ORIGINAL

In the

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,

Petitioner,

--vs--

HAROLD WHORTON,

Respondent

Number 78-749

Washington, D. C.
April 16, 1979

Pages 1 thru 48

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COMMONWEALTH OF KENTUCKY, Petitioner,	:	
v.	:	No. 78-749
HAROLD WHORTON, Respondent.	:	

Washington, D. C.
Monday, April 16, 1979

The above-entitled matter came on for argument at 1:20 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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 PAUL STEVENS, Associate Justice

APPEARANCES:

PATRICK B. KIMBERLIN, III, ESQ., Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, on behalf of Petitioner.

TERRENCE R. FITZGERALD, ESQ., Chief Appellate Defender, Jefferson District, Louisville, [illegible] 40202, on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Kentucky against Whorton.

Mr. Kimberlin, you may proceed.

ORAL ARGUMENT OF PATRICK B. KIMBERLIN, III, ESQ.,

ON BEHALF OF PETITIONER

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

I am Patrick Kimberlin, Assistant Attorney General for the Commonwealth of Kentucky, and it is the Commonwealth of Kentucky which is the Petitioner in the case at bar.

The facts of this case, stated briefly, are as follows. On May 16, 1976, in the evening hours in the suburbs of Louisville, Kentucky, the Respondent Harold Whorton entered a fast food restaurant, armed with a pistol and a knife, and robbed that restaurant -- the employees, and he took money from the cash register. While he was there, he took the knife and cut the telephone lines. He then left the restaurant, fled the scene in a 1967 blue Oldsmobile. Seven days later, on the 23rd of May, he committed yet another robbery, again in the evening hours, again in the suburbs of Louisville, again a fast food restaurant; again armed with a knife and a pistol, he robbed that restaurant, taking money from the cash register and fled the scene. Finally, again seven days later, on June 1, 1976, he robbed the last fast food restaurant, again in the suburbs of

Louisville, Kentucky, and in the evening hours. This time, he pulled the telephone from the wall, fired a shot into the ceiling and robbed a number of patrons of the restaurant, as well as the employees, and again took money from the cash register. However, in the course of this final robbery, one of the patrons managed to slip away and advise the police of what was happening. Just as Harold Whorton was fleeing the scene, the police arrived and gave chase. In a short while, they forced Whorton off the road. The car he was in was a blue '67 Oldsmobile. He got out of the car, flourished a weapon, but dropped it at the command of the police. The police seized him, the weapon and some money from the automobile and returned him immediately to the scene of that last robbery, where ten individuals who had been at that fast food restaurant positively identified him as the man who had just victimized them.

Thereafter, the Jefferson County Grand Jury returned three separate indictments, one for each of these three robberies. These indictments were joined for trial and the trial was held in the Jefferson Circuit Court in Jefferson County, Kentucky, in September 1977.

During the course of that trial, the Commonwealth of Kentucky introduced an abundance of evidence establishing the guilt of Harold Whorton on the charges that were brought against him.

The evidence presented by Whorton was only that of

his sister and his wife. Those two ladies testified that on the evening of one of the three robberies he was with them, thus attempting to establish an alibi. Harold Whorton did not take the stand and testify in his own defense. At the conclusion of all the evidence, Harold Whorton requested an instruction on presumption of innocence. The trial court refused the requested instruction as per the law in the Commonwealth of Kentucky at that time. The jury returned verdicts finding Harold Whorton guilty on ten counts of first degree robbery, two counts of attempt to commit first degree robbery and two counts of wanton endangerment.

Whorton, thereafter, pursued an appeal to the Kentucky Supreme Court. While that appeal was pending in the Kentucky Supreme Court, this Court rendered its decision on May 30, 1978, in the case of Taylor v. Kentucky. Seven days later, argument was heard in the Kentucky Supreme Court on the case at bar, Whorton v. Commonwealth.

The Taylor case was before the Kentucky Supreme Court at the time of the oral argument and they considered that course at great length in the body of their opinion which was rendered, I believe, on June 25, 1978.

The opinion of the Kentucky Supreme Court resulted in the reversal of all fourteen charges. Two of the charges, the wanton endangerment charges, were reversed on double jeopardy grounds. However, all the ten first degree robbery charges,

as well as the two attempted first degree robbery charges, were reversed upon the ground of the interpretation given by the Kentucky Supreme Court to this Court's opinion in Taylor v. Kentucky. The Kentucky Supreme Court interpreted Taylor v. Kentucky to mean that a newly declared constitutional requirement had been created by this Court in Taylor, and that that newly declared constitutional requirement was that the presumption of innocence -- when an instruction is requested on the presumption of innocence, it must be given.

If the request is rejected by the trial court, it is a violation of due process of law, and reversal must be had.

At the conclusion of the majority opinion in the Kentucky Supreme Court, it would appear that an open invitation was given for review, if that interpretation that the Kentucky Supreme Court gave to Taylor meant anything other than what the Kentucky Supreme Court saw it to be.

As a consequence of this interpretation, we feel that there has been a serious hindrance of effective administration of criminal justice in Kentucky because, as of this time, we now have fifty cases which will be automatically reversed as a consequence of the decision in Whorton and the interpretation it gave to the Taylor case.

All these cases -- many of them are already reversed or in the stages that will be reversed. The majority of them have been reversed.

In addition to this case, for which the petition for certiorari was granted here on January 8th, we have four other cases pending right now on petition for certiorari that have already reached this Court.

Our argument is two-fold. The first is that it is our belief that the opinion of this Court in Taylor v. Kentucky means that the Taylor decision is limited to its own facts and is of narrow application, and does not create a per se constitutional rule requiring automatic reversal on due process grounds, under the Fourteenth Amendment, if a presumption of innocence instruction is requested and then refused by the trial court.

We feel that the interpretation that should be given to the Taylor case is that constitutional error may occur on an ad hoc basis, and the true constitutional principle involved in Taylor is not the giving or not giving, in a mandatory sense, of a presumption of innocence instruction, but the principle that is constitutionally protected, that an accused in a criminal case can be tried only on the basis of probate of evidence actually adduced at trial and beyond the reasonable doubt.

