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THE TENSION BETWEEN *IN RE WINSHIP* AND THE USE OF PRESUMPTIONS IN JURY INSTRUCTIONS AFTER *SANDSTROM, ALLEN* and *CLARK*

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INTRODUCTION

In *In re Winship*, the United States Supreme Court declared that "the due-process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[1] The Court's holding necessarily called into question the criminal justice system's long-standing reliance on presumptions,[2] because presumptions had the effect of easing the burden on the prosecution to prove every element of its case beyond a reasonable doubt.[3] Insofar as most courts employed jury instructions encompassing such presumptions, the continuing validity of these instructions was also in doubt after *Winship*. In the past seven years, the United States Supreme Court has addressed the constitutionality of jury instructions on presumptions in criminal cases on five separate occasions.[4] Despite this guidance, a large body of frequently contradictory precedent has developed in the lower courts. This paper will discuss the tension between the principle of *In re Winship* and presumptions in criminal cases by examining the law recently emanating from the United States Supreme Court and lower court interpretations of that law.

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1. 397 U.S. 358 (1970). The Court held unconstitutional a New York statute that permitted adjudication of juvenile delinquency on a preponderance of the evidence. *Id.* at 364.

2. Presumptions have been described as "evidentiary devices that assist the trier [of fact] in determining the existence of an ultimate or elemental fact from the existence of a basic fact." Note, *After Sandstron: The Constitutionality of Presumptions that Shift the Burden of Production*, 1981 WIS. L. REV. 519, 519. This description applies with equal force to statutorily-created and common law presumptions.

For purposes of this paper, the term "presumptions" will be understood as including conclusive or irrebuttable presumptions, presumptions that shift the burden of persuasion, presumptions that shift the burden of production, and permissive inferences. These four evidentiary devices will be discussed in greater detail in Part II, *infra*.

3. "In criminal cases, . . . a presumption may be sufficient to take an otherwise defective case to the jury and ultimately result in a conviction that otherwise could not have occurred." C. MCCORMICK, EVIDENCE 811 (2d ed. 1972).

4. *See* Rose v. Clark, 106 S.Ct. 3101 (1986), Francis v. Franklin, 105 S.Ct. 1965 (1985), Connecticut v. Johnson, 460 U.S. 73 (1983), Sandstrom v. Montana, 442 U.S. 510 (1979), and County Court, Ulster County, New York v. Allen, 442 U.S. 140 (1979).

I. THE GENERAL BACKGROUND

A. *The Theoretical Problem Arising From the Tension Between the Winship Principle and Presumptions in Criminal Cases*

The Supreme Court established in *Winship* that the burden is placed squarely upon the prosecution to prove every element of the crime charged beyond a reasonable doubt.[5] Presumptions, however, which have been described as "a staple of our adversary system of fact-finding,"[6] operate to allow the trier of fact (the jury) to determine the existence of an element of a crime (the "ultimate fact") from the existence of one or more "evidentiary" or "basic" facts.[7] Although it might not appear that this process would be inherently threatening to the *Winship* requirement of proof beyond a reasonable doubt of all elements of a crime, "presumptions in criminal cases typically arise in response to the prosecution's difficulty in proving an element of the crime, most often the mental element."[8] By allowing the prosecution to "prove" a critical element of a crime, such as intent, by reliance on an evidentiary device that allows the jury to presume the presence of that element from proof beyond a reasonable doubt of a less difficult-to-prove element, the *Winship* requirement may, indeed, be undermined.[9]

Furthermore, the very act of instructing a jury about the presumption adds weight to the prosecution's case.[10] The facts from which the jury is told they may presume the "ultimate fact" may become endowed with greater substance than they would otherwise possess.[11] Finally, the process may promote irrational decision-making by the jury. Instructing the jury that they may find the existence of the "ultimate fact" from the presence of facts already in evidence merely informs the jury of a permissible outcome. Such instructions provide no guidance as to why a jury *should* reach such an outcome. Indeed, even when requested to clarify the pres-

5. 397 U.S. at 364.

6. *Allen*, 442 U.S. at 156.

7. *Id.*

8. Note, *The Evolving Use of Presumptions in the Criminal Law: Sandstrom v. Montana*, 41 OHIO ST. L.J. 1145, 1146 (1980).

9. The presumption eases the prosecution's burden by allowing the mental element to be inferred from the act. Although the jury naturally might make the inference from the evidence, the presumption assures the factfinder that a conviction can be secured even if there is no direct evidence on an element. *Id.* at 1146-47.

10. "Through the use of presumptions, certain inferences are commended to the attention of jurors by legislatures or courts." *Allen*, 442 U.S. at 169 (Powell, J., dissenting). *See also* Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 322 (1980).

11. *Cf.* Yee Hem v. United States, 268 U.S. 178, 185 (1925) (a presumption gives facts "artificial value").

umptive instructions, most judges simply feel obliged to restate the original, often confusing instructions.[12]

The judiciary has repeatedly confronted the tension between the *Winship* requirement of proof beyond a reasonable doubt and the use of presumptions in criminal cases. Indeed, the United States Supreme Court addressed this problem directly in *Sandstrom v. Montana*.[13] This paper shall demonstrate that despite the Court's apparent resolution of the problem in *Sandstrom* and *County Court, Ulster County v. Allen*,[14] its recent approach to the issue leaves the vitality of the *Winship* principle very much in doubt.

B. The Supreme Court Background

In *Sandstrom v. Montana*,[15] David Sandstrom was convicted of "deliberate homicide" under a Montana statute.[16] Although Sandstrom had confessed to killing the victim, Annie Jessen, he denied having the requisite intent.[17] At trial, the judge instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," despite defense counsel's objection that the instruction had the effect of impermissibly shifting the prosecution's burden of proof on the issue of purpose or knowledge to the defendant.[18] On appeal, the Montana Supreme Court upheld the constitutionality of the instruction and rejected the defendant's argument, finding that "[d]efendant's sole burden . . . was to produce *some* evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted 'purposely' or 'knowingly.'"[19] The Montana Supreme Court thus characterized the

12. *See, e.g.*, Rock v. Coombe, 694 F.2d 908, 915 (2d Cir. 1982), *cert. denied*, 460 U.S.1083 (1983) (presumption language twice repeated in supplemental instructions responding to the jury's requests for clarification on the issue of intent). One commentator has suggested that this dilemma could be avoided by replacing presumptive jury instructions with judicial comment. *See* Allen, *supra* note 10, at 365.

13. 442 U.S. 510 (1979). The Court stated that "the question before this Court is whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind." *Id.* at 521.

14. 442 U.S. 140 (1979).

15. 442 U.S. 510 (1979).

16. MONT. CODE ANN. § 45-5-102 (1978). The statute provided that criminal homicide constituted deliberate homicide if "it is committed purposely or knowingly." *Sandstrom*, 442 U.S. at 512.

17. *Sandstrom*, 442 U.S. at 512.

18. *Id.* at 513. The presumption that a person intends the natural and probable consequences of voluntary acts is a common law presumption "of ancient vintage." Note, *supra* note 2, at 525 n. 27. The presumption has been classified as "derived from the course of nature," "founded on the 'feelings and emotions natural to the human heart.'" *Id.* (quoting W. BEST, A TREATISE ON PRESUMPTIONS OF LAW AND FACT 170, 175, 176 (1844)).

19. 176 Mont. 492, 497, 580 P.2d 106, 109 (1978) (emphasis added).

presumption as one that shifted only the burden of production onto the defendant.[20]

The United States Supreme Court reversed.[21] Although the Court recognized that the Montana Supreme Court was the final authority on the legal weight to be given a presumption under Montana law, it stressed that the lower court did not have such authority in determining the jury's potential interpretation of the instruction.[22] Despite the fact that some jurors might have interpreted the instruction as permissive or as shifting only the burden of production, the Supreme Court held that the possibility of interpreting the presumption as "conclusive" or as "shifting the burden of persuasion" on the element of intent was sufficient to call into question the instruction's constitutional validity.[23]

> [T]he fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid.[24]

The Court first determined that intent (whether manifested through purpose or knowledge) was an element of the crime of deliberate homicide, as defined in the Montana statute.[25] Since the presumption would have the effect of relieving the prosecution of its burden of proof on intent, the Court concluded that the instruction was constitutionally infirm, as mandated by *Winship*.[26] Thus, the Court reaffirmed *Winship* as a con-

20. The burden of production denotes the obligation to raise an issue. Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1329 n. 8 (1979). The party bearing the burden of production must adduce some evidence of a particular factual assertion to introduce that issue into the case. If a rational factfinder is satisfied that enough evidence has been adduced to make it likely that the issue will be proved, the burden of production is satisfied. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1390-91 (1955).

The burden of persuasion denotes the obligation to prove to the factfinder the ultimate truth of the particular factual assertion. If, after all the evidence is considered, the trier of fact remains unconvinced, the burden of persuasion has not been satisfied. Jeffries & Stephan, *supra*.

21. *Sandstrom*, 442 U.S. at 527.

22. *Id.* at 516-17. The Court therefore did not reach the question of the constitutionality of a production-shifting presumption like the one described by the Montana Supreme Court.

23. A conclusive presumption requires the jury to find the existence of an ultimate fact (an element of the offense, such as intent) from the existence of the basic fact (such as the defendant's voluntary act, in *Sandstrom*).

24. *Sandstrom*, 442 U.S. at 519. "The pivotal concept of *Sandstrom* is that the *possibility* that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion." Schmolesky, *County Court of Ulster County v. Allen and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face*. 33 RUTGERS L. REV. 261, 272 (1981) (emphasis in original).

25. *Sandstrom*, 442 U.S. at 520. In fact, it was the only element of the crime in dispute. *Id.* at 521.

26. *Id.* The instruction was invalid whether it was construed as containing a conclusive or burden-shifting presumption. *Id.*

stitutional limitation on the use of presumptions to relieve the prosecution's burden of proof in criminal cases.

Just two weeks before it decided *Sandstrom*, however, the Court decided a case that would appear to cast doubt on the breadth of the *Sandstrom* holding. In *County Court of Ulster County, New York v. Allen*,[27] the Court upheld the constitutionality of a New York statute that provided that the presence of a firearm in an automobile was presumptive evidence of the firearm's illegal possession by all people then occupying the automobile.[28] Two large-caliber handguns were in an open handbag, visible through the window of the car. The handbag belonged to a 16-year-old girl, Jane Doe, who, although one of the original defendants, was not one of the three respondents in *Allen*. At trial, the defendants objected to the prosecution's introduction of the objects seized from the car (including the handguns) as evidence, but the trial court overruled the objection on the basis of the statutory presumption.[29] At the end of the trial, the judge instructed the jurors:

> Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.
>
> In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.
>
> The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of evidence in the case.[30]

The defendants did not object to this instruction.[31]

The three adult co-defendants were convicted, and their convictions

27. 442 U.S. 140 (1979). The Court decided *Allen* on June 4, 1979. The *Sandstrom* case was decided on June 18, 1979.

28. *Id.* at 165. N.Y. Penal Law § 265.15(3) (McKinney 1967). The statute exempted stolen or public vehicles from the presumption, and provided that the presumption would not apply when the firearm was found on the person of one of the occupants of the vehicle.

29. *Allen*, 442 U.S. at 144-45.

