "comports" with, *Jackson*); *Yamada*, 2012 WL 3150262 at *13–14 (Hawaii's standard "consistent with the principles set forth in *Jackson*"); *Watson v. Nix*, 551 F. Supp. 1 (S.D. Iowa 1982) ("Iowa substantial evidence standard . . . is the same as the *Jackson* standar[.]"), aff'd, 696 F.2d 1000 (8th Cir. 1982)).

[37] Those states are Alabama, Florida, Louisiana, Minnesota, and Virginia. *See Lewis v. State*, 24 So. 3d 480, 523 (Ala. Crim. App. 2006), aff'd sub nom. *Ex parte Lewis,* 24 So. 3d 540 (Ala. 2009) ("The test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt[.]"); *State v. Law,* 559 So. 2d 187, 188 (Fla. 1989) ("The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse."); *State v. Ricks*, 428 So. 2d 794, 796 (La. 1983) (applying *Jackson* along with LSA-R.S. 15:438, which provides that "in order to support a conviction, circumstantial evidence must exclude every reasonable hypothesis but guilt."); *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017) (stating that "[f]or approximately a century, we have applied a separate standard of review to challenges to the sufficiency of circumstantial evidence . . . we take this opportunity to reaffirm what we have already stated about the circumstantial-evidence standard of review."). Virginia's practice is detailed *infra*.

[38] *See Strother*, 2016 WL 861294, at *3; *Pagan,*, 830 So. 2d at 803; *Ex parte* G.G., 601 So. 2d at 892; *Brown*, 421 So.2d at 856.

[39] Virginia often, but not always, uses the "reasonable hypothesis of innocence" standard for circumstantial-evidence cases. *See Jones v. Comm.*, 170 S.E.2d 779 (Va. 1969) ("The Commonwealth must prove the guilt of an accused to the exclusion of every reasonable hypothesis consistent with his innocence."). Virginia at times uses the circumstantial-evidence standard alongside *Jackson*, alongside the statutory standard, or alone. *Compare Kelly v. Comm.*, 584 S.E.2d 444, 447-48 (Va. Ct. App. 2003) (*Jackson* and reasonable hypothesis standards), *with Stevens v. Comm.*, 567 S.E.2d 537, 539-40 (Va. Ct. App. 2002) (statutory and reasonable hypothesis standards), *and Tribuzi v. Comm.*, 487 S.E.2d 870 (Va. Ct. App. 1997) (reasonable hypothesis standard alone). The circumstantial-evidence standard in Virginia, which predates *Jackson*, also contains its own "beyond a reasonable doubt" clause, *see Burton v. Comm.*, 62 S.E. 376, 379 (Va. 1908), and Virginia courts interpret it as a formulation of the existing burden of proof, rather than a heightened standard. *See Comm. v. Hudson*, 578 S.E.2d 781, 785 (Va. 2003). The U.S. Court of Appeals for the Fourth Circuit, however, has characterized the standard as higher than that required by *Jackson*. *Inge v. Procunier*, 758 F.2d 1010, 1014 (4th Cir. 1985) ("we should not adopt Virginia's stricter standard of review for sufficiency of the evidence because *Jackson* establishes the federal standard").

cases. It is notable that other states once used a special circumstantial-evidence standard[40] but now apply *Jackson* to all cases. Oklahoma, for example, applied a "reasonable hypothesis" standard to circumstantial cases until 2004, when it corrected course and began applying Jackson to all cases.[41] Similarly, Texas applied "reasonable hypothesis" language to interpret *Jackson* in circumstantial cases until 1991.[42]

Finally, the "no evidence" standard, while abandoned by most jurisdictions, is still used in unusual ways by three jurisdictions: West Virginia; the District of Columbia; and Virginia. But only Virginia's use unmitigatedly defies *Jackson*'s holding. West Virginia has created a hybrid that uses part of the "no evidence" standard alongside language from *Jackson*: "'a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.' This passage requires the presence of evidence in order for the jury to find guilt beyond a reasonable doubt." *State v. Boyd*, 796 S.E.2d 207, 216 & n.12 (W.Va. 2017) (quoting *State v. Guthrie*, 461 S.E.2d 163 (1995)) (rejecting conflict with *Jackson*). West Virginia courts believe this language functions constitutionally alongside *Jackson*, which it also uses. *Id.* Federal district courts appear

