ORIGINAL

In the

Supreme Court of the United States

JAMES A. JACKSON, Petitioner, v. COMMONWEALTH OF VIRGINIA and R. ZAHRADNICK, Warden Respondents.	)	No. 78-5283

Washington, D. C.
March 21, 1979

Pages 1 thru 44

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COMMONWEALTH OF VIRGINIA and R. ZAHRADNICK, Warden, Respondents.	:	No. 78-5283

Washington, D. C.

Wednesday, March 21, 1979

The above-entitled matter came on for argument at 1:50 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

CAROLYN J. COLVILLE, Esq., Colville and Dunham, 2 North First Street, Richmond, Virginia 23219, for the Petitioner.

MARSHALL COLEMAN, Esq., Attorney General of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Jackson against Commonwealth of Virginia, No. 78-5283.

Ms. Colville, I believe you can proceed whenever you are ready now.

ORAL ARGUMENT OF MS. CAROLYN J. COLVILLE

ON BEHALF OF THE PETITIONER

MS. COLVILLE: Thank you, your Honor.

Mr. Chief Justice, and may it please the Court: The issue before the Court today is whether a Federal district court should issue a writ of habeas corpus when there is insufficient evidence in the State court record to convince a rational trier of fact of guilt beyond a reasonable doubt.

A statement of the relevant proceedings is as follows: The petitioner, James A. Jackson,was tried and convicted of first degree murder in the Circuit Court of Chesterfield County and sentenced to 30 years in prison. Briefly, the evidence indicated that he had shot the deceased, Mrs. Mary Cole, twice, that several shots were fired at the scene. Did he engage in target practice that day? However, there is extensive evidence indicating he consumed a large amount of alcohol, and shortly before the death of Mrs. Cole the two of them had drank two fifths of whisky, a fifth of some other alcoholic beverage that was not divulged in the

record, and an undetermined amount of beer. He admitted to the shooting in a statement made to the police. He indicated it was in self-defense.

He then unsuccessfully appealed his case to the Virginia Supreme Court. He thereupon filed a pro se petition for writ of habeas corpus to the United States District Court for the Eastern District of Virginia, in which he made numerous allegations, including an allegation that his conviction for first-degree murder was unsupported by evidence of premeditation.

The district court judge thereupon searched the record and determined that he could find no evidence of premeditation to be found.

QUESTION: Now, how did this district judge come to be addressing this subject?

MS. COLVILLE: Mr. Jackson alleged in his petition that his conviction was not supported by evidence of premeditation.

QUESTION: This wasn't the first time the case had been before a court. The case wasn't initiated in the Federal court.

MS. COLVILLE: No. It was initiated in the Circuit Court of Chesterfield County, Virginia. He then unsuccessfully appealed the case to the Virginia Supreme Court.

QUESTION: What was the Federal court doing with it? What brought the Federal court into the case?

MS. COLVILLE: He was alleging a deprivation of rights.

QUESTION: Oh. By what kind of a procedure was he in Federal court?

MS. COLVILLE: He filed a petition for writ of habeas corpus.

QUESTION: Habeas corpus.

MS. COLVILLE: Right.

QUESTION: Yes. I had the impression from your earlier remarks that the case was being tried by a Federal judge.

MS. COLVILLE: No. No. The district court judge --

QUESTION: There's quite a difference, isn't there?

MS. COLVILLE: Yes. Yes, there is, your Honor.

The district court judge searched the State court record and determined that he could not find evidence of premeditation. He then dismissed the other allegations for failure to exhaust the court remedies.

The State of Virginia thereupon filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit. The Fourth Curcuit in a per curiam opinion reversed the findings of the district court judge and held that it could find some evidence of premeditation and need not

search the record any further to see if a rational trier of fact could have found guilt beyond a reasonable doubt. Whereupon, we filed petition for writ of certiorari to this Court.

Both the district court and the Federal court of appeals applied Virginia law, whereupon one may be so intoxicated as to be incapable of deliberation. In addition, both courts applied the holding of the 1960 case of Thompson v. City of Louisville, which held that it was a violation of due process to convict and punish a person without some evidence of guilt.

It is our contention that it is also a violation of due process to convict and punish a person when no rational trier of fact could have found guilt beyond a reasonable doubt.

QUESTION: You think that's the situation here on this record?

MS. COLVILLE: Yes, I do, your Honor. I don't think that a rational trier could have found guilt beyond a reasonable doubt.

QUESTION: I take it you will expand on that in due course in your comments.

MS. COLVILLE: Yes, your Honor.

QUESTION: could they have found him guilty of manslaughter?

MS. COLVILLE: I think it is possible that they could have found him guilty of manslaughter.

QUESTION: Would that take it out from under Thompson?

MS. COLVILLE: Excuse me?

QUESTION: In Thompson they say you couldn't be convicted of anything.

MS. COLVILLE: I think --

QUESTION: This was a question of degree.

MS. COLVILLE: Certainly it is a question of degree. We personally have no --

QUESTION: Isn't that a little different from Thompson?

MS. COLVILLE: I think the holdings of this Court after Thompson, I believe four years after, about 1974, indicated that there has to be some evidence of every element of the offense. We are indicating that there is no evidence of premeditation.

QUESTION: Do you think he should go free?

