NOTES

PRESUMPTIVE INTENT JURY INSTRUCTIONS AFTER SANDSTROM—Sandstrom v. Montana, 442 U.S. 510 (1979).

In *Sandstrom v. Montana,*[1] the United States Supreme Court held unconstitutional a jury instruction which raised a presumption on the element of intent[2] in the context of a first-degree murder conviction. The Court's analysis of this instruction centered on the *possibility* that a jury could interpret it in an unconstitutional manner. The Court's analysis implied that such erroneous instructions can never be harmless. This note will conclude that the *Sandstrom* decision sets strict limits upon the future use of presumptive intent instructions[3] and should have a

---

1. 442 U.S. 510 (1979).

2. The meaning of intent in the criminal law has been obscured by its use in phrases such as "general intent," "specific intent," and "presumed intent." W. LAFAVE & A. SCOTT, CRIMINAL LAW 195 (1972). Although the meaning of intent traditionally encompassed knowledge that the consequences of one's acts were likely to result, the modern view has distinguished knowledge from intent or purpose in some areas of criminal liability.

> It is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that result is practically certain to follow from his conduct, whatever his desires may be as to that result.

Id. at 196.

This modern view is reflected in the ALI MODEL PENAL CODE § 2.02 (a)-(b) (Prop. Official Draft 1962), which differentiates the culpability of a person who acts purposely, ("it is his conscious object . . . to cause a result") from the culpability of a person who acts knowingly ("he is aware that it is practically certain that his conduct will cause such a result"). The comments to the Code state that this distinction is useful where existing law has used the concepts of "general" or "specific" intent and where different degrees of an offense have been recognized, as in homicide. MODEL PENAL CODE § 2.02, Comment, at 124-25 (Tent. Draft No. 4, 1955). *See also* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 16, at 18 (2d ed. 1961); Cook, *Act, Intention, and Motive in the Criminal Law,* 26 YALE L.J. 645, 653-58 (1917); Perkins, *A Rationale of Mens Rea,* 52 HARV. L. REV. 905, 910-11 (1939).

Because intent is a state of mind, it can rarely, if ever, be proved by direct evidence. While witnesses may give direct evidence of what a defendant does or fails to do, they cannot give an eyewitness account of the defendant's state of mind. Some courts have thus instructed juries that they may presume or infer intent from the natural, probable, usual, ordinary, or necessary consequences of the defendant's acts. *See* E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.13 (3d ed. 1977) (the standard jury instruction on proof of intent). In the first-degree murder context, many courts have also given jury instructions which raised a presumption of intent from the use of a deadly weapon. *See* note 42 *infra.*

3. For want of a better term, this note refers to jury instructions which raise a presumption of the element of intent from the natural, probable or ordinary conse-

significant impact on past convictions in cases in which a presumptive intent instruction was given.

In December 1976, David Sandstrom was charged with "deliberate homicide"[4] in that he "purposely or knowingly" caused the death of Annie Jessen. At trial, Sandstrom's attorney contended that, although his client confessed to the slaying, he did not act "purposely or knowingly"[5] and was therefore not guilty of "deliberate homicide" but of a lesser crime. The trial court instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."[6] Sandstrom's objected that such an instruction shifted to the defendant the burden of proof on the mental state issue, in violation of his constitutional guarantee of due process of law.[7] The jury found Sandstrom guilty. He was sentenced to 100 years in prison. The Montana Supreme Court affirmed the conviction, holding that the challenged jury instruction was constitutionally valid in that it only required the defendant "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' . . . ."[8]

The United States Supreme Court reversed. The opinion of a unanimous Court stated: "[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."[9] The Court said the instruction could have been interpreted by the jury as a permissive inference,[10] as a mandatory presumption rebuttable by "some" evidence,[11] as a mandatory presumption rebuttable by persuasive evidence,[12] or as a conclusive

---

quences of a defendant's voluntary or deliberate acts as presumptive intent instructions.

4. MONT. REV. CODES ANN. § 94-5-102 (Crim. Code of 1973). The statute provides: "94-5-102. Deliberate homicide. (1) Except as provided in 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if: '(a) it is committed purposely or knowingly . . . .'"

5. Based on the testimony of two court-appointed mental health experts, the attorney argued that, due to a personality disorder aggravated by alcohol consumption, his client did not have the requisite mental state at the time of the incident. *Sandstrom*, 442 U.S. 512.

6. *Id.* at 513.

7. U.S. CONST. amend. V, XIV.

8. Sandstrom v. State, 580 P.2d 106, 109 (Mont. 1978), *rev'd sub nom.* Sandstrom v. Montana, 442 U.S. 510 (1979) (emphasis added).

9. *Sandstrom*, 442 U.S. at 514.

10. *See* text accompanying notes 49-62 *infra.*

11. *See* text accompanying notes 43-48 *infra.*

12. *See* text accompanying notes 34-42 *infra.*

presumption.[13]

The Court rejected Montana's contention that the presumption described a permissive inference, pointing out that the jurors were never told that they had a choice whether or not to infer intent from the evidence presented.[14] The Court also rejected Montana's contention that the presumption, at most, shifted to the defendant the burden of producing "some" evidence of the non-existence of intent.[15] Given the common definition of presume[16] and the lack of qualifying instructions explaining the legal effect of the presumption, the Court could not discount the possibility that the jury either interpreted the instruction as shifting to the defendant the burden of persuasion or as a conclusive presumption.[17] Since either of these more stringent interpretations would have relieved the state of its burden of proving beyond a reasonable doubt every fact constituting the crime,[18] the Court held the presumptive intent instruction unconstitutional.

Montana also contended that the jury may not have relied on the presumption because, where the mental state requirement for deliberate homicide embraced both "purpose" and "knowledge," the jury may have interpreted intent as relevant only to "purpose."[19] The jury may then have convicted Sandstrom solely because he acted with "knowledge." The Court rejected this argument because "we cannot be certain that this is what they *did*

---

13. *See* text accompanying notes 29-33 *infra*.

14. *Sandstrom*, 442 U.S. at 515.

15. *Id.*

16. "To suppose to be true without proof." WEBSTER'S NEW COLLEGIATE DICTIONARY 911 (1974) (cited in *Sandstrom*, 442 U.S. at 517).

17. Although the Court did say that the Montana Supreme Court was the final authority on the meaning of the presumption under Montana law, it rejected the state's contention that the Montana Supreme Court was the final authority as to the effect of the presumption on the jury. Here again the Court emphasized the importance of the interpretation a juror *could have* given the instruction. *Sandstrom*, 442 U.S. at 516-17.

18. In violation of *In re* Winship, 397 U.S. 358 (1979). *See* text accompanying notes 35-39 *infra*.

19. The Court's initial response to this contention pointed out that "intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness." *Sandstrom*, 442 U.S. at 525-26 (quoting United States v. United States Gypsum, 438 U.S. 422, 445 (1978)).

The Court concluded that, given this common understanding of intent, it could not be certain that a jury would interpret intent as relevant only to "purpose." The Court further concluded that even if a juror did interpret intent as relevant to purpose but not to knowledge, it still could have relied on the presumption. *See* text accompanying notes 20-21 *infra*. For a discussion of the mental state requirement in first-degree murder cases see note 2 *supra*.

do."[20] The Court stated:

> As the jury's verdict was a general one . . . we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction. And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside . . . ."[21]

By rejecting this argument, the Court again emphasized a reviewing court's inability to retrospectively examine a jury's decisional process.

