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HABEAS CORPUS: UNRESOLVED STANDARD OF REVIEW ON MIXED QUESTIONS FOR STATE PRISONERS

Wright v. West, 112 S. Ct. 2482 (1992)

I. INTRODUCTION

The United States Supreme Court held in *Wright v. West*¹ that a state prisoner's conviction based solely on unexplained possession of stolen goods did not violate his right to due process of law. The prisoner's petition for habeas corpus was based on insufficient evidence at trial. The Court unanimously reversed the judgment of the Fourth Circuit² and denied the petition. However, in five separate opinions, the Court failed to set a new standard of review for mixed questions of law and fact³ in federal habeas corpus cases of state prisoners.⁴

In his plurality opinion, Justice Thomas held that there was sufficient evidence at trial to convict the prisoner.⁵ Justice Thomas relied on *Jackson v. Virginia*,⁶ in which the Court held that a habeas corpus applicant is entitled to relief if it is found that no rational trier of fact could have found proof of guilt beyond a reasonable doubt. The Thomas opinion initiated the debate over whether a federal court, when considering habeas corpus petitions from state prisoners, should give deference to state court determinations of mixed questions or continue to review mixed questions *de novo*.⁷

¹ 112 S. Ct. 2482 (1992).

² *West v. Wright*, 931 F.2d 262 (4th Cir. 1991).

³ The Supreme Court has defined a mixed question as one asking "whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). A mixed question presents the decisionmaker with the task of applying the law to the facts of the case.

⁴ Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, wrote the plurality opinion. Justice White, Justice O'Connor (joined by Justice Blackmun and Justice Stevens), Justice Kennedy, and Justice Souter wrote concurring opinions.

⁵ *West*, 112 S. Ct. at 2492.

⁶ 443 U.S. 307 (1979).

⁷ *West*, 112 S. Ct. at 2491-93. *De novo* means "afresh; a second time." BLACK'S LAW DICTIONARY 435 (6th ed. 1990). The Court has referred to the *de novo* standard of review as "plenary," meaning independent. *Townsend v. Sain*, 372 U.S. 293, 312 (1963).

Justice Thomas opined that the *de novo* review rule is not settled and that the Court should defer to the state court on mixed questions, following the recent trend demonstrated in *Teague v. Lane*⁸ to narrow federal court review of state court decisions.⁹

Justice White found that there was sufficient evidence to convict the prisoner. He applied the *Jackson* test but did not join in the standard of review discussion.¹⁰

Justice O'Connor, with Justice Blackmun and Justice Stevens, found that there was sufficient evidence to convict the prisoner based on the *Jackson* test.¹¹ Justice O'Connor disagreed with Justice Thomas's analysis of habeas corpus, however, and defended the Court's decisions, which established federal court *de novo* review of mixed questions.¹²

Justice Kennedy concurred in the judgment, denying the petition for habeas corpus, but objected to Justice Thomas's reliance on *Teague* as a method of narrowing the review standard since that case did not establish a new standard of review for mixed questions in federal habeas corpus cases of state prisoners.¹³

Justice Souter agreed with the judgment of the Court. He denied review of the case either *de novo* or deferentially on the ground that the petitioner relied on the retroactive application of a new rule.¹⁴

This Note begins with a brief review of habeas corpus and examines the standard of review of mixed questions, noting the constitutional law of insufficient evidence claims. Next, the five opinions of *West* are considered. Finally, this Note argues that *West* was an inappropriate case for the Court to attempt to overturn the standard of review for mixed questions in habeas corpus and that the underlying issues necessary to properly answer the standard of review question were not fully debated.

II. HABEAS CORPUS BACKGROUND

A. EARLY BOUNDARIES OF THE GREAT WRIT

Habeas corpus is the fundamental safeguard against illegal restraint or confinement.¹⁵ The writ became a heritage of English

⁸ 489 U.S. 288 (1989).

⁹ *West*, 112 S. Ct. at 2491-93.

¹⁰ *Id.* at 2493 (White, J., concurring).

¹¹ *Id.* at 2493-97 (O'Connor, J., concurring).

¹² *Id.* (O'Connor, J., concurring).

¹³ *Id.* at 2498-2500 (Kennedy, J., concurring).

¹⁴ *Id.* at 2500-03 (Souter, J., concurring).

¹⁵ Habeas corpus is defined as:

common law and was adopted in the American colonial common law prior to the Revolution.¹⁶ The United States Constitution protects against the suspension of habeas corpus,¹⁷ and the Judiciary Act of 1789 gave federal courts jurisdiction over those in federal custody seeking habeas corpus relief within the "principles and usages of law."¹⁸ Thus, early Supreme Court decisions applied the traditional common law to form the writ's boundaries.¹⁹ This meant that a prisoner could not be granted habeas corpus relief when convicted by a court of competent jurisdiction.²⁰ In *Ex parte Watkins*, the Court reasoned that the writ did not protect individuals from poor judgments but served only to guaranty a trial in a proper court.²¹

During the post-Civil War Reconstruction, both legislative action and judicial decree expanded federal habeas corpus jurisdiction. In 1867, Congress strengthened federal court power in habeas corpus to include jurisdiction over state prisoners.²² Additionally, the Court extended the boundaries of habeas corpus to include review of unconstitutional state laws.²³ In *Ex parte Siebold*, the Court

Lat. (You have the body.) The name given to a variety of writs . . . having for their object to bring a party before a court or judge. In common usage, and whenever these words are used alone, they are usually understood to mean the *habeas corpus ad subjiciendum* . . . the purpose of which is to test the legality of the detention or imprisonment; not whether [the prisoner] is guilty or innocent.

BLACK'S LAW DICTIONARY 709 (6th ed. 1990)

¹⁶ See generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980).

¹⁷ U.S. CONST. art. I, § 9, cl. 2 provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require It."

¹⁸ Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81.

¹⁹ E.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (Chief Justice Marshall stated that the meaning of the writ may be found in common law).