MS. COLVILLE: No, your Honor. The respondents have addressed the issue of what can be done even if this Court found that there is insufficient evidence. I think the common belief is that he could not be retried for first-degree murder due to the double jeopardy clause of the Constitution. However, we would agree that he could either

be sent back to the State courts for sentencing for second-degree or for a retrial, because the only issue has been premeditation, a necessary element of first-degree murder, not second-degree.

QUESTION: Do we need Thompson v. Louisville to do that?

MS. COLVILLE: To send it back to the State courts?

QUESTION: For resentencing.

MS. COLVILLE: No, your Honor.

QUESTION: You are relying on the Winship case.

MS. COLVILLE: Yes, your Honor.

QUESTION: The question, I suppose, is whether the Winship case as a constitutional matter requires that there be proof beyond a reasonable doubt in order to support a conviction in a State court or only that the jury be instructed that they must find guilt beyond a reasonable doubt. That's the real question, isn't it?

MS. COLVILLE: Yes, your Honor. Our contention --

QUESTION: The jury was so instructed in this case, wasn't it?

MS. COLVILLE: Yes, sir.

QUESTION: And arguably that's all that Winship requires.

MS. COLVILLE: Well, your Honor, first of all, there was not a jury in this case. It was tried by a judge.

QUESTION: Well, then, presumably the trier of fact followed that --

MS. COLVILLE: It is our contention that in Winship, which held the Due Process Clause of the Fourteenth Amendment requires that there be proof beyond a reasonable doubt, certainly a jury instruction to the effect that the jury cannot convict unless there is evidence beyond a reasonable doubt is insufficient if in fact that jury has found guilt beyond a reasonable doubt.

QUESTION: Ms. Colville, the facts of Winship were that the trial judge stated that he could find these particular defendants guilty by a preponderance of the evidence but he couldn't bring himself to find them guilty beyond a reasonable doubt.

MS. COLVILLE: Yes, your Honor.

I believe that this Court in addressing the issue as a juvenile indicated that in a juvenile proceeding there cannot be a conviction unless the charges have been proved beyond a reasonable doubt.

Now, arguably the Federal courts have said that this is only a jury instruction. However, at least four courts and at least two appeals courts in the context of a direct appeal have indicated that In re Winship requires that there be proof beyond a reasonable doubt.

QUESTION: Where do you get your definition of

beyond a reasonable doubt?

MS.COLVILLE: From In re Winship, which held that the Due Process Clause requires that in a criminal setting there must be -- that you cannot convict a person unless there is proof beyond a reasonable doubt.

QUESTION: I realize that, but I presume that if your argument were accepted by this Court, other courts would have to decide was there or was there not proof "beyond a reasonable doubt." Where do you get the definition of "beyond a reasonable doubt"?

MS. COLVILLE: Your Honor, that is not an easy question.

QUESTION: No, it isn't.

MS. COLVILLE: I do think that it has been a standard that has been generally accepted in both the Federal and State courts for some time. I think --

QUESTION: For some time. It was accepted before the Constitution was adopted, wasn't it?

MS. COLVILLE: Yes, your Honor. It has been accepted for some time. I think the courts are far more familiar with that standard than the no-evidence standard of Thompson, which I submit is a far more difficult standard for a court to apply than beyond a reasonable doubt. The courts are familiar with beyond a reasonable doubt. They have not been with the no-evidence rule of Thompson.

QUESTION: But you are not prepared, at least now, to expand on simply the phrase "beyond a reasonable doubt" in offering guidance as to how courts would analyze transcripts under situations like this.

MS. COLVILLE: Well, your Honor, if you mean by can we offer a definition, no. I think what we can offer is that if this Court adopted our position that the Due Process Clause requires this and that it is something that is cognizable in a writ of habeas corpus, what we would be suggesting is that the Federal district court would give great deference to the findings of the State. We are not suggesting that there be a great overruling of State court cases. What we are saying is if there is conflict of testimony, the conflict should in most cases be favoring the State. We are not asking for second guessing. We are asking if there is a clear issue of innocence here, then the Federal courts should intervene.

QUESTION: In your State, what is the reviewing standard?

MS. COLVILLE: Clearly erroneous, your Honor.

QUESTION: When a convicted criminal appeals and says the evidence was insufficient to prove guilt beyond a reasonable doubt, what standard does the appellate court use in your State?

MS. COLVILLE: In Virginia, there has not been a

ruling indicating that In re Winship requires to prove beyond a reasonable doubt for the State to overrule the lower court finding. What they have indicated is if the finding is clearly erroneous, or in this particular case where they simply indicated whether there has been any violation of the Constitution. They did not elaborate on that. In Virginia as of right now --

QUESTION: Let's assume in the ordinary criminal case in Virginia, no constitutional issues involved in it, there is just a conviction and a claim that the evidence was insufficient. I suppose the standard in Virginia, they instruct the jury that they must find beyond a reasonable doubt.

MS. COLVILLE: That's right.

QUESTION: And in reviewing the sufficiency of the evidence, what does the -- you say the Virginia appellate courts simply say --

MS. COLVILLE: If it's clearly erroneous. They have not --

QUESTION: If what is clearly erroneous?

MS. COLVILLE: The judgment of the lower court. If you are --

QUESTION: The decision of the jury or what?

MS. COLVILLE: Yes.