It is this principle with which the Due Process Clause of the Fourteenth Amendment was invoked by this Court, we believe, in the Taylor case, in order to insure, in effect, a fair and reasonable trial in the Taylor case.

And, as we know, of course, what happened in the Taylor case was during the course of that trial many numerous

extraneous, negative circumstances arose -- extraneous from the evidence, that had nothing at all to do from the evidence -- comments made by the prosecutor in his opening statement with respect to inferences to be drawn from an indictment which was read to the jury, comments made by the prosecutor, in his summation, with respect to equating the status of a defendant with that of guilt, and that all defendants who were brought to the bar are guilty. There were numerous comments to this effect.

Given the circumstances of the Taylor case, Petitioner who was Taylor in that case, urged that under these particular circumstances in Taylor, the presumption of innocence instruction, which was requested, should have been given in order to protect the principle that a man is to be tried only upon the basis of the evicence introduced at trial.

Of course, this Court noted in the Taylor case that the purpose of the presumption of innocence instruction is to protect the principle that a man is to be found guilty only on the basis of the proof adduced at trial and no extraneous matters.

I think also, if we go to the case of Estelle v. Williams, where this Court noted in that case that the presumption of innocence serves the purpose -- its purpose is twofold. One is to remind the jury that the burden of persuasion is with the Government and it must carry its burden of persuasion beyond the reasonable doubt. And secondly, that it has a purging effect. It can forestall the consideration by the

jury of extraneous matters.

It was the purging effect which this Court, I believe, felt was so important in the Taylor case. It was necessary to purge some of the -- or all of the extraneous matters which arose during the course of that trial.

We submit that if there are no extraneous matters occurring during the course of the trial upon which the jury could improperly base, or assume, the guilt of the accused, and if their verdict is based solely upon the overwhelming evidence of guilt properly presented at trial, then no constitutional error occurs, that given certain circumstances, as in Taylor -- given the degree of negative circumstances, as in Taylor, and the cumulative effect of those negative circumstances, they can pyramid one on top of the other until there can be a violation of due process of law, in the absence of an instruction on the presumption of innocence.

However, we respectfully submit that in the absence of the negative circumstances there is no constitutional mandate that the presumption of innocence instruction, as a per se rule, is required.

Thus, we submit that in this case there was no violation of any constitutional standard, simply because we do not have, in comparison of the facts of this case to those in the Taylor case, the type of improper comments made by the prosecutor throughout the trial. We do not have a situation where

we have a mere swearing contest between two witnesses, as in Taylor. The victim there testified was the only person to testify. The defendant testified was the only person to testify for the defense.

Here, we have fifteen different witnesses who positively identified the accused as the man who had victimized them on these three separate occasions. We have the testimony of police officers who gave chase and apprehended him fresh from the scene.

QUESTION: Then the instruction on innocence wouldn't have hurt the Government at all, would it?

MR. KIMBERLIN: That's correct. It would not have hurt the Government at all.

QUESTION: Why not give it? Why not allow it to be given?

MR. KIMBERLIN: Well, in fact, interestingly enough, Justice Marshall, the day after the oral argument was heard by the Kentucky Supreme Court in this case that court amended Kentucky Rule of Criminal Procedure 9.56 and now requires a presumption of innocence instruction.

There would be absolutely no hard, I don't feel, that it would have done to the Government's case. I agree --

QUESTION: Is this an order -- by an order?

MR. KIMBERLIN: This is by act of the court, Your Honor. Justice White, our court can amend its own rules, its

criminal rules, and it has done so in this case.

QUESTION: Do you have a copy of the order?

MR. KIMBERLIN: Not of the order, but the amended rule is a part of the brief in our case.

QUESTION: That's what worries me. Then what do we have before us?

MR. KIMBERLIN: Well, before this Court --

QUESTION: Can we reverse that order?

MR. KIMBERLIN: Well, that order --

QUESTION: Can we touch that order?

MR. KIMBERLIN: Mr. Justice Marshall, that order --

QUESTION: Can we?

MR. KIMBERLIN: No, but that order doesn't affect this case.

QUESTION: In Kentucky, you have to give the instruction.

MR. KIMBERLIN: Right, Your Honor.

QUESTION: Well, what is this here?

MR. KIMBERLIN: Because that order does not affect this case, nor does it affect the other forty-nine or fifty cases which were reversed before that order ever went into effect. There is no retroactive effect.

QUESTION: Do you have a copy of the Watson decision here?

MR. KIMBERLIN: Your Honor, it is made a part of the

reply brief filed by the Commonwealth of Kentucky in this case.

QUESTION: In full, is it?

MR. KIMBERLIN: Yes, Your Honor, the entire --

QUESTION: In Watson, the court said, quote, "In Whorton, we elected as a matter of state law not to engage in the application of the harmless error doctrine. We chose simple prophylaxis over Talmudic hair splitting."

And that means what?

MR. KIMBERLIN: Yes, Your Honor, I am fully aware of what that opinion says.

That brings us to the second aspect of this case. The underpinning of the Kentucky Supreme Court's decision in the Whorton case is that this Court created a constitutional requirement, under the Fourteenth Amendment and the Due Process Clause, that a presumption of innocence instruction must be given as a per se matter, regardless of facts and circumstances or anything else. And if the instruction itself when requested is not given, then it's a violation of the Due Process Clause of the Fourteenth Amendment. That is the underpinning of the Whorton opinion. And because of that decision these other fifty cases have been automatically reversed.

If that is what this Court said in the Taylor case -- if that's what the proposition in Taylor stands for, then we are wrong, and we would candidly admit it, if that's what this Court meant in the Taylor case.

QUESTION: But that rule is not before us. We can't touch it, can we?

MR. KIMBERLIN: No, Your Honor, but the rule has no significance to this case. The rule didn't go into effect until after this case was already decided.

QUESTION: But that is the rule in Kentucky, regardless of what we say in this case.

MR. KIMBERLIN: That's true, but it affects this case and all the other cases that were in the pipeline prior to the rule going into effect. The rule went into effect July 1.

QUESTION: And it will affect whether this particular Respondent remains in jail or gets out?

