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Presumptive *Mens Rea*: An Analysis of the Federal Judiciary's Retreat from *Sandstrom v. Montana*

Direct or empirical evidence rarely provides proof of *mens rea*, a critical element of most crimes. The practical difficulties inherent in proving that a criminal defendant had the requisite state of mind have led to presumptions of *mens rea*. The judiciary's attempt to provide a constitutional standard for the use of presumptions in criminal trials culminated in *Sandstrom v. Montana*. In *Sandstrom*, the Supreme Court held that the jury instruction, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," violates due process.

*Sandstrom* and its progeny have provoked both controversy and chaos in the legal community. This Note examines the goals embodied in *Sandstrom* and the extent to which these goals have been frustrated by the federal judiciary's treatment of *Sandstrom* during the past decade. Part I sketches the historical development and use of presumptions. Part II discusses the Supreme Court's pre-*Sandstrom* attempts to constitutionalize

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1. The maxim *actus non facit reum nisi mens sit rea* expresses the common law principle that "an act does not make one guilty unless his mind is guilty." Strict liability crimes are a notable exception to this general rule. See generally I W. LaFave & A. Scott, *Substantive Criminal Law* § 3.4 (1986).

2. A presumption is a deductive device that allows or requires the factfinder to assume the existence of one fact upon proof of another fact. The term "presumption" is ambiguous; one author posits that it is used in at least eight different senses by the judiciary. Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195, 196-207 (1953). The lay meaning of "presumption" is "to accept as true or credible without proof or before inquiry." Webster's Third New International Dictionary 1796 (1986). This Note gives the term the following technical meanings:

1. A *permissive* presumption provides that the factfinder may, but is not required to, find the existence of the presumed fact upon proof of the basic fact. Sometimes a condition precedent to the presumption's application exists. For example, "Fact X may be presumed from Fact Y unless litigant A produces evidence to controvert Fact X" is a permissive presumption with a condition precedent to its application. Permissive presumptions are sometimes called "inferences."

2. A *mandatory rebuttable* presumption requires a finding of the presumed fact upon proof of the basic fact, unless that finding is rebutted. As a practical matter, the duty of rebuttal generally falls to the opponent of the presumption. Fulfillment of this duty may involve *producing evidence* which controverts the presumed fact (a "production shifting presumption") or *persuading* the factfinder that the presumption should not be applied (a "persuasion shifting presumption"). For example, "Fact X must be presumed from Fact Y unless litigant A produces evidence to controvert Fact X" is a mandatory rebuttable presumption; the duty to rebut entails the burden of producing evidence showing the non-existence of Fact X, but not of persuading the factfinder to believe the evidence produced.

3. A *conclusive* presumption requires the factfinder to find the presumed fact upon proof of the basic fact, even in the face of rebutting evidence. "Fact X must always be presumed from Fact Y" is an example of a conclusive presumption.

Unfortunately, the judiciary lacks an aptness for clarity in phrasing many presumptions. Interpretive difficulties as to the true nature of a given presumption often arise. For a thorough discussion of the use and classification of presumptions, see Graham, *Presumptions—More Than You Ever Wanted to Know and Yet Were Too Disinterested to Ask*, 17 CRIM. L. BULL. 431 (1981); Asford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969). This Note focuses primarily on conclusive and persuasion shifting presumptions.


4 Id. at 521-24; see infra notes 49-64 and accompanying text.
the use of presumptions, while Part III analyzes the Sandstrom mandate. Part IV reviews the challenges Sandstrom has faced in the federal courts over the past decade. Part V considers how the frequent application of the harmless error doctrine and the stringent requirements for habeas corpus review have impeded Sandstrom's implementation. Part VI concludes that widespread confusion over and resistance to Sandstrom's mandate have rendered it ineffective and recommends that the judiciary reconsider its treatment of Sandstrom.

I. The Historical Development and Use of Presumptions

The mens rea presumption dates to the Mosaic Code and became firmly entrenched in the English common law. Early rationales supporting presumptions included the perceived necessity for judicial guidance of lay juries and the impracticality of proving certain facts. Most pre-twentieth century scholars believed that only a rebuttable deductive device deserves the title "presumption." These scholars labeled conclusive presumptions as judicial legislation, since, in essence, conclusive presumptions make one fact the legal equivalent of another. Conversely, they freed permissive presumptions of all legal significance, so as

6 Thayer described the development of presumptions in the common law as follows:

Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them.

J. Thayer, A Preliminary Treatise on Evidence at the Common Law 326 (1898).
7 "Such advice and such direction is natural and desirable when a presiding learned tribunal is instructing an unlearned one . . . for the administration of the law should be kept consistent." Id. at 318.
8 "It will readily be seen that were no such presumption raised, crime would still more often go unwhipped of justice, and the criminal could carry his 'I don't mean to' as a safe and certain talisman to keep him immune from the consequences of his misdemeanor." 1 B. Jones, Jones on Evidence, § 130, at 211 (2d. ed. 1926).
9 Thayer advanced this view:

Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. . . . When the term is legitimately applied it designates a rule or a proposition which still leaves open to further inquiry the matter assumed. The exact scope and operation of these prima facie assumptions are to cast upon the party against whom they operate, the duty of going forward, in argument or evidence, on the particular point to which they relate.

J. Thayer, supra note 6, at 314 (footnote omitted).
10 Thayer explained:

In such cases [where conclusive presumptions are used], that which is evidential merely . . . has itself become the subject of a rule of substantive law, and comes to have certain consequences directly annexed to it. . . . [It] is clear that this is true legislation. . . . Such is the nature of all rules to determine the legal effect of facts as contrasted with their logical effect. To prescribe and fix a certain legal equivalence of facts, is a very different thing from merely allowing that meaning to be given to them.

J. Thayer, supra note 6, at 316-17. Wigmore agreed, asserting that "in strictness there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist . . . the second fact's existence is wholly immaterial for the purpose of the proponent's case." 9 J. Wigmore, Evidence in Trials at Common Law § 2492, at 307-08 (Chadbourn Rev. 1981).
to afford the permissive presumption a legal weight no greater than its natural probative force.\textsuperscript{11}

The presumption that "a person intends the ordinary consequences of his voluntary acts," held unconstitutional in \textit{Sandstrom}, has enjoyed frequent use since the early days of the common law.\textsuperscript{12} It gained the qualified approval of nineteenth century jurisprudences under a variety of rationales. Thayer thought the principle to be a sound maxim of legal reasoning; he quarrelled, however, with its expression as a "presumption" of law.\textsuperscript{13} According to Greenleaf, the presumption belonged to a class in which "long experienced connection... has been found so general and uniform as to render it expedient for the common good that this connection be taken to be inseparable and universal."\textsuperscript{14} Nonetheless, Greenleaf conceded that case law limited the presumption's application to trials in which no evidence of intent had been introduced and allowed rebuttal evidence when the presumption was applied.\textsuperscript{15} Similarly, Law-

\textsuperscript{11} See, e.g., J. Thayer, \textit{supra} note 6, at 334 ("Of course it must be remembered always that many widely different things are called 'presumptions.' As regards all that class of things, thus named, which are merely judicial recognition of what is probable, or permissible in reasoning, or of what is sufficient to support a verdict, these have no quality of substantive law.") (footnote omitted); see also 1 S. Greenleaf, \textit{supra} note 5, \S 44 ("They are, in truth, but mere arguments" and "depend upon their own natural force and efficacy in generating belief or conviction in the mind.").

Thayer believed that judges should exercise great caution to prevent overemphasizing the weight of a permissive presumption. In discussing a case in which the judge did not exercise such caution, Thayer noted:

"[I]t is probable that grave consequences followed from this sort of error; far too serious an emphasis was laid on a matter of mere ordinary probability, by laying it down to the jury as a "legal presumption"... It seems likely, in this case, that this unexplained use of the term "legal presumption"... contributed materially towards what was felt to be the difficult result of a conviction. In that point of view the case may serve as a conspicuous warning against loose modes of expression very common in our courts. To be sure, the men who were hanged in this case well deserved their fate—had the law been adequate; but in the next case, where feelings run high, they may not deserve it."

J. Thayer, \textit{supra} note 6, at 340 n.1.

\textsuperscript{12} See, e.g., Commonwealth v. Drum, 58 Pa. 9, 17 (1868) ("He who uses upon the body of another, at some vital part, with a manifest intention to use it upon him, a deadly weapon, as an ax, a gun, a knife, or a pistol, must, in the absence of qualifying facts be presumed to intend the death which is the probable and ordinary consequences of such an act."); Commonwealth v. Webster, 60 Mass. (5 Cush.) 295, 316 (1850) ("The ordinary feelings, passions, and propensities under which parties act, are facts known by observation and experience; and they are so uniform in their operation, that a conclusion may be safely drawn, that if a person acts in a particular manner he does so under the influence of a particular motive."); accord Commonwealth v. York, 50 Mass. (9 Met.) 93 (1845); Murphy v. People, 37 Ill. 447 (1865); Riggs v. State, 30 Miss. 636 (1856).

\textsuperscript{13} Thayer asserted:

"Often these maxims and ground principles get expressed in this form of a presumption perversely and inaccurately, as when... the doctrine that every one is chargeable with the natural consequences of his conduct, is expressed in the form that every one is presumed to intend these consequences.... In whatever form they are made or ought to be made, their character is the same, that of general maxims in legal reasoning, having no particular relation to the law of evidence."

J. Thayer, \textit{supra} note 6, at 335 (footnote omitted).

\textsuperscript{14} 1 S. Greenleaf, \textit{supra} note 5, at 111.

\textsuperscript{15} Id. at 115 & n.1. Greenleaf comments that this qualification "limits the application of the rule very much, for in a very few cases will the killing by the defendant be the only thing shown. The circumstances in every case will tend to prove or disprove malice, which then becomes a question of fact to be decided by the jury." Id. at 115 n.1. Modern courts have generally given the \textit{mens rea} presumption in jury instructions regardless of the presence or absence of evidence of \textit{mens rea}. For example, the trial court in \textit{Sandstrom} instructed the jury on the presumption of intent even though \textit{Sandstrom} introduced evidence tending to show a lack of intent. 442 U.S. at 512.
son recognized the widespread use of the presumption, but disapproved of its reputation as an "infallible proposition." He suggested that if the evidence of intent in a particular case is weak, the presumption should correspondingly be given little weight. Furthermore, Lawson completely exempted offenses which required a "specific intent" from the reach of the *mens rea* presumption. Regardless of the approach taken to the presumption of intent, however, scholars and courts have never doubted its value to the prosecution.

II. The Constitutionalization of Presumptions

The twentieth century introduced an era of heightened awareness of the constitutional need for procedural due process. As the Supreme Court placed the process of proof in criminal trials under closer scrutiny, the use of *mens rea* presumptions became constitutionally suspect. Three general developments in procedural due process influenced *Sandstrom*: (1) precedent discussing the allocation and measure of proof in criminal trials; (2) precedent discussing the propriety of using presumptions as aids to proof; and (3) precedent providing a method for classifying presumptions.