In a concluding paragraph, the Court declined to resolve whether the use of the erroneous presumptive intent instruction was prejudicial or harmless since that issue had not been considered by the Montana Supreme Court.[22] The judgment of the Montana court was reversed and remanded for reconsideration in light of *Sandstrom*.[23]

This note will discuss the various interpretations that may be applied to presumptive intent jury instructions and the constitutional questions these interpretations raise. *Sandstrom* will be analyzed for its effect on the future use of these presumptive intent instructions. The note will also discuss *Sandstrom's* significance for past convictions in cases which have used presumptive intent jury instructions.

The note argues that *Sandstrom* conclusively established that presumptive intent instructions which could be interpreted as raising a conclusive or burden-of-persuasion-shifting presumption should no longer be used. In addition, the substantial constitutional problems inherent in other possible interpretations of such instructions provide good reasons for not using a presumptive intent instruction at all. The note finally concludes that, although the Court explicitly declined to resolve the harmless error issue; its analysis implicitly addressed that issue and suggested that a strict test be applied to erroneous presumption instructions. *Sandstrom* should thus have a significant effect both on future jury instruction practice and on past convictions in cases

---

20. *Sandstrom*, 442 U.S. at 526. In a footnote the Court explained that since a presumption provides assistance to the jury, making its fact-finding task easier, "there is no reason to believe the jury would have deliberately undertaken the more difficult task." *Id.* at 526 n.13.

21. *Id.* at 526 (quoting Leary v. United States, 395 U.S. 6, 31-32 (1969)).

22. *Id.* at 527.

23. On remand, the Montana Supreme Court concluded that the erroneous instruction was not harmless and ordered a retrial of the case. State v. Sandstrom, 603 P.2d 244, 245 (1979). The Montana court's reasoning is summarized at note 96 *infra*.

which have used presumptive intent instructions.

I. SANDSTROM'S SIGNIFICANCE FOR FUTURE JURY INSTRUCTION PRACTICE

Presumptions in criminal jury instructions assist the prosecution by permitting the jury to find certain facts which have not been shown by direct evidence.[24] In *County Court of Ulster County v. Allen,*[25] decided two weeks prior to *Sandstrom,* the Supreme Court stated that presumptions operate as evidentiary devices by which "the trier of fact [determines] the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts."[26] Because the term "presumption" may be interpreted in numerous ways, it has been called a "semanticist's nightmare."[27]

Presumptions generally are divided into four types: (1) conclusive presumptions that require the jury to find the presumed fact from the basic facts; (2) presumptions that shift to the defendant the burden of persuading the jury, by a preponderance of the evidence (or a higher standard), that the presumed fact does not exist; (3) presumptions that shift to the defendant the burden of producing some evidence tending to contradict the presumed fact; and (4) permissive inferences that merely allow the jury to find the presumed fact from evidence of the basic fact.[28]

This section of the note discusses these four kinds of presumptions and examines *Sandstrom's* significance for the future use of presumptive intent instructions which can be interpreted

---

24. A presumption may be created either by statute, see note 49 *infra,* or by common law, as in *Sandstrom. See* County Court of Ulster County v. Allen, 442 U.S. 140, 168 n.1 (1979) (Powell, J., dissenting).

25. 442 U.S. 140 (1979).

26. *Id.* at 156.

27. State v. Pendry, 227 S.E.2d 210, 221 (W. Va. 1975).

28. L. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 884 (1977). For other definitional schemes see Laughlin, *In Support of the Thayer Theory of Presumptions,* 52 MICH. L. REV. 195, 196-207 (1953); Soules, *Presumptions in Criminal Cases,* 20 BAYLOR L. REV. 277, 278-82 (1968). In *Allen* and *Sandstrom,* the Court most recently examined these types of presumptions. The *Allen* Court divided presumptions into two categories: permissive inferences and mandatory presumptions. *Allen,* 442 U.S. 140. It further subdivided mandatory presumptions into those that shift the burden of persuasion and those that shift to the defendant the burden of producing some evidence to rebut the presumption. *Id.* at 157-58 n.16.

Sandstrom discussed a third type of mandatory presumption, the conclusive or irrebuttable presumption. *Sandstrom,* 442 U.S. at 517.

For another discussion of mandatory presumptions see C. MCCORMICK, THE LAW OF EVIDENCE 804 (2d ed. 1972).

in each of these ways. Instructions which can be interpreted as conclusive or as shifting to the defendant the burden of persuasion are unconstitutional and should no longer be given. Instructions which can be interpreted either as shifting to the defendant the burden of production or as permissive inferences were not critically analyzed by the *Sandstrom* Court. Given the constitutional problems inherent in even these interpretations, however, presumptive intent instructions should not be given at all.

A. Jury Instructions on Conclusive or Irrebuttable Presumptions

The jury in *Sandstrom* could have believed that the instruction required it to find an intent to kill regardless of how much evidence was introduced to establish the nonexistence of that intent. Under this interpretation, the presumption would operate as a conclusive presumption. A conclusive presumption, although usually considered a form of mandatory presumption, is not technically a presumption at all, but rather "an irrebuttable direction by the court"[29] to find the ultimate fact upon proof of the basic fact.

Instructions raising conclusive presumptions have been held unconstitutional because they conflict with the presumption of innocence and prevent the jury from considering an element of the offense. In *Morissette v. United States,*[30] the defendant was charged with theft of government property after taking abandoned bomb casings from a bombing range. Although the defendant denied any intent to steal, the trial judge ruled that intent "is presumed by his own act."[31] *Morissette* held that because this presumption could not be rebutted, intent was effectively eliminated as an element of the offense. In addition, the Court held that the presumption "conflict[ed] with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime."[32] Given this effect of irrebuttable presumptions, the *Sandstrom* Court held that the possibility that the instruction could have been interpreted as raising a conclusive presumption deprived the defendant of his constitutional right to be convicted only upon proof beyond a reasonable doubt of every element necessary to consti-

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

30. 342 U.S. 246 (1952).

31. *Id.* at 249.

32. *Id.* at 275. *See also* United States v. United States Gypsum Co., 438 U.S. 422 (1978).

tute the crime charged.[33] Given *Sandstrom's* clear warning, it is unlikely that an instruction that could be interpreted as raising a conclusive presumption as to an element of the offense will withstand appellate review.

B. Jury Instructions on Presumptions That Shift the Burden of Persuasion

The jury in *Sandstrom* could have believed that the instruction required it to find an intent to kill unless persuaded by the defendant that he lacked intent to kill.[34] Under this interpretation, the presumption would operate as a rebuttable presumption which shifts to the defendant the burden of persuasion.

