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FEDERAL HABEAS CORPUS: GREATER PROTECTION FOR "INNOCENT" STATE PRISONERS AFTER *JACKSON v. VIRGINIA*

In *Jackson v. Virginia*,[1] the Burger Court recently made an apparent "about face" with regard to the scope of powers extended to a federal habeas corpus court reviewing a state court conviction. On the basis of this ruling, habeas corpus petitioners may now demand federal court examination of whether the evidence produced at their trials was sufficient to justify a finding of guilt beyond a reasonable doubt.[2] *Jackson* is, therefore, a significant step beyond the Warren Court rule that due process is violated only when the record is totally devoid of any evidence to support the conviction.[3]

I. HISTORY OF FEDERAL HABEAS CORPUS

In order to fully appreciate the changes in the law made by *Jackson*, a brief review of the history of federal habeas corpus is necessary.[4] "It is now well established that the phrase 'habeas corpus' used alone refers to the common law writ of habeas corpus *ad subjiciendum*, known as the 'Great Writ.' "[5] In form, "the Great Writ is simply a mode of procedure, [but] its history is inextricably intertwined with the growth of fundamental rights of personal liberty."[6]

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1. 99 S. Ct. 2781 (1979). Until this term, Supreme Court watchers could confidently predict Burger Court behavior in the criminal law arena: the Court could be expected to take a narrow view of the rights of criminal defendants. In *Jackson*, that anticipation crumbled. Gunther, *Burger Court: Nine Men Search For What is Right, Regardless of Law*, Nat'l L.J., Aug. 13, 1979, at 58, col. 3.

2. 99 S. Ct. at 2792; Gunther, *supra* note 1, at 59, col. 1.

3. Thompson v. Louisville, 362 U.S. 199 (1960).

4. For a detailed discussion of the history of federal habeas corpus, *see* D. MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY (1968); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Hart, *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Developments in the Law, *Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

For a discussion of the history of habeas corpus in Virginia, *see* Miller and Shepherd, *New Looks at an Ancient Writ: Habeas Corpus Reexamined*, 9 U. RICH. L. REV. 49 (1974).

5. Stone v. Powell, 428 U.S. 465, 474-75, n. 6 (1976) *citing* Ex parte Bollman, 4 Cranch 75, 95 (1807) (Marshall, C.J.).

6. Fay v. Noia, 372 U.S. 391, 401 (1963). The function of the writ of habeas corpus has been to:

> [P]rovide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always

The United States Constitution does not expressly provide for the writ of habeas corpus but does provide that "the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[7] Congress remedied this omission by making the writ available to federal prisoners by the Judiciary Act of 1789.[8] Not until 1867 did Congress make the writ of habeas corpus available to prisoners held by state authority.[9] At that time, habeas corpus relief was limited to "an inquiry as to the jurisdiction of the sentencing tribunal."[10]

The substantive expansion of the Great Writ began with the use of a

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be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to immediate release.

Id. at 401-02.

7. U.S. CONST. art. I, § 9, cl. 2.

8. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (1789).

9. Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86 (1867). Habeas corpus relief for state prisoners is now codified in 28 U.S.C. § 2254 (1976) which reads in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
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> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
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> . . . .
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> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . ., shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
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> . . . .
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> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
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> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination is produced . . . and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . .

28 U.S.C. § 2254 (1976) (enacted June 25, 1948, ch. 646, § 1, 62 Stat. 869, 967 (1948)) amended Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1104, 1105 (1966) (this section is declaratory of existing law as affirmed by the Supreme Court); *see* Ex parte Hawk, 321 U.S. 114 (1944). Subsections (a) and (d) were part of the amendments made in 1966. Subsection (b) has remained unchanged from its enactment in 1948.

10. Stone v. Powell, 428 U.S. 465, 475 (1976). *See* Comment, 32 U. MIAMI L. REV. 417, 418 (1977).

broad interpretation of the term "jurisdiction."[11] Despite this initial concession, however, the Court was reluctant to allow habeas corpus to be used as a writ of error.[12] As a result, a claim of an insufficiency of the evidence at trial to support the conviction was not a cognizable claim in a habeas corpus proceeding.[13]

In 1915, the Court, in *Frank v. Mangum,*[14] recognized that violations of due process of law were reviewable by a federal habeas corpus court, thereby indicating that nonjurisdictional claims were within the scope of habeas corpus review. The Supreme Court reaffirmed this position in *Moore v. Dempsey,*[15] by granting a writ of habeas corpus solely on the grounds of a due process violation. The decisions in *Frank* and *Moore* laid the necessary framework for further substantive expansion of the use of the Great Writ as evidenced by the opinions in *Brown v. Allen*[16] and *Fay v. Noia.*[17] After *Fay,* it was firmly established that a prisoner had the right to attack a state court conviction by seeking federal habeas corpus review whenever a federal question was presented.[18]

The extension of the application of habeas corpus to due process violations led to claims that a conviction based upon evidence insufficient to support it was a denial of due process of law. In determining what quantum of evidence was required to meet due process standards, the Court, in *Thompson v. Louisville,*[19] stated:

> The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.[20]

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11. *See* Ex parte Siebold, 100 U.S. 371 (1879); Ex parte Lange, 85 U.S. 163 (1873).