MR. KIMBERLIN: Certainly, because it's like any change in criminal rules. In Kentucky or in any of the other states or in the Federal Government, a change in the criminal rule does not retroactively affect all other cases.

QUESTION: But the rule isn't before us.

MR. KIMBERLIN: That's true. I certainly agree with you. That rule is not before us.

QUESTION: Well, how can we rule on it?

MR. KIMBERLIN: I am not asking you to rule on that rule, on the change in the rule, because this happened before the rule ever went into effect.

QUESTION: You brought it up.

MR. KIMBERLIN: I brought it up to advise the Court

of what was happening in Kentucky. And also I believe this. The rule in Kentucky, before the Taylor case came down, was that there was absolutely no necessity for a presumption of innocence instruction at all if a reasonable doubt instruction was given.

Now, I think in some cases, there would be no violation of constitutional rules if you don't have the extraneous negative circumstances like occurred in Taylor which, in effect, infected that man's right to a fair and reasonable trial and to be tried only on the basis of the evidence presented.

QUESTION: Mr. Kimberlin, may I ask -- I am looking at page 9 of your reply brief, the Watson opinion. Do you have it there?

MR. KIMBERLIN: Yes, Your Honor.

QUESTION: The paragraph at the bottom of the page.

Whatever principle of law is laid down in that paragraph, does that apply to this case?

MR. KIMBERLIN: Do you mean the last paragraph in the argument?

QUESTION: Yes.

MR. KIMBERLIN: Yes, Your Honor, but that is --

QUESTION: It does?

MR. KIMBERLIN: Yes.

QUESTION: It does apply to this case.

Now, what does it mean in the second sentence, "In

Whorton, supra, we elected as a matter of state law not to engage in the mental gymnastics inherent in the application of the harmless error doctrine"?

MR. KIMBERLIN: What that means, we feel, is this. As I said earlier, our case -- we had a two-fold approach, first being, is it an ad hoc basis and not a per se rule? The second aspect of our case is if Taylor created a per se rule -- if what you said in Taylor means that you have to give the instruction, if you don't it's a constitutional error, then what we submitted in our brief--which by the way was written prior to the decision of our court in the Watson case -- was that if a per se rule is created then the harmless error -- the Court can turn to the harmless error rule, under the Chapman and Harrington cases, and determine it on a case to case basis. The starting point --

QUESTION: But, taking your second proposition, doesn't this paragraph from Watson indicate that your Supreme Court, as a matter of Kentucky law, has said we are not going to indulge in the application of the harmless error doctrine?

MR. KIMBERLIN: As to the application of the Federal harmless error rule, that is true. However, Justice Brennan --

QUESTION: But it has not said that it regards it as a per se violation of the Federal Constitution to fail to give the instruction.

MR. KIMBERLIN: Oh, yes, I believe it has. In the Whorton case, it said quite clearly, we think, that "We interpret

Taylor to mean -- "

QUESTION: But that's what you are appealing here.

MR. KIMBERLIN: That's right, that if this is a per se rule, if this is a per se rule, the only hope we have is to apply the Federal harmless error rule. And quite candidly, the Watson case --

QUESTION: This looks, does it not, as if your Supreme Court has said if you get to the point where there has been a violation then it can't be saved by application of the harmless error rule, the conviction can't be --

MR. KIMBERLIN: They have chosen in that case -- I agree, Justice Brennan, that they have chosen not to apply the Federal harmless error rule. But before you ever get to the Federal harmless error rule, in Chapman or Harrington you have to have a constitutional violation.

QUESTION: I understand. This is your first submission.

MR. KIMBERLIN: That's going back to that, that in other words you look at the case, you look at the facts of the case in order to determine where there are negative circumstances pyramiding until you have constitutional violation.

QUESTION: But the Kentucky court has simply announced a prospective ruling.

MR. KIMBERLIN: That's correct, Your Honor. It's like the rule, like the amendment of the --

QUESTION: Isn't your basic submission that Taylor was not a per se rule?

MR. KIMBERLIN: Exactly.

QUESTION: Yes, but don't you think -- Aren't you really arguing that Taylor only applies where you couldn't find harmless error?

MR. KIMBERLIN: Oh, no. It might appear as somewhat an awkward situation. First, you have to look at the facts to determine whether there is constitutional error, if this is an ad hoc application --

QUESTION: But if there is no prejudice, there is no error, under your reading of Taylor?

MR. KIMBERLIN: In a sense, you could say that. I see what you are saying.

QUESTION: Well, in a sense, that's what you are saying.

MR. KIMBERLIN: What you have to do, we are saying, on an ad hoc basis --

QUESTION: Well, what do you think Taylor means?

MR. KIMBERLIN: We think that it is not necessary to give the presumption of innocence instruction, where there are no extraneous matters.

QUESTION: What does that mean?

MR. KIMBERLIN: In effect, I guess, exactly what you just said, Your Honor.

QUESTION: Yes, exactly.

Do you think that's any different than saying --

MR. KIMBERLIN: A per se rule?

QUESTION: No. Do you think that's any different than saying that you must give the instruction where you couldn't hold that it would be harmless error?

MR. KIMBERLIN: Well, what that is, of course, assuming there is a per se rule and then applying the harmless error --

QUESTION: No, no --

QUESTION: That wouldn't be the first instance in the law in which there was a semantic doubt. For instance, in our Bruton (?) case, where we held that an implicated defendant could admit -- could object to the admission of a co-defendant's confession against him. You are confronted in lower courts now with arguments that either there was no Bruton violation or if there was it was harmless error. Sometimes those are rather hard to straighten out.

MR. KIMBERLIN: That's right. I understand that.

The way I would try to establish it in my own mind -- I was getting quite confused and other attorneys in our office were saying well what's the difference of approaching the facts in the beginning and then approaching the facts in the end on the two arguments. And the difference, I think, is this.

If it is an ad hoc rule, then you have to look at the

facts to determine where there is a constitutional violation. And if you --

QUESTION: Or whether there is harmless error.

MR. KIMBERLIN: If you have to do that for the ad hoc rule to establish the constitutional violation, I don't think harmless error applies.

