ORIGINAL

In the

Supreme Court of the United States

MICHAEL TAYLOR,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent

No. 77-5549

Washington, D.C.
March 27, 1978

Pages 1 thru 38

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SUPREME COURT OF THE UNITED STATES

MICHAEL TAYLOR, Petitioner,	:	
v.	:	No. 77-5549
COMMONWEALTH OF KENTUCKY, Respondent.	:	

Washington, D. C.

Monday, March 27, 1978

The above-entitled matter came on for argument at 11:05 o'clock, a.m.

BEFORE:

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

APPEARANCES:

J. VINCENT APRILE II, ESQ., Assistant Deputy Public Defender, State Office Building Annex, Frankfort, Kentucky 40601, for the Petitioner.

GUY C. SHEARER, ESQ., Assistant Attorney General, of Kentucky, Capitol Building, Frankfort, Kentucky 40601, for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-5549, Taylor against Kentucky.

Mr. Aprile.

ORAL ARGUMENT OF J. VINCENT APRILE II, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case arises out of a State criminal prosecution in which the Petitioner, Michael Taylor, was convicted of the offense of Second Degree Robbery in violation of the Criminal Code of Kentucky.

The two constitutional issues presented in this case are, first, whether the trial judge denied Petitioner his due process guarantee under the Federal Constitution when he refused to instruct under presumption of innocence, when he was requested to do so by the defense attorney. And secondly, whether or not the trial judge denied Petitioner due process under the Federal Constitution when he refused to give the requested instruction on the indictment's lack of evidentiary value.

This is a relatively simple criminal prosecution. The State presented only one witness to prove its case. That was Mr. James Maddox, the victim of the alleged robbery. The defense presented one witness, the Petitioner, Michael Taylor, testifying in his own behalf. No other corroborative evidence was presented

by the State of any sort, physical or testimonial.

An analysis of the facts of this case reveals that at the inception of the trial during the voir dire of the jury, the defense attorney attempted to talk to the jurors concerning the presumption of innocence and the indictment's lack of evidentiary value.

In his opening statement, the prosecutor told the jury that he would have but one witness, the alleged robbery victim, and that the essence of the Commonwealth evidence would include the fact that a warrant was taken against Michael Taylor by the prosecuting witness, and that the grand jury had returned an indictment against Michael Taylor. He then was instructed by the trial judge to read the indictment to the jury which he did.

QUESTION: Would your constitutional issues be different if there had been ten witnesses on each side?

MR. APRILE: No, Your Honor, I don't believe that they necessarily would be, but I believe the facts of this case make it a fine vehicle for focusing on the impact of the presumption of innocence. In this case, it was clearly the word of one man against the word of another. And if the status of the defendant as a person who has been arrested, indicted and arraigned is to be used as any indicia of guilt against him, this could be the crucial factor in this case to swing the jury to convict this man in a very, very close case. And that is why I focused on the facts in this instance.

Without belaboring the facts, I would also like to point to the fact that under the direct examination of this prosecution witness, the prosecutor elicited from him that he had, indeed, reported this crime immediately to the police, that he had obtained a warrant against the Petitioner and that he had testified before the grand jury seeking the indictment, which, of course, was eventually returned.

Also, the case boiled down to the fact that the defense admitted that Michael Taylor knew the robbery victim, that he had been to his apartment on three, or so, occasions, and he adamantly denied that he had participated in this robbery or that he was present on the night of the alleged crime, February 16, 1976.

At this point, with the evidence in this posture, the parties met with the trial judge on the instructions. At that time, the trial defense attorney requested and tendered instructions on the presumption of innocence and the indictment's lack of evidentiary value. The trial judge refused to give those instructions and gave no comparable version of them. Instead, he instructed on only three things, one, the substantive elements of the offense of Second Degree Robbery; two, he told the jury about reasonable doubt and gave a general definition of reasonable doubt; and third, he instructed them that their verdict must be unanimous.

In this configuration --

QUESTION: Did the indictment go to the jury room?

MR. APRILE: No, Your Honor, it did not go to the jury room, but it was read in toto to them by the prosecutor at the inception of the trial. At that point, the defense attorney is still trying to talk to the jury, talk to them about the presumption of innocence.

QUESTION: In this jurisdiction, is any criminal case ever tried without the essence, if not the exact contents, of the indictment communicated to the jury?

MR. APRILE: Yes, Your Honor.

QUESTION: How does the jury find out what the charge is?

MR. APRILE: Well, it is unique, I suspect, with regard to other jurisdictions, but I have reviewed many transcrips of records in which the indictment is never given to the jury nor read.

QUESTION: I don't mean given. Someone tells the jury what the crime --

MR. APRILE: Normally, the prosecutor gives a synopsis of the charge in his opening statement.