The *Sandstrom* Court based its constitutional analysis of presumptions which shift the burden of persuasion on the line of cases exemplified hy *In re Winship.*[35] In *Winship,* the Court held 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."[36]

In *Mullaney v. Wilbur,*[37] the Supreme Court discussed the significance of *Winship* when applied in a mandatory rebuttable presumption context. In *Mullaney,* the defendant challenged a Maine homicide statute which required a person charged with murder to prove by a preponderance of the evidence that he acted in the heat of passion in order to reduce the homicide to manslaughter. The jury was instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be implied unless it was rebutted

---

33. *Sandstrom,* 442 U.S. at 523. The Seventh Circuit Court of Appeals in Hughes v. Matthews, 576 F.2d 1250 (7th Cir. 1978), has recognized that a rebuttable presumption may, in some contexts, operate as a conclusive presumption. In *Hughes,* the jury was given Wisconsin's first-degree murder instruction: "When there are no circumstances to rebut or prevent the presumption, the law presumes that a reasonable person intends all the natural, probable, and usual consequences of his deliberate acts." WIS. J.I. CRIM. 1100, *First Degree Murder* (1975). At trial, the defendant was not allowed to present psychiatric testimony to show lack of capacity to form intent. The court of appeals held that this exclusion of evidence, when combined with the presumptive intent instruction calling for rebutting evidence, yielded a conclusive presumption and was hence constitutionally infirm.

34. Since the burden of persuasion standard is not clarified in this context a jury could, in its confusion, apply either the "more likely than not" standard or even the strict "beyond a reasonable doubt" standard.

35. 397 U.S. 358 (1970).

36. *Id.* at 364 (emphasis added).

37. 421 U.S. 684 (1975).

by the defendant's proof that he acted in the heat of passion.[38] The Court held that this presumption of malice violated the due process requirement of *Winship* by relieving the state of its burden of proof on an essential element of the crime.[39] In *Patterson v. New York,*[40] the Court summarized *Mullaney* as requiring that "a State must prove every ingredient of an offense beyond a reasonable doubt and . . . it may not shift the burden of proof to the defendant . . . ."[41] by means of a presumption.

Since the jury instruction in *Sandstrom* could have been interpreted as shifting to the defendant the burden of persuasion on the crucial element of intent, the Court held the instruction unconstitutional under *Mullaney.* As in the case of instructions raising conclusive presumptions, instructions which can be interpreted as shifting to the defendant the burden of persuasion should no longer be used in view of *Sandstrom's* statement that they are constitutionally infirm.[42]

C. *Jury Instructions On Presumptions that Shift the Burden of Production*

The jury in *Sandstrom* could have believed that the instruction required it to find an intent to kill unless the defendant introduced "some" evidence tending to contradict intent to kill. Under this interpretation, the presumption would operate as a rebuttable presumption which shifts to the defendant the burden of production.

---

38. *Id.* at 686.

39. *Id.* at 703-04.

40. 432 U.S. 197 (1977). *Patterson* severely limited what were perceived as the very broad implications of *Mullaney* for affirmative defenses. In *Patterson* the Court upheld a New York statute which defined second-degree murder as the intentional killing of another and which provided tbat this crime could be reduced to manslaughter by the defendant's proof, by a preponderance of the evidence, that he acted under extreme emotional disturbance. *Id.* at 206.

41. *Id.* at 215.

42. Although *Sandstrom* addressed "presumed intent" in the specific context of the "natural and probable consequences" charge, the analysis based on the possibility of unconstitutional interpretations may also be applied to instructions which permit the jury to presume intent from the use of a dangerous or deadly weapon. *See, e.g.,* Green v. United States, 405 F.2d 1368, 1369 (1968); State v. Pendry, 227 S.E.2d 210, 223 (W. Va. 1975). *See generally* Oberer, *The Deadly Weapon Doctrine—Common Law Origin,* 75 HARV. L. REV. 1565 (1962).

In addition, the "possibility of misinterpretation" analysis may be applied to instructions on presumed intent that have been given at trials for crimes other than first-degree murder. *See, e.g.,* Lofton v. State, 83 Wis. 2d 472, 491 n.1, 266 N.W.2d 576, 584 n.1 (1978) (Abrahamson, J., concurring).

Finally, the analysis may also be applied to instructions which raise presumptions other than the presumption of intent. *See, e.g., Pendry,* 227 S.E. 2d at 224.

The *Sandstrom* Court did not decide the constitutionality of presumptions interpreted in this manner. Since the presumption instruction given in *Sandstrom* could have been interpreted as shifting the entire burden of proof or as conclusive, and since the mere possibility of an unconstitutional interpretation rendered the entire instruction unconstitutional, the Court found it unnecessary to examine closely the issues raised by a shift in the burden of production.[43]

Although the *Sandstrom* Court did not resolve the issue, a presumption which places a production burden on the defendant raises significant constitutional questions. If a defendant fails to introduce *some* evidence in rebuttal of the presumed fact, the jury could conclude that it must find against the defendant as to the presumed fact. This consequence 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, since the jury's role in weighing the evidence on an element would be eliminated and since the State would thereby be freed from its constitutionally mandated burden of proof.[44] The *Sandstrom* Court recognized that "such a consequence is not possible upon a defendant's failure [to produce evidence of a lack of intent], however, as verdicts may not be directed against defendants in criminal cases."[45] To avoid this result, a court would have to frame the presumption as a permissive inference, the only remaining alternative way of phrasing the natural and probable consequences instruction.[46] If, on the other hand, the defendant does produce some evidence to rebut the presumed fact, an instruction on the presumption would no longer serve any purpose. Once some evidence has been introduced, the presumption is no longer applied.[47] A presumption instruction under these circumstances should not be given since it unnecessarily lengthens the

---

43. The *Allen* Court, while similarly avoiding a close scrutiny of this issue, indicated that, to the extent that such a presumption imposes a very low burden of production, "[its] impact may be no greater than that of a permissive inference and it may be proper to analyze it as such." *Allen*, 442 U.S. at 158 n.16. *See also Mullaney*, 421 U.S. at 703 n.31.

44. *See* McCORMICK, *supra* note 28, at 831. *See also* FED. R. EVID. 303, Advisory Committee's Note; Soules, *supra* note 28, at 283.

45. *Sandstrom*, 442 U.S. at 516 n.5 (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977)); Brotherhood of Carpenters v. United States, 330 U.S. 395, 408 (1947); Mims v. United States, 375 F.2d 135, 148 (5th Cir. 1967). *See also* McCORMICK, *supra* note 28, at 804.

46. It would then be confronted with the constitutional problems inherent in permissive inferences. These are discussed in text accompanying notes 52-59 *infra*.

47. *See generally* McCORMICK, *supra* note 28, at 821, 824-26.

total number of jury instructions and may confuse the jurors. A presumption instruction that shifts the burden of production would serve no purpose after the defendant produces some evidence and the instruction should be framed as a permissive inference if the defendant fails to produce some evidence.[48]

D. Jury Instructions on Permissive Inferences

The jury in *Sandstrom* could have believed that it was merely allowed, but not required, to infer an intent to kill from proof of the defendant's acts and the ordinary consequences of those acts. Under this interpretation, the presumption would operate as a permissive inference.[49]

The Supreme Court has reviewed the use of permissive inferences in the light of due process protections because they may enable a case to go to the jury and to result in a conviction which, in the absence of the presumption, could not have occurred.[50] In assessing the constitutional validity of these devices, the Court has applied a "rational connection" test: "a statutory presumption can not be sustained if there be no rational connection between the fact proved and ultimate fact presumed, if the inference . . . is arbitrary because of lack of connection between the two in common experience."[51] Since this test measures the probative sufficiency of "basic" facts, and not merely their relevancy, the Court has required that presumed facts "more likely

---

48. Because *Patterson* held it appropriate to place on the defendant the hurden of persuasion to establish an affirmative defense, see note 40 *supra*, it is also appropriate to place the burden of production on a defendant who claims an affirmative defense and most jurisdictions have in fact done so. LAFAVE & SCOTT, *supra* note 2, at 47. *See, e.g.*, State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960) (self-defense). It is also appropriate to place the burden of production on a defendant who claims a defense such as intoxication or mental illness, which negates the existence of the mental state element. *Id. See* note 62 *supra* for a discussion of the special problem posed by this kind of defense for the use of presumptive intent instructions.