A. Allocation and Measure of the Burden of Persuasion

A trilogy of cases dealing with the allocation and measure of the burden of persuasion impacted the *Sandstrom* Court's analysis of persuasion shifting presumptions. These cases raise a due process issue: which facts must the prosecution prove beyond a reasonable doubt? The first case in this series, *In re Winship*, held that the prosecution must prove "every fact necessary to constitute the crime." However, interpretive difficulties followed *Winship*.

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17 *Id.* at 271 ("'The act done and the circumstances attending its commission may indicate more or less clearly the intention of the party doing it, and authorize an inference of more or less weight in regard to such intention.'") (quoting Quinebaug Bank v. Brewster, 30 Conn. 559, 563 (1862)).
18 *Id.* ("A statute makes a willful, deliberate and premeditated killing murder in the first degree. B kills C. There is no presumption that the killing was deliberate and premeditated..."") (quoting Roberts v. People, 19 Mich. 401, 414 (1870)).
19 See generally Chamberlain, *Presumptions as First Aid to the District Attorney*, 14 A.B.A.J. 287 (1928) (arguing that statutory *mens rea* presumptions "help the district attorney out of [the] predicament" posed by the presumption of innocence, privilege against self incrimination, and prosecutorial reasonable doubt standard); *see also* United States v. Gainey, 380 U.S. 63, 83 (1965) (Black, J., dissenting) (noting that the presumption "is a boon to prosecutors and an incongruous snare for defendants in a country that claims to require proof of guilt beyond a reasonable doubt").
20 See *infra* notes 23-35 and accompanying text.
21 See *infra* notes 36-43 and accompanying text.
22 See *infra* notes 44-48 and accompanying text.
24 *Id.* at 364. *Winship* held that the prosecutorial reasonable doubt standard is constitutionally required by the due process clauses of the fifth and fourteenth amendments. The Court reasoned that since the defendant in a criminal trial "has at stake an interest of transcending value," due process demands that the "margin of error" be reduced by placing a reasonable doubt standard on the prosecution. *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).
In *Mullaney v. Wilber*, 25 a state law required the defendant in a murder trial to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide charge to manslaughter. A successful heat of passion defense operated to negate a presumption of malice, which was the sole statutory factor distinguishing murder from manslaughter. 26 Employing a two-step analysis, the Supreme Court held that the requirement violated *Winship*.

The Court first examined the historical evolution of the law of homicide. It found the presence or absence of "heat of passion on sudden provocation" to be "the single most important factor in determining the degree of culpability attaching to an unlawful homicide." 27 Second, the Court examined the distinction between murder and manslaughter; it concluded that they "differ significantly" in terms of punishment and stigma. 28 Even though "heat of passion" was not an enumerated statutory element, the Court decided that its absence fell definitionally within those facts necessary to constitute murder. 29

The sweeping language of *Mullaney* 30 lost much of its force in *Patterson v. New York*. 31 In *Patterson*, a state law required a defendant charged with murder to prove that he acted under "extreme emotional disturbance" in order to reduce the charge to manslaughter. 32 The Supreme Court explained that if it limited *Winship* to only those facts as defined by state law, "a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements . . . *Winship* is concerned with substance rather than this kind of formalism." 33

26 Id. at 685-87. Under Maine law, three elements constituted murder: (1) unlawfulness [i.e., a killing which is neither justifiable nor excusable]; (2) intent; and (3) malice aforethought. Three elements also constituted manslaughter: (1) unlawfulness; (2) intent; and (3) heat of passion on sudden provocation. The trial court instructed the jury that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation. The court also instructed the jury that malice aforethought and heat of passion on sudden provocation are inconsistent; thus, by proving the latter, the defendant negates the former and reduces the homicide to manslaughter. Id.
27 Id. at 696. The Court also found that the "clear trend" among the states was to make the prosecution bear the burden of proof on this issue. Id.
28 Id. at 697. The penalty for murder under Maine law was life imprisonment, while the penalty for manslaughter consisted of no more than a $1000 fine or 20 years imprisonment. Id. at 686 n.3. The prosecution argued that since the fact in question did not enter into dispute until the jury had already determined that the defendant was guilty of either murder or manslaughter, his interest in liberty and reputation had diminished. Id. at 697. The Court flatly rejected this reasoning, explaining that "[t]he safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." Id. at 698.
29 The Court explained that if it limited *Winship* to only those facts as defined by state law, "a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements. . . . *Winship* is concerned with substance rather than this kind of formalism." Id. at 698-99 (footnote omitted).
30 Some courts and commentators predicted the demise of affirmative defenses after *Mullaney*. See, e.g., Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975) (*Mullaney* prohibits placing the burden of persuasion on the defendant for any theory of justification, excuse, or mitigation); Commonwealth v. Rodriguez, 370 Mass. 684, 352 N.E.2d 203 (1976) (*Mullaney* requires the prosecution to bear the burden of persuasion on self defense); Case Comment, *Unburdening the Criminal Defendant: Mullaney v. Wilber and the Reasonable Doubt Standard*, 11 Harvard C.R.-C.L. L. Rev. 390, 391 (1976) ("In the recent case of *Mullaney v. Wilber*, the Supreme Court has put forth an analysis which, if carried to its logical conclusion, suggests that it may no longer be proper to impose upon the defendant in a criminal trial the burden of proving any fact which will affect the determination of his guilt or the degree thereof.") (footnotes omitted).
32 Under New York law, two elements, intent and causation, constituted second degree murder. Manslaughter consisted of intent, causation, and extreme emotional disturbance. If the prosecution
Court distinguished *Mullaney* on the ground that the “extreme emotional disturbance” defense did not operate to negate any statutory element of murder.\(^{33}\) The Court defended its narrow interpretation of *Mullaney* by explaining that due process requires that “only the most basic procedural safeguards be observed; more subtle balancing of society’s interests against those of the accused have been left to the legislative branch.”\(^{34}\) However, the *Patterson* dissent argued that the majority’s mechanical approach invites legislative circumvention of the principles elucidated in *Winship* and *Mullaney*.\(^{35}\)

### B. Presumptions as Aids to or Replacements for Evidence

A related but distinct issue arose in two other pivotal pre-Sandstrom cases: *Morissette v. United States*\(^{36}\) and *United States v. United States Gypsum Co.*\(^{37}\) Whereas *Winship*, *Mullaney*, and *Patterson* explored the issue of which facts the prosecution must prove beyond a reasonable doubt, *Morissette* and *Gypsum* addressed the propriety of using conclusive presumptions to meet this burden of persuasion.

In *Morissette*, the Supreme Court reversed a trial court’s holding that felonious intent “is presumed by [the defendant’s] own act.”\(^{38}\) The Court characterized the presumption as conclusive, and then explained that “[a] conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.”\(^{39}\) The Court asserted that even a permissive presumption of intent would

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\(^{33}\) Id. at 206-07 (“This affirmative defense . . . does not serve to negative any facts of the crime which the state is to prove in order to convict of murder. It constitutes a separate issue . . . .”). Although the Court claimed to remain true to *Winship* and *Mullaney*, the difference between requiring the prosecution to prove “all of the elements necessary to constitute the crime” and requiring the prosecution to prove “all of the elements included in the definition of the offense,” id. at 210, clearly involves more than semantics.

\(^{34}\) Id. The Court opined that since the defendant has better knowledge of and access to the evidence, placing the burden of persuasion upon him, with a lower threshold of proof, is fair. *Id.* at 211 n.13. The Court made no attempt to justify its position in light of its repeated refusal to accept this “comparative convenience” argument in past cases. *See, e.g.*, *Leary v. United States*, 395 U.S. 6, 45 (1969).

\(^{35}\) 432 U.S. at 217-32 (Powell, J., dissenting). The dissent argued that since “extreme emotional disturbance” is the modern equivalent of “heat of passion,” draftsmanship, not substance, differentiated the Maine and New York statutes. *Id.* at 220. The dissent accused the majority of being “indefensibly formalistic,” and of turning *Winship* and *Mullaney* into a “simplistic lesson in statutory draftsmanship.” *Id.* at 224.

\(^{36}\) 342 U.S. 246 (1952).


\(^{38}\) 342 U.S. at 249. Morissette was charged with stealing and converting government property. He admitted taking the property, but argued that he thought the government had abandoned it. The trial court refused to allow this defense into evidence. *Id.*

\(^{39}\) *Id.* at 275. The Court explained that “[w]here intent . . . is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. . . . How clear the proof may be, or however uncontroversible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury.” *Id.* at 274 (quoting *People v. Flack*, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891)).
wrongly prejudge a conclusion for the jury, perhaps even one which the evidence did not support.\textsuperscript{40}

Similarly, the \textit{Gypsum} Court found error in a conclusive presumption of intent.\textsuperscript{41} The Court explained that the "jury must remain free to consider additional evidence before accepting or rejecting the inference."\textsuperscript{42} Unlike \textit{Morissette}, however, the \textit{Gypsum} Court expressed approval of permissive presumptions.\textsuperscript{43}

\section*{C. Methods for Classification of Presumptions}

Courts use the term "presumption" broadly to encompass a variety of meanings.\textsuperscript{44} Because the constitutional validity of a presumption may depend upon its classification,\textsuperscript{45} the need exists for a principled method by which reviewing courts can determine the nature of challenged presumptions. The Supreme Court responded to this need in \textit{Ulster County v. Allen}\textsuperscript{46} with the following formulation: A reviewing court must examine the words actually spoken to the factfinder to determine the most accurate interpretation of the presumption. If the presumption is statutory in nature, the court may resort to the underlying statute as well as other cases interpreting the presumption's meaning.\textsuperscript{47} The Supreme Court developed this standard further in \textit{Sandstrom}.\textsuperscript{48}