²⁰ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830). In *Watkins*, the Supreme Court stated that "[a]n imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous." *Id.* at 202.

²¹ *Id.*

²² Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2241 (1988)). The Act originally stated:

[T]he several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.

Id., cited in Charles D. Weisselberg, *Evidentiary Hearings on Habeas Corpus Cases*, 1190 B.Y.U. L. Rev. 131, 137 n.26 (1990).

The Act may have been intended to expand habeas corpus beyond deciding competent jurisdiction to empower courts to decide factual questions. See Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337 (1983).

²³ *Ex parte Siebold*, 100 U.S. 371 (1879). Habeas corpus relief was granted for prisoners serving illegal sentences, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and for illegal pretrial judicial decisions, *Ex parte Wilson*, 114 U.S. 417 (1885).

reasoned that no state court can have jurisdiction over an unconstitutional law.²⁴

Although momentum for broadening the writ's scope was mounting by the end of the nineteenth century, habeas corpus still only applied to convictions under unconstitutional laws. Thus, at the turn of the century, federal courts did not decide whether prisoners' rights had been violated by unfair convictions under constitutional laws. Furthermore, since habeas corpus differed from a direct appeal, federal courts only reviewed constitutional questions of law and deferred to the state courts' findings of fact.²⁵

B. MIXED QUESTIONS AND THE STANDARD OF REVIEW

During the twentieth century, the Court significantly enlarged the scope of federal habeas corpus. *Moore v. Dempsey*²⁶ expanded habeas corpus review into state court proceedings.²⁷ The petitioners in *Moore* alleged that their convictions for murder were the result of a mob-dominated trial, violating their due process rights under the Fourteenth Amendment.²⁸ Justice Holmes wrote for the Court: "[I]t appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceeding undisturbed."²⁹ The Supreme Court remanded the case to the district for a hearing³⁰ signaling the Court's willingness for federal courts to engage in an independent determination of the facts.³¹

Although this case signaled a change in the Court's review of state court determinations, in *Brown v. Allen*,³² the Court explicitly

²⁴ *Siebold*, 100 U.S. at 376-77.

²⁵ See generally Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

²⁶ 261 U.S. 86 (1923). The petitioners in *Moore* were convicted by an Arkansas trial court for a murder that occurred during a racial disturbance. The trial only lasted forty-five minutes and defense counsel never consulted the defendants nor called any witnesses. *Id.* at 86-89. The Arkansas Supreme Court affirmed the conviction. *Id.* at 91. After the district court dismissed the habeas corpus petitions, the Supreme Court remanded the case to the district court for a hearing of the facts surrounding the judicial corrective process. *Id.*

²⁷ Expansion in the jurisdiction of federal habeas courts can best be seen by examining the scope of issues cognizable under the writ. See Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1040, 1055-61 (1970).

²⁸ *Moore*, 261 U.S. at 87.

²⁹ *Id.* at 92.

³⁰ *Id.*

³¹ See Charles D. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. REV. 131, 140-43 (1990).

³² 344 U.S. 443 (1953). In *Brown*, a convicted felon who had been sentenced to death in North Carolina, filed an application for habeas corpus in the federal district

empowered federal courts to review factual issues *de novo* and mandated that federal courts make their own mixed question determinations without deference to state court findings. In *Brown*, the Court discussed what weight should be given state court adjudications in habeas corpus cases.³³ Justice Reed's majority opinion answered the question generally:

[W]here there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue . . . In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*.³⁴

Thus, the Court confirmed that a federal court can review state court factual determinations.

More specifically, *Brown* provided a flexible rule for federal district judges in choosing the appropriate standard of review for pure factual questions.³⁵ State court findings of fact deserved deference unless a "vital flaw" was found.³⁶ To find flaws, the district court must carefully examine the record.³⁷ If no record exists, if it is inadequate, or if a "vital flaw" appears on the record, the district court may re-hear the case to determine its factual merits.³⁸

In Justice Frankfurter's separate but unanimously supported opinion, *Brown* also established the standard of review for mixed questions as follows:

[T]he District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge . . . Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding right is to be attached to the State determination.³⁹

Thus, the Court ruled that a federal judge *must* make a *de novo* review of mixed questions, and in doing so, may review the state court

court, alleging that his due process rights had been violated by an unfair jury selection. The North Carolina courts selected jurors using property tax lists which Brown alleged resulted in jury panels with disproportionately fewer African-Americans than whites. The Supreme Court dismissed the habeas corpus petition, holding that no systematic discrimination had been shown. *Id.*

³³ *Id.* at 458.

³⁴ *Id.* (citation omitted).

³⁵ *Id.* at 506.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 507-08 (Frankfurter, J., concurring).

determination.⁴⁰ While a *de novo* review of the factual portion of the issue might not have been necessary, the judge was required to make a fresh and independent application of the federal law to the facts.⁴¹ The Court reasoned that this expansion of habeas corpus was justified because "[t]he state court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."⁴² This *de novo* review procedure was quickly followed in the lower courts⁴³ and later clarified in *Townsend v. Sain*,⁴⁴ in which the Court again announced that the district court must make its own application of federal law to state factual findings.⁴⁵

In the past twenty years and beginning with *Stone v. Powell*,⁴⁶ in which the Court held that the use at trial of illegally obtained evidence did not afford habeas corpus protection, the Court has stopped the expansion of federal habeas corpus jurisdiction.⁴⁷ However, the *Brown* framework for the standard of review has remained fully intact.⁴⁸ As recently as 1985, the Court reiterated that a mixed question in a habeas corpus proceeding is subject to a *de*

⁴⁰ *Id.* at 507 (Frankfurter, J., concurring).

⁴¹ *Id.* (Frankfurter, J., concurring).

⁴² *Id.* at 508 (Frankfurter, J., concurring).

