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## Commonwealth of Kentucky v. Whorton: The Erosion of a Bastion of the Law

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# *Commonwealth of Kentucky v. Whorton*: The Erosion of a Bastion of the Law

*The decision of the U. S. Supreme Court in Whorton represents a marked departure from historical precedent to the effect that a requested jury instruction on the presumption of innocence is a constitutional requisite to a fair trial. The author examines the purposes of the "presumption," and reaches the conclusion that the term may be a misnomer in theory and effect, particularly in light of the ruling in the principal case.*

## I. INTRODUCTION

*Commonwealth of Kentucky v. Whorton*<sup>1</sup> represents a departure from a long line of precedent in the criminal law field. In its mildest interpretation, the decision means that the presumption of innocence is not a right of constitutional proportions. In its most radical interpretation, the decision may signal the beginning of the end of any presumption in favor of the defendant in criminal cases.

The *Whorton* decision may be analyzed in either of two ways. The decision can be reviewed simply as an interpretation of the Court's ruling in *Taylor v. Kentucky*,<sup>2</sup> which would mean that *Whorton* is merely a clarification of the law as laid down in *Taylor*. However, the decision may alternatively be viewed as a departure from precedent, in which case *Taylor* is a mere stepping stone to the holding reached in the *Whorton* case. In this note, some attention will be given to the former interpretation, but will primarily focus on the developmental aspects of the holding as they affect the presumption of innocence.

## II. FACTUAL BACKGROUND

Harold Whorton was convicted of ten counts of first degree robbery,<sup>3</sup> two counts of first degree wanton endangerment,<sup>4</sup> and two

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1. 99 S. Ct. 2088 (1979).

2. 436 U.S. 478 (1978).

3. KY. REV. STAT. § 515.020(1) (1970). KY. REV. STAT. § 508.060 (1970).

4. The Kentucky Supreme Court reversed this part of the conviction finding that this conviction was inseparable from the conviction for 1st degree robbery. *Whorton v. Commonwealth of Kentucky*, 570 S.W.2d 627, 631 (Ky. 1978) *reh. den.* (Oct. 10, 1978).

counts of first degree attempted robbery,<sup>5</sup> by a jury in a circuit court of the State of Kentucky. Whorton, a black male, had entered a doughnut shop armed with a pistol and robbed the store and three employees, all of whom later identified him as the assailant. That same evening, Whorton was identified at the scene of another robbery. Two weeks later, a man robbed a restaurant and its customers by sticking a gun in a waitress' face and saying, "This is a robbery." One of the customers managed to slip away and call the police. The police appeared on the scene and gave chase to a car departing from the front of the restaurant. When the car ran into a fire hydrant, Whorton emerged from the car and pointed a gun at the pursuing officer. Whorton, on request, dropped the gun and, when taken back to the restaurant, was identified by ten witnesses.<sup>6</sup>

At trial, numerous eyewitnesses identified Whorton as the actor in each of the various crimes. Weapons, stolen money, and other incriminating evidence taken from the defendant's car were introduced at trial. Whorton chose not to testify on his own behalf and offered, as his only evidence in defense, alibi testimony concerning his whereabouts during the first robbery.<sup>7</sup> At the close of the evidence, Whorton's counsel proffered several instructions to the jury. The trial judge refused to give them. The first sought to define reasonable doubt,<sup>8</sup> and the second was to inform the jury of the presumption of innocence.<sup>9</sup> Whorton appealed, claiming that he had been denied due process of law in violation of the fourteenth amendment because the trial judge failed to instruct the jury of the presumption of innocence.<sup>10</sup> The Kentucky Supreme Court heard the case and, in a majority opinion by Chief Justice Palmore, reversed the trial court.<sup>11</sup> The opinion was sharply critical<sup>12</sup> of the United States Supreme Court decision in *Taylor v.*

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5. KY. REV. STAT. § 506.010 (1970).

6. *Id.* at 629.

7. *Id.*

8. *Id.* at 629-30.

9. The instruction on the presumption of innocence was as follows:  
The law presumes an accused to be innocent of crime. He begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit an accused unless the jury members are satisfied beyond a reasonable doubt of the accused's guilt from all the evidence in the case.

*Id.* at 630. Following the decision of *Taylor v. Kentucky*, 436 U.S. 478 (1978), Rule 9.56 of the Kentucky Rules of Criminal Procedure was amended to require jury instructions to include the presumption of innocence. KY. RULES CRIM. PROC. § 9.56 (West Supp. 1979).

10. 99 S. Ct. 2088 (1979). A timely request for the instruction was made.

