OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ELLIS B. WRIGHT, JR., WARDEN AND MARY SUE TERRY, ATTORNEY GENERAL OF VIRGINIA, Petitioners, v. FRANK ROBERT WEST, JR.

CASE NO: 91-542

PLACE: Washington, D.C.

DATE: Tuesday, March 24, 1992

PAGES: 1 - 51

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- X

ELLIS B. WRIGHT, JR., WARDEN :

AND MARY SUE TERRY, ATTORNEY :

GENERAL OF VIRGINIA, :

Petitioners :

v. : No. 91-542

FRANK ROBERT WEST, JR. :

- X

Washington, D.C.

Tuesday, March 24, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

DONALD R. CURRY, ESQ., Senior Assistant Attorney General of Virginia, Richmond, Virginia; on behalf of the Petitioners.

MAUREEN E. MAHONEY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioners.

STEVEN H. GOLDBLATT, ESQ., Washington, D.C.; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 91-542, Ellis B. Wright v. Frank Robert West.

Mr. Curry, you may proceed.

ORAL ARGUMENT OF DONALD R. CURRY

ON BEHALF OF THE PETITIONERS

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

What this case is all about is whether this Court meant what it said in Teague v. Lane and its progeny about having confidence in the state courts to faithfully follow the Constitution and about Federal habeas courts deferring to reasonable good faith state court judgments. West and his amici complain that we are trying to take the Federal courts out of the formula by which habeas corpus cases are decided. Nothing could be farther from the truth.

We are not asking for a rule of preclusion. All we are asking is that the Court make explicitly clear that the state courts are an important part of that calculus too, and that Federal habeas courts are not free to decide the cases of state prisoners as if the state court decision had never even occurred. In a system where Congress has expressly required that a state prisoner

first take his constitutional claims to state court before bringing them to Federal court, it makes absolutely no sense to then turn around on Federal habeas corpus and completely disregard the state court decision.

The problem that exists is that Federal collateral relief, with all of the systemic costs that this Court has identified, is still being granted not because the state court decision was indefensible, not because it was objectively unreasonable under existing precedent, but simply because a Federal habeas court thinks in its opinion that its decision is right and that the decisions of all the state courts that went before were wrong.

QUESTION: Then why don't you simply argue that this is a misapplication or a failure to apply Teague by in effect applying a new rule or a new and more specific application of the, of, as it were, of Jackson, of any rule attacking the unexplained possession theory, that it arose after the date of conviction and therefore it shouldn't be applied under Teague? Why do we have to get into a separate category of mixed law and fact?

MR. CURRY: Of course, Justice Souter, that's exactly what we are arguing, and that's exactly the question that we raised in the court below.

QUESTION: But you don't really need, then, a

separate, or a specific rule for mixed questions. All you need is a, in effect a clear statement, or a clearer statement perhaps, of when Teague applies and when it doesn't.

MR. CURRY: Well, it's certainly true, Justice Souter, that we should win under a correct application of Teague. But the point of this case as we see it at this juncture in view of the Court's question that it asked when certiorari was granted is whether Teague in effect has taken the Jackson standard, which is a very deferential standard, and in effect applied it across the board and made it the standard of review.

QUESTION: Well, suppose the court had not instructed the jury with reference to the inference, and it just submitted the case to the jury, and we later find out from say closing argument of counsel or by examining the jurors after the verdict that the jurors did indeed rely on this inference as a common sense inference. Could the petitioner then ask the Federal court for review based on the theory that the evidence was insufficient?

MR. CURRY: Certainly. And I think it is, the common law inference is just a recognition of what is common sense.

QUESTION: But habeas review would then lie in this case? You may win, you may lose, but the Court

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

would, in your view, have the right to exercise its jurisdiction to determine sufficiency of the evidence?

MR. CURRY: Justice Kennedy, we have never, we have never contended that sufficiency of the evidence claims are not reviewable in habeas corpus.

QUESTION: So it's just the presence of the inference in this case that makes Federal, the exercise of Federal jurisdiction inappropriate?

MR. CURRY: No, we're not, we're not challenging whether the Federal habeas court had jurisdiction. We contended below that we should win under a straight out application of Jackson, and we should win under a straight out application of Jackson. We are contending that --

QUESTION: Let's strike the word jurisdiction. Whether or not it's appropriate for the Federal Court to exercise its authority. If Teague applies, then I take it it is inappropriate?

MR. CURRY: Well, it is appropriate under Teague and Jackson to the extent that the Federal court looks at whether the decision reached by the decision-maker is one that a reasonable decision-maker could have made. And that is the inquiry under Jackson. It is also the inquiry under Teague.

QUESTION: Well, isn't that a little bit of an elision of some of the factors in Teague, that the only

question is was the state court decision reasonable. If it's simply an application of existing constitutional law to the facts of a case, it isn't enough that the state court decision be reasonable. It really has to be correct, doesn't it?

MR. CURRY: I don't think that's what Teague means. And I think what the Court just said a few weeks ago in Stringer makes that point. The Court said in Stringer that the Teague doctrine, the interest of federalism underlying that doctrine, are equally undermined when you apply a new rule, in other words apply an after-decided case, and it is equally undermined when you take settled law and apply it in a way that is not dictated by precedent. And that's exactly what we're contending should have been the standard in this case.

QUESTION: But every single fact situation isn't an original inquiry under the law. I mean, there are settled principles of law that apply to different fact situations. You would agree with that, wouldn't you?

MR. CURRY: Well, I agree that there are situations where you take a settled principle and you apply it to the facts of a case, but I don't think that makes any difference for purposes of the Teague inquiry. After all, in Butler v. McKellar he, the petitioner in that case, the prisoner in that case first said that he

was relying on the Roberson decision which was an after-decided case. And when clearly he could not do that under Teague, his answer to that was all I am asking the Court to do is to take Edwards v. Arizona and apply it to the facts of my case, and I should win.