49. *See, e.g., Allen*, 442 U.S. at 157; Barnes v. United States, 412 U.S. 837, 840 n.3 (1973).

50. Most of these challenged instructions raised statutory presumptions, *see, e.g., Allen*, 442 U.S. 140 (presumptions of illegal possession of a firearm from its presence in automobile); Turner v. United States, 396 U.S. 398 (1970) and Leary v. United States, 395 U.S. 6 (1969) (presumption of knowledge that a drug was illegally imported from possession of that drug); United States v. Romano, 382 U.S. 136 (1965) and United States v. Gainey, 380 U.S. 63 (1965) (presumption of possession of illegal still and presumption of carrying on distilling business from presence at the site of a still); Tot v. United States, 319 U.S. 463 (1943) (presumption of receipt of firearm in violation of Federal Firearms Act from possession of firearm by person convicted of violent crime). For a challenge to a common-law presumption, see Barnes v. United States, 412 U.S. 837 (1973) (presumption of knowledge necessary for conviction from unexplained possession of recently stolen goods).

51. *Tot*, 319 U.S. at 467-68.

than not" flow from "basic" or proved facts.[52]

The *Sandstrom* decision did not apply a "permissive inference" analysis to the presumption instruction because the jury was not told that they could choose whether or not to apply the presumption. They were only told that "the law presumes" intent. The probability that the jury interpreted this phrase as indicating a mandatory presumption rendered any substantive analysis of the presumption under the "rational connection" test unnecessary.[53]

Although *Sandstrom* did not resolve whether or not presumptive intent instructions which are framed as permissive inferences are constitutional, such instructions are subject both to the constitutional problems inherent in all permissive inferences and to a special problem raised by the presumption of a narrowly defined mental state from a defendant's acts and the natural and probable consequences of those acts.

All jury instructions based upon permissive inferences raise two substantial constitutional issues. A permissive inference may impair the sixth amendment right to a jury trial by predetermining what "basic" facts constitute evidence sufficient to prove the "ultimate" facts which establish an element of the crime charged.[54] For example, 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. It has also been suggested that a permissive inference may impair a defendant's fifth amendment right to remain silent by forcing him to rebut the presumed facts.[55] For example, when a jury can infer intent to kill by proof of the ordinary consequences of voluntary acts, the practical effect may be to compel the defendant to

52. *See, e.g., Leary*, 395 U.S. at 36; *Turner*, 396 U.S. at 416. Although *Leary*, *Turner*, and *Barnes* had even suggested that a "beyond a reasonable doubt" standard might be required in criminal cases, the Court's decision in *Allen* made it clear that, where a presumption is not the sole basis for a finding of guilt, it need only satisfy the "more likely than not" test. *Allen*, 442 U.S. at 166-67.

53. In spite of the Court's silence as to the validity of a "natural and probable consequences" instruction phrased as a permissive inference, two post-*Sandstrom* decisions by state courts have cited *Sandstrom* in support of the validity of such inferences. *See* Jacks v. State, 394 N.E.2d 166, 175-76 (1979); State v. Rinehart, 283 N.W.2d 319, 322-23 (1979). *Rinehart's* application of the "rational connection" test to the "natural and probable consequences" inference is discussed in note 61 *infra*.

54. *Turner*, 396 U.S. at 431-32 (Black, J., dissenting); *Gainey*, 380 U.S. at 77-87 (Black, J., dissenting). *See also* McCORMICK, *supra* note 28, at 814; Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 351-52 (1970).

55. *Turner*, 396 U.S. at 432-33 (Black, J., dissenting); *Gainey*, 380 U.S. at 87-88 (Black, J., dissenting). *See also* McCORMICK, *supra* note 28, at 814.

come forward and testify even though doing so may jeopardize his chances of acquittal. This problem is particularly acute where no other witnesses or other forms of evidence are available to show lack of intent. The *Sandstrom* Court's silence with regard to these questions does not place permissive inferences relating to the finding of intent from the natural and probable consequences of an act on a firmer constitutional foundation. To the contrary, unless satisfying answers to these substantial issues can be articulated, courts should question the propriety of giving instructions which raise permissive inferences.

The propriety of jury instructions on permissive inferences is particularly suspect where "specific intent" or purpose is the element to be inferred. Although research has uncovered no pre-*Sandstrom* decision in which a court explicitly applied the "rational connection" test to determine whether "specific intent" or mental purpose is "more likely than not" connected to the natural consequences of one's voluntary acts,[56] many courts have indicated serious doubts as to the validity of permitting the jury to make this inference without regard to all the circumstances which may indicate the presence or absence of intent.[57] *Morissette v. United States,*[58] which the *Sandstrom* Court relied on in its determination that *conclusive* presumptions are unconstitutional, is probably the Supreme Court's clearest statement of the problems raised by *permissive* presumptions in the "specific intent" context. The Court stated:

> 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. 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.[59]

In *Morissette,* although the lower court stated that the intent to steal was presumed from the voluntary act of taking certain property, the Court concluded that this isolated fact was

---

56. Research has uncovered only one post-*Sandstrom* decision applying the "rational connection" test to the "natural and prohable consequences" presumption. *See* note 61 *infra.*

57. *See, e.g.,* United States v. Bertolotti, 529 F.2d 149, 159 (2d Cir. 1975); United States v. Cangiano, 491 F.2d 906, 910 (2d Cir. 1974); United States v. Woodring, 464 F.2d 1248, 1251 (10th Cir. 1972). These courts' reasons for doubting the validity of the inference are summarized in note 66 *infra.*

58. 342 U.S. 246 (1952).

59. *Id.* at 275 (emphasis added).

not an adequate basis on which the jury could find the criminal intent to steal. The Court said, "Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances."[60]

The "natural and probable consequences" charge, even when framed as a permissive presumption, allows the jury to find a narrowly defined mental state, the purpose to kill, from the isolated fact of the defendant's voluntary act and its natural consequences. This instruction differs qualitatively from other presumption instructions which permit inferences that have been approved under the *Tot* "rational connection" test. Because specific intent or purpose is subjective, it can only be demonstrated by the circumstances surrounding the act. It cannot be demonstrated by the act itself. For example, where A aims and then fires a gun at B, and where B dies as a result, A might not have intended the death of B if he was not aware that the gun was loaded. The intent to kill could only be inferred by considering all of the circumstances surrounding the incident.[61]

Since the natural and probable consequences charge may undermine the jury's responsibility to weigh the defendant's testimony and all of the surrounding circumstances, and since *Morissette* concluded that no substantial connection exists between the isolated fact of one's act and the "specific intent" mental state, presumptive intent instructions framed as permissive inferences should no longer be given.[62]

---

60. *Id.* at 276. *See also* Bloch v. United States, 221 F.2d 786, 788-89 (9th Cir. 1955); Berkovitz v. United States, 213 F.2d 468, 476 (5th Cir. (1954); Wardlaw v. United States, 203 F.2d 884, 887 (5th Cir. 1953). Although these cases involved instructions which could have been interpreted in ways other than as permissive inferences, the courts' concern is with the validity of permitting the jury to find "specific intent" from the natural and probable consequences of a voluntary act. This concern is equally important in the permissive inference context.