11. 5-2 decision with Justices Clayton and Stephenson dissenting.

12. The Court said:

*Kentucky*.<sup>13</sup> To be "safe",<sup>14</sup> the Kentucky court read *Taylor* to mean that "when an instruction on the presumption of innocence is asked for and denied, there is a reversible error."<sup>15</sup>

The particular problem involved in *Whorton* has<sup>16</sup> a propensity to arise in Kentucky, inasmuch as the state has a policy of avoidance of "abstract legal principles, presumptions, comments on the weight of the evidence, and references to the burden of proof. . . ." <sup>17</sup> in instructing the jury. The instructions given in Kentucky are designed to give only the "bare bones" and thus create little interference with the jury's decision-making process.<sup>18</sup> This policy differs from the federal court's method of instruction, which requires that more complete instructions be given. This fact caused much discussion and criticism in the case.<sup>19</sup>

The majority decision was offset by the dissents of two justices.<sup>20</sup> Both of the dissenting opinions recognized that an instruction on the presumption of innocence was a "constitutional

If the trial court's 'truncated discussion of reasonable doubt . . . was hardly a model of clarity', as remarked in *Taylor*, we must confess that we have a similar difficulty with the *Taylor* opinion itself.

To bring this discussion to a merciful end, we read *Taylor* to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error. If it means something short of that, we shall welcome further enlightenment from the only source that seems able to either construe or amend the Constitution.

570 S.W.2d 627, 632, 633 (Ky. 1978).

13. 436 U.S. 478 (1978).

14. The Court stated that "[t]hose of us in the majority would like to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick." 570 S.W.2d at 633.

15. *Id.*

16. See note 8, *supra*.

17. 570 S.W.2d 627, 631-32 (Ky. 1978) (footnote omitted); see also *Mason v. Commonwealth of Kentucky*, 565 S.W.2d 140 (Ky. 1978) (presumption of sanity); *Wells v. Commonwealth of Kentucky*, 561 S.W.2d 85 (Ky. 1978), *rev'd.*, 436 U.S. 478 (1978) (presumption of knowledge which arises from possession of recently stolen goods); *Webster v. Commonwealth of Kentucky*, 508 S.W.2d 33, 36 (Ky. 1974); *Swango v. Commonwealth of Kentucky*, 291 Ky. 690, 165 S.W.2d 182 (1942) (presumption of innocence); *Commonwealth of Kentucky v. Taylor*, 551 S.W.2d 813 (Ky. App. 1977) (presumption of innocence).

18. 570 S.W.2d at 632.

19. *Id.* Both concurring opinions criticized the Supreme Court's intrusion into the state territory in making its ruling in *Taylor*. At one point, Justice Lukowsky said: "In the field of criminal procedure we have observed a decisional process by the Supreme Court of the United States which has crushed the status of the several states as 'insulated chambers' of legal experimentation." 570 S.W.2d 627, 633 (Ky. 1978) (footnote omitted).

20. See note 10, *supra*.

right”<sup>21</sup> but thought *Taylor* to be less absolute in its requirements than did the majority. Both dissents thought that the failure to give an instruction on the presumption of innocence was subject to the harmless-error rule,<sup>22</sup> and that the error in this case was harmless beyond a reasonable doubt.<sup>23</sup> Thus, they would have affirmed the conviction.

The United States Supreme Court granted certiorari to consider whether the *Taylor* decision was correctly interpreted by the Kentucky court.<sup>24</sup>

### III. HISTORICAL DEVELOPMENT OF THE PRESUMPTION OF INNOCENCE

The presumption of innocence has had a venerable history which has been traced from the Bible through the common law to the present. One of the first references to the presumption of innocence may be found in Deuteronomy.<sup>25</sup> Thereafter, the presumption was found to be embodied in the Roman laws where it was said: “*Satius est, impunitum relinqui facinus nocentis, quam innocentem damnare.*”<sup>26</sup> From these origins, the presumption of innocence found its way into the common law of England,<sup>27</sup> and from there into our own common law. The history of the presumption of innocence in the American legal system has been ambiguous and changing, but nonetheless, ever present.<sup>28</sup>

The nature of the presumption of innocence and its effect in the American courts has changed over time. In *Coffin v. United States*<sup>29</sup> and other early cases,<sup>30</sup> the presumption of innocence

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21. 570 S.W.2d 627, 638 (Ky. 1978).

22. *Id.* at 636-38.

23. See note 68, *infra*, discussing the harmless-error doctrine.

24. 99 S. Ct. 832 (1979).