QUESTION: There are going to be gray areas where there is argument as to whether this was fore-ordained by prior decisions or whether it's an expansion under Teague, but you can certainly have some issues or some fact situations which, although not precisely covered by a prior constitutional decision, nonetheless would not be regarded as a new rule, can you not?

MR. CURRY: Mr. Chief Justice, I think the answer to that question, that question would be answered by applying the Teague test. If it's, if the fact situation is close enough, then the result was dictated by precedent. If the fact situation is not close enough, then it was not dictated by precedent.

QUESTION: Okay. Well now take the case where the fact situation was close enough to be dictated by prior precedent. In that case it's not enough that the state court decision be, quote, reasonable, close quote. It has to be correct on the law, does it not?

MR. CURRY: Well --

QUESTION: In the eyes of the Federal habeas

court, although perhaps the Federal habeas court's view of the law might not correspond to that of some other court.

MR. CURRY: Well maybe, I see it a little bit differently, Mr. Chief Justice. The way I see it is that when you, if you say that the result was not dictated by precedent, then by definition under the Teague standard the result that the state court reached was not reasonable under existing precedent.

QUESTION: Do I take it that the conclusion of your colloquy with the Chief Justice is that the Teague issue here is analyzed substantially the same way whether or not the jury was instructed with reference to the inference?

MR. CURRY: That's right. That's right.

QUESTION: And by the same, just to nail it down, I think you are also saying that even if we conclude that Jackson v. Virginia was correctly applied, you still win under Teague?

MR. CURRY: Well, we should win under Teague, but I don't really see that there is a difference between the Jackson standard and the Teague standard. It think it's impossible that a Federal habeas court --

QUESTION: Do you want to rest, I mean, are you going to rest on that?

MR. CURRY: Well, let me just explain why I say

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that. I think if a Federal habeas court decided the case under Jackson and found that no rational jury could have reached this conclusion, it is simply impossible to say that the same Federal court would look at it under Teague and say well, even though the jury acted irrationally I have to find that a reasonable state court could have affirmed that irrational verdict.

Our point is that they are both very deferential standards. I think it is completely a mistake to look at Jackson as a de novo standard. I think that point was made clear by the Court in Lewis v. Jeffers.

QUESTION: Well, the court of appeals here purported to be applying Jackson and asking the question could a rational jury have decided it this way.

MR. CURRY: That's right, but, that's part of our point. In view of Teague -- Jackson itself talks about the state appellate court's decision. In no fewer than three places in Jackson it talks about the state court appellate decision and says at one point of course it's entitled to deference.

QUESTION: Well, I suppose you would be --

MR. CURRY: And I think --

QUESTION: I suppose you would be satisfied to win on, if we just reversed the court of appeals on the basis that they misapplied Jackson, that here a rational

jury could have convicted.

MR. CURRY: Well, Justice White, as I said before, we have always contended that we should win under Jackson. We contend that today. But we petitioned for certiorari on the Teague issue because we think the point of Teague is that it basically takes a standard very much like Jackson and applies it across the board. And the Court asked the question that asked about it in terms of the standard of review, and we think that Teague provides that standard of review.

QUESTION: If Teague had been -- excuse me, Chief Justice.

QUESTION: The fact that the Court asked a question does not mean that your own questions, of course, are superceded.

MR. CURRY: No. Certainly not.

QUESTION: If Teague had been on the books would Jackson, should Jackson have been analyzed differently and decided differently?

MR. CURRY: Yes, I think it would have to be analyzed differently in terms of Teague, because Jackson, although it talks about the state appellate court's decision and it has to be given deference, it doesn't articulate what that deference is, and it talks more in terms of the Federal court looking directly at the jury's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

verdict.

QUESTION: So you're asking us to cut back on Jackson?

MR. CURRY: Well, I think it's really more a question of modifying the way that it has been applied. It is commonly applied as if the state court decision had never even occurred, when Jackson itself says that the state court appellate decision is entitled to deference.

QUESTION: I thought we were, in Teague, just talking about questions of law.

MR. CURRY: Well --

QUESTION: Weren't we?

MR. CURRY: Teague --

QUESTION: Yes or no?

MR. CURRY: Yes.

QUESTION: Well, and now you want to expand it to cover application of law to facts.

MR. CURRY: Well, that is certainly my answer to the question, but I think --

QUESTION: Well, isn't it?

MR. CURRY: I think the Court itself has expanded Teague, because when you say in Teague that a prisoner cannot take advantage of a case that was decided after his case became final, state prisoners immediately come to the Federal court and say I don't want the benefit

of that case. I want the benefit of this preexisting case applied to the facts of my case. That is the situation that the Court has been confronted with from Butler v. McKellar on.

And the Court has answered that question not by saying well, since you're not asking for the benefit of an after-decided case, fine, we'll just go ahead with de novo review. What the Court has said is let's look at the preexisting case and see if it dictates the result that you want. And the way you define whether it is dictated is was the result one that a reasonable court could have reached under existing precedent.

The fundamental underlying premise of the view that insists upon de novo review in Federal collateral proceedings is basically a distrust of state courts. In other words these matters are just too important and we cannot trust state court judges to faithfully follow the Constitution and to apply constitutional principles to the facts of a given case. That is a premise that we unequivocally reject. More importantly, it is a premise that this Court has repeatedly and emphatically rejected.

And while the Court knows, just like I know, that state courts don't blindly follow every time a lower Federal court finds or announces a Constitutional principle, the Court also knows that the state courts do

pay close attention when this Court speaks, and that they do their level best to faithfully follow the Constitution and to apply constitutional principles as this Court directs them to do.

And what this case all boils down to is how much does this Court trust the state courts, and whether this Court has meant it in the past when it has said that it does have that confidence in the state courts.

At this point if there are no further questions I would like to yield to the Solicitor General and save my remaining time for rebuttal.

QUESTION: Very well, Mr. Curry.