12. Sunal v. Large, 332 U.S. 174 (1947); Adams v. McCann, 317 U.S. 269 (1942); Bowen v. Johnston, 306 U.S. 19 (1939); Craig v. Hecht, 263 U.S. 255 (1923); Henry v. Henkel, 235 U.S. 219 (1914); Johnson v. Hoy, 227 U.S. 245 (1913); Glasgow v. Moyer, 225 U.S. 420 (1912); Crossley v. California, 168 U.S. 640 (1898).

13. Glasgow v. Moyer, 225 U.S. 420, 430 (1912); Crossley v. California, 168 U.S. 640 (1898); *see generally* 39 AM. JUR. 2D, *Habeas Corpus* § 62 (1968).

14. 237 U.S. 309 (1915)(petition for writ of habeas corpus denied).

15. 261 U.S. 86 (1923).

16. 344 U.S. 443 (1953).

17. 372 U.S. 391 (1963); *see* Sanders v. United States, 373 U.S. 1 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

18. The Court, in *Fay,* stated that "[t]he course of decisions of this Court from *Lange* and *Siebold* to the present makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus . . . ." *Id.* at 409.

19. 362 U.S. 199 (1960).

20. *Id.* at 200. The Court in *Thompson* reversed the conviction on the basis that the record contained no evidence to support it. This holding is referred to as the "no evidence" rule.

This "no evidence" rule had been used previously by the Court in civil cases[21] and in habeas corpus proceedings concerning non-criminal custody.[22] It remained the rule governing claims of insufficiency of the evidence made by state prisoners seeking federal habeas corpus review until the decision in *Jackson.*[23]

In 1970, the Supreme Court, in its decision in *In re Winship,*[24] declared: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." This decision led to much discussion and divergence of opinion concerning the relationship between the high degree of proof necessary for conviction at trial, as dictated by *Winship,* and the limited scope of evidentiary review by federal habeas corpus courts, as previously dictated by *Thompson. Jackson* resolves this conflict by requiring that "in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[25] This comment will focus on the specific facts of *Jackson* and an analysis of the reasons behind the Court's ruling, as well as the practical and legal effects of the decision on the future of federal habeas corpus actions.

See Vachon v. New Hampshire, 414 U.S. 478 (1974); Douglas v. Buder, 412 U.S. 430 (1973); Harris v. United States, 404 U.S. 1232 (1971); Gregory v. Chicago, 394 U.S. 111 (1969); Johnson v. Florida, 391 U.S. 596 (1968); Garner v. Louisiana, 368 U.S. 157 (1961).

21. Schware v. Board of Bar Examiners of N.M., 353 U.S. 232 (1957)(no evidence of lack of good moral character); Eagles v. United States, 329 U.S. 304 (1946)(some evidence of attempting to evade military draft).

22. Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927); Tisi v. Tod, 264 U.S. 131 (1924)(deportation proceedings).

23. For the application of the "no evidence" rule to Virginia state prisoners in habeas corpus proceedings, *see* Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978); Holloway v. Cox, 437 F.2d 412 (4th Cir. 1971); Wall v. Superintendent, 418 F. Supp. 403 (W.D. Va. 1976); Welch v. Riddle, 402 F. Supp. 464 (E.D. Va. 1975); Shrader v. Riddle, 401 F. Supp. 1345 (W.D. Va. 1975); Young v. Paderick, 378 F. Supp. 1143 (W.D. Va. 1974).

24. 397 U.S. 358, 364 (1970).

25. 99 S. Ct. at 2792. *Jackson* was a 5-3 decision, with Justice Powell taking no part in the consideration or decision of the case. Justice Stevens, Justice Rehnquist, and Chief Justice Burger concurred in the decision but expressed serious criticism of the adoption of a new constitutional rule. Ten states filed amicus curiae briefs on behalf of the Commonwealth of Virginia.