\begin{footnotes}
\item[40] \textit{Id.} at 275. The Court found that the trial court also erred in holding that the only question of intent was whether the defendant intended to take the property. The Court explained that, although the defendant admitted the conscious and intentional act of taking the property, "that isolated fact is not an adequate basis on which the jury should find the criminal intent ... \textit{wrongfully} to deprive another of possession of property." \textit{Id.} at 276 (emphasis in original).
\item[41] 438 U.S. at 446. The \textit{Gypsum} defendants had allegedly engaged in a price-fixing conspiracy in violation of the Sherman Act. The trial court instructed the jury that if the jury found that the exchange of price information among the defendants affected prices, then intent existed as a matter of law. \textit{Id.}
\item[42] \textit{Id.}
\item[43] \textit{Id.} ("[I]t would be correct to instruct the jury that it may infer intent from an effect on prices.").
\item[44] \textit{See supra note 2.}
\item[45] For example, the \textit{Gypsum} Court opined that if the presumption in that case had merely allowed the jury to infer the existence of intent from the effect that the defendants' agreement had on prices, the presumption would be constitutional. 438 U.S. at 446. \textit{See also supra note 43 and accompanying text.} Nonetheless, most cases prior to \textit{Sandstrom} did not find the conclusive-rebuttable-permissive distinction to be critical. \textit{See C. McCormick, McCormick on Evidence }\S\ 347, at 997 n.68 ("Early cases did not) appear to turn on the question whether the presumption involved was 'mandatory' or 'permissive.' ").
\item[46] 442 U.S. 140 (1979). \textit{Allen} discusses the constitutional analysis appropriate for permissive and production shifting presumptions. According to \textit{Allen}, a reviewing court should examine permissive presumptions factually; if, in light of all the evidence, the basic fact rationally connects with the ultimate fact, then the presumption is valid. Conversely, production shifting presumptions should be reviewed facially; thus, the reviewing court should not consider the sufficiency of the evidence. \textit{Allen} relied on a series of cases beginning with \textit{Tot v. United States}, 319 U.S. 463 (1943), to reach its conclusions. For a thorough discussion of \textit{Allen} and the cases upon which it relies, see \textit{Schmolesky, County Court of Ulster v. Allen and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face}, 33 Rutgers L. Rev. 261 (1981).
\item[47] 442 U.S. at 157 n.16.
\item[48] \textit{See infra} notes 53-55 and accompanying text. However, the \textit{Sandstrom} Court did not apply the standards of review enunciated in \textit{Allen} for production shifting and permissive presumptions. 442 U.S. at 519 n.9. The \textit{Sandstrom} Court distinguished \textit{Allen} on the ground that \textit{Sandstrom} dealt with persuasion shifting and conclusive presumptions. \textit{Id.}
\end{footnotes}
III. The Sandstrom Mandate

A Montana jury convicted David Sandstrom of "deliberate homicide" in 1977. Under Montana law, deliberate homicide required that the defendant "purposely or knowingly" caused the death of another person.\footnote{442 U.S. at 512-13.} Although Sandstrom confessed to the killing, he contended that a personality disorder prevented him from "purposely or knowingly" taking his victim's life.\footnote{Id. at 512.} The trial court instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."\footnote{Id. at 512.} Sandstrom argued that this presumption unconstitutionally shifted to the defense the burden of disproving the "purposely or knowingly" element of deliberate homicide.\footnote{Id. at 512.}

A. Characterization

In accord with Allen, the unanimous Court first determined the nature of the presumption under attack. This determination, the Court explained, requires "careful attention" to the jury instructions, because whether Sandstrom "has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."\footnote{Id. at 514.} Although the prosecution argued that the instruction described nothing more than a permissive or production shifting presumption, the Court rejected both characterizations because a "risk" existed that Sandstrom's jurors had interpreted it otherwise.\footnote{Id.} In fact, the Court concluded that Sandstrom's jurors may have interpreted the presumption as either conclusive or persuasion shifting.\footnote{Id. at 514.} In reaching this conclusion, the Court relied on the lack of qualifying instructions which

\footnote{Id. at 514. To the extent that Sandstrom refused to give credence to the Montana Supreme Court's interpretation of the instruction, see infra note 54, it arguably steps beyond the boundaries set by Allen. Allen conceded that, while the jury instructions "generally" control, "their interpretation may require recourse to the statute involved and the cases decided under it." 442 U.S. at 158; see supra note 47 and accompanying text.}

\footnote{442 U.S. at 514-17. The Court quickly dismissed the prosecution's argument that the instruction contained a permissive inference, saying only that "[the jurors] were not told that they had a choice, or that they might infer that conclusion; they were only told that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory." Id. at 515. The prosecution's alternative argument—that the instruction contained a production shifting presumption—was augmented by a holding of the Montana Supreme Court that the sole legal effect of the presumption was to shift the burden of production. Notwithstanding, the Court explained: If Montana intended its presumption to have only the effect described by its Supreme Court, then we are convinced that a reasonable juror could well have been misled by the instruction given, and could have believed that the presumption was not limited to requiring the defendant to satisfy only a burden of production. . . . They were not told that the presumption could be rebutted. . . . by the defendant's simple production of "some" evidence; nor even that it could be rebutted at all. Id. at 517.}

\footnote{Id. at 517.}
might have obviated the risk of an erroneous interpretation. It also noted that the lay definition of presume, “to suppose to be true without proof,” augmented the conclusion that the jurors might have interpreted the presumption as conclusive or persuasion shifting.

B. Applicable Analysis

Having determined that a reasonable juror might have interpreted the instruction as conclusive or persuasion shifting, the Court next tackled the question of whether those types of presumptions are constitutionally infirm. The Court began its analysis with a review of Winship. The Court found that Winship required the prosecution to prove beyond a reasonable doubt that Sandstrom “purposely or knowingly” caused his victim’s death. Thus, the Court reasoned that if the instruction had the effect of relieving the prosecution of its Winship burden, the presumption must fail constitutional scrutiny. Under this rubric, if the instruction had a conclusive effect, it fails under Morissette and Gypsum because it “would ‘conflict with the overriding presumption of innocence . . .’ and would ‘invade the factfinding function’ which in a criminal case the law assigns solely to the jury.” If, conversely, the instruction had a persuasion shifting effect, it fails under Mullaney and Patterson because it shifted the burden of disproving intent to Sandstrom.

Justice Rehnquist concurred, but he expressed a desire to read Sandstrom restrictively. Justice Rehnquist explained that, while he would defer to the Court’s analysis in this case, he was “loathe to see this Court go

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56 Id. By “qualifying” instructions, the Court meant “instructions as to the legal effect of the presumption,” not merely additional correct instructions. Id. The Court clarified this important point in a footnote, explaining:

The potential for these interpretations of the presumption was not removed by the other instructions given at the trial. It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. But this is not rhetorically inconsistent with a conclusive or burden shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. Id. at 518 n.7 (citations omitted).

57 Id. at 517.
58 Id. at 519.
59 Id. at 521.
60 Id. at 523 (quoting Morissette v. United States, 342 U.S. 246, 275 (1952) and United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978), respectively). See supra notes 36-43 and accompanying text.
61 442 U.S. at 524. The prosecution offered two alternative rationales for affirmance of Sandstrom’s conviction. First, it argued that since the instruction used the term “intends,” the jurors could have interpreted that word as referring only to the defendant’s “purpose” instead of both his “purpose” and “knowledge.” Thus, if the jury convicted Sandstrom only for his knowledge, it would not have needed to rely on the impermissible presumption. Id. at 525. The Court remained unconvinced, saying that “even if a jury could have ignored the presumption . . . we cannot be certain that this is what they [sic] did do.” Id. at 526 (emphasis in original). Second, the prosecution argued that the error was harmless because the evidence sufficiently supported the conviction. However, the Court reserved judgment on the harmless error issue since it had not been considered in the record below. See infra notes 114-35 and accompanying text for a discussion of the application of harmless error to Sandstrom violations.
into the business of parsing jury instructions given by state trial courts.”

He also questioned the ability of Sandstrom’s jurors to “[dive] the difference recognized by lawyers between ‘infer’ and ‘presume.’”

IV. A Decade of Confusion and Circumvention

The teaching of Sandstrom, although embodying a novel approach to the analysis of presumptions, is quite straightforward. Trial courts can easily avoid the error by eliminating potentially persuasion shifting or conclusive presumptions from jury instructions, and the analysis expected of reviewing courts is relatively uncomplicated. Nonetheless, many circuit courts continued to affirm the constitutional validity of such presumptions by distinguishing Sandstrom on a variety of rationales.

The Supreme Court reaffirmed Sandstrom in 1985 in Franklin. In Franklin, the Court addressed major areas of confusion which had plagued the circuits in the aftermath of Sandstrom. Unfortunately, many post-Franklin decisions continue to reflect uncertainty over the analysis required under Sandstrom.

A. Initial Reactions to Sandstrom: 1979 - 1985

Although the circuits acknowledged Sandstrom’s holding, many cases reflect a fundamental misunderstanding of, or resistance to, Sandstrom’s methodology. Three approaches used in the circuit courts to determine the validity of challenged presumptions illustrate the scope of the problem. First, most often circuit decisions have distinguished the presumptions before them from Sandstrom on the basis of contextual language or rebuttability; some have also applied standards other than the “risk” standard. Second, some circuit decisions have demonstrated a willing-

63 Id. at 527. Justice Rehnquist referred to an earlier case, Cupp v. Naughten, 414 U.S. 141, 146-47 (1973), in which the Supreme Court held that “a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” Justice Rehnquist did not disclose why he felt that the second step in the Sandstrom analysis (i.e., determining whether contextual instructions eliminate the risk of misinterpretation) might be inadequate to meet this concern. Some circuit courts have expressed similar reservations. See infra note 80.

64 442 U.S. at 528. Justice Rehnquist’s doubts led him to abandon his support of Sandstrom six years later. See infra note 106 and accompanying text.

65 A Sandstrom analysis should entail three basic steps:

1. Determine, from the challenged language itself, whether a reasonable juror might have interpreted the presumption as persuasion shifting or conclusive.

2. If so, look to the contextual instructions; determine whether the context of the presumption adequately explains the legal effect of the presumption.

3. If the contextual language does not “cure” the persuasion shifting or conclusive presumption, then the presumption is a Sandstrom error.


66 See infra notes 69-98 and accompanying text.


68 See infra notes 107-11 and accompanying text.

69 See infra notes 72-84 and accompanying text.
ness to restrict Sandstrom's effect to the specific presumption before the Sandstrom Court. Third, some circuit decisions have placed great weight on the defense theory raised at trial.

1. Context, Rebuttability and Standards

In Jacks v. Duckworth (Jacks I), the Seventh Circuit reviewed the constitutionality of the following instruction: "Bear[] in mind the presumption of law, that everyone is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such to indicate the absence of such intent." Contextual instructions informed the jury that the prosecution carried the burden of proof on all elements of the crime, and that the jury could look to all the circumstances surrounding the killing to find intent. The Seventh Circuit found no error. It held that the correct contextual instructions, coupled with the language of rebuttal, "nullif[ied] the mandatory flavor" of the presumption.