QUESTION: Clearly erroneous or that --

MS. COLVILLE: Clearly erroneous, not proof beyond a reasonable doubt.

QUESTION: Is there a difference in the standard when a judge tries the case without a jury and when he tries it with a jury?

MS. COLVILLE: No, your Honor. Both would be under an obligation to find proof beyond a reasonable doubt.

In this particular case we did have a judge, and we have briefed the arguments that it should not make any difference that a judge tried this case rather than a jury. I don't think a judge will make an error as often as a jury.

QUESTION: Are you suggesting that the Federal court should apply a different standard from the highest court of the State in reviewing the conviction?

MS. COLVILLE: Your Honor, I think Virginia has not accepted In re Winship as requiring a substantive right to proof.

QUESTION: What evidence do you base your statement on, Ms. Colville, that Virginia has not accepted Winship? Have they said so?

MS. COLVILLE: No, there simply has not been any holding where they have come down and said that, "We will overturn if the proof is insufficient, if the proof has not been beyond a reasonable doubt."

QUESTION: Well, generally, reviewing courts in

States very clearly do accept Winship. As you say, Virginia has not. That's not the test in the appellate court, not whether or not the members of the appellate court are convinced of guilt beyond a reasonable doubt, but only whether they can say that a rational jury could have so found.

MS. COLVILLE: Certainly, your Honor.

QUESTION: That's the test.

MS. COLVILLE: Certainly, your Honor.

QUESTION: Or a rational judge.

MS. COLVILLE: Rational trier.

QUESTION: Rational fact-finder.

MS. COLVILLE: They are saying that if someone had acted non-arbitrarily, they would have found the person not guilty.

QUESTION: What I want to get at, and I am not clear on, I am still confused from the outset of your argument: Are you suggesting that there should be the same standard in the Federal district court on writ of habeas corpus as there would be in the State review?

MS. COLVILLE: I am suggesting that if In re Winship which we feel establishes a substantive right to proof --

QUESTION: That's a substantive right for the trial in the State court, isn't it?

MS. COLVILLE: Yes. We would argue --

QUESTION: Does that continue all the way through

up in habeas corpus, or 2255, 2254 if the State had a similar remedy?

MS. COLVILLE: We would argue that if there is a Federal right to proof, then certainly yes. What we have argued is that the Federal district judge would look at the record --

QUESTION: Doesn't this case come to us with the presumption of regularity in the application of the Federal Constitution by the Virginia courts?

MS. COLVILLE: Yes, your Honor, but we feel that a mistake has been made. And I think the fact that the Federal district judge indicated that a mistake was made also, that, in fact, the person should have been acquitted of first-degree murder.

QUESTION: Well, I thought your argument was that in Federal habeas corpus the wrong standard was applied. Isn't that it?

MS. COLVILLE: Our argument is that at this point the Federal courts have seemingly not adopted the position of rational trier of fact as to habeas corpus. And we would urge --

QUESTION: Was I wrong or right in understanding your argument to be that in this Federal habeas corpus case the district court and the court of appeals were in error in applying the Thompson standard rather than the Winship

standard?

MS. COLVILLE: Yes, your Honor.

QUESTION: Isn't that your claim?

MS. COLVILLE: Yes, your Honor.

Now, we realize that in recent years this Court has been cutting back the scope of habeas corpus out of considerations of comity and federalism, particularly in cases where someone did not exhaust their State court remedies, where someone didn't object, or particularly the Stone v. Powell, which we have put great emphasis on in our brief, where the exclusionary rule was involved, which this Court held frustrated the criminal process.

However, we would urge the Court to particularly look at footnote 31 of that case where it is indicated that innocence is at the heart of habeas corpus. Because what we are in fact arguing here, if the evidence was not sufficient to convince a rational trier of fact, then that person was technically innocent of that offense.

Now, in that footnote, the Court discussed various States' rights interests, including federalism, state autonomy, fiction. However, the clear implication of it is that innocence should be of overriding importance. I think that is basically what it boils down to here, that innocence should be of importance to the writ of habeas corpus and that considerations of comity and federalism should be of secondary

importance.

QUESTION: Ms. Colville, could I ask you a question about your theory as to why the judgment is arbitrary on the premeditation issue. Is it because you think no rational judge could conclude that the defendant was not intoxicated? Or is it because you argue that no rational judge could find that shooting twice and reloading the gun and shooting from only half an inch away and so forth could be evidence of premeditation?

MS. COLVILLE: My argument would be that he was so indeed intoxicated as to be incapable of premeditation.

QUESTION: No rational judge could believe he was not intoxicated.

MS. COLVILLE: That would be my argument. Under Virginia law a mind may be so bewildered by intoxicating beverages as to be incapable of deliberation.

QUESTION: The court of appeals relied on the fact that the deputy sheriff obviously didn't think he was totally intoxicated because he let him retain his weapon after he had seen him with a weapon.

MS. COLVILLE: Your Honor --

QUESTION: Is that some evidence of not being totally intoxicated?

MS. COLVILLE: No, your Honor, we would not agree that that would be some evidence. I think the record, the

transcript indicates that, first of all, the deputy sheriff knew the woman, and I think there is some doubt whether he knew the petitioner, but apparently he felt embarrassed by them coming up, swaggering, bloodshot eyes, and he wanted them out. I think he also indicated he wanted badly to get back inside the cafe. He went outside with them but wanted to get back in the cafe with the other police officers.