61. In State v. Rinehart, 283 N.W.2d 319 (Iowa 1979), the Iowa Supreme Court applied *Tot's* "rational connection" test to a "natural and probable consequences" presumption phrased as a permissive inference. The court merely asserted its conclusion, stating that "the inferences are certainly supported by common sense and experience." *Id.* at 323. The court gave no reasons supporting its conclusion and offered no rebuttal of the concerns raised by *Morrissette* in this context.

62. Another issue raised by the "natural and probable consequences" instruction occurs when a defendant claims not merely that he had no intent to kill, but that he had no intent to kill because of mistake, intoxication, mental illness or some other defense which supports an inference of the non-existence of the intent element. *See generally* LAFAVE & SCOTT, *supra* note 2, at 44-51. Although a defendant generally has only a burden of producing evidence in support of these defenses, courts may be reluctant to instruct the jury on these defenses unless the defendant has produced evidence which satisfies a high standard of proof. The potential for unfairness in this situation is magnified by

E. Toward a Presumption-Free Jury Determination of Intent

The *Sandstrom* decision should have a very significant impact on future jury instruction practice. If a presumptive intent instruction is used at all, it must be given in a way which excludes the possibility that the jury could interpret the presumption as conclusive or as shifting the burden of persuasion. A trend in this direction already has started in many jurisdictions prior to *Sandstrom*.[63] Both lower federal courts and state courts have identified errors in the use of some form of the word "presumption";[64] in the use of the "natural and probable consequences" charge where "specific intent" or purpose[65] is an element of the offense;[66] and in the use of language, in one form or another, which permits the inference of intent "unless the contrary appears from the evidence."[67]

---

the use of the "natural and probable consequences" instruction, which aids the prosecution by permitting the jury to find intent without regard to surrounding circumstances such as evidence of intoxication or mistake. This problem is an additional reason why a presumptive intent instruction, even if framed as a permissive inference, should not be used.

63. *See, e.g.*, United States v. Reeves, 594 F.2d 536 (6th Cir. 1979); United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977); United States v. Robinson, 545 F.2d 301 (2d Cir. 1976); People v. Wright, 78 Mich. App. 246, 259 N.W.2d 443 (1977); State v. Anderson, 33 Or. App. 605, 575 P.2d 677 (1978); Menard v. State, 578 P.2d 966 (Alas. 1978); State v. O'Connell, 256 S.E.2d 429 (1979). *But see* Genova v. State, 91 Wis. 2d 595, 283 N.W.2d 483 (Ct. App. 1979).

64. The standard reference work for federal jury instructions says that the propriety of giving any instruction in terms of a presumption is "in severe doubt" and is "an invitation to reversal." E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS 403 (3d ed. 1977). An instruction that "the law presumes," rather than that "the jury may draw the inference" that a person intends the natural and probable consequences of his acts, has been called clearly erroneous. *Id.* at 405. Some courts have even suggested that instructions should speak in terms of "inferences" and should not mention "presumptions" at all. *See, e.g.*, United States v. Lake, 482 F.2d 146 (9th Cir. 1973); United States v. Marshall, 431 F.2d 944, 945 (5th Cir. 1970). In addition, the Federal Rules of Evidence eliminate all references to "presumptions" in criminal cases.

65. *See* note 2 *supra* for a discussion of this mental state element.

66. This instruction is objectionable because a jury may mistakenly believe they may infer "specific" knowledge or intent if the defendant merely did an act, without regard to the total circumstances surrounding that act. Cohen v. United States, 378 F.2d 751, 755 (9th Cir. 1967). The jury may also believe that the doing of the act shifts to the defendant the burden of proving knowledge or intent, or that the question is whether a reasonable person similarly situated would have had the requisite knowledge or intent rather than whether the defendant had it. *Id. See also* United States v. Barash, 365 F.2d 395, 402-03 (2d Cir. 1966).

67. Many courts have concluded that this and similar phrases constitute error since they may cause the jury to believe that the defendant bears the burden of proving, by contrary evidence, the lack of intent. Some courts have held that this rebuttal language when used in conjunction with the natural and probable consequences charge, increases the error by magnifying the burden-shifting characteristics of the charge. United States v. Robinson, 545 F.2d 301, 306 (2d Cir. 1976).

Sandstrom, however, should not be read as approving presumptive intent instructions which shift only the burden of production or which are framed as permissive inferences. The Court did not address these issues since the instruction could have been interpreted as raising either a conclusive or a burden-of-persuasion-shifting presumption. Since both permissive inferences and burden-of-production-shifting presumptions involve substantial constitutional questions, courts may decide that these instructions should not be used at all.

If trial courts discontinue the use of presumptive intent instructions, prosecutors should be quite capable of explaining to the jury, in their final arguments, the problems of proving the mental state element by the use of circumstantial evidence. However, because a jury may mistakenly believe that circumstantial evidence can never establish intent beyond a reasonable doubt, some courts may desire to give some form of instruction on the intent element. One possible alternative to the "natural and probable consequences" jury instruction on intent is to tell the jury that intent must usually be proved by circumstantial evidence, and that they may infer intent from such evidence but should not do so unless convinced beyond a reasonable doubt, on the basis of all the evidence, that the defendant had such an intent.[68] This instruction avoids the constitutional difficulties

---

This instruction has become known as the "*Mann* instruction," after Mann v. United States, 319 F.2d 404 (5th Cir. 1963), which first reviewed this rebuttal language. Its history and evolution are discussed at length in United States v. Chiantese, 560 F.2d 1244, 1249-55 (5th Cir. 1977) (en banc).

Mann language can take several forms, all of which are suspect insofar as the jury might believe that the defendant must prove a lack of intent. In Wisconsin, the criminal instructions on intent employ a form of *Mann* language: "When there are no circumstances to prevent or rebut the presumption . . . ." WIS. J.I. CRIM. 1100, *First Degree Murder* (1975). Under this instruction, a jury would not know what kind of circumstances could rebut the presumption and might believe that only circumstances that persuasively rebutted intent would be sufficient.

A post-*Sandstrom* Wisconsin Supreme Court case, Muller v. State, No. 77-204-CR (Wis. Sup. Ct. filed March 4, 1980), held that *Sandstrom* does not render this instruction unconsititutional. The majority opinion concluded that the rebuttal language of Wisconsin's instruction "clearly tells the jury that the presumption may be rebutted or prevented by any evidence . . . . Since the instruction specifically states: 'When there are *no* circumstances . . . ,' no reasonable juror could interpret it as shifting the burden of persuasion to the defendant." *Id.* at 19. A well-reasoned dissent pointed out, however, that prior Wisconsin cases had already recognized the burden-of-persuasion-shifting potential of this instruction. The dissent thought that the rebuttal language not only failed to inform the jury that any amount of evidence at all would suffice as rebuttal but also may have rendered the instruction more offensive by expressly shifting to the defendant the burden of persuasion. *Id.* at 5, 7 (Abrahamson, J., dissenting).

