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*Connecticut v. Johnson: Can Sandstrom Error Ever Be Harmless?*

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INTRODUCTION

A presumption is an evidentiary device which enables the trier of fact to assume the existence of one fact upon proof of another.¹ The use of a presumption as a method of proof in a criminal trial may in some cases violate the accused's constitutional rights. This potential is particularly dangerous where the presumption enables the jury to conclude without proof the existence of an essential element of a crime which the prosecution is required to prove beyond a reasonable doubt.² In Sandstrom v. Montana,³ the United States Supreme Court examined a trial court's instruction to a jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts."⁴ The

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¹ “Generally speaking, presumptions involve a relationship between one fact or set of facts—the basic fact(s)—and another fact or set of facts—the presumed fact(s). Basic facts imply presumed facts, the strength of the implication varying with the [nature of the] presumption. Where a presumption exists, certain advantages usually accrue to a party proving the basic fact which would not accrue absent the presumption.” R. Lemert & S. Saltzburg, A Modern Approach to Evidence 803 (2d ed. 1982).

The nature of presumptions vary, depending on their wording. Some “presumptions” allow, but do not require, the trier of fact to infer the existence of the presumed fact upon sufficient proof of the basic fact. Such a “presumption” is really not a presumption at all, but, rather, a permissive inference. Other presumptions, referred to as rebuttable presumptions, require the trier of fact to find the existence of the presumed fact upon proof of the basic fact, unless the adverse party can prove the presumed fact false. Conclusive presumptions mandate that the trier of fact conclusively find the existence of the presumed fact upon proof of the basic fact. Id. at 803-20.

Presumptions are created both by courts and by statute. Often their aim is to produce socially desirable results in certain situations where, although there is a lack of competent evidence to prove so, it is common knowledge that one fact would likely have followed from another. For example, in some jurisdictions the mailing of a properly stamped and addressed letter raises a presumption that the letter was received by the addressee; in some jurisdictions, the birth of a child to a married woman separated from her husband raises a presumption that the husband was nevertheless the father of the child. The extent to which the trier of fact is required to find the existence of these presumed facts, and the extent to which the adverse party may be required or even allowed to disprove them, depends on the nature of the presumption. Id. See also infra note 33.

² See infra text accompanying notes 31-40.
⁴ Id. at 512.
Court concluded that the instruction violated the defendant's right to due process of law. In so holding, the Court found that the jury could reasonably have interpreted the instruction as describing a conclusive or a rebuttable presumption, either of which would have obviated the requirement that the prosecution prove the element of intent beyond a reasonable doubt.  

Well before Sandstrom was decided, the Supreme Court in Chapman v. California held that some constitutional errors may be so insignificant in the setting of a particular case that they may be deemed harmless. The Court enunciated a test which allows reviewing courts to uphold convictions if, in light of all the evidence presented at trial, it appears beyond a reasonable doubt that the error complained of did not contribute to the jury's verdict.

In Connecticut v. Johnson, the Supreme Court addressed the question left unanswered by its decision in Sandstrom: whether a Sandstrom error, i.e., a trial court instruction which removes the determination of an essential element of a crime from the jury, can ever be so insignificant as to be harmless under the holding of Chapman. The result was an equally divided Court. Four members of the Court concluded that a Sandstrom error could never be harmless because it is impossible to determine beyond a reasonable doubt the effect that such an error may

5. Id. at 523-24.
7. Id. at 22.
8. Id. at 24. See also Milton v. Wainwright, 407 U.S. 371 (1972) (use at trial of confession which may have been recorded in violation of accused's sixth amendment right to counsel would nevertheless have been harmless where jurors were presented with other overwhelming evidence of guilt); Schneble v. Florida, 405 U.S. 427 (1972) (violation of accused's sixth amendment right to confront witnesses against him was harmless where accused's own unchallenged confession was minutely detailed and completely consistent with other objective and persuasive evidence of guilt); Chambers v. Maroney, 399 U.S. 42 (1970) (unnecessary to decide whether evidence was admitted in violation of accused's fourth amendment rights where other evidence in record clearly showed that error would have been harmless beyond a reasonable doubt); Coleman v. Alabama, 399 U.S. 1 (1969) (denial of accused's sixth amendment right to have counsel present at preliminary hearing required that conviction be vacated and remanded for determination of whether error was harmless in light of other evidence); Harrington v. California, 395 U.S. 250 (1969) (violation of accused's sixth amendment right to confront adverse witnesses was harmless where evidence of guilt was overwhelming); Chapman v. California, 386 U.S. 18 (1967) (other evidence of accused's guilt not persuasive enough to preclude reasonable possibility that damaging prosecutorial comment on accused's failure to testify might reasonably have contributed to jury's verdict).
have had on a jury's verdict. Four other justices reached the opposite conclusion, stating that a Sandstrom error may be harmless in certain situations where it is clear beyond a reasonable doubt that the erroneous instruction did not contribute to the jury's verdict. The remaining justice declined to consider the question. The division within the Court concerning the question has thus failed to resolve the conflict that has developed within the federal circuits concerning this issue.\(^\text{10}\)

This note will first examine the development of the harmless error doctrine under Chapman and its subsequent refinement under Sandstrom. It will then analyze the Johnson Court's divergent viewpoints on the applicability of the harmless error doctrine to a Sandstrom error to determine whether such an error can ever be harmless. To guide this analysis, this note will focus on the process by which a Sandstrom error is determined and the implications arising from that process.