⁴³ See *United States ex rel. Leyra v. Denno*, 208 F.2d 605 (2d Cir. 1953), *rev'd on other grounds*, 347 U.S. 556 (1954); *United States ex rel. Darcy v. Handy*, 203 F.2d 407 (3d Cir. 1953); *Clark v. Warden Maryland Penitentiary*, 293 F.2d 479 (4th Cir. 1961); *Ellis v. Ellisor*, 239 F.2d 175 (5th Cir. 1956); *Sims v. Alvis*, 242 F.2d 506 (6th Cir. 1957); *Wiggins v. Ragen*, 238 F.2d 309 (7th Cir. 1956); *Torrence v. Looney*, 233 F.2d 715 (10th Cir. 1956).

⁴⁴ 372 U.S. 293 (1963).

⁴⁵ *Id.* at 318.

⁴⁶ 428 U.S. 465 (1976).

⁴⁷ See *Wainwright v. Sykes*, 433 U.S. 72 (1977) (state court-barred constitutional claims are not reviewable in a federal habeas court without a showing of actual prejudice); *Sumner v. Mata*, 449 U.S. 539 (1981) (presumption that state court factual determinations on the merits are correct); *Rose v. Lundy*, 455 U.S. 509 (1982) (federal habeas court cannot review a petition which contains exhausted and non-exhausted claims); *Harris v. Reed*, 489 U.S. 255 (1989) (federal habeas court cannot review a claim which was procedurally barred in a state court without a showing of prejudice and actual innocence); *Teague v. Lane*, 489 U.S. 288 (1989) (federal habeas court cannot review a claim that relies on a new rule).

Two important law review articles may have provided the underlying rationale for this trend: 1) Bator, *supra* note 22 (collateral review of state decisions should be limited to assuring the adequacy of state process); and 2) Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (habeas claims should be reserved for cases in which there is a possibility of an innocent prisoner wrongly convicted, not just for procedural details which interfere with justice).

⁴⁸ *Miller v. Fenton*, 474 U.S. 104 (1985) (voluntariness of a confession is not an issue of fact entitled to deferential review; rather, it is a legal question meriting independent consideration in a federal habeas corpus proceeding).

novus federal review.⁴⁹

C. INSUFFICIENT EVIDENCE CLAIMS IN HABEAS CORPUS

Habeas corpus relief may be granted to a state prisoner held "in custody in violation of the Constitution."⁵⁰ The Supreme Court has long held that the Constitution requires proof beyond reasonable doubt for conviction in criminal cases.⁵¹ More particularly, the Court determined in *Jackson v. Virginia* that the Due Process Clause of the Fourteenth Amendment is violated when a person is convicted without "sufficient proof."⁵²

In *Jackson*, a convicted murderer contended that insufficient evidence existed at his trial to prove that he had the requisite specific intent to kill.⁵³ The Supreme Court denied habeas corpus relief after a thorough review of the record.⁵⁴ The Court held that in a habeas corpus proceeding arising from a due process claim in which a state court has convicted a prisoner with insufficient evidence, a federal court must consider "whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt."⁵⁵ Thus, prisoners challenging state court convictions were entitled to relief only when the evidence at trial was such that no rational trier of fact could have found proof of guilt beyond a reasonable doubt.⁵⁶ Prior to *West*, federal courts applied this test independently (*de novo*) and without deference to the results of the state courts' application of the test.⁵⁷

III. FACTUAL AND PROCEDURAL BACKGROUND

Between December 13, 1978, and December 26, 1978, Angelo Cardova's vacation home in Westmoreland County, Virginia, was burglarized.⁵⁸ Cardova reported as stolen belongings worth ap-

⁴⁹ *Id.* at 112. The majority opinion was joined by seven other justices.

⁵⁰ 28 U.S.C. § 2241(c)(3) (1988).

⁵¹ See *Miles v. United States*, 103 U.S. 304, 312 (1881); *Brinegar v. United States*, 338 U.S. 160, 174 (1949); *Leland v. Oregon*, 343 U.S. 790, 795 (1952); *In re Winship*, 397 U.S. 358, 361-67 (1970).

⁵² 443 U.S. 307, 316 (1979).

⁵³ *Id.* at 311.

⁵⁴ *Id.* at 326.

⁵⁵ *Id.* at 324.

⁵⁶ *Id.*

⁵⁷ See *Palmariello v. Superintendent of M.C.I. Norfolk*, 873 F.2d 491 (1st Cir. 1989); *Liberta v. Kelly*, 839 F.2d 77 (2d Cir. 1988); *Evans v. Ct. of Common Pleas*, 959 F.2d 1227 (3d Cir. 1992); *Resnover v. Pearson*, 965 F.2d 1453 (7th Cir. 1992); *Denham v. Deeds*, 954 F.2d 1501 (9th Cir. 1991); *Cordoba v. Hanrahan*, 910 F.2d 691 (10th Cir. 1990); *Stokes v. Singletary*, 952 F.2d 1567 (11th Cir. 1992).

⁵⁸ *Wright v. West*, 112 S. Ct. 2482, 2484 (1992).

proximately \$3,500.⁵⁹ On January 10, 1979, sheriff's officers searched Frank West's home in Gloucester County, Virginia, and seized items they believed were stolen from Cardova's home.⁶⁰ Cardova later identified the items seized by police, estimating their value at \$1,100.⁶¹

West pled not guilty to a charge of grand larceny pursuant to Virginia Code § 18.2-95.⁶² At trial, the prosecution presented six witnesses who testified about the timing of the theft, the ownership of the property, the value of the property and the chain of custody of the property after it was seized from West's home.⁶³

West denied the theft and testified that he had purchased the items at flea markets, which he attended regularly.⁶⁴ West also testified that he remembered buying some of the items from an acquaintance, Ronnie Elkins, but his testimony surrounding Elkins was confused and incomplete.⁶⁵ Elkins did not testify at West's trial.⁶⁶ The prosecution presented no rebuttal evidence.⁶⁷ Virginia law permitted an inference that a person who fails to explain, or falsely explains, exclusive possession of recently stolen property is guilty of theft.⁶⁸ West was convicted and received a ten-year prison sen-

⁵⁹ *Id.*

⁶⁰ Brief for the Respondent at 1, *Wright v. West*, 112 S. Ct. 2482 (1992)(No. 91-542)[hereinafter Brief for Respondent].