II. THE FACTS OF *Jackson v. Virginia*

James A. Jackson was convicted of first degree murder[26] in a bench trial in the Circuit Court of Chesterfield County, Virginia, as a result of the shooting death of Mary Houston Cole.[27] At trial, Jackson did not deny that he had shot and killed Mrs. Cole, but he claimed that the shooting was in self-defense.[28] Jackson also claimed that the State's own evidence indicated that he had been too intoxicated to form the specific intent to kill required for a conviction of first degree murder under Virginia law.[29] This claim of an insufficiency of the evidence to support the conviction was the central issue in *Jackson*; therefore, the relevant facts are those concerning Jackson's degree of intoxication at the time of the shooting.[30]

On the day of Mrs. Cole's death, Jackson began drinking during the

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26. The Virginia Code distinguishes the degrees of murder as follows:

> Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery, burglary or abduction . . . is murder of the first degree, punishable as a Class 2 felony.
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> All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony.

VA. CODE ANN. § 18.2-32 (Repl. Vol. 1975).

The punishment for conviction of a Class 2 felony is imprisonment for a term of twenty years to life. *Id.* § 18.2-10(b). Conviction of a Class 3 felony results in imprisonment for five to twenty years. *Id.* § 18.2-10(c).

Murder is defined in Virginia as the unlawful killing of a human being with malice aforethought. Stapleton v. Commonwealth, 123 Va. 825, 96 S.E. 801 (1918). Every homicide is prima facie murder in the second degree, and the burden is on the accused to reduce, and on the Commonwealth to elevate, the grade of the offense. Perkins v. Commonwealth, 215 Va. 69, 205 S.E.2d 385 (1974); Painter v. Commonwealth, 210 Va. 360, 171 S.E.2d 166 (1969). Premeditation, or specific intent to kill, is an element of first degree murder and its proof by the prosecution is essential to a conviction of first degree murder. Shiflett v. Commonwealth, 143 Va. 609, 130 S.E. 777 (1925). Due process requires proof beyond a reasonable doubt of every fact necessary to constitute the crime of which the accused is charged. In re Winship, 397 U.S. 358, 364 (1970). *See* note 24 *supra* and accompanying text.

27. 99 S. Ct. at 2784. Mary Houston Cole is hereinafter referred to as Mrs. Cole.

28. *Id.* at 2785.

29. *Id.* Voluntary intoxication, while not an affirmative defense to second degree murder, is relevant to the determination of the ability of the accused to premeditate and form the specific intent to kill necessary for conviction of first degree murder. If the accused was sufficiently intoxicated so as to be incapable of premeditation, a conviction of first degree murder will not lie. *See* Hatcher v. Commonwealth, 218 Va. 811, 241 S.E.2d 756 (1978); Gills v. Commonwealth, 141 Va. 445, 126 S.E. 51 (1925); Willis v. Commonwealth, 73 Va. (32 Gratt.) 929 (1879).

30. After being sentenced to thirty years in the Virginia State Penitentiary for first degree murder, Jackson, by counsel, moved to set aside the verdict as "contrary to the law and evidence," which motion was denied and an exception noted. Brief for Petitioner at 7, Jackson v. Virginia, 99 S. Ct. 2781 (1979).

morning and, by early afternoon, he had consumed "several bottles" of alcoholic beverage.[31] About 6:00 p.m. that evening, Mrs. Cole picked up Jackson at her son's home and drove to a local diner for dinner.[32] While at the diner, Mrs. Cole and Jackson were observed by three police officers, one of whom testified at the trial that Jackson has been "boistrous [sic]" and "was in a pretty rough condition" as evidenced by his staggering footsteps and his bloodshot eyes.[33] As Jackson and Mrs. Cole prepared to leave the diner, one of the police officers suggested that Mrs. Cole drive the car, as she appeared to be less intoxicated than Jackson.[34] Mrs. Cole then drove herself and Jackson to a secluded church parking lot where they continued to consume a large quantity of liquor and began "messing around."[35] Later, a struggle ensued between Mrs. Cole and Jackson, resulting in the fatal shooting of Mrs. Cole.[36]

At the conclusion of the evidence presented at Jackson's trial, the prosecution declined to seek a conviction for first degree murder because of the degree of intoxication of Mrs. Cole.[37] However, after expressing the opinion

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31. Brief for Petitioner at 3. Evidence produced at the trial indicated that Jackson continued drinking throughout the afternoon. *Id.* at 3-4.