25. “[A]nd it is told you and you hear of it; then you shall inquire diligently, and if it is true and certain that such an abominable thing has been done in Israel . . . .” Duet. 17:4 (Revised Standard). Greenleaf thought this passage to mean “in a formal accusation, upon legal trial, satisfactorily proved, beyond all reasonable doubt.” 3 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 35 n.4 (16th ed. rev. and ann. 1899) (*hereinafter* cited as GREENLEAF).

26. Translated literally this means: It is better to leave the guilty person unpunished than to condemn the innocent. 3 GREENLEAF 35 n.4. See also *Coffin v. United States*, 156 U.S. 432, 435 (1895).

27. For a treatment of the presumption of innocence in the English common law, see *Coffin v. United States*, 156 U.S. at 455-56.

28. *Id.* at 457. It is interesting to note that although the presumption of innocence has been firmly embodied in the American legal system, its impact on the American public has been less than spectacular. More than 37% of all Americans apparently believe that the defendant has the burden of proving himself innocent. *Lauscope: State Courts Seeking to Draw Blueprint for the Future*, 64 A.B.A. J. 653 (May 1978).

29. 156 U.S. 432 (1895).

30. See *Bryant v. State*, 23 So. 40 (Ala. 1898); *Edwards v. State*, 21 Ark. 512

was regarded as evidence in favor of the accused; thus the innocence of the accused was thought to be established until the prosecution came forward with enough evidence to surmount the proof which the law presumed.<sup>31</sup> The view that the presumption of innocence was to be treated as evidence in favor of the accused was repudiated by the United States Supreme Court in 1897, in *Agnew v. United States*,<sup>32</sup> where the Court said that the evidentiary effect given to the presumption in *Coffin* was "inappropriate and misleading."<sup>33</sup> This new view concerning the effect of the presumption of innocence was spurred on<sup>34</sup> and adopted by the leading textwriters of the time<sup>35</sup> and has been adopted by most modern writers today.<sup>36</sup> Thayer said of the view: "The presumption itself, *i.e.*, the legal rule, conclusion, or position, cannot be evidence."<sup>37</sup> State<sup>38</sup> and federal<sup>39</sup> courts quickly recognized the change in theory.

In modern times the courts have recognized that the presump-

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(1860); *People v. O'Brien*, 106 Cal. 104, 39 P. 325 (1895); *Case v. Case*, 17 Cal. 598 (1861); *Goggans v. Monroe*, 31 Ga. 331 (1860); *Harrington v. State*, 19 Ohio 264 (1869); *McEwen v. Portland*, 1 Oreg. 300 (1860).

31. 156 U.S. 432, 459 (1895); *Allen v. United States*, 164 U.S. 492 (1896); *see generally* cases cited in note 30, *supra*.

32. 165 U.S. 36 (1897).

33. *Id.* at 42.

34. The *Coffin* view was subjected to severe criticism by at least one leading textwriter before the court repudiated the evidentiary view. J. THAYER, A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE AT THE COMMON LAW 551-76 (1898) (*hereinafter* cited as THAYER).

35. *Id.*

36. *See* 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940); C. MCCORMICK, EVIDENCE 805-06 (2d ed. 1972).

37. THAYER, *supra* note 34, at 563. The rationale for the change as summarized by Thayer is fivefold:

1. A presumption operates to relieve the party in whose favor it works from going forward in argument or evidence.
2. It serves, therefore, the purposes of a *prima facie* case, and in that sense it is, temporarily, the substitute or equivalent for evidence.
3. It serves this purpose until the adversary has gone forward with his evidence. . . .
4. A mere presumption involves no rule as to the weight of evidence necessary to meet it. . . .
5. A presumption itself contributes no evidence, and has no probative quality.

*Id.* at 575-76.

38. *See* *People v. Moran*, 144 Cal. 48, 77 P. 777 (1904); *People v. Grant*, 313 Ill. 69, 144 N.E. 812 (1924); *People v. Ostrander*, 110 Mich. 60, 67 N.W. 1079 (1896).