**BACKGROUND**

*Chapman v. California: The Harmless Error Doctrine*

In the early nineteenth century, English courts created what became known as the "Exchequer Rule." This doctrine mandated reversal for any error committed during the course of a trial, no matter how slight or insignificant.\(^\text{11}\) Later, when American courts adopted the rule, the result was a tremendous backlog of cases from overturned convictions.\(^\text{12}\) Although the English legislature subsequently created a harmless error rule which

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10. The Eleventh Circuit has held that Sandstrom errors can be harmless if the evidence of guilt is overwhelming. Lamb v. Jernigan, 683 F.2d 1332, 1342-43 (11th Cir. 1982). Several other circuits have taken the position that whether or not a Sandstrom error can be harmless depends on whether intent was a disputed issue in the case. United States v. Winter, 663 F.2d 1120, 1144-45 (1st Cir. 1981); Washington v. Harris, 650 F.2d 447, 453-54 (2d Cir. 1981); Dietz v. Solem, 640 F.2d 126, 131 (8th Cir. 1981); McGuinn v. Crist, 657 F.2d 1107, 1108-09 (9th Cir. 1981). The Fifth Circuit has held that Sandstrom error can never be harmless because of the possibility that the error might have contributed to the jury's verdict. Hammontree v. Phelps, 605 F.2d 1371, 1380 (5th Cir. 1979).


12. See 1 J. Wigmore, Evidence § 21 (3d ed. 1940), wherein the author notes that the Exchequer Rule "did more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling." Id. Another commentator noted that the excessive number of reversals that resulted from the application of the Exchequer Rule had transformed the courts into "impregnable citadels of technicality." Kavanaugh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A.B.A. J. 217, 222 (1925).
prohibited reversal absent substantial wrong. American courts continued to reverse any convictions based on error. This strict approach led some lawyers to intentionally inject error into trials as a hedge against losing verdicts.

In an effort to combat the problems created by the application of the strict Exchequer Rule, statutes were enacted during the first half of the twentieth century at the state and federal levels to eliminate reversals based solely upon technical errors not affecting substantial rights. Neither the federal nor state statutes, however, applied to federal constitutional errors, and despite increasing criticism, the United States Supreme Court continued to reverse convictions based on federal constitutional error, no matter how slight.

Finally, in the 1967 case of Chapman v. California, the Supreme Court formulated a harmless error rule by which federal constitutional errors could be analyzed for harmlessness. The Court held that although some constitutional rights are "so basic to a fair trial that their infractions can never be treated as harmless error," some constitutional errors are so insignificant that they may be deemed harmless, not requiring the reversal of

15. By 1967, all 50 states had enacted harmless error statutes. See Chapman v. California, 386 U.S. 18, 22 (1967). The harmless error statute first enacted by Congress in 1919, Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181 (codified at 28 U.S.C. § 2111 (1982), has remained essentially unchanged, and reads: "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."
16. Justice Black, writing for the Court in Chapman, noted that the language of the various harmless error statutes invariably addressed only "technical" errors, errors which "did not affect the substantial rights of the parties." 386 U.S. at 22. State statutes had uniformly avoided any reference to federal constitutional errors. Id. One commentator has suggested that this was due to the fact that the Supreme Court, prior to Chapman, had never seriously considered the question of whether a federal constitutional error could be harmless, and thus the state legislatures had never envisioned that such an error could be harmless either. Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. Crim. L. & Criminology 421, 423-25 (1980).
17. See supra note 12. The organized bar formed the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. Pound, Taft, Wigmore, Hadley, and Frankfurter were among those members of the legal community involved in the coalition. Goldberg, supra note 16, at 422 n.15.
19. Id. at 23 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)). See also Payne v. Arkansas, 356 U.S. 560 (1958); Tumey v. Ohio, 273 U.S. 510 (1927). Justice Black, the author of the Chapman opinion, gave no explanation as to why the three types of errors
the conviction.\textsuperscript{20} Before an error can be deemed harmless, however, a reviewing court must be able to conclude beyond a reasonable doubt that the error did not contribute to the jury's verdict.\textsuperscript{21}

In fashioning a federal harmless error rule, the Court noted that such a rule could serve a very useful purpose by blocking the reversal of convictions for "small errors or defects that have little, if any, likelihood of having changed the result of trial."\textsuperscript{22} The Court also noted, however, that a harmless error rule can work "very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into trial in which the question of guilt is a close one."\textsuperscript{23} To strike the proper balance between these competing concerns, the Court adopted a strict standard of reasonable doubt.