Likewise, in Potts v. Zant, the trial court had presented the jury with three “presumptions of law” which it defined as “conclusion[s] which the law draws from given facts:” (1) Every person is presumed to be of sound mind and discretion; (2) The acts of a person of sound mind and discretion are presumed to be the product of that person’s will; and (3) A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act. The trial court told the jury that each presumption could be rebutted if “overcome by evidence to the contrary.” The Eleventh Circuit concluded that “the overall effect of the charge delivered here was such that it is unlikely that a reasonable juror would have given the presumption conclusive or burden shifting

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70 See infra notes 85-90 and accompanying text.
71 See infra notes 91-98 and accompanying text.
72 651 F.2d 480 (7th Cir. 1981), cert. denied, 454 U.S. 1147 (1982). The illustrations throughout this section do not necessarily attempt to demonstrate that the circuits have reached incorrect conclusions, but rather that they have employed incorrect rationales to reach those conclusions.
73 Id. at 491. The instruction continued: “When an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the state in the absence of justifying or excusing facts, since the law presumes a criminal intent from an unlawful act knowingly done.” Id.
74 Id.
75 Id. at 485-86. The court explained:

[I]n contrast to the instruction condemned in Sandstrom ... [this instruction] does not contain a mandatory injunction to presume the requisite intent from the act committed since the jurors were told they could “look to all the surrounding circumstances, including what was said and done in relation thereto” and that any presumption ... was rebuttable by “justifying or excusing facts.” The absence of a mandatory effect ... is also shown by the qualifying phrase “unless the circumstances are such as to indicate the absence of [] intent” which follows the reference to the presumption ... .

Id. at 485.

77 Id. at 533. The Potts court also analyzed and approved a permissive presumption.
78 Id.
79 Id.
effect." The presence of the rebuttability clause and the fact that the trial court had given otherwise flawless instructions convinced the court that no Sandstrom error had occurred.

The bases for the Jacks and Potts decisions contradict Sandstrom. First, Sandstrom explicitly rejected the theory that the mere presence of other correct instructions cures an infirm presumption. Second, Sandstrom recognized that rebuttal language in itself may be burden shifting rather than ameliorative. Finally, the Potts "likelihood" standard stands at odds with Sandstrom, which simply requires the possibility of an erroneous interpretation by the jury.

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80 Id. at 534 (emphasis added). In analyzing the Sandstrom claim, the Potts court stressed the standard enunciated in Cupp v. Naughten, 414 U.S. 141 (1973), for federal review of state jury instructions. The Cupp Court was concerned about federal interference with state court practices, which, although admittedly undesirable, were not constitutional errors. Id. at 145-46. Thus, the Cupp Court explained that "[b]efore a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which is guaranteed to the defendant by the Fourteenth Amendment." Id. Accordingly, the Court directed that "the ail[ing] instruction by itself [must] so infect[] the entire trial that the resulting conviction violates due process." Id. at 147.

Some circuit decisions adopt the view that Cupp demands an analysis beyond that demanded by Sandstrom. See, e.g., Niziolek v. Ashe, 694 F.2d 282 (1st Cir. 1982), in which the First Circuit upheld the validity of the instruction, "[a] person is presumed to intend the natural and probable consequences of his own acts. For example, someone who strikes another with a hammer is presumed to intend the injury to the person being struck." Id. at 292-93. The Ashe court indicated that it might reverse if the instruction had been given in a federal district court instead of a state court. However, the Ashe court believed that, under Cupp, it had no "supervisory power" over state court jury instructions. Id. at 290. In dissenting from a similar analysis by the Second Circuit in Langone v. Smith, 682 F.2d 287 (2d Cir. 1982), cert. denied, 459 U.S. 1110 (1983), Judge Oakes asserted that "the application of Cupp v. Naughten in this fashion simply reads Sandstrom out of the United States Reports." Id. at 290 (Oakes, J., dissenting).

Sandstrom should not implicate the concerns of Cupp. Cupp applies only to nonconstitutional errors; by definition, Sandstrom error is of constitutional dimension. The fact that the Sandstrom analysis includes consideration of qualifying language, see supra note 56 and accompanying text, should also address any lingering doubts about the Cupp standard. Additionally, Sandstrom itself involved a state court jury instruction; had the Sandstrom Court intended that Cupp limit its holding, it surely would have addressed that issue. But see supra note 63 and accompanying text, discussing Justice Rehnquist's opinion on the relationship between Cupp and Sandstrom.

81 734 F.2d at 534. The court asserted that the rebuttability clause "clearly serves to distinguish this case from Sandstrom." Id. Additionally, the court looked to the contextual instructions, which stated, inter alia, that the defendant did not have to disprove intent, that the prosecution carried the burden of proof on all elements of the crime, and that the jury should determine intent from all the evidence. The court believed that these additional instructions "reduc[ed] the likelihood that the jury might misunderstand the permissive character of these presumptions." Id. The fact that the trial court had phrased the third presumption permissively earlier in the instruction served as another criterion for minimizing the effect of that presumption. Id. The court did not explain why it thought that jurors faced with both permissive and mandatory language would resolve the inconsistency in favor of the permissive language.

82 See supra note 56 and accompanying text. Judge Swygert, dissenting in Jacks, noted this error: "We cannot be sure that the text of the other instructions mitigated the effect of the improper language. . . . As Sandstrom points out, 'even if a jury could have ignored the presumption . . . we cannot be certain that this is what they [sic] did do.'" 651 F.2d at 493 (Swygert, J., dissenting) (citations omitted) (quoting Sandstrom, 442 U.S. 510, 526 (1979)) (emphasis in original).

83 See supra note 61 and accompanying text. Judge Swygert appealed to the Jacks majority on this ground as well, arguing that "[t]he majority's holding ignores the nature of the two-part analysis in Sandstrom. . . . The Court held the instruction to violate the Due Process Clause under either [a conclusive or persuasion-shifting] interpretation." 651 F.2d at 491 (Swygert, J., dissenting).

84 See supra note 54 and accompanying text. Examples of deviations from Sandstrom similar to those in Jacks and Potts include United States v. Love, 767 F.2d 1052 (4th Cir. 1985) (finding no error, in part because the trial court had explained the element of intent and the prosecution's burden to the jury), cert. denied, 474 U.S. 1081 (1986); Hux v. Murphy, 735 F.2d 737 (10th Cir. 1984).
2. Restriction of Sandstrom to its Facts

In Pigee v. Israel, the Seventh Circuit found no error in the following instruction: "When there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all the natural and probable and usual consequences of his deliberate acts." The court distinguished Sandstrom on a variety of grounds, including the fact that the Pigee instruction used the term "deliberate acts" as opposed to "voluntary acts", that the presumption applied only to a "reasonable" person, not to "any" person; and that the presumption spoke of "natural, probable and usual" consequences, not "ordinary" consequences. However, the Pigee court encouraged trial courts to

(finding no error in light of whole charge, which told jury that the prosecution had the burden of proof on all elements of the crime, and that intent was an element), cert. denied, 471 U.S. 1103 (1985), overruled, Wiley v. Rayl, 767 F.2d 679 (10th Cir. 1985); Corn v. Zant, 708 F.2d 549 (11th Cir. 1983) (finding that clear statement of state's burden of proof and language of rebuttability made presumption, at most, permissive), cert. denied, 467 U.S. 1224 (1984); Mattes v. Gagnon, 700 F.2d 1096 (7th Cir. 1983) (finding that numerous general instructions mitigated any erroneous effect); Brayboy v. Scully, 695 F.2d 62 (2d Cir. 1982) (holding that, although challenged presumption was given three times, it did not constitute error because two of the three times the words "unless the act was done under circumstances or conditions precluding [presumption]" or "unless the contrary appears from the evidence" followed and the third time the presumption was preceded by general contextual instructions), cert. denied, 460 U.S. 1055 (1983); Rock v. Coome, 694 F.2d 908 (2d Cir. 1982) (applying a "likely effect" test instead of the "risk" standard), cert. denied, 460 U.S. 1083 (1983); Rivera v. Coome, 683 F.2d 697 (2d Cir. 1982) (finding that any error in presumption itself was cured by contextual instructions and rebuttability clause), cert. denied, 459 U.S. 1162 (1983); United States v. Wolters, 656 F.2d 523 (9th Cir. 1981) (finding no error because the jury was told of the presumption of innocence and the government's burden of proof).

A few cases have rejected the argument that correct contextual instructions or rebuttability clauses prevent or cure Sandstrom errors. The Sixth Circuit has done so quite consistently. See, e.g., Patterson v. Austin, 728 F.2d 1389 (11th Cir. 1984) (finding that correct contextual language tends more to confuse than clarify); Engle v. Kocher, 707 F.2d 241 (6th Cir. 1983) (finding that instructions on state's burden of proof and the presumption of innocence merely contradicted presumption but did not cure it), aff'd by an equally divided court, 466 U.S. 1 (1984); United States v. Hogg, 670 F.2d 1358 (4th Cir. 1982) (finding that overall import of instruction was to lower state's burden of proof and that rebuttability clause is not curative); United States v. Winter, 665 F.2d 1120 (1st Cir. 1981) (rejecting idea that general contextual instructions obviate possibility of an erroneous application of the presumption by the jury), cert. denied, 460 U.S. 1011 (1983); Dietz v. Solem, 640 F.2d 126, 131 (8th Cir. 1981) (holding that fact that the presumption could be rebutted by "other evidence" was not curative because "it is apparent that the 'other evidence' which might rebut . . . would only be offered by the defendant"); United States v. Davis, 608 F.2d 698 (6th Cir. 1979) (stating in dictum that clauses such as "unless there is evidence to the contrary" may be persuasion shifting), cert. denied, 445 U.S. 918 (1980). However, it is worthy of note that in many cases in which Sandstrom error has been found, the courts have held the errors harmless. See infra notes 114-35 and accompanying text.

85 670 F.2d 690 (7th Cir.), cert. denied, 459 U.S. 846 (1982).
86 Id. at 692.
87 Id. at 694. According to the court, "[a] deliberate act is something more [than a voluntary act]; it involves actions which are carefully considered, as a result of some prior weighing of the acts and their consequences." Id. (footnote omitted). Thus, the court reasoned, the jury would have to determine, from all the evidence, that the defendant's acts were "deliberate" before the presumption would arise. Id. The dissent disagreed, arguing that "no definition of 'deliberate' was given to the jury and no attempt was made by the trial judge to distinguish between voluntary acts and deliberate acts as is done in the majority opinion." Id. at 697 (Baker, J., dissenting).
88 Id. at 694 ("Thus, the instruction in this case indicates that the presumption may be applied only if the jury decides that the defendant was a reasonable person.") (footnote omitted).
89 Id. The court admitted that this distinction was of "minor significance." Id. The court also held that the introductory language, "[w]hen there are no circumstances to prevent or rebut," was the "crucial qualifying language which the Supreme Court found lacking in Sandstrom." Id. Alternatively, the court reasoned that even if the jury could have viewed the presumption as mandatory,
avoid such instructions because of the flood of appeals spawned by Sandstrom.90

3. Significance of the Defense Theory

In finding the challenged presumption in Mancuso v. Harris91 constitutional, the Second Circuit considered the extent to which the element of intent was at issue.92 Mancuso had advanced a defense of noninvolvement and accordingly attempted to discredit witnesses to his involvement. Since Mancuso did not introduce evidence on state of mind, the court concluded that, once the jury has rejected the noninvolvement defense, one challenged instruction on intent created no “significant possibility” of harm.93

Conversely, in Ramirez v. Jones,94 the Second Circuit found a challenged presumption to be persuasion shifting, in part because the defendant had brought intent into issue. The defendant did this, the court explained, by admitting to the conduct charged, but claiming that he lacked the requisite state of mind to be convicted of the crime.95 The court concluded that, in contrast to Mancuso, a significant possibility of harm existed because of the defense theory.96

“the presumption imposes at most an extremely low burden of production on the defendant.” Id. at 695.