39. *See* *United States v. Fernandez*, 496 F.2d 1294, 1298 (5th Cir. 1974); *United States v. Thaxton*, 483 F.2d 1071, 1073 (5th Cir. 1973); *Harrell v. United States*, 220 F.2d 516, 522 (5th Cir. 1955); *United States v. Nimerick*, 118 F.2d 464, 467-68 (2d Cir. 1941).

tion does not conform to the nature of an ordinary presumption. In *United States v. Cummings*,<sup>40</sup> the court said:

The presumption of innocence is not an ordinary evidentiary presumption. . . [b]oth the presumption and the burden remain throughout the trial and go with the jury when it deliberates. The presumption does not disappear when evidence to the contrary is received; it is overcome only by evidence convincing the jury beyond a reasonable doubt.<sup>41</sup>

In *Taylor v. Kentucky*,<sup>42</sup> the Supreme Court said “[t]he principal inaccuracy is the fact that [the presumption] is not technically a ‘presumption’ — a mandatory inference drawn from a fact in evidence. Instead, it is better characterized as an ‘assumption’ that is indulged in the absence of contrary evidence.”<sup>43</sup>

Although the operation of the presumption seems to have changed over time, the basic proposition that an instruction on the presumption of innocence is required, especially when requested, in every criminal case had been almost universally accepted prior to the court’s decision in the *Whorton* case.<sup>44</sup> Indeed, some courts have found the instruction to be necessary even when no request was made.<sup>45</sup> In the federal courts it has been said that a defendant is entitled to have the jury apprised of the presumption of innocence.<sup>46</sup>

### *Constitutional Status of the Presumption*

The presumption of innocence is not embodied anywhere in the language of the Constitution, yet most of the cases touching on the issue of instructions on the presumption of innocence, up to

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40. 468 F.2d 274 (9th Cir. 1972).

41. *Id.* at 280. See also *United States v. Mfr’s. Ass’n. of Relocatable Bldg. Indus.*, 462 F.2d 49, 50 (9th Cir. 1972); *But see United States v. Elliot*, 426 F.2d 775, 777 (5th Cir. 1970); *Dodson v. United States*, 23 F.2d 401, 402 (4th Cir. 1928).

42. 436 U.S. 478 (1978).

43. *Id.* at 484 n.12. See also *Carr v. State*, 192 Miss. 152, 156, 4 So. 2d 887, 888 (1941).

44. See generally *Estelle v. Williams*, 425 U.S. 501 (1976); *Cupp v. Naughten*, 414 U.S. 141, 151 n.1 (1973); *Cool v. United States*, 409 U.S. 100, 104 (1972); *Coffin v. United States*, 156 U.S. 432 (1895); *United States v. Vega*, 589 F.2d 1147 (2d Cir. 1978); *United States v. Carter*, 522 F.2d 666, 677 (D.C. Cir. 1975); *United States v. Fernandez*, 496 F.2d 1294, 1298 (5th Cir. 1974); *United States v. Nelson*, 498 F.2d 1247, 1248 (5th Cir. 1974); *United States v. Davila-Nater*, 474 F.2d 270, 285 (5th Cir. 1973); *McDonald v. United States*, 284 F.2d 232 (D.C. Cir. 1960); *Helton v. United States*, 231 F.2d 654 (5th Cir. 1956); *von Moltke v. United States*, 189 F.2d 56, 60 (6th Cir. 1951); *Dodson v. United States*, 23 F.2d 401 (4th Cir. 1928); *Rogers v. Redman*, 457 F. Supp. 929, 933 n.4 (D.C. Del. 1978); *Wright v. State of Texas*, 415 F. Supp. 5, 6-7 (E.D. Tex. 1975) *rev’d*, 533 F.2d 185 (5th Cir. 1976); *United States ex rel. Campagne v. Follette*, 306 F. Supp. 1255 (E.D. N.Y. 1969).

45. *United States ex rel. Castleberry v. Sielaff*, 446 F. Supp. 451 (N.D. Ill. 1978) (Court’s failure to *sua sponte* instruct jury on presumption was error of constitutional magnitude).

46. *Id.* at 454 n.1; see also *United States v. Lawson*, 507 F.2d 433, 439-41 (7th Cir. 1974); *Merrill v. United States*, 338 F.2d 763, 767 (5th Cir. 1964); *Application of Texas*, 27 F. Supp. 847, 851 (W.D. Okl. 1939); *FED. R. CRIM. P.* 30.

the time of the *Whorton* decision, had treated it as a constitutionally protected right.<sup>47</sup> The treatment of the presumption as a constitutional right seems to have been directly dealt with first by the Supreme Court in *Coffin v. United States*,<sup>48</sup> wherein the Court stated: "The principal that there is a presumption of innocence in favor of the accused is the *undoubted law, axiomatic and elementary*, and its enforcement lies at the foundation of the administration of our criminal law."<sup>49</sup> The Court goes on to say that "[t]he inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so *vital and fundamental* a principle as the presumption of innocence be not denied, when requested to anyone accused of crime."<sup>50</sup> This language<sup>51</sup> and other similar language<sup>52</sup> has been adopted by the Supreme Court and most of the federal district<sup>53</sup> and circuit<sup>54</sup> courts in the eighty-four years since the *Coffin* decision.