30. *Id.* at 161, n. 20.

31. *Id.* at 145. The failure to object to a jury instruction containing a statutory or common law presumption seldom precludes appellate review of the instruction's constitutionality. *See, e.g.*, Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), *cert denied*, 106 S.Ct. 3340 (1986); State v. LaForge, 347 N.W.2d 247 (Minn. 1984); State v. Martell, 465 A.2d 1346 (Vt. 1983); Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983), *aff'd*, 104 S.Ct. 1673 (1984) *per curiam* (by an equally

were affirmed by the New York Appellate Division and the New York Court of Appeals.[32] The United States District Court for the Southern District of New York, however, granted the defendants' petition for a writ of habeas corpus, and the United States Court of Appeals for the Second Circuit affirmed, holding that the statutory presumption was facially unconstitutional because it "sweeps within its compass (1) many occupants who may not know they are riding with a gun (which may be out of their sight), and (2) many who may be aware of the presence of the gun but [are] not permitted access to it."[33]

The United States Supreme Court reversed.[34] After reviewing the distinctions between "permissive" and "mandatory" presumptions, the Supreme Court rejected the court of appeals' analysis and characterization of the New York statutory presumption as mandatory.[35] Praising the trial judge's "careful" instructions, the Court found that they encompassed merely a "permissive inference available only in certain circumstances, rather than a mandatory conclusion of possession, and that it could be ignored by the jury even if there was no affirmative proof offered by the defendants in rebuttal."[36] Once the Court found the presumption to be "permissive," the only possible impediment to its constitutionality was the due process question of whether there was a rational relationship between the basic fact (presence of firearms in the automobile) and the ultimate fact (unlawful possession).[37] The Court found that "[a]s applied to the facts of this case, the presumption of possession is entirely rational."[38] It was, therefore, constitutional.

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divided Court); Plass v. State, 457 A.2d 362 (Del. Sup. 1983); United States v. Fricke, 684 F.2d 1126 (5th Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983); Tweety v. Mitchell, 682 F.2d 461 (4th Cir. 1982), *cert. denied*, 460 U.S. 1013 (1983); State v. Trieb, 315 N.W.2d 649 (N.D. 1982); State v. Roth, 637 P.2d 1013 (Wash. App. 1981); State v. Amado, 433 A.2d 233 (R.I. 1981); McGuinn v. Crist, 657 F.2d 1107 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982).

32. People v. Lemmons, 40 N.Y.2d 505, 387 N.Y.S.2d 97, 354 N.E.2d 836 (1976).

33. Allen v. County Court, Ulster County, 568 F.2d 998, 1007 (2d Cir. 1977), *rev'd*, 442 U.S. 140 (1979).

34. *Allen*, 442 U.S. at 167.

35. *Id.* at 156-60. A mandatory, or rebuttable presumption, requires the jury to find the existence of an ultimate fact, such as intent, unless the defendant produces sufficient evidence to show that he lacked intent. Jeffries & Stephan, *supra* note 20, at 1335. Mandatory presumptions shift either the burden of persuasion or production onto the defendant, depending on the quantum of evidence required of the defendant. *Id.* at 1335, n. 20.

A permissive inference allows, but does not require, the jury to find the existence of an ultimate fact from proof of the basic fact, and "places no burden of any kind on the defendant." *Allen*, 442 U.S. at 157.

36. *Allen*, 442 U.S. at 161.

37. The Court had already stated that an inference "affects the application of the 'beyond a reasonable doubt' standard only if, *under the facts of the case*, there is no rational way the trier could make the connection permitted by the inference."

Id. at 157 (emphasis added). Therefore, once the Court found the basic fact rationally related to the presumptive fact in this case, its due process analysis was complete.

38. *Id.* at 163.

Although it is arguable that the *Allen* and *Sandstrom* opinions are reconcilable,[39] their impact on subsequent lower court decisions has resulted in confusion. This confusion may result from the two opinions' emphasis on different constitutional safeguards in reaching their respective results. In *Sandstrom*, as in *Winship*, the Supreme Court focused on the criminal defendant's sixth amendment right to have a jury find that the prosecution had proved every element of the crime. In *Allen*, on the other hand, the Court focused on the due process right to an accurate fact-finding process. At least one point, however, emerges clearly from the two opinions: the initial process of classification of the presumption is likely to be determinative of the result of a constitutional challenge.

II. THE STATUS OF PRESUMPTIONS AFTER *ALLEN* AND *SANDSTROM*

A. *Conclusive Presumptions*

In *Sandstrom*, the Supreme Court was concerned that the jury might have interpreted the instruction "the law presumes that a person intends the ordinary consequences of his voluntary acts" as a conclusive presumption. The Court described a conclusive presumption as "an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption."[40] The Court has recognized that such a presumption was not technically a presumption at all, but rather a rule of substantive law.[41]

The *Sandstrom* Court's aversion to conclusive presumptions should have come as no surprise. The Supreme Court had invalidated such instructions twice before, in *Morissette v. United States*[42] and in *United States v. United States Gypsum Co.*[43] In *Morissette*, the defendant was

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39. As one commentator noted:

> The ultimate holdings of *Allen* and *Sandstrom* do not clash. The primary concern of the unanimous *Sandstrom* Court was with the instruction's propensity to mislead the jury into regarding the presumption as conclusive or as shifting the burden of persuasion. Had the *Sandstrom* Court been satisfied that the instruction to the jury could only be interpreted as permissive, as the Court was satisfied in *Allen*, there is no indication that any constitutional defect would have remained.

Schmolesky, *supra* note 24, at 273.

The *Allen* Court's assumption that permissive presumptions or inferences are constitutional as long as the basic facts presented are rationally related to the ultimate facts presumed will be examined in Part II, *infra*.

40. *Sandstrom*, 442 U.S. at 517.

41. *Id. See* Francis v. Franklin, 105 S.Ct. 1965, 1973 n. 5 (1985) ("An *irrebuttable* presumption, of course, does not shift any burden to the defendant; it eliminates an element from the case if the State proves the requisite predicate facts.") (emphasis in original). *See also* Graham, *Presumptions—More Than You Ever Wanted to Know and Yet Were Too Disinterested to Ask*, Evidence and Trial Advocacy Workshop, CRIMINAL LAW BULLETIN 431, 435. Despite the admitted inaccuracy of referring to these substantive rules of law as "presumptions", this paper will adhere to common practice in labeling them "conclusive presumptions."

42. 342 U.S. 246 (1952).

43. 438 U.S. 422 (1978).

charged with theft of government property after taking abandoned bomb casings from a bombing range.[44] The defendant denied any intent to steal, but the trial court instructed the jury to presume intent and refused to allow the defendant to rebut the presumption.[45] The Supreme Court established that intent was an element of the crime and then stated:

> It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. . . . A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. . . . [T]his presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.[46]

In *United States v. Gypsum Co.*, the Court reaffirmed its holding in *Morissette*. Defendants charged with criminal violations of the Sherman Act challenged a jury instruction remarkably similar to that invalidated in *Sandstrom*. The instruction contained the following language:

> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.[47]

Because intent was an element of a criminal antitrust offense, the Court found that it could not be removed from the trier of fact's consideration "through reliance on a legal presumption of wrongful intent. . . ."[48]

Although not explicitly stated in any of its three decisions concerning conclusive presumptions, the Court's language came suspiciously close to invalidating those presumptions as the equivalent of "directed verdicts" for the prosecution. As the *Sandstrom* Court described it, "[u]pon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), *Sandstrom*'s jurors could reasonably have concluded that they were directed to find against defendant on the element of intent."[49] Although a directed verdict in favor of the *defense* is possible in

44. 342 U.S. at 247-48.

45. *Id.* at 249.

46. *Id.* at 274-75.

47. 438 U.S. at 430.

48. *Id.* at 435. The Court concluded that "ultimately the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this fact-finding function." *Id.* at 446.

Conclusive presumptions on an element of a crime effectively remove that element from the definition of that crime. *See Allen, supra* note 10, at 356. Although the *Sandstrom* Court reached the same result (invalidation of the conclusive presumption), it did not directly address this concern.

49. 442 U.S. at 523. *See also* Connecticut v. Johnson, 460 U.S. 73, 84 (1983).

criminal cases, a directed verdict in favor of the *State* is not possible, as it would impair both the right to trial by jury and the right to have the State prove each element of the offense beyond a reasonable doubt.[50]

Many of the lower courts that have reviewed instructions identical to the one given in *Sandstrom* have found constitutional error on precisely this basis. In *State v. Walton*,[51] the defendant was convicted of two counts of theft by deception. As in *Sandstrom*, the jury had been instructed that "[t]he law presumes that a person intends the reasonable and ordinary consequences of his own acts."[52] The Utah Supreme Court found reversible error in the giving of the instruction, stating "[i]f the jury interpreted the presumption as conclusive, the State's burden of proof was automatically met irrespective of other evidence on the question of intent."[53]

Similarly, in *Garland v. Maggio*,[54] defendant appealed his conviction for second-degree murder. At trial, the jury had been instructed that "[t]he law holds that a person is presumed to intend the natural and probable consequences of his own deliberate acts."[55] The court recognized the similarity between the instruction given at Garland's trial and that invalidated in *Sandstrom*, and found the instruction constitutionally unsound. "A plea of 'not guilty' places all elements of the charged crime into issue, forcing the state to establish every element beyond a reasonable doubt. Under most circumstances, a *Sandstrom* instruction effectively relieves the state of its constitutional burden of proving the element of requisite intent."[56] This conclusion, however, was not dispositive of the result in the case. The court of appeals did not issue a writ of habeas corpus, despite its finding of constitutional error, because it determined the error to be harmless.[57]

After *Sandstrom*, the many courts examining instructions similar or identical to the instruction given in that case have had little difficulty in discerning the instructions' infirmities.[58] Even instructions on presump-

50. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); Carpenters v. United States, 330 U.S. 395, 408 (1947). *See also* Note, *Presumptive Intent Jury Instructions After Sandstrom*, 1980 WIS. L. REV. 366, 374.

51. 646 P.2d 689 (Utah, 1982).

52. *Id.* at 691.

53. *Id.* at 692.

54. 717 F.2d 199 (5th Cir. 1983).

55. *Id.* at 203.

56. *Id.* (citations omitted).

57. *Id.* at 204. The harmlessness of *Sandstrom*-type constitutional errors will be discussed in Part III, *infra*.

58. *See, e.g.*, State v. Martell, 465 A.2d 1346, 1347 (Vt. 1983) ("Under the law a person is presumed to intend the natural and probable consequences of his acts."); People v. Mitchell, 58 N.Y.2d 368, ___, 461 N.Y.S.2d 267, 271, 448 N.E.2d 121, ___ (1983) ("person is presumed to intend the natural and probable consequences of his act and, accordingly, if the consequences are

tions quite different from the instruction in *Sandstrom* have been subjected to the *Sandstrom* conclusive or burden-shifting presumption analysis.[59] Such analysis is not, however, necessarily dispositive of the result in those cases. In *Rose v. Clark*, the United States Supreme Court determined that instructions that were unconstitutional under *Sandstrom* were amenable to harmless error analysis.[60] The effect of harmless error analysis on the vitality of the *Winship* requirement of proof beyond a reasonable doubt on all elements of the charged crime will be discussed in Part III, *infra*.