And I want to make it clear, Your Honor, that it is not an attack made on the procedure of telling the jurors about the content of the indictment or reading it to them, or even giving it to them. The problem seems to be, in this context, that there is a conflict between being allowed to do this on the

part of the prosecution and having some means of guaranteeing that the presumption of innocence is not overridden by a mistake on the part of the jury that that indictment is in some way evidence of the defendant's guilt. And in this posture what the defense attorney attempted to do was what is done in very many jurisdictions, and that is to have the trial judge give a cautionary instruction that the indictment could not be considered as having any evidentiary value in the case.

QUESTION: Would you think that would be more important, more critical in a situation, as in some jurisdictions, the indictment goes to the jury room with the jurors, along with other pieces of paper that are evidence?

MR. APRILE: Well, Your Honor, it might be in certain cases, but I would say in this case there was not one exhibit introduced, this jury didn't have the slightest concept of what an exhibit was. All the evidence they heard came from the witness stand or statements that were made in the course of the trial. So they would have no way, really, to differentiate a paper exhibit, a documentary exhibit, from testimonial evidence. So they were looking at what they had heard in that courtroom, and they had heard the prosecutor, under instruction of the judge, read them in complete verbatim form the indictment.

So I think that while your distinction is valid, and certainly comes to play in many situations, such as some of the cases I've cited in the brief, it isn't really crucial in this

particular case. I think we have to look at the inner play that we have in this particular situation. There are two things that occur. Number one, the trial judge never tells in his instruction the jury that the defendant is presumed innocent. Number two, he does not give them an instruction that the indictment lacks evidentiary value. Add to this the fact that even his reasonable doubt instruction that he gives the jury does not deal with the burden of persuasion, that nowhere in any of those instructions that he gave does he ever say the burden of proof is on the prosecution. Indeed, his instruction begins on the substantive offense with the statement, "You will find the defendant guilty under this instruction, if and only if you believe from the evidence beyond a reasonable doubt all of the following." When he goes into his instruction on a reasonable doubt, he says, "If, upon the whole case, you have a reasonable doubt as to the defendant's guilt, you will find him not guilty." Number one, no statement that there is a presumption of innocence accorded to this defendant. Number two, no statement that the prosecution bears the burden of proof, proving the man guilty beyond a reasonable doubt. Number three, this prosecutor did two things that coalesce both of these arguments together.

Number one, he knew that the indictment had been read to the jury and he questioned this one witness that he had whether or not he had appeared before the grand jury and

testified. It looks to be, on the face of it, that what it was was an attempt to bootstrap that one witness' identification. In other words, it's an indirect way of saying, "Did you testify before the grand jury." "Yes, I did." "Did they bring back an indictment?" "Yes, they did." "The grand jury believed you."

That was another reason why this cautionary instruction was so important. As this Court pointed out in Estelle v. Williams, to guarantee the presumption of innocence and the fundamental fair trial guarantee, you will look with close judicial scrutiny at practices and procedures that conflict with the presumption of innocence.

I submit that in this case the refusal to give the instruction on the indictment's lack of evidentiary value conflicted with the defendant's constitutional guarantee of a presumption of innocence.

But look also at what this particular prosecutor did in this case. He had just heard, prior to his closing argument, the trial judge refuse to give an instruction on the presumption of innocence. What did he do? One of the very first things he said in his closing argument was, "The defendant, like every other defendant who has ever been tried, who is in the penitentiary or in the reformatory today, had the presumption of innocence until proven guilty beyond a reasonable doubt." That's just a presumption in his behalf. What did he do? Number one, he equated the presumption of innocence with the concept of people

who had been tried, convicted and sentenced to imprisonment. Number two, he indicated that the presumption of innocence really doesn't have any validity in a criminal trial, because it certainly didn't protect all those people who are presently confined in the penitentiaries and penal institutions of Kentucky at the time of that trial. Number three, he misstated, clearly misstated, the definition of reasonable doubt which was given by the judge. He told the jurors that reasonable doubt in this case was a big doubt. He also told them, "Here he is. This prosecutor is faced with absolutely no evidence but the complaining witness." What did he say? He said, "The absence of evidence in this case clearly equates with the defendant's guilt"--

QUESTION: Are you challenging the instruction given by the trial court on the question of reasonable doubt?

MR. APRILE: Your Honor, number one, in all candor, as I tried to point out in my brief, number one, it was not challenged by the defense attorney at trial. But under the teaching of this Court in Boyd v. United States and as you applied it in Cupp v. Naughten and Kibby v. Henderson, you said, this Court said that you must evaluate all of the instructions. And I submit that this particular instruction while it may not be constitutionally bankrupt on the issue of reasonable doubt, it is deficient because it did not allow the jury to utilize the fact that reasonable doubt can be generated from a want or a lack of evidence.

QUESTION: If it is not bankrupt, as you say, and not constitutionally deficient, what business does this Court have addressing itself to it?