The "apparent" status of the presumption of innocence as a constitutional right seems to be rooted in the fifth, sixth, and fourteenth amendments and the due process rights embodied therein.<sup>55</sup> Although none of the decisions have determined ex-

47. *Taylor v. Kentucky*, 436 U.S. 478, 479 (1978); *Estelle v. Williams*, 425 U.S. 501 (1976); *Cupp v. Naughten*, 414 U.S. 141, 151 n.1 (1973); *Cool v. United States*, 409 U.S. 100, 104 (1972); *Turner v. United States*, 396 U.S. 398, 427 (1970) (dissenting opinion); *Deutch v. United States*, 367 U.S. 456, 471 (1961); *Sinclair v. United States*, 279 U.S. 263, 296-97 (1929); *United States v. Vega*, 589 F.2d 1147, 1155 (2d Cir. 1978) (concurring opinion); *United States v. Carter*, 522 F.2d 666, 677 (D.C. Cir. 1975); *United States v. Thaxton*, 483 F.2d 1071, 1073 (5th Cir. 1973); *United States v. Beedle*, 463 F.2d 721, 724 (3rd Cir. 1972); *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928); *United States ex rel. Castleberry v. Sielaff*, 446 F. Supp. 451, 455 (N.D. Ill. E.D. 1978).

48. 156 U.S. 432 (1895).

49. *Id.* at 453 (emphasis added); see also *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978).

50. 156 U.S. at 460-61 (emphasis added).

51. See *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *United States v. Fernandez*, 496 F.2d 1294, 1298 (5th Cir. 1974).

52. See *Cool v. United States*, 409 U.S. 100, 104 (1972) where the court said: "Because such a requirement is plainly inconsistent with the constitutionally rooted presumption of innocence, the conviction must be reversed." See also *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("basic component" of fair trial).

53. See *Rogers v. Redman*, 457 F. Supp. 929, 933 n.4 (D. Del. 1978); *United States ex rel. Castleberry v. Sielaff*, 446 F. Supp. 451 (N.D. Ill. E.D. 1978).

54. *United States v. Vega*, 589 F.2d 1147 (2d Cir. 1978); *United States v. Carter*, 522 F.2d 666, 667 (D.C. Cir. 1975); *United States v. Pepe*, 501 F.2d 1142, 1143-44 (10th Cir. 1974); *Cohen v. Wainwright*, 418 F.2d 565, 567 (5th Cir. 1969).

55. *Estelle v. Williams*, 425 U.S. 501, 520 (1976); *Turner v. United States*, 396 U.S. 398, 427 (1970) (dissenting opinion).



actly how the presumption of innocence reached a constitutional-right status, it seems that the right to a fair trial, implicit in the due process requirements of the Constitution, provides the key.<sup>56</sup> If the instruction to the jury on the presumption of innocence is a *necessary*<sup>57</sup> element in insuring that the defendant receives a fair trial, then the absence of such an instruction would be a denial of his due process rights. Whether or not the presumption of innocence is a necessary and required element of the constitutional right to a fair trial depends upon the purposes it serves. The particular function which the instruction on the presumption of innocence plays in safeguarding the defendant's right to a fair trial is to: "caution the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced."<sup>58</sup> It also serves as "a corollary to the standard of proof in a criminal case, it serves to remind the jury that the prosecution has the burden of persuading the factfinder of the defendant's guilt beyond a reasonable doubt and in the absence of such proof, that the jury must acquit."<sup>59</sup>

Given this background and history on the presumption of innocence, the Supreme Court undertook the task of deciding *Commonwealth of Kentucky v. Whorton*.

#### IV. ANALYSIS OF THE COURT'S DECISION

In view of the history of the presumption of innocence and some of the language in *Taylor v. Kentucky*<sup>60</sup> it is understandable that the Supreme Court of Kentucky would have had trouble making its decision<sup>61</sup> in *Whorton*.<sup>62</sup> The *Taylor* decision was typical of the Supreme Court. Using and quoting strong language on the one hand,<sup>63</sup> yet backing away from firm commitments<sup>64</sup> to le-

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56. *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978) (concurring opinion); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928).