⁶¹ Brief for Petitioners at 4, *Wright v. West*, 112 S. Ct. 2482 (1992) (No. 91-542) [hereinafter Brief for Petitioners]. Among the items stolen from Cardova and later seized from West: two television sets, a sleeping bag, a shell-framed mirror, a coffee table, a ball-shaped hardwood carving, a synthetic-fiber fur coat with the name "Esther" embroidered in the lining, a box of flatware, a mounted lobster, a silk jacket with "Korea 1970" embroidered on the outside, and a record player. *Id.*

⁶² The felonious taking, stealing and carrying away of property with a value of \$100 or more is a violation of VA. CODE ANN. § 18.2-95 (Repl. Vol. 1975). *West v. Wright*, 931 F.2d 262, 263 (4th Cir. 1991).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Brief for Respondent, *supra* note 60, at 3. West testified that he did not call Elkins as a witness since West was not aware until trial that he was being charged with stealing the property he bought from Elkins. He was incarcerated when the stolen property was seized by police from his house and the indictment did not specify the items that were taken from Cardova. *Id.*

⁶⁷ Brief for Respondent, *supra* note 60, at 3.

⁶⁸ *Wright v. West*, 112 S. Ct. 2482, 2485 (1992). The trial court instructed the jurors:

If you believe from the evidence beyond a reasonable doubt that property of value of \$100.00 or more was stolen from Angelo Cardova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe be-

tence.⁶⁹ The Supreme Court of Virginia denied West's appeal, which raised several issues including whether the evidence at trial was sufficient to support a finding of guilt beyond a reasonable doubt.⁷⁰

In 1987, West filed a writ of habeas corpus in the Virginia Supreme Court but his petition was summarily denied in May 1988.⁷¹ West then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254⁷² in the Federal District Court for the Eastern District of Virginia.⁷³ United States District Judge James R. Spencer applied the constitutional standard established in *Jackson v. Virginia* and denied relief, finding that "there was sufficient evidence upon which a rational trier of fact could find West guilty beyond a reasonable doubt."⁷⁴

The United States Court of Appeals for the Fourth Circuit reversed, ruling that West's due process rights were indeed violated since there was insufficient evidence under the *Jackson* test.⁷⁵ The Fourth Circuit relied heavily on *Cosby v. Jones*,⁷⁶ in which the Eleventh Circuit collaterally reviewed a state burglary conviction that was based solely on the inference of possession, as in West's case.⁷⁷ In *Cosby*, the court utilized five contextual factors in applying the *Jackson* sufficiency of evidence test and held that the prisoner's due process rights had been violated.⁷⁸ A rehearing of *West* was denied

yond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty.

Id. n.2.

⁶⁹ *Id.* at 2485.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Habeas corpus relief on a claim of insufficient evidence is grounded in 28 U.S.C. § 2254(a) (1988), which provides that:

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.

⁷³ *Wright*, 112 S. Ct. at 2485.

⁷⁴ Brief for Petitioners, *supra* note 61, at 4. Judge Spencer specifically noted West's attempt to explain his possession of the stolen goods but concluded that "it is clear from the evidence that the defendant was found in possession of recently stolen property, and that the jury did not believe his explanation." *Id.*

⁷⁵ *West v. Wright*, 931 F.2d 262, 270 (4th Cir. 1991).

⁷⁶ 682 F.2d 1373 (11th Cir. 1982).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1382-83. The Eleventh Circuit refined the *Jackson* test for convictions based on unexplained possession of recently stolen property by asking five questions: 1) Was the possession recent in relation to the type of crime? 2) With what percentage of the stolen property was the defendant found? 3) Was there an attempt to conceal the property? 4) Was the explanation given by the defendant plausible? and 5) Was there evidence to support the defendant's explanation? *Id.*

by the Court of Appeals.⁷⁹

On December 16, 1991, the Supreme Court granted certiorari.⁸⁰ In an unusual step, the Court amended the grant for certiorari two days later, stating:

In addition to the questions presented by the petition, the parties are requested to brief and argue the following question: In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?⁸¹

This novel way of raising the issue suggested that some members of the Court were poised to abandon the *de novo* review standard of state court mixed question determinations.

IV. SUPREME COURT OPINIONS

The Supreme Court unanimously reversed the Fourth Circuit decision and denied West's habeas corpus petition.⁸² However, the Court's five separate opinions reveal its disagreement as to the proper means of arriving at the judgment. Since no majority opinion exists, the standard of review to be used by federal courts in determining mixed questions arising out of state petitions for habeas corpus was left unresolved.

A. THE PLURALITY OPINION

Justice Thomas announced the judgment of the Court.⁸³ The Court unanimously held that "there was more than enough evidence to support West's conviction."⁸⁴ Prior to announcing the judgment, however, Justice Thomas initiated a debate over what standard of review should be used in deciding mixed questions in habeas corpus petitions from state prisoners.

Justice Thomas first emphasized the writ's narrow applicability in the early years of the United States and its gradual expansion since that time.⁸⁵ According to Justice Thomas, *Brown v. Allen*⁸⁶ sig-

⁷⁹ Wright v. West, 112 S. Ct. 2482, 2486 (1992).

⁸⁰ Wright v. West, 112 S. Ct. 656 (1991).

⁸¹ *Id.* at 672.

⁸² *West*, 112 S. Ct. at 2482.

⁸³ *Id.* at 2484. Chief Justice Rehnquist and Justice Scalia joined Justice Thomas.

⁸⁴ *Id.* at 2492.