Ms. Mahoney.

ORAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING PETITIONERS

MS. MAHONEY: Mr. Chief Justice, and may it please the Court:

The United States takes the position that Teague does not itself mandate an application of a deferential standard of review to mixed questions of law and fact, that instead it and its progeny seem to suggest that settled questions of law can be applied to the facts, and it has not yet changed the standard of review that would govern those determinations by the state courts.

What we ask this Court to do, however, is to reevaluate whether that standard of review in fact conforms to the purposes of the writ, because for the last 16 years in a series of decisions starting with Wainwright v. Sykes, Francis v. Henderson, and all the way through Coleman v. Thompson, what this Court has said is that when looking at rules governing the scope of the writ we need to weigh the costs in terms of finality and comity against the benefits. And those benefits are generally viewed in terms of whether they are necessary, whether the rule is necessary to advance the fundamental deterrent and remedial purposes of the writ.

We submit that, for the same kinds of reasons that led the Court in Teague and Butler to change the standard of review in effect that is applicable to state determinations of questions of law, this Court should also now find that it is appropriate to use a deferential standard of review for mixed questions of fact and law.

QUESTION: Well, what, what does your position do to Jackson against Virginia?

MS. MAHONEY: We contend that Jackson v. Virginia is wrong. Not the underlying substantive standard about --

QUESTION: Well, Jackson against Virginia is awfully deferential.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MS. MAHONEY: Yes, Your Honor, it is deferential, and the underlying --

QUESTION: It certainly isn't de novo, is it?

MS. MAHONEY: No, it is not. The substantive standard of due process viewing the jury verdict we think is absolutely right, whether any rational jury could find guilt.

QUESTION: Well, what's wrong with that standard? Why shouldn't a habeas court see, ask that question that Jackson asks?

MS. MAHONEY: I think instead the habeas court should ask whether the state court's rejection of the Jackson claim was reasonable, because as this Court found, as the lower court found -- excuse me?

QUESTION: If it rejects, it rejects -- what's wrong with, what's the difference between the question that Jackson wants asked and what you say is proper?

MS. MAHONEY: There is not a great difference, but the real difference is that for Jackson, Jackson says that the Federal habeas court should look to what a reasonable juror would have done. What we say is that the Federal habeas court should look to whether the state judge's determination of the question was reasonable or unreasonable, and that that standard should be applied for all determinations --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, the state, the state court, appellate courts have to apply the Jackson standard.

MS. MAHONEY: Yes, Your Honor, they did.

QUESTION: That's your point, I guess.

MS. MAHONEY: That is our point. The state courts --

QUESTION: And that once they go through with it we should never disagree, the Federal courts should never disagree with it?

MS. MAHONEY: No, Your Honor. The Federal courts should determine whether their judgement was reasonable. If it was reasonable --

QUESTION: How do you determine that other than by asking?

MS. MAHONEY: Excuse me?

QUESTION: How do you determine that?

MS. MAHONEY: Whether it is reasonable?

QUESTION: Yes.

MS. MAHONEY: I think that the Fourth Circuit, if asked that question, would have found that the judgment of the Virginia court was reasonable. The refer to the fact that it was a judgment call as to whether a rational fact finder could have reached one result or the other. And I think that had they been applying a deferential standard of review this case in fact would have come out

the other way, proving the point that even in the Jackson context the standard of review that we seek can make a difference.

The critical point here is that there is just no reason to assume that the Federal courts on de novo review are more likely to get the answer right --

QUESTION: That isn't de novo. It's not, you aren't talking about de novo review. You're just talking about a choice between a Jackson type of review, which certainly isn't de novo, and a, and review in your terms.

MS. MAHONEY: The review of the state court's determination of the Jackson claim is de novo. I understand your point. This is somewhat more complicated in the Jackson context than it would be in other areas of mixed questions of fact and law, such as ineffective assistance of counsel and a number of the other areas, voluntariness of confessions, where you wouldn't get the extra layer of deference. But the principle is the same. If the state court's determination of the constitutional question is reasonable, this Court, the Federal court should defer to that judgment because the --

QUESTION: It still isn't de novo. You wouldn't say we think this is -- you still say do you think any reasonable judge could have arrived at that decision.

MS. MAHONEY: Yes, Your Honor.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, that isn't de novo.

MS. MAHONEY: No, that's a deferential standard of review.

QUESTION: But we'd open up a whole new classification of examination, wouldn't we, whether a particular decision on the legal question was reasonable, that we certainly have never expressly recognized before?

MS. MAHONEY: This Court has not expressly recognized it, but this I think is a way to avoid the problems that the Fourth Circuit discussed in the case about how to determine whether you are into the realm of a new rule or whether you are simply applying settled law to facts. These distinctions are very difficult to draw, and by adopting the rule that we are proposing it, those distinctions would not become as difficult or as important. Moreover --

QUESTION: But the whole foundation, Ms. Mahoney, for Teague is that there is a distinction between questions of law and questions of fact, and if that distinction is as unworkable as you suggest then maybe we should reexamine Teague.

MS. MAHONEY: Your Honor, I think that the underlying rationale of Teague very much supports the rule of deference for mixed questions as well. I know of no area of the law where greater deference is shown to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

interpretations of law than it is to interpretations of mixed questions of law and fact. In fact under this Court's precedents there are a number of areas of the law where it is exactly the reverse, where greater deference is shown to the application of law to fact for mixed questions than for the determinations of the legal issue.

This Court's willingness to defer to reasonable interpretations in the legal area I think compels logically the conclusion that the same kind of deference should be applied to the state court application of law to fact. And in fact if we look at recent experience in a number of cases that have come to this Court in the last few years where the lower courts had issued the writ because they found on de novo review that the state court's application of law to fact was wrong, this Court reversed. That happened in Estelle v. McGuire, it happened in Duckworth v. Eagan. After years and years of litigation on habeas this Court found ultimately that the state court was right and the Federal court was wrong.