MR. APRILE: Well, Your Honor, as I understand it, you do not, this Court does not wish to evaluate instructions in some sort of isolation. This instruction, while I'm not assuming, arguendo, that it will pass constitutional muster, I would submit that it still, standing alone, is so deficient, that it does not guarantee or protect this man's right to the presumption of innocence and that his guilt be proven by probative evidence beyond a reasonable doubt.

QUESTION: Well, similarly to that, Kentucky Appellate Court and your Petitioner for certiorari don't raise that as a separate point, do they?

MR. APRILE: No, Your Honor, and I am not trying to litigate it separately. But I don't believe that we can take the Kentucky court's position which is if you give an instruction on the reasonable doubt standard, you don't have to give an instruction on the presumption of innocence. That was their position. They based it on a long line of Kentucky cases that go back to the early 1900s, maybe older than that. But my point is this was no model instruction on reasonable doubt. Perhaps, it is constitutionally bankrupt. I know I don't have that issue before you. But I am saying that it certainly was not a model of clarity and it certainly did not give that jury the reason to

believe that they understood how the reasonable doubt standard worked. Number one, it never talked to the burden of persuasion. Number two, it never dealt with the crucial factor that this Court recognized in Johnson v. Louisiana that most courts recognize, that reasonable doubt can be generated just as much from the absence or want of evidence as from the evidence itself. In this case, that was the crucial point. There was an absence of evidence.

We had a swearing contest in this case. Here is the complaining witness. He said, "This man did it." Here is the defendant, "I didn't do it. I wasn't even there." It was a balancing contest.

QUESTION: There are thousands of cases like that. You don't want to upset all of them, do you?

MR. APRILE: Your Honor, I only want you to --

QUESTION: You don't want us to set a special rule where there is only one witness on a side, do you?

MR. APRILE: No, Your Honor.

QUESTION: Well, why do you keep pushing that point?

MR. APRILE: Because, Your Honor, I think it clearly demonstrates the problem that we had in this case. If you want me to reach back to the very clear abstract principles, I would say this. I think the dissenting judge summarized the problem very well in his statement. He said, "The law builds in a presumption of innocence in favor of the defendant. But of what

good is it to the defendant if the jury is not told about it?"

Now this Court in 1895, in Coffin v. United States, clearly said that a reasonable doubt instruction is not sufficient when a man asks for a presumption of innocence instruction. The language, although the case was a Federal prosecution, was in the terms that every man is guaranteed the protection of --

QUESTION: That was not in constitutional terms, Mr. Aprile. And that leads me to ask you a question that's troubled me from the time I read the briefs in this case. I was unable to find that what you say is the first question presented, whether Petitioner was deprived of his constitutional right to due process of law by the refusal of the trial court to give an instruction on the presumption of innocence when Petitioner's counsel requested and tendered such an instruction. I was unable to find that that issue was ever raised in this case in the trial court or in the appellate courts of Kentucky. I've looked at the requested instruction, at that transcript. I don't find that that was ever asserted as a constitutional claim. I've looked at the opinion of Judge Howard for the Court of Appeals of Kentucky and I find that he says, in answer to the contention, "The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt, an instruction on the presumption of innocence is not necessary."

Well, that would be no answer whatsoever to a

constitutional claim. And yet it seems to be, in the view of Court of Appeals of Kentucky, the complete answer to whatever defense counsel's claim was. I don't find any evidence except mentioned once in Judge Wilhoyt's dissenting opinion of the phrase "due process," that this was ever tendered as a constitutional issue to the Kentucky courts.

MR. APRILE: Your Honor, if I may just speak to that. I was not the trial attorney, but I certainly was the appellate attorney and I wrote the brief in the Kentucky Court of Appeals. Argument I was phrased, "The court below erred to a point of substantial prejudice, denied Appellant due process of law, by refusing to give the defense requested instruction on the presumption of innocence."

Not only did it cite Coffin v. United States, it cited this Court's decision in Estelle v. Williams and predicated it upon the fact that in Estelle v. Williams you said that the presumption of innocence, although not articulated in the United States Constitution, is part and parcel of the due process guarantee of a fair trial.

Now, I have no control over what the Appellate --

QUESTION: You don't have any control, but unless it's raised at the first opportunity to raise it, which in this case was in the trial court, then it's not before us.

MR. APRILE: Your Honor, I would like to make two points. Number one, Kentucky courts have never focused on the

statement of a constitutional principle in an objection.

Number two, the Attorney General's office in this case has never challenged that this is a constitutional question to any stage of this proceeding.

Number three, neither in oral argument nor in any of the pleadings of the court, have they said that we did not have a preserved constitutional issue here. But I will go one step further --

QUESTION: That's a matter of our jurisdiction, you know.

QUESTION: We decide that.

MR. APRILE: Well, Your Honor, my point is that in every stage Kentucky has allowed this to be litigated as a constitutional --

QUESTION: The two of you together can't give us jurisdiction.

