OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 83-1590

TITLE ROBERT FRANCIS, WARDEN, Petitioner v. RAYMOND LEE FRANKLIN, Respondent.

PLACE Washington, D. C.

DATE Wednesday, November 28, 1984

PAGES 1 - 54

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT FRANCIS, WARDEN, :

Petitioner : No. 83-1590

v. :

RAYMOND LEE FRANKLIN, :

Respondent. :

- -x

Washington, D.C.

Wednesday, November 28, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 9:59 o'clock a.m.

APPEARANCES:

MS. SUSAN V. BOLEYN, ESQ., Assistant Attorney General of Georgia, Atlanta, GA; on behalf of Petitioner.

RONALD J. TABAK, ESQ., New York, NY; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Francis v. Franklin. Ms. Boleyn, you may proceed whenever you're ready.

ORAL ARGUMENT OF SUSAN V. BOLEYN, ESQ.

ON BEHALF OF THE PETITIONER

MS. BOLEYN: Mr. Chief Justice, may it please the Court, there are two major points that are the question for the Court's resolution in this case, and I'd like to briefly outline those points before going back and addressing them in more detail for the Court's consideration.

The State of Georgia originally sought a petition for writ of certiorari in this case because of our great concern about the ramifications of the holding of the Eleventh Circuit in connection with its finding about the Sandstrom violation that it found in this case and the application of the reasonable juror test in Sandstrom to state court instructions, especially in the context of a federal habeas corpus case.

As we stated in our brief to the Court, we contend that the Eleventh Circuit both misinterpreted and misapplied the holding of the Supreme Court in Sandstrom v. Montana and specifically unnecessarily broadened the reasonable juror test set forth by the

Court in that decision.

We contend that the charge considered as a whole in this case was permissive in nature, did not have a mandatory effect on the jury, and did not interfere with the fact-finding ability of the jurors.

The second point that we wish to discuss this morning is our contention that the Eleventh Circuit properly considered whether or not harmless error rule would prohibit the granting of the writ of habeas corpus in this case, but then improperly decided that the harmless error rule under the facts of this case did not prohibit the granting of the writ of habeas corpus.

It's our contention that harmless error would have prohibited the granting of the writ, as it's our contention that there was overwhelming evidence of the Respondent's guilt of murder, and that his defense to the charges was, in fact, frivolous if the facts of the case are examined.

The validity of the holding in Francis v. Franklin is important to us for several reasons. First of all, at the time that Mr. Franklin was tried, this charge that is the subject of the Court's review today was a standard charge utilized by many of the state courts in Georgia.

And, in effect, there are 31 death penalty

cases pending in the Eleventh Circuit which potentially may be affected by this Court's decision in the case.

Of course, the potential impact of the harmless error rule is very great in Georgia, as if all of these 31 cases, for example, did have a charge found to be violative of Sandstrom, the application of the harmless error rule might prevent needless retrial in cases where the doubt -- there is no doubt, excuse me, as to the guilt of the Respondent.

The procedural history in this case, we contend, is very important for the Court's consideration of these issues. First of all, the Georgia Supreme Court in the Respondent's direct appeal to that court, found that under the principles of Sandstrom, the effect of the instruction was to merely create a permissive instruction, and that it was not unconstitutionally burden shifting.

Next, of course, in the federal habeas corpus court, the district court found that under the principles of Sandstrom, the charge in this case was distinguishable from that found to be unconstitutional in Sandstrom, because there was additional language considering the court's charge as whole which indicated that the charge was, in effect, permissive.

The Eleventh Circuit then considered the case

on appeal and determined that the effect of the contested portion of the charge was mandatory; therefore, the charge was unconstitutional; therefore, federal habeas corpus relief should be granted.

It's interesting to note that after the decision of the Eleventh Circuit in the Franklin case, the court had the occasion on several other times to consider a similar charge, sometimes finding that the similar charge violated the Constitution and sometimes finding that it didn't.

QUESTION: You mean an internal, intra-circuit conflict?