57. Assuming that without the instruction a defendant would not receive a fair trial. See *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

58. *United States v. Thaxton*, 483 F.2d 1071, 1073 (5th Cir. 1973); see also *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *United States v. Fernandez*, 496 F.2d 1294, 1298 (5th Cir. 1974); 9 WIGMORE, EVIDENCE § 2511 at 407 (3d ed. 1940).

59. *United States v. Thaxton*, 483 F.2d 1071, 1073 (5th Cir. 1973); see also *Jackson v. Virginia*, 99 S.Ct. 2781, 2787 (1979); *Taylor v. Kentucky*, 436 U.S. 478, 485-86 (1978); *Estelle v. Williams*, 425 U.S. 501, 518 (1976) (dissenting opinion); *Cupp v. Naughten*, 414 U.S. 141, 151 n.1 (1973); *United States v. Fernandez*, 496 F.2d 1294, 1298 (5th Cir. 1974); *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928).

60. See text accompanying note 49, *supra*. See also *Taylor v. Kentucky*, 436 U.S. 478, 479, 484-85, 488, 490 (1978).

61. See note 13, *supra*.

62. 570 S.W.2d 627 (Ky. 1978).

63. See note 60, *supra*.

gal principals on the other, the decision was ambiguous and confusing. What the *Taylor* decision did do was to set the stage for a final determination of the status of the presumption of innocence in a criminal case. The decision in *Taylor* can be aptly described as a chameleon of the law; able to change its color depending upon its surroundings. When the court decided *Whorton* a year later, it found that it could draw on *Taylor* for almost any conclusion it sought to reach. There were basically three possible paths that the court could take following the *Taylor* decision.

The first was to hold that the presumption of innocence and its communication to the jury was constitutionally required in every case.<sup>65</sup> The result of this choice would have meant a possible reversal where the instruction was requested and refused.<sup>66</sup> It would also have meant that a denial of the instruction would have been subject to the harmless error doctrine.<sup>67</sup> Many cases have held that the refusal of the court to give the instruction, where requested, was harmless error.<sup>68</sup> There is support for this proposition in the majority and concurring opinions in *Taylor*.<sup>69</sup> This interpretation also seems to have the most support in the history

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64. Using such language as "in the circumstances of this case . . ." 436 U.S. at 486; and "on the facts of this case . . ." *Id.* at 490.

65. Assuming that the instruction was requested. See note 43 *supra*, and accompanying text.

66. *Taylor v. Kentucky*, 436 U.S. 478, 479-84 (1978); see also note 47, *supra*.

67. The harmless error doctrine basically states that where there is error the decision will be overturned unless it is found that the error was harmless beyond a reasonable doubt. The rule, commonly called the *Chapman - Harrington* rule, has been applied to violations of constitutional rights. In *Chapman v. California*, 386 U.S. 18, 24 (1967) the court stated: "[b]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The rule is also embodied in statute: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (West 1959). See also *Harrington v. California*, 395 U.S. 250, 254 (1969); *Bruton v. United States*, 391 U.S. 123 (1968); *Fahy v. Connecticut*, 375 U.S. 85 (1963); *United States v. Price*, 577 F.2d 1356, 1362 (9th Cir. 1978).

68. See *Estelle v. Williams*, 425 U.S. 501, 506 (1976); *United States v. Cummings*, 468 F.2d 274, 280 (9th Cir. 1972). See also *Whorton v. Commonwealth of Kentucky*, 570 S.W. 2d 627, 636-38 (Ky. 1978) (dissenting opinion). But see *Howard v. Fleming*, 191 U.S. 126, 136-37 (1903); *State v. Kennedy*, 154 Mo. 268, 55 S.W. 293 (1900); *Commonwealth of Pennsylvania v. Russoqulo*, 263 Pa. 93, 106 A. 180 (1919).

69. The Court in *Taylor* went to great lengths to discuss the importance of the presumption of innocence in a criminal trial, 436 U.S. at 479-84, and found that on the facts of the case, the denial of the instruction on the presumption of innocence combined with certain objectionable comments of the prosecutor made out reversible error. *Id.* at 487-90. Thus, the court seems to indicate that had the prosecutor

of the presumption.<sup>70</sup> The adoption of this ruling would not have produced a different result in the case since, in view of the overwhelming evidence of Whorton's guilt,<sup>71</sup> the failure to give the instruction would undoubtedly have been harmless error.<sup>72</sup> This was the conclusion which the dissent would have reached. The *Whorton* dissent, per Justice Stewart, argued that the presumption was constitutionally required in every case, reasoning that:

[b]ecause every defendant, regardless of the totality of the circumstances, is entitled to have his guilt determined only on the basis of the evidence properly introduced against him at trial, I would hold that an instruction on the presumption of innocence is constitutionally required in every case where a timely request has been made.<sup>73</sup>

Justice Stewart also felt that the harmless error doctrine should have been applied in the case, saying: "I would vacate its [the Kentucky Supreme Court's] judgment and remand the case to that court, but only for consideration of whether the failure to give the instruction in the circumstances presented here was harmless error."<sup>74</sup> The majority, however, plainly rejected this view when it said, "In short, the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution."<sup>75</sup> Thus, the majority turned its back on a long line of precedent<sup>76</sup> and effectively quashed any motion that an instruction on the presumption of innocence in and of itself is a constitutionally protected right.

The second alternative was for the Court to hold that although an instruction on the presumption of innocence was not itself a constitutional right, the presumption was an *essential* element of a fair trial which is a right guaranteed by the due process clause of the fourteenth amendment.<sup>77</sup> If the instruction was an essential element of the right to a fair trial, then a refusal to so instruct would result in reversible error, unless of course, harmless error

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not made such statements, the conviction might have been upheld despite the absence of the instruction.

70. See note 47 and accompanying text, *supra*.

71. See text accompanying note 7, *supra*.

72. It is difficult to see that the prosecution would have had any difficulty establishing that the error was harmless beyond a reasonable doubt. Since the evidence against Whorton was so overwhelming, it is doubtful whether an instruction on the presumption of innocence would have changed the decision of the jury.

73. 99 S.Ct. at 2090 (footnote omitted). It is interesting to note that the *Whorton* dissent (Stewart, Marshall and Brennan) all either joined in the majority decision or concurred with the majority in *Taylor*. This adds credence to the view that *Taylor* stood for the proposition that the right to an instruction of the presumption of innocence is constitutionally protected.

74. *Id.* at 2091.

75. *Id.* at 2090.

76. See notes 47-52, *supra*.

77. 436 U.S. 478, 490 (1978); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *United States v. Fernandez*, 496 F.2d 1294, 1298 (5th Cir. 1974); *United States v. Thaxton*, 483 F.2d 1071, 1073 (5th Cir. 1973).

was found. There the protected right is that of a fair trial and so the instruction on the presumption of innocence would receive no independent constitutional protection. Nevertheless, since it would be essential to protect the right of a criminal defendant to a fair trial, it would be necessary in every case.<sup>78</sup> This view receives some concrete support in *Taylor* also. In the opening sentence of the *Taylor* decision, the Court, quoting *Estelle v. Williams*,<sup>79</sup> said that the "presumption of innocence, although not articulated in the Constitution, is a *basic component of a fair trial* under our system of criminal justice."<sup>80</sup> The Court also reviewed the purposes that the presumption of innocence instruction served and the importance of the instruction to lay jurors.<sup>81</sup> In *Whorton*, the Court disposed of this argument by interpreting *Taylor*: "This explicitly limited holding, and the Court's detailed discussion of the circumstances of defendant's trial, belie any intention to create a rule that an instruction on the presumption of innocence is constitutionally required in every case."<sup>82</sup>

For its decision in *Whorton*, the Court drew on *Taylor* for "support", thus its holding must be viewed, at least initially, as the third possibility offered by that case. As will be seen, however, the *Whorton* decision used *Taylor* merely as a stepping stone to its ultimate holding. The Court held that *Taylor* was expressly limited to the facts of that case saying, "It was under these circumstances that the Court held that the failure of the trial court to instruct the jury on the presumption of innocence denied the defendant due process of law."<sup>83</sup> However, other than the *Taylor* Court's cautious use of the words "on the facts of this case," there is little, if any, support for the conclusion reached in *Whorton*.<sup>84</sup> In *Taylor*, the Court did not expressly or impliedly deny direct or indirect<sup>85</sup> constitutional right status to the presumption of inno-

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78. See text accompanying notes 57-59, *supra*.

79. 425 U.S. 501, 503 (1976).

80. 436 U.S. 478, 479 (1978) (emphasis added).

81. *Id.* at 484-85. See also text accompanying note 58, *supra*.

82. 99 S.Ct. at 2090.

83. *Id.* at 2089.

84. See 436 U.S. at 485.

85. The *Taylor* decision was ambiguous at best and, given the history of the presumption in criminal cases, it is easy to see why the dissenting justices in *Whorton* found themselves fighting against an interpretation of the *Taylor* opinion in which they either joined or concurred. The Kentucky Supreme Court was also admittedly confused by *Taylor* which they interpreted as at least giving the presumption of innocence constitutional right status. That court's only confusion con-

cence. The decision, thus, must be viewed as a break with the past, thereby relegating *Taylor* to the dubious position of a transition<sup>86</sup> case.