MR. APRILE: I understand that, Your Honor, but my point is simply this. The fact that the presumption of innocence instruction was requested and the fact that the evidentiary -- lack of evidentiary value of the indictment was requested, allowed in Kentucky the appellate counsel to argue the constitutional ramifications of it.

I don't rest on that premise alone. I'll go to the language of the -- In the Appendix it is clear that with leave of court in this particular case, the defense attorney, after

his instructions were rejected, at the conclusion of the trial, dictated his reason into the record, as to why he thought he was entitled to those instructions.

QUESTION: Where is this?

MR. APRILE: Page 50 and 51, Your Honor.

And he points out there, "and that this presumption of innocence alone is sufficient to acquit the defendant." Let's see, the court in one of its other instructions so charges the jury with this very basic and fundamental principle of judicial fair play. "It was error for the court to refuse to give this instruction."

He talks of it in terms of a fundamental principle of judicial fair play.

QUESTION: And no mention, whatsoever, of the Constitution of the United States.

In the opinion of the Court of Appeals of Kentucky, their sole answer: "It's a matter of this is the established Kentucky law."

And, of course, that would be no answer whatsoever to a constitutional claim.

MR. APRILE: Your Honor, as I recall in a recent case this Court decided, Diggen v. Smith, you rejected this same sort of argument when the Federal District Court judge said that the constitutional issue had not been presented to the State Appellate Court --

QUESTION: Well, it's a matter of fact, isn't it? In some cases it is and in some cases it isn't. I am not arguing. I am asking where, if at all, was it raised in this case?

MR. APRILE: Well, it clearly was raised in the Appellate court, by the language --

QUESTION: Did the court have to consider it?

It did consider it, but did it have to? You are sort of stuck with that, aren't you?

MR. APRILE: Did it have to consider it? I've only practiced there for five years, done a myriad of Appellate Court cases before both of the Appellate Courts of Kentucky and I have never seen a decision in which they have refused to consider a properly objected to trial error as constitutional ramification, even though a constitutional basis was not set forth. I am talking about the Federal Constitution.

QUESTION: Well, they didn't talk about your constitutional issue.

MR. APRILE: Your Honor, I think what it really was is that they only took part of it, when they talked in terms of substantial prejudice. You notice that they did talk in terms of due process with regard to the second.

QUESTION: The indictment.

MR. APRILE: The indictment. And both of those arguments were stated the exact same way. If they were going to

differentiate, there was no basis in the record to make a differentiation between one being decided on a state law basis --

QUESTION: Well, they couldn't possibly have been talking about the Federal issue, when they talked in terms of the established law of Kentucky. That's no answer whatsoever.

MR. APRILE: I understand that, Your Honor, and I am not defending their position.

QUESTION: That's not addressing itself, whatsoever, to any sort of a Federal constitutional claim.

MR. APRILE: The Kentucky Court of Appeals has often elected not to address, in my pleadings and in other pleadings of the State Public Defender's office, the constitutional issue presented.

QUESTION: And it was not raised in the trial court. And as a matter of Kentucky procedure is that sufficient ground for the Kentucky Appellate Court to disregard the claim under Kentucky law?

MR. APRILE: I don't believe it is.

QUESTION: Why not?

MR. APRILE: And, number two, I would cite you the two cases --

QUESTION: That would be the general rule of many states that if a litigant doesn't raise something in the trial court, then the appellate court's not required to consider it.

MR. APRILE: This particular argument has never been

made by the Attorney General. It has never been in oral argument before the appellate courts of Kentucky and the point I would say is even if you want to look at it from the point of view of the law of Kentucky, I will cite you to two cases. I can give you the cite, but I don't know the numbers. Futrell v. Commonwealth and Jackson v. Commonwealth stand for the principles in Kentucky that an unobjected to denial of due process sufficient -- of an aggravated nature -- would be reviewed on appeal even if it has not been properly preserved. Not properly preserved in constitutional terms, properly preserved at all, not even objected to.

We do not have a rigid contemporaneous objection rule like Florida has.

QUESTION: Does the Kentucky Constitution have a due process clause in it?

MR. APRILE: Yes, Your Honor. In Futrell and Jackson they were dealing with Federal constitutional rights, though. In the two cases where those statements were made.

QUESTION: So, even with respect to your second point, this reference to due process of law could be referring to the State Constitution, couldn't it?

MR. APRILE: Well, Your Honor, I didn't raise any due process issue under the State Constitution in either issue. That question was not even before the court. I didn't ground my issues in either case on anything but the Fourteenth Amendment guarantee.

QUESTION: Well, there is no mention of the Fourteenth Amendment throughout this opinion or the dissenting opinion.

MR. APRILE: Your Honor, I think it would be a grave disservice to criminal litigants in the appellate process if State appellate courts could, by the language of their opinion, decline to reach constitutional issues. And that that would be binding upon this Court.

QUESTION: The constitutional issue was not raised in the trial court.

