

# The Burger Court Opinion Writing Database

## *Kentucky v. Whorton*

441 U.S. 786 (1979)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



CHAMBERS OF  
THE CHIEF JUSTICE

May 2, 1979

Re: 78-749 - Kentucky v. Whorton

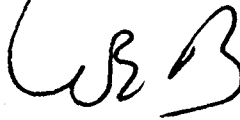
MEMORANDUM TO THE CONFERENCE:

The exchange of memos persuades me that the difference between the harmless error rule, as I could apply it to this case, and the "totality" rule is not great.

We can often conclude a particular error is harmless because of the totality of all the evidence.

Perhaps the views expressed will guide developments.

Regards,

A handwritten signature in dark ink, consisting of the letters 'W', 'B', and 'B' in a stylized, cursive-like font. The 'W' is formed by two overlapping loops, and the 'B's are simple, rounded strokes.

~~Supreme Court of the United States~~  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 11, 1979

Re: 78-749 - Kentucky v. Whorton

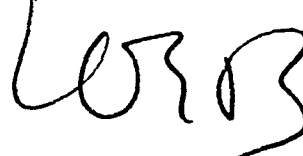
Dear Potter:

Since the entire discussion on this case has turned on whether Taylor laid down a constitutional rule, I think we should make it crystal clear; line 4, final paragraph of p. 2 should have "constitutional" after "a" at the beginning of the line and before "rule".

Similarly in the penultimate line, page 3, "constitutionally" ought to be inserted after "is" and before "required".

With those insertions, I join.

Regards,



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 10, 1979

RE: No. 78-749 Commonwealth of Kentucky v. Whorton

Dear Potter:

Please join me in your dissent in the above.

Sincerely,

*Bill*

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 1, 1979

Re: 78-749 - Kentucky v. Whorton

Dear Chief:

I have just read your memorandum of today discussing Sandstrom v. Montana and Kentucky v. Whorton. You state that the Conference vote in Whorton was to "reverse and vacate on a 'totality of the circumstances' basis." Since this does not reflect my view of the case, and since you have assigned the Court opinion to me, I feel I should clarify my position.

In my view, Taylor v. Kentucky establishes that a defendant in a criminal case has a constitutional right to an instruction on the presumption of innocence. The Taylor case does not, however, preclude the possibility that failure to give this instruction can be harmless error as a matter of federal constitutional law. My vote in Whorton, and my understanding of the Conference vote, was to reverse and remand for consideration of whether the failure to give the instruction was harmless error. The state court would also be free to hold, as a matter of state law, that it would not consider the question of harmless error in this context. See Watson v. Commonwealth, \_\_\_ S.W. 2d \_\_\_\_.

If a majority of the Court does not share these views, and would reverse and remand on a totality of the circumstances basis, I think the opinion should be reassigned.

Sincerely yours,

The Chief Justice

Copies to the Conference

P.S.  
✓

Mr. Justice Brennan  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Stewart  
 Circulated: 10 MAY 1979

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 78-749

Commonwealth of Kentucky,  
 Petitioner,  
 v.  
 Harold Whorton.

On Writ of Certiorari to the  
 Supreme Court of Kentucky.

[May —, 1979]

MR. JUSTICE STEWART, dissenting.

No principle is more firmly established in our system of criminal justice than the presumption of innocence that is accorded to the defendant in every criminal trial. In *In re Winship*, 397 U. S. 358, the Court held that the Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of a defendant's guilt. I believe that the Due Process Clause of the Fourteenth Amendment equally requires the presumption that a defendant is innocent until he has been proven guilty.

Almost 85 years ago the Court said: "The principle 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." *Coffin v. United States*, 156 U. S. 432, 453. Only three years ago the Court reaffirmed that the presumption of innocence "is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 245 U. S. 501, 503. And a fair trial, after all, is what the Due Process Clause of the Fourteenth Amendment above all else guarantees.