QUESTION: Once you decide that the Taylor rule applies, there couldn't possibly be harmless error.

MR. KIMBERLIN: That's correct, if it is on an ad hoc basis. Because you have to look at the facts first to determine the constitutional violation. I don't think you could reasonably look at the facts and determine there is not reversible error.

QUESTION: But if there is some possibility of harm there couldn't be harmless error.

MR. KIMBERLIN: Well, harmless error rules have only been applied, to my knowledge, where there is a per se constitutional rule, and a per se constitutional rule is ordinarily only triggered by a triggering fact or a triggering fact or two. Like in Miranda, if a man is arrested, he can't be questioned unless you give him these -- regardless of all the other facts and circumstances -- that's the per se rule.

QUESTION: He can be questioned all you want to question him, but unless you obey the Miranda rules you can't introduce what he says at trial.

MR. KIMBERLIN: But after you have the per se rule,

then you can look to see if it's harmless, because it doesn't make any difference what facts went before in a per se rule, because there is only a triggering fact. But on an ad hoc basis I think you have to look at all the facts to determine whether it has actually been a constitutional violation.

In any event, if this Court did create a per se rule, we believe that, with respect to the second aspect of our case, the Watson decision may very well have cut out from under us our argument as to the application of the Federal harmless error rule, because there is nothing in Chapman -- and we candidly concede this. There is nothing in Chapman or Harrington which would preclude a state court from refusing to apply the harmless error rule of those two cases. In effect, that does nothing more than create a stricter and more narrow standard than that required by this Court, if there is a per se rule established to begin with. If there is not, then you don't --

QUESTION: Or, I suppose, if your Kentucky court had said, "Well, as we understand Taylor, it is not a per se rule. It's on an ad hoc basis. You do it from case to case. You have to figure out whether there is any real need to give this instruction.

"That's just a lot of mental gymnastics. We are just not going to do that. As a matter of state law, we are going to say that if the Supreme Court of the United States wants to inject this kind of confusion at state trials, we are going to clear it

all up by, as a matter of state law, making it a per se rule."

That would be a matter of state law then, wouldn't it?

MR. KIMBERLIN: A matter of state law, but, you know, I think this Court -- sometimes opinions are written in such an atmosphere and I think the Taylor opinion affected the Kentucky Supreme Court in a certain way, and I think you can see what way it affected it by reading the Whorton opinion.

Also, I think, you can almost see a type of reaction by the Kentucky Supreme Court in, for the first time,changing that particular Kentucky Criminal Rule to mean the exact opposite of what it had ever meant in the past.

And not only that. This Court in Taylor criticized the skeletal instruction on reasonable doubt. Interestingly enough, on the amended criminal rule in Kentucky now, the term "reasonable doubt" cannot even be defined.

I think that this --

QUESTION: You don't want us to overrule Taylor, do you?

MR. KIMBERLIN: Oh, no. I don't want you to -- I think Taylor is a superb case for its facts, and any other cases that come within the degree or purview of those type of facts that establish a constitutional violation -- But I cannot believe -- and I guess I'll find out soon enough -- whether this Court, in Taylor, said that you have to give that instruction as a matter of constitutional law, under the Due Process Clause of the

Fourteenth Amendment.

QUESTION: When requested.

MR. KIMBERLIN: When requested.

If there are no more questions from the bench, that will conclude the argument for the Commonwealth of Kentucky.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Kimberlin.

MR. KIMBERLIN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Fitzgerald.

Is there any question about it that the Taylor case emphasized that it was decided on the facts of that case and that it disclaimed laying down a per se rule?

ORAL ARGUMENT OF TERRENCE R. FITZGERALD, ESQ.,

ON BEHALF OF RESPONDENT

MR. FITZGERALD: Mr. Chief Justice, and Members of the Court:

It is very difficult for me to tell this Court what it meant by its language.

MR. CHIEF JUSTICE BURGER: I want to know what you think it meant.

MR. FITZGERALD: I will be glad to tell you what I think it means.

The common sense of the matter to me is that there are three branches to Taylor.

First of all, this Court recognized the vital function of the presumption of innocence as a tool for the jury, and

therefore imposed an affirmative duty on trial judges to give light to the presumption for the jury.

However, at the same time, the Court exalted substance over form and wisely refrained from legislating form instructions containing magic words.

To me, the operative due process principle in Taylor is not that an instruction containing the magic words "presumption of innocence" must be conveyed to the jury in every case, but rather that in some manner the trial judge must reliably convey to the jury the substance of the presumption.

And on the particular facts before the Court in Taylor, this Court appears to me to have held that only an instruction would have conveyed the substance.

I submit that the Kentucky court, in Whorton, correctly discerned the principle which I have enunciated and said, in effect, as applied to Kentucky cases, this means that it will have to be given in every case because we pride ourselves on bare bones instructions which keep the trial court from reliably importing the substance of the presumption to the jury in any other way.

QUESTION: You are talking about Whorton and not Watson?

MR. FITZGERALD: Yes.

QUESTION: Take a look at page 22 of Petition for Writ of Certiorari. The penultimate paragraph of the court's

opinion in Whorton.

Do you think you can really reconcile what you just said with the court's statement there that "Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick"?

MR. FITZGERALD: I think that's the second branch of our case here today. I merely said that I thought in Whorton that the court correctly discerned a general constitutional principle, as a matter of due process, that the substance of the presumption of innocence should be conveyed to the jury.

Whether it is subject to the harmless-error rule is a second question.

I am merely responding to General Kimberlin's notion that it is not even a general due process principle.

I think it is. Whether it is subject to exceptions is another matter. I think the court said, "We are uncertain about exceptions. And we are afraid that if we make an exception it might not stick."

The court then went on in Watson to elaborate on that fear and to explain that part of that fear is not based on the notion that --

QUESTION: But in Whorton, it said, in this paragraph I am talking about, "Yet Taylor contains no hint that it might have been appropriate to consider whether the error was, in fact,

prejudicial.