B. Presumptions that Shift the Burden of Persuasion

The Supreme Court invalidated the *Sandstrom* presumption because it could have been interpreted either as a conclusive presumption or as a presumption that shifted the burden of persuasion onto the defendant.[61]

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natural and probable, he will not be heard to say that he did not intend them."); Plass v. State, 457 A.2d 362, 367 (Del. Supr. 1983) ("A person is presumed to intend the natural and probable consequences of his act."); People v. Woods, 416 Mich. 581, ___, 331 N.W.2d 707, 709 (1982), *cert. denied* by Michigan v. Alexander, 462 U.S. 1134 (1983); State v. Trieb, 315 N.W.2d 649, 652 n. 3 (N.D. 1982) ("It is presumed . . . however, that an unlawful act was done with unlawful intent."); Turcio v. Manson, 186 Conn. 1, ___, 439 A.2d 437, 440 (1982) ("Every person is conclusively presumed to intend the natural and necessary consequences of his acts."); State v. Amado, 433 A.2d 233 (R.I. 1981); State v. Roth, 30 Wash.App. 740, 637 P.2d 1013 (Ct. App. 1981); Collins v. Francis, 728 F.2d 1322, 1330 (11th Cir.) (per curiam), *cert. denied*, 105 S.Ct. 361 (1984) ("A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts."); United States v. Crowder, 719 F.2d 166 (6th Cir. 1983), *cert. denied*, 105 S.Ct. 2352 (1984); Healy v. Maggio, 706 F.2d 698, 700 (5th Cir.), *cert. denied*, 104 S.Ct. 428 (1983) ("The law holds that a sane person is presumed to intend the natural and probable consequences of his own deliberate act."); Ramirez v. Jones, 683 F.2d 712 (2d Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983); Tweety v. Mitchell, 682 F.2d 461, 462 (4th Cir. 1982), *cert. denied*, 460 U.S. 1013 (1983) ("a man is presumed to intend that which he does, or which is the immediate or necessary consequences of his act.").

59. *See, e.g.*, People v. Frazier, 79 Ill.Dec. 27, ___, 123 Ill.App.3d 563, ___, 463 N.E.2d 165, 171 (Ill.App. 4 Dist. 1984) ("If you find beyond a reasonable doubt that the amount of alcohol in the defendant's blood as shown by a chemical analysis of his breath was .10 percent or more by weight of alcohol, you shall presume that the defendant was under the influence of alcohol."); Trenor v. State, 252 Ga. 264, ___, 313 S.E.2d 482, 484 (1984) ("If you find that a homicide is proved to have been committed in this case by the defendant, and with a weapon that you find was, in the manner in which it was used upon the occasion in question, a weapon likely to produce death, the law would presume malice and the intent to kill."); Krucheck v. State, 671 P.2d 1222, 1223 (Wyo. 1983) ("the use of a deadly weapon in a deadly or dangerous manner raises a presumption of malice."); State v. Williams, 324 N.W.2d 154, 159 (Minn. 1982) ("It is enough to prove such intention if you find beyond a reasonable doubt that at the time defendant issued the check the checking account did not have sufficient funds to pay the check."); Spencer v. Zant, 715 F.2d 1562, 1577 (11th Cir. 1983) ("[w]hen the state's evidence shows the commission of a homicide by the accused by the use of a deadly weapon, the law presumes murder.").

60. *Clark*, 106 S.Ct. at 3109.

61. *Sandstrom*, 442 U.S. at 524. *See* note 20, *supra*, for a discussion of burdens of persuasion and production. *See also* text accompanying note 84, *infra*. *See* note 23, *supra*, for a definition of conclusive presumptions.

In Francis v. Franklin, 105 S.Ct. 1968 (1985), Justices Brennan and Rehnquist disagreed as to whether the Court's analysis in *Sandstrom* constituted alternative holdings (Brennan, J., 105 S.Ct. at 1973, n. 5), or whether the language concerning mandatory rebuttable presumptions was merely dictum (Rehnquist, J., dissenting, 105 S.Ct. at 1981).

A presumption that shifts the burden of persuasion, or mandatory rebuttable presumption, "does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding."[62] In *Sandstrom*, the Court described the possible effect of a shift in the burden of persuasion: the jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state."[63] As the *Sandstrom* Court pointed out, such a presumption was found to be unconstitutional in *Mullaney v. Wilbur*.[64]

In *Mullaney*, the defendant was charged and convicted of murder, which was defined under state law as requiring proof of both intent and malice. The jury was instructed that if the prosecution proved intent, malice would be presumed unless it was rebutted by the defendant's proof by a preponderance of the evidence that he acted in the heat of passion.[65] The United States Supreme Court held that the presumption of malice violated *Winship*'s due process requirement by relieving the prosecution of its burden of proof on an essential element of the crime.[66] The presumption invalidated in *Mullaney* is a classic example of a presumption that unconstitutionally shifts the burden of persuasion onto the defendant.[67]

One year ago, the Supreme Court reaffirmed its prohibition against presumptions that shift the burden of persuasion ("mandatory rebuttable presumptions") in *Francis v. Franklin*.[68] In *Franklin*, a state prisoner, while attempting to escape, shot and killed a local resident when the prisoner's gun went off, penetrating the front door of the resident's house

62. *Franklin*, 105 S.Ct. at 1972-73.

63. 442 U.S. at 524. The party who has the burden of persuasion in criminal cases must prove that fact beyond a reasonable doubt. C. MCCORMICK, EVIDENCE 793 (2d ed. 1972).

64. 421 U.S. 684 (1975).

65. *Id.* at 686. Murder committed under heat of passion carried a statutorily reduced penalty.

66. *See id.* at 703-04.

67. The Court's broad prohibition against burden-shifting presumptions may have been severely undercut by its subsequent holding in Patterson v. New York, 432 U.S. 197 (1977). In *Patterson*, the defendant was charged with second degree murder under a statute that required the defendant to bear the burden of proof by a preponderance of the evidence on the affirmative defense of "extreme emotional disturbance." *Id.* at 198. Despite the fact that the affirmative defense operated in an almost identical manner to the defense of "heat of passion" invalidated in *Mullaney*, the *Patterson* Court upheld New York's allocation of the burden of persuasion to the defendant on this issue. *Id.* at 216. The Court distinguished *Mullaney* on the basis that in *Patterson* the prosecution had proven every fact necessary to constitute a crime as defined by the state. *Id.* at 205-06.

The clear lesson of *Patterson* and *Mullaney* is that legislators have been warned to be precise in their draftsmanship of statutes defining crimes: "The reasonable doubt rule, after Patterson v. New York, applies only to those issues that the state legislatures have chosen to include in the portion of the statutory text defining the offense charged." Comment, *Affirmative Criminal Defenses—The Reasonable Doubt Rule in the Aftermath of Patterson v. New York*, 39 OHIO ST.L.J. 393, 413 (1978).

68. 105 S.Ct. 1965 (1985).

as he slammed the door against the intruding prisoner. Franklin denied that he intended to kill the resident and claimed that the death was an accident. At trial, the jury was instructed that a person's acts are presumed to be the product of that person's will, but that the presumption could be rebutted.[69] Franklin was found guilty of murder.[70]

The United States Supreme Court affirmed the Eleventh Circuit Court of Appeals' order issuing a writ of habeas corpus, reasoning that "the instruction that the presumptions 'may be rebutted' could reasonably be read as telling the jury that it was required to infer intent to kill as the natural and probable consequence of the act of firing the gun unless the defendant persuaded the jury that such an inference was unwarranted."[71] Such a burden-shifting presumption was unconstitutional.[72] As in *Sandstrom,* the fact that the instruction might reasonably have been understood as creating a mandatory rebuttable presumption was dispositive.[73]

Since the *Sandstrom* decision, lower courts have generally not had great difficulty in ascertaining when challenged jury instructions contained impermissible burden-shifting presumptions. Many of these instructions have contained explicit burden-shifting language, like that held invalid in *State v. Mincey.*[74] In *Mincey,* the Arizona trial court gave an instruction identical to that invalidated in *Sandstrom* and continued with the following language: "Any such presumption as I have mentioned, however, maybe [sic] overcome by contrary evidence."[75] The *Mincey* court explained its reason for invalidating the above instructions: "The net effect of the series of instructions is that it falls on appellant to disprove, rather than on the state to prove, the element of intent, an element required for both first- and second-degree murder."[76]

The instructions found constitutionally defective in *Mincey* explicitly stated that the burden of persuasion shifted to the defendant was the burden of proof beyond a reasonable doubt.[77] In other cases, however, appellate courts have been troubled by the lack of specificity in the jury instructions as to precisely how great the burden placed upon the defendant

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69. The specific language of the instruction was:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

Id. at 1969-70.

70. *Id.*

71. *Id.* at 1973.

72. *Id.*

73. *Id.* at 1977.

74. 130 Ariz. 389, 636 P.2d 637 (1981), *cert. denied,* 455 U.S. 1003 (1982).

75. *Id.* at ___, 636 P.2d at 644.

76. *Id.*

77. *Id.*

actually was.[78] In these cases, the distinction between the burden of persuasion and the burden of production becomes less clear.[79] In *State v. Williams*,[80] the Idaho Court of Appeals held invalid jury instructions given in the defendant's trial for second degree burglary. The jury had been instructed that unexplained breaking and entering raised a "presumption . . . that the breaking and entering were accomplished with the intent to commit larceny," but then were told that the presumption was effective "only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption."[81] The court rejected the state's assertion that the instructions merely shifted the burden of production, finding that the instructions did not explain *how* the presumption might be rebutted and that the jurors might have expected the accused to overcome each presumption absolutely.[82]

A similar state argument was made and rejected in *Harris v. Israel*.[83] In that case, the defendant had been convicted of first degree murder. At trial, the jury had been given the following Wisconsin jury instruction: "When there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all of the natural, probable, and usual consequences of his deliberate acts."[84] Despite a Wisconsin Supreme Court interpretation of the same instruction that focused on the "*no* circumstances" language to conclude that the instruction was constitutional,[85] the *Harris* court concluded that the instruction could have been interpreted as shifting the burden of persuasion onto the defendant, and was therefore invalid.[86] The court rejected the notion that the jury could have interpreted the instruction as requiring the defendant to submit only "some" evidence, with the burden of proof remaining at all times on the prosecution:

78. *See, e.g.*, Dix v. Kemp, 804 F.2d 618, 620 (11th Cir. 1987) ("There is no mention of the quantum of evidence necessary to rebut the presumption. Because of this omission, the jury could have concluded that Dix had to produce more than 'some' evidence to rebut the presumption.").

79. This distinction becomes particularly telling when it is remembered that in *Allen*, the Supreme Court suggested that "[t]o the extent that a presumption imposes an extremely low burden of production—*e.g.*, being satisfied by 'any' evidence—it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." *Allen*, 442 U.S. at 157, n. 16. As will be discussed in detail in Part D, *infra*, the analysis of permissive inferences suggested by the Court in *Allen* requires considerably less scrutiny than that required of even presumptions that shift the burden of production onto the defendant. As has already been discussed, presumptions that shift the burden of persuasion are constitutionally invalid under *Sandstrom*. *See* note 20, *supra*, for a discussion of burdens of persuasion and production.

80. 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982).