32. Brief for Petitioner at 4. Jackson first became acquainted with Mrs. Cole, an employee of the Chesterfield County Jail, while he was incarcerated there on a disorderly conduct charge. 99 S. Ct. at 2784. Upon Jackson's release from the Chesterfield County Jail, Mrs. Cole arranged for him to stay with her son and daughter-in-law. *Id.*

33. Brief for Petitioner at 4. When asked at trial if Jackson was "loaded," the officer replied in the affirmative. *Id.*

34. Brief for Petitioner at 5. Outside the diner, Jackson showed the police officer the gun he was carrying. The officer offered to keep the gun for him until he sobered up, but Jackson indicated that this would not be necessary as he and Mrs. Cole were about to engage in sexual activity. 99 S. Ct. at 2784. Mrs. Cole told the officer that she had a knife in the front seat of the car. Brief for Petitioner at 4.

35. Brief for Petitioner at 6. This information, as well as the facts relating to the actual shooting of Mrs. Cole, was obtained from a post-arrest statement made by Jackson which was read at trial. *Id.* at 5. In that statement, Jackson remembered that he and Mrs. Cole, while at the church parking lot, consumed a fifth of Old Crow, a fifth of Wild Turkey, and a pint of unidentified liquor. *Id.* at 6. When asked whether he was drunk at the time of the shooting, Jackson replied that he didn't think he was drunk, but he thought he was "pretty high." 99 S. Ct. at 2785.

36. 99 S. Ct. at 2785. In his post-arrest statement, Jackson claimed that Mrs. Cole had sought sexual relations with him, which he refused. *Id.* Jackson stated that Mrs. Cole then tried to stab him with the knife, that he fired six warning shots into the ground and that after he reloaded the revolver, Mrs. Cole tried to wrest the gun away from him. He stated that during that scuffle, two shots were fired, killing Mrs. Cole. *Id.*

37. Brief for Petitioner at 7. The autopsy report of Mrs. Cole revealed that her blood alcohol content was 0.17 by weight by volume. *Id.* In comparison, for the purposes of determining whether a person was driving while intoxicated, the Virginia Code states that "[i]f there was . . . 0.10 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcohol intoxicants." VA. CODE ANN. § 18.2-269(3)(Repl. Vol. 1975).

that if Jackson had been "drunk" he would have been arrested by the police officers at the diner, the trial court found Jackson guilty of first degree murder.[38]

Following the conviction, Jackson filed a petition for a writ of error in the Supreme Court of Virginia on the ground that the evidence was insufficient to support the conviction.[39] The petition and writ were refused, "the effect of which [was] to affirm the judgment of the [trial] court."[40] Jackson then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, again on the ground that the evidence of premeditation was insufficient to support a conviction of first degree murder.[41] The District Court, applying the "no evidence" rule of *Thompson,* found the record totally devoid of evidence of premeditation and granted the writ.[42] The State of Virginia appealed the order granting a writ of habeas corpus, and the Court of Appeals for the Fourth Circuit reversed the District Court's judgment.[43]

Jackson's petition for a writ of certiorari was granted by the United States Supreme Court. Upon consideration of the merits, the Court held that a federal habeas corpus court must consider whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt, but that even under this new standard, Jackson's con-

38. Brief for Petitioner at 7.

39. 99 S. Ct. at 2785.

40. Amicus Curiae Brief for Respondent by the State of California at B-1, Jackson v. Virginia, 99 S. Ct. 2781 (1979). *See also,* Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974) where that court held that "the Due Process Clause . . . does not require that the petitioner be granted a writ of error as a matter of right . . . . [A] decision to grant or refuse a petition for writ of error is based upon one equally-applied criterion—the merits of the case." *Id.* at 423-24.

41. 99 S. Ct. at 2785. The opinion of the District Court is unreported.

42. 99 S. Ct. at 2785. The District Court based its decision to grant the writ of habeas corpus on testimony attesting to the fact that Jackson was intoxicated, on the lack of antagonism between Mrs. Cole and Jackson shortly before the shooting occurred, and on the lack of bruises and lacerations on the body of Mrs. Cole after the shooting. Appendix at 25-27, Jackson v. Virginia, 99 S. Ct. 2781 (1979).