MR. APRILE: Your Honor, I submit to you --

QUESTION: The court has to be given an opportunity to consider whatever claims counsel has to make. And if he doesn't make them, then he has waived them, generally.

MR. APRILE: Well, it seems, if we are moving to such a point --

QUESTION: We are not moving to such a point. That's the established law.

MR. APRILE: Well, Your Honor, what I would say in this regard is he put this in terms of fundamental due process, fundamental judicial --

QUESTION: Didn't mention due process in the trial court, State or Federal.

MR. APRILE: And yet the State Appellate Court did mention due process with regard to the indictment issue, the instruction on the lack of evidentiary value. I don't think that

there is any doubt that in this particular case, both of these issues were addressed on a constitutional basis.

QUESTION: Your response suggests that if they mention due process in treating the evidentiary value of the indictment, but not with respect to other issues, that perhaps if you are right that they use due process in the Federal sense, they were treating a Federal question in one instance, but not in the other.

MR. APRILE: Your Honor, the only thing that I am saying is that I think what you had there was a hastily constructed language in the opinion, in which one instance they refer to one aspect which was the due process. In the other, they refer to the substantial prejudice. I grounded the issue on substantial prejudice and due process of law, Kentucky law and Federal constitutional law.

QUESTION: It certainly is a very unusual rule in appellate courts, however, that the court need not deal with questions that weren't properly presented in the trial court.

Now, is that the law of Kentucky or is it your submission that appellate courts in Kentucky will always consider a constitutional issue even though it's raised there for the first time?

MR. APRILE: No, Your Honor. I certainly didn't mean to give you that impression. The language that I quoted to you from Futrell and Jackson is the law of Kentucky, that because an issue is not properly preserved, even minimally preserved, in

terms of an objection, does not preclude review by an appellate court in Kentucky, if it is an aggravated denial of due process.

QUESTION: So, then the question would be whether, in fact, the Kentucky appellate courts had passed on the constitutional question.

MR. APRILE: I think the question, Your Honor, can best be seen by the fact that if, upon a review of the pleadings that I know are part of the record that is before this Court, you will notice that the Attorney General's office waived any challenge in the appellate court to any question of preservation in terms of constitutional grounds.

QUESTION: Is your brief in the Court of Appeals part of the record here?

MR. APRILE: Yes, Your Honor. It is not part of the Appendix, but it is part of the record that was brought up.

QUESTION: We can find in it then the question as you presented it to the Court of Appeals.

MR. APRILE: Yes, Your Honor. Yes, sir.

QUESTION: Neither the court's opinion, nor the dissenting opinion, makes any reference to the Federal constitutional claim, do they?

MR. APRILE: All I can say is, based on my experience in Kentucky, that the Court of Appeals' decision that uses the term "due process" could just as easily have been the Federal Constitution. I do not know why they would have been referring

to due process --

QUESTION: The dissenting opinion even focuses -- dissenting opinion -- Judge Wilhoyt says -- expresses the view that "the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority."

And the antecedent for that is the Kentucky cases.

MR. APRILE: Your Honor, it is also the antecedent for that, the fact that in argument as well as in the briefs I pointed out that if those cases still existed on the books, they were no longer valid in terms of your pronouncement in 1976 in Estelle v. Williams that made the presumption of innocence part and parcel of the Due Process Clause.

QUESTION: The court obviously did not consider your claim because it simply relied on the line of Kentucky cases. I am looking at page 55 of the Appendix. "The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt, an instruction on the presumption of innocence is not necessary."

Now, that would be no answer whatsoever to your claim.

MR. APRILE: Well, my claim, Your Honor, was presented in terms of Federal constitutional --

QUESTION: Then it obviously was not considered.

MR. APRILE: At no time, Your Honor, was any argument -- not one question in oral argument was placed to me on this basis. Not one time has anyone to this moment suggested that this

was not properly preserved. The State courts of Kentucky did not do that. There is nothing to suggest that preservation was an issue.

QUESTION: Do you suppose this is a case we ought to send back to the Court of Appeals in Kentucky and ask them, as we have done in Quigby v. California (?): "Did you decide this Federal constitutional question, or didn't you?"

MR. APRILE: I would see that would be a possible remedy, but I think maybe the best answer to your question, Mr. Justice Stewart, is that on one of my issues that I did not take before the court, the prosecutor's closing argument, there is a lengthy discussion that although the prosecutor's closing argument was improper it would not be considered on the ground that it was not properly preserved. Here, the opinion goes to great lengths to say no proper preservation. Why? Because the Attorney General's office argued lack of proper preservation.

In this case, they don't talk about this constitutional issue is not clearly before us. Now, I think you have to give a fair reading to this opinion. And a fair reading of it is under Diggen v. Smith, that I submit is Federal constitutional issues to that court, and you have to interpret to conclude that they did not reach my question, simply because they don't make reference to it in the court's opinion.

QUESTION: Not only that, but they don't cite -- They certainly were aware of Estelle v. Williams and other cases that

you now rely on, but not a reference to them.