MS. BOLEYN: Yes, Your Honor. In the Corn case, for example, there were very similar instructions, and the panel considering that case found that there was no mandatory presumption created by --

QUESTION: What before or after we divorced the East Divison from the West, the Eleventh --

MS. BOLEYN: It was after it was the Eleventh Circuit, Your Honor. It was an Eleventh Circuit case.

Essentially, our position is that we urge a return to the principles of Cupp v. Naughton in determining when the reasonable juror test requires reversal.

QUESTION: May I ask a question about -- maybe

it's a question of Georgia law book, because each case has somewhat different facts. And this is a case in which the Defendant shot the man through the door, isn't it?

MS. BOLEYN: Yes.

QUESTION: When the door slammed, then the gun went off.

As a matter of Georgia law, what intent had to be proved in order to establish the conviction. Do you have to prove that the Defendant intended to kill the victim, or merely intended to pull the trigger?

MS. BOLEYN: What the courts have held, the Eleventh Circuit held in the Holloway case that there are three essential elements to murder in Georgia. And, of course, they relied on Georgia case law in making that determination.

And the first is that it's an unlawful act. And then the second is malice. And the court held that criminal intent, specific criminal intent, is a sub-category of malice, and that one would have to have the intent to do the act which resulted in the killing, and it would have to be done with malicious intent. That's essentially what Georgia law would require.

QUESTION: I still don't know the answer to my question. Do they -- is it your understanding that as a

matter of Georgia law, the intent that the Defendant must have is merely to pull the trigger, or to kill the victim?

MS. BOLEYN: No. We would have to have malicious intent, Your Honor.

QUESTION: Does that mean he had to intend to kill the victim?

MS. BOLEYN: Yes. That would be one of the essential elements, yes.

QUESTION: So that -- and you think it's frivolous to suggest that there was any possible state of facts whereby he didn't really intend to kill the victim?

MS. BOLEYN: Yes, I do, Your Honor, basically because it seems like that present counsel is now saying that the gun could have accidentally discharged as a result of the slamming of the door. But if one looks at the facts of the case, what it shows is that the Respondent actually never denied that he fired the gun.

In fact, when he's talked about the second shot that was also fired through the door, he said, "I guess I cocked the hammer again." This was what was included in his statement.

QUESTION: Of course, the second shot went through the roof, I guess.

MS. BOLEYN: Yes, it did, Your Honor, but Mrs. Collie, the victim's wife, said that when she came from her bedroom, where she had been at the time that her husband was killed, back into the living room, that that's when he fired the second shot. And it was her opinion that he saw her shadow coming from the bedroom into the hall and the second shot was intended for her.

In fact, she said that on several occasions, that she thought what happened is, he shot through the door intending to kill her also, but that shot simply went awry.

QUESTION: But, just to make it perfectly clear, you agree that the intent was intent to kill?

MS. BOLEYN: Yes.

QUESTION: And, to some extent, intent is mixed up with how good a marksman the man is.

MS. BOLEYN: Whether or not the shot actually killed anyone would not be -- of course, the homocide would be necessary for it to be murder, of course. But the Respondent's counsel has made a great to-do over the fact that nobody else was harmed.

Of course, he tried to harm them and, in effect, after he had killed the victim, he went up and put the gun to the temple of the victim's wife and cocked the hammer and said, "Give me the car keys now."

So he did take quite a lot of threatening gestures. He chased the victim's daughter throughout the house. She had to escape by running into the nearby woods. So there's more than just the fact that the two shots were fired at the victim himself. It indicates the type of intent that he had.

Of course, first of all, he starts out by saying at the time he originally escapes from the custody of Cobb County authorities that he has nothing to lose. The deputies say, "Well, you know what you're doing?" He says, "I'm in for life; I don't have anything to lose."

In fact, he tells the victim's wife when he holds the gun to her head, "I might as well kill you." So there's a great many actions and interactions in the facts that indicate his intent, other than just the fact that he fired the gun, the revolver, through the door twice in the direction of the victim.