68. In Wisconsin, the Criminal Jury Instruction Committee of the Wisconsin Board of Criminal Court Judges has realized the burden shifting potential of the "natural and probable consequences" charge such as that used in WIS. J.I. CRIM. 1100, *First Degree*

raised by permissive inferences since it permits the inference of intent only upon the jury's full consideration of *all* the circumstances of the case. The sixth amendment issue is avoided because the instruction does not predetermine which "basic" facts constitute evidence sufficient to prove the "ultimate" facts. The fifth amendment issue is avoided because, although the defendant may still feel compelled to testify as to his lack of intent, the degree of compulsion has not been increased by an instruction favoring the prosecution. Unlike the presumptive intent instruction, this instruction does not favor the prosecution by simplifying the jury's determination of intent.[69] Given this alternative, and given the substantial constitutional problems inherent in all forms of presumptions, courts should not be reluctant to forego the future use of presumptive intent jury instructions.

II. Harmless Error in the Context of Presumptive Intent Instructions

Sandstrom's significance for past convictions in cases in which a presumptive intent instruction was given may be limited by a variety of collateral issues inherent in every discovery of

---

Murder (1975). *See* note 33 *supra*. In 1977, the Committee recommended that the instruction be changed so as to alleviate this burden-shifting problem. The revised instruction excludes all reference to an inference of intent from "natural and probable consequences" and thus avoids the constitutional problems inherent in permissive inferences. The proposed instruction states:

> Intent to ___ must be found as a fact before you can find the defendant guilty of ___. You cannot look into a person's mind to find out his/her intent. You may determine sucb intent directly or indirectly from all the facts in evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate his/her state of mind. You may find intent to ___ from such statements or conduct. You are the sole judges of the facts and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to ___.

Lofton v. State, 83 Wis. 2d 472, 492 n.3, 266 N.W.2d 576, 585 n.3 (1978) (quoting the 1977 proposed revision of Wisconsin criminal jury instructions relating to proof of intent).

69. While this instruction is substantially neutral inasmuch as the "natural and probable consequences" language is no longer available to assist the jury's fact-finding function, its use does not resolve the issue presented by situations in which the trial court is reluctant to instruct the jury on defenses which negative the existence of an element of the crime. *See* note 62 *supra*. For example, where a defendant has produced evidence of intoxication, a court's refusal to give an instruction on the intoxication defense may indicate to the jury that the evidence of intoxication has no significant bearing on the intent issue. The refusal to instruct on such a defense seems to confiict with the instruction that requires the jury to infer intent from *all* the circumstances surrounding the defendant's act. The problems associated with "proof of intent" instructions are thus not likely to be solved by the mere abrogation of the "natural and probable consequences" charge.

constitutional error.[70] This section of the note focuses on the special relationship of one of these issues, harmless error, to *Sandstrom's* analysis of presumptive intent instructions. After describing the federal harmless-constitutional-error doctrine, the note discusses the harmless error issue in the presumptive intent instruction context and the questions raised by *Sandstrom's* analysis of that issue. Although various harmless error standards might be applied to presumptive intent instructions, the note will show that *Sandstrom* probably means, and should mean, that errors in this context can never be harmless.

---

70. These issues include: whether *Sandstrom* creates a new constitutional standard and thus creates an issue of retroactive application; whether the failure to object to the instruction at trial constitutes a waiver of the right to raise the issue on appeal; whether the error can ever be dominated harmless; and, if the error cannot be harmless, whether it can be "cured" by other instructions. The special relationship between harmless error doctrine and *Sandstrom's* analysis of presumption instructions is discussed in text accompanying notes 90-101 *infra*. The relation of the other collateral issues to *Sandstrom* is summarized below.

a. Retroactivity: Since *Sandstrom* is essentially a reiteration of Mullaney v. Wilbur in the jury instruction context it should be retroactive under Hankerson v. North Carolina, 432 U.S. 233 (1972) (holding *Mullaney* retroactive). Even if *Sandstrom* is viewed as a new constitutional rule insofar as it is a new application of the *Mullaney* rule, the *Hankerson* reasoning is still applicable: where the major purpose of a constitutional rule is to protect the fact-finding process, neither good-faith reliance by prosecuting authorities on prior constitutional law, nor severe impact on the administration of justice can prevent a retroactive application. *See* Ivan V. v. City of New York, 407 U.S. 203, 204 (1972). *See generally* Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965); Rossum, *New Rights and Old Wrongs: The Supreme Court and the Problem of Retroactivity*, 23 EMORY L.J. 381 (1974).

b. Waiver: The waiver issue was not addressed in *Sandstrom* because defense counsel had objected to the instruction at trial on *Mullaney* grounds. *Sandstrom*, 442 U.S. at 513. The resolution of this issue depends largely on the law of a particular state. In jurisdictions where an objection would have been futile under the law at that time, it is unlikely that the error, which is of constitutional dimension and which directly affects the fact-finding process, could be waived. *See, e.g.*, Jones v. Warden, 241 S.E.2d 914, 917 (W. Va. 1978).

c. Cure: The only collateral issue explicitly addressed by *Sandstrom* is whether other jury instructions could cure the erroneous intent instruction. The Court said the potential for misinterpretation of the instructions was not removed by general instructions on the presumption of innocence and on the State's burden of proof since these instructions are "not rhetorically inconsistent with a . . . burden shifting presumption. The jury could have interpreted . . . [the instruction] as indicating that the presumption was a means by whicb proof beyond a reasonable doubt as to intent could be satisfied." *Sandstrom*, 442 U.S. at 519 n.7. The Court did not decide whether curative instructions given in the immediate context of the presumption instruction may have cured the error. *See, e.g.*, United States v. Jenkins, 442 F.2d 429 (5th Cir. 1971); United States v. Restaino, 405 F.2d 628 (3d Cir. 1968). *See generally* R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 78-80 (1970).

A. Federal Harmless Error Doctrine

Errors during a trial may result from violations of constitutional rights or from violations of state or federal evidentiary rules of nonconstitutional dimension.[71] Although many appellate courts had, until the last few decades, regularly reversed decisions for any trivial error,[72] these courts have increasingly been willing to consider whether many kinds of trial errors were harmless.

In *Fahy v. Connecticut*,[73] the Supreme Court first indicated a willingness to consider as harmless some violations of constitutional rights.[74] Since the Court found that, in that particular case, the erroneous admission of illegally obtained evidence[75] was clearly prejudicial, the issue of whether such error could be harmless was not reached. The Court did, however, set forth its harmless error test as "whether there is a *reasonable possibility* that the evidence complained of might have contributed to the conviction."[76]

In *Chapman v. California*,[77] the Court first applied this harmless error rule. In *Chapman*, the prosecution had commented extensively on the defendant's failure to testify, a violation of the constitutional privilege against self-incrimination.[78] Although the Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,"[79] it did not place the privilege against self-incrimination in this category. Instead, the Court applied its harmless error standard: "We . . . adhere to the

---

71. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 989 (1973). Many jurisdictions have developed a stricter standard for review of constitutional, as opposed to nonconstitutional errors. *See id.* at 999-1010.

72. TRAYNOR, *supra* note 70, at 3-17.

73. 375 U.S. 85 (1967).