⁸⁵ *Id.* at 2486. Justice Thomas opined that prior to 1953, habeas corpus would not lie for a state prisoner if he had been given an opportunity to obtain full and fair consideration of his claim. *Id.* (Harlan, J., dissenting) (quoting *Fay v. Noia*, 372 U.S. 391, 459-60 (1963)). Justice Thomas also quoted Justice Powell. *Id.*

naled a landmark decision, in which the principle of absolute deference was first rejected.⁸⁷ As Justice Thomas interpreted the case, however, *Brown* merely gave federal courts the ability to ignore state court findings of mixed questions; it did not completely thwart deferential treatment since a federal judge could still choose to rely on the state court's findings.⁸⁸ Therefore, according to Justice Thomas, the standard to be used after *Brown* was unresolved since deferential treatment, although no longer absolute, could still be invoked at the federal judge's discretion.⁸⁹

After reviewing the case law post-*Brown* through *Miller v. Fenton*,⁹⁰ Justice Thomas found that the Court never explicitly considered whether the standard of review should be *de novo* or deferential for mixed questions.⁹¹ He opined that the Court, although never technically resolving the question, "gradually [came] to treat as settled the rule that mixed constitutional questions are 'subject to plenary federal review' on habeas."⁹² Therefore, the use of plenary or *de novo* review for habeas corpus courts deciding mixed questions was merely fortuitous and lacked formal foundation.

According to Justice Thomas, *Jackson v. Virginia*⁹³ contributed to the fortuitous use of a *de novo* standard of review.⁹⁴ Justice Thomas also argued that the *Jackson* Court confused the issue by first stating that state courts' judgments were entitled to deference but indicating later that the *Jackson* rule itself should be applied independently by the federal court.⁹⁵

Justice Thomas then attacked the practice of *de novo* review of mixed questions. He wrote, "Despite our apparent adherence to a standard of *de novo* habeas review with respect to mixed constitutional questions, we have implicitly questioned that standard, at least with respect to pure legal questions, in our recent retroactivity precedents."⁹⁶ Justice Thomas referred explicitly to *Teague v.*

⁸⁶ 344 U.S. 443 (1953).

⁸⁷ *West*, 112 S. Ct. at 2487.

⁸⁸ *Id.*

⁸⁹ *Id.* at 2488.

⁹⁰ 474 U.S. 104 (1985). See *supra* note 48.

⁹¹ *West*, 112 S. Ct. at 2488.

⁹² *Id.* at 2489 (quoting *Miller*, 474 U.S. at 112). Justice Thomas cited the subsequent cases he examined: *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Strickland v. Washington*, 466 U.S. 668 (1984); *Brewer v. Williams*, 430 U.S. 387 (1961); *Irvin v. Dowd*, 366 U.S. 717 (1961). *West*, 112 S. Ct. at 2488.

⁹³ 443 U.S. 307 (1979).

⁹⁴ *West*, 112 S. Ct. at 2489.

⁹⁵ *Id.*

⁹⁶ *Id.*

Lane,⁹⁷ in which the Court held that a habeas corpus petitioner cannot rely on a "new rule" of criminal procedure announced after his conviction became final on direct appeal.⁹⁸ Justice Thomas argued that *Teague* and other recent retroactivity cases⁹⁹ stood for deferential treatment of pure legal questions and were premised on a new, more limited, view of the nature and function of the writ of habeas corpus.¹⁰⁰ Justice Thomas reasoned that habeas corpus was not designed to substitute for direct review and that its use should be balanced with the states' interest in finality.¹⁰¹ After preparing for an assault on the *de novo* review standard, Justice Thomas threw a white feather to his opponents and merely concluded that "such far-reaching issues" need not be decided in *West*.¹⁰²

B. JUSTICE WHITE'S CONCURRING OPINION

Justice White's one-sentence opinion avoided engaging in the standard of review discussion that Justice Thomas cultivated. He simply stated that there was sufficient evidence to support West's conviction under the *Jackson* standard.¹⁰³

C. JUSTICE O'CONNOR'S CONCURRING OPINION

Justice O'Connor concurred in the judgment but disagreed with Justice Thomas's habeas corpus discussion.¹⁰⁴ Justice O'Connor listed nine errors in Justice Thomas's opinion.

In her first two objections, Justice O'Connor attacked Justice Thomas's description of the pre-1953 law of habeas corpus, preferring a broader historical interpretation of the writ.¹⁰⁵ She explained that the early limit of habeas corpus to jurisdictional questions resulted from the limited constitutional protection perceived prior to the turn of the twentieth century.¹⁰⁶ Justice O'Connor also found fault with Justice Thomas's use of Justice Powell's quotation sup-

⁹⁷ 489 U.S. 288 (1989).

⁹⁸ *Id.* at 310.

⁹⁹ See *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Butler v. McKellar*, 494 U.S. 407 (1990).

¹⁰⁰ *West*, 112 S. Ct. at 2490.

¹⁰¹ *Id.* at 2490.

¹⁰² *Id.* at 2492.

¹⁰³ *Id.* at 2493 (White, J., concurring).

¹⁰⁴ *Id.* at 2493-94 (O'Connor, J., concurring). Justices Blackmun and Stevens joined Justice O'Connor.

¹⁰⁵ *Id.* (O'Connor, J., concurring).