QUESTION: I suppose you would, you ought to be satisfied if we just overruled Jackson and go back to the old rule. The old rule was you never disturb a state court decision if there was any evidence whatsoever to support the verdict.

MS. MAHONEY: Your Honor, our concerns go far

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

beyond Jackson. The rule that we are --

QUESTION: Well, wouldn't that, wouldn't that rule satisfy you?

MS. MAHONEY: No, Your Honor, I think that the -- we don't have any --

QUESTION: Why not? Why not?

MS. MAHONEY: Because we think that it is appropriate for the Federal court to conduct review of state court determinations to insure that they are reasonable, to insure that they are conducted in accordance with fair process. That is the traditional role of the writ.

QUESTION: Well you would never disturb, under the old pre-Jackson rule you would never disturb a state conviction if there was any evidence whatsoever to support the verdict.

MS. MAHONEY: But, Your Honor, we don't think --

QUESTION: That's pretty deferential, isn't it?

MS. MAHONEY: But we don't, we're not asking for total deference. We don't think that the rule should be that state court determinations should never be disturbed. We think that instead the rule has to be tailored to insure that there is fair process and reasoned decision making, and that is the thrust of all of this Court's adjudication in the areas of rules --

QUESTION: Ms. Mahoney, you are asking for a rather substantial change in existing law, are you not?

MS. MAHONEY: Yes, we are, Your Honor.

QUESTION: What do you say to the amicus brief filed by four former attorney generals of the United States that suggest that there is a separation of powers problem here and that really your argument should be pressed over across the street in Congress?

MS. MAHONEY: Your Honor, there is absolutely nothing in the statute that dictates a de novo standard of review for mixed questions of law and fact, and in fact we submit that the language clearly suggests otherwise. It provides that the writs are to be disposed of --

QUESTION: Well, are you or are you not asking us to change the law?

MS. MAHONEY: Asking you to change this Court's precedence. We are not asking you to change the statute. The statute gives you the equitable power to devise rules that are appropriate in light of comity and federalism in order to preserve finality while still insuring that the writ can serve its traditional purpose of preventing fundamental unfairness. And, Your Honor, the statute specifically says that the writ shall issue as law and justice requires. And this Court has for years found that the rules governing the scope of the writ are to be

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

designed by this Court, and in a series of cases over the last 16 years has displaced prior rules that were based upon -- thank you.

QUESTION: Thank you, Ms. Mahoney.

Mr. Goldblatt, we'll hear from you.

ORAL ARGUMENT OF STEVEN H. GOLDBLATT

ON BEHALF OF THE RESPONDENT

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

I think it has become clear from the argument that what both Virginia and the Solicitor General are asking for is essentially an overruling of Miller v. Fenton, Strickland v. Washington, and many, many decisions coming from this Court since Brown v. Allen that has required, not as a matter of judge-made law but as an understanding of what Congress has required, including Jackson itself, that mixed questions of law --

QUESTION: Well, we have certainly done that before. I mean, Fay against Noia overruled Brown against Allen. We have subsequently overruled large parts of Fay against -- we have always felt freer to move in this area of habeas than we have in other statutory questions just because of the traditional nature of the writ, I guess.

MR. GOLDBLATT: I don't dispute that with regard to several areas of habeas review, but with regard to this

question as to whether the fundamental review standard for the habeas court is independent of state court judgments, I would submit that that is one area where the Court has been careful not to disturb.

There are threshold questions of whether or not you are allowed to bring the writ, whether you are entitled to relief, whether you have defaulted the issue, whether you have abused the writ, and things like that, but as the questions became clear the review that the Federal habeas court conducts is independent review, and the understanding is that that was required by Congress.

That is what Jackson v. Virginia held. The Court didn't simply devise that standard based on its own view of what --

QUESTION: What do you think Jackson against Virginia held?

MR. GOLDBLATT: Jackson v. Virginia holds that the Federal habeas court must conduct its own independent review of whether any rational juror could find guilt beyond a reasonable doubt based on the state court, state's definition of the elements of its crimes.

QUESTION: Well, that's a strange definition of de novo.

MR. GOLDBLATT: I would describe it as it's independent review by the Federal court under a highly

deferential standard. But in fact it did change the prior standard which was Thompson v. Louisville --

QUESTION: It certainly did.

MR. GOLDBLATT: -- which was any scintilla of evidence. So in that sense -- but it is independent review. I think what has happened is there has been a confusion over whether or not the Federal habeas court must accept the state court determination because it's reasonable, which I don't think is the correct question. The question for this Court, I think at this point in reviewing the Fourth Circuit, is whether its determination under Jackson v. Virginia was correct.

QUESTION: What --

QUESTION: Let me ask you what I might call a retail rather than a wholesale question, Mr. Goldblatt, about the opinion of the Fourth Circuit here. That is, it said it was not holding the common law presumption of guilt from recent possession unconstitutional, and yet under the common law presumption it is, a jury is charged that it may without any additional evidence find a defendant guilty on the base of the presumption, yet the court of appeals sets aside -- it seems to me there is an inconsistency in what they're saying there. I hope sometime during your argument you will address yourself to that.

MR. GOLDBLATT: Let me address it now, because I think the answer to that is that, partially in the answer that my opponent gave to Justice Kennedy's question, I don't think the instruction is relevant here. I think it's a red herring in many ways. And when they indicated that if no instruction was given at all the sufficiency issue would be there, that's the issue we have always raised.

My understanding of this Court's decision in United States v. Gainey, the Court recognized there that even if you have an instruction that tells the jury that a certain quantum evidence is legally sufficient, that doesn't alter the power of the Court to rule on a motion JNOV or even to reverse on appeal on the basis that the evidence was not adequate to let the jury decide the case that way.