The dissent believed that “the majority decision is in collision with Sandstrom.” Id. at 697 (Baker, J., dissenting). Judge Baker explained that the prefatory phrase “condems the instruction and makes possible the untenable interpretation that the defendant must disprove intent.” Id.

90 Id. at 696 (The court suggested that “a sweeping application of the doctrine in Sandstrom would provide greater reason to limit the doctrine to prospective application.”). See also Lampkins v. Gagnon, 710 F.2d 374, 376 (7th Cir. 1983) (upholding the same instruction used in Pigee) (fact that presumption was given twice, and the second time without any correct contextual instructions, “stands alone in this case as an indication of a risk of jury confusion, and, as such, it is too slight a peg to support a finding that the jury was unconstitutionally instructed”). cert. denied, 456 U.S. 1050 (1984); Nelson v. Scully, 672 F.2d 266, 271 (2d Cir.) (“To be sure, a trained lawyer possessing . . . analytical skill . . . could parse the instruction . . . . But this is attributing altogether too much legal acumen to the ordinary juror—who had not imbibed Wigmore’s Evidence with his mother’s milk.”), cert. denied, 456 U.S. 1008 (1982).

91 677 F.2d 206 (2d Cir.), cert. denied, 459 U.S. 1019 (1982). The jury instruction stated: “Every one is presumed to intend the natural consequences of his act and unless the act is done under circumstances or conditions that might preclude the existence of such intent, you, the jury, have to find, have a right to find the requisite intent from the proven action of an individual.” Id. at 207.

92 Id. at 211.

93 Id. (quoting Nelson v. Scully, 672 F.2d 266 (2d. Cir.), cert. denied, 456 U.S. 1008 (1982)).

94 683 F.2d 712 (2d Cir. 1982), cert. denied, 460 U.S. 1016 (1983). The challenged instruction stated:

A person is presumed to intend the natural and probable consequences of his acts. . . .

Under our law, every person is presumed to intend the natural and inevitable consequences of his own acts. . . . [O]ne’s mind is compelled from necessity to refer to the acts and physical manifestations of the intent exhibited by the results produced is the safest, if not the only[,] proof of the fact to be ascertained.

Id. at 714-15.

95 Id. at 716.

96 Id. (“[T]he [Mancuso] court found it significant that . . . the defendant had not specifically placed the question of his intent in issue . . . In this case, however, appellant admitted that he stabbed Casilla. Thus the essential issue to be decided by the jury was whether appellee possessed the intent necessary to support a conviction.”).

The court refused to hold that, by asserting self defense, Ramirez conceded his intent to kill. The court explained that “appellee’s intent to defend himself is consistent with either (a) an intent to kill, (b) an intent to injure seriously, or (c) an intent to injure slightly.” Id. See also Mason v. Balkom, 669 F.2d 222 (5th Cir. Unit B 1982) (finding Sandstrom error because, in asserting self
Aside from the fact that the "significant possibility of harm" standard has no place in a Sandstrom inquiry, the emphasis placed on the theory of defense finds little support in Sandstrom. Of greater concern, however, is the difficulty such an emphasis causes for a defendant who either advances a nonparticipation defense or relies totally on the prosecution's burden of proof.

B. Francis v. Franklin: The Supreme Court Reevaluates Sandstrom

The Supreme Court spoke again on the central issue of Sandstrom in Francis v. Franklin. The Franklin Court analyzed the following jury instruction: "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 consequences of his acts but the presumption may be rebutted." Following the analysis set forth in Sandstrom, the Court found the instruction unconstitutional.

defense, the defendant was forced to admit the facts that activated the presumption), cert. denied, 460 U.S. 1016 (1983).

97 Although the Sandstrom Court found the presumption of intent especially egregious in that case because of the nature of Sandstrom's defense, 442 U.S. at 520-21, it did not indicate that the Constitution approves such presumptions as to defendants who do not raise mens rea defenses. Indeed, Winship, the pivotal case upon which Sandstrom relies, held that the prosecution must prove every element necessary to constitute the crime charged, not just those elements which the defendant actively contests. See supra note 24 and accompanying text.

Mullaney also supports this proposition. The prosecution in Mullaney argued that once the jury had determined that the defendant was culpable to some extent, the defendant's interest in liberty and reputation had diminished to the extent that shifting the burden of persuasion on state of mind was an immaterial error. See supra note 28. This argument parallels the holding in Mancuso; the Mancuso court held that once the jury rejected the noninvolvement defense—and therefore determined that the defendant was culpable to some extent—a persuasion shifting instruction on state of mind was not error. See supra note 99. The Mullaney Court rejected this reasoning, saying "[t]he safeguards of due process are not rendered unavailing simply because a determination of guilt may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." 421 U.S. at 698. To the extent that the Mancuso approach violates this principle of Mullaney, it is invalid.

The courts have also placed weight on the nature of the defense in harmless error determinations. See infra notes 131-34 and accompanying text.

98 Judge James Oakes of the Second Circuit, who has consistently championed Sandstrom over the past decade, asserts:

Whether intent is the only element at issue or only one of several to be decided by the jury should not be the key for holding that a Sandstrom charge is constitutionally defective. In either case, the burden of proving every element of the crime charged, including intent, must remain with the prosecution. Where such a charge is employed and there exists the possibility, however slight, that a reasonable juror could have concluded that the presumption was sufficient to satisfy the prosecution's burden as to intent, then Sandstrom instructs that there has been constitutional error.


100 Id. at 309.

101 Id. at 325. As it had in Sandstrom, the Court first examined the presumption to determine whether a reasonable juror might interpret it in an unconstitutional manner, id. at 316-17, and then analyzed the general contextual instructions to determine whether they adequately explained the legal effect of the presumption. Id. at 318-20.
1. Reaffirmation of the Sandstrom Mandate

Franklin reaffirmed Sandstrom in three important ways. First, the Court once again held that correct contextual instructions do not cure an infirm instruction unless they explain its legal effect. Second, the Court reiterated Sandstrom's holding that persuasion shifting presumptions are as constitutionally onerous as conclusive presumptions. Finally, the Court expressly rejected any standard other than the “risk” standard enunciated in Sandstrom. Unlike Sandstrom, the Franklin decision attracted only a five person majority. Justice Powell dissented because he believed that the correct contextual instructions adequately eliminated the possibility of misinterpretation by the jury. Justice Rehnquist, joined by Justice O'Connor and Chief Justice Burger, accused the majority of extending Sandstrom. Rehnquist advanced an analysis comparable to that used in many of the circuit cases discussed above.

102 Id. General contextual instructions told the jury that the defendant is presumed innocent and that the prosecution must prove every element of the offense beyond a reasonable doubt. The sentence immediately following the presumption told the jury that “[a] person will not be presumed to act with criminal intention.” Id. at 319.

The Franklin Court first rejected the prosecution’s argument that the general instructions sufficiently clarified the presumption, noting that a reasonable juror might think that the presumption provided the prosecution with the requisite proof. Id. The Court then found the “criminal intention” language unhelpful; it explained that “a reasonable juror trying to make sense of the juxtaposition [of the two instructions] may well have thought that the instructions related to different elements of the crime and were therefore not contradictory.” Id. at 320-21. The Court concluded that “language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.” Id. at 322.

103 Id. at 316-18. “The language challenged here differs from Sandstrom, of course, in that the jury in this case was explicitly informed that the presumptions ‘may be rebutted’... A mandatory rebuttable presumption is perhaps less onerous from the defendant’s perspective, but it is no less unconstitutional.” Id. at 316-17.

104 Id. at 322 n.8. The majority rejected an alternative “at least as likely as not” test proposed by the dissent (see infra note 106 and accompanying text):

This proposed alternative standard provides no sound basis for appellate review of jury instructions. Its malleability will certainly generate inconsistent appellate results and thereby compound the confusion that has plagued this area of the law. Perhaps more importantly, the suggested approach provides no incentive for trial courts to weed out potentially infirm language from jury instructions; in every case, the “presumption of innocence” boilerplate in the instructions will supply a basis from which to argue that the “tone” of the charge as a whole is not unconstitutional. Most importantly, the dissent’s proposed standard is irreconcilable with bedrock due process principles. When there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict the verdict must be set aside.

105 Id. at 327-31 (Powell, J., dissenting). “We noted in Sandstrom that general instructions may be insufficient by themselves to make clear that the burden of persuasion remains with the State. In this case, however, the trial court went well beyond the typical generalities of such instructions.” Id. at 329 (citation omitted).

106 Id. at 331-42 (Rehnquist, J., dissenting). Rehnquist argued that (1) the correct contextual language prevented jury misinterpretation, id. at 333-40; (2) the language of rebuttal distinguished this instruction from the one given in Sandstrom, id.; and (3) the “risk” standard should be replaced by an “at least as likely as not” standard for jury misinterpretation, id. at 342. Rehnquist also raised the same concern mentioned in his concurring opinion in Sandstrom: “I do not believe that the Court must inject itself this far into the state criminal process to protect the fundamental rights of criminal defendants.” Id. at 342. See supra note 63 and accompanying text.

Under this rubric, most of the circuit cases discussed above would be rightly decided. However, adoption of Rehnquist’s methodology requires complete abandonment of Sandstrom.
2. Post Franklin Reactions in the Circuit Courts

Franklin's reaffirmation of Sandstrom did prompt some reform in the circuits. Nonetheless, many circuit decisions demonstrate misunderstanding of or resistance to Franklin's true import. For example, the Seventh Circuit recently denied habeas corpus relief in Jacks v. Duckworth (Jacks II). The petitioner in Jacks II unsuccessfully argued that Franklin "should serve to convince this Court that the majority in [Jacks I] was wrong with respect to whether the presumption complained of shifted the burden of proof." Unpersuaded, the court reasoned that since Franklin effected no change in the Sandstrom standard, the instruction given at Jacks' trial must still comport with that standard. In reaffirming its decision that the presumption did not violate Sandstrom, the Seventh Circuit applied the same incorrect standard it had used in Jacks I—the standard explicitly rejected by Franklin.