43. 99 S. Ct. at 2785. The opinion of the Court of Appeals is unreported. The Court of Appeals reached the decison to reverse the District Court's judgment based upon the facts that Jackson had reloaded his gun after firing six warning shots, that he had time to do so, and that Mrs. Cole was shot twice. These facts were held to show some evidence that Jackson intended to shoot Mrs. Cole. *Id.* at 2786. While premeditation is an essential element of first degree murder in Virginia, it need not exist for an appreciable period of time. The requirement of premeditation is met as long as the necessary intention exists immediately before the fatal blow is struck. Hairston v. Commonwealth, 217 Va. 429, 230 S.E.2d 626 (1976); Akers v. Commonwealth, 216 Va. 40, 216 S.E.2d 28 (1975); Shiflett v. Commonwealth, 143 Va. 609, 130 S.E. 777 (1925).

viction for first degree murder must be affirmed.[44]

III. Analysis of *Jackson*

The new standard of review adopted by the Court in *Jackson* was based squarely on its opinion in *In re Winship*.[45] The Court recognized that the *Thompson* "no evidence" rule did not provide constitutionally adequate review of insufficiency of the evidence claims after the ruling in *Winship*.[46] In *Winship*, the Court recognized that the standard of proof beyond a reasonable doubt " 'plays a vital role in the American scheme of criminal procedure,' " because it gives " 'concrete substance' to the presumption of innocence," insuring against unjust convictions.[47] Under the *Thompson* rule, "a mere modicum of evidence may satisfy a 'no evidence' standard";[48] "[b]ut it could not seriously be argued that such a 'modicum' of evidence could support a conviction beyond a reasonable doubt."[49] As a result of the Court's analysis of the constitutional framework of *Thompson* and *Winship*, it is apparent that the "no evidence" rule "fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored."[50]

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44. 99 S. Ct. at 2792-93. The State of Virginia filed a petition for a rehearing on the new standard announced by the Court. This petition was denied on October 1, 1979. 100 S. Ct. 195 (1979).

45. *See* note 24 *supra* and accompanying text.

46. In *Jackson*, the Court noted that "a person cannot incur the loss of liberty without notice and a meaningful opportunity to defend," and that "[a] meaningful opportunity to defend . . . presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused." 99 S. Ct. at 2786-87. Consequently, the *Thompson* "no evidence" rule "secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty." *Id.* at 2787.

47. 99 S. Ct. at 2787, *citing* In re Winship, 397 U.S. 358 (1970). *See generally* Johnson v. Louisiana, 406 U.S. 356 (1972); Coffin v. United States, 156 U.S. 432 (1895). *See also* Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 Mich. L. Rev. 30 (1977); Jefferies and Stephan, *Defenses, Presumptions, and Burdens of Proof in the Criminal Law*, 88 Yale L.J. 1325 (1979); Kaplan, *Decision Theory and the Factfinding Process*, 20 Stan. L. Rev. 1065, 1071-77 (1968); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299 (1977).

48. Jacobellis v. Ohio, 378 U.S. 184, 202 (1964)(Warren, C.J., dissenting). "Any evidence that is relevant—that has the tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401—could be deemed a 'mere modicum.' " 99 S. Ct. at 2790.

49. 99 S. Ct. at 2790. The Court in *Jackson* expressed apprehension that, under the *Thompson* rule, a defendant whose conviction is founded upon little, albeit some evidence, will be denied habeas corpus relief even though his conviction may be in violation of *Winship*, while another defendant, whose conviction is founded upon overwhelming evidence, may be able to assert a technical constitutional error and be released. *Id.*

50. *Id.*

The approach taken by the Court in *Jackson* was not totally unanticipated. In *United States v. Amato,*[51] the Court of Appeals for the Fifth Circuit, on direct review of a federal criminal conviction, had held that the *Winship* standard applied in determining whether there was sufficient evidence at the trial to submit the case to the jury. The Court of Appeals for the Sixth Circuit recently recognized the possible impact of *Winship* on federal habeas corpus review, holding that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.[52] In his dissent to a denial of certiorari in *Freeman v. Zahradnick,*[53] Justice Stewart espoused the application of *Winship* to sufficiency of the evidence claims raised in federal habeas corpus proceedings. In fact, the dissent in *Freeman* is substantially incorporated into the majority opinion in *Jackson.*

The tendency of Burger Court decisions[54] to limit the expansion of federal habeas corpus initiated by the Warren Court[55] is not followed in *Jackson.* A comparison of the nature of the claims of constitutional error advanced in those decisions limiting the expansion of federal habeas corpus with the nature of the claim of constitutional error made in *Jackson* may provide some insight into the apparent inconsistency of the Burger Court.

In *Estelle v. Williams,*[56] *Francis v. Henderson,*[57] and *Wainwright v.*

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51. 495 F.2d 545 (5th Cir. 1974). *Accord,* United States v. Jeffords, 491 F.2d 90 (5th Cir. 1974); United States v. Jorgenson, 451 F.2d 516 (10th Cir. 1971); United States v. Harris, 441 F.2d 1333 (10th Cir. 1971). These cases illustrate the effect of *Winship* on direct appellate review of criminal convictions.