MR. APRILE: I certainly don't intend to go outside the record, but if I say for over five years I practiced in the Appellate Courts of Kentucky and it is not unusual for them to dismiss Federal constitutional claims without reference to a Federal constitutional --

QUESTION: For them to answer a Federal constitutional claim by saying it is well established State law. That just poses the question. That doesn't answer it.

MR. APRILE: Your Honor, all I can say is that I've seen it done on innumerable occasions. But, on the other hand, they are quick to point out the absence of proper preservation.

Ultimately, I see -- I don't know how much time that I have exactly left, but I would like to reserve just a few moments for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Shearer.

ORAL ARGUMENT OF GUY C. SHEARER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I am getting a bit aged, I am afraid, to fight fire with fire, but sometimes you have found yourself in such a position that you have no other out. I agree with Mr. Aprile that this is a balancing contest, in speaking of what occurred here. Mr. Maddox, the victim in here, was robbed by Michael

Taylor. He was a man who worked -- respected 51 year old man -- at a whiskey store, very diligent, had his own little place where he had lived for 16 years and a job that he had occupied for 17 years. He had known Michael Taylor for 15 years, and Michael had come to his home two or three times, and apparently they were friends. On the night in question, Michael brought a man with him, went to the door and told him they wanted to come in. He said, "No, you can't come in because I want to go to bed and go to sleep." He had a friend with him. He locked the door and went back to bed. Shortly thereafter, fifteen minutes thereafter, he returned to his home and told him that he was going to let him in. He didn't let him but he did unlock the door. The two men pushed in the house, pulled him out, robbed him, took his money, $10 or $15, took his credit cards and the like and then the man ran away.

QUESTION: Now, the jury has settled all these issues.

MR. SHEARER: Yes, sir.

QUESTION: So the only issue before the Court is --

MR. SHEARER: The balancing contest was the only reason for my bringing that up, Your Honor.

What we are here on today, though, is did the Petitioner Michael Taylor have a constitutional right to have the jury instruction of presumption of innocence tendered by his counsel as a separate instruction.

The instructions which were tendered here by counsel

speak for themselves. In his instruction, he showed that he had said that the man was "slate clean" or "clean slate." These are just a few of the tracks left along. When, as a matter of fact, the man wasn't slate clean or clean slate. He knew it, but he wanted to give the impression over to that jury adroitly. By inflection of the voice, convey the idea at a later time.

We are also concerned with this case that he mentioned here in the matter of -- by what he was basing it on --

QUESTION: General Sherer, may I interrupt you with one question, please?

MR. SHEARER: Yes, sir.

QUESTION: Do you dispute the fact that the defendant comes into court with a clean slate, as far as the jury is concerned? I didn't understand your argument about the clean slate. You argued that the instruction that the defendant tendered was not correct, as I understood.

MR. SHEARER: Yes, sir, was not correct as to form and it would have been an error for him to have accepted it.

QUESTION: Why is that? Why does not the defendant come into court with a clean slate?

MR. SHEARER: You'll have to ask his counsel, Mr. Justice. Oh, why isn't it?

Well, the prosecutor didn't put it in issue because it did reflect on his integrity. He was under probated sentence for normally receiving stolen property. One year sentence.

QUESTION: Is it not true that for purposes of the matter on trial he was presumed to be innocent and presumed to come in with a clean slate?

MR. SHEARER: Yes, I agree with you 100%. It was to be -- he was free as far as his charge was concerned, until evidence was introduced against him.

QUESTION: As far as his charge was concerned, did he not have a clean slate?

MR. SHEARER: No, yes. But here is the point. If he could get an instruction with the slate clean or clean slate and which was no excuse at all because that was evidence, he used it as the peg on which to get over to the jury in its argument that this man was clean slate on everything all the way through. It's an old trick. It's as common as the day is long.

QUESTION: As long as we've had courts, we've had the presumption of innocence.

MR. SHEARER: Sir?

QUESTION: As long as we've had common law courts --

MR. SHEARER: That's correct, sir.

QUESTION: That's right, oh, yes.

MR. SHEARER: And we've had this argument on this very thing here, goes back to King Dirus (?) over 2,500 years ago. And in that you didn't have any specific instruction on it that said the mouths of two or three witnesses. That was the burden of

proof you had to meet. But it showed that the presumption of innocence followed you until it was overcome and overwhelmed by evidence.

QUESTION: Mr. Attorney General, is it the practice in Kentucky if a man has the kind of clean slate where he has never been on probation or parole, or anything at all, then does he get the instruction?

MR. SHEARER: Does he get the instruction?

QUESTION: Yes. If this man had had the kind of clean slate --

MR. SHEARER: No, he was not entitled to it at all with that word "clean slate" in there.

QUESTION: Even if he had a completely clean slate.

MR. SHEARER: If he had just said the presumption of innocence until he's proved to be guilty, it would have been all right, but the clean slate is evidence and has no place in there.