I think a reasonable, rational explanation would be that he wanted to finish his dinner.

QUESTION: Isn't it a question of fact as to whether the man is drunk or not?

MS. COLVILLE: Yes, your Honor, it would be a matter of fact.

QUESTION: Didn't a judge decide that fact?

MS. COLVILLE: Yes, your Honor.

QUESTION: How can you attack that?

MS. COLVILLE: Well, your Honor, we are arguing that a rational trier of fact could not have --

QUESTION: Why? Why is it irrational to find that this man wasn't too drunk?

MS. COLVILLE: Because I think the --

QUESTION: What evidence do you have that shows that he was not too drunk -- or that he was too drunk?

MS. COLVILLE: I think the fact --

QUESTION: All you have is that he was drunk.

QUESTION: And he consumed a fifth of whisky.

QUESTION: I know some people who get drunk off of one drink of whisky and I know others who can drink two fifths.

QUESTION: You are asking for a constitutional rule that proof that a man has consumed at least a fifth of whisky demolishes the possibility that he could not have a requisite intent to kill somebody.

MS. COLVILLE: I am not asking a constitutional rule as to that. I am asking a constitutional rule that a rational trier could not determine that.

I think first of all that there was a great deal of evidence here that he had drank the entire day. The deputy sheriff that you referred to earlier, Mr. Justice Stevens --

QUESTION: Are you arguing that because the Federal district judge on habeas corpus, or that a Federal district judge on habeas corpus, if that judge disagrees with the State court judge who tried out the fact issue, then the Federal court determination prevails?

MS. COLVILLE: I would say that the Federal district court judge, if he gives all the deference necessary to the State court judge, if he determines at that point that no rational trier of fact could have found guilt beyond a reasonable doubt, or in this particular case intoxication and premeditation, then I would say, yes, definitely the writ

would have to be issued.

QUESTION: And then three other Federal court judges from the Fourth Circuit can draw an opposite conclusion from that of the district judge?

MS. COLVILLE: Well, your Honor, I think the Fourth Circuit in its opinion, first of all, held that it was under the obligation to follow Thompson v. City of Louisville, and then went on to say that it did not feel that it needed to look to see if there was evidence sufficient to convince a rational trier --

QUESTION: That's what I thought your argument was, Ms. Colville, not what the result should be in this case on the facts of this case, but rather that the Federal courts and Federal habeas corpus since the Winship case, which came after the Thompson case, are obligated by the Constitution to apply a different test and a different rule than was applied here.

MS. COLVILLE: Certainly, your Honor.

QUESTION: Is that your argument?

MS. COLVILLE: We are arguing that the Fourth Circuit and the district court applied the wrong standard. They applied the 1960 standard of Thompson. We would urge that the 1970 case of In re Winship should have been the proper standard for the courts to have applied in this case. And we feel that the innocence of the person should be of

overriding importance in looking at other State considerations. But overall, yes, we are asking that a Federal writ of habeas corpus be issued if no rational trier of fact could have found guilt beyond a reasonable doubt for that particular offense.

QUESTION: Counsel, you just said that the innocence is of overriding importance. I don't know whether you mean to suggest that that is the only conceivable factor to be considered. You are familiar with our decision in Patterson v. New York where we said punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail?

MS. COLVILLE: Excuse me, your Honor. I didn't catch that. I am sorry.

QUESTION: I am just curious whether you think that innocence is, the possibility of innocence is --

MS. COLVILLE: Is the only --

QUESTION: -- the only factor, yes.

MS. COLVILLE: -- determination? No, but I think in granting writ of habeas corpus we have to look at if there has been a deprivation of due process rights. Then I think other principles can come into play. This Court has, in the last few years, indicated comity and federalism in Francis v. Henderson, Estelle v. Williams, and Wainwright v. Sykes, that

these other things will come into play, but that when innocence is at the heart of the argument, the innocence is at the heart of the right involved, then that should be of overriding importance.

QUESTION: Patterson v. New York was a direct appeal here from the State courts, so there wasn't any problem of comity and Federal habeas. And it was in that case that the Court said that punishment of those found guilty by a jury is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail.

MS. COLVILLE: Well, your Honor, I can just go back to my argument of Stone v. Powell of innocence in the footnote, indicating innocence is at the heart of habeas corpus.

QUESTION: But that was in an exclusionary sense, in the sense that if there was no -- if the claim made had no bearing on innocence, perhaps it couldn't be treated in Federal habeas. But there has never been any suggestion that any Federal constitutional claim couldn't be treated on direct review here, as was the case in Patterson.

MS. COLVILLE: Certainly, your Honor. I would just argue that in the writ of habeas corpus this should be the proper standard.

I reserve the rest of my time for rebuttal.

MS. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF J. MARSHALL COLEMAN

ON BEHALF OF THE RESPONDENTS

MR. COLEMAN: Mr. Chief Justice, and if it may please the Court, this case does present the legal issue of whether or not the same evidence standard that was established in the Thompson v. City of Louisville case should be overturned in favor of the rule of proof beyond a reasonable doubt upon a collateral attack by writ of habeas corpus of a Virginia, or State, judgment. And it is our position that those two cases are thoroughly consistent, one with the other, and that as the Chief Justice has suggested, the standard of proof beyond a reasonable doubt has been employed in the several States for time out of mind and, in fact, is the standard in Virginia, and upon review by the Virginia Supreme Court the test is whether a rational juror could decide and hold that proof had been established beyond a reasonable doubt.