For example, the post-Franklin Tenth Circuit held that general contextual instructions do not cure or prevent Sandstrom error. See Wiley v. Rayl, 767 F.2d 679 (10th Cir. 1985) (overruling Hux v. Murphy, 733 F.2d 737 (10th Cir. 1984), cert. denied, 471 U.S. 1103 (1985)); accord Myrick v. Maschner, 799 F.2d 642 (10th Cir. 1986). The Seventh Circuit has acknowledged that Franklin disposes of the argument that a rebuttability clause cures or prevents Sandstrom error. See Dean v. Young, 777 F.2d 1239 (7th Cir. 1985), cert. denied, 475 U.S. 1142 (1986). The Eleventh Circuit began to find Sandstrom error without reservation; in fact, it reversed several prior Sandstrom decisions in which it had applied an improper analysis. See, e.g., Lakes v. Ford, 779 F.2d 1578 (11th Cir. 1985) (finding error despite presence of rebuttability clause and general instructions); Davis v. Kemp, 752 F.2d 1515 (11th Cir.) (finding Sandstrom error because no rhetorically inconsistent instructions accompanied the error), cert. denied, 471 U.S. 1143 (1985). Lastly, the Second Circuit applied the correct standard for contextual instructions in Fratarcangelo v. Smith, 792 F.2d 40 (2d Cir. 1986), in which it held that a challenged instruction, immediately followed by phrase beginning with "in other words," was not error because the contextual instructions explained the legal effect of the presumption within the meaning of Franklin.

In Dean v. Young, 777 F.2d 1239 (7th Cir. 1985), cert. denied, 475 U.S. 1142 (1986), the Seventh Circuit reconsidered Pigee v. Israel, in light of Franklin. After recounting the reasons advanced in Pigee for denying relief, see supra notes 85-90 and accompanying text, the Dean court concluded that Franklin disposed of only one: that the presumption could be overcome by circumstances which prevent or rebut its operation. 777 F.2d at 1244. Not only did the court hold that the remaining reasons were still valid, but it also added a new rationale: Since the instruction referred to "circumstances" but failed to say which party carried the burden of making them appear, the jury would not have understood it as throwing the burden of persuasion on the defendant. Id. The use of this rationale is highly questionable in light of both Sandstrom's and Franklin's declarations that such ambiguities may easily be confusing to the jury.

Likewise, in Knaubert v. Goldsmith, 791 F.2d 722 (9th Cir.), cert. denied, 479 U.S. 867 (1986), the Ninth Circuit rejected a Sandstrom claim because "[a]lthough the initial instruction may have had the potential to confuse the jury, the court's final instruction that the state has the burden of proving beyond a reasonable doubt... was sufficient to clear up any initial confusion." Id. at 726 (footnote omitted). The court did not attempt to reconcile this conclusion with Franklin or Sandstrom.

See also Mancuso v. Scully, 824 F.2d 154 (2d Cir. 1987) (rejecting appeal, in which petitioner asked the court to reconsider its prior decision (see supra notes 91-93 and accompanying text) in light of Franklin, because intent was not the thrust of the defense); Williford v. Young, 779 F.2d 405 (7th Cir. 1985) (finding that instruction, reviewed in the light of Franklin, easily passed scrutiny because
V. Extrinsic Causes of Sandstrom's Deterioration

Two related developments, although not bearing directly on the Sandstrom analysis, have affected Sandstrom adversely. First, the circuits have frequently applied the harmless error doctrine to the few cases in which they do find Sandstrom violations. Second, federal habeas corpus restrictions on petitioners who have committed procedural default create an almost insurmountable barrier to relief in Sandstrom cases.

A. Harmless Error Rationales

The Supreme Court first addressed the harmless error doctrine's applicability to Sandstrom error in 1983 in *Johnson v. Connecticut*, but deep divisions among the Justices prevented a resolution of that issue until 1986 in *Rose v. Clark*. Both *Johnson* and *Clark* reflect an effort by some Justices to limit Sandstrom indirectly through the generous application of the harmless error doctrine to Sandstrom violations. This effort ultimately succeeded in *Clark*.

1. Supreme Court Guidelines

The Court's attempt to resolve the harmless error issue in *Johnson* resulted in a plurality decision. The plurality argued that, at least in the case of a conclusive presumption, a reviewing court could hold Sandstrom error harmless in two situations only: (1) where the erroneous instruction had no bearing on the offense for which the defendant was convicted, and (2) where the defendant has conceded intent; the defendant advanced a nonparticipation defense).

A harmless error analysis, in the context of Sandstrom error, implicates the sixth amendment right to trial by a jury of one's peers. The Supreme Court first held that errors of constitutional dimension might be subject to harmless error analysis in *Chapman v. California*, 386 U.S. 18 (1967). Under *Chapman*, an error is harmless when the reviewing court can say, beyond a reasonable doubt, that the constitutional error did not contribute to the verdict obtained. *Id.* at 24. Errors subject to harmless error analysis include admission of evidence obtained in violation of the fourth amendment (Chambers v. Maroney, 399 U.S. 42 (1970)); improper comments on the defendant's failure to testify (United States v. Hastings, 461 U.S. 499 (1983)); and refusal to permit cross examination concerning witness bias (Delaware v. Van Arsdall, 475 U.S. 673 (1986)). The *Chapman* rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial, rather than on the virtual inevitable presence of immaterial error." *Id.* at 681. See generally R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970).

*Chapman* explained, however, that some constitutional errors always mandate reversal because they render a trial fundamentally unfair. 386 U.S. at 23. Such errors include admission into evidence of a coerced confession (Payne v. Arkansas, 356 U.S. 560 (1958)); complete denial of counsel (Gideon v. Wainwright, 372 U.S. 335 (1963)); and adjudication by a biased judge (Tumey v. Ohio, 273 U.S. 510 (1927)).
ant "may in some cases" do so by raising defenses such as alibi, insanity, or self defense.118 Because a reviewing court cannot say with certainty that the jury considered the evidence of state of mind, the plurality believed that such evidence should be irrelevant in a harmless error analysis.119

The dissent criticized the plurality for advancing an "automatic reversal" rule for Sandstrom error.120 The dissent reasoned that a jury need not rely on the presumption when the basic facts "establish intent as conclusively as if it were unequivocally conceded."121 A reviewing court should therefore hold the error harmless if it finds overwhelming evidence of state of mind, the dissent opined.122

The views expressed by the Johnson dissent influenced the majority in Rose v. Clark. The Clark Court held that overwhelming evidence of intent renders Sandstrom error harmless.123 The Court explained that Sandstrom sought to protect only the accuracy of the verdict, not the in-

118 Id. at 87. Guthrie v. Warden, 683 F.2d 820 (4th Cir. 1982), is an example of the first exception; the erroneous presumption in that case afflicted a different offense than that for which the defendant was convicted. For examples of the second exception, see infra notes 132-33 and accompanying text. The plurality cautioned that a defendant who relies entirely on the prosecutorial burden of proof should not be deemed to concede intent. 460 U.S. at 87 n.16.

119 The plurality asserted that a conclusive presumption has the same effect as a directed verdict; thus, the jury faced with such a presumption would ignore the evidence and follow the presumption. 460 U.S. at 84-85. Since a conclusive presumption cases the jury's task, the plurality reasoned that the jury would not deliberately undertake "the more difficult task of evaluating the evidence of intent." Id. at 85. (quoting Sandstrom, 442 U.S. at 526 n.13). In any event, the plurality contended, reasonable jurors would do as they are told and ignore the evidence controverting the presumption. Id. at 85 n.14.

The plurality believed that "[t]o allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury may never have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made." Id. at 86.

120 Id. at 90 (Powell, J., dissenting). The dissent argued that the second exception outlined by the plurality was largely meaningless, since a trial court would not give state of mind instructions if the defendant had conceded intent. Id. at 94. Notwithstanding this argument, Sandstrom error often occurs in cases in which the defendant has alleged self defense, alibi, or insanity. See infra notes 132-33 and accompanying text.

The dissent disagreed with the characterization of a conclusive presumption as the functional equivalent of a directed verdict; since the jury must find the basic facts before it may apply the presumption, the dissent opined that "the presumption does not remove the issue of intent from the jury's consideration." 460 U.S. at 95. This assertion reflects the dissent's apparent confusion over the nature of a conclusive presumption. The dissent argued that "[s]uch a presumption leaves the issue ultimately to the jury." Id. The dissent also repeatedly asserted that the presumption at issue "permits" or "allows" a finding of intent from the basic facts, and that intent was still a question of fact for the jury to determine. Id. at 95-98 & nn.3-5. The instruction at issue stated that "every person is conclusively presumed to intend the natural and necessary consequences of his act." Id. at 96. By its very terms, the presumption controverts the dissent's assertion that it left the question of intent to the jury.

121 Id. at 97-99.

122 The dissent suggested that Sandstrom error should be harmless whenever the evidence is 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. Id. at 97 n.5.

123 478 U.S. at 580 ("[T]he error at issue . . . is not 'so basic to a fair trial' that it can never be harmless.") (quoting Chapman v. California, 386 U.S. 18, 23 (1967)). The Court adopted the test approved by the dissent in Johnson; that is, that a Sandstrom error is harmless when a reviewing court finds that the record developed at trial establishes guilt beyond a reasonable doubt. Id.

The Clark Court admitted that if the trial court had directed a verdict for the prosecution, harmless error could not be applied, even in the light of overwhelming evidence, because of the "Sixth Amendment's clear command to afford jury trials in serious criminal cases." 478 U.S. at 578. How-
tegrity of the factfinding process. Accordingly, the Court asserted that a presumption existed in favor of applying harmless error analysis in Sandstrom cases. The dissent protested that "'[t]he Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under the Sixth Amendment, can demand be performed by a jury.'"

2. Clark's Impact in the Circuits

Most circuits had previously adopted an analysis similar to that required by Clark. Consequently, the holding in Clark did not greatly influence the circuits. Only in the Eighth Circuit, which had held that Sandstrom error could not be harmless, and in the Sixth and Ninth Cir-

ever, the Court specifically rejected the contention that Sandstrom error equals a directed verdict for the state. Id.

The Court's attempt to distinguish mens rea presumptions from directed verdicts is unpersuasive. By definition, a conclusive presumption precludes the factfinder from considering the evidence of the presumed fact. Likewise, a persuasion shifting presumption precludes the factfinder from considering the evidence of the presumed fact unless a rebuttal occurs. See supra note 2. See also Allen & DeGrazia, supra note 65, at 13 n.77 ("There is no functional difference between 'directing a verdict' on an issue in every case and eliminating that element from the definition of the crime.") (suggesting that conclusive presumptions essentially eliminate the presumed fact from the definition of the crime); J. Wigmore, supra note 10, at 308 (asserting that a conclusive presumption renders the existence of the presumed fact "wholly immaterial").

124 478 U.S. at 580.

125 The Court reviewed the history of harmless error analysis under Chapman and concluded that "if the defendant had counsel and was tried before an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." Id. at 579. It also asserted that the purpose behind Winship and Sandstrom "is to ensure that only the guilty are criminally punished." Id. at 580.