81. *Id.* at ___, 651 P.2d at 572.

82. *Id.* at 574.

83. 515 F.Supp. 568 (E.D. Wis. 1981).

84. *Id.* at 570.

85. Muller v. Wisconsin, 94 Wis.2d 450, 289 N.W.2d 570 (1980). This case is discussed extensively in Note, *supra* note 2, at 528-34.

86. 515 F.Supp. at 571.

> This is indeed a subtle notion. While one schooled in the fine distinctions of the law may appreciate the idea of a presumption which is countered by the production of evidence that does not persuade one to the contrary, the idea is foreign to the layman. The usual and customary meaning of the term 'rebut' is 'to contradict . . . by countervailing proof.' A proposition is generally not thought to have been rebutted until it has been shown that it is more likely than not that the contrary is true.[87]

Many of the lower courts examining jury instructions dealing with presumptions have focused on the particular language of those instructions in determining whether they improperly shift the burden of persuasion to the defendant.[88] At least a few courts, however, have recognized that an overly formalistic reliance on the presence or absence of specific terms in the instructions may undermine the *Sandstrom* holding.[89] The standard analysis used by most lower courts after *Sandstrom* appears to be, first, to determine whether the jury instruction included a presumption concerning one of the statutorily-defined elements of the crime and, second, whether that instruction unconstitutionally shifted the burden of persuasion to the defendant.[90] Even after determining that the answers to both of the above questions are affirmative, however, reversal of the judgment is not assured. Despite finding that the presumption shifted the burden of persuasion onto the defendant, in violation of *Sandstrom*, the violation may be found to be harmless error. This issue will be discussed in Part III, *infra*.

C. Presumptions that Shift the Burden of Production

A presumption that shifts the burden of production does not, in theory, alter the burden of persuasion (which remains on the prosecution in

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87. *Id.* (citation omitted).

88. *See, e.g.*, Brooks v. Kemp, 762 F.2d 1383, 1388 (11th Cir. 1985) (en banc), *cert denied*, 106 S.Ct. 3340 (1986); State v. LaForge, 347 N.W.2d 247, 251 (Minn. 1984); Goswick v. State, 656 S.W.2d 68, 69-70 (Tex.Ct.App. 1983); Conway v. Anderson, 698 F.2d 282, 284 (6th Cir.), *cert. denied*, 462 U.S. 1121 (1983); Rock v. Coombe, 694 F.2d 908, 915 (2d Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); Lamb v. Jernigan, 683 F.2d 1332, 1341 (11th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983). Such analysis is, arguably, required by the Supreme Court: "Analysis must focus initially on the specific language challenged. . . ." *Franklin*, 105 S.Ct. at 1971.

89. *See, e.g.*, State v. Rainey, 298 Or. 459, ___, 693 P.2d 635, 639 (1985) ("it is not the label given to the evidentiary device, but the effect upon the burden of proof that is significant. The evidentiary device is not permitted to relieve the state of the burden of proving all elements of a crime."); Patterson v. Austin, 728 F.2d 1389, 1395 (11th Cir. 1984) ("*Sandstrom*-type issues cannot be decided by the application of a rigid and pre-determined list of criteria, in which the presence or absence of a particular phrase must inevitably be dispositive of whether a given instruction is to be sanctioned or condemned."); Engle v. Koehler, 707 F.2d 241, 245 (6th Cir. 1983), *aff'd per curiam by an equally divided Court*, 104 S.Ct. 1673 (1984) ("The question is one of burden-shifting effect, not of verbal formulation.").

90. *See, e.g.*, Dietz v. Solem, 640 F.2d 126, 131 (8th Cir. 1981).

criminal cases), but requires the jury to draw a certain inference unless the defendant produces *some* evidence to the contrary.[91] The United States Supreme Court in *Sandstrom* did not address the constitutionality of presumptions that shift the burden of production onto the defendant, because it rejected the State's characterization of the presumption at issue as one of that sort.[92] Similarly, in *Allen,* the Court rejected the Second Circuit Court of Appeals' characterization, instead finding the instruction at issue to contain merely a permissive inference.[93] The *Allen* Court did suggest that presumptions that shift the burden of production might be constitutional,[94] but was not forced to decide the question.

Despite the *Allen* Court's assumption to the contrary, however, there still remain serious questions about the constitutionality of presumptions that shift the burden of production onto the defendant in a criminal case. First, although it is conceded that the defendant thereby receives the burden of going forward with *some* evidence, it is by no means clear how much evidence is, in fact, required. The *Allen* Court suggested that when the burden of production was extremely low (that is, satisfied by "any evidence"), it would be appropriate to analyze it as a permissive inference.[95] Conversely, when the burden of production is high (for example, "substantial evidence"), it is practically identical to a presumption that shifts the burden of *persuasion.*[96]

Indeed, regardless of the extent of the burden, presumptions that shift the burden of production may share many of the same constitutional infirmities that invalidate presumptions that shift the burden of persuasion onto the criminal defendant. Presumptions that shift the burden of production share the same "implied directed verdict" problem already dis-

91. State v. Johnson, 100 Wash.2d 607, 674 P.2d 145, 151 (1983). For a discussion of the burden of persuasion, see note 20, *supra.*

92. 442 U.S. at 515. Similarly, in *Franklin,* the Court explicitly refrained from deciding whether a presumption that shifts only the burden of production to the defendant is constitutional. 105 S.Ct. at 1971 n. 3.

93. *Allen,* 442 U.S. at 160. In *Allen,* however, unlike *Sandstrom,* the Court discussed at length the difference between analyzing production-shifting presumptions and permissive inferences. *See id.* at 157-60.

94. *Id.* at 157 n. 16.

95. *Id.* The Court appeared to be suggesting that in such situations, the presumption is, in practical effect, indistinguishable from a permissive inference. *Id. See* note 35, *supra,* and accompanying text for a discussion of permissive inferences. *See also* text accompanying note 111, *infra.*

96. One commentator has noted that the primary distinction between burdens of production and persuasion is "merely quantitative." Note, *supra* note 10, at 328. Despite the fact that the level of persuasion used to test the satisfaction of a burden of production may be considerably lower than that used to test the satisfaction of a burden of persuasion, the court is still asked to determine whether the evidence presented has any persuasive force at all. On the other hand, it is likely that in most cases, "the burden of production will require the defendant to raise no more than a reasonable doubt with respect to an issue; this represents a burden of persuasion no greater than that normally required of the defendant even when the burden of production remains with the state." *Id.* at 329. In such cases, then, the theoretical utility of such an instruction is doubtful at best.

cussed with respect to presumptions that shift the burden of persuasion.[97] Furthermore, when it is the judge, rather than the jury, who decides when the burden of production has been met, the judge may not instruct the jury on that issue at all if he decides that the burden of production on an issue has not been satisfied.[98] Conversely, if the defendant *has* satisfied his burden of production, it is difficult to see why the jury should receive any instruction on the presumption at all; once the evidence is produced and the burden satisfied, the presumption should disappear.[99]

The problem with a production-shifting presumption is brought most clearly into focus when it is realized that, as a practical matter, it forces the defendant to take the witness stand in order to satisfy his burden. When, as is frequently the case, *no* testimonial or circumstantial evidence other than the defendant's own testimony is available, the criminal defendant will be confronted with a true Hobson's choice: to risk what will amount to a directed verdict against him on the disputed element, or to take the witness stand, thus abandoning his fifth amendment privilege against self-incrimination.[100]

These problems have not escaped the attention of lower courts analyzing presumptions that shift the burden of production. In *State v. Johnson,*[101] the defendant challenged his conviction of four felony counts of passing worthless checks on the basis of improper jury instructions.[102] The Kansas Supreme Court was troubled by the imprecise nature of the presumption. It explained that "the jury must be clearly instructed as to the nature and extent of the presumption and that it does not shift the

97. *See* note 49, *supra,* and accompanying text. "Instructing a jury that under certain circumstances it *must* draw a particular inference infringes upon both the right to trial by jury on that element and the right to have the State prove every element of the charge beyond a reasonable doubt. Such an instruction is in reality just a polite form of a partial directed verdict, a procedural device which is 'abhorrent to the criminal law.'" State v. Johnson, 100 Wash.2d 607, ___, 674 P.2d 145, 152 (1983) (quoting C. MCCORMICK, EVIDENCE 804 (2d ed. 1972) (emphasis in original)).

98. Allen, *supra* note 10, at 329. The risk of foreclosing jury consideration of an issue thus determined adversely to a criminal defendant may conflict with the defendant's right to trial by jury under the sixth amendment. *See* State v. Johnson, 100 Wash.2d 607, ___, 674 P.2d 145, 152 (1983).

99. In that respect, the presumption that shifts the burden of production should operate like a Thayer "bursting bubble" presumption. *See* C. MCCORMICK, EVIDENCE 821 (2d ed. 1972).

100. *See* Turner v. United States, 396 U.S. 398, 432 (1970) (Black, J., dissenting).

101. 233 Kan. 981, 666 P.2d 706 (1983).

102. The instruction at issue read:

> In any prosecution against the maker or drawer of a check, . . . payment of which has been refused by the drawee on account of insufficient funds, the making, drawing, issuing or delivering of such check shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or on deposit with, the drawee. . . . As used in this instruction, 'prima facie evidence' is evidence that on its face is true, but may be overcome by evidence to the contrary.

666 P.2d at 708.

burden of *proof* to the defendant."[103] The court recognized the possibility that the jury might believe that the burden had been shifted to the defendant to disprove an element of the crime, and, therefore, the court reversed the defendant's conviction.[104]

Other lower courts have been concerned with the effect of the production-shifting presumption when the defendant introduces no evidence in rebuttal. In *State v. Truppi*,[105] the defendant was convicted of sexual assault, robbery and kidnapping. He appealed, challenging the court's jury instructions on intent.[106] The Connecticut Supreme Court asserted that the burden of producing "some credible evidence" was low, but pointed out the problem arising from the fact that the defendant had not taken the stand, offered any witnesses, or suggested any theory of defense during cross-examination or at any other time. "Thus, unless the state introduced credible evidence which rebutted the presumed intent, the jury could have concluded that it must find against the defendant on the issue of intent even though the state had not otherwise proven intent beyond a reasonable doubt."[107] Such a conclusion would have violated the defendant's due process rights.[108]

Even when courts are aware of the problems inherent in presumptions that shift the burden of production onto the defendant, they need not always reverse the convictions obtained with the aid of such presumptive instructions. The applicability of harmless error analysis to such instructions will be discussed in Part III, *infra*.

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103. *Id.* at 711 (emphasis added).

104. *Id.* The court found the instruction to be clearly erroneous. *Id.*

105. 182 Conn. 449, 438 A.2d 712 (1980), *cert. denied*, 451 U.S. 941 (1981).

106. The jury instructions provided:

> Now, in the usual case, the State of Connecticut does not have to offer evidence to prove that a man charged with a crime actually had a guilty intent or guilty knowledge. That is because a man is presumed to have intended to do the acts which he did do. Accordingly, until some credible evidence comes into the case tending to prove that, because in the light of the circumstances as he honestly and in good faith believe [sic] them to be, the act which he did would appear to be lawful or because the act was an accident, the State may safely rely upon the presumption that the accused intended to commit the acts which he did commit.Until such evidence appears in the case, the jury must presume that the accused intended to commit such acts as the jury may find that he did commit. . . .