We have reviewed by transcript already in Virginia. When someone files a petition for writ to our Virginia Supreme Court, he is not entitled to a hearing, but he is entitled to a review of the record to determine on the question of sufficiency of the evidence, whether that is shown in the transcript.

QUESTION: But despite your practice since time immemorial in the State of Virginia, not until the Winship case

was it clearly decided that the Federal Constitution required that a State prove a person guilty beyond a reasonable doubt before it could convict him.

MR. COLEMAN: My reading of Winship is that the Court was saying in that case that as to a juvenile trial, the proof had to be beyond a reasonable doubt if preponderance of the evidence was not sufficient, and that lest there be any doubt, it would say as a matter of constitutional law that was the rule. But I have cited some cases here that I think suggest that that was not a new rule, was one that was --

QUESTION: It was surely not a new rule in the common law. But it is my understanding that [illegible] not until the Winship case had it been squarely decided --

MR. COLEMAN: I think that's right. It was constitutionalized at that point.

QUESTION: Right. Since it was constitutionalized at that point and since it has been the practice since time almost immemorial of Federal courts on Federal habeas corpus to apply the constitutional test to State criminal convictions, why shouldn't the rule of Winship be the applicable test now that Winship has been decided, which came after Thompson?

MR. COLEMAN: I think for several reasons. I think the reasons that have already been alluded to, effective use of resources, federalism, comity, avoiding --

QUESTION: Well, on that basis we could just not

consider First Amendment questions, for example.

MR. COLEMAN: That is certainly correct.

QUESTION: That would save some time.

MR. COLEMAN: It would save some time. But in this case, you see, the case is tried first in the State court, then it is taken on appeal.

QUESTION: Yes.

MR. COLEMAN: Then it comes back to the Federal court, and then the question there --

QUESTION: That's true in any Federal habeas corpus.

MR. COLEMAN: It is.

QUESTION: Except you have to exhaust your State remedies before you can go into the Federal court.

MR. COLEMAN: But with respect to sufficiency of the evidence, of course, that is an objection that any defendant can make. So that the resources of the court, if it has to go through and have another trial by transcript, would be monumental, and it would engage the resources of the Federal courts to the extent that it would be using up the time of the courts that could better be focused --

QUESTION: If it is a constitutional duty to do it, it is a constitutional duty to do it.

MR. COLEMAN: I think the constitutional duty, if --

QUESTION: That is the question, isn't it?

MR. COLEMAN: The question is, it seems to me --

QUESTION: It's just too bad if it's going to add a lot of business to the Federal courts. But if that's their job, it's their job.

QUESTION: Is it not the question, Mr. Attorney General, whether after Winship the States in trial of criminal cases are constitutionally obliged --

MR. COLEMAN: That's precisely the point.

QUESTION: -- to apply the reasonable doubt standard? Isn't that all Winship decided?

MR. COLEMAN: That's precisely the point, that it may --

QUESTION: It had nothing to do directly with collateral attacks.

MR. COLEMAN: That's exactly right.

QUESTION: Is there any State in the Union that you know at the time of Winship that did not apply --

MR. COLEMAN: I don't know.

QUESTION: -- the reasonable doubt rule?

MR. COLEMAN: But I do think that after Winship in every case the rule was is there proof beyond a reasonable doubt as a standard in the State court. Now, what the Louisville rule, I think, established was that the Court was willing to look at the record to see if there was any evidence to support that. But it seems to me that the Court could consider in this case that since there is an interest in

cutting back on these cases, and the rule of Stone v. Powell is that if there has been an opportunity for a full and fair hearing in the State court, that there is no need to redo that in the Federal court and --

QUESTION: May I ask, Mr. Attorney General, of course, review is not sought of the decision in your supreme court in this case.

MR. COLEMAN: That's right.

QUESTION: Suppose there had been a petition for review of your supreme court on the ground that Winship had not been properly applied. Now, surely that is a Federal question which we could have reviewed.

MR. COLEMAN: That's right.

QUESTION: And we might have disagreed with your supreme court and reversed this conviction.

MR. COLEMAN: That's right.

QUESTION: And now, your suggestion is that the litigants ought to be limited to coming to us directly on review from State courts rather than go into Federal habeas corpus.

MR. COLEMAN: I am making that suggestion to the Court.

QUESTION: Right. Don't we have enough to do up here?

MR. COLEMAN: I am suggesting to the Court if they

come up on direct review, that's sufficient protection and check and supervision over what's happening --

QUESTION: You know something about the happenstance of certiorari grants, don't you?

MR. COLEMAN: I do. I realize that, and I am suggesting that habeas corpus could still exist for the purpose of determining whether there had been an opportunity for a full and fair hearing. But once there has been given an opportunity --

QUESTION: I understand your argument. Perhaps I misunderstand it. You suggest we ought to foreclose habeas review in cases like this and limit the review, if there is to be any Federal review, to direct review by this Court of your highest State court?