¹⁰⁶ *Id.* at 2493 (O'Connor, J., concurring). "The only protections the Constitution afforded to state prisoners were those for which the text of the Constitution explicitly limited the authority of the States, most notably the Due Process Clause . . . [which] was understood to guarantee no more than a full and fair hearing in the state courts." *Id.*

porting the premise that prior to 1953, federal courts gave absolute deference to state court findings. According to Justice O'Connor, Justice Powell referred to "absolute respect" which is not the same as stating that state court judgments were entitled to complete deference.¹⁰⁷

Justice O'Connor's next two objections to Justice Thomas's opinion related to the interpretation of *Brown v. Allen*.¹⁰⁸ According to Justice O'Connor, *Brown* was not the first case in which the doctrine of complete deference was not followed.¹⁰⁹ Justice O'Connor then argued that Justice Thomas also understated "the certainty with which *Brown v. Allen* rejected a deferential standard of review of issues of law."¹¹⁰ Here, Justice O'Connor stated that *Brown* only discussed the possibility of deferential treatment in passages dedicated to the standard of review used in determining pure questions of fact.¹¹¹ More importantly, Justice O'Connor noted that the *Brown* Court gave a *de novo* review to Brown's case "without any hint of deference to the state courts."¹¹²

Justice O'Connor next found error in Justice Thomas's statement that the Court has never considered which standard of review to apply to mixed questions in a federal habeas corpus court.¹¹³ In addition to the cases listed by Justice Thomas as cases in which the Court allegedly adhered to the rule without foundation, Justice O'Connor cited twenty-one other cases in which *de novo* review was discussed and explicitly chosen.¹¹⁴

¹⁰⁷ *Id.* (O'Connor, J., concurring).

¹⁰⁸ *Id.* at 2494 (O'Connor, J., concurring).

¹⁰⁹ *Id.* (O'Connor, J., concurring). Justice O'Connor cited *Salinger v. Loisel*, 265 U.S. 224 (1924), *Carter v. McClaghry*, 183 U.S. 365 (1902), and *Ex parte Spencer*, 265 U.S. 652 (1913).

Justice Thomas addressed *Salinger* in a footnote:

Salinger, however, involved the degree of preclusive effect of a habeas judgment upon subsequent habeas petitions filed by a federal prisoner. This case, of course, involves the degree of preclusive effect of a criminal conviction upon an initial habeas petition filed by a state prisoner. We cannot fault ourselves for limiting our focus to the latter context.

Wright v. West, 112 S. Ct. at 2487 n.3.

¹¹⁰ *West*, 112 S. Ct. at 2494 (O'Connor, J., concurring).

¹¹¹ *Id.* (O'Connor, J., concurring).

¹¹² *Id.* at 2495 (O'Connor, J., concurring).

¹¹³ *Id.* (O'Connor, J., concurring).

¹¹⁴ *Id.* (O'Connor, J., concurring). Justice O'Connor cited *United States ex rel. Leyra v. Denno*, 347 U.S. 556, 558-61 (1954); *United States ex rel. Jennings v. Ragen*, 358 U.S. 276, 277 (1959); *Rogers v. Richmond*, 365 U.S. 534, 546 (1961); *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963); *Pate v. Robinson*, 383 U.S. 375, 384-86 (1966); *Sheppard v. Maxwell*, 384 U.S. 333, 349-63 (1966); *McMann v. Richardson*, 397 U.S. 759, 766-74 (1970); *Barker v. Wingo*, 407 U.S. 514, 522-36 (1972); *Lego v. Twomey*, 404 U.S. 477, 482-90 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 480-90 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-91 (1973); *Schneekloth v. Bustamonte*, 412 U.S. 218, 222-49 (1973);

Justice O'Connor's next point of contention pertained to Justice Thomas's description of *Jackson v. Virginia* as adding to the confusion surrounding the standard of review issue.¹¹⁵ Justice O'Connor argued that the *Jackson* Court did not add to any alleged confusion over the standard of review to be used. The Court simply "adhered the general rule of *de novo* review of constitutional claims on habeas."¹¹⁶

According to Justice O'Connor, Justice Thomas also mischaracterized *Teague v. Lane*.¹¹⁷ Stated simply, Justice O'Connor argued, *Teague* was not a case where the standard of review was discussed; it was a case about retroactivity.¹¹⁸ The case, therefore, did not stand for the proposition that the standard of review should be redesigned.

Justice O'Connor then refuted Justice Thomas's suggestion that *de novo* review is incompatible with the maxim that federal courts should "give great weight to the considered conclusions of a coequal state judiciary."¹¹⁹ For Justice O'Connor, this maxim does not paralyze federal courts in acting on state courts' legal conclusions. Federal courts "have an independent obligation to say what the law is."¹²⁰

Finally, Justice O'Connor noted that Congress, on thirteen occasions since *Brown*, has refused to adopt habeas corpus legislation that would provide a deferential standard of review in the face of the judicial precedent of *de novo* review.¹²¹ Thus, argued Justice O'Connor, such legislative refusals to correct the judicially established precedent supported her argument that the precedent favoring *de novo* review is appropriate.¹²²

Manson v. Brathwaite, 432 U.S. 98, 109-17 (1977); Watkins v. Sowders, 449 U.S. 341, 345-49 (1981); Jones v. Barnes, 463 U.S. 745, 750-54 (1983); Berkemer v. McCarty, 468 U.S. 420, 435-42 (1984); Moran v. Burbine, 475 U.S. 412, 420-34 (1986); Kimmelman v. Morrison, 477 U.S. 365, 383-87 (1986); Maynard v. Cartwright, 486 U.S. 356, 360-65 (1988); Duckworth v. Eagan, 492 U.S. 195, 201-05 (1989); Estelle v. McGuire, 112 S. Ct. 475, 480-81 (1991).

¹¹⁵ *West*, 112 S. Ct. at 2496 (O'Connor, J., concurring)(citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

¹¹⁶ *Id.* (O'Connor, J., concurring).

¹¹⁷ *Id.* (O'Connor, J., concurring)(citing *Teague v. Lane*, 489 U.S. 288 (1989)).

¹¹⁸ *Id.* Justice O'Connor referred here to Justice Kennedy's assertion that the evaluation of whether a rule is "new" is not the same as deference. *Id.* at 2498-2500 (Kennedy, J., concurring).

¹¹⁹ *Id.* at 2497 (O'Connor, J., concurring)(quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)).

¹²⁰ *Id.* (O'Connor, J., concurring).

¹²¹ *Id.* (O'Connor, J., concurring).

¹²² *Id.* (O'Connor, J., concurring).