438 A.2d at 715.

107. *Id.* at 717.

108. The same concerns troubled the Supreme Court of Washington in State v. Johnson, 100 Wash.2d 607, 674 P.2d 145, 152 (1983) ("When the defendant presents no evidence to rebut the presumption, the jury is *required* to find an element of the crime, effectively removing that issue from the jury's consideration. In addition, the State is relieved of its burden of proving the element in question beyond a reasonable doubt. Both of these consequences violate the defendant's constitutional rights. . . ."). *See also* People v. Roder, 33 Cal.3d 491, 189 Cal.Rptr. 501, 658 P.2d 1302, 1308-09 (1983).

D. Permissive Inferences

Permissive inferences are not technically presumptions at all, since they do not compel acceptance of the "ultimate fact" upon proof of a "basic fact"; instead, proof of the "basic fact" merely raises a question as to whether the "ultimate fact" exists: the jury is free to accept or reject the existence of the "ultimate fact."[109] Nevertheless, because permissive inferences share many of the problems that afflict "true" presumptions, it is appropriate to analyze them in light of the *Winship* principle, and subsequent judicial treatment.

In *Allen,* the United States Supreme Court discounted the possibility of tension between the *Winship* requirement of proof beyond a reasonable doubt for all elements of a crime, and the use of permissive inferences:

> Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.[110]

The Court explicitly stated that as long as the connection between the "basic fact" and the "ultimate fact" was rationally related as applied to the facts of that case, the permissive inference was likely to withstand constitutional scrutiny.[111]

The requirement of a "rational relationship" is a recurring theme in the Court's earlier decisions concerning presumptions and permissive inferences. Although suggested even earlier,[112] it was presented by the United States Supreme Court as the "controlling" method of review in *Tot v. United States.*[113] *Tot* involved a federal statute which provided that a person found in possession of a firearm who had previously been convicted of a violent crime was presumed to have received the weapon through interstate commerce (in violation of the statute). The Court held the statute unconstitutional, stating that "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."[114] Although the Court in *Allen* referred to the pre-

109. Note, *supra* note 2, at 519.

110. *Allen,* 442 U.S. at 157.

111. *Id.*

112. *See* Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35 (1910), McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916), and Yee Hem v. United States, 268 U.S. 178 (1925). These cases all involved statutory presumptions.

113. 319 U.S. 463, 467 (1943).

114. *Id.* at 467-68. The *Tot* Court expressly rejected the "comparative convenience" test, which would allow a presumption to be applied against a defendant whenever the defendant had greater

sumption invalidated in *Tot* as "mandatory" (shifting the burden of production),[115] the precise nature of the presumption is far from clear.[116] The same lack of clarity is apparent in the Supreme Court's next consideration of a deductive device it clearly labelled an "inference," but which may have had production-shifting effect.[117] In *United States v. Gainey,* the challenged statute provided that proof of a person's presence at an illegal still "shall be deemed sufficient evidence to authorize conviction" for the offense of carrying on the business of an illegal still, "unless the defendant explains such presence to the satisfaction of the jury."[118] Although the Fifth Circuit Court of Appeals had reversed Gainey's conviction under the statute on the grounds of a lack of rational connection between the basic and presumed facts,[119] the Supreme Court found the requisite rational connection present.[120] The Court, therefore, reversed the judgment of the court of appeals and upheld the constitutionality of the statute.[121]

Such a rational relationship was *not,* however, evident to the Supreme Court in *United States v. Romano,*[122] which dealt with another statutory presumption enacted to aid the government in prosecuting liquor cases. In *Romano,* presence at an illegal still "authorized" the narrow finding of "possession, custody and . . . control" of that still.[123] A unanimous Court distinguished the rationality of the presumption at issue from the broader one presented in *Gainey:*

> Presence at an operating still is sufficient evidence to prove the charge of 'carrying on' because anyone present at the site is very probably connected with the illegal enterprise. . . . But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather

familiarity with the facts: "Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption." *Id.* at 469. In so doing, the Court invalidated a traditional justification for the use of presumptions.

The *Tot* Court also rejected a "greater includes the lesser" rationale for the use of presumptions. "The government had argued that Congress' *greater power* to enact a statute to prohibit the possession of all firearms by persons convicted of violent crimes, necessarily *included the lesser power* to create the presumption in question." C. MCCORMICK, EVIDENCE 812 (2d ed. 1972) (emphasis in original).

115. *Allen,* 442 U.S. at 157, n. 16.

116. The Court's language in *Tot* would allow one to conclude either that the presumption shifted the burden of production, or that it constituted merely a permissive inference. Furthermore, since the opinion does not mention the instructions given to the jury, which "are a crucial indicator of how a deductive device operates," determining the nature of the presumption is even more difficult. Schmolesky, *supra* note 24, at 277.

117. United States v. Gainey, 380 U.S. 63 (1965).

118. *Id.* at 64 n. 2.

119. Barrett v. United States, 322 F.2d 292 (5th Cir. 1963).

120. 380 U.S. at 67-68.

121. *Id.* at 71.

122. 382 U.S. 136 (1965).

123. *Id.* at 140.

> than in one of the supply, delivery or operational activities having nothing to do with possession. . . . [A]bsent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary. . . .'[124]

The Court explicitly invalidated the presumption on the grounds of a lack of rational relationship between the basic fact and the presumed fact; it pointed out that if the question had been, instead, the sufficiency of the evidence presented, Romano's conviction would have been sustained.[125]

Four years later, the Supreme Court reiterated the rational relationship test with greater precision in *Leary v. United States*.[126] Dr. Timothy Leary had been convicted under a federal statute that included a presumption providing that possession of marijuana was sufficient evidence to authorize conviction of transporting and concealing the drug with knowledge of its illegal importation unless the defendant explained his possession to the jury's satisfaction. Justice Harlan, writing for a unanimous Court, found the presumption constitutionally unsound because of the lack of a rational connection between possession and defendant's knowledge of unlawful importation:

> The upshot of *Tot, Gainey,* and *Romano* is . . . that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[127]

The Court went beyond its earlier requirement that the proved fact must rationally tend to prove the presumed fact.[128] In *Leary,* the Court clearly required a link between the proved and presumed facts that was "more likely than not."[129] Furthermore, the Court continued to test the rationality of the presumption *on its face;* it did not question whether Dr. Leary might have, in fact, known that the marijuana he was carrying was imported. Rather, the Court consulted books, studies and government reports demonstrating the likelihood that a significant percentage of domestically consumed marijuana was grown in the United States. The Court relied on these materials in determining that the presumption was

124. *Id.* at 141 (citation omitted).
125. *Id.* at 139.
126. 395 U.S. 6 (1969).
127. *Id.* at 36.
128. *Gainey,* 380 U.S. at 67-68.
129. *Leary,* 395 U.S. at 36. Since the Court found that the statutory presumption did not meet the "more likely than not" standard, it expressly did not reach the question of whether the presumption would satisfy the still more stringent criminal "reasonable doubt" standard. The question of the applicability of the latter standard is still in doubt. *See* Note, *supra* note 8, at 1149.

invalid because a majority of marijuana users were probably unaware of the drug's origin.[130]

The following term, the Court repeated its *Leary* analysis of extensive materials outside the record in reviewing a presumption very similar to the one invalidated in *Leary,* but dealing with possession of heroin and cocaine.[131] Once again, knowledge of the illegal importation of the drugs was statutorily permitted to be presumed from possession. The Court upheld the validity of the presumption as it related to Turner's possession of heroin, because it found that no heroin was made in the United States.[132] It invalidated the presumption as it related to cocaine, however, because the Court found that large quantities of cocaine were produced in the United States.[133]

The Court reviewed a common-law presumption in *Barnes v. United States,*[134] the last major decision by the Supreme Court involving a presumptive device before *Allen* and *Sandstrom.* The *Barnes* presumption allowed the jury to find knowledge that property was stolen from proof of the defendant's unexplained possession of the property. The Court consistently referred to the presumption as an inference, perhaps because the jury was told that it was "never required to make this inference."[135] Despite the fact that the Court's previous opinions had analyzed only statutory presumptions, the Court held that the rational relationship test was equally applicable to common law presumptions and inferences[136] and concluded that the device in question satisfied even the reasonable doubt standard.[137]

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130. *Leary,* 395 U.S. at 52.

131. Turner v. United States, 396 U.S. 398 (1970).

132. *Id.* at 415-16. The Court concluded:

> [T]he overwhelming evidence is that the heroin consumed in the United States is illegally imported. . . . Whether judged by the more-likely-than-not standard . . . or by the more exacting reasonable-doubt standard normally applicable in criminal cases, [the statutory presumption] is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug.

Id.

133. *Id.* at 418-19. The Court's willingness to rely on materials not introduced at trial to justify the validity of the presumption disturbed at least two members of the Court. Justice Black dissented, with the support of Justice Douglas, and pointed out that "petitioner was never given an opportunity to confront before the jury the many expert witnesses now arrayed against him in the footnotes of the Court's opinion. Nor does it apparently matter to the Court that the fact-finding role it undertakes today is constitutionally vested not in this Court but in the jury." *Id.* at 433.

134. 412 U.S. 837 (1973).

135. *Id.* at 840 n. 3.

136. The Court pointed out, however, that common law deductive devices presented fewer constitutional problems since they were invoked "only in the discretion of the trial judge." *Id.* at 845 n. 8.

137. *Id.* at 846. The Court stated that if the inference "satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process." *Id.* at 843.

In all of the pre-*Allen* decisions analyzing permissive inferences, the Court applied a rational relationship test. That test, however, was a *facial* test: the Court analyzed whether the presumption was rational *on its face*, in light of common experience. The *Leary* case makes it clear that the Court did not analyze the rationality of the presumption as applied to the facts of the particular case before it. Although the Court implicitly acknowledged that Mr. Leary might well have known that the marijuana he was carrying was imported, the rationality of the presumption in general was dispositive. In *Allen*, however, the Court developed a new rational relationship test; it determined the rationality of the relationship of the presumption to the actual facts of the *Allen* case.[138]

As discussed above, the Court in *Allen* reaffirmed the validity of the rational relationship test as applied to permissive inferences.[139] The Court explicitly rejected application of a "beyond a reasonable doubt" standard, announcing that the *Leary* more-likely-than-not standard was the appropriate measure of the rational relationship test: "As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*."[140] Although the *Allen* Court emphasized that the "basic" fact had to be proved beyond a reasonable doubt, it allowed the prosecution to rely on all of the evidence in the record in meeting this standard.[141] Since the Court found that the challenged permissive presumption satisfied the *Leary* test, it upheld the constitutionality of the presumption.[142]

The *Allen* Court characterized permissive inferences as allowing, but not requiring the trier of fact to infer the "ultimate" fact from proof of the "basic" fact, and as placing "no burden of any kind on the defendant."[143] Despite this assertion, however, permissive inferences are not free from many of the problems that afflict presumptions that shift the burden of persuasion or production onto the defendant. In *Barnes*, the Court recognized the actual coercive impact of even permissive inferences.[144] Justice Black had previously pointed out the potential danger to a defendant's fifth amendment right to remain silent posed by permissive inferences.[145]

Furthermore, the Court has recognized that a permissive inference may

138. *Allen*, 442 U.S. at 157.