74. Prior to *Fahy*, a rule requiring automatic reversal was consistently applied to errors of constitutional dimension. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 535 (1927); Bram v. United States, 168 U.S. 532 (1897). An excellent summary of the history of harmless error rules and standards is found in TRAYNOR, *supra* note 70, at 3-51. See also Mause, *Harmless Constitutional Error: The Implicatons of Chapman v. California*, 53 MINN. L. REV. 519, 519-26 (1969); Saltzburg, *supra* note 71, at 998-1018; Note, *Harmless Constitutional Error: A Reappriasal*, 83 HARV. L. REV. 814 (1970); Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967).

75. A violation of Mapp v. Ohio, 367 U.S. 643 (1961).

76. *Fahy*, 375 U.S. at 86-87 (1963) (emphasis added).

77. 386 U.S. 18 (1967).

78. Griffin v. California, 380 U.S. 609 (1965).

79. *Chapman*, 386 U.S. at 23. This automatic reversal standard was recently applied in Holloway v. Arkansas, 435 U.S. 475, 487-91 (1978) (improperly requiring joint representation over objection requires automatic reversal).

meaning of our *Fahy* case when we hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it is harmless beyond a reasonable doubt."[80] Under this standard, the conviction was reversed.

The rule announced in *Fahy* and *Chapman*, if strictly applied, is almost an automatic reversal rule since courts can seldom discount the reasonable possibility that an error prejudicially influenced a conviction.[81] However, in *Harrington v. California*,[82] the Court indicated that in some situations it will consider other evidence of guilt in assessing whether a jury has been influenced by an error.

In *Harrington*, the defendant was convicted of felony murder under a California law which provided that "[a]ll persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills . . . ."[83] The confessions of two non-testifying co-defendants had been admitted into evidence in violation of *Bruton v. United States*.[84] The Court concluded that the erroneously admitted confessions were cumulative evidence against Harrington, in that they added nothing to the testimony of Harrington and others. Since Harrington's guilt could be established by his mere presence at the scene of the crime,[85] and since the Court believed that the untainted evidence of his presence was overwhelming,[86] the error was held harmless.

Although the *Harrington* Court explicitly reaffirmed the *Chapman* harmless error test, it may have departed from that rule by shifting the inquiry from whether the error contributed to the conviction to whether untainted evidence provided "overwhelming" support for the convicton.[87] The view that *Harrington* created a more relaxed harmless error standard is particularly

---

80. *Chapman*, 386 U.S. at 24.

81. *See* TRAYNOR, *supra* note 70, at 43-44; Thompson, *Unconstitutional Search and Seizure and the Myth of Harmless Error*, 42 NOTRE DAME LAW. 457, 467 (1967).

82. 395 U.S. 250 (1969).

83. *Harrington*, 395 U.S. at 253 n.2 (quoting People v. Washington, 62 Cal. 2d 777, 782, 44 Cal. Rptr. 442, 445, 402 P.2d 130, 133 (1966)).

84. 391 U.S. 123 (1968) (holding that admission of a confession of a nontestifying co-defendant is a denial of rights under the confrontation clause of the sixth amendment).

85. The significance of this difference for the harmless error issue in *Sandstrom* is discussed in note 101 *infra*.

86. In the presumptive intent jury instruction context, the reviewing court would be unable to assess other "untainted" evidence simply because there is none. The significance of this difference is discussed in text accompanying notes 88-101 *infra*.

87. *Harrington*, 395 U.S. at 255 (Brennan, J., dissenting). *See* Saltzburg, *supra* note 71, at 1014 n.89, for a discussion of the possible interpretations of the "overwhelming" evidence test.

compelling since the Court evaluated the untainted and "overwhelming" evidence according to "what seems to us to have been the *probable impact* of the two confessions on the minds of an average jury."[88] Even if *Harrington* does not depart from *Chapman's* "harmless beyond a reasonable doubt" rule, it is an important indication that in some situations the Court is willing to resolve the harmless error issue by looking at other evidence of guilt.[89] The questions raised by *Sandstrom's* analysis of this issue in the presumptive intent instruction context must be viewed against this background.

B. The Harmless Error Issue in the Presumptive Intent Instruction Context

The use of a presumptive intent instruction raises two distinct issues: whether the instruction's use constitutes error; and whether the error is harmless or prejudicial.[90] In *Sandstrom,* the first issue was not critical to the Court's analysis. Since the *Sandstrom* instruction was subject to four possible interpretations, and since the parties agreed that two of these were unconstitutional,[91] the Court found it unnecessary to further examine the constitutional issues raised by each possible interpretation of the instruction. The second issue thus became critical to the Court's analysis. Precisely stated, that issue was whether, in the absence of a clear explanation to the jury of the presumption's proper use, the effect of the two unconstitutional interpretations

---

88. *Harrington,* 395 U.S. at 254 (emphasis added). *See* TRAYNOR, *supra* note 70, at 44-45 for a discussion of the significance of this "probable impact" test.

89. In Schneble v. Florida, 405 U.S. 427 (1972), which also involved a violation of *Bruton,* the Court again concluded that the error was harmless where " 'the minds of an average jury' would not have found the State's case significantly less persuasive had the [confessions] been excluded." *Id.* at 432. *Schneble* may be more evidence of a departure from the *Chapman* standard than *Harrington* because the defendant's confession, which was the only other evidence of guilt, may have been coerced.

90. Because the Court did not seem to be aware that its decision was essentially a harmless error decision, it did not clearly indicate that these two issues are raised by presumption instructions. The Court stated:

> Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption like that in *Mullaney,* or a conclusive presumption like those in *Morissette* and *United States Gypsum,* and because either interpretation would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional.

Sandstrom, 442 U.S. at 524.

The first clause of this sentence relates to the harmless error issue: an error is prejudicial when it *may have been* interpreted in an unconstitutional manner. The second clause of this sentence relates to the determination of error issue: the use of a presumption is error when it deprives a defendant of due process of law.

91. *See* text accompanying notes 29-42 *supra.*

was harmless or prejudicial. The Court resolved this issue, which is the issue of harmless error, by applying a standard almost identical to that announced in *Fahy* and *Chapman.*

Sandstrom repeatedly emphasized the critical significance of the *possibility* that a jury would erroneously interpret the presumptive intent instruction. This represents a very high standard for measuring the prejudicial effect of errors. Whereas the *Fahy* Court looked for a *reasonable* possibility of prejudice, the *Sandstrom* Court looked for *any* possibility. And whereas *Chapman* required that an error be "harmless beyond a reasonable doubt," *Sandstrom* implicitly required that the presumptive intent instruction be harmless to a certainty.[92] By apparently surpassing even the strict harmless error standards of *Fahy* and *Chapman,* the Court is, at the very least,[93] indicating that the application of harmless error standards to errors in jury instructions requires special attention by a reviewing court.[94]

C. *Sandstrom's Significance For The Harmless Error Doctrine In The Presumptive Intent Instruction Context*

Although *Sandstrom* was implicitly addressing the issue of harmless error, its approach to this issue must be viewed with caution. The Court's explicit refusal to consider this issue indicates that its "possibility of misinterpretation" test cannot be considered the final word on harmless error in the presumptive intent instruction context. Although *Sandstrom* did not resolve what harmless error standard should govern the presumptive intent instruction context, the "possibility of misinterpretation" test strongly suggests that, if the Court does not apply an automatic reversal standard,[95] it will strictly adhere to the *Chapman*

---

92. *Sandstrom,* 442 U.S. at 526.