[40] *See, e.g., Dolvin v. State*, 391 So. 2d 133, 137 (Ala. 1980) (citing "reasonable hypothesis" standard to test verdicts based on circumstantial evidence); *State v. Buchanan*, 312 N.W.2d 684, 689 (Neb. 1981) ("[B]efore an accused may be convicted on the basis of circumstantial evidence alone, the State must disprove every hypothesis but that of guilt."); *Poellinger*, 451 N.W.2d at 756-58 (Wisc. 1990) (shifting from "reasonable hypothesis of innocence" standard in circumstantial cases to *Jackson*-compliant standard in all cases).

[41] *See Easlick v. State*, 90 P.3d 556, 557–58 (Okla. Crim. App. 2004).

[42] *Compare Butler v. State*, 769 S.W.2d 234, n. 1 (Tex. Crim. App. 1989) (using "reasonable hypothesis theory" as an "analytical construct to facilitate the application of the *Jackson* standard")), *with Geesa v. State*, 820 S.W.2d 154, 158 (Tex. Crim. App. 1991) ("It follows that circumstantial evidence should not be tested by an *ultimate* standard for review different from direct evidence; the standard in both kinds of cases is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (internal quotations omitted) (emphasis in original).

to have accepted their conclusion, though without directly examining it;[43] and undersigned found no Fourth Circuit review of the language. In a similarly unusual move, D.C. sometimes uses a standard similar to Virginia's, found in a D.C. statute for bench trials.[44] But D.C.'s Court of Appeals uses *Jackson* to review jury verdicts.[45]

Virginia is the third, and most glaringly unconstitutional, exception, as already discussed. Not only does Virginia use its "without evidence" standard in most cases, but it has never engaged in any introspective analysis of whether that standard complies with *Jackson*.[46] Federal district courts have a few times found Virginia's practice "not contrary to" *Jackson*, though without reasoned analysis.[47] The U.S. Court

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[43] *See, e.g., Payne v. Ballard*, No. 2:17cv126, 2018 U.S. Dist. LEXIS 150943 at *5 n. 2 (N.D.W. Va. June 12, 2018) ("[T]he first assignment of error was based upon the Petitioner's claim that there was insufficient evidence to support a conviction upon each count under *State v. Guthrie*, [], which itself was based largely on the United States Supreme Court case law (namely, *Jackson v. Virginia*[.])"); *Horn v. Ballard*, No. 1:07-0503, 2009 U.S. Dist. LEXIS 34998 at *44 n. 12 (S.D. W. Va. Feb. 26, 2009) ("In *State v. Guthrie* [], the West Virginia Supreme Court of Appeals adopted the analysis set forth in Jackson to determine whether the evidence was sufficient to support the jury's verdict.").

[44] *See Burwell v. U.S.*, 901 A.2d 763, 765-66 (D.C. 2006) (quoting D.C.Code § 17–305(a) (2001)) ("Where a defendant has been tried by a judge sitting without a jury, 'the court may review both as to the facts and the law, but the judgment may not be set aside except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it.'").

[45] *See, e.g., Timberlake v. U.S.*, 758 A.2d 978, 980-981 (D.C. 2000) (quoting *Jackson* 443 U.S. at 319) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."). Sometimes, the D.C. Court of Appeals uses the "no evidence" phrase in conjunction with *Jackson*'s standard when consider jury verdicts, similar to the practice of West Virginia, *supra*. *See id.* at 981 (*quoting Curington v. U.S.*, 621 A.2d 819, 824 (D.C. 1993)) ("Reversal is warranted only where there is *no evidence* upon which a reasonable [juror] could infer guilt beyond a reasonable doubt[.]") (emphasis added)); *Harris v. U.S.*, 668 A.2d 839, 840 (D.C. 1995) (*citing Curry v. U.S.*, 520 A.2d 255, 263 (D.C. 1987)) ("This court will only overturn a conviction where there is *no evidence* upon which a reasonable mind could fairly conclude guilt beyond a reasonable doubt, drawing no distinctions between direct and circumstantial evidence.").