The Court in *Whorton* adopted a totality of the circumstances test to determine whether the defendant received a fair trial in light of the failure to give the requested instruction on the presumption of innocence.<sup>87</sup> In the words of the Court: "Such a failure must be evaluated in light of the totality of the circumstances — including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors — to determine whether the defendant received a constitutionally fair trial."<sup>88</sup> The clear import of this language is that if the defendant has otherwise received a fair trial, the instruction on the presumption of innocence is not necessary. The defendant is "entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody or other circumstances not adduced as proof at trial."<sup>89</sup> The presumption of innocence is only one means of informing the jury of this right. Presumably a full and complete instruction to the jury that the prosecution has the full burden of proving the defendant's guilt beyond a reasonable doubt would adequately perform this function.<sup>90</sup> Where other factors enter the case, such as a prosecutor's misconduct, the inadequacy of other instructions, or even undue publicity, then it is possible that the instruction on the presumption of innocence might be required to put the parties back on an equal footing and to remind the jurors that only the evidence adduced at trial is to be considered.<sup>91</sup> If in fact the only separate function that the presumption of innocence plays in a criminal trial is to remind the jury that they are only to consider legal evidence presented at trial,<sup>92</sup> then there is really no presumption *in favor* of the defendant, rather, the jurors are merely being reminded that they may only base their decision on

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cerned the propriety of applying a harmless error standard, not whether or not the instruction was constitutionally required. *See also* *United States v. Vega*, 589 F.2d 1147, 1155 (2d Cir. 1978) (this judge was also apparently "confused" by *Taylor*).

86. Presumably this transition was from the Court's decision in *Estelle v. Williams*, 425 U.S. 501 (1976) to the conclusion drawn in *Whorton*.

87. 99 S. Ct. at 2090.

88. *Id.*

89. 436 U.S. 478, 485 (1978); *see also* note 58 and accompanying text, *supra*.

90. *In re Winship*, 397 U.S. 358 (1970). *See also* *Jackson v. Virginia*, 99 S. Ct. 2781, 2787 (1979); *United States v. Fernandez*, 496 F.2d 1294, 1298 (5th Cir. 1974).

91. *United States v. Dark*, 597 F.2d 1097 (6th Cir. 1979).

92. *See* note 57 and accompanying text, *supra*.

certain evidence.<sup>93</sup> If this is the case, then the words "presumption of innocence" are misleading. They give to the defendant an undue advantage and do not adequately perform the purpose for which they are given. A more appropriate wording would be "neutral presumption."<sup>94</sup> This would avoid giving the jurors a misleading instruction and would also leave room for a more appropriate instruction.<sup>95</sup> *Whorton* certainly makes this interpretation plausible in holding that an instruction on the presumption of innocence is not a constitutional requirement. It seems clear that unless the court can show that the presumption of innocence serves some purpose other than to remind the jury of the evidence they may properly consider<sup>96</sup> or to remind the jury that the prosecution bears the burden of proving guilt beyond a reasonable doubt,<sup>97</sup> then an instruction on the presumption of innocence should not be required in any case because it is inappropriate for the purposes it serves and does more harm<sup>98</sup> than good.

#### V. CONCLUSION

Whether or not *Whorton* stands for the proposition that a criminal defendant is entitled only to a "neutral presumption" or not is open to further interpretation by the courts. However, since an instruction on the presumption of innocence is no longer constitutionally required and has been held not to be an essential element of the right to a fair trial, the path for clarification or interpretation has clearly been opened.

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93. Possibly an instruction directing the jurors to consider only certain evidence would be more appropriate to protect the defendant's right to a fair trial.

94. A "neutral presumption" would mean that the prosecution and the defendant would begin the trial on equal footing, neither side having the edge. Only evidence presented at trial would be considered with the prosecution bearing the burden of proving that the defendant is guilty beyond a reasonable doubt. See *United States v. Dark*, 597 F.2d 1097 (6th Cir. 1979).

95. An example might be: You are not to consider any evidence except that produced at trial. The arrest, indictment, arraignment and continued detention of the defendant are not to be considered in your decision.

96. See text accompanying note 57, *supra*.

97. See text accompanying note 58, *supra*. This purpose is adequately served by a burden of proof instruction.

98. It may cause more harm to the prosecution's case inasmuch as it may give the defendant an undue advantage.