Justice Stevens, concurring in the judgment, took exception to the majority's characterization of the harmless error rule. He argued that "our Constitution, and our criminal justice system, protects other values besides the reliability of the guilt or innocence determination. A coherent harmless error jurisprudence should similarly respect those values." Id. at 588 (Stevens, J., concurring). However, Stevens agreed that the "primary" value protected by Sandstrom is an accurate determination of the defendant's guilt or innocence. Id. at 589.

126 Id. at 593 (Blackmun, J., dissenting). The dissent reasoned that, when "[faced with an incorrect instruction and a general verdict of guilty, a reviewing court simply lacks any adequate basis for deciding whether the jury has performed its constitutionally required function." Id. at 596. The dissent asserted that Sandstrom error is "analytically indistinguishable" from errors, such as ineffectual counsel or a biased judge, which may never be harmless. Id. at 592-93.

Additionally, to the extent that the Clark majority's "overwhelming evidence" standard undermines the "risk" standard, it stands in direct conflict with Sandstrom and Franklin.

127 With little variation, the circuits have held Sandstrom error harmless if (1) the defendant failed to raise a mens rea defense, and (2) overwhelming evidence in favor of conviction exists in the record. Even though Clark adopted the overwhelming evidence test, many circuits still apply the mens rea defense test as a corollary. See infra notes 192-33 and accompanying text.

A few pre-Clark cases refused to hold Sandstrom error harmless, regardless of the defense theory or the evidence submitted. See, e.g., United States v. Voss, 787 F.2d 393 (8th Cir.) (holding that "'[i]f the Sixth Amendment right to a jury decision of guilt or innocence means anything, it means that the facts essential to conviction must be proven beyond the jury's reasonable doubt, not ours'"), cert. denied, 479 U.S. 888 (1986); Burton v. Burgman, 649 F.2d 428 (6th Cir. 1981) (holding that every element is necessarily at issue in a criminal case, so fact that the defendant did not raise intent is irrelevant), vacated on other grounds, 456 U.S. 953 (1982); Hammonetree v. Phelps, 605 F.2d 1371 (5th Cir. 1979) (refusing to consider the sufficiency of the evidence where mandatory presumption is involved).

The pre-Clark Sixth and Ninth Circuits held that Sandstrom error could not be harmless if the defendant raised a mens rea defense, even in the face of overwhelming evidence. See, e.g., Conway v. Anderson, 698 F.2d 282 (6th Cir.), cert. denied, 462 U.S. 1121 (1983) and Petition of Hamilton, 721
circuits, which had held that Sandstrom error could not be harmless if the defendant raised a mens rea defense, did any major changes occur.128

However, the way in which the circuit decisions, both before and after Clark, have applied the "overwhelming evidence" test is disturbing. For example, some circuits have found overwhelming evidence by simply reapplying the erroneous presumption.129 Others have found overwhelming evidence after weighing the credibility of the testimony and evidence, thereby invading the exclusive province of the jury to decide credibility issues.130

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A jury may infer mens rea from conduct alone; indeed, proof of conduct may be the only indication of mens rea available in a given case. But a critical difference exists between allowing a jury to find state of mind from conduct alone and allowing a reviewing court to determine that a properly instructed jury would have reached that conclusion based on proof of conduct alone. As the dissent in Clark noted, a reviewing court is simply incapable of determining what a jury might find from conduct alone in any given case. See supra note 126 and accompanying text. The jury decision in Clark presents a good example of this problem. Clark was charged with the first degree murder of two people. The prosecution used the same evidence to prove both murders. Despite the fact that exactly the same sequence of events led to the two murders, the jury convicted Clark of first degree murder for one killing and second degree murder for the other. See Clark, 478 U.S. at 494 (Blackmun, J., dissenting).

The Eleventh Circuit's approach is more justifiable. It has held that a reviewing court should not find overwhelming evidence exclusively from the sequence of physical acts involved in the crime, but from evidence of state of mind as well, at least when intent is specifically at issue. The Eleventh Circuit recommends this approach because conduct is often ambiguous. See Dix v. Kemp, 832 F.2d 546 (11th Cir. 1987), cert. denied, 108 S. Ct. 1247 (1988).

130 See, e.g., Baker v. Montgomery, 811 F.2d 557 (11th Cir. 1987) (court finds the defense theories of provocation and self defense to be "frivolous and wholly implausible," noting that the defendant was only the witness for the defense and that all other evidence at trial controverted his testimony); Sturgis v. Goldsmith, 796 F.2d 1103 (9th Cir. 1986) (court finds overwhelming evidence based on eyewitness testimony); Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983) (court finds overwhelming
The circuits also often consider the defense theory significant; they reason that the defendant who fails to raise a mens rea defense at trial either "concedes" mens rea or "allows" the evidence to be overwhelming by leaving it undisputed.\(^1\) This approach may permit Sandstrom error to occur with impunity in trials in which the defendant raises self defense or insanity,\(^2\) claims alibi or nonparticipation,\(^3\) and possibly even when

\(^1\) See infra notes 132-134 and accompanying text.

\(^2\) The effect of a self defense or insanity plea varies among the jurisdictions:

In the Ninth Circuit, a defendant who asserts an insanity or self defense theory at trial constructively concedes his state of mind. See, e.g., Sturgis v. Goldsmith, 796 F.2d 1103 (9th Cir. 1986) (insanity); Petition of Hamilton, 721 F.2d 1189 (9th Cir. 1983), overruled on other grounds by McKenzie v. Risley, 842 F.2d 1525 (self defense), cert. denied sub nom. McKenzie v. McCormick 109 S. Ct. 250 (1988).

In the Sixth Circuit, an insanity defense is equivalent to a concession of intent. See Cook v. Foltz, 814 F.2d 1109 (6th Cir.) (an insanity plea does not controvert intent, but merely contests the defendant's general ability to know right from wrong), cert. denied, 108 S. Ct. 119 (1987).

The Fifth and Second Circuits have held that by asserting self defense, the defendant makes intent a critical issue. See Mason v. Balkcom, 669 F.2d 222 (5th Cir. Unit B 1982) (self defense plea does not necessarily mean an intent to kill; rather, it means that the defendant is admitting involvement; one could shoot to frighten, wound, or reactively, with no specific intent, as well as to kill), cert. denied, 460 U.S. 1016 (1983); Arroyo v. Jones, 685 F.2d 35 (2d Cir.) (the defendant "highlighted" intent by pleading self defense and amnesia), cert. denied, 459 U.S. 1048 (1982).

Two panels of the Eleventh Circuit split that court on the issue of insanity; an en banc decision later held that a plea of insanity does not equal a concession of intent. See Dix v. Kemp, 832 F.2d 546 (11th Cir. 1987) (en banc) (insanity plea brings intent into issue) (arguing that the jury's rejection of an insanity defense does not mean that it found the defendant totally free of mental infirmity or found that he had the capacity to form a specific intent), cert. denied, 108 S. Ct. 1247 (1988). See generally W. LAFAVE & A. SCOTT, supra note 1, at § 4.1 (discussing the different theories of insanity and what effect each has on mens rea).

The defenses of intoxication and accident are generally deemed to be mens rea defenses. See, e.g., Lakes v. Ford, 779 F.2d 1518 (11th Cir. 1986) (accident); Hyman v. Aiken, 824 F.2d 1537 (4th Cir. 1987) (intoxication); Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983) (drugs), aff'd by an equally divided court, 466 U.S. 1 (1984). But see Church v. Kincheloe, 767 F.2d 639 (9th Cir. 1985) (intent not at issue because the defendant conceded that he mentally intended to do physical acts; intoxication only produced mistaken belief that what he was doing was lawful), cert. denied, 478 U.S. 1022 (1986).

135 See, e.g., Burton v. Foltz, 810 F.2d 18 (6th Cir.) (intent is conceded when sole issue raised by defendant is nonparticipation), cert. denied, 108 S. Ct. 327 (1987); Payne v. Le Fevre, 825 F.2d 702 (2d Cir.) (nonparticipation defense concedes state of mind), cert. denied, 108 S. Ct. 508 (1987); Shaw v. Johnson, 786 F.2d 993 (10th Cir.) (nonparticipation/alibi defense raised, so intent not at issue), cert. denied, 479 U.S. 843 (1986); Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986) (nonparticipation defense concedes intent), cert. denied, 481 U.S. 1059 (1987); Charles v. Foltz, 741 F.2d 834 (6th Cir. 1984) (intent and malice are not at issue where sole question at trial is the identity of the perpetrator), cert. denied, 469 U.S. 1193 (1985); Garland v. Maggio, 717 F.2d 199 (5th Cir. 1983) (effect of Sandstrom error depends on the nature of the defense; nonparticipation defense may diminish effect of error); United States v. Vricke, 684 F.2d 1126 (5th Cir. 1982) (failure to object to instruction coupled with exclusive reliance on nonparticipation defense may diminish effect of error), cert. denied, 460 U.S. 1011 (1983); United States v. Winter, 663 F.2d 1120 (1st Cir.) (nonparticipation defense takes intent out of issue, so the error could not have contributed to the verdict), cert. denied, 460 U.S. 1011 (1981); McGunn v. Crist, 657 F.2d 1107 (9th Cir. 1981) (nonparticipation defense concedes intent), cert. denied, 455 U.S. 990 (1982).

In most of these cases, the lack of a mens rea defense was treated conjunctively with the presence of overwhelming evidence. Most courts first look at the nature of the defense and then determine if, in the light of that defense, overwhelming evidence exists. The interaction of these two criteria can
the defendant relies entirely on the prosecution's burden of proof.\footnote{134}

Moreover, Clark focuses exclusively on Sandstrom's concern with the accuracy of the verdict. Clark overlooks the fact that the Sandstrom Court predicated its holding on dual constitutional objections: that mens rea presumptions conflict with the presumption of innocence and that they interfere with the jury's factfinding process.\footnote{135} By creating a presumption in favor of applying harmless error analysis in Sandstrom cases, the Clark Court also diminished the incentive to obey Sandstrom by removing the penalty for noncompliance in most cases.

