No. 08-559

IN THE
SUPREME COURT OF THE UNITED STATES

E.K. McDANIEL, Warden
Petitioner,
vs.

TROY BROWN
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (ADEPA)?

2. Does analysis of a sufficiency-of-the-evidence claim pursuant to Jackson v Virginia, 443 US 307, 318-319 (1979) under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability off testimony and evidence given at trial?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties. Amicus defends convictions against claims of sufficiency of evidence in state courts, and also on federal habeas corpus review.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing. Counsel were notified timely of the intent to file as amicus.

Argument

I. The Standard For Review of a Sufficiency-of-the-Evidence Claim on Review Under Federal Habeas Corpus of a State Conviction

A. Introduction

Amicus confesses to being somewhat nonplused by the opinion of the 9th circuit in this case. This Court has plainly stated that the evidence reviewed on a sufficiency claim is that heard by the jury (that "adduced at the trial," see Jackson v Virginia, infra, at 324)—and yet the majority of the 9th circuit panel considered an expanded record. And this Court has held that a court reviewing a sufficiency claim must consider all evidence heard by the jury, even that which is held on appeal to have been improperly admitted, see Lockhart v Nelson, 488 US 33 (1988)—and yet the majority of the 9th circuit panel found the evidence constitutionally insufficient by discarding evidence it determined to be "unreliable" through its consideration of evidence never heard by the jury in the "expanded" record. For these reasons alone, the 9th circuit must be reversed. But also involved here is the fundamental question of the standard to be applied under the AEDPA to federal review of state convictions on sufficiency-of-the-evidence claims.

B. Jackson v Virginia Should be Reconsidered, At Least in the Context of Habeas Corpus Review of State Convictions

In Jackson v Virginia, 443 US 307 (1979) this Court found that the evidence presented was sufficient to allow a rational trier of fact to find guilt proven beyond a reasonable doubt. But in reaching this conclusion, the Court concluded that the

requirement of In re Winship, 397 US 358 (1970) that a trier of fact in a criminal case test the evidence by a standard of persuasion of beyond a reasonable doubt also provides the standard of appellate review for a verdict of guilt so reached by the trier of fact. The rule previously had been, at least on federal habeas corpus review, that the Winship requirement was an instructional one, setting the standard of persuasion that the fact-finder is to apply, with review of a verdict on habeas being only as to whether there was any evidence at all on each element, given that the weight of the evidence—the logical and probative force to be given to the evidence individually and collectively—belongs to the jury. See Jackson, 443 US at 316, and citing Cunha v Brewer, 511 F2d 894 (CA 8, 1975) as an example.

Jackson established that the question on habeas review from that time forward is not whether the jury was properly instructed on its burden, and reached the conclusion of guilt by applying the reasonable-doubt standard where there was some evidence on every element, but whether a "rational jury" could have concluded, on the evidence, that guilt was proven beyond a reasonable doubt, based necessarily on the reviewing court's assessment of the evidence. To be sure, this Court cautioned that the reviewing court was not to decide whether it was convinced beyond a reasonable doubt, but only whether any rational fact-finder could be so convinced, taking the evidence in the light most favorable to the verdict. Jackson, at 319. But though the Court said that this review standard gives "full play" to the jury to resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences, the standard ineluctably involves the reviewing court in weighing evidence, and determining whether the weight given to evidence by the properly instructed jury was for some

reason "improper," even though supported by some evidence in the record.

Application of the Jackson standard necessarily intrudes upon the historical authority of the jury to draw inferences and weigh evidence. At least where state convictions are reviewed by federal courts on habeas review, that intrusion should be ended, for much the reasons stated by Justice Stevens in his concurring opinion in Jackson. As Judge Learned Hand in the lamentably repudiated United States v. Feinberg 140 F.2d 592, 594 (CA2, 1944) put the matter:

> . . .courts-at least federal courts- have generally declared that the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases; and that, given evidence from which a reasonable person might conclude that the charge in an indictment was proved, the court will look no further, the jury must decide, and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt. . . .We agree with Judge Amidon. . . who refused to distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt. While at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use.

The contrary view, expressed in cases such as United States v Taylor, 464 F2d 240 (CA 2, 1972), where the second circuit repudiated the former rule, became known as the "Curley rule." See Curley v United States, 160 F2d 229 (CA DC, 1947). But that

rule is, amicus submits, fundamentally flawed in its premise. In Taylor the court stated the premise this way: "more 'facts in evidence' are needed for the judge to allow" jurors "'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt." Taylor, at 242. But this is manifestly untrue. No more "facts in evidence" are required to convince a jury in a criminal case than in a civil one; rather, the jury must be persuaded by a higher standard, not necessarily by "more facts"—and so instructed—in the criminal case. It would not be at all surprising that "fewer facts in evidence" might persuade a properly instructed jury beyond a reasonable doubt in one case, where "more facts in evidence" might fail to persuade a jury by a preponderance of the evidence in a civil case, as the matter turns not on the number of facts in a case but the force or weight of those facts. It is quite possible for few facts to be compelling—to persuade a properly instructed jury beyond a reasonable doubt—or on the other hand for an extensive factual record to be unpersuasive to a given jury. And where there is evidence on an element, to say that the evidence is not sufficient to prove guilt on that element beyond a reasonable doubt is to say nothing other than that the reviewing court views the weight of that evidence and its logical force differently than did the jury. This intrudes on the historical function of the jury, and unnecessarily so.