QUESTION: And then at the end it says, "If we are wrong, we shall welcome further enlightenment from the only source that seems to be able either to construe or amend the constitution," which I presume is French for saying the Supreme Court. Which would certainly imply that this is not a rule of state law, if the answer to the question lies here.

MR. FITZGERALD: I think that I am not here to defend the language of the Supreme Court of Kentucky, but I think that the result was correct. If we look beyond the words to the substance of what they did, they first of all discerned it to be, I think correctly, a general due process requirement. They discerned that it was unclear whether there might be exceptions. And rather than play constitutional roulette they did two things. One, they reversed all pending cases. Secondly, they adopted a state rule govering all future cases. And actually then, thirdly, they elucidated in Watson that part of their reason for doing this was state law. They didn't want to engage in the mental gymnastics.

That is not entirely clear from the language of Whorton itself.

QUESTION: No, it is not. In fact, the language of Whorton, itself -- particularly in the sentence that I just read -- implies quite the contrary, that the answer to whether or not there is a harmless-error rule lies with the Supreme

Court of the United States.

That certainly is wholly inconsistent with saying that it is a matter of state law, isn't it?

MR. FITZGERALD: It would appear so, if the Whorton case were taken on its own. But when you couple with that the adoption of a rule of state law, which they noted in a footnote they were doing simultaneously, I suggest that their motivations -- although not clearly enunciated -- may have been both.

QUESTION: But your client is Whorton, not Watson, right?

MR. FITZGERALD: That is correct. But I would submit that even if Whorton had said solely as a matter of federal constitutional law we hold that we cannot apply the harmless-error standard, if the court has subsequently said -- and it is a matter of state law -- that "We choose not to do so," that this Court should not involve itself in the state process.

QUESTION: I don't think we can, can we?

MR. FITZGERALD: That's what I am saying.

QUESTION: Well, then that would still leave the question of whether Taylor is a per se rule or not, would it not, as a matter of federal constitutional law?

MR. FITZGERALD: Yes, I think so. However, if you read the reluctance, as I think Justice White pointed out so graphically during General Kimberlin's remarks -- If you read their reluctance to engage in the mental gymnastics of applying

the harmless-error rule after the fact, I think we can see they would have the same reluctance to apply them before the fact to an exceptional-cases doctrine.

QUESTION: I repeat the question: Did not the dispositive paragraph -- second from the last sentence in Taylor -- make it clear that it's a case by case decision, not a per se rule?

MR. FITZGERALD: My own reading of Taylor -- Again, I profess little, if any, clairvoyance when it comes to the minds of the members of this Court.

QUESTION: I am not asking about the minds of the Court. What does it mean to you when you read those words, on the facts of this case?

MR. FITZGERALD: Yes, when you read those words, as I said earlier, with the earlier statements in the opinion, that the judge has a duty to insure that the jury understands the substance of it. Then it may be a case by case question of whether these exact words need to be conveyed.

But the due process requirement is that in some manner the jury must be informed of the operative principles by which it must decide a case. Presumption of innocence is so vital that the jury cannot be trusted to reliably apply the correct standards to weighing evidence unless it is informed.

Now, whether these particular words, or some other words may satisfy it, I think the opinion says "might be left to

a case by case determination, or might be left open for future consideration of whether there is a harmless-error standard."

QUESTION: What is before us?

Speaking of this rule the Supreme Court has adopted, doesn't that take this case away from us?

MR. FITZGERALD: General Kimberlin has contended that because it does not apply to the cases pending at the time it was adopted that those cases are still before you. And I suppose to some extend he is correct, but I think the importance of that rule is that it shows the state's reluctance, not only as a matter of federal constitutional holding, but as a matter of state law to get involved in this kind of case by case analysis. It shows a preference for prophylaxis and that preference is indicated, I think, as a certain --

QUESTION: Doesn't that take this case from us? That says that this is the Kentucky law. That's what the rule says. Not this case, the rule is the law.

QUESTION: But the rule is prospective only, is it not?

MR. FITZGERALD: Yes.

QUESTION: How about retrials?

There are some 40 or 50 cases we were told by the General that the Supreme Court of Kentucky either has or predictably will reverse -- convictions that will be reversed by that court for a new trial.

Now, will the rule be applicable to the new trials, by its terms?

MR. FITZGERALD: Yes, it will.

QUESTION: So, it will be applicable to these cases if they are tried again?

MR. FITZGERALD: That is correct, absolutely. Every one of these will get the form instruction under RCR 956.

QUESTION: Including this one?

MR. FITZGERALD: Including this one, if it were re-tried?

MR. FITZGERALD: Yes.

The presumption of innocence is, as I said earlier, and I think this Court knows better than I, from its language in Taylor and Estelle, more than originally thought, more than mere evidence on behalf of the accused. If it were mere evidence, the jury could disregard it. It is, rather, a guiding operative principle by which the jury weighs the evidence.

And as Justice Wilhoyt of the Kentucky Court of Appeals noted in his dissent in Taylor, before it ever got to this Court, that presumption is probably contrary to the mind-set of many of the jurors, and they probably entertain a presumption of guilt, by the time they go into that jury room after having heard the indictment read, or even as they enter the beginning of the trial.

QUESTION: Somewhere in these papers, in one of the

separate opinions in the Kentucky Supreme Court, reference to a study that indicates that 37% of the population thinks that the rule of law is that a person is guilty until he proves himself innocent.

Isn't that here somewhere? Didn't I see it?

MR. FITZGERALD: I don't recall that. I believe I've seen something to that effect, but I don't recall where. But I think that underscores the dramatic need for the presumption of innocence. The operative principle has no life, unless each and every juror understands it clearly and applies it correctly in the decision of a case.

And it seems to me what this Court was saying in Taylor --

QUESTION: It's in Justice Clayton's dissenting opinion on page 33 of the Petition for Certiorari, the Footnote: "According to a comprehensive national survey conducted by the National Center for State Courts"--the actual figure is 37%, and that stands for --"that figure is over a third of all Americans believe it is the responsibility of the accused to prove his or her innocence."

That's what I thought I had remembered.