52. Spruytte v. Koehler, 590 F.2d 335 (6th Cir. 1979)(unpublished opinion). *See also* Speigner v. Jago, 603 F.2d 1208 (6th Cir. 1979), *aff'g* 450 F. Supp. 799 (N.D. Ohio 1978).

53. 429 U.S. 1111 (1977)(Stewart, J., dissenting).

54. Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976).

55. *E.g.,* Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

56. 425 U.S. 501 (1976). The petitioner sought collateral relief on the basis that he was denied due process of law because he was tried while wearing prison clothing. In denying his petition for a writ of habeas corpus, the Court noted that no objection to the clothing had been made during petitioner's trial despite the fact that petitioner's counsel was aware of the clothing as it was expressly referred to by counsel during voir dire. *Id.* at 509-510. The Court expressed the view that, although the State cannot compel an accused to stand trial before a jury while dressed in prison clothes, the failure to make an objection, for tactical or other reasons, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation. *Id.* at 512-13.

57. 425 U.S. 536 (1976). The petitioner alleged that his conviction for felony murder was void due to the unconstitutional exclusion of Negroes from the grand jury which indicted him. The Court, in denying the petition for a writ of habeas corpus, noted that the petitioner had not raised this claim prior to trial and that this failure constituted a waiver of that claim under state law. *Id.* at 537. Applying the rule of Davis v. United States, 411 U.S. 233 (1973), which denied habeas corpus review of such a claim made by a federal prisoner, the Court

Sykes,[58] federal habeas corpus relief was denied to state prisoners on the ground that, in each case, the petitioners had failed to make a timely objection to an alleged error in their trials; therefore, petitioners had waived their rights to raise such questions in a collateral proceeding. Absent from these cases is any showing of a "colorable claim of innocence."[59] Rather, constitutional error was alleged on technical procedural grounds.[60]

In *Stone v. Powell,*[61] the petitioner asserted that his conviction was based on evidence obtained in an unconstitutional search and seizure. The question presented to the Court was:

> [W]hether state prisoners—who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review—may invoke their claim again on federal habeas corpus review. The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.[62]

Justice Powell, speaking for the majority, expressed a concern that application of the exclusionary rule diverts attention from the "ultimate question of guilt or innocence that should be the central concern in a criminal proceeding," thereby deflecting the truth finding process and often freeing the guilty.[63] Also, "the physical evidence sought to be excluded is typically

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expressed that, absent a showing of cause and actual prejudice, considerations of comity and federalism required that the *Davis* rule be applied to state prisoners as well. *Id.* at 542.

58. 433 U.S. 72 (1977). A state prisoner failed to make a timely objection, under a state contemporaneous-objection rule, to the admission of his inculpatory statements at trial. At the trial, there was no challenge to the admission of his statements on the ground that he did not understand the warnings read to him in compliance with Miranda v. Arizona, 384 U.S. 436 (1966). *Id.* at 90-91. The Court ruled that, in the absence of a showing of cause for the noncompliance with the state's procedural rules and an affirmative showing of actual prejudice, the petition for a writ of habeas corpus must be denied. *Id.*

59. Friendly, *supra* note 4, at 142.

60. There has been much discussion on the appropriateness of holding counsel's acts, or failure to act, as a knowing and intelligent waiver by the defendant or as binding on the defendant to preclude further review of his claims. For discussion of these areas, *see* Fay v. Noia, 372 U.S. 391 (1963); Alschuler, *The Defense Attorney's Role in Plea Bargaining,* 84 YALE L.J. 1179 (1975); Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services,* 12 AM. CRIM. L. REV. 667 (1975); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 59 VA. L. REV. 927 (1973); Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035 (1977); Wice and Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis,* 10 CRIM. L. BULL. 161 (1974).

61. 428 U.S. 465 (1976).

62. *Id.* at 489. The exclusionary rule dictates that evidence obtained in an unconstitutional search and seizure shall be excluded from admission at trial. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

63. 428 U.S. at 490.

reliable and often the most probative information bearing on the guilt or innocence of the defendant."[64] Justice Powell noted that while the exclusionary rule is thought to deter unlawful police activity by nurturing respect for fourth amendment values, indiscriminate application of the rule may well generate disrespect for the law and the administration of justice.[65] In rejecting the petition for a writ of habeas corpus, the Court reasoned that the furtherance of fourth amendment goals would be outweighed by the overall detrimental effect to the criminal justice system.[66]

In contrast to these earlier Burger Court decisions, the habeas corpus petitioner in *Jackson* alleged that he had been denied due process because the evidence produced at his trial was insufficient to support his conviction of first degree murder.[67] Petitioner Jackson did not deny or challenge the sufficiency of the evidence to support a conviction of second degree murder.[68] In short, Jackson advanced constitutional error in "a colorable claim of innocence."[69]