### B. Habeas Corpus Appeals

A habeas corpus petitioner who seeks federal collateral review of a final judgment faces an obstacle potentially lethal to his Sandstrom claim. If the petitioner failed to object to the alleged error at trial or on direct appeal,\footnote{136} the federal courts will refuse to address the merits of the Sandstrom claim unless the petitioner demonstrates cause for and actual prejudice from the procedural default.\footnote{137} The courts have demanded very

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\footnote{134} See Burger, 785 F.2d 890, discussed supra note 133.
\footnote{135} See supra note 60 and accompanying text.
\footnote{136} Most defendants who failed to object to the Sandstrom-type instruction at trial or on direct appeal had trials prior to the Sandstrom decision. Before Sandstrom, defense counsel may have either not realized that burden-shifting and conclusive presumptions violated the Constitution or they may have thought it futile to object to instructions which had enjoyed such longstanding judicial use. See generally Remington, State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts, 44 Ohio St. L.J. 287, 288-89 (1983).
\footnote{137} The Supreme Court first adopted the "cause and prejudice" standard for habeas corpus appeals from state court convictions in Wainwright v. Sykes, 433 U.S. 72 (1977). The Sykes Court believed that state contemporaneous objection rules protect the important state interests of finality and comity, and thus should be accorded great deference by the federal judiciary. Thus, the Court held that, absent a waiver of default by the state courts, a defendant may not allege federal constitutional violations for the first time on federal habeas corpus appeal without first showing cause for and actual prejudice resulting from that failure. \textit{Id.} at 90-91. The Court believed that this standard adequately protects "a defendant who in the absence of a federal habeas corpus adjudication will be the victim of a miscarriage of justice." \textit{Id.} at 91. See also Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (holding that the burden of justifying federal habeas
exacting proof of these elements. In fact, the difficulty of meeting the cause and prejudice standard led one commentator to observe that "although the symbolic significance of ... Sandstrom v. Montana remains great, the practical impact ... is an unwarranted rise in state prisoner expectations."\textsuperscript{138}

1. Cause

Federal habeas corpus petitioners generally advance two theories of causation for their procedural defaults: (1) novelty of the Sandstrom claim and (2) ineffective assistance of counsel. Although the federal courts accept the theoretical possibility that a petitioner could show cause through proof of novelty or ineffective counsel, they routinely reject such claims in individual cases.

The Supreme Court established a bright line test for determining the novelty of a claim involving unconstitutional jury instructions in Engle v. Issac\textsuperscript{139} and Reed v. Ross.\textsuperscript{140} Under Issac and Ross, such a novelty claim does not constitute "cause" unless the petitioner's trial occurred before Winship. The Engle Court reasoned that defense counsel had the "tools" to construct Sandstrom-type claims after Winship.\textsuperscript{141} Accordingly, the Sixth Circuit rejected the habeas petitioner's novelty argument in McBee v. Grant,\textsuperscript{142} even though the petitioner's trial had occurred less than one year after Winship and nine years before Sandstrom.\textsuperscript{143} The Fifth Circuit also rejected the novelty argument in Johnson v. Blackburn\textsuperscript{144} because Sandstrom "was an entirely foreseeable extension" of Winship, Mullaney, and Patterson.\textsuperscript{145}
In response to the judiciary's treatment of the novelty argument, petitioners have advanced the ineffective assistance of counsel theory; that is, they argue that if pre-Sandstrom counsel had or should have had the "tools" and foresight to construct a challenge to presumptive mens rea instructions, but failed to do so, those attorneys provided ineffective assistance. The Supreme Court impliedly rejected this argument in Issac, explaining that "[n]ot every astute counsel would have relied upon Winship.... [T]he Constitution... does not insure that defense counsel will recognize and raise every conceivable constitutional claim." Thus, in Johnson, the Fifth Circuit concluded that failure to object to the "entirely foreseeable" Sandstrom error did not render counsel ineffective because no reasonable probability existed that a timely objection would have altered the outcome of the trial.

The Ross-Issac approach to causation penalizes habeas corpus petitioners for having mediocre legal counsel—not poor enough to be ineffective but not good enough to construct a foreseeable claim. Furthermore, the judiciary's expectation that defense attorneys could and would construct Sandstrom-type objections without the benefit of Sandstrom seems ironic in light of the fact that many courts continue to be unable or unwilling to recognize Sandstrom error.

2. Prejudice

The Supreme Court explored the contours of the prejudice test in United States v. Frady. The Court concluded that a habeas petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." The circuits have followed this mandate by

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Taylor v. Harris, 640 F.2d 1 (2d Cir.) (finding no cause because the instruction at issue had been contrary to state law for more than a century), cert. denied, 452 U.S. 942 (1981).
146 456 U.S. at 133-34 ("Where the basis of a constitutional claim is available, and other counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default.").
147 778 F.2d at 1050. In reaching this conclusion, the Johnson court relied on the facts that petitioner had not contested intent at his trial (he asserted a defense of nonparticipation), that contextually correct instructions surrounded the error, and that the evidence supporting the verdict was overwhelming. Id. See also Lockett v. Arn, 740 F.2d 407 (6th Cir. 1984) (rejecting petitioner's contention that the instructions were so constitutionally infirm that failure to object demonstrated ineffective counsel and thus constituted cause), cert. denied, 478 U.S. 1019 (1986); Tsirizotakis v. Le Fevre, 736 F.2d 57, 62-63 (2d Cir.) (finding no ineffective assistance "of constitutional dimension" because intent was not at issue (the defendant pleaded self defense); the court reasoned that counsel's failure to object "could well have reflected counsel's view that making an issue of intent would only detract from petitioner's primary defense of justification"), cert. denied, 469 U.S. 869 (1984). But cf. Tyler v. Phelps, 622 F.2d 172 (5th Cir. 1980) (The court explained that a lack of knowledge by counsel that the actions of the judge constituted a due process violation is sufficient cause for failure to object and that a defendant should not be bound by the non-tactical decisions of counsel if these decisions result in prejudice. Upon rehearing, however, the court refused to find cause because Tyler's counsel could not remember why he failed to object to the instruction.), vacated, 643 F.2d 1095 (5th Cir. 1981), cert. denied, 456 U.S. 935 (1982).
149 Id. at 170. The petitioner in Frady failed this test; the Supreme Court concluded that "the strong uncontradicted evidence of malice in the record, coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention that he suffered such actual prejudice." Id.
performing an analysis similar to a harmless error review. For example, the Sixth Circuit found no prejudice in *Fornash v. Marshall* because (1) the prosecution introduced overwhelming evidence of intent and (2) other instructions cured "any possible defect" in the challenged presumption. Similarly, the Second Circuit rejected the prejudice argument in *Dudley v. Dalsheim* because it found strong and uncontradicted evidence of intent in the record.

Application of the actual prejudice test to *Sandstrom* claims in this manner indicates a lack of understanding of *Sandstrom*. *Sandstrom* stands for the proposition that the possibility that the jury applied an impermissible presumption in itself constitutes prejudice to the defendant. Requiring a habeas corpus petitioner to show, as a procedural matter, facts far in excess of those sufficient to support the underlying substantive claim renders that underlying claim meaningless.

VI. Conclusion

The *Sandstrom* Court attempted to accord criminal defendants the full benefit of their due process and jury trial rights. Trial courts can easily avoid the harm which the Court sought to redress, and the analysis expected of the reviewing courts is straightforward and practical. *Sandstrom* does not undermine the jury's right to infer state of mind from a defendant's actions, if it so finds from all the evidence. Nor does it prevent the trial court from so instructing the jury. Yet, *Sandstrom* has encountered overwhelming resistance in the circuit courts.

Although the courts have not clearly expressed their reasons for resisting *Sandstrom*, at least three plausible theories of resistance exist. First, the courts may hesitate to abolish the presumption because of the

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151 Id. at 1187.
152 686 F.2d 110 (2d Cir. 1982).
153 Id. at 112.
154 Professor Remington explains one reason why tension exists between *Sandstrom* and the restrictions on federal habeas corpus review of state court decisions:

The difficulty is created by the Supreme Court's desire to reaffirm important principles of federal constitutional law, such as the requirement that guilt is proved beyond a reasonable doubt, and to make those decisions apply retroactively when they affect the integrity of the factfinding process, on the one hand, and, on the other hand, the increasing desire of the federal courts to play only a limited role in the postconviction review of state prisoner convictions. These somewhat inconsistent objectives can be fully achieved only if state courts willingly assume the responsibility for implementing decisions such as *Sandstrom* by reversing the large number of convictions that must be reversed if the decisions are to be applied retroactively.

Remington, *supra* note 136, at 303. Remington suggests that "if state courts refuse to follow *Sandstrom*, the responsibility for applying constitutional principles should be shared by the federal courts through habeas corpus review." *Id.* at 305.

As with harmless error, the cause and prejudice standard stands in direct conflict with *Sandstrom* and *Franklin* to the extent that it undermines the "risk" standard.
practical difficulties inherent in proving state of mind. Second, the courts may fear that strict enforcement of Sandstrom would provoke a flood of litigation. Third, the courts may believe that Sandstrom violates the tradition of federal deference to state jury instructions.

None of these reasons survives close scrutiny. First, the fact that the mens rea presumption has enormous utility does not detract from its unconstitutionality. For as long as the criminal law requires the prosecution to show a guilty mind as well as an evil hand, the judiciary must reject the mens rea presumption.

Second, strict enforcement of Sandstrom in present claims would arguably reduce or eliminate future claims. Such enforcement would force the trial courts to carefully scrutinize jury instructions, thus minimizing the possibility of error. Even if strict enforcement does result in increased litigation, however, the courts should not foreclose valid constitutional claims to solve docket problems.

Third, the principle that the federal courts should abstain from scrutinizing state jury instructions does not apply when an error of constitutional dimension has occurred. Since Sandstrom error invokes both sixth and fourteenth amendment concerns, the federal courts can and should employ Sandstrom to sanction offending instructions.

Most importantly, the lower courts must follow Supreme Court precedents, even if those courts dislike the precedents or believe that they are misguided. Sandstrom and Franklin remain in the United States Reports. Judicial integrity demands that courts adhere to them.

The circuits have not acted alone, however. The Supreme Court has retreated from Sandstrom as well through extrinsic restrictions. The Court's treatment of Sandstrom in the context of habeas corpus review and harmless error analysis have, as a practical matter, reduced Sandstrom to a polite fiction. If Sandstrom lacks constitutional merit, the Court should overrule or restructure it. But if the result of Sandstrom is constitutionally required under the Winship and Morissette precedents, the Court should construe it liberally to advance its objectives.

Laurie A. Briggs

155 See supra note 8 and accompanying text for the traditional statement of this view.
156 See, e.g., Figee v. Israel, 670 F.2d 690, 694 (7th Cir.) (expressing concern over the "plethora of cases" raising Sandstrom claims), cert. denied, 459 U.S. 846 (1982).
157 See supra note 80 (discussing the precedential basis for federal deference to state jury instructions, and the effect this deference may have on Sandstrom claims). Justice Rehnquist expressed this reservation in his concurrence in Sandstrom. See supra note 63 and accompanying text.
158 See supra note 1.
159 See supra note 80.
160 Judge Oakes reminded the Second Circuit of this important point after reviewing that circuit's treatment of Sandstrom: "It seems obvious that we will be confronted with Sandstrom issues for some time to come. If consistency on this issue is to be restored, the Second Circuit must follow the teaching of Sandstrom, rather than trying to avoid it through meaningless distinctions that only tend to cloud an otherwise clear holding by the Supreme Court. In stating this, I am reminded of that Court's mandate to the federal judiciary... that "a precedent of [the Supreme] Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be." Oakes, supra note 98, at 654-55 (footnote omitted).