[46] When Virginia courts use the "without evidence" and *Jackson* standards together in the same case, they do not acknowledge that they are different. *See e.g., Seaton v. Comm.*, 595 S.E.2d 9, 13 & n.2 (Va. Ct. App. 2004) (reciting *Jackson*'s standard in the body, and then stating in a footnote: "This standard comes from Code § 8.01-680 – the basis for our appellate review of factfinding in civil and criminal cases as well as bench and jury trials.").

[47] *See, e.g., MacDonald v. Holder*, No. 1:09cv1047, 2011 U.S. Dist. LEXIS 109749 at *20-22 (E.D. Va. Sep. 26, 2011) (Virginia standard "is clearly in line with the federal standard"), rev'd on other grounds by *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013); *Jackson v. Warden*, No. 1:09cv1157, 2011 U.S. Dist.

of Appeals for the Fourth Circuit has not spoken on the issue. This stands in stark contrast to experiences of states like Arizona, where state courts were reprimanded on federal review for including a "no evidence" component to their sufficiency standard (even alongside other language the federal court found *Jackson*-compliant on its own),[48] and subsequently removed the unconstitutional phrase from their lexicon.[49] Virginia's pernicious use of its "without evidence" standard has never received critical examination by any Virginia or federal court; it has flown under the radar for decades.

Federal courts routinely apply *Jackson* not only to review state convictions, as detailed *supra*, but every Court of Appeal, including for the Armed Forces, also relies upon *Jackson* to review federal convictions on direct appeal.[50]

Virginia is thus an extreme outlier among both state and federal jurisdictions.

LEXIS 42852 at *14 (E.D. Va. Apr. 20, 2011) ("Although the Court of Appeals of Virginia did not explicitly cite the federal standard, the court did not arrive at a different conclusion than the Supreme Court of the United States on a question of law because its reasoning comports with the standard from *Jackson*. Therefore, its determination was not contrary to clearly established federal law.").

[48] The U.S. District Court stated that although Arizona's "substantial evidence" standard complied with *Jackson*, the state also applied "a standard of a complete absence of probative facts," and thus "contradict[ed] that holding in *Jackson*, [making] its decision [] contrary to Supreme Court law." *Sandoval v. Ryan*, No. CV188250PCTJJTJFM, 2019 WL 3558198 at *15 (D. Ariz. June 3, 2019), rpt. and recommendation adopted, No. CV1808250PCTJJTBSB, 2019 WL 3556968 (D. Ariz. Aug. 5, 2019).

[49] Arizona cases since *Sandoval* have left out the "complete absence of probative facts" prong. *See, e.g., State v. Dunbar,* No. 2 CA-CR 2018-0064, 2020 Ariz. App. LEXIS 419 at *14-15 (Ct. App. Apr. 29, 2020) (unpub.) ("'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (citing other Arizona cases)).

[50] See *U.S. v. Smith*, 749 F.3d 465, 476-77 (6th Cir. 2014) (quoting and applying *Jackson* standard); *U.S. v. Brown*, 726 F.3d 993, 1005 (7th Cir. 2013) (same); *U.S. v. Bansal*, 663 F.3d 634, 665 (3d Cir. 2011) (same); *U.S. v. Aponte*, 619 F.3d 799, 804 (8th Cir. 2010) (same); *U.S. v. Madrigal-Valadez*, 561 F.3d 370, 374 (4th Cir. 2009) (same); *U.S. v. Zavala-Mendez*, 411 F.3d 1116, 1118 (9th Cir. 2005) (same); *U.S. v. Magallanez*, 408 F.3d 672, 681 (10th Cir. 2005) (same); *U.S. v. Arrington*, 309 F.3d 40, 48 (D.C. Cir. 2002) (same); *U.S. v. Diaz*, 248 F.3d 1065, 1093 (11th Cir. 2001) (same); *U.S. v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (same); *U.S. v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (same); *U.S. v. Olbres*, 61 F.3d 967, 970 (1st Cir. 1995) (same); *U.S. v. Greenwood*, 974 F.2d 1449, 1456 (5th Cir. 1992) (same).

III. This Court would act judiciously to summarily reverse and remand this case to the state court to apply *Jackson* to Ms. Ortiz's sufficiency claim.