Another part of the facts that might should be highlighted for the Court's review is that Ms. Heitmuller, who was the dental hygienest that he kidnapped, said that he held the gun up and positioned it in front of the screen door, demanding the car keys from the victim, and then he demanded the keys once again, the door was slammed, he pulled the trigger, the

shot went through the door, she heard the glass shatter and she heard a moan.

At this time, the Defendant-Respondent still had hold of her arm. At the time that he fired the second shot, he backed up from the screen door which covered the wooden door that Mr. Collie had slammed, fired the second shot, and then he released her arm and she was able to flee.

So she was actually there when the two shots were fired, and he fired both of them through the door with some short interval being between the first and second shots.

QUESTION: How many shots hit home?

MS. BOLEYN: Only one hit home. The first one pierced both the screen door, the wooden door, the glass, and the curtain covering the glass, and then went into the victim's lung and his heart. And that was the fatal bullet.

The second shot did land in the ceiling of the hall or the living room or the foyer, if you will, of the home of the victim.

We urge a return to the principles of Cupp v. Naughton in this case, in that the federal habeas corpus courts should not be allowed, with intent, to merely search through instructions and look for allegedly

erroneous language. But essentially what they must do is consider the charge as a whole in determining the effect that any presumption might have, instead of focusing on specific phraseology and determining that these magic words, if you will, require that habeas corpus relief should be granted.

If the charge in this case is viewed as a whole, the charge itself is replete with permissive inferences and with cautions to the jury about their duties and their fact-finding abilities.

Of course, there's the basic constitutional framework present in the instructions in this case because we have, of course, repeated instructions on the presumption of innocence, on reasonable doubt, and on the burden upon the State to prove each and every essential element of the crime.

QUESTION: Well, assume we look over the entire set of instructions and conclude that a reasonable juror could have believed that all the prosecution would have to prove in light of these instructions was that he pulled the trigger?

MS. BOLEYN: If you --

QUESTION: Now, do you object to that test, that we look to see what a reasonable jury might conclude after looking at all the instructions?

MS. BOLEYN: No, Your Honor. We don't object to the test. We're not trying to overrule the reasonable juror test of Sandstrom. What we're trying to do is say that what's happening is that the federal habeas corpus courts aren't applying the reasonable juror test because, in effect, it's lost its reasonablenes.

QUESTION: So the Court of Appeals applied the right test and you think they just came out wrong.

MS. BOLEYN: I think their analyzation of the test was wrong, Your Honor, because what they started out with was an assumption that that language was mandatory, and therefore a federal habeas corpus relief should be granted.

They made too quick an assumption as to the effect that a reasonable jury could think the charge had.

QUESTION: So they just misapplied the test, you say?

MS. BOLEYN: Yes; correct.

Essentially what they did is, they said it had the magic words, a person is presumed -- therefore, it has to be mandatory; therefore, it's unconstitutional; therefore, federal habeas corpus relief should be granted.

And what they did was, they said had the constitutional error been cured -- and what we're saying is they need to consider the whole charge before they determine whether, in effect, there's been unconstitutional error; not deciding that there's constitutional error and then seeing if it's cured by some other language in the charge.

Our position is that the charge as a whole neutralized any potentially mandatory effect that any portions of the charge, considered by themselves, might have.

As I've said, one of the most important parts of the charge is the clear instruction to the jury that the burden was not on the Defendant to prove anything, and that the burden was on the State to prove each and every essential element of the crime of murder.

QUESTION: Ms. Boleyn, when we talk about the reasonable juror test, do you think of that as yielding only one result in a given case, or do you think it could yield several different results?

Let me explain a minute what I mean. Do you think that -- when you say how would a reasonable juror have understood these instructions, do you think that only one answer is permissible, that a reasonable juror either would have understood them as permissive or would

have understood them as mandatory?

Or do you think an answer is possible, well, a reasonable juror might have understood them as permissive or might have understood them as mandatory; that either one would be reasonable?

MS. POLEYN: I think that in reviewing this case, there is no question but that the application of the reasonable juror test would compel the conclusion that it was not mandatory.

I think that when you have conflicting presumptions, say, in another case, the reviewing court might have difficulty in determining how a reasonable juror would resolve the conflicts.