I think there are two different questions. I think if no instruction had been given here at all and the jury had returned a verdict of guilty, they would be arguing that there is an inference to be drawn from the fact that he was in possession of these goods and that that was enough to convict this person beyond a reasonable doubt, and we would be arguing the same things we have been arguing all along. I don't think this is an instruction case.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And I think the answer to that partially, and again to avoid the problem of announcing a new rule here, my authority for that is Ulster County Court v. Allen, which was decided I believe 2 weeks before Jackson v. Virginia, that recognized that the instruction, an instruction like this may be given under a more likely than not standard.

QUESTION: Yeah, but that was just an instruction as to the finding of one fact in the case, wasn't it, not an instruction as to the finding of guilt or innocence?

MR. GOLDBLATT: I believe that was a finding that you could infer knowledge of possession of the gun from anyone who was an occupant of the car. I think it's the same type of permissive inference that was used here. I don't think there is any real distinction to be drawn. Or the same with the Gainey inference, which was anybody who was in the, at a still was presumed or inferred under the policy that is used now to be part of that operation was guilty. And I really think that that is critical to the understanding of our case because this is not a case that challenges the inference directly. It never was.

QUESTION: Well, it does seem that you are arguing that the inference should be that the unexplained possession of stolen goods shows guilty knowledge, but not

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

necessarily fact.

MR. GOLDBLATT: Justice O'Connor, the inference, there are two inferences that arise, they were both recognized in common law. One is that the possessor obtain the goods as the thief, the person who took them from the owner. The other, more widely recognized and I think in most of the authorities considered stronger, is that the person who has possession of those stolen goods knew them to be stolen when they gained possession of them.

The difference between the two is, in the complaint that we have here is not only did Virginia ask the jury to draw from his possession the fact that he came by the goods unlawfully, but that he at least 2 weeks earlier was at a certain place at a certain time and took them in a certain way. In Virginia they would use this inference, since they could reasonably show that the theft took place at the same time as the burglary, to convict of burglary or robbery or what have you.

QUESTION: Well, it does sound to me like you're attacking the validity of the inference, and that issue is procedurally barred.

MR. GOLDBLATT: No, I would submit that where we are attacking is the sufficiency of the evidence that gives rise to whatever inferences may exist in this case,

whether they exist in common law or not. We're saying that whatever inference there is in this case that he is the thief is not adequate to prove the elements of the crime beyond a reasonable doubt.

And we would be making that argument if no instruction had been given at all. It is essentially the same issue. The fact that Virginia recognizes a common law inference does not bind the Federal court in determining whether the proof meets the requisite standard. And I think that that is the critical distinction for purposes of a Teague analysis, because again in Ulster County Court the Court had recognized the distinction between the issue of the validity of the inference and the giving of the instruction and the separate question of whether or not the crime had been proven beyond a reasonable doubt.

QUESTION: Mr. Goldblatt, I'd like to come back to the question of whether Jackson applies a de novo standard or not. It seems to me it's not de novo as to the fact finder, as to the jury. You don't reexamine what the jury has, but it is really a de novo standard as far as the state court is concerned, isn't it?

MR. GOLDBLATT: I would agree. Yes.

QUESTION: You're doing exactly the same thing under Jackson that the state court did. You're just

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

repeating the same, the same exercise that the state court performed.

MR. GOLDBLATT: Not necessarily. It would depend on whether or not the state court would use the any rational juror standard. They could use a different -- they are not bound to use, that's the fun of due process standard.

QUESTION: Yes, but do you know anybody that doesn't?

MR. GOLDBLATT: It's not altogether clear and it wasn't altogether clear when Jackson was decided whether Virginia does. We would submit in this case that there was, it's hard to tell what analysis they used here at all. We would submit that their analysis is not the same, that this Court would understand where this inference is operating is required by due process. So I think there is a difference in the legal standard.

QUESTION: Can I ask you what causes a particular determination to be a general rule and therefore to be governed by Teague or not to be a general rule and therefore not to be governed by Teague? I mean, it's always, anything can be stated as a general rule. You know, the general rule is given all these facts, given facts of this sort a defendant of this type can be lawfully convicted. That's a general rule. How are we

supposed to decide how general you have to get to be before Teague applies?

MR. GOLDBLATT: Well, I think there are levels of abstraction that you have to deal with. There would be the due process standard which would be the most abstract. I think Jackson is one step removed from that. It was a refinement of the Thompson v. Louisville standard. And I think that even if you're dealing with the mixed question of law and fact where you're dealing with an abstract principle, there is still room for determination of whether or not you're applying a new rule.

QUESTION: Why isn't this a general rule, in this case? Why isn't this at the Teague level of generality?

MR. GOLDBLATT: I don't think it's at the Teague level of generality because there is more specificity. I think, as the Fourth Circuit correctly held, if you were to say that each time a court does a Jackson v. Virginia analysis of the new set of facts that a new rule emerges from that, you have overruled Jackson v. Virginia. There could be no sufficiency analysis.

QUESTION: Or, more precisely, we would have said that Teague has already overruled Jackson v. Virginia.

MR. GOLDBLATT: Or you could say that. But I

don't think, I don't think that that's a fair reading of Teague, which doesn't discuss any of the standard of review cases. It would likely overrule Miller v. Fenton, Strickland v. Washington, and any other abstract rule case, and I don't think that's what it was designed to do.

QUESTION: Why isn't this a general case, that where you have this kind of a situation, possession of the stolen property, it is lawful to convict on the, it is constitutional to convict on the basis of the mere possession of the property? That seems to me a general rule.

MR. GOLDBLATT: Justice Scalia, I can find no such general rule in Federal jurisprudence. What I can find is Ulster County Court v. Allen, which recognizes the existence of common law inferences, or, and statutory inferences, and suggests that in each case you have to look at some point at the underlying facts giving rise to the inference to determine whether or not they prove guilt beyond a reasonable doubt, and that was decided before this case was finalized in the state courts.