This Court should grant certiorari, and summarily reverse and remand this case for adjudication of Ms. Ortiz's claim under the constitutionally-required standard. Virginia never adopted *Jackson*, and is operating in direct conflict not only with this Court's ruling but with every other jurisdiction in the country on a clear application of federal law. This is clear from the history, patterns, and survey presented in this Petition.

The posture of Ms. Ortiz's case is ideal for addressing this problem simply and directly with a summary reversal. The most time- and resource-efficient mode of correcting the Virginia courts at this juncture is also the only sure way to ensure they meaningfully change their practices. In contrast, waiting for federal habeas proceedings in Ms. Ortiz's case will most-likely insulate the problem. Not only would the deferential doctrines of federal review make it difficult for a federal court to directly review the claim, but Ms. Ortiz, who is indigent, is not entitled to counsel for any proceedings past her state direct appeal (state law does not compensate counsel for the present cert petition, either). The same reasons may explain why this issue has evaded federal inspection for over 45 years. And it means, realistically, that this Petition is Ms. Ortiz's most meaningful (and likely her last) opportunity to seek redress.

This Court should, respectfully, grant certiorari to summarily reverse and remand this case, in order to ensure conformity with the clear holding of *Jackson*. Virginia will not do this on its own, as the last 45 years have shown. Instead it will continue, as it did in this case and many-hundreds of others, to apply its own pre-*Jackson* artifact without self-reflection, and in direct conflict with a bedrock doctrine of this Court. The *Jackson* appellate standard is as fundamental as the "reasonable doubt" requirement itself, "'symboliz[ing] the significance that our society attaches to the criminal sanction and thus to liberty itself.'" *Jackson*, 443 U.S. at 315 (*quoting In re Winship*, 397 U.S. at 372 (Harlan, J., concurring)). This case presents a simple opportunity for this Court to redirect Virginia's path going forward.

And finally, for Ms. Ortiz, justice can only come from the review sought here. Ms. Ortiz's case is a poignant example of precisely why this Court held that *Thompson's* "no evidence" standard was untenable with Due Process guarantees. Ms. Ortiz was convicted of possession of stolen property on a joint dominion and control theory, although she indisputably never drove the car. Instead, the car was driven by her abusive husband. The Supreme Court of Virginia found an implicit inference supported a legal theory of joint control, without citing or applying any part of *Jackson*'s rational, beyond-a-reasonable-doubt standard. The only legal standard the Virginia Supreme Court utilized was the following:

> When presented with a challenge to the sufficiency of the evidence in a criminal case, the Court reviews the evidence "in the 'light most favorable' to the Commonwealth." *Bowman v. Commonwealth*, 290 Va. 492, 494 (2015) (quoting *Commonwealth v. Hudson*, 265 Va. 505, 514 (2003)). "Viewing the record through this evidentiary prism requires [the Court] to 'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom.'" *Id.* (quoting *Kelley v. Commonwealth*, 289 Va. 463, 467-68 (2015)).

No. 250679, p. 4. The inference it used was based on the following:

- A teenager who, it appears, stole the car without Ms. Ortiz's or Whitaker's involvement or knowledge, brought the car to them claiming she owned it. State Court Electronic (Audio) Record, Exh. 10 at 8:06:31-8:06:42. She then abandoned the car with Whitaker after being kicked out of the couple's motel. *Id.* at 8:06:42-8:06:46, 8:07:01-8:07:05, 8:07:06-8:07:14. A few days later, Ms. Ortiz figured out that the car was likely stolen. *Id.* at 8:07:26-8:07:47. She then urged Whitaker not to drive it, but he did not listen to her. *Id.* at 8:07:52-8:08:02, 8:44:54. Ms. Ortiz herself never drove the car, *id.* at 08:08:37-08:08:44, even before she knew it was stolen, because Whitaker didn't want her to. *Id.* at 08:40:44-08:40:58.