Since \textit{Chapman}, the Supreme Court has applied the harmless error doctrine to a variety of federal constitutional errors, examining each error in light of the evidence presented at trial to determine whether the error might reasonably have contributed to the jury's verdict.\textsuperscript{24} The Court's continued application of the doctrine following \textit{Chapman} has led to substantial use of the doctrine by both federal and state courts.\textsuperscript{25} This trend also has

\textsuperscript{20} 386 U.S. at 22.
\textsuperscript{21} \textit{Id.} at 24. In \textit{Chapman}, the prosecutor commented extensively on the defendants' failure to testify on their own behalf. After the Chapmans' trial, but before their appeal, the Supreme Court held in Griffin v. California, 380 U.S. 609 (1965), that such comment violated the defendant's fifth amendment right not to be compelled to be a witness against himself. The \textit{Chapman} Court concluded that the prosecutor's comments were not harmless in light of the particular facts of the case. 386 U.S. at 24-26.
\textsuperscript{22} 386 U.S. at 22.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{See supra} note 8.
\textsuperscript{25} SHEPARD'S UNITED STATES CITATIONS lists over 6,000 citations to \textit{Chapman}. One commentator has estimated that 2.5\% of all criminal appeals in the federal system each year are harmless error cases. \textit{See Note}, \textit{Harmful Use of Harmless Error in Criminal Cases}, 64 CORNELL L. REV. 538, 544-48 (1978). Another commentator has estimated that the figure approaches 10\% when state appellate court decisions are included. \textit{See Goldberg, supra} note 16, at 421 n.3.

The substantial use of the doctrine by both federal and state courts has prompted several commentators to suggest that the scope of the doctrine needs to be refined to insulate violations of certain classes of important constitutional rights from harmlessness review.
served as a reaffirmation of both the need for and the appropriateness of a harmless error doctrine for federal constitutional errors.

The Nature of Sandstrom Error

The United States Constitution guarantees certain protections to the accused in a criminal trial. First, the sixth amendment guarantees the right of the accused to have the question of his guilt decided by a jury. Second, the due process clause of the fourteenth amendment affords the accused in a criminal trial a strong presumption of innocence, requiring proof of the accused's guilt beyond a reasonable doubt. The burden of such proof is on the prosecution.


26. The sixth amendment states:

   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

U.S. CONST. amend VI. The purpose of a jury is to serve as a check on oppressive government. See United States v. Martin Linen Supply, 430 U.S. 564, 572-73 (1977) (a jury's overriding responsibility is to stand between the accused and a potentially arbitrary or abusive government that is in command of the criminal sanction); Sparf & Hansen v. United States, 156 U.S. 51, 106 (1895) ("The main reason ordinarily assigned for a recognition of the right of a jury in a criminal case, to take the law into their own hands, and to disregard the directions of the court in matters of law, is that the safety and liberty of the citizen will thereby be more certainly secured.").

The sixth amendment thus prohibits a judge from directing a verdict against the accused by removing the issue of guilt from the jury. See United States v. Martin Linen Supply, 430 U.S. 564, 572-73 (1977) (trial judge prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict); Carpenters & Joiners v. United States, 330 U.S. 395, 408 (1947) (judge may not direct a verdict of guilty in criminal case no matter how conclusive the evidence); Sparf & Hansen v. United States, 156 U.S. 51, 105-06 (1895) (same).


A presumption is an evidentiary device which enables the trier of fact to assume the existence of one fact upon proof of another. The use of a presumption may violate the accused's constitutional rights. It may, as a matter of law, instruct the jury to presume without proof the existence of a fact essential to the crime charged which the sixth amendment requires the jury to determine of its own volition and which due process requires the prosecution to prove beyond a reasonable doubt.

In *Sandstrom v. Montana*, the Supreme Court examined the constitutionality of a trial court's instruction to a jury which stated that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Court reasoned that the constitutionality of the instruction depended upon the nature of the presumption which the jury could have inferred from the instruction. First, the jury could have interpreted the presump-
tion as a "conclusive" presumption, an irrebuttable direction by the court to the jury to find intent upon proof of the defendants' voluntary actions and their ordinary consequences. 34 Second, the jury might have interpreted the presumption as a "rebuttable" presumption, a direction by the court to find intent upon proof of the defendant's voluntary actions and their consequences unless the defendant proved otherwise. 35

The Court noted that the common definition of "presume" is "to suppose to be true without proof." 36 Because of the lack of any qualifying instructions from the trial judge as to the legal effect of the presumption, the Court found that it could not discount the possibility that the jury might reasonably have interpreted the instruction as describing either a conclusive or a rebuttable presumption. 37 The Court further stated that the other general instructions given at trial 38 did not remove or mitigate the potential harm caused by the instruction on intent. 39 The Court concluded that because the jury might reasonably have interpreted the instruction as describing either a conclusive or a burden-shifting presumption, and because neither interpretation forced the state to prove every element of the crime beyond a reasonable doubt, the instruction had deprived the defendant of his constitutional right to due process of law. 40

The Sandstrom Court declined to address the question of whether such an error could ever be a harmless one. 41 The Court addressed the question three years later, however, in Connecticut v. Johnson, 42 attempting to resolve a conflict which had devel-

A comprehensive discussion of a series of United States Supreme Court decisions which have examined the constitutionality of presumptions in a variety of different criminal trial contexts is presented in Allen, Structuring Jury Decisionmaking in Criminal Cases; A Unified Constitutional Approach to Evidentiary Devices, 94 HARV. L. REV. 321 (1980).