QUESTION: I think we're going to have an awful lot of trouble figuring out when -- the lower courts are, and we will if we ever take those cases, figuring out when Teague applies and when Teague doesn't apply. At some ineffable level of generality it applies, and below that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

it doesn't apply.

MR. GOLDBLATT: I don't think so. It's more a question, in my view, as to what was Teague designed to do. Teague, as I understand it, is a rule of retroactivity that adopted in large part the Justice Harlan view in Mackey that on collateral review you apply the law, the Federal habeas court applies the settled law as it can independently and objectively determine that law to be in existence at the time the case was decided in the state courts. We ask for application of Jackson v. Virginia and Ulster County Court, both of which were in existence at the time.

The most I can see in the language of the Court that would deal, when you're dealing in the more abstract, would be the language in Stringer which was decided a few weeks ago where the Court said if you're in an application situation if the habeas court is going to apply an established rule in a novel setting and thereby extend the precedent, then you have a Teague bond. What I submit here and what we have been arguing all along is that that is not the case here. This is a straightforward sufficiency case. There was no rule in effect at the time this case was litigated as a matter of Federal due process law.

QUESTION: What if the court of appeals had said

that, said this kind of a permissive inference can never be drawn from mere possession?

MR. GOLDBLATT: That I would submit -- if they drew that, that rule, if they said that, an absolute rule that this evidence standing alone can never be sufficient, that would be a new rule.

QUESTION: And hence it would be a new rule if the court said this instruction may never be given?

MR. GOLDBLATT: That would be a new rule as well. There would be nothing in the Federal law before that -- the rule before that would be that the instruction may be given as long as it is more likely than not that the ultimate inference flows from the basic facts.

QUESTION: Don't you, as the Chief Justice asked you a while ago, don't you think the court came, the court of appeals came awfully close to saying that, at least in this case, that the evidence, that the inference was not enough, or the fact of possession was not enough to support the verdict?

MR. GOLDBLATT: In this case, based on the facts of this case and fact intensive of when he was in possession of the goods, how much of the total goods taken were in his possession, what was the nature of the goods, what other evidence was presented in the case, it's fact intensive. The court if anything went out of its way to

indicate that it was not suggesting a general rule in Virginia or anywhere that the inference could not be, continue to be used. It assumed that it would continue to be used.

What makes this case unusual, it's one of the few cases that we or the other side has been able to find where the prosecution relied on the inference so strongly. But ultimately the inference is irrelevant. The question is whether West's possession of these goods 2 weeks after the theft is enough evidence to prove that he was guilty of the crime. That is classic sufficiency review. The inference, whether it operates or not, is --

QUESTION: The court of appeals certainly didn't analyze the case the way you're now asking us to analyze it. It went very deeply into the common law presumption the fact that it had been used as an instruction. In fact it intimated, I believe in one place in its opinion, that it very likely, if pressed it would hold it unconstitutional. So it didn't treat it just as if it were a red herring at all.

MR. GOLDBLATT: Mr. Chief Justice, admittedly that language is there. I'm not going to stand here and say that language is not there. I don't think it's central to its decision, and in fact in deciding what issue it was reviewing the court came to the conclusion

that the issue we were raising was that the evidence was inadequate under whatever instructions the court might give. So whatever language is in there, ultimately it is a fact intensive review based on the facts of our case and a disclaimer at the end of the opinion that the court was making any ruling on the inference itself. We do the same --

QUESTION: As I understand it, the relevance of the inference was that the common law had deemed when that inference was available, had deemed the evidence to be sufficient. That's a general rule. I mean, you, I guess you can reduce any case into what, you can call it a sufficiency of the evidence case. I guess even where the exclusionary rule applies. I guess you can say really what we have here is a sufficiency of the evidence case. Was this evidence properly included or not. If it should have been excluded, the evidence is insufficient. Anything can be called a sufficiency of evidence case, I suppose.

MR. GOLDBLATT: I would submit not. I would submit that this case, if you look at this record from the beginning, from the, when it was tried in Virginia, it has always been a sufficiency case. This hasn't been dressed up in a new way to avoid Teague.

QUESTION: But sufficiency under the common law

as embodied in the Constitution, and the assertion has been that under the common law this presumption has been deemed available so that the evidence would be considered sufficient. And that's a general rule.

MR. GOLDBLATT: But I don't think that is the general rule. The general rule as a matter of Federal due process law since Ulster County Court v. Allen was that where these inferences are created either by statute or existent common law, there is a duty upon the part of the court to determine whether the underlying facts that give rise to the inference prove guilt beyond a reasonable doubt. The elements analysis that this Court has developed for the due process standpoint dates from In Re Winship. The common law inference goes back to trial by combat.

QUESTION: But what we're discussing now is a general rule, whether that general rule exists or not. We're not analyzing evidence anymore, you and I. We're discussing a general rule.

MR. GOLDBLATT: And what I'm suggesting is the only issue that was properly before the circuit in which it decided is discussing evidence, the evidence that the state introduced to prove the elements of the crime. The existence of an inference and what strength it had in common law is not the relevant inquiry in order to decide

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

this case under established constitutional principles.

QUESTION: Well then the court of appeals certainly misunderstood what it was doing in writing the opinion it did, if you're right.

MR. GOLDBLATT: Based on its reliance on the Cosby v. Jones case decided out of the Eleventh Circuit, I would submit that although there is language in there, this broad language regarding the strength of the inference, that is not central to the actual decision in the case. This case comes down to a question of whether his possession of these goods 2 weeks after they were taken somewhere else in Virginia establishes guilt of the crime charged. That is classical Jackson analysis.

And the minute they say that this case is different if the instruction was not given, that's proper Jackson v. Virginia review, I submit it's the same question we've been raising all along. It's not a challenge to the instruction.

QUESTION: If you were a Virginia trial court judge and the opinion of the Fourth Circuit stood, there were no opinion from this Court, would you charge the jury with that instruction, with that inference?

