

**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHAEL A. SCOTT,	:	CIVIL ACTION
Petitioner,	:	
	:	NO. 01-3228
v.	:	
	:	
ROBERT SHANNON, et al.,	:	
Respondents.	:	

**MEMORANDUM**

BUCKWALTER, J.

July 24, 2002

Petitioner has filed objections to the Report and Recommendation of Chief United States Magistrate Judge James R. Melinson.

Petitioner's objection is that the failure of the trial judge to charge on the presumption of innocence at the conclusion of his trial when coupled with the confusing and misleading reasonable doubt instruction makes his case indistinguishable from Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed. 468 (1978). Trial counsel was thus ineffective at trial and on direct appeal for not urging the claim as raised in the habeas petition and the state court decision affirming denial of PCRA relief was both unreasonable and contrary to well-established federal law under 28 U.S.C. § 2254(d).

The instructions at issue are:

First, before the taking of testimony, the trial judge stated:

“Always in a trial of a case there exists, as for this defendant, the presumption of innocence. Another permissible verdict would be not guilty ... As I indicated to you, the Commonwealth has the burden of

proving whatever degree of homicide there is and that burden remains upon the Commonwealth throughout this trial until you walk in that jury room and you come to the conclusion that you are persuaded beyond a reasonable doubt that what the evidence shows from the law as I gave it to you, that he is guilty of murder in the first degree or maybe murder in the third degree or voluntary manslaughter, that presumption lasts until you come to that conclusion.” (N.T. 7/15/77 pgs. 18-19).

Second, in closing instructions, the trial judge stated:

What do I mean by reasonable doubt? A reasonable doubt is a doubt that arises out of the evidence or the lack of evidence and is one that would cause you to hesitate in matters of serious importance to you in your own lives. I told you it is not a fanciful doubt, it is not one that you conjure up to escape an unpleasant duty. It is a real, substantial doubt in your mind.

It is rare that anyone can prove anything to mathematical certainty, except things in the physical sciences. And the law does not require that. However, members of the jury, reasonable doubt means more than just suspicion. And it might be that it could be created from the lack of evidence. If you have such a doubt, members of the jury, you must give that to the defendant and find him not guilty.

Petitioner contends that Magistrate Judge Melinson divided his first habeas claim into two separate claims. Instead, Petitioner submits that while there are two aspects to his first claim, *i.e.*, the failure to charge presumption of innocence and the misleading definition of reasonable doubt, each aspect must be considered with the other.

Citing Taylor, Petitioner argues that once Petitioner has shown that the trial judge failed to instruct the jury on the presumption of innocence at the conclusion of the trial, to prevail he then must only show that the definition of reasonable doubt was misleading or confusing. In Kentucky v. Whorton, 441 U.S. 786, 99 S.Ct. 2088, and 60 L.Ed.2d 640 (1979), the court explained Taylor in this language:

While this Court in *Taylor* reversed a conviction resulting from a trial in which the judge had refused to give a requested instruction on the

presumption of innocence, the Court did not there fashion a new rule of constitutional law requiring that such an instruction be given in every criminal case. Rather, the Court's opinion focused on the failure to give the instruction as it related to the overall fairness of the trial considered in its entirety.

The Court observed, for example, that the trial judge's instructions were "Spartan," 436 U.S., at 486, that the prosecutor improperly referred to the indictment and otherwise made remarks of dubious propriety, *id.*, at 486-488, and that the evidence against the defendant was weak. *Id.*, at 488. "[T]he combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that petitioner's status as a defendant tended to establish his guilt created a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial." *Id.*, at 487-488.

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. Indeed, the Court's holding was expressly limited to the facts: "We hold that *on the facts of this case* the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." *Id.*, at 490 (emphasis added). This explicitly limited holding, and the Court's detailed discussion of the circumstances of the defendant's trial, belie any intention to create a rule that an instruction on the presumption of innocence is constitutionally required in every case.

In short, the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under *Taylor*, 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.

With the foregoing as a background of applicable federal law, the question is has Petitioner established that the opinion of the Superior Court of Pennsylvania, attached as Exhibit "C" to his brief, resulted in a decision that was contrary to or involved an unreasonable

application of clearly established federal law. The answer to that question is, according to Magistrate Judge Melinson (and with which I concur) No.

The Superior Court found that it must review the charge as a whole to determine if error occurred. It went on to say that, “We will not find error based on isolated excerpts. Commonwealth v. Ohle, 470 A.2d 61 (Pa. 1983). When we review the record under this standard, we find no error in the trial court’s charge on reasonable doubt.” (Exhibit “C”, p. 2).

The Superior Court did not decide whether it was error to give the presumption of innocence charge in the trial court’s opening instructions rather than in its closing instructions. [It did note however that Pa.R.Crim.P. 1119(d) states that the trial judge may give instructions to the jury before the taking of evidence or at any time during the trial as the judge deems appropriate]. Instead, it ruled that no prejudice was shown (or even alleged), the second prong of an ineffective assistance of counsel argument.

Magistrate Judge Melinson’s careful analysis of the Superior Court’s decision and reasoned conclusion that it was neither contrary to nor involved an unreasonable application of clearly established federal law is correct.