MR. COLEMAN: I am suggesting to the Court to consider that as a possibility. We have urged in this case, first of all, that the Thompson rule should be maintained. We think that is very important. But in view of the cases that have occurred recently, the Wainwright case and Estelle and Francis and Stone v. Powell, that would certainly be consistent with --

QUESTION: If it's any comfort to you, I didn't agree with any of those.

MR. COLEMAN: I read that.

Your Honors, I would say simply that in this case --

QUESTION: Stone v. Powell is different than this case, isn't it?

MR. COLEMAN: Well, in --

QUESTION: If your adversary's argument has any substance that innocence is involved and is at the heart of Federal habeas, that was not true in Stone v. Powell.

MR. COLEMAN: I think it is different, but it seems to me that the principle makes sense across the board because Stone v. Powell is saying if there is an opportunity for full and a fair hearing, there needs to be an end. And as has been said in one of the case, if the thing can be done well once, there is no need to do it twice.

QUESTION: We haven't pursued Stone v. Powell every time we have been asked to.

MR. COLEMAN: I understand that.

QUESTION: Your argument would lead, I should think, inexorably to the conclusion that if there has been a valid conviction in the State court, that's the end of the matter, there could never be Federal habeas corpus.

MR. COLEMAN: Well, as far as sufficiency of the evidence is concerned --

QUESTION: That would have denied review in Thompson v. Louisville. Obviously the police court in Louisville there thought there was proof beyond a reasonable doubt or it would not have convicted Thompson.

MR. COLEMAN: Well, it always leaves the opportunity for direct review.

QUESTION: I know, of course there is opportunity for discretionary direct review, the petition for certiorari here. But we are talking about Federal habeas corpus. It seems to me that your argument leads ineluctably to the conclusion that Federal habeas corpus is never available if there has been a valid State court conviction.

MR. COLEMAN: I think it is available for the court to determine the question of the opportunity of a full and fair hearing. I don't think that has been completely flushed out. I don't think we know exactly what --

QUESTION: But you said when there has been a full and fair hearing, that's the end of the matter, there is no Federal habeas corpus ever.

MR. COLEMAN: For sufficiency of the evidence.

QUESTION: For anything. That's where your argument leads.

MR. COLEMAN: I think what the effect of habeas corpus would be is to see still if constitutional rights are being violated. If there is not in fact --

QUESTION: Would constitutional rights be violated if a State had convicted a person on evidence of a lesser standard than beyond a reasonable doubt under Winship?

MR. COLEMAN: I think under Winship the only test

would be has that standard of proof been applied in the case.

QUESTION: Had they mouthed the right things to the jury. Is that it?

MR. COLEMAN: But I think there would be ways to look behind the substance, look to the substance if the appearance of justice did not conform with the substance.

QUESTION: That's just what this is about, isn't it? That's exactly what this case is about.

MR. COLEMAN: If it please the Court, I will settle for the adoption, as I say in the brief, of the Thompson rule.

QUESTION: Let me give you an easier one, Mr. Attorney General. If this had been a jury trial with the finest of instructions on reasonable doubt, et cetera, and the same record you have here, wouldn't you be in a better position?

MR. COLEMAN: If there had been a jury in this case?

QUESTION: With the full instruction of reasonable doubt right out of Winship.

MR. COLEMAN: Well, except that the law may be --

QUESTION: Wouldn't you be in better shape?

MR. COLEMAN: It could be argued about what standard they were supposed to apply, but the law in Virginia is that the judge is supposed to apply the same standard that

the trier of fact does.

QUESTION: Would you draw a line between those two?

MR. COLEMAN: Well, I haven't thought about that. I think that as long as --

QUESTION: It would be helpful.

MR. COLEMAN: Well, if it's helpful, I will adopt it.

QUESTION: What if, going a little further than my brother Marshall's suggestion, this had been a jury trial and there had been absolutely perfect instructions on the duty of a jury not to convict until it found guilt beyond a reasonable doubt and on the presumption of innocence and all the rest of it, but that in fact the evidence was no stronger than it was in Thompson v. Louisville and the court of appeals said, the State appellate system erroneously,let's assume, had held that instructions were fine and we think the evidence was sufficient under that standard.

Now, is a Federal district court absolutely foreclosed from examining it?

MR. COLEMAN: If you adopt the standard, I think you are in the same position as with Wainwright, that you are cut off because of procedural default. There -- here you are cut off --

QUESTION: There was no procedural default at all. There had been pursuit of State remedies --

MR. COLEMAN: I think you are right. As long as there was the ability to raise that question and get a full and fair hearing under the --

QUESTION: That's the end, no Federal --

MR. COLEMAN: That's the end of it.

QUESTION: That's what I thought your argument was.

MR. COLEMAN: Now, my point on that, your Honor, is simply that there is, I think, in this Court a greater sensitivity to the integrity and capacities of the State courts. There is a growing recognition that the State courts are well able to apply Federal law to administer their State criminal laws and that as long as they are doing that, that there is no reason to retry cases, to duplicate effort, and to expand the time between when someone is charged and when the case is over.

QUESTION: That argument, I think, leads to overruling Thompson v. Louisville, at least insofar as its applicability to collateral attack goes.

MR. COLEMAN: That's right.

QUESTION: Yes, I think it's right, isn't it. I think it's correct.

MR. COLEMAN: Yes, sir.

QUESTION: I don't agree that it is necessarily right.