34. 442 U.S. at 517. The Court noted that such an interpretation would prevent the jury from reviewing evidence of intent. Id.

35. Id. at 517. The interpretation would effectively have shifted the prosecution's burden of proof on the issue of intent to the defendant. Id.

36. Id.

37. Id.

38. The other general instructions were that the accused was presumed innocent and that the state had the burden of proving intent beyond a reasonable doubt. Id. at 518 n.7.

39. Id.

40. Id. at 523-24.

41. Id. at 526-27. The case was remanded to the Montana Supreme Court for a determination of whether the error was harmless. On remand, the Montana Supreme Court held that it was not. 603 P.2d 244 (1979).

42. 103 S. Ct. 969 (1983).
oped within the federal circuits during the interim.43

**CONNECTICUT v. JOHNSON**

**Facts**

The defendant, Lindsay Johnson, was tried before a jury on charges of attempted murder, kidnapping, robbery, and sexual assault for his role in the overnight abduction and sexual assault of a woman. The evidence at trial revealed that Johnson and three male companions were parked in an automobile when the victim stopped her car and asked for directions.44 Johnson offered to accompany her in her car to show her the way. After a short drive, Johnson forced her to stop the car and admit his three companions and, subsequently, a fifth man.45 The victim was then taken to an apartment, where all five men sexually assaulted her.46 Johnson then bound the victim’s hands with telephone cord, threw her over a bridge into icy water, and drove off in her car. The woman survived, and later provided information which led to Johnson’s arrest. Johnson was charged with kidnapping, sexual assault, robbery, and attempted murder.47

At trial, Johnson asserted that the woman had consented to accompany him and to have sex with him, that he had not intended to kill her, and that he had intended to return the car.48 The jury returned a verdict of guilty an all four counts. Johnson appealed his conviction to the Connecticut Supreme Court, claiming that his constitutional rights were violated when the trial court instructed the jury that “every person is conclusively presumed to intend the natural and necessary consequences of his act.”49

**The Connecticut Supreme Court**

After examining the challenged instruction in light of the trial court’s charge to the jury on all four counts, the Connecticut Supreme Court affirmed the convictions on the kidnapping and

43. See supra note 10.
44. 103 S. Ct. at 971-72.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id. at 973-75.
sexual assaults counts, but reversed the convictions on the murder and robbery counts. In analyzing the challenged instruction, the court began by stating that the trial court's use of the word "presume" in its instruction did not necessarily render the instruction invalid under *Sandstrom*. The court instead found that the lack of any further qualifying instructions as to the legal effect of the statement had opened the door to the possibility that the jury might have interpreted the presumption as either conclusive or burden-shifting. In either case, such an instruction would be unconstitutional.

The court stated that a presumptive instruction can be cured where it is accompanied by other instructions that clearly delineate to the jury that the presumptive instruction actually authorizes only a permissible inference rather than a conclusive or burden-shifting presumption. In assessing the effect of the challenged conclusive presumption instruction with respect to each count, the court noted that there were additional instructions regarding intent to commit kidnapping which explained to the jury that intent was largely a matter of inference and that the inference was to be made only after considering all of the circumstances. Upon concluding that these additional instructions had a significant curative

51. Id.
52. Id. The court noted that the challenged instruction was given by the trial court judge at the beginning of his charge to the jury before any instructions pertaining to the specific counts in an attempt to explain to the jury principles applicable to criminal trials. *Id.* at 169, 440 A.2d at 862. In addition, the trial court instructed the jury generally that: first, the state bore the burden of proving all facts essential to the crime charged, including intent, beyond a reasonable doubt; second, they were to be the sole judge of facts; and, third, they could consider circumstantial evidence and draw inferences, but that all inferences drawn had to be reasonable and logical, based upon established facts rather than guess or surmise. *Id.* The court stated that had the challenged instruction contained only the ambiguous word "presume," as was the case in *Sandstrom*, rather than the less ambiguous words "conclusively presumed," the accompanying general instructions would have sufficiently cured the possibility that the jury might have interpreted the challenged instruction in an impermissable manner. *Id.* at 170-71, 440 A.2d at 862-63. Because the challenged instruction in *Johnson* included the less ambiguous word "conclusive," however, the court concluded that the additional general instructions had not cured the challenged instruction. The court then considered whether the instructions relating to each specific count might have cured the conclusive presumption instruction. *Id.* at 171-72, 440 A.2d at 863.