QUESTION: That's not what your Court of Appeals said. Your Court of Appeals said if the court gives a reasonable doubt instruction, the court does not have to do any more.

MR. SHEARER: That's correct.

QUESTION: So that's the law of Kentucky.

MR. SHEARER: That's absolutely the law of Kentucky.

QUESTION: Up 'til now

(laughter)

MR. SHEARER: In the case of Coffin, the court did hold

that the presumption of innocence was evidence. Later, however, this Court, in Agnew and Holt, said that it was not evidence. It is pure argument, and argument has no place in the instructions given. In the cases of Holt and Agnew, it was recognized that, for the first time, by this Court that it was not proof or evidence. Then if it was not evidence or proof, there would not exist any need for the judge to give an instruction on something that was not proof. The instruction must dovetail with the evidence. And Kentucky law is that the instruction should dovetail with the evidence; if the presumption of innocence is not evidence, then you can't dovetail an instruction with the evidence.

The State has their own justice system, just as the Federal court has its district system, has its court of appeals system, its own rules, and the rules of this Court.

The reason some things weren't mentioned and didn't go into the argument before counsel was it was not preserved at the State level. It could have been, but was not preserved, and should have been if they thought there was something detrimental in it and that some deduction was made therefrom which was not reasonable.

The State and the Federal Government follow their rules and in this case I notice that there was supposed to be, in Rule 23 you weren't supposed to bring things up for the first time here, and that there were some brought up which I ignored and we

did not answer because we didn't think that we should answer them.

QUESTION: Well, according to your brother these were not brought up for the first time here, but were brought up in the Court of Appeals of Kentucky in its brief, its constitutional arguments. Do you agree with that, sir? Did they make their constitutional claims in the Court of Appeals of Kentucky?

MR. SHEARER: No, they did not. You mean, did they argue that this was within the constitution frame of conducting --

QUESTION: No, did they argue that Kentucky law was unconstitutional, under the Federal Constitution?

MR. SHEARER: No, sir.

QUESTION: You say they didn't argue that in the Court of Appeals?

MR. SHEARER: They did not.

Your talking about the one witness in this case recalls to mind the ancient Latin Legal Maxim II, that witnesses are weighed not counted. And the weight in this case was what they were trying to circumvent through tendering an instruction. That could have been a good instruction if they had just knocked out two or three words in it, and then rewrite the instruction previously given by the court.

Now, in Kentucky, they'll take your -- after the court gives its instructions, it will read them and accept them or reject them and you can take exception to them. Or you can tender

amended form, ask the court to write its own form. But it is not the court's duty to write instructions for the defendant. That is the duty of his counsel. Counsel in this case had no doubt looked a long time before he found in that Federal form book the one that contained those words "clean slate" which he tried or wanted to turn into a peg on which to hang a hope that he could talk the jury into believing this man's record was spotless.

QUESTION: Mr. Shearer, am I right in thinking now that the Court of Appeals of Kentucky is an intermediate appellate court?

MR. SHEARER: Yes, sir, it is now.

QUESTION: And your highest court is now called the Supreme Court?

MR. SHEARER: Is the Supreme Court, yes, sir.

QUESTION: And I notice at page 59 of the record that there is an order by the Chief Justice of the Supreme Court denying what is denominated "discretionary review." Does the Supreme Court have absolute discretion to deny a petition for any -- whatever the grounds in the petition?

MR. SHEARER: At the State level, that is correct, sir.

QUESTION: Even if it is a Federal constitutional claim, it has discretion to deny it, does it?

MR. SHEARER: Yes, sir, I think it does.

QUESTION: Would they place that in a case like this on the grounds that the Federal constitutional claim was not

preserved in the trial court?

MR. SHEARER: Yes.

QUESTION: That would be one of the bases of discretion?

MR. SHEARER: That is correct.

Now, in the Coffin case which was mentioned here, the Court held it was evidence, but later held that the presumption of innocence and the doctrine of reasonable doubt were not equivalent. They were not the same. I think the Court was correct in that ruling, but the error -- and that was written, I believe, in 1895, by Mr. Justice White and it was concluded that the burden then, as it is now, is upon the Commonwealth to make its case. And in this case, we submit that that was done.

Tendered instruction Number 3, tendered instruction Number 4 all speak for themselves, all have things in them that are evidence, and it is not evidence. And the very case that was cited by the defendant proves that they weren't evidence.

For example, Number 4 there, "the law presumes the defendant to be innocent of a crime." That's all right if it had stopped there. "Thus the defendant, although accused, begins the trial with a clean slate." He doesn't say if no proof were heard he would be entitled to acquittal or a preemptory dismissal.

They have to put all this other in there to -- and then he ends up saying "So that presumption of innocence alone is sufficient to acquit the defendant." It's the lack of proof

alone that is sufficient.