139. *See supra* note 109 and accompanying text.

140. *Allen*, 442 U.S. at 167. At least one commentator has characterized the *Allen* stance on the reasonable doubt standard as a "retreat." *See* Note, *supra* note 8, at 1151.

141. 442 U.S. at 167.

142. *Id.*

143. *Id.* at 157.

144. 412 U.S. at 846 n. 11. The Court acknowledged that even if the government proved only the basic fact of possession, the defendant would, in fact, be influenced to explain his possession, "since ordinarily the Government's evidence will not provide an explanation . . . consistent with innocence." *Id.*

145. *See Turner*, 396 U.S. at 432-33 (Black, J., dissenting), and *Gainey*, 380 U.S. at 87-88 (Black, J., dissenting).

endow the "basic" fact with weight it would not otherwise attain: "A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect."[146] Normally, one piece of relevant evidence would merely *tend* to prove guilt. A permissive inference, however, may be used to make that evidence *sufficient* to find guilt. Indeed, the inference itself will become evidence for the prosecution in the case.[147]

Finally, a permissive inference, like other presumptions, presents the jury with an easy solution to its task. In *Sandstrom,* the Court pointed out that a presumption eases the jury's burden of examining the evidence "and there is no reason to believe the jury would have deliberately undertaken the more difficult task."[148] That the assistance of even a permissive inference simplifies the jury's responsibilities cannot be in doubt: "when a jury can infer intent to kill upon proof of the ordinary consequences of the defendant's acts, the jury no longer has to consider *all* of the evidence in determining whether such an intent exists beyond a reasonable doubt."[149]

Lower courts have adopted several different approaches in determining whether jury instructions contain merely permissive inferences after *Allen.* In part, the lack of consistency of approach must be attributed to the inherent inconsistencies in the *Allen* opinion itself. First, the Court required that the fact to be inferred be rationally related to the fact proved.[150] In that respect, permissive inferences do not differ from any other presumption. Next, the Court required an "applied analysis": the party challenging the permissive inference must "demonstrate its invalidity *as applied to him.*"[151] The Court implicitly shifted the burden to the defendant to show why the permissive inference should be *ignored* by the jury; if the defendant did not come forward with evidence refuting the validity of the inference in his case, the jury would, presumably, apply the inference, with the Court's blessing.[152]

146. Morissette v. United States, 342 U.S. 246, 275 (1952).

147. *See* Schmolesky, *supra* note 24, at 302 ("since the burden of production never shifts with a permissive inference, the jury will hear the instruction no matter how much evidence the defense introduces to demonstrate that there is no basis for finding the presumed fact. The supposedly innocuous permissive inference can be more onerous than a mandatory presumption.").

148. *Sandstrom,* 442 U.S. at 526 n. 13.

149. Note, *supra* note 50, at 376 (emphasis in original). Furthermore, "a presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition." Morissette v. United States, 342 U.S. 246, 275 (1952). This concern prompted the Oregon Supreme Court to declare that "[i]nferences when used against the defendant should be left to argument without any instruction." State v. Rainey, 298 Or. 459, ___, 693 P.2d 635, 640 (1985).

150. *Allen,* 442 U.S. at 157. This is, presumably, a facial analysis.

151. *Id.* (emphasis added).

152. *Id.* at 162. This second analysis could be seen as requiring the court to find a second rational relationship between the basic facts and the presumed fact. Alternatively, the four Justices who dissented may be correct in stating that the Court is simply applying an "unarticulated harmless error standard" to find the defendants "guilty as charged." *Id.* at 177 (Powell, J., dissenting).

Thus, it is not clear precisely what *Allen* was directing the lower courts to do. In *Lannon v. Hogan,*[153] the First Circuit Court of Appeals scrutinized the words actually spoken to the jury, to uphold the instruction because it contained merely a permissive inference. The court held the instruction valid and stated: "We do not think that a reasonable juror could have misinterpreted the instructions. Not only are the particular sentences unambiguously phrased in permissive terms; in addition, they are both followed by an explicit reminder that the jury 'may' draw the inferences but is 'not required' to do so."[154] The same approach was taken by the court in *Nelson v. Solem.*[155] This approach assumes that the "rational relationship" requirement has been met, and ignores the *Allen* Court's admonition to look at the entire record. Rather, the challenge to jury instructions is evaluated entirely on the basis of the challenged jury instructions themselves.

A second approach used by some of the lower courts is to examine the challenged jury instructions within the context of *all* the instructions given to the jury.[156] In *Brayboy v. Scully,*[157] language identical to that invalidated in *Sandstrom* was used three times. The Second Circuit Court of Appeals found no error because on two of those occasions, "curative" language immediately followed.[158] Even on the third occasion, the jury was told that criminal intent was not to be "presumed," from the defendant's proven acts, but rather that they could infer and find such intent from "all the circumstances" and "surrounding facts" in light of the jury's "own experience and understanding of how people operate."[159] The court concluded that these directions transformed the instructions from encompassing conclusive or burden-shifting presumptions into permissive inferences.[160] Similarly, in *State v. Cosgrove,*[161] the Connecticut Supreme

153. 719 F.2d 518 (1st Cir. 1983), *cert. denied,* 104 S.Ct. 1606 (1984).

154. *Id.* at 521. The instructions provided that "you may infer, that is, conclude, that a person ordinarily intends the natural and probable consequences of any act which is knowingly done. . . . You are not required to come to that conclusion, but you may do so." *Id.*

155. 640 F.2d 133, 135 (8th Cir. 1981) ("After reviewing the words actually spoken to the jury and the way a reasonable juror could have interpreted this instruction, we hold that the instruction constituted only a permissive inference."). *See also* United States v. Johnson, 735 F.2d 373 (9th Cir. 1984).

156. A majority of the Supreme Court recently affirmed the correctness of this method of analysis in Francis v. Franklin. Emphasizing that the analysis is "straightforward," 105 S.Ct. at 1971, the Court first determined the nature of the presumption described in the challenged jury instruction, and then considered the "potentially offending words" within the context of all of the instructions to the jury. *Id.* Although the second prong of this analysis is, arguably, a harmless error analysis, *see* Part III, *infra,* it is perceived by a majority of the Supreme Court as distinct from the harmless error inquiry. 105 S.Ct. at 1977.

157. 695 F.2d 62 (2d Cir. 1982), *cert. denied,* 460 U.S.1055 (1983).

158. *Id.* at 66.

159. *Id.*

160. *Id.*

161. 186 Conn. 476, 442 A.2d 1320 (1982).

Court relied on the presence of "qualifying instructions" to support its finding that only a permissive inference was conveyed by the challenged jury instructions.[162]

A third category of lower court cases examine the language of the jury instructions themselves, and also look for a rational relationship between the "basic" fact and the fact to be inferred. In *State v. Spoon*,[163] the Supreme Court of Arizona examined a jury instruction which provided "[y]ou may determine that the defendant intended to do the act if he did it voluntarily."[164] The court first decided that the use of the word "may" established the "permissive character of the instruction."[165] The court then upheld the instruction, finding that there was a rational relationship between an individual's voluntary action and his intent to act.[166]

The lower courts' analyses of instructions as permissive inferences reflect the least precision of judicial analysis of presumptions. This may be due, in part, to the "unarticulated harmless error analysis" that pervades the *Allen* opinion. A reading of many of the lower court opinions suggests that what the courts are actually doing is applying harmless error analysis directly instead of first determining whether error in the form of a conclusive or burden-shifting presumption is present at all. As discussed in Part III, *infra*, the validity of this approach is dubious, for while it provides appellate courts with a short cut in its inquiry into presumptive intent jury instructions, constitutional safeguards may be disregarded in the process.

III. THE APPLICABILITY OF HARMLESS ERROR ANALYSIS TO PRESUMPTIVE JURY INSTRUCTIONS

A. The Harmless Error Doctrine

Until the mid-1960s it had been assumed that automatic reversal was required whenever a constitutional right was violated. The United States Supreme Court laid this assumption to rest in *Chapman v. California*,[167] when it held that some constitutional errors could be considered harmless

162. *Id.* at ___, 442 A.2d at 1323. *See also* State v. Dusablon, 453 A.2d 79 (Vt. 1982), and Spurlock v. Risley, 520 F.Supp. 135 (D. Mont. 1981). After Francis v. Franklin, however, qualification of the offending instructions may not be sufficient. The Court explicitly stated that the challenged jury instructions must be *explained* in subsequent instructions. 105 S.Ct. at 1976 n. 8. ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.* at 1975.).

163. 137 Ariz. 105, 669 P.2d 83 (1983).

164. *Id.* at ___, 669 P.2d at 87.

165. *Id.* at ___, 669 P.2d at 88.

166. *Id.* The court provided no reason for its conclusion that the inferred fact was rationally related to the proven fact. *See also* Hall v. State, 661 S.W.2d 101, 103-04 (Tex.Ct.App. 1983) (Teague, J., concurring).

167. 386 U.S. 18 (1967).

if the beneficiary of the error proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[168] As several commentators pointed out, however, the *Chapman* rule amounted to an almost automatic reversal rule, since courts could seldom reasonably discount the possibility that an error prejudicially influenced a conviction.[169]

The Court retreated somewhat from its uncompromising position in *Harrington v. California,*[170] decided just two years after *Chapman*. In *Harrington,* the defendant had been convicted of felony murder. At trial, the confessions of two non-testifying co-defendants had been erroneously admitted. The Court concluded that the confessions were merely cumulative evidence against the defendant since the defendant's guilt could be established by his presence at the scene of the crime. Because the Court found the untainted evidence of his presence to be "overwhelming," it concluded that the error was harmless.[171]

As one commentator has noted, even if *Harrington* does not represent a departure from the *Chapman* "harmless beyond a reasonable doubt rule," it is "an important indication that in some situations the Court is willing to resolve the harmless error question by looking at other evidence of guilt."[172] This willingness to look at other, untainted, evidence becomes especially significant in the context of presumptive jury instructions.

B. The Supreme Court Background to the Issue of Harmless Error and Presumptive Jury Instructions

Just last term, in *Rose v. Clark,* the United States Supreme Court decided that harmless error analysis could be applied to sustain a conviction for murder.[173] The trial court had instructed the jury that

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable . . . doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.[174]

Nevertheless, the Court held that harmless error analysis was appropriate

168. *Id.* at 24. The Court emphasized, however, that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23.

169. *See, e.g.,* Note, *supra* note 50, at 384. *See also* R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 43-44 (1970).

170. 395 U.S. 250 (1969).

171. *Id.* at 254.

172. Note, *supra* note 50, at 385.

173. 106 S.Ct. 3101, 3109 (1986).