The idea that the scope of the writ of habeas corpus should revolve around the concept of a claim of innocence was first articulated in Justice Black's dissent in *Kaufman v. United States,*[70] in which he said:

> [I] agreed with *Fay v. Noia* as one of the bright landmarks in the administration of criminal justice. But I did not think then and do not think now that it laid down an inflexible rule compelling the courts to release every prisoner who alleges in collateral proceedings some constitutional flaw, regardless of its nature, regardless of his guilt or innocence, and regardless of the circumstances of the case. The Court's opinion in *Noia* shows, from beginning to end, that the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant.[71]

Judge Friendly of the Second Circuit Court of Appeals also advanced the thesis that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."[72] Judge Friendly asserted that collateral attack carries a serious burden of justification in light of its

64. *Id.*
65. *Id.* at 491.
66. *Id.* at 494.
67. 99 S. Ct. at 2786.
68. *Id.*
69. Friendly, *supra* note 4, at 142.
70. 394 U.S. 217 (1969).
71. *Id.* at 235-36 (Black, J., dissenting).
72. Friendly, *supra* note 4, at 142. The four exceptions where habeas corpus is justified irrespective of the claim of innocence are: (1) where the tribunal lacked jurisdiction or where the criminal process itself broke down so that the defendant did not receive a fair trial as

inherent problems, and that notions of finality do have a place where constitutional error is alleged and there is no question of guilt.[73]

Justice Powell, in a concurring opinion in *Schneckloth v. Bustamonte,*[74] also expressed concern for the issue of innocence in federal habeas corpus, especially in fourth amendment claims:

> Habeas corpus review of search and seizure claims thus brings a deficiency of our system of criminal justice into sharp focus: a convicted defendant asserting no constitutional claim bearing on innocence and relying solely on an alleged unlawful search, is now entitled to federal habeas [corpus] review of state conviction and the likelihood of release if the reviewing court concludes that the search was unlawful.[75]

Justice Powell reaffirmed this view in *Stone v. Powell.*[76]

From the opinion in *Stone* and the decision reached by the Court in *Jackson,* it appears that the Burger Court is expressing a tendency toward expansion of "truth-furthering rights" and the limiting of "truth-obstructing rights" in the treatment of habeas corpus petitions.[77] "Truth-furthering rights" are those that "foster sound guilt/innocence determinations with the requisite degree of certainty."[78] "Truth-obstructing rights" are those which tend to deflect the truth finding process, such as the fourth amendment exclusionary rule.[79] The requirement espoused in *Thompson* that conviction be based on some evidence of guilt was a step in the "truth-furthering" direction, as was the requirement that due process of law mandates that each element of a crime be proved beyond a reasonable doubt, expressed in *Winship.*[80] The *Jackson* decision, indicating a concern for the just determination of guilt or innocence is, therefore, not a radical departure from the values espoused in *Stone.*

Jackson, however, is not without criticism. The concurring opinion expressed grave doubts regarding the majority's conclusion that the new

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guaranteed by the Constitution; (2) where the denial of a constitutional right is claimed on the basis of facts outside the record and only collateral attack can vindicate the claim; (3) where the state has failed to provide a proper procedure for making a defense at trial and on appeal; and (4) when new constitutional developments relating to criminal procedure are announced and are retroactive. *Id.* at 150-53, as set out in McFelly, *Habeas Corpus and Due Process: From Warren to Burger,* 28 BAYLOR L. REV. 533, 554 (1976).

73. Friendly, *supra* note 4, at 146, 149; McFeely, *supra* note 72, at 554.

74. 412 U.S. 218 (1973).

75. *Id.* at 258 (Powell, J., concurring).

76. *See* notes 61-66 *supra* and accompanying text.

77. Cover and Aleinikoff, *supra* note 60, at 1092.

78. *Id.*

79. *Id.* at 1092-93.

80. *Id.*

standard of habeas corpus review was compelled by *Winship*.[81] "[A]n examination of *Winship* reveals that it has nothing to do with appellate, much less habeas corpus, review standards."[82] In contrast to *Jackson*, the facts of *Winship* presented "a case where the choice of the standard of proof has made a difference: the juvenile court judge below forthrightly acknowledged that he believed by a preponderance of the evidence, but was not convinced beyond a reasonable doubt," of the juvenile's guilt.[83] Since the adoption of the new standard was not necessary to the determination of *Jackson*, the decision was described by the concurring Justices as "an unwise act of lawmaking,"[84] and "adopted simply to forestall some hypothetical evil that has not been demonstrated."[85]

Jackson may not present facts that point out the deficiencies of the "no evidence" rule. However, the facts in *Freeman*, as related by Justice Marshall in his dissent to the denial of certiorari, show that there are instances in which there is some evidence to support the conviction, yet the *Winship* standard is not complied with in the trial court.[86] The holding in *Jackson*, therefore, provides greater constitutional protection to arguably innocent criminal defendants by adding support to the ruling in *Winship*.