D. JUSTICE KENNEDY'S CONCURRING OPINION

Justice Kennedy agreed that sufficient evidence existed to convince a rational trier of fact that West was guilty beyond a reasonable doubt.¹²³ In his separate opinion, Justice Kennedy did not engage in the debate over the proper historical interpretation of habeas, noting that the "real issue dividing [his] colleagues [was] whether the retroactivity analysis of *Teague* casts doubt upon the rule of *Miller v. Fenton*."¹²⁴ Specifically, did *Teague* overrule the precedent expressly affirmed in *Miller* that mixed questions require *de novo* review for habeas corpus claims?

For Justice Kennedy, *Teague* did not create any conflict with the *de novo* requirement and actually supported such a principle.¹²⁵ Moreover, *Teague* did not establish any necessity to defer to state court determinations; it instead established a new retroactivity principle.¹²⁶ Justice Kennedy noted that in order to distinguish between old rules and new rules, the federal court must interpret existing precedents, suggesting in one sense a deference to state courts.¹²⁷ But the purpose for a *Teague* inquiry is to "determine whether application of a new rule would upset a conviction that was obtained in accordance with the constitutional interpretations existing at the time of the prisoner's conviction."¹²⁸ That purpose is not frustrated by a *de novo* review since the claim must first pass the retroactivity threshold before being considered in a habeas corpus review. Justice Kennedy stated: "With this safeguard in place, recognizing the importance of finality, *de novo* review can be exercised within its proper sphere."¹²⁹ In Justice Kennedy's view, the instant case passed the retroactivity threshold, but did not pass the *Jackson* threshold upon *de novo* review.

E. JUSTICE SOUTER'S CONCURRING OPINION

Justice Souter rejected West's petition without using the *Jackson*

¹²³ *Id.* at 2500 (Kennedy, J., concurring).

¹²⁴ *Id.* at 2498 (Kennedy, J., concurring).

¹²⁵ *Id.* (Kennedy, J., concurring).

¹²⁶ *Id.* (Kennedy, J., concurring).

¹²⁷ *Id.* (Kennedy, J., concurring).

¹²⁸ *Id.* (Kennedy, J., concurring). Justice Kennedy quoted *Stringer v. Black*, 112 S. Ct. 1130, 1135 (1992), for the explanation that when a petitioner seeks federal habeas relief based upon a principle announced after a final judgment, *Teague* and its progeny require an answer to two questions: 1) whether the decision relied on a new rule, and if not 2) whether granting the relief sought would create a new rule because it extends the old rule to new ground. *West*, 112 S. Ct. at 2498-99 (Kennedy, J., concurring).

¹²⁹ *Id.* at 2500 (Kennedy, J., concurring).

standard.¹³⁰ His discussion was limited to the application of the *Teague* retroactivity test to West's habeas corpus claim.¹³¹ First, Justice Souter determined that the rule relied on by the court of appeals in granting West relief was not completely developed in *Jackson*.¹³² Second, he found the specific rule relied on by the court of appeals failed the *Teague* test.¹³³

Although the Fourth Circuit suggested that it was using the *Jackson* standard to determine whether West's conviction was reasonable, it actually refined the test with the *Cosby v. Jones*¹³⁴ analysis.¹³⁵ Based on the five guideposts established in *Cosby*, the court of appeals reversed the conviction.¹³⁶ Since *Cosby* was decided after West's conviction, it was a "new rule" pursuant to the *Teague* retroactivity test.¹³⁷ Therefore, no court could apply *Cosby* to West's facts even though that rule afforded West habeas corpus relief. Justice Souter concluded that the Fourth Circuit's decision should be reversed in light of *Teague*.

V. ANALYSIS

The Court correctly decided *West*. West possessed recently stolen property and the jury did not believe his confused and incomplete explanation. Under Virginia law, a jury could find guilt based solely on the inference made from unexplained possession of stolen goods.¹³⁸ The Court found that "there [was] sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt."¹³⁹ To afford West relief, the Fourth Circuit refined the Court's insufficient evidence test by using a new rule.¹⁴⁰ Since a habeas petitioner cannot rely on the retroactive application of a new rule to gain relief,¹⁴¹ the Fourth Circuit erred.

More importantly, the Court in *West* exhibited division over which standard of review was proper. The Court opened the standard of review question even though it had not been raised by either party. This Note argues that *West* was an inappropriate case to de-

¹³⁰ *Id.* (Souter, J., concurring).

¹³¹ *Id.* at 2502 (Souter, J., concurring).

¹³² *Id.* at 2502 (Souter, J., concurring).

¹³³ *Id.* (Souter, J., concurring).

¹³⁴ 682 F.2d 1373 (11th Cir. 1982). See *supra* note 78.

¹³⁵ *West*, 112 S. Ct. at 2502 (Souter, J., concurring).

¹³⁶ *Id.* (Souter, J., concurring).

¹³⁷ *Id.* (Souter, J., concurring).

¹³⁸ *Id.* at 2485.

¹³⁹ *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

¹⁴⁰ *Wright v. West*, 931 F.2d 262 (4th Cir. 1991).

¹⁴¹ *Teague v. Lane*, 489 U.S. 288, 310 (1989).

cide the standard of review question, which resulted in an incomplete debate of the underlying issues. Thus, *West* merely represents the Court's irresolution on the mixed question debate and foreshadows the possible abandonment of the *de novo* standard.

A. POOR FACTS/POOR LAW

For two reasons, *West* was an inappropriate case to use as a basis for attempting to establish a new standard of review for mixed questions in habeas corpus cases. First, the facts in *West* were not favorable for discussing the differences between deferential and *de novo* standards of review. Since either standard of review produced the same result, the standard of review issue was irrelevant. Second, the test established in *Jackson* for insufficient evidence claims already gave deference to the state finding.¹⁴² Thus, applying the test with a deferential standard of review was unnecessary.