MR. GOLDBLATT: Yes. I think that the only thing that would guide the Virginia courts in reading Federal law would be Ulster County Court, is it more

likely than not that the inference flows from the underlying inference, from the underlying facts. That's the same as it has always been even when this case was decided in the Virginia courts.

It's a very rare case where the only evidence that the state presents is whatever evidence gives rise to the inference. There, that is why these cases rarely arise in the Federal system under habeas review and why they can cite so few cases. It's an unusual, rare circumstance, but it's a sufficiency issue. Do they have enough evidence to convict of the crime that they have charged for? The instructions that the court gives is not the issue that we are raising.

There was no general rule that existed as a matter of Federal constitutional law at the time this case was decided in the state courts that said this inference, no matter how weak it is, will always prove theft. If such a rule existed as a matter of Federal law we would have a Teague problem. Indeed if Jackson was decided let's say a year later than it was, we'd be reviewing this case under the Thompson v. Louisville standard. We wouldn't be entitled to Jackson.

But if the Court agrees that there was no rule in effect at the time that this inference was necessarily sufficient to prove guilt beyond a reasonable doubt --

QUESTION: Well, what about the, a rule being in effect in that the common law inference had never been held unconstitutional? Isn't that a form of rule?

MR. GOLDBLATT: I don't believe so in light of the --

QUESTION: But then would you say that Miranda was not a new decision when it came down in 1966?

MR. GOLDBLATT: It certainly was a new decision. What I'm saying here is I don't think there is a rule here that the common law inference is unconstitutional. There's a ruling here that the evidence presented was not sufficient to convict him of the crime charged.

QUESTION: But that is contrary to the common law inference which says that, in that charge to the jury, you may infer just from the fact of recent possession. So when you say in some cases you cannot infer it, those are two contrary propositions.

MR. GOLDBLATT: What I am saying, Mr. Chief Justice, is I'm drawing from Gainey, that there are two separate questions. One, you may instruct the jury that you have this permissive inference, you may infer from the possession of these goods that the person is the thief does not foreclose later review by a court on a legal question of whether or not the evidence is sufficient to convict. There are two --

QUESTION: Well, you never know what the jury does. They might say well, if it weren't for this instruction we would acquit, but we have been told that this one fact alone is enough to prove beyond a reasonable doubt, so that's what we're going to rely on.

MR. GOLDBLATT: That may well happen, Justice White. The point I'm raising is the safeguard in that situation, especially since this Court has upheld as a matter of due process the giving of this type of instruction not on the basis that it proves guilt beyond a reasonable doubt, but on the basis that it is more likely than not. That the safeguard is straightforward sufficiency review after the case is over to insure that each element of the crime has been proven beyond a reasonable doubt.

Otherwise the standard for giving the instruction in the first place would have to be the beyond a reasonable doubt standard, which the court rejected because there is other evidence in the case that has to be evaluated. And United States v. Gainey, which is obviously not a habeas case but a Federal case, recognized that even when a statute says that the inference is sufficient to convict does not foreclose --

QUESTION: You think this instruction meant to the jury, to a juror that this fact of possession, from

the fact of possession it may be inferred that it's more reasonable than not that he took the goods himself --

MR. GOLDBLATT: No --

QUESTION: -- but that it doesn't necessarily prove beyond a reasonable doubt? That isn't what the instructions say.

MR. GOLDBLATT: No, it doesn't. But the due process question of whether the instruction may be given or not is whether it is more likely than not, with the test of whether the conviction was proven beyond a reasonable doubt based on a review of the entire record including the evidence giving rise to the inference and anything else that was presented.

QUESTION: Gainey was a Federal case where the court was able to interpret the statutory presumption in the way it did, but a Federal habeas court does not have any room to interpret a common law presumption that is applied in the first instance by the state court.

MR. GOLDBLATT: That's correct, Mr. Chief Justice, but here I don't think that the common law inference is part of the elements of the crime in Virginia. Rather in this case they held that the common law inference was enough to convict beyond a reasonable doubt. That's the ultimate question under Jackson, which I would submit has to be decided independently under

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Federal law.

QUESTION: Well, it seems to me a Jackson review in a case like this would almost always require a court to say well, we don't know what the jury did. They may have relied solely on the fact of possession and the instruction, in which event if you, if you overturned the conviction based on Jackson you would be invalidating the inference. And that's a new rule.

MR. GOLDBLATT: Justice White, in this case I don't think it is a new rule. I don't think there was a rule in effect --

QUESTION: Yeah, but you don't know what the jury did in this case.

MR. GOLDBLATT: That I would submit is true in any case when you do a Jackson analysis.

QUESTION: That's what I'm saying. You don't know. And I would think a Jackson court would always have to say well, the, we don't know what the jury did. They may have relied solely on the fact of possession and the instruction. And hence our question is is that inference, does the inference pass muster under Jackson. And if you say it doesn't --

MR. GOLDBLATT: In this particular case. But I don't think that there was any rule that can be pointed to that existed at the time this case was litigated as a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

matter of Federal due process law that, in inference like this, can be judged in the abstract. It has to be viewed in light of the facts that are presented. The inference is not constant. It can be weak or it can be strong.

QUESTION: But, but that may be the Federal due process verdict on the inference, but the inference itself is exactly that. It is constant.

MR. GOLDBLATT: I would submit --

QUESTION: That's where the inconsistency is.

MR. GOLDBLATT: Mr. Chief Justice, I would argue that whatever the state law is on the constancy of the inference, whatever they determine to be as a matter of state law adequate evidence to prove each element of the crime, does not control the Federal independent determination of whether the elements as defined by the state have been proven beyond a reasonable doubt.

That's what Jackson v. Virginia decided you needed independent Federal review for, and that's what I would submit is not a question of state law but is a matter of Federal Jackson law, which is not bound by the state. It doesn't constitute a new rule. There was no rule in effect in the Federal system that any common law inference or statutory inference in and of itself was necessarily sufficient to prove guilt without looking to the facts of your case to see what evidence gave rise to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the inference.