MR. COLEMAN: Well, obviously, in order to uphold

the judgment of the Fourth Circuit, it's not necessary for the Court to go this far. And the chief thrust of my brief obviously is simply that the standard of Louisville v. Thompson is still the correct application except that the Court wants to go further and break out into a new area and say as far as sufficiency of the evidence is concerned, we are satisfied the State courts can do it and do it well. And that has been the experience in the past.

I think that the --

QUESTION: That would be an expansion of Stone v. Powell, basically, wouldn't it?

MR. COLEMAN: It would be.

QUESTION: But a Stone v. Powell approach. But a Stone v. Powell approach.

MR. COLEMAN: It would be. It certainly would be.

QUESTION: To this case.

MR. COLEMAN: It would be the application of the Stone v. Powell doctrine into this case.

QUESTION: To that extent, I gather a pro tanto appeal by the court, I mean, Federal habeas corpus statute --

MR. COLEMAN: I think there would still be something there for habeas corpus.

QUESTION: I said pro tanto.

MR. COLEMAN: Yes, sir.

QUESTION: With a judge trial as compared with a

jury trial, that same interest is -- where the Federal district judge was a former State judge of the same State and where we have a judge trial without a jury trial, why can't he do the same thing? He is a former State judge.

MR. COLEMAN: Assume where the State judge is -- I didn't hear that part.

QUESTION: Where the district judge is a former State judge.

MR. COLEMAN: That's right.

QUESTION: And you ask him to pass on a judgment by a State judge in a trial without a jury, would you give him some leeway?

MR. COLEMAN: Well, it would be treating people that had gone before a jury in a different manner, I suppose, because you would be cutting off, you would be chilling somewhat, I suppose, their interest in taking a jury trial. But I think that he would be just as capable.

The question that all of this raises in my mind is that who is to say what is a correct verdict? Judges disagree on points that are very particularized and very slight in many cases. It has been said by Justice Jackson that this Court is infallible because it's final, and it's not final because it's infallible. There could be a different disposition if we had another level of appellate courts. We have one judge in Chesterfield agreeing and thinking it's proof beyond a

reasonable doubt. Then we have the district court disagreeing. The Fourth Circuit comes back and says, well, it takes another view, it's OK. This Court might have a third or fourth view. And then there might be -- if it were tried in a different forum.

The point is, it seems to me, that there is a very important consideration not to be dismissed out of hand that the finality of these proceedings and the dignity and the integrity of the State courts is of such a level now that the Court might consider departing, and in fact contracting, the expansion of some habeas corpus. This could give the Court, it seems to me, the ability to look very carefully at the fewer needles in the haystack, because in looking for all those needles sometimes I think it almost comes to the point is it worth finding and will we recognize when we see them. Hundreds of pages of transcript are gone through, I think even for applying the some-evidence standard. Obviously it's much easier, but it is still a tremendous job.

So I would simply suggest to the Court that the State courts know how to administer criminal laws --

QUESTION: Mr. Attorney General, of course, the Federal habeas statute requires that all issues presented to the Federal habeas court be exhausted in the State courts first.

MR. COLEMAN: That's right.

QUESTION: So that I suppose the logical end of your position is the not only pro tanto repeal of the habeas corpus statute, but let's just repeal it.

MR. COLEMAN: I don't want to do that.

QUESTION: Well, every question that comes to a Federal habeas court shouldn't be adjudicated there at all unless the State courts have already adjudicated it.

MR. COLEMAN: That's right.

QUESTION: Then complete exhaustion. So why shouldn't that be the end of it?

MR. COLEMAN: I think that it's there for cases where there is not proper respect and regard for the Federal Bill of Rights. It seems to me that would be --

QUESTION: I know, but are you suggesting that if all the petitioner does in the Federal habeas corpus petition is to claim the State court made a mistake, I got a good hearing, they applied the right rules, the only thing is they came to the wrong result. If that's all he says, should he be dismissed automatically?

MR. COLEMAN: I don't think the result ought to have an effect now with the sufficiency of evidence. You might disagree with the result. But if there is something to uphold it, if you --

QUESTION: What about the voluntariness of a confession?

MR. COLEMAN: Well, I think that we have seen in Wainwright that the Court is willing to say --

QUESTION: Let's say it has been raised absolutely correctly and it has been adjudicated, the rules have all been followed in the State courts. The only thing is the petitioner comes into Federal habeas and says the State court applied the right rules but it just misjudged the facts.

MR. COLEMAN: Well, I will confess that I have had trouble in figuring where this line ought to be drawn. I know you are much more capable of doing that than I am. But I think that with sufficiency of the evidence, I can make a case, as I have tried to do today, that that is one area where you had a sifting of the evidence, you had a full canvass by the State procedures of the facts. It has gone to the appellate review, you have got judges that are experienced and practiced in these matters, and that could be the end of it consistent with their constitutional obligations.

QUESTION: If that can be the end of it, why couldn't it be the end of a review by this Court directly of the Virginia Supreme Court? Why aren't you arguing we ought also to be barred?

MR. COLEMAN: I think one reason is that that does give you a check. As you say, it seems sometimes to be infrequent that you get certiorari, but you ...

QUESTION: You concede it is not the end of it to the

extent of direct review by this Court.