1. The Facts

Justice Thomas concluded that "the claim advanced by the habeas petitioner must fail even assuming that the state court's rejection of it should be reconsidered *de novo*."¹⁴³ Therefore, whatever standard was deemed appropriate for *West*'s claim, he should not have been granted relief. The facts in *West* did not provide a basis to debate the important aspects of the proper standard of review since the different standards of review were not determinative. In essence, the standard of review was irrelevant.

A more appropriate case would be one in which a deferential review by a federal court would deny a prisoner relief but a *de novo* review would grant him freedom. For example, if the state court made a reasonable but flawed application of constitutional law to the facts, a genuine dilemma would arise as to which standard of review to use. Using a *de novo* standard of review, a federal court would correct the error. A federal court deferring to the state court would uphold the conviction.

Three of the Justices' opinions recognized that *West* was a poor case for determining the standard of review. Justice Thomas concluded that the far-reaching issues raised by the standard of review question did not need to be decided in *West*.¹⁴⁴ Justice Souter reversed on other grounds, noting that the standard of review ques-

¹⁴² *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

¹⁴³ *Wright v. West*, 112 S. Ct. 2482, 2492 (1992).

¹⁴⁴ *Id.*

tion should not be reached.¹⁴⁵ Finally, Justice White's silence on the standard of review issue suggested that he, too, found the *West* facts ill-suited for the standard of review question.¹⁴⁶

2. *The Law*

Jackson v. Virginia established the constitutional law applicable to *West's* claim.¹⁴⁷ In that case, Justice Stewart held that an "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."¹⁴⁸ Therefore, under the *Jackson* test, federal courts are to determine the reasonableness of state court convictions. The *Jackson* standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."¹⁴⁹ Thus, the *Jackson* test built deference into the law of insufficient evidence claims.

Since the *Jackson* Court established the insufficient evidence test with deference to state courts, application of that test with a deferential standard of review would be repetitive and unnecessary. Using a deferential standard of review for an insufficient evidence claim, the federal court would ask whether the state appellate court could have *reasonably* determined that a *reasonable* juror could have found proof of guilt beyond *reasonable* doubt. This repetition of reasonableness is unnecessary because the *Jackson* test already required the federal judge to defer to the state conviction. State convictions of prisoners seeking habeas corpus relief in federal courts were already insulated from federal protection.

B. THE BALANCE OF STATE AND FEDERAL INTERESTS

Because *West* did not require the Court to solve the standard of review question, an incomplete debate resulted. Justice Thomas admitted that balancing the federal interest in ensuring constitutional fairness in state courts with the states' interests in justice and finality was necessary to solve the standard of review question.¹⁵⁰ States'

¹⁴⁵ *Id.* at 2500 (Souter, J., concurring). Justice Souter stated that since the merits of *West's* case should not have been addressed under any standard, it was a poor case to decide the proper standard of review. *Id.*

¹⁴⁶ *Id.* at 2493 (White, J., concurring).

¹⁴⁷ 443 U.S. 307 (1979).

¹⁴⁸ *Id.* at 324.

¹⁴⁹ *Id.* at 319.

¹⁵⁰ *West*, 112 S. Ct. at 2491.

interests in both the finality of concluded litigation and the right to punish support any limitation of habeas corpus in federal courts. Assuming that a fundamental requirement of the criminal justice system is fairness, delays in implementing penalties on state prisoners frustrate this fairness and ultimately, justice. This argument is sometimes combined with the argument that the volume of habeas corpus cases reviewed by federal courts has put an unwarranted strain on the federal justice system, especially in capital cases.¹⁵¹ These interests must be weighed against what Justice O'Connor found to be the federal courts' obligation to determine constitutional law.¹⁵²

Federal courts set the boundaries of constitutional protection by deciding cases requiring mixed question determinations. Moreover, many constitutional protections now recognized in federal habeas corpus courts only arise in the form of a mixed question. They include claims concerning insufficient evidence,¹⁵³ a defense counsel's conflict of interest,¹⁵⁴ the constitutionality of pretrial identification procedures,¹⁵⁵ the voluntariness of a guilty plea,¹⁵⁶ the effectiveness of defense counsel¹⁵⁷ and the constitutionality of involuntary confessions.¹⁵⁸ A deferential standard of review would not test whether state courts' decided these cases properly, but only whether state courts' decided them reasonably. Federal courts, however, have an interest in determining constitutional law, not merely in reviewing the state conclusions for reasonableness. For "[t]he state court cannot have the last say when it . . . may have misconceived a federal constitutional right."¹⁵⁹ This reasoning is based on the Supremacy Clause.¹⁶⁰ Although Justice O'Connor defended a federal duty to decide constitutional law, the Court in *West* ultimately did not balance the federal and state interests.

¹⁵¹ See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES (1989).

¹⁵² *West*, 112 S. Ct. at 2497 (O'Connor, J., concurring). Justice O'Connor noted that although federal courts should give weight to state conclusions, this does not mean that "federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." *Id.*

¹⁵³ *Jackson v. Virginia*, 443 U.S. 307 (1979).

¹⁵⁴ *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

¹⁵⁵ *Sumner v. Mata*, 449 U.S. 509 (1982).

¹⁵⁶ *Marshall v. Lonberger*, 459 U.S. 422 (1983).

¹⁵⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁵⁸ *Miller v. Fenton*, 474 U.S. 104 (1985).

¹⁵⁹ *Brown v. Allen*, 344 U.S. 443, 508 (1953) (Frankfurter, J., concurring).

¹⁶⁰ *Id.* at 510 (Frankfurter, J., concurring).

V. CONCLUSION

In *West*, the Supreme Court created a question which was not raised by either party. The Court asked the parties to brief the question of whether a federal court should give deference to the state court's application of law to the specific facts in habeas corpus petitions. In questioning the *de novo* standard of review precedent, Justice Thomas began a battle the Court did not finish. This indecisiveness in the Supreme Court serves as a warning of the possible abandonment of the *de novo* review standard.

JAMES BASTA