And as far as the indictment goes, it's a common practice in our Commonwealth for the defense to get up and take the paper and say "this is a piece of paper." He has a piece of paper with the indictment on it. This piece of paper is worth just as much as that, until they put proof on which might substantiate what's on that one.

These arguments are all used. And as far as presumption of innocence goes, I am going to say this to this Court. I have practiced law 41 years, the great bulk of which was as a defense attorney. And I have yet, in the Commonwealth, to hear a trial start out in which the thing they get first is the individual's name, as was done in this case, the second thing they get is: "Are you acquainted with the fact that this man must be proven guilty beyond a reasonable doubt? He is presumed to be innocent until that point is reached." And invariably they say yes, and every single juror in this case -- every one of them was asked that. They went back, had discussion on it in the chambers. It was argued to all of them outside. And if you are good, counsel has a way of getting that in front of the jury -- one of the favorites that we use down our way would say, "Look, this is a presumption of innocence." In your talk, you can mention it, say "this was brought up in voir dire and a man is presumed to be innocent until proven guilty as stated by the instructions in this court." And then they will turn to the judge

and say, "Now, Your Honor, if I've misstated, please inform me wherein I have erred." You've got it in front of the jury far more than ever. And the judge will either confirm it or deny it.

QUESTION: Is the record of the voir dire in this case in the record? Does the transcript of the voir dire appear in the record before us?

MR. SHEARER: It certainly does. And some quotations of it appear there. It shows that they went at great length into it.

The other thing that was brought out about this slate clean was that they were trying to make this man who worked in a liquor store, probably knowing that some people were prejudiced against it, or dry, appear that he was not comparable with the man who had robbed him and was in there using this, employing this vehicle trying to get an acquittal.

The last thing that he has here in his second question is that of having an instruction as to the lack of value of an indictment, that it is not evidence. Well, clean slate was. That it is not evidence. Those cases are all Federal cases. Do not argue with them. But those are cases where they took, Mr. Chief Justice, the indictment back into the jury room and where they could place the indictment down and read it and re-read it.

And these Federal courts have held, and very properly so, that if you are going to do that, an instruction is going to

do that,an instruction is going to accompany it, to let that jury know that it is not evidence. And that should be the law. And nowhere in those cases is there any consideration given to the instruction that the indictment lacks evidentiary value in Kentucky or that it is a constitutional right. Yet, counsel for the Petitioner continues to contend that because of the cited cases the Petitioner was entitled to an instruction on the indictment's lack of evidentiary value.

The burden of proving that such an instruction is a constitutional right is not upon the Commonwealth, but it is upon the Petitioner alleging it. And this burden the defendant has not met.

The sum total of the evidence in this case can leave little doubt that there was nothing more imbued in the minds of those twelve jurors than the doctrine of the presumption that a man is innocent until proven guilty beyond a reasonable doubt. And that instruction was given by the judge and that judge labored so hard -- the facts in the records speak for it -- to be sure he got it. Let him make a statement now. Let him come back after the argument, after the court and put other statements in the record. And I don't know what more he could have done. You could not expect him to abdicate his right to prepare instructions over to defense counsel. I never could get them to do it.

So that is the sum total of the entire picture, as I

see it. And it looks like my time is about up, and I don't want to run over like my friend, Mr. Aprile, did. But I think this is a very important case to Kentucky. The ruling in Kentucky leaves more leeway, wider space and a presumption of innocence is just one thread in the fabric and it is much better, from an advocacy point of view, you've got more room to roam than you do in many of the other States.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Aprile, you have about one minute left.

REBUTTAL ORAL ARGUMENT OF J. VINCENT APRILE II, ESQ.,

ON BEHALF OF THE PETITIONER

MR. APRILE: Thank you, Your Honor.

I would just like to, of course, take issue with a point that was made by the representative of the Commonwealth. When you peruse the brief in this case, you will see that in both of those issues, Estelle v. Williams, the Fourteenth Amendment, due process was all set forth as the basis for the due process denial on both of these issues.

QUESTION: Well, you relied greatly -- I just read through your brief in the Court of Appeals of Kentucky -- you relied greatly on these three Federal cases, Coffin, Holt and the one at 218 U.S. 245, none of which was a constitutional case.

MR. APRILE: On page 7 of the brief and page 8 talk in terms of the right of a fair trial as a fundamental liberty, secured the presumption of innocence, that sort of thing, went onto

say that, in this context, this denied the man a right to fair trial.

QUESTION: Would you agree that these three Federal cases are not constitutional cases?

MR. APRILE: They are not decided in constitutional parameters, that is true. That is the point I was trying to make when we got into our original discussion.

Also, I would point out that at no time did the trial court or the Appellate Court in this case challenge the giving of this instruction on the presumption of innocence, on the basis that it was defective in any way. The voir dire in argument was certainly not part and parcel of the judicial instruction, and I've cited many cases to that effect.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:57 o'clock, a.m., the case in the above-entitled matter was submitted.)