MR. COLEMAN: It's not. I think if you take away all these habeas corpus petitions, you are going to have an ability to render more --

QUESTION: We will be swamped. It would be impossible for us to handle it, obviously, if the only review can be here.

QUESTION: Do you think the Federal habeas statute was intended as a substitute for an additional layer of review in the conventional sense of review?

MR. COLEMAN: Well, the habeas statute has, of course, been a changing thing over the years. It seems to me that its ideal was the vindication of fairness, of due process, the constitutional rights that all people in the country have. And I think its expansion has grown. It was originally thought, I believe, to contest only matters of jurisdiction. There is a historical disagreement --

QUESTION: The scope of the Federal judge in Virginia then is not the same as the scope of the highest court in the State of Virginia?

MR. COLEMAN: I don't think it is. If you adopted Winship, it seems to me, you would make the supreme court of Virginia and the supreme court of every State in the Union absolutely inferior to every district court.

QUESTION: General Coleman, I don't know whether

you were in on the initial habeas proceedings or not, but I notice on page 25 of the appendix that the case not only has a civil number, it has a magistrate number. Do you know whether this case was originally referred by the habeas judge to a magistrate?

MR. COLEMAN: No, it wasn't.

QUESTION: Mr. Attorney General, another easy one. It's true in combing this record nobody who has made a decision in this case has shown any expertise in whether the man is too drunk to know what he is doing, up until now, isn't that right?

MR. COLEMAN: I think that the --

QUESTION: The trial judge could be a teetotaler, couldn't he?

MR. COLEMAN: Well, the trial judge had to determine whether or not --

QUESTION: You know, I mean no one knows when a man is too drunk.

MR. COLEMAN: The same thing is true of the Supreme Court of Virginia.

QUESTION: That's what I am saying.

MR. COLEMAN: And it would be true here.

QUESTION: That's what I am saying. So what do you do?

QUESTION: If you had 12 lay jurors who passed

on this issue, Mr. Attorney General, would we have any better information or knowlege about their capacity to make a judgment --

MR. COLEMAN: I don't think we would. We have no information about that.

QUESTION: You could have an instruction on it, couldn't you, with a jury?

MR. COLEMAN: You could, yes.

QUESTION: I thought so.

MR. COLEMAN: Of course, the judge also is supposed to --

QUESTION: I said there is nothing in the record to show it. The supposition is that he is trained as a Virginia judge to do the same thing a jury does, and he does it that way.

MR. COLEMAN: If he does it and he is familiar with the law.

The question of finality that is being raised here, I think, is an important one, because in so many other issues, a person is not set free if we find 10 years later that somebody didn't commit the crime because another person confesses to it. His remedy is executive clemency. It seems to me that in a State trial when the person has gone through the trial and has appealed the matter and been found guilty, that that should be the end of it.

So I would like to conclude by saying that while I would urge the Court to consider the application of Stone v. Powell, drawing the line as I have suggested on these questions of sufficiency of the evidence on the theory that if a job can be done once well, there is no reason to do it twice. If the Court does not feel that it wants to make that departure, clearly the rule of Thompson v. City of Louisville is applicable and is not inconsistent with In re Winship.

Thank you.

MR. CHIEF JUSTICE BURGER: You have anything further, Ms. Colville?

REBUTTAL ARGUMENT OF MS. CAROLYN J. COLVILLE

ON BEHALF OF THE PETITIONER

MS. COLVILLE: Your Honor, just a very brief statement about what exactly we are seeking.

We are seeking that there be a standard in habeas corpus that if no rational trier of fact could have found guilt beyond a reasonable doubt, then the writ of habeas corpus should issue.

In this particular case, we would ask either that the Court decide as to the facts of the case or that it be remanded to the Fourth Circuit, who had already indicated it had some doubts in its mind about the applicable law but without further guidance felt they had to apply Thompson . We either

ask that the Court apply it to the facts of the case or remand it for the Fourth Circuit to apply it.

Thank you.

QUESTION: Ms. Colville, let me ask you one question, if I might.

I suppose one could apply your standard to a trial that took 20 days and had 80 witnesses and a transcript of many thousands of pages. Is the procedure you contemplate, that would simply be submitted to the habeas judge for his perusal or referral by him to a magistrate, if that was his inclination?

MS. COLVILLE: My basic inclination is that the transcript would go to the Federal district judge. He would then have the benefit of the wisdom of the State court plus any pleadings filed on behalf of the State. He would then look at those in order to swiftly review --

QUESTION: How would you swiftly review several thousand pages?

MS. COLVILLE: I think what I am saying is it would be far easier if the State said this is where we say there is reasonable doubt. I think the court could then look at it to see if indeed this does create reasonable doubt. I think it would be an easier process if they are being guided somewhat as to where the State says the reasonable doubt exists.

QUESTION: Like a sufficiency of evidence argument

on appeal, say, to the Supreme Court of Virginia.

MS. COLVILLE: Certainly.

QUESTION: Ms. Colville, you have answered it, I know, but I am just a little confused. Is the standard you propose the same as the standard that is applied in direct review in Virginia?

MS. COLVILLE: No, your Honor, I could not find that reasonable doubt was the rule applied in Virginia, no.

QUESTION: So it's a somewhat narrower standard, I would presume, then.

MS. COLVILLE: Yes.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 2:39 p.m., the oral argument in the above-entitled matter was concluded.)