Petitioner’s argument that the definition of reasonable doubt in his case is almost identical to that given in Taylor is flat out wrong. Here’s the entire charge that the court gave in Taylor:

“All right. These are your instructions as to the law applicable to the facts you’ve heard in evidence from the witness stand in this case.

“Number one, you will find the defendant guilty under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following: A. That in this county on or about February 16, 1976 and before the finding of the indictment herein, he the defendant stole a sum of money and a house key from James Maddox, 249 Rosewood, Frankfort,

Kentucky; and B. in the course of so doing he used physical force on James Maddox. If you find the defendant guilty under this instruction you will fix his punishment at confinement in the penitentiary for not less than five nor more than ten years in your discretion.

“Number two, if upon the whole case you have a reasonable doubt as to the defendant’s guilt you will 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 whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty.

“Number three, the verdict of the jury must be unanimous and be signed by one of you as foreman. You may use the form provided at the end of these instructions for writing your verdict.

“There is appended to these instructions a form with alternate verdicts, one of which you will use: A. We the jury find the defendant not guilty; B. We the jury find the defendant guilty under instruction number one and fix his punishment at blank years in the penitentiary.”

To equate the Taylor charge with the 21-page final charge given in this case is a stretch, to say the least. It is true that the trial judge used the phrase “it is a real, substantial doubt in your mind.” But the Superior Court determination that the word “substantial” was used to distinguish reasonable doubt from fanciful or imagined doubt and was proper in that context is neither an unreasonable application of Taylor nor contrary to well-established federal law.

Moreover, Magistrate Judge Melinson evaluated the instructions given in light of the totality of the circumstances to determine whether the defendant received a constitutionally fair trial and concluded that he did. Petitioner claims otherwise, because he says:

First, he has proven the absence of the presumption of innocence from the final charge and that the only reference was in the court’s initial charge;

Second, he has shown that the attorney never mentioned presumption of innocence in his closing;

Third, the evidence against him was no more than a swearing contest, with no scientific confirmation;

Fourth, the court's definition of "reasonable doubt" was confusing; and

Fifth, that the other instructions served to enhance the confusion.

The totality of the circumstances, then, as Petitioner views it, entitles him to relief. While he is correct as to his first two contentions, as previously stated, and found by Magistrate Judge Melinson, there is no constitutional requirement that a presumption of innocence charge be given.

As to his third point, to suggest that the trial in this case was just a swearing contest is not particularly helpful to him. Taylor, on the other hand, fits the classic mold of a "swearing contest". In that case, the Commonwealth's only witness was the victim. The only witness for the defense was the defendant. The victim said the defendant, with a friend, robbed him. The defendant denied robbing him. There was no other evidence a crime had been committed – no allegedly stolen objects ever recovered – just the victim's testimony that a crime occurred.

By contrast in this case, the victim's body was evidence that a crime was committed. The victim had been stabbed and died from a single stab wound. There was testimony that prior to the fight between Petitioner's brother and the victim, Petitioner's brother had handed a knife to Petitioner. Another witness testified that he saw the Petitioner with a knife standing over the victim's body. A third witness, a bystander who was parking a car, described what she saw although she could not identify Petitioner as the one with the knife. Petitioner also had a witness to call on his behalf, besides his own testimony.

As to his fourth point, as already suggested in this opinion, when the court used the words, “it is a real, substantial doubt”, it was essentially contrasting it to a fanciful one. In West v. Vaughn, 204 F.3d 53 (3<sup>rd</sup> Cir. 2000), the court was faced with an instruction using the words, “the kind of substantial doubt”, and then proceeded to analyze Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 382, 112 L.Ed.2d 339 (1990) where the jury instruction equated reasonable doubt with “actual substantial doubt” and “grave uncertainty” in conjunction with language calling for “moral certainty”. The use of such words suggested a higher degree of doubt than contemplated by the reasonable doubt standard. Referring to Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) for, among other things, the proposition that “the Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof. Rather, taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury. Victor, 511 U.S. at 5 (citations and quotations omitted)”, the court affirmed the District Court’s order dismissing the petition in West.

Petitioner’s fifth point, that other instructions served to enhance the confusion, is based upon what he calls the confusing definition of reasonable doubt. For reasons discussed, the definition was not confusing. Counsel could not be ineffective for failing to raise baseless objections. Of course, there being no constitutional defect in the charge, there is no basis for a due process claim.

The Report and Recommendation will be approved. An order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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	:	
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Respondents.	:	

**ORDER**

AND NOW, this 25<sup>th</sup> day of July, 2002, upon careful and independent consideration of the petition for a writ of habeas corpus, and after review of the Report and Recommendation of Chief United States Magistrate Judge James R. Melinson, and Petitioner's objections thereto, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The Petition for a Writ of Habeas Corpus is DENIED without prejudice.
3. No certificate of appealability will issue because based upon the foregoing memorandum, Petitioner has failed to make a substantial showing of the denial of any constitutional right.

BY THE COURT:

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RONALD L. BUCKWALTER, J.