While an instruction on the presumption of innocence in one sense only serves to remind the jury that the prosecutor has the burden of proof beyond a reasonable doubt, it also has a separate and distinct function. Quite apart from consid-

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Stewart

10 MAY 1979

Circulated: \_\_\_\_\_

Reimmediated: \_\_\_\_\_

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 78-749

Commonwealth of Kentucky,	}	On Writ of Certiorari to the Supreme Court of Kentucky.
Petitioner,		
v.		
Harold Whorton.		

[May —, 1979]

PER CURIAM.

In *Taylor v. Kentucky*, 436 U. S. 478, this Court reversed a criminal conviction resulting from a trial in which the judge had refused to give a requested jury instruction on the presumption of innocence. Relying on its understanding of that decision, the Kentucky Supreme Court in the present case held that such an instruction is constitutionally required in all criminal trials, and that the failure of a trial judge to give it cannot be harmless error. — Ky. —. We granted certiorari to consider whether the Kentucky Supreme Court correctly interpreted our holding in *Taylor*. — U. S. —.

I

The respondent was charged in three separate indictments with the commission of several armed robberies. At trial, numerous eyewitnesses identified the respondent as the perpetrator. Weapons, stolen money, and other incriminating evidence found in the respondent's automobile were introduced in evidence. The respondent did not take the stand in his own defense. The only evidence on his behalf was given by his wife and sister who offered alibi testimony concerning his whereabouts during the time of the commission of one of the robberies.

The respondent's counsel requested that the jury be in-

The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Stewart

2nd DRAFT

Circulated: \_\_\_\_\_

# SUPREME COURT OF THE UNITED STATES

15 MAY 1979

No. 78-749

Commonwealth of Kentucky,  
 Petitioner,  
 v.  
 Harold Whorton.

On Writ of Certiorari to the  
Supreme Court of Kentucky.

[May —, 1979]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

No principle is more firmly established in our system of criminal justice than the presumption of innocence that is accorded to the defendant in every criminal trial. In *In re Winship*, 397 U. S. 358, the Court held that the Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of a defendant's guilt. I believe that the Due Process Clause of the Fourteenth Amendment equally requires the presumption that a defendant is innocent until he has been proven guilty.

Almost 85 years ago the Court said: "The principle 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." *Coffin v. United States*, 156 U. S. 432, 453. Only three years ago the Court reaffirmed that the presumption of innocence "is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 245 U. S. 501, 503. See also *Cool v. United States*, 409 U. S. 100, 104. And a fair trial, after all, is what the Due Process Clause of the Fourteenth Amendment above all else guarantees.

While an instruction on the presumption of innocence in one sense only serves to remind the jury that the prosecutor has the burden of proof beyond a reasonable doubt, it also has



2, 3

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. John H. Stewart

Circulated  
Received 15 MAY 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-749

Commonwealth of Kentucky,	}	On Writ of Certiorari to the Supreme Court of Kentucky,
Petitioner,		
v.		
Harold Whorton,		

[May —, 1979]

PER CURIAM,

In *Taylor v. Kentucky*, 436 U. S. 478, this Court reversed a criminal conviction resulting from a trial in which the judge had refused to give a requested jury instruction on the presumption of innocence. Relying on its understanding of that decision, the Kentucky Supreme Court in the present case held that such an instruction is constitutionally required in all criminal trials, and that the failure of a trial judge to give it cannot be harmless error. — Ky. —. We granted certiorari to consider whether the Kentucky Supreme Court correctly interpreted our holding in *Taylor*. — U. S. —.

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The respondent was charged in three separate indictments with the commission of several armed robberies. At trial, numerous eyewitnesses identified the respondent as the perpetrator. Weapons, stolen money, and other incriminating evidence found in the respondent's automobile were introduced in evidence. The respondent did not take the stand in his own defense. The only evidence on his behalf was given by his wife and sister who offered alibi testimony concerning his whereabouts during the time of the commission of one of the robberies.

The respondent's counsel requested that the jury be in-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 30, 1979

CASES HELD FOR NO. 78-749, KENTUCKY v. WHARTON

MEMORANDUM TO THE CONFERENCE:

Four cases have been held for this case: No. 78-750, Kentucky v. Brannon; 78-1084, Kentucky v. Williams; 78-1085, Kentucky v. Avery; and 78-1493, Kentucky v. Miller.