MR. FITZGERALD: That's what I think underscored what this Court recognized in Taylor and Williams, that not only must the jury be made aware of the presumption, they must be made aware ot it reliably by the trial judge. No amount of

argument, no amount of persuasion can carry with it the weight which the state attaches to that presumption, as an operative principle to guide them in weighing facts during the fact-finding process.

QUESTION: What should we do with this case if we say the Kentucky court was wrong with respect to Taylor, that it wasn't a per se rule, it was an exceptional circumstances or an ad hod due process case?

Should we just reverse then, or --

MR. FITZGERALD: I think you can dismiss for mootness in light of the language in Watson, that they would not want to engage in that kind of mental gymnastics on the front end any more than they would on the back end. It's the same process.

QUESTION: Yes, but they can say that again, that we are talking about this case, not Watson.

Why wouldn't we just reverse or at least vacate and say, "Here's what Whorton meant." Maybe we can't say what it meant, but we can tell you that Whorton didn't mean what you said it meant -- I mean Taylor. "Taylor didn't mean what you said it meant. And now you can do about it what you want to, as a matter of local law."

MR. FITZGERALD: If this Court feels that Taylor is strictly an exceptional circumstances case, that certainly is a remedy available to the Court.

QUESTION: It is available, but is that what we --

Let's just assume that that's what we would hold with respect to Taylor.

What would you then argue we should do with the case?

MR. FITZGERALD: I think that the circumstance of the Kentucky court's explanation of its unwillingness to get into a case by case approach and the adoption of the rule would still justify this Court in upholding the decision in Whorton as -- and mooting this case.

I think it is much more likely, a much stronger case to moot, if we are talking about a general principle subject to possible harmless error exception. But the circumstances of the Kentucky court's action, summarily reversing all pending cases, propectively imposing a mandatory duty in all future cases, and then in Watson explaining what it has done as being a reluctance as a matter of state law to get into case by case evaluation, would indicate that the Kentucky court would do no differently on remand than it did before.

QUESTION: So, I take it, you then are quite sure in your own mind -- at least you would argue -- that no matter what we said about Taylor -- if we said this is not a per se case, the Kentucky court would still leave its mandatory instruction in?

MR. FITZGERALD: I believe that unless this Court overrules Taylor that the Kentucky court will continue to prefer prophylaxis to case by case --

QUESTION: Would rather have a black or white situation than a case by case argument about it.

MR. FITZGERALD: Yes. I am confident of that.

QUESTION: Of course, if we reverse this case, saying that Taylor had not meant what the Kentucky Court of Appeals said it meant, the Kentucky Court of Appeals is perfectly free to say that on remand.

MR. FITZGERALD: Surely they are.

QUESTION: And could say, as a matter of state law, "We just don't want this uncertainty. We are going to leave our rule in."

MR. FITZGERALD: That's true, they could do that.

QUESTION: Mr. Fitzgerald, are the judges of the Kentucky Supreme Court elected?

MR. FITZGERALD: Yes, they are.

QUESTION: When was the last election?

MR. FITZGERALD: I believe the elections are staggered.

QUESTION: Was there one in the fall of '78?

MR. FITZGERALD: No.

QUESTION: Mr. Fitzgerald, the issue in Taylor, really, was whether or not there had been a fair trial, and the court emphasized a number of factors relevant to that issue. First of all, the thinness of the evidence the prosecution was able to muster. You had one on one, nothing else.

Then the court emphasized -- the argument by the

prosecutor, the closing argument which went quite far afield. It talked at length about the indictment and also implied that every defendant was guilty. In addition to that, the basic instructions were quite skeletal. The court's opinion examined all of those factors and concluded, as the Chief Justice has stated, that in those circumstances the failure to give the instruction deprived the defendant of a fair trial.

Do you detect any suggestion of per se rule in those circumstances? Why would we have gone into those? All we would have had to say is that whenever there is a failure to give that instruction, in clear language, there has been a denial of due process.

MR. FITZGERALD: I take Taylor to mean, and perhaps wrongly, from what you are saying, that the trial judge has a duty to insure that the substance of the presumption is conveyed to the jury in some manner. And the reason that these factors were gone into, it impressed me, was to see whether it had to be done in this particular manner, with this particular instruction.

In Kentucky, the same skeletal instructions have been given from time immemorial. And, indeed, the opinion in Whorton considers this Court's criticism of those instructions as a compliment.

QUESTION: Didn't the outline that Mr. Justice Powell just repeated to you indicate that there might be a different

result when you had fifteen eyewitnesses and no contradiction of those eyewitnesses that was enough to shake the jury. He had only one alibi witness. His wife said he was home. Fifteen other people said he was in the store with a gun.

MR. FITZGERALD: I think it at least leaves open that possibility. I read the decision myself, quite frankly, as leaving for future determination whether or not there might be a different result.

It is not uncommon, in my experience, for a court to qualify its result and leave open for future consideration on a better record, with perhaps more experiential data from different states or jurisdictions which have experimented with a rule, whether or not there are exceptions.

I could take that language to mean there are exceptions or I can take it, as I did in fact, that we will leave open for a future date discussion of whether there are exceptions.

But insofar as we are stressing the similarities between this case and the dissimilarities between this case and Taylor, let me point out that in this case the same skeletal instructions were given. They do not convey to the jury the presumption of innocence. They do not dispel the notion that Mr. Justice Stewart has pointed out, that perhaps some 37% of them may have had, that he is presumed guilty.

What difference does that make, you may ask, with so many witnesses? I suggest that the complex nature of this

case and the fact that the jury is being asked to determine fifteen or more charges, rather than one or two, makes it very difficult for the jury to sort out and to discriminate. He might be guilty of twelve of them and not guilty of the other three. And yet the inevitable tendency, if the jury starts out with a presumption of guilty, is to say, "Well, let's see. Was he there? Yes, he was there. Let's go ahead and find him guilty on all of them and impose the maximum penalty on all of them." Which is exactly what they did.

QUESTION: The instructions actually given are here, beginning on page 18 of the Appendix, those that were actually given?

MR. FITZGERALD: Yes.

QUESTION: And where are the instructions on presumption of innocence and reasonable doubt that were actually given?