QUESTION: And of course if we said Teague applies because in effect the court of appeals has invalidated the inference on constitutional grounds we would, you would lose the case.

MR. GOLDBLATT: On the Teague grounds, yes.

QUESTION: On the Teague ground, but the court of appeals decision then would stand?

MR. GOLDBLATT: Well, I don't think the court, the court of appeals decision wouldn't stand if it was determined to be a new rule and therefore Teague-barred.

QUESTION: Well, it wouldn't stand, but they would, the court -- the state would know that the court of appeals believes that the inference is unconstitutional.

MR. GOLDBLATT: Yes, subject only to the qualification that I truly believe a fair reading of the opinion is that they were invalidating the conviction in this case. They were not invalidating the inference. That is what they say at the end of the opinion. When they talk in terms of the inference not being as strong as it was, they're referring to comments including Lord Hale, some several hundred years ago, as to the strength of the inference dissipating.

It wasn't something that happened in the last 10 years or so. They went into a historical analysis that

itself challenges the ability of this inference particularly to distinguish how someone came into possession of the goods, which is the way it was used here.

Ultimately I think the two issues that are correctly before the Court are, one, is the decision by the Fourth Circuit not reasonable but is it correct application of law, and two, whether or not it announced a new rule by application of Jackson, which of course if it did it would be Teague-barred. Those are the questions that I think that are properly before the Court.

We submit that this isn't a novel application of Jackson v. Virginia, and that no precedent was extended by virtue of the decision, and any language in the Fourth Circuit opinion that is read otherwise is dicta and was not central to any decision that it reached. That was the whole battle we went through below, was are we attacking the inference or not. And then there was briefing and rebriefing of that issue because I think the court recognized it couldn't announce a new rule that the inference was not valid and could not be used in Virginia except for purposes of how it was used in this particular case as a matter of evidential sufficiency.

And finally I would simply suggest that those I think are the proper issues that are before the Court.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

The question of standard of review is not a Teague question. Standard of review cases are not even discussed in Teague. Mixed law, fact and law questions are subject to Teague in the sense that I have just described. If this is an extension of Jackson, as this Court has defined it, then it is Teague-barred.

But to suggest that all mixed questions and all state court decisions that are reasonable, quote, unquote, must be upheld by the Federal habeas court flies in the face of this Court's understanding of the statute, overrules cases that are not even mentioned in Teague, and is ultimately a question, as has been addressed in many of the amici briefs, for Congress to decide. Whether there is independent review or not is a congressional decision because of the weighing of so many different factors as to whether or not we need Federal habeas review.

I would submit that it has been the Court's understanding since 1953 that this is a question that has already been decided by Congress. This case is not affected by that line of authority at all.

If there are no further questions, that concludes my argument.

QUESTION: Thank you, Mr. Goldblatt.

Mr. Curry, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DONALD R. CURRY

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

ON BEHALF OF THE PETITIONERS

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

I'd just like to make three or four brief points. I don't want to be misunderstood about what I said in answer to Justice Kennedy's question. What I meant to say and what I think I said was the fact that the instruction was given doesn't mean that the jury couldn't have drawn the inference in the absence of the instruction. But I think it's important that the instruction was given here because the instruction, this was not, this is not a common law inference that allows you to infer an element of the offense. This is an instruction that allows you to infer guilt. It says you can infer theft from these facts.

QUESTION: It doesn't quite say that. It says that the inference, taking into consideration the whole evidence, is sufficient.

MR. CURRY: That's right. And the evidence here, of course, was that, the Fourth Circuit admitted that the basic facts were there to properly instruct the jury as to recent possession --

QUESTION: Right.

MR. CURRY: -- plus he falsely testified about his involvement. But I think it's a bit disingenuous to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

say that they're not attacking the instruction or the common law inference under those circumstances, because obviously if you tell the jury that they can draw the inference based on these facts and then you say well, if you do your verdict will be overturned, in effect you are challenging the inference.

The second point I'd like to make is that a point was raised about Virginia's standard of review and not knowing what it is. I think that's interesting since they have never said in 12 years of litigation that Virginia may have applied the wrong standard. The fact of the matter is that Virginia applies a more stringent standard than Jackson. Under Virginia law the evidence must exclude every reasonable hypothesis of innocence. This Court recognized that in the Jackson decision itself.

QUESTION: Is that only where the case is based on circumstantial evidence?

MR. CURRY: That's right, when it's based solely on circumstantial evidence, like this one was.

And to answer a point that Justice Scalia raised, this is of course a general rule case, and I think a basic juxtaposition here shows this. If the decision by the Fourth Circuit in this case was in fact a decision of this Court that had been rendered in 1985, say, well then West would have come to the Federal habeas court and said

insufficiency of the evidence, I win under that case. And the Federal habeas court would have had to say no, you don't get the benefit of that case. It was decided after your case became final.

His only recourse would be to say the result was dictated by preexisting precedent at the time my conviction became final, in other words Jackson v. Virginia. And that's exactly our point. The result, this case is governed by Teague, and unless it can be said, and it cannot be said in view of the common law inference which has existed for centuries, that the result in this case was dictated by precedent at the time his conviction became final.

Finally with regard to this business of congressional intent, I think the best evidence that there is no congressional mandate for de novo review is this Court's cases. In case after case in the last 15 years this Court has afforded state prisoners something far less than de novo review, and in many instances no review at all in default cases. And the, in each of those cases, in each of those line of cases the Court reached that conclusion over a dissent which made the congressional intent argument, and of course the Court necessarily rejected that view in order to hold the way that it did.

If there are no further questions, thank you.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Curry.

The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 91-542 ELLIS B. WRIGHT, JR., WARDEN AND MARY SUE TERRY, ATTORNEY GENERAL OF VIRGINIA, Petitioners v. FRANK ROBERT WEST, JR.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Marie Federico

(REPORTER)