53. Regarding Johnson’s intent to commit kidnapping, the trial court instructed the jury that a man’s intention is primarily a matter of inference:

Again, no witness can be expected to come here and testify that he looked into another man’s mind and saw therein a certain intention. The only way in
effect, the court reasoned that there was no Sandstrom error as to the kidnapping count, and affirmed Johnson’s conviction.\textsuperscript{54}

Turning to the murder and robbery counts, however, the court found that there were no additional qualifying instructions which might have cured the conclusive or burden-shifting presumption.\textsuperscript{55} The court concluded that the challenged instruction was erroneous under Sandstrom with respect to both counts, and reversed both convictions.\textsuperscript{56} Finally, the court affirmed the conviction for sexual assault, noting that because the crime did not require specific intent, the challenged instruction would not have affected the jury’s verdict on that count.\textsuperscript{57}

In reversing the murder and robbery convictions, the Connecticut Supreme Court did not address the state’s argument that the Sandstrom error was harmless, apparently relying on an earlier decision in which it had held that Sandstrom error could never be harmless.\textsuperscript{58} The State of Connecticut subsequently appealed the court’s reversal of the murder and robbery convictions to the United States Supreme Court, claiming that the trial court’s error was harmless.

\textit{The United States Supreme Court}

\textbf{The Plurality Opinion}

In a plurality decision written by Justice Blackmun and joined by Justices Brennan, Marshall, and White, the Court affirmed the Connecticut Supreme Court’s reversal of the murder and

which you can determine in a case such as this what a man’s intention was at any given time is by determining what his conduct was and what the circumstances were surrounding that conduct and from those infer what his intention was. As stated before, to draw such an inference is not only the privilege but also the duty of a juror, provided, of course, the inference to draw is a reasonable inference.

\textit{Id.} at 173, 440 A.2d at 864.

\textsuperscript{54} \textit{Id.} at 174, 440 A.2d at 864.

\textsuperscript{55} In its specific instructions regarding the robbery count, the trial court explained that intent was an element of the crime but had no further explanation regarding how it was to be ascertained. \textit{Id.} In its specific instructions regarding the murder count, the trial court repeated the prohibited “conclusive presumption” language when referring to intent. \textit{Id.} at 172, 440 A.2d at 863.

\textsuperscript{56} \textit{Id.} at 173-76, 440 A.2d at 863-65.

\textsuperscript{57} \textit{Id.} at 176, 440 A.2d at 865.

\textsuperscript{58} In State v. Truppi, 182 Conn. 449, 438 A.2d 712 (1980), cert. denied, 451 U.S. 941 (1981), the court held that a Sandstrom error could never be harmless. The case held that because a Sandstrom error would allow the jury to find intent without considering the
robbery convictions.\textsuperscript{59} Noting that the State of Connecticut did not appeal the Connecticut Supreme Court's determination of \textit{Sandstrom} error, the Court proceeded only to the narrower question of whether a \textit{Sandstrom} error could ever be harmless.\textsuperscript{60} The plurality found that a conclusive presumption would, except in rare instances, deprive the accused of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."\textsuperscript{61}

Because a conclusive presumption eases the jury's task, "there is no reason to believe the jury would have deliberately undertaken the more difficult tasks of evaluating the evidence on intent."\textsuperscript{62} The plurality reasoned that the erroneous instruction permitted the jury to find intent to kill as a matter of law, without looking to the evidence of intent, once it had determined that Johnson had committed the acts in question, and that the natural consequences of those acts would be to cause the victim's death.\textsuperscript{63} The jury would therefore not need to consider evidence tending to cast doubt on the intent element of the crime.\textsuperscript{64}

Where the jury may have failed to consider evidence of intent, the plurality stated, a reviewing court is precluded from holding that the erroneous instruction did not contribute to the verdict.\textsuperscript{65} The plurality found that it would be impossible for a reviewing court to conclude beyond a reasonable doubt that the evidence, a reviewing court could not examine the error for harmlessness no matter how overwhelming the evidence without transferring to the court the jury's function of evaluating the evidence. \textit{Id.} at 466, 438 A.2d at 721.

\textsuperscript{59} 103 S. Ct. 969 (1983). Justice Powell wrote the dissenting opinion, in which Justices Burger, Rehnquist, and O'Connor joined. Justice Stevens wrote a separate opinion, concurring in the judgment reached by the plurality opinion, but without reaching the merits.

\textsuperscript{60} \textit{Id.} at 975 n.10. Justice Stevens noted that \textit{Chapman} does not require, but merely permits, state appellate courts to make a harmless error determination in appropriate cases. \textit{Id.} at 978. Consequently, the Connecticut Supreme Court's refusal to make a harmless error determination did not present a federal question. Accordingly, Justice Stevens voted to affirm that court's judgment. \textit{Id.} at 979.

Both the plurality and the dissent, however, interpreted the Connecticut Supreme Court's refusal to address the harmless contentions as a reliance by that court on one of its previous decisions in which it interpreted the federal harmless error rule to require automatic reversal for \textit{Sandstrom} error. \textit{Id.} at 974-81. Accordingly, the plurality and dissent noted, a federal question was presented. \textit{Id.}

\textsuperscript{61} \textit{Id.} at 978 (quoting \textit{Chapman} v. California, 386 U.S. 18, 23 (1967)).

\textsuperscript{62} \textit{Id.} at 976-77 (quoting \textit{Sandstrom} v. Montana, 442 U.S. 510, 526 n.13 (1979)).