MR. FITZGERALD: The instructions tendered by the defense and not given --

QUESTION: No. I am talking about the ones actually given in this case.

MR. FITZGERALD: They begin on page 18, and they go on, counting the formal verdicts, all the way over to page 40, twenty-two pages that the jury had to sift through.

QUESTION: Thirty-one, really, actual construction.

Where -- if you know, and don't waste your time if you

don't -- in here are the instructions actually given as to presumption of innocence and reasonable doubt?

MR. FITZGERALD: None. Except the standard Kentucky instruction that was given in Taylor, which was --

QUESTION: You say, "None, except," which means there were some. And where are they?

MR. FITZGERALD: All right. Page 30. Middle of page 30, Instruction No. XVIII; "If upon the whole case you have a reasonable doubt as to the defendant's guilt, you shall find him not guilty. The term 'reasonable doubt' means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proven, but whether after hearing all the evidence you actually doubt that the defendant is guilty."

This is the only instruction that Kentucky has permitted for years.

QUESTION: And there is nothing beyond that, at least, as to presumption of innocence?

MR. FITZGERALD: Nothing whatsoever.

QUESTION: It's like Taylor in that respect.

MR. FITZGERALD: Exactly, in that respect. Except that instead of a close --

QUESTION: How about in the voir dire, as there was in Taylor, was there any explanation to the jury then of the presumption?

MR. FITZGERALD: Do you mean by the court?

QUESTION: Either court or counsel.

MR. FITZGERALD: I do not recall whether there was any by counsel. I am confident there was not by the court.

QUESTION: How about in closing arguments by counsel?

MR. FITZGERALD: I do not recall.

QUESTION: Do you argue before the judge's instructions in Kentucky?

MR. FITZGERALD: No. The judge reads the instructions to the jury. The attorneys then have to go from the instructions. The instructions contain the whole law of the case.

QUESTION: Would you be free to argue a presumption of innocence if the judge had been instructed on it?

MR. FITZGERALD: Presumably so, yes.

QUESTION: You just said you were bound by the instruction.

MR. FITZGERALD: Well, what I am saying is that's not contrary to the instruction, but neither does it carry the weight of the court behind it.

If I were to argue there was a presumption of innocence and I sit down --

QUESTION: Did you try this case or did someone else?

MR. FITZGERALD: Someone else from our office tried it. I believe he did discuss it in the closing argument.

QUESTION: The presumption of innocence?

MR. FITZBERALD: Yes. To what extent, I don't recall.

I did not consider that to be really the question before this Court.

QUESTION: Unless Taylor is a totality case.

MR. FITZGERALD: Yes, Your Honor.

QUESTION: But you say it is the judge that must get it across to the jury?

MR. FITZGERALD: Yes, and not only that. The written instructions are carried into the jury room. So that long after the arguments of counsel have ceased to ring in the jurors ears all that remains is the truncated reasonable doubt instruction.

QUESTION: You hope they ring there at all.

MR. FITZGERALD: If they do.

And twelve or thirteen pages of instructions to sift through without one mention of the presumption of innocence.

I pointed out in my brief that the defendant relied more heavily than most on the presumption in this case. He wanted biparcated trials on guilt and penalty.

QUESTION: That's about all he had going for him, wasn't it?

MR. FITZGERALD: That's about all he had going for him, exactly. He relied very heavily upon it. He had an alibi to one or two of the robberies that he wanted to put on, but to do that he would have had to testify in a joint trial as to all three robberies. So he had an election to stand upon his Fifth Amendment right to remain silent and to count upon the presumption

to carry him through on those two other robberies. And yet he got no benefit from the presumption because the jury was never told of it. Instead they were given confusing, lengthy instructions containing the same kind of skeletal reasonable doubt instruction, and they went back and found him guilty, not of some of the robberies, not discriminating from one to the other, but of every single count and imposed the maximum penalty on every single one.

QUESTION: Well, the jury was also given fifteen witnesses who incriminated him, weren't they?

MR. FITZGERALD: Yes. Now, ten of those witnesses applied to one robbery. The other two robberies did not have that kind, that volume of evidence.

QUESTION: Were the sentences concurrent?

MR. FITZGERALD: No, they were all consecutive, totalling two hundred and thirty years.

QUESTION: And you say in Kentucky the judge's instructions go in written form to the jury when it begins to deliberate?

MR. FITZGERALD: That's correct. They are read to the jury orally, the lawyers may refer to them in their arguments, and they are taken back to the jury room.

QUESTION: What does it say about reasonable doubt?

MR. FITZGERALD: The same as was in Taylor, Instruction No. XVIII on page 30, "If upon the whole case you have a

reasonable doubt as to the defendant's guilt, you should find him not guilty." The term 'reasonable doubt' as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proven, but whether after hearing all the evidence you actually doubt the defendant is guilty."

I submit that this does not in any shape, manner or form convey to the jury the presumption of innocence in its substance, but rather the opposite.

QUESTION: Isn't there something else in these instructions about whose burden it is to present the proof?

QUESTION: No. Except that each one of the instructions says they must find beyond a reasonable doubt.

MR. FITZGERALD: There is no other kind of general instruction on burden of proof, reasonable doubt, or any of these matters in Kentucky. This is the bare bones upon which the Kentucky court has prided itself for years.

QUESTION: Fifteen pages of skeletal instructions?

MR. FITZGERALD: Fifteen pages of instructions on the substantive offense. None, except this one paragraph, on the function of the jury, the process which it must use in weighing the evidence under these fifteen instructions. That's the skeletal part.

In conclusion, it is our position that this Court said in Taylor that due process of law requires the trial judge

to take some kind of action to insure that every criminal jury is guided by the presumption of innocence during the fact-finding process. If the Court didn't say that in Taylor, then we would urge that the Court should say it now, because many states which have considered this proposition have increasingly in recent years tended in that direction. The reason is that it is an operative principle to guide the jury and it has no life whatsoever, unless the jury is reliably informed of it. The only person in a position to reliably perform this duty is the trial judge.

QUESTION: When the jury comes in in a Kentucky criminal trial, does the judge give him a little talk first before the trial starts or not?