174. *Id.* at 3104.

when "a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt."[175] The basis of the Court's holding was its perception of the purpose of the *Winship* principle as ensuring "that only the guilty are criminally punished."[176] By characterizing *Winship* as focusing on the accuracy of the fact-finding process, the Court harmonized *Winship* (and, by extension, *Sandstrom*) with analysis of the entire record to determine if giving an erroneous jury instruction was harmless. The Court then remanded to the Sixth Circuit Court of Appeals to determine whether the error committed was harmless beyond a reasonable doubt.[177]

The Court's decision in *Clark* apparently resolved the question left unanswered just two years earlier in *Connecticut v. Johnson*.[178] In that case, the Supreme Court was faced with the question whether a *Sandstrom* instruction could ever constitute harmless error.[179] At that time, the Court was unable to formulate a decision in which a majority of justices would join.[180] In his plurality opinion, Justice Blackmun found only 'rare situations" in which a reviewing court could be confident that giving a *Sandstrom* conclusive presumption instruction did not play any role in a jury's decision to convict the defendant.[181] The first situation in which this error might be harmless was when the instruction was given in connection with an offense for which the defendant was acquitted and the instruction did not relate to the offense for which he was convicted. Second, if the defendant conceded the element to be proved by the presumption (in this case, intent), the error in giving the instruction might also be harmless.[182] Because neither of these exceptional situations were present, Justice Blackmun concluded that the error in giving the *Sandstrom* instruction was not harmless.[183]

In concluding that *Sandstrom* presumptions could seldom, if ever, be harmless error, Justice Blackmun argued that these presumptions allowed the jury to convict without even examining the evidence presented on

175. *Id.* at 3107.

176. *Id.*

177. *Id.* at 3109.

178. 460 U.S. 73 (1983).

179. The instruction in Connecticut v. Johnson provided that "a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act." *Id.* at 78.

180. Justice Blackmun announced the judgment of the Court and delivered an opinion in which Justices Brennan, Marshall and White joined. Justice Stevens concurred in the judgment, although he would have dismissed the writ of certiorari. *Id.* at 88-90. Justice Powell wrote a dissenting opinion, in which Chief Justice Burger, and Justices O'Connor and Rehnquist joined. *Id.* at 90.

181. *Id.* at 87.

182. *Id.*

183. *Id.* at 87-88. The Connecticut Supreme Court had reversed the defendant's conviction, so its judgment was affirmed. *Id.* at 88.

one element of the crime charged.[184] He applied the *Chapman* standard: "If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict."[185] In contrast, Justice Powell, in dissent, emphasized that "[i]n applying *Chapman*'s test, a court must assess the effect of the error in light of the facts of each case."[186] He disagreed with the plurality's assertion that a *Sandstrom* presumption operated independently of the evidence in a case. Rather, he stated that "[t]he jury must look to the evidence initially to see if the basic facts have been proved before it can consider whether it is appropriate to apply the presumption."[187]

The dissent castigated the plurality for establishing "an automatic reversal rule whenever a *Sandstrom* instruction is given, regardless of the conclusiveness of the evidence of intent."[188] Furthermore, the dissent reformulated the harmless-error inquiry:

> In determining whether a *Sandstrom* error was harmless, the inquiry is not, as the plurality intimates, whether the presumption was unnecessary to the jury's verdict 'in the sense that the evidence was sufficient for a properly instructed jury to find that respondent acted with the requisite intent.' Instead, the inquiry is *whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.*[189]

After reviewing the evidence, the dissent concluded that a reviewing court might well say beyond a reasonable doubt that the jury found the presumption unnecessary in determining intent, but, since the Connecticut Supreme Court had not addressed the issue, the dissent would have remanded the case for consideration of whether the error was harmless beyond a reasonable doubt.[190]

Due to the lack of a majority, *Connecticut v. Johnson* did not resolve the question of the applicability of harmless error analysis to *Sandstrom*-type instructions. The issue remained unresolved in *Franklin*, as the Court explicitly deferred to the lower court's determination that the erroneous instruction was not harmless error.[191] Both the *Allen* and *Sandstrom* opin-

184. *Id.* Justice Blackmun unsuccessfully propounded the same argument in his dissenting opinion in *Rose v. Clark*. 106 S.Ct. 3101, 3115 (Blackmun, J., dissenting). In that opinion, Justice Blackmun was joined by Justices Brennan and Marshall.

185. 460 U.S. at 85-86.

186. *Id.* at 95 (citing Harrington v. California, 395 U.S. 250 (1969)).

187. *Id.* at 96. In *Clark*, Justice Powell advanced the same argument in his majority opinion. 106 S.Ct. 3101, 3107-08. Chief Justice Burger and Justices White, Rehnquist and O'Connor joined in that opinion.

188. 460 U.S. at 97 (Powell, J., dissenting).

189. *Id.* at 97 n. 5 (Powell, J., dissenting) (emphasis added) (citation omitted).

190. *Id.* at 101-02 (Powell, J., dissenting).

191. 105 S.Ct. at 1977.

ions, however, offered guidance (although frequently contradictory) on this question.

Sandstrom has been described as implicitly rejecting harmless error analysis.[192] This characterization of the opinion derives from the fact that "the pivotal concept of *Sandstrom* is that the *possibility* that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion."[193] The Court explicitly refused to consider the question of whether the error could be harmless, as the Montana Supreme Court had not considered the issue.[194] The Court acknowledged that the lower court could consider the issue on remand, explicitly acknowledging the possibility of the error's being deemed harmless.[195]

As has been suggested,[196] the *Allen* Court's analysis of permissive presumptions may have been an unarticulated application of the harmless error standard. The Court's insistence on determining the constitutionality of a permissive inference by reviewing the inference as applied to the facts of the case, suggests a harmless error "overwhelming evidence" standard like that articulated in *Harrington v. California*.[197] The *Allen* Court was careful, however, to limit this type of analysis to permissive inferences. The Court rejected the "overwhelming evidence" standard of review as applied to presumptions that shift the burden of production.[198] Nevertheless, both the *Allen* and *Sandstrom* opinions left considerable doubt as to the applicability of harmless error analysis to presumptive intent jury instructions. For this reason, it is difficult to reconcile *Rose v. Clark* with the Court's earlier opinions analyzing presumptive intent jury instructions.

C. *Application of* Rose v. Clark: *Does Harmless Error Analysis Weaken* Winship?

In *Rose v. Clark,* the Supreme Court did not consider whether the jury instructions given at trial were permissible under the *Sandstrom* or *Allen* standards. Instead, the Court assumed that the instructions were unconstitutional,[199] but found the error to be harmless.[200] The majority opinion reached this result by applying a two-step analysis. First, it established

192. *See* Note, *supra* note 2, at 540.

193. Schmolesky, *supra* note 24, at 272 (emphasis in original). *See also supra* text accompanying note 24.

194. 442 U.S. at 527.

195. *Id.*

196. *See supra* text accompanying note 151.

197. 395 U.S. at 254.

198. *Allen,* 442 U.S. at 159-60.

199. 106 S.Ct. 3101, 3105 n. 5 (1986).

200. *Id.* at 3109.

a rule of near-universal applicability of harmless error analysis.[201] In doing so, the Court endowed a verdict obtained at a trial where the defendant was represented by counsel and was tried by an impartial judge with a presumption of validity.[202] Second, the Court reconciled harmless error analysis with *Winship*'s mandate of proof beyond a reasonable doubt of every element of the charged crime. The Court did so by characterizing that mandate as designed to ensure that only the guilty are criminally punished.[203] The Court reasoned that "[w]hen the verdict of guilty reached in a case in which *Sandstrom* error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interest that the [*Winship*] rule serves."[204]

Although superficially appealing by virtue of its simplicity, the majority's approach to the applicability of harmless error analysis to presumptive intent jury instructions suffers from several critical flaws. First, as Justice Stevens pointed out in his separate opinion concurring in the judgment, harmless error analysis has historically been the exception, rather than the rule in examining constitutional errors.[205] Justice Stevens compared the *Clark* majority's broad statements about the almost universal applicability of harmless error analysis with the Court's earlier holding in *Chapman v. California:* " 'We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.' "[206] Justice Stevens characterized *Chapman* as having articulated a "rigorous standard for determining whether a presumptively prejudicial error could, in fact, be deemed harmless,"[207] and disagreed with the majority's establishment of a rule of presumptive applicability of harmless error analysis.

Justice Stevens' concern with the majority's characterization of the harmless error rule as broadly applicable is well-taken. As originally fashioned, the harmless error rule was a narrow exception to the rule of automatic reversal for presumptively prejudicial constitutional errors. The *Clark* majority effectively stood that rule on its head, and left only a few exceptions to the new rule of applicability of harmless error analysis to constitutional errors.[208] The obvious question after *Clark* is whether even

201. *Id.* at 3106. "We have emphasized, however, that while there are some errors to which Chapman does not apply, they are the exception and not the rule." *Id.*

202. *Id.*

203. *Id.* at 3107.

204. *Id.*

205. *Id.* at 3110-11 (Stevens, J., concurring in the judgment).

206. *Id.* at 3110 (quoting *Chapman v. California,* 386 U.S. 18, 22 (1967)).

207. *Id.* at 3111 (Stevens, J., concurring in the judgment).

208. These exceptions are the introduction of a coerced confession, complete denial of the right to counsel, and adjudication by a biased judge. *Id.* at 3106.

these few last bastions of immunity to harmless error analysis can withstand being subjected to harmless error inquiry in the long run. Furthermore, application of harmless error analysis to constitutional error reflects an implicit assessment of the lack of importance of that error, and, ultimately, of the constitutional right violated as well. The *Clark* majority implicitly characterized the right to counsel and to an impartial adjudicator as the "primary" constitutional rights at issue in a criminal trial; the many other constitutional rights implicated in errors subject to harmless error analysis only "ensure that those trials lead to fair and correct judgments."[209] By implication, then, the constitutional interest in fair and correct judgments is less important than other interests that are "basic to a fair trial."[210]

The problem with the *Clark* majority's implicit ranking of constitutional values by importance is aggravated by the majority's compression into one of the two constitutional values implicated in presumptive intent jury instructions. As discussed earlier,[211] these values are the due process right to a reliable and accurate fact-finding process, and the sixth amendment right to have a jury find that the prosecution had proved every element of the charged crime. The *Clark* Court characterized *Winship* and *Sandstrom* as concerned only with the reliability of the fact-finding process.[212] As Justice Blackmun's dissenting opinion accurately pointed out, however, the *Clark* majority focused entirely on the due process right and disregarded the sixth amendment right.[213]

In his dissenting opinion, Justice Blackmun equated the sixth amendment right to have a jury determine that the prosecution had met its burden of proving beyond a reasonable doubt every element of the charged crime with the class of constitutional errors recognized by the majority as rendering a trial fundamentally unfair.[214] The dissent argued that the latter class of errors, such as denial of the right to counsel and trial before a biased judge, "play central roles in the basic trial process,"[215] and that the jury is an equally "central entity" under the sixth and fourteenth amendments.[216] The dissent reasoned that the error in the instant case was "analytically indistinguishable" from the errors the majority had stated were not amenable to harmless error analysis,[217] because "[t]he erroneous instruction invites the jury to abdicate its constitutional responsibility to decide for itself whether the State has proved every element

209. *Id.* at 3107.
210. *Id.* (citing Chapman v. California, 386 U.S. 18, 23 (1967)).
211. See text accompanying note 39, *supra*.
212. 106 S.Ct. at 3107.
213. *Id.* at 3113 (Blackmun, J., dissenting).
214. *Id.* at 3114.
215. *Id.*
216. *Id.*
217. *Id.*

of the offense beyond a reasonable doubt."[218] The dissent thus rejected the majority's assertion that a *Sandstrom* error was not equivalent to a directed verdict for the State.