- Another, unnamed woman was staying at the motel with Whitaker and Ms. Ortiz; this woman was in a personal relationship with Whitaker and to some extent Ms. Ortiz, which may have been a "throuple" romantic relationship, though the truth is completely undeveloped in the record. The facts about the relationship come exclusively from Ms. Ortiz's police station interrogation, in the immediate aftermath of an extremely emotional and terrifying event for Ms. Ortiz (in which an officer threatened to shoot her in the head, the two struggled over a gun, and ultimately the officer shot and killed Whitaker in close proximity to Ms. Ortiz). Both were screaming – Officer Hall screaming threats to shoot Ms. Ortiz in the head if she continued reaching for her gun. Ms. Ortiz's police interrogation was punctuated by her traumatic responses to these events: sobbing, numbness, and vomiting. *Id.* at, *e.g.,* 8:17:06, 8:29:20, 8:35:37, 8:38:30.

- In her police interrogation Ms. Ortiz stated that Whitaker drove the car that morning, with Ms. Ortiz in the front passenger seat, first to give "our girlfriend" a ride to the girlfriend's work. *Id*. at 8:02:57-8:03:09. She later characterized this unnamed woman as Whitaker's girlfriend, however. *Id.* at 8:02:33-8:02:40.

- After dropping the girlfriend at work, Whitaker unilaterally chose to drove the car to pick up his friend (whose name Ms. Ortiz did not know), and drive to a smokeshop so that Whitaker and his friend could buy something to smoke marijuana. *Id*. at 8:04:05-8:05:58. When they got to the shopping center, Whitaker parked the car, while his friend got out alone, and walked to the smoke shop alone. Shortly after that, Whitaker got out of the driver's door, at which point the police officer approached the car, leading to Whitaker's death and Ms. Ortiz's charges.

It is very important to note the context surrounding these relationships: Whitaker was an abusive spouse who sex-trafficked Ms. Ortiz, and likely this second woman as well. Perhaps in light of this context, the intermediate appellate court had rejected the Commonwealth's position that the woman was associated more with Ms. Ortiz than Whitaker, finding the evidence established instead: "Ortiz also may have had a relationship with Deshawn's girlfriend[.]" No. 1918-23-1 at 8. The Court of Appeals also observed: "From her interview with the police, the girlfriend appeared to be in a relationship with both Ortiz and Deshawn [Whitaker]." No. 1918-23-1 at 4 n.4. The intermediate court vacated the possession conviction, finding the evidence failed to establish Ms. Ortiz exercised dominion and control over the car after learning that it was stolen. The Commonwealth failed to establish control because: "There was no evidence that Ortiz had told her husband where to drive or who to carry in the vehicle" after she knew it was stolen; and the Commonwealth (and circuit court) erroneously relied on "her status as the wife of the driver of the stolen vehicle and that she knew the few passengers who were driven in the car by her husband." No. 1918-23-1 at 8. Furthermore, "while Ortiz also may have had a relationship with Deshawn's girlfriend and the unidentified male, the Commonwealth failed to establish that Ortiz exercised control over the use of this stolen vehicle in transporting these friends." *Id.*

The Supreme Court of Virginia reversed, quibbling with the intermediate court's interpretation of the facts and rejecting the sufficiency claim. But as noted above, they did not engage with *Jackson*'s standard at all. If they had, this attenuated inference, based on a vastly incomplete and ambiguous record, would not meet it. No rational jury could find, beyond a reasonable doubt, that Ms. Ortiz possessed the car.

CONCLUSION

If the Virginia courts are required to apply the proper due process standard to her case, Ms. Ortiz may finally receive relief from her flawed conviction. No rational trier of fact could find the existing evidence proves beyond a reasonable doubt that Ms. Ortiz exercised any dominion and control over the stolen car her abusive husband chose to drive. The Due Process Clause and *Jackson* compel a different result here.

For all of these reasons, Ms. Ortiz respectfully seeks a grant of certiorari, summary reversal and remand to the Supreme Court of Virginia for application of *Jackson v. Virginia* to her claim. The petition for a writ of certiorari should be granted, to allow this Court to summarily reverse and remand Ms. Ortiz's case to the Supreme Court of Virginia for application of *Jackson v. Virginia*.

Respectfully submitted this 8th day of September, 2026,

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No. ___________________

IN THE

SUPREME COURT OF THE UNITED STATES

JACQUELINE LYNNE ORTIZ – PETITIONER

vs.

COMMONWEALTH OF VIRGINIA – RESPONDENT

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

APPENDIX

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