In all these cases, the Kentucky Supreme Court interpreted Taylor v. Kentucky to hold that failure to give a requested instruction on the presumption of innocence is per se reversible error. This interpretation is obviously inconsistent with Kentucky v. Wharton. I therefore recommend that these cases be granted, vacated, and remanded in light of Kentucky v. Wharton.

P.S.  
✓

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 10, 1979

Re: 78-749 - Kentucky v. Whorton

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Dear Potter,

I agree with the per curiam you have  
prepared.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

cmc

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 11, 1979

Re: No. 78-749 - Kentucky v. Whorton

Dear Potter:

Please join me in your dissent.

Sincerely,

*TM*

T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 7, 1979

Re: No. 78-749 - Kentucky v. Whorton

Dear Chief:

Lewis, in his letter of May 2, correctly described my  
vote to reverse.

Sincerely,

*HAB.*  
-

5/7

*Now 6-3  
against PS*

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 11, 1979

Re: No. 78-749 - Kentucky v. Whorton

Dear Potter:

Please join me in the per curiam you have  
proposed for this case.

Sincerely,

*H.A.B.*

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 2, 1979

No. 78-749 Kentucky v. Whorton

Dear Chief:

This refers to Potter's letter to you of May 1.

My own notes (which are not invariably accurate) record that you, Byron, Harry, Bill Rehnquist and I voted to reverse on a "totality of the circumstances" basis. John stated that Taylor is a "totality case", but he thought that Kentucky had established a different rule.

Potter did make clear his view that the Constitution requires an instruction on the presumption of innocence. But he commented that "a constitutional violation need not result in reversal of a conviction where there was harmless error." I suppose the difference between totality of circumstances and the harmless error standards may not differ a great deal in many cases.

But I did not intend, in writing Taylor, to establish Potter's view as the law of this Court. I think the presumption of innocence instruction should be given, but I would not want to hold that the failure to do so violates the Constitution. I would look to the totality of the circumstances - including the instructions, the argument of counsel, and whether the weight of the evidence is overwhelming - to determine whether the defendant had a fair trial.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 10, 1979

78-749 Kentucky v. Whorton

Dear Potter:

I agree with your Per Curiam.

As the author of Taylor v. Kentucky, I particularly appreciate your writing an opinion from which you must dissent, and - as I view it - writing it so faithfully to what I intended in Taylor.

Sincerely,

*Lewis*

Mr. Justice Stewart

lfp/ss

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 3, 1979

Re: No. 78-749 Kentucky v. Whorton

Dear Chief:

I cannot resist the temptation to join in the melange of circulations in this case generated by your memorandum of May 1st. These comments are addressed solely to Kentucky v. Whorton, since I agree with you that you and I were in the minority in No. 78-5384, Sandstrom v. Montana.

I think so far as practical results are concerned, Potter's position that it is invariably constitutional error for a state court in a criminal case to fail to give an instruction on the presumption of innocence may not differ too much from the position espoused by Lewis and John that only by considering all aspects of the trial -- the instructions, the argument of counsel, and the like -- can one determine whether there was any constitutional violation in a failure to give an instruction on the presumption of innocence. For as Potter points out in his letter to you of May 1st, he would leave open to the state courts the question of whether or not, the constitutional violation having been estab-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 11, 1979

Re: 78-749 - Kentucky v. Whorton

Dear Potter:

Please join me in the proposed per curiam disposition  
in the above entitled case.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 3, 1979

Re: 78-749 - Kentucky v. Whorton

Dear Potter:

For what it's worth, my understanding of Taylor v. Kentucky is the same as that expressed by Lewis. In short, I do not subscribe to your views, although I recognize that there is considerable merit to your position.

Respectfully,



Mr. Justice Stewart

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 10, 1979

Re: 78-749 - Commonwealth of Kentucky v.  
Whorton

Dear Potter:

Please join me in your per curiam.

Respectfully,



Mr. Justice Stewart

Copies to the Conference