\textsuperscript{63} \textit{Id.} at 976.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.} at 977.
The jury had interpreted the instruction in a manner which would lead them to review evidence of intent without considering the applicability of the presumptive instruction. To allow a reviewing court to speculate as to how the jury had evaluated the evidence of intent would, in effect, remove the question of fact from the jury and transfer it to the reviewing court.\textsuperscript{66} Thus, the plurality concluded, the conclusive presumption instruction deprived Johnson of constitutional rights so basic to a fair trial that the infraction could not be treated as harmless error.\textsuperscript{67}

The Dissenting Opinion

The dissent argued that a conclusive presumption instruction does not direct a verdict on the issue of intent. Such an instruction does not necessarily cause the jury to ignore the evidence on intent and thus does not remove the issue from the jury's consideration.\textsuperscript{68} Rather, a conclusive presumption merely provides an alternative means by which the jury can find intent, to be resorted to only if the evidence on that issue is unpersuasive.\textsuperscript{69} Because a conclusive presumption does not prevent the jury from reviewing the evidence of intent, a reviewing court is not precluded from determining that the evidence on intent was so overwhelming that the jury did not need to rely on the presumption.\textsuperscript{70}

The dissent utilized two premises in reaching its conclusion. First, during the trial court's instructions to the jury in a criminal trial, additional instructions which explain general principles applicable to criminal law will normally be given. The additional instructions usually indicate that the state has the burden of proving all elements of the offense, including intent, beyond a reasonable doubt. These additional instructions also inform the jury that intent is a question of fact to be determined solely by it. In light of these additional instructions, the dissent argued that a jury would not perceive the conclusive presumption instruction as a directed verdict. Rather, the jury would perceive the conclusive presumption instruction as merely one means by which it might conclude that the state had met its burden of proving

\begin{itemize}
\item \textsuperscript{66} \textit{Id.} at 977 n.15.
\item \textsuperscript{67} \textit{Id.} at 978 (quoting \textit{Chapman}, 386 U.S. at 23).
\item \textsuperscript{68} \textit{Id.} at 982 (Powell, J., dissenting).
\item \textsuperscript{69} \textit{Id.} at 982-83 (Powell, J., dissenting).
\item \textsuperscript{70} \textit{Id.} at 983 (Powell, J., dissenting).
\end{itemize}
intent, to be resorted to only if the evidence itself did not establish intent beyond a reasonable doubt.\textsuperscript{71}

The second premise relied on by the dissent was that where the defendant's acts are in and of themselves dispositive of intent, a reviewing court may conclude that the weight of the evidence enabled the jury to find intent without resorting to the conclusive presumption instruction.\textsuperscript{72} In an execution-style slaying, for example, where the defendant has bound his victim and shot him repeatedly in the head, it would be clear beyond a reasonable doubt that a jury would not need to rely on the conclusive presumption instruction.\textsuperscript{73} The impact of the presumption on the jury's verdict will, of course, vary with the facts and circumstances of each case.\textsuperscript{74}

Applying these principles to the case at hand, the dissent concluded that a reviewing court might have been able to say beyond a reasonable doubt that the jury had found the presumption unnecessary to its determination of Johnson's intent. The case should therefore have been remanded for that determination.\textsuperscript{75}

\textsuperscript{71.} \textit{Id.} at 982-83 (Powell, J., dissenting).
\textsuperscript{72.} \textit{Id.} at 983 (Powell, J., dissenting).
\textsuperscript{73.} \textit{Id.} at 984 (Powell, J., dissenting). In a footnote, the dissent pointed to other cases where it would have been clear that the jury would not have needed to rely on the presumption in order to determine that the requisite intent to kill existed. \textit{See, e.g.}, \textit{White v. State}, 415 So. 2d. 719 (Fla.) (members of motorcycle gang stabbed woman 14 times and slit her throat twice), \textit{cert. denied}, 103 S. Ct. 474 (1982); \textit{Arango v. State}, 411 So. 2d. 172 (Fla.) (defendant beat victim with a blunt instrument, wrapped a wire around his neck, stuffed a towel into his mouth, and shot him twice in the head), \textit{cert. denied}, 102 S. Ct. 2973 (1982); \textit{State v. Mercer}, 618 S.W.2d. 1 (Mo.) (defendant strangled rape victim until his companion, who was monitoring her pulse, told him it had ceased), \textit{cert. denied}, 454 U.S. 933 (1981).
\textsuperscript{74.} 103 S. Ct. at 984 (Powell, J., dissenting).
\textsuperscript{75.} \textit{Id.} at 985. (Powell, J., dissenting). The dissent stated that:

[O]n these facts, a reviewing court might well say beyond a reasonable doubt that the jury found the presumption unnecessary to its task of determining intent. With respect to the charge of robbery, the uncontradicted evidence was that the respondent stated, "We need a car, we are going to take your car...." His actions confirmed his unequivocal statements: he overpowered the woman, took her car, and never returned it. One would think that intent to rob could not have been clearer. The evidence of respondent's intent on the attempted murder charge could be viewed as only marginally less compelling. Having participated in a gang-type rape of this woman, respondent bound her hands with wire and threw her into an icy river in the middle of December.

The jury, consistent with its instructions, could have regarded these facts as dispositive of intent and not relied on the presumption.