93. At most, this language indicates that erroneous presumptive intent instructions should be classified with constitutional errors so basic to a fair trial as to require automatic reversal. *See Chapman,* 386 U.S. at 23. *See also* note 95 *infra.* If the court had expressly addressed the barmless error issue, bowever, it may have tempered its possibility language with the word "reasonable."

94. Traynor has stated that "if an instruction on a substantial issue is confusing to a reasonable juror, the judgement should be reversed." TRAYNOR, *supra* note 70, at 74. *See* text accompanying notes 98-104 *infra* for a discussion of tbis issue. *See also* Mause, *supra* note 74, at 541-42.

95. It is not difficult to conceive of the presumptive intent instruction as subverting a "constitutional right so basic to a fair trial" as to require reversal. *See, e.g.,* Hankerson v. North Carolina, 432 U.S. 233 (1972) (*Mullaney* violation described as "substantially impairing" the truth finding function of a criminal trial); *Chapman,* 386 U.S. at 44 (Stewart, J., concurring) (citing Bollenbach v. United States, 326 U.S. 607, 614-15 (1946)) ("Wben a jury is instructed in an unconstitutional presumption, the conviction must be

standard.[96] Thus, if *Harrington* is perceived as a more relaxed standard, *Sandstrom,* which requires a strict standard, may be perceived as ruling out the application of this relaxed standard in the context of presumptive intent instructions. Even if the *Harrington* standard is not interpreted as less strict than *Chapman,* however, the *Sandstrom* opinion supports the view that the presumptive intent instruction context differs fundamentally from those situations where the Court has applied *Harrington's* "overwhelming untainted evidence" test.

In the presumptive intent jury instruction context, a reviewing court would be unable to apply the "overwhelming untainted evidence" test because there is no "untainted evidence." Errors involving the improper admission or exclusion of evidence may, by their very nature, leave a certain amount of evidence unaffected.[97] In *Harrington,* for example, the Court could identify other evidence which was unaffected by the erroneously admitted confessions and upon which the jury could have based a conviction. It is important to distinguish this evidentiary context from the jury instruction context in *Sandstrom.* An erroneous instruction on an element of the crime will subvert or "taint" *all* the evidence on that issue. In the presumptive intent context, all evidence of intent, even that which appears to the majority of a reviewing court as "overwhelming evidence," has been affected by the presumption. A jury can rely on the presumption and thereby fail to give appropriate consideration to all of the other evidence. A reviewing court has no recourse to other, untainted evidence.

Sandstrom emphasized this point in its response to the state's "purposely or knowingly" contention.[98] Even if a jury could have ignored the presumption instruction and found the requisite mental state based on an inference from other evidence, the Court could not be certain that this is what they did do. The Court said that the presumptive intent instruction context raises

---

overturned, though there was ample evidence apart from the presumption to sustain the verdict").

96. In reconsidering *Sandstrom* on remand from the United States Supreme Court, the Montana Supreme Court applied the *Fahy* and *Chapman* standards and stated it was not able to conclude that the offensive instruction "could not reasonably have contributed to the jury verdict." State v. Sandstrom, 603 P.2d at 245. The Montana court concluded that "the erroneous instruction goes to a vital element of the proof . . . namely, intent . . . . If the jury followed the instruction, it could have presumed the intent without proof beyond a reasonable doubt." *Id.*

97. *See* TRAYNOR, *supra* note 70, at 69-73 for a discussion of the various factors to be considered when assessing other evidence of guilt in these evidentiary contexts.

98. *See* text accompanying notes 19-21 *supra.*

an issue identical to that found in cases which are submitted to the jury on alternative theories. Since the unconstitutionality of any one of alternative theories requires reversal,[99] the Court concluded that the use of presumptive intent instructions susceptible to unconstitutional interpretation should also require reversal. The Court explained that since a presumption provides "assistance" to the jury, making its fact-finding task easier, "there is no reason to believe the jury would have deliberately undertaken the more difficult task."[100] Thus, even substantial evidence of intent to kill does not remove the *possibility* that the jury relied only on the presumption which undermined the jury process of drawing inferences from all the evidence and of weighing the inferred facts in deciding whether intent exists beyond a reasonable doubt.

Since *Sandstrom* concluded that the possibility that the jury relied on the presumption could not be discounted, there could never be "untainted evidence" to which the *Harrington* test may be applied. All the evidence on the issue of intent may have been subverted by reliance on the presumption. The "overwhelming evidence" test is therefore not likely to be transplanted to the jury instruction context.[101]

An appellate court's response to substantial errors in instructions also depends largely on its view of how a jury responds to instructions.[102] The *Sandstrom* Court's emphasis on the mere "possibility" that a substantial error prejudicially influenced the jury probably reflects the view that jurors generally understand and adhere to instructions.[103] However, even if one suspects that jurors are frequently confused by the complex concepts and language used in instructions, this is only more reason for courts to follow a strict harmless error standard. Justice Rehnquist's

---

99. *See, e.g.*, Stromberg v. California, 283 U.S. 359 (1931).

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

101. This test is particularly inapplicable to jury instructions which raise a presumption of intent. The *Harrington* Court emphasized the fact that "[t]he case against Harrington was not woven from circumstantial evidence." *Harrington*, 395 U.S. at 254. This is a significant fact because in the presumptive intent instruction context, the jury can not merely look at direct evidence in order to find guilt. Where a mental state is at issue, the jury must draw an inference from circumstantial evidence in order to find guilt. Although the *Sandstrom* Court's analysis is not based on this consideration, it should resolve any lingering doubts about the propriety of looking to other, "untainted and overwhelming" evidence where a "specific intent" or mental purpose is an element of the crime.

102. TRAYNOR, *supra* note 70, at 73-74. *See, e.g.*, *Sandstrom*, 442 U.S. at 527-28 (Rehnquist, J., concurring).

103. *See generally* H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY (1966).

doubt, in *Sandstrom,* as to whether the jury really "divined the difference recognized by lawyers between 'infer' and 'presume' "[104] does not support the position that errors in instructions are harmless. To the contrary, the inability of jurors to understand the legal significance of these terms calls for a more precise wording of such instructions to comport with due process protections. The *Sandstrom* Court's emphasis on the possibility of prejudice in the use of presumptive intent instructions should be interpreted as a firm resolution that substantial errors in jury instructions can never be harmless.

CONCLUSION

In *Sandstrom v. Montana,* the United States Supreme Court considered, for the first time, the problems raised by presumptive intent jury instructions. The Court's analysis, which focused on the possibility that such an instruction was unconstitutionally interpreted, requires that these instructions be framed in a manner which excludes even the possibility of erroneous interpretation. Since every possible interpretation of presumption instructions raises at least some constitutional problems, such instructions should no longer be used. By discussing the possibility of prejudice, the Court also addressed the harmless error issue and implicitly suggested that the use of the erroneous instruction can never be "harmless beyond a reasonable doubt." *Sandstrom* should thus have a significant effect, both on future jury instruction practice and on past convictions in cases which have used presumptive intent instructions.

DAVID D. COOK*

104. *Sandstrom,* 442 U.S. at 528.

* The author was a student intern in the Legal Assistance to Institutionalized Persons Program. In representing Wisconsin defendants in post-conviction motions, the Program has taken the position that *Sandstrom* renders Wisconsin Jury Instruction 1100, First Degree Murder, unconstitutional, and that this error can never be harmless.