I don't think that is present in this case. So essentially, of course, it's still a case-by-case application of the reasonable juror standard. But I think if it's not clear that a reasonable juror would find it to be permissive, then, of course, I suppose the Court would have to find that, you know, it would be unreasonable to assume that all the jurors did apply that kind of an interpretation.

In this particular case, we think it's very clear, though, because essentially the major --

QUESTION: Don't you think it would be possible for two jurors to have different views of the

instructions as a whole and both be very reasonable?

MS. BOLEYN: Oh, yes, Your Honor, I think --

QUESTION: All right. So there are two reasonable instructions.

Now, let's assume that we really could poll all the jurors and there were eleven that thought tha the prosecution had to prove intent; you just couldn't presume it under all the instructions. And there was just one, a very reasonable juror, who thought that if the prosecution proved that the Defendant pulled the trigger, that's all they had to prove because we have been told that you should infer intent unless the Defendant disproves it?

Now, what if there's just one out of the twelve? What do you say about that?

MS. BOLEYN: I suppose my answer to that, Your Honor, is that this Court has held that it's the possibility that the presumption influenced the verdict that the Court's examining when it applies the reasonable juror test.

And, of course, if the charge is so permissive in nature that it makes the possibility very slim that any of the jurors acting in a reasonable --

QUESTION: In my hypothhetical, there are eleven reasonable jurors who have one view and there's

one reasonable juror who has another as to the meaning of the instructions.

And the one -- his understanding would violate Sandstrom. Now, would you think that one reasonable juror believing that is enough to invalidate the --

MS. BOLEYN: I guess, Your Honor, since you have to have unanimous verdict in Georgia, of course, that the possibility that one might have interpreted still wouldn't invalidate it unconstitutionally, though: that what you're doing is -- of course, we can't go back and determine how many of the jurors thought -- but what you're doing is, under these instructions, eliminating the possibility or making it so small that any reasonable juror would find it to be permissive.

So it's reducing that possbility that the reviewing court would have to do.

QUESTION: Well, three of -- this was unanimous below, wasn't it?

MS. BOLEYN: Yes, it was.

QUESTION: So three Court of Appeals judges are unreasonable.

MS. BOLEYN: Well, Your Honor, I think what happened is, then they considered on virtually the same language in the Corn case and three other judges of the Eleventh Circuit said that it wasn't unreasonable.

So I guess in response to that, we do have inconsistency in the application of the standard to similar language.

QUESTION: Let me pursue the question that Justice White asked you. You are here representing the State of Georgia. Now, are you satisfied with the state of the law which says that if one out of twelve jurors could reasonably have read a presumption as being mandatory, although eleven reasonably read it -- that that means the instruction violated --

MS. BOLEYN: No, Your Honor, I'm not; because I think that when you start saying what one particular juror would thik, you're not applying the reasonable juror test anymore.

QUESTION: So you say the reasonable juror just gives you one answer.

MS. BOLEYN: Right.

QUESTION: It isn't a question of a reasonable juror could have said this, but another reasonable juror could have said that.

MS. BOLEYN: That's correct, because what you're doing, of course, in federal habeas corpus review, the federal habeas court is looking for denial of fundamental fairness, and because of that, you're not trying to determine what individual jurors might think,

but trying to place yourself in the position of one reasonable juror.

QUESTION: May I go back for a moment to your argument based on the Corn case and the 31 other cases?

I looked at the opinion on the petition for rehearing, and they distinguish -- or one of the opinions -- distinguish Corn on the grounds that those instructions said that the presumption they are talking about did not arise unless they had proved beyond a reasonable doubt that the Defendant was the intentional slayer.

There's no comparable instruction in this case, is there?

MS. BOLEYN: There's a comparable instruction in the case on the malice part of it, Your Honor. The malice charge is excellent in this case because it tells the jury that malice is an essential element of the crime charged, that the Defendant does not have to disprove malice, that the burden is not on the Defendant to prove anything with reference to the essential element of the offense. And it specifically tells the jury that it is not incumbent upon them to prove excuse, mitigation, or justification.