Although the *Clark* majority acknowledged that harmless error analysis would not apply if a court directed a verdict for the prosecution in a criminal jury trial,[219] it summarily rejected the dissent's contention that a *Sandstrom* error was equivalent to a directed verdict for the State.[220] The Court stated that "[w]hen a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt."[221] This reasoning does not, however, resolve the problem of a burden-shifting instruction on intent constituting, in effect, a directed verdict for the prosecution. Under *Winship*, the prosecution must prove beyond a reasonable doubt every element of the crime charged. If a jury is allowed to presume an element, intent, for example, from proof of defendant's commission of a killing, the court has effectively directed a verdict of first degree murder upon a finding by the jury that the prosecution has proved defendant guilty of second degree murder.[222] The mere fact that the jury found that the prosecution had proved beyond a reasonable doubt the facts necessary to convict the defendant of second degree murder does not legitimize this result.

The problem with informing the jury that it is permitted to presume, or infer, intent from the defendant's actions, stems directly from the fact that in many criminal cases, intent is the only issue in dispute. The *Clark* majority correctly pointed out that in many of those cases, the facts developed at trial conclusively establish intent, so that no rational jury could find that the defendant committed the act charged, but did not intend to cause the injury.[223] In those cases, as the Court also pointed out, the erroneous instruction is "simply superfluous,"[224] and should probably not have been requested. The real problem with these instructions occurs, however, when the evidence of intent at trial was *not* over-

218. *Id.* at 3115.

219. *Id.* at 3106.

220. *Id.* at 3107.

221. *Id.* at 3107-08. Justice Powell quoted from his own dissenting opinion in Connecticut v. Johnson, in which he stated " 'Because a presumption does not remove the issue from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue.' " *Id.* at 3107 n. 8 (quoting Connecticut v. Johnson, 460 U.S. at 95 n. 3 (Powell, J., dissenting)).

222. Indeed, in *Clark*, the defendant was charged with the first degree murders of two people who were together in a truck when they were shot to death. According to the dissenting opinion, the State used the same evidence to prove that Clark killed both people. 106 S.Ct. at 3115 (Blackmun, J., dissenting). The jury, however, convicted Clark of first degree murder of one of the victims, and second degree murder of the other. *Id.*

223. *Id.* at 3108.

224. *Id.*

whelming, as in the *Franklin* case, for example,[225] and the court instructs the jury that it may presume or infer intent if it finds that the prosecution has proved beyond a reasonable doubt that the defendant has committed the predicate acts. In these more difficult cases, the *Clark* majority's argument notwithstanding, the court may have impermissibly rendered a directed verdict against the defendant on the issue of intent.[226]

Furthermore, as a practical matter, the legitimization of the harmless error inquiry in this context obviates the necessity for a preliminary inquiry into the nature of the presumption (whether it shifts the burden of persuasion or production, or is merely an inference), and allows the reviewing court to assume that the instruction was unconstitutional if it is going to find the error to be harmless anyway. Thus, the reviewing court may immediately engage in a review of the entire record, looking only for evidence supporting a defendant's conviction, and then find any error that may have occurred in instructing the jury to have been harmless. Justice Stevens pointed out the practical dangers of automatic application of harmless error analysis in his opinion concurring in the judgment in *Clark:* "An automatic application of harmless error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever present and always powerful interest in obtaining a conviction in a particular case."[227]

Although it is premature to attempt to speculate about the effect that the *Clark* decision will have on the lower courts, a review of the six reported lower court decisions[228] analyzing presumptive intent jury instructions in light of *Rose v. Clark* is interesting and instructive. In *Myrick v. Maschner,*[229] the Tenth Circuit Court of Appeals examined an instruction that had shifted to the defendant the burden of proving intent.[230] The defendant had been convicted of premeditated and felony murder. The court acknowledged that the instruction contravened due process,[231] and

225. *See* text accompanying note 68, *supra.*

226. The widespread use of general verdict forms makes it impossible to tell, on review, whether the jury actually found that the prosecution had proved intent, or whether the jury merely presumed or inferred intent from their finding that the defendant committed the predicate acts.

227. 106 S.Ct. at 3112 (Stevens, J., concurring). *See also* authorities criticizing the impact of the Supreme Court's expansive harmless error jurisprudence collected in United States v. Lane, 106 S.Ct. 725, 732-33 nn. 13 and 14 (1986) (Stevens, J., dissenting).

228. Dix v. Kemp, 804 F.2d 618 (11th Cir. 1986); Merlo v. Bolden, 801 F.2d 252 (6th Cir. 1986); Thomas v. Kemp, 800 F.2d 1024 (11th Cir. 1986) (per curiam); Myrick v. Maschner, 799 F.2d 642 (10th Cir. 1986); Washington v. Scully, 640 F.Supp. 1226 (S.D.N.Y. 1986); Guizar v. Estelle, 640 F.Supp. 1146 (S.D. Cal. 1986).

229. 799 F.2d 642 (10th Cir. 1986).

230. The instruction provided: "There is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true." *Id.* at 644-45.

231. *Id.* at 645.

then applied harmless error analysis, as instructed in *Rose v. Clark*.[232] The defendant had argued that the evidence as to his intent was not clear, but the Court of Appeals found his argument unconvincing, in light of the fact that he was tried as an accessory, whose only requisite intent was that he had intentionally promoted or assisted in the commission of the crime.[233] After reviewing the record, the court found that the evidence of defendant's intent was clear beyond a reasonable doubt, and upheld the conviction, reasoning that the error in instructing the jury had been harmless.[234]

In three post-*Clark* cases, however, the reviewing courts have determined that *Sandstrom* errors were *not* harmless. In *Thomas v. Kemp*,[235] the Eleventh Circuit reconsidered an earlier decision holding that a *Sandstrom* instruction was not harmless error in light of *Rose v. Clark*.[236] The defendant had argued that the admittedly violent acts he had committed were insufficient to establish intent because he had been under the influence of drugs when he acted, and was not capable of forming the intent to do those acts.[237] After reviewing the evidence, the Eleventh Circuit found that the unconstitutional burden-shifting instruction could not be said, beyond a reasonable doubt, not to have affected the jury's verdict.[238] The court relied on the holding in *Sandstrom*, and reasoned that "the law of *Sandstrom* is now fixed in federal law, and a proper application of that law to this case prevents the court from denying relief for the constitutional error of the state court under the harmless-error standard of *Rose v.Clark*."[239]

Similarly, in *Merlo v. Bolden*,[240] the Sixth Circuit Court of Appeals considered whether a *Sandstrom* error was harmless when defendant had contested the element of intent, in light of *Rose v. Clark*. The court acknowledged that its earlier holding that a *Sandstrom* error could not be harmless when a defendant challenged the element of intent was no longer a correct statement of the law after *Clark*.[241] After reviewing the

232. "Consequently, the harmless error analysis that we now must undertake requires our viewing the entire record to determine whether the instruction which theoretically *could* have altered the verdict of the jury actually had such effect as a practical reality." *Id.* (emphasis in original) (citing *Clark*, 106 S.Ct. at 3108 n. 11).

233. 799 F.2d at 645-46.

234. *Id.* at 646. *See also* Guizar v. Estelle, 640 F.Supp. 1146 (S.D. Cal. 1986) (instruction containing mandatory presumption on intent harmless error in light of entire record); Washington v. Scully, 640 F. Supp. 1226 (S.D.N.Y. 1986).

235. 800 F.2d 1024 (11th Cir. 1986) (per curiam).

236. The court's earlier judgment, Thomas v. Kemp, 766 F.2d 452 (11th Cir. 1985), had been vacated and remanded by the United States Supreme Court for further consideration in light of Rose v. Clark, 106 S.Ct. 3325 (1986).

237. 800 F.2d at 1026.

238. *Id.*

239. *Id.*

240. 801 F.2d 252 (6th Cir. 1986).

241. *Id.* at 257.

record, however, the court found that the evidence was "in such a balanced state that we cannot say beyond a reasonable doubt that it was so dispositive of intent . . . that the jury would have found it unnecesary to rely on the presumption' created by the erroneous *Sandstrom* instruction."[242] The court refused, therefore, to find that the error was harmless.[243]

Although all of the lower court opinions after *Clark* carefully examined the evidence in determining whether the errors in jury instructions were harmless, it is not clear that *Clark* has instructed the reviewing courts to ask the correct questions. As Justice Blackmun warned in his dissenting opinion, "[t]he Court recognized 40 years ago that the question a reviewing court must ask 'is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards' required by the Constitution."[244] It remains to be seen whether the lower courts will find the Supreme Court's guidance in this area sufficient to enable them to find answers to this question.

CONCLUSION

The tension between the *Winship* requirement of proof beyond a reasonable doubt on all elements of a charged crime and the use of presumptions to ease the prosecution's burden of proof in criminal cases has not been resolved by the Supreme Court's opinions. The *Allen* Court's observation that "[i]nferences and presumptions are a staple of our adversary system of factfinding"[245] is still true, and unlikely to change without clearer guidance from the highest Court in the land.

Perhaps the real problem is the *Mullaney-Patterson* one of definition of the elements of a crime. If, instead of side-stepping the issue, the Supreme Court were to provide clear guidance as to what elements of a crime could not constitutionally be omitted from states' definitions of their crimes, the constitutionality of even permissive inferences might be more easily determined, and the need for harmless error review would be avoided. The judiciary would be warned against placing undue weight on certain aspects of the prosecution's case, for fear that presumptive intent instructions might place criminal convictions in constitutional jeopardy.

An obvious solution to the problem has been found by the many courts

242. *Id.* (quoting Connecticut v. Johnson, 460 U.S. at 97 n. 5 (Powell, J., dissenting)).

243. 801 F.2d at 257. *See also* Dix v. Kemp, 804 F.2d 618, 621-22 (11th Cir. 1987) (evidence of defendant's intent found to be not overwhelming in light of defense of insanity, so *Sandstrom* error not harmless).

244. 106 S.Ct. at 3115-16 (Blackmun, J., dissenting) (quoting Bollenbach v. United States, 326 U.S. 607, 614 (1946)).

245. *Allen*, 442 U.S. at 156.

that disallow instructions that permit the jury to presume or infer intent from a criminal defendant's actions.[246] Indeed, the "overwhelming evidence" harmless error analysis illuminates the very redundancy of presumptive intent jury instructions in some cases. If the evidence presented on intent is truly "overwhelming," it is surely unnecessary to provide the jury with the crutch of a presumption on intent. It is only when the evidence is scanty that such an instruction is necessary for conviction. It is precisely in this latter situation that the instruction is most troublesome and most likely to be constitutionally infirm.

The answer emphatically does not lie in formalistic omission or inclusion of words like "presume" or "infer." Rather, the judiciary must be informed of the dangers inherent in the use of presumptions and permissive inferences, and be provided guidelines for solving these problems. Until more concrete guidance is forthcoming from the Supreme Court, the basic tension between the use of presumptive jury instructions and the *Winship* principle of proof beyond a reasonable doubt is likely to remain.

246. *See* State v. Rainey, 298 Or. 459, ___, 693 P.2d 635, 640 (1985) ("Inferences when used against the defendant should be left to argument without any instruction."); United States v. Winter, 663 F.2d 1120, 1144 (1st Cir. 1981) ("we hold that this sort of instruction should not be used.").