\textit{Id.}
The dissent also criticized the plurality’s approach as substantially limiting Chapman’s harmless error doctrine. The dissent pointed out that in every harmless error case the possibility exists that the error contributed to the jury’s verdict. The Chapman decision, however, rejected the argument that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. “Accordingly, the proper inquiry is whether a court may say ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained’.” The dissent concluded that a court must assess the effect of the error in light of the facts of each case, because “it is only by assessing the weight of the evidence against the defendant that the effect of the error on the jury’s verdict can be judged.”

ANALYSIS

Both the plurality and the dissent noted that the question of whether the trial court’s additional instructions may have cured the erroneous instructions was not before the court. Both apparently assumed that there was error, and proceeded to the question of whether or not the error was sufficiently harmless to avoid reversal. Prior Supreme Court harmless error decisions dating back to Chapman had consistently addressed this question by examining all of the evidence to determine whether the error might reasonably have contributed to the jury’s verdict. Despite this fact, the appropriateness of weighing a Sandstrom error against the evidence of intent became the point of contention between the plurality and dissent.

Of the differing conclusions reached by the plurality and the dissent, the plurality’s conclusion is clearly the correct one. While the dissent’s analysis provides an adequate basis upon which a reviewing court can conclude that a jury did not need to rely upon a particular presumption, it provides no basis upon which a reviewing court can conclude beyond a reasonable doubt that the jury did indeed interpret the presumption as merely an

76. Id. at 983 n.5 (Powell, J., dissenting).
77. Id. at 981-82 (Powell, J., dissenting) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).
78. Id. at 982 (Powell, J., dissenting).
79. See supra text accompanying note 60.
80. See supra note 8.
alternative rather than a directed verdict. It would appear that such an analysis is foreclosed by the apparent fact that a Sandstrom error, by definition, is a determination that there was a reasonable doubt that the jury interpreted the presumption as a directed verdict, or, at the very least, as a shift in the burden of persuasion.

In Sandstrom, the Court had held that the question of whether a presumptive intent jury instruction denies a defendant his constitutional rights depends upon the manner in which a reasonable juror could have interpreted the instruction.\textsuperscript{81} The critical fact that appears to follow from the Sandstrom analysis is that by finding that a Sandstrom error has occurred, a court has already concluded that there is at least a reasonable doubt that the jury interpreted the instruction as either a directed verdict or as a shift in the burden of persuasion. Thus, a Sandstrom error, by definition, precludes a reviewing court from ever concluding beyond a reasonable doubt that the jury interpreted the instruction only as an alternative. What the Sandstrom Court seemingly did was formulate an analysis which examines a presumptive intent instruction for harmlessness before it concludes that the instruction constituted error.

In determining that the instruction given in Sandstrom constituted error, the Court noted that there was a lack of any qualifying instructions as to the legal effect of the presumption. The Court also noted that the resulting potential for impermissible interpretations of the presumption was not removed by the other instructions given at the trial. The implication therefore arises that a presumptive intent instruction could conceivably be cured or rendered harmless by certain additional or qualifying instructions. The Connecticut Supreme Court took precisely this approach in its determination that while the conclusive presumption instruction had not been cured with respect to the murder and robbery counts, it had been cured with respect to the kidnapping count.\textsuperscript{82}

This approach, which focuses on the additional or qualifying instructions in determining whether or not the instruction was

\textsuperscript{81} 442 U.S. 510, 514 (1979).

\textsuperscript{82} See supra text accompanying notes 49-54. Other courts have also taken such an approach, although not reaching the same conclusion as to whether the additional instructions were sufficient to cure or render harmless the presumptive intent instruction. In Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981), the defendant had been convicted of
harmless, is sound for two reasons. First, the approach focuses on the trial court's instructions, rather than the evidence on intent, as the factor which renders harmless an erroneous instruction of law. A presumptive intent instruction differs from other types of errors to which the harmless error doctrine has been applied in that it is an incorrect statement of law rather than an item of improperly admitted evidence. It follows that only other instructions on law, rather than evidence, will affect first-degree murder. During that trial, the trial court instructed the jury, in part, that:

"Every man is presumed to intend the natural consequences of his acts, and when one does an illegal act, he is responsible for all the consequences that legitimately flow therefrom."

You are instructed that where specific intent is required to make an act an offense . . . it is not always possible to prove a purpose by direct evidence, for purpose and intent are subjective facts. That is, they exist within the mind of man, and since you cannot delve into a person's mind and determine his purpose and intent, you may look to all the surrounding circumstances, including what was said and done in relation thereto; bearing in mind the presumption of law, that every one is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent.

When an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the state in the absence of justifying or excusing facts, since the law presumes a criminal intent from an unlawful act knowingly done.

Id. at 490-91.

The defendant Jacks appealed his conviction on the grounds that the above jury instructions violated his constitutional rights under Sandstrom because the instructions allowed the jury to presume intent against him. The court held that the presumptive intent instructions contained within the group of instructions had been cured by the additional and qualifying instructions, and thus did not constitute error. Id. at 485-87. In concluding that the instruction had been cured, the court emphasized the fact that the jury had been instructed to look at all the surrounding circumstances, consider any justifying or excusing facts, and consider any circumstances that might have indicated the absence of intent. Id. at 485.

In Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981), the defendant had been convicted on a charge of burglary. The defendant Dietz appealed his conviction on the grounds that the presumptive intent instruction rendered by the court had the effect of shifting the burden of proof on the issue of intent to the defendant. Although both the presumptive intent instruction and the additional and qualifying instructions given in Dietz were very similar to those given in Jacks, the court concluded that the presumptive intent instruction had not been cured by the additional instructions, and thus constituted error. Id. at 131. The court noted that while the effect of the erroneous instruction was to be determined in light of the accompanying instructions, it is, as a general rule, unlikely that accompanying instructions will be able to cure a presumptive intent instruction. Id. at 130-31. The court concluded that because the instruction constituted error, and because intent was an issue in the case, the conviction had to be reversed. Id. at 131.
the manner in which a jury will likely interpret the erroneous instruction.\textsuperscript{83}

Second, this approach produces either a conclusion that there was no error, because there was no reasonable doubt that the jury could have interpreted the instruction in an impermissible manner, or a conclusion that there was non-harmless error, because a reasonable doubt existed that the jury interpreted the instruction in an impermissible manner. Either conclusion would avoid the seemingly anomalous result of “harmless error.”

The \textit{Sandstrom} analysis appears to incorporate a check for harmlessness within itself, evaluating additional or qualifying instructions to determine whether a jury could reasonably have interpreted the erroneous instruction in an impermissible manner. It follows that once a court determines that a \textit{Sandstrom} error has occurred, the conviction must be reversed, because the court has already determined that the error was not harmless beyond a reasonable doubt.

\textbf{JOHNSON’S IMPACT}

While the plurality’s analysis ultimately reached the correct conclusion that a \textit{Sandstrom} error can never be harmless, it failed in two important respects to provide courts with clear guidelines for future decisions. First, the plurality’s analysis fails to emphasize that a conclusion that a \textit{Sandstrom} error requires automatic reversal is not inconsistent with the \textit{Chapman} Court’s rejection of an automatic reversal rule for all federal constitutional errors. Insofar as the \textit{Sandstrom} analysis incorporates a check for harmlessness before it concludes with a finding of error, automatic reversals of \textit{Sandstrom} error are entirely consistent with the principles established in \textit{Chapman}.

Second, the plurality’s analysis fails to discuss the process by which a presumptive intent jury instruction can be analyzed for harmlessness. The \textit{Sandstrom} Court’s analysis dictates that the additional or qualifying instructions, rather than the evidence on intent, are the proper factors to be considered when analyzing a presumptive intent instruction for harmlessness.

These deficiencies in the plurality’s analysis are significant in that they may lead future courts to conclude incorrectly either

\textsuperscript{83} See Cupp v. Naughten, 414 U.S. 141 (1973) wherein the Court stated that it is a “well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” \textit{Id.} at 147-48.
that presumptive intent jury instructions are not to be analyzed for harmlessness,\textsuperscript{84} or that evidence of intent is the proper factor to be considered when analyzing a presumptive intent instruction for harmlessness.\textsuperscript{85}

CONCLUSION

A \textit{Sandstrom} error requires automatic reversal, because a \textit{Sandstrom} analysis has already considered the question of whether the instruction was harmless and has determined that it was not before it ever concludes that a \textit{Sandstrom} error occurred. Insofar as the State of Connecticut did not appeal the Connecticut Supreme Court’s determination of \textit{Sandstrom} error with respect to the murder and robbery counts, the Connecticut Supreme Court’s judgment that the convictions required automatic reversal was correctly affirmed. Because the \textit{Johnson} Court failed to recognize, however, that the \textit{Sandstrom} analysis does examine a presumptive intent instruction for harmlessness before it determines that the instruction constituted error, the Court failed to realize that such an instruction can be analyzed for harmlessness. Future courts should thus look to the Connecticut Supreme Court’s opinion for a better illustration of how a \textit{Sandstrom} analysis is employed in evaluating a presumptive intent instruction for harmlessness.

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\textsuperscript{84} See Hammontree v. Phelps, \textit{t}, F.2d 1371, 1380 (5th Cir. 1979) (giving of presumptive intent instruction cannot be harmless because of possibility that instruction might contribute to jury’s verdict).

\textsuperscript{85} Of course, the plurality did not advocate reviewing the evidence to determine the effect of a \textit{Sandstrom} error. In fact, the plurality expressly rejected such a notion. The plurality’s failure to reconcile its opinion with \textit{Chapman} and its progeny, however, may lead future courts to reject the plurality’s conclusion and to continue to resort to the traditional “evidence as a whole” approach espoused by the dissent. See Healy v. Maggio, 706 F.2d 698, 702 (5th Cir. 1983) (post-\textit{Johnson} decision holding that presumptive intent instruction which constituted error was harmless where the “evidence was so dispositive of intent that . . . the jury would not have found it necessary to rely on the presumption”); Lamb v. Jerminan, 683 F.2d 1332, 1342-43 (11th Cir. 1982) (presumptive intent instruction did constitute error but was harmless where evidence of guilt was so overwhelming that no reasonable juror could have determined that defendant acted without intent).