As Justice Stevens well stated in his opinion concurring in Jackson, "nothing in the Winship opinion suggests that it bore on appellate or habeas corpus procedures....it never mentioned the question of how appellate judges are to know whether the trier of fact really was convinced beyond a reasonable doubt, or indeed, whether the fact-finder was a

'rational' person or group of persons." Jackson, at 331 (Stevens, J., concurring). Further, "the very premise of Winship is that properly selected judges and properly instructed juries act rationally, that the former will tell the truth when they declare that they are convinced beyond a reasonable doubt and the latter will conscientiously obey and understand the reasonable-doubt instructions they receive before retiring to reach a verdict, and therefore that either fact-finder will itself provide the necessary bulwark against erroneous factual determinations. To presume otherwise is to make light of Winship." Jackson, at 333 (Stevens, J., concurring). This is correct, and, at least in federal review of state convictions, the Court should avoid intrusion into the jury function.

Other decisions also well state the matter. The 4th circuit in Holloway v. Cox 437 F.2d 412, 413 (C.A.4 1971) cogently observed that:

> we think the 'some evidence' standard is still appropriate in federal courts' review of sufficiency of the evidence before the state trial court in federal habeas corpus proceedings. To hold otherwise would require federal courts to exhaustively explore the state court transcript of the trial of every habeas corpus petitioner to be certain that there was evidence upon which the trier of fact should have found guilt beyond a reasonable doubt. To require such exhaustive review would transfer the ultimate fact finding function from state court juries to the federal courts. In re Winship, we hold, does not dictate this drastic change (emphasis supplied).

See also Fields v. Strickland, 444 F.Supp. 795, 803 (D.C.S.C. 1977): "The factfinding process is not transferred to a federal judge where a state jury

convicts a defendant who later seeks federal habeas relief."

Moreover, Justice Stevens has proven prescient in his concern regarding the reach of the Jackson rule. Reasonable courts previously disagreed on occasion even under the "any evidence" test for review of sufficiency. Allowing reviewing courts to second-guess the weight given to evidence by jurors to determine whether the reviewing court is satisfied that the properly instructed jurors were "reasonable" in their determination that guilt was shown beyond a reasonable doubt has heavily involved federal courts in review of the everyday decision of sufficiency of the proofs involved, and intrudes both on state juries and state reviewing courts. The Court should now set is face against this review, and limit the reach of habeas review with regard to sufficiency-of-the-evidence claims to whether a state court unreasonably concluded that a the verdict found by a properly instructed jury was supported by any evidence, the weight and force of that evidence being solely for the properly instructed jury.

C. Application of the AEDPA

Because of Jackson v Virginia, states were required to engage in weighing evidence and reviewing jury verdicts for "reasonableness," to determine whether on the evidence a reasonable jury could find guilty proven beyond a reasonable doubt. For example, in Michigan the law had long been that "The sufficiency of the evidence was exclusively for the jury. It is only where there is no evidence upon a material point that the court can take the case from the jury." People v. Eaton, 59 Mich. 559, 562, 26 N.W. 702, 703 (Mich. 1886). But in People v. Hampton, 407 Mich. 354, 366, 285 N.W.2d 284, 286 (Mich., 1979) the court was forced to change its view, saying that "the resolution of this issue is now

controlled by the rationale underlying the decision in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)." Should this Court determine that it mis-stepped in Jackson v Virginia, states would be free to determine whether to return to "any evidence" standard, leaving the weight and credibility of evidence to the jury. But whether they do so or not, review on habeas is governed by the AEDPA's requirement that the state-court conclusions not be overturned unless they are either contrary to settled law from this Court, or constitute an unreasonable application of that law. Were a state court to determine that a reasonable jury could have found guilt beyond a reasonable doubt, that conclusion should be upheld on habeas review if it is not unreasonable to find the verdict supported by "any evidence."

II. Analysis of a sufficiency-of-the-evidence claim pursuant to Jackson v Virginia, 443 US 307, 318-319 (1979) under 28 U.S.C. § 2254(d)(1) does not permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability off testimony and evidence given at trial.

Amicus leaves to the well-stated argument of the Petitioner the point that the 9th circuit's finding that the Nevada court's decision was "contrary" to Jackson v Virginia because it employed the term "rational jury" rather than "reasonable jury" is, to be generous, fanciful. Even more startling is the 9th circuit's consideration of non-record evidence to undermine the evidence considered by the jury. It is this that is "contrary" to settled law from this Court.

First, Jackson v Virginia holds that "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" (emphasis added). Jackson v. Virginia 443 U.S. 307, 324. This seems rather clear. Further, assume that it is determined on appeal that certain evidence should not have been admitted. Under the approach taken by the 9th circuit here, that evidence is to be excluded from the record and the reviewing court is to determine whether on the remaining evidence a rational jury could find guilt proven beyond a reasonable doubt. But this is also contrary to settled law from this Court, for in Lockhart v Nelson, supra, this Court held that all the record evidence, including that determined to be admitted improperly, is considered on the sufficiency question, so that retrial cannot be barred by consideration of the evidence for sufficiency by purging from the record improperly admitted evidence. And see also, for example, United States v. Cruz, 363 F.3d 187, 197 (CA 2, 2004): "In situations where some government evidence was erroneously admitted, we must make our determination concerning sufficiency taking into consideration even the improperly admitted evidence." And see United States v. Riggi, 541 F.3d 94, 108 (CA.2, 2008).

Conclusion

Because Jackson v Virginia necessarily involves federal courts in assessing the weight of evidence and the strength of inferences drawn from that evidence by state juries, it should be reconsidered. On habeas review, the verdict should be upheld unless it can be said that the state court unreasonably determined that the verdict was supported by some evidence on each element. And this Court should reaffirm that review is limited to the evidence actually presented at trial, and must include all evidence, even that a reviewing court determines was improperly admitted.

Relief

WHEREFORE, this Court should reverse the 9th Circuit

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