QUESTION: Yes, but does that go to the point that presumption doesn't arise until after malice or

intentional killing, which they said in the Corn case?

MS. BOLEYN: I think what they did in Corn, perhaps I can make myself clearer if I indicate to the Court what my idea of what they did.

They properly utilized the reasonable juror test. They looked at all portions of the charge before they determined whether it was mandatory, rather than using this curative type language that the Eleventh Circuit utilized in Franklin.

In, I believe it's the Tucker case that was decided even after Corn after Franklin, the exact same charge that was in this case was again found to be constitutional. It's just not clear --

QUESTION: Well, I don't know about that case. I'm just trying to explore your argument. In Corn, the instruction was quite different; you would agree with that?

MS. BOLEYN: Yes, it was. Most definitely.

Here, of course, I think we probably have a stronger charge on malice. That was merely my point; I think that here the malice charge, we contend, was so important because we contend the real dispute was over whether he maliciously fired the gun so as to cause the death of Mr. Collie; that it was the malice element that would be the major factor that the jury would have to

determine in deciding whether he was guilty of murder or nothing, as he plead accident, and also that he did not have the intention to kill the victim when he went to the victim's home.

It's interesting --

QUESTION: May I return, before you go to on, to the statements you made at the beginning, that the Sandstrom type instruction was commonplace at the time of this trial. What was the date of the trial? Was it in January of '79?

MS. BOLEYN: Yes, Your Honor.

QUESTION: I knew he was indicted, but I didn't --

MS. BOLEYN: The trial was in April of '79. Indictment was in -- the offense was January 12, 1979, and I believe he was tried April 23rd, 24th, and 25th.

And then, of course, Sandstrom --

QUESTION: He was tried in January?

MS. BOLEYN: He was tried in April. Indicted in January, tried in April.

QUESTION: Oh, tried in April?

MS. BOLEYN: Yes, Your Honor.

QUESTION: When did we hand down Sandstrom?

MS. BOLEYN: In June of -- June, after the trial being in April. And then in October of that year,

the Georgia Supreme Court adopted the test of Sandstrom in its own case.

QUESTION: Yes, but when did this Defendant first raise the Sandstrom question?

MS. BOLEYN: On direct appeal to the Georgia Supreme Court.

QUESTION: Initially?

MS. BOLEYN: Yes. He attacked both the intent portion of the charge and the malice portion of the charge, and the Georgia Supreme Court said that the intent portion was permissive and the malice charge was definitional and properly informed the jury of their standard in citing Skrine, which is the Georgia Supreme Court version of Sandstrom, in which it adopts Sandstrom.

QUESTION: Was the Sandstrom charge presented to us in either one of the prior petition?

MS. BOLEYN: Yes, it was presented in the initial petition for certiorari from the affirmance of the conviction by the Georgia Supreme Court.

I believe, as I've said in this particular charge, the malice instruction was very significant and, of course, the challenged instruction itself was distinguishable from that reviewed by the court in Sandstrom, in that the jury was specifically told as

soon as the presumption was given, that the presumption was rebuttable and that a person will not be presumed to act with criminal intention.

The jurors were told that they should say, after consideration of all the facts and circumstances, whether reasonable doubt existed and that they should be concerned that the verdict -- and I believe the words the judge used, "speaks the truth of the case on the facts as you find them."

He told the jurors that malice must exist before the alleged homocide could be murder, and he told the jurors that the Defendant contended, by his not guilty plea, that the material elements of the offense had not been proven beyond a reasonable doubt, and that the homocide was an accident.

Apparently, what the Eleventh Circuit seems to be doing in its decision in Franklin is compelling, through its habeas corpus powers, specific language in trial courts' instructions to the jury on intent, as it did with the case law to its federal trial courts in its supervisory capacity.

Essentially, our intention is that the federal habeas corpus courts are trying to oversimplify the reasonable juror test. They want to look for magic words and say that this compels the conclusion that it's

a mandatory instruction and that habeas corpus relief should be granted.