MR. FITZGERALD: At the present time, I don't think this was true at the time Whorton was tried. In Jefferson County, Kentucky, there is a jury pool and there is a film presented by the bar association which conveys this sort of thing to the jury panel. I don't believe that was in effect at the time Whorton was tried.

QUESTION: But the judge never said a word to them, except, "Good morning, ladies and gentlemen"?

MR. FITZGERALD: As a matter of fact, the practice was very sporadic. We had a series of litigations against this particular judge for holding locked-door sessions with jurors at the beginning of their term, when we couldn't tell what he

had said to them. I don't think that was true of this particular panel, but the practice was very, very sporadic, particularly with this judge. I have no indication that he said anything to this particular panel one way or the other at the beginning of their term of service.

QUESTION: But every single instruction had the reasonable doubt reference in it.

MR. FITZGERALD: Has the reference, yes.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Fitzgerald.

Do you have anything further, Mr. Kimberlin?

REBUTTAL ORAL ARGUMENT OF PATRICK B. KIMBERLIN, III, ESQ.,

ON BEHALF OF PETITIONER

MR. KIMBERLIN: Could I have just one comment?

I believe the reason the rule was amended and the reason the Whorton opinion was written the way it was was because of the way the Kentucky Supreme Court had it fixed in their minds as to what the Taylor case meant.

If they didn't think the Taylor case meant a per se rule, the Kentucky Rule of Procedure in Kentucky would not have been changed and this case here before the Court now wouldn't have come out the way it did.

That's the only comment I have.

Thank you, very much.

QUESTION: But that doesn't really follow. Even if it were a non per se rule, would it not still be wise for the

state court, as a matter of state law, to lay down a per se rule for the future administration of its own business?

MR. KIMBERLIN: I think, looking at it practically, what happened was a knee-jerk reaction on the part of the court back in Kentucky, Your Honor. That's why the rule changed and that's why the opinion was written the way it was. And that's the way, I think, perhaps the Court should look at it.

QUESTION: It seems to me the Kentucky Supreme Court indicated a very definite interest in running its own affairs to the extent it could, and it would be very likely to play down a per se rule that it thought was wise, whether it thought it was compelled to or not.

MR. KIMBERLIN: I don't come to that conclusion from reading the language in the Whorton opinion. And it seems to me that they were a little bit bothered about it. I don't know if intervention is the correct word, but they were bothered by the Taylor opinion, very much so. And they took it to mean something that it didn't mean because, perhaps, I think they reacted too quickly to it.

This case here was argued seven days after the Taylor opinion came down. The rule was amended the very next day and went into effect about twenty days later, on July 1.

I think, of course, in all criminal cases, obviously, the criminal -- pardon me. That is the wrong expression. The accused is entitled to justice. The Commonwealth is entitled to

justice, and its citizens are entitled to justice. And to reverse fifty cases or more -- we don't know what the final number will be yet -- is a possibility here.

QUESTION: By the time the case comes to the Supreme Court, your first terminology was correct. He stands convicted when he comes with a conviction.

MR. KIMBERLIN: Well, all these cases come before the Court, Your Honor, now where the conviction is reversed.

If this Court reverses the Whorton case, unless there is some other error on remand, other than this per se business here, the conviction will then become affirmed.

QUESTION: Your prediction is that if we reversed and said Taylor is a totality case, depending on the circumstances, and the ultimate issue being whether there is a fair trial in a particular case, as my brother Powell says, that the Kentucky court would probably revoke this rule?

MR. KIMBERLIN: I don't know that they would revoke this rule, which is a prospective effect, but as to these fifty or more cases in the pipeline right now, many, many of them, I feel, the convictions will be affirmed.

The Kentucky Court of Appeals, which is a lower court below the Kentucky Supreme Court, affirmed two criminal convictions, after Taylor came down, but before the decision in Whorton came down. They distinguished the Taylor case. They didn't think it was a per se rule at all, and they distinguished

it and affirmed the convictions. And I think this is what will happen in many of the Court of Appeals cases and the Kentucky Supreme Court cases that have now been automatically reversed due to what we feel is a basic misinterpretation.

Whether the Kentucky Supreme Court wants to change the criminal rule that they amended so hastily, I don't know.

QUESTION: Mr. Attorney General, can we decide what they said as well as you can?

You are trying to tell us what they said. We can read that, can't we?

MR. KIMBERLIN: Yes, I can only give my ideas of what they said.

QUESTION: Could I ask you one more?

MR. KIMBERLIN: Certainly, Mr. Justice White.

QUESTION: Do you have a list -- I take it you have a list of the cases that might be affected, past convictions?

MR. KIMBERLIN: Yes,

QUESTION: I don't want the list, but what's the oldest one?

MR. KIMBERLIN: The oldest one, of course, in progression in appeal, would be this one. The most recent one is a conviction on a murder case where the accused got the death penalty and it is now pending before the Kentucky Supreme Court and will be, if things go as they are, automatically reversed. There are twenty-nine issues in that particular case. The first

one is a presumption of innocence instruction was requested and denied.

QUESTION: You are talking about cases on direct appeal?

MR. KIMBERLIN: Yes. I am talking about cases -- We've tried to delay the cases in the sense that we asked all the procedural things, like petitions for rehearing and this and that. Because what has happened is we have been getting blocked up with all these cases trying -- It keeps them alive until they get to this Court -- and hoping for a decision from this Court. If we lose, so be it.

QUESTION: Are there a lot of other cases that might come up on collateral attack?

MR. KIMBERLIN: We don't know, because we don't know the detail of when these have come up or not, because it would depend upon whether the instruction was requested or not.

QUESTION: You are only talking then about X number that are on direct appeal?

MR. KIMBERLIN: Right. From time to time -- The most recent case was about two weeks ago that came to our attention. There may be others as they come in from the state on the process of going up in the appellate system.

When we originally pursued this litigation, we guessed -- We made a guestimate --

QUESTION: But there may be a lot of cases that will

be subject to state and then federal collateral attacks.

MR. KIMBERLIN: It certainly could be, although we don't know any exact number, of course.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:17 o'clock, p.m., the case was submitted.)