IV. Implications of *Jackson*

The major substantive effect of *Jackson* is that a state prisoner is now assured that, even if the trier of fact misapplies the standard of *Winship*, his conviction will not be affirmed on habeas corpus review without evidence to support it beyond a reasonable doubt.[87] *Jackson* also illustrates that the Burger Court is more sensitive to petitions for a writ of habeas corpus when there is a claim of innocence than when technical procedural error is alleged.[88]

The practical implications of *Jackson* are more diverse. As in any case which expands the review capacity of the federal courts, there are fears of a flood of new petitions and the consequent added workload on the already

81. 99 S. Ct. at 2793 (Stevens, J., concurring).

82. *Id.* at 2795.

83. 397 U.S. 358, 369 (1970)(Harlan, J., concurring).

84. 99 S. Ct. at 2793 (Stevens, J., concurring).

85. *Id.* at 2794.

86. 429 U.S. 1111, 1116-18 (1977)(Marshall, J., dissenting). A review of the facts of other cases in which convictions were affirmed under the "no evidence" rule may offer examples of the need for the standard adopted by the Court in *Jackson*.

87. 99 S. Ct. at 2792.

88. *See* Cobb, *The Search for a New Equilibrium in Habeas Corpus Review: Resolution of Conflicting Values*, 32 U. Miami L. Rev. 637 (1978); Cover and Aleinikoff, *supra* note 60, at 1086; Friendly, *supra* note 4, at 142; McFeely, *supra* note 72, at 533.

overburdened district courts.[89] The majority responded to these fears by expressing that "a more stringent standard will expand the contours of this type of claim, but will not create an entirely new class of cases cognizable on federal habeas corpus."[90] The Court also noted that "this type of claim can almost always be judged on the written record without need for an evidentiary hearing in the federal court."[91]

Involved, also, are questions of comity and the states' desire to adjudicate fully and finally their own criminal cases. An increase in the scope of federal review of state convictions inevitably leads to increased tension between the state and federal judiciaries.[92] However, the majority in *Jackson* indicates that most meritorious claims of insufficiency of the evidence will be handled by the state appellate process, but that "[i]t is the occasional abuse that the federal writ of habeas corpus stands ready to correct."[93]

Of more concern, perhaps, is the desire for finality of criminal cases and the economic allocation of judicial resources. It has been asserted that there comes a point in the review process at which the law of diminishing returns applies: although there is a strong desire to determine truth, repetitious review may well undermine that goal by imposing on the judicial system countless hours of unproductive labor spent on meritless claims.[94] One commentator has pointed out the effects of duplicative processes on the art of judging:

> I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else. Of course this does not mean that we should not have appeals . . . . What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the "truth."[95]

One other important result of the lack of finality of criminal convictions is seen in the rehabilitation process. It has been argued that rehabilitation of the criminal cannot begin until he is assured that his case is closed and

89. 99 S. Ct. at 2798 (Stevens, J., concurring).

90. *Id.* at 2791.

91. *Id.*

92. *See generally* Hopkins, *Federal Habeas Corpus: Easing the Tension Between State and Federal Courts*, 44 ST. JOHN'S L. REV. 660 (1970).

93. 99 S. Ct. at 2791.

94. Bator, *supra* note 4, at 451. *See* 99 S. Ct. at 2799 (Stevens, J., concurring).

95. Bator, *supra* note 4, at 451.

that there is no avenue left open for his premature release.[96] While the Court recognized the problems of finality in criminal proceedings, "deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right."[97]

V. CONCLUSION

The "open door" habeas corpus policy of the Warren Court has been trimmed by the Burger Court to a "conditional open door" policy. *Jackson,* as well as *Stone,* illustrates that a claim of innocence is a vital condition to receiving federal habeas corpus review. Claims of innocence based on an insufficiency of the evidence are no longer measured by the "no evidence" rule of *Thompson,* but are now gauged by the standard of *Winship.* As a result, *Jackson* provides greater protection for the arguably innocent state criminal defendant.

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96. *Id.* at 452.
97. 99 S. Ct. at 2791.