And our basic contention is that before the conclusion is made as to the effect of the charge, and whether it's permissive, mandatory, or burden shifting, that the trial court's charge as a whole must be reviewed, as well as the circumstances of the case, including the offense that he's charged with, as essential elements, the defenses that the Respondent brings up and the strength of the evidence.

Of course, we contend that if the reasonable juror test was properly applied in this case, that no habeas corpus relief would have been granted by the court.

The remainder of the trial court's instructions neutralized any potentially mandatory interpretation that a reasonable juror could make of these constructions.

If there are not further questions on whether or not there was a Sandstrom violation as an initial matter, I'll move to my discussion of the harmless error rule in connection with this case.

With respect to the harmless error rule, I think it's important to note that there was no procedural bar to this Court considering the harmless

error question, because it was considered by the Eleventh Circuit below. It said that Chapman v. California harmless error test was applicable in Sandstrom violations, but then of course our disagreement is with their finding that under the Chapman test, it was not harmless error in this particular case.

Of course, as I've already said, we contend that there was overwhelming evidence of the Respondent's intent to murder and his malice and all of the other essential elements of the offense, and that there was simply no question but that he shot and killed Mr. Collie with malice.

His defense to this crime was, in effect, frivolous. What his statement said after it was admitted at trial was that the gun went off when the door slammed. That's the phrase that he used. And then mysteriously, for some unknown reason, and unexplained in his confession, the gun simply went off again, and as I said, he said it must -- "I must have cocked the gun again for some other reason."

His defense to the crime was just frivolous in the sense that the defense attorney tried to say that he was excited because he had escaped. He was fearful, and that when the door slammed, it somehow scared him into

pulling the trigger.

Of course, that doesn't explain, we submit, why he eventually fired the second shot that was right over the Defendant's wife's head and in her general direction, and it doesn't explain why he opened the door of Mr. Collie's home, stepped over the fallen body of Mr. Collie, rifled through his pockets looking for the victim's car keys, and when there were no car keys in Mr. Collie's pockets, he proceeds to chase his wife and daughter throughout the house, threatening them with bodily harm and placing the gun to the temple of Mrs. Collie's head.

QUESTION: May I ask a question on the harmless error inquir? Do you think that we should decide whether we think the defense was frivolous, or whether we think the jury must have thought it was frivolous?

MS. BOLEYN: I think that I would advocate a reasonable juror test and the harmless error situation as well.

QUESTION: Well, if we focus on the jury, would you care to comment on the fact that the jury came in at the end and said we want another inspection on an accident and intent and all?

MS. BOLEYN: Well, first of all, Your Honor,

they didn't ask for a reinstruction on the challenged presumption.

QUESTION: I understand.

MS. BOLEYN: They asked for a reinstruction on malice and accident. And I think basically it's our contention that it's not unusual for jurors to ask for a recharge on malice, because that's a word that jurors sometimes have trouble with, the legal definition of malice.

And as for the accident charge, we think it's at least reasonable to assume that the jurors were trying to determine what legal accident is, versus the common ordinary meaning of that term, if there was such a distinction, and because it was simply redefinitions that the jurors were asking for, it's not a case such as Bollenbach in where --

QUESTION: You think they could have asked for that clarification, even though they thought the absence of intent defense was really a frivolous defense?

MS. BOLEYN: I think the fact that they asked for reclarification doesn't indicate that they were confused by the current instructions.

In the opening statement that defense counsel made on the Petitioner's behalf, he stated that his version of the facts did not differ significantly from

the State's version, and at the time of his closing argument, defense counsel said Raymond Franklin did fire the shot that killed Claude Collie, but he didn't kill any other people. He did take Carol Heitmuller from the dentist's office.

So he, in fact, admitted that his client had fired the gun. He said the door slammed in his face and "bang," the gun went off. He simply tried to reiterate to the jury that the Respondent was scared, excited, didn't hurt anyone else, and perhaps was suffering from the effect of the novocaine in his body.

Assuming, but not conceding, that there has been a Sandstrom violation, it's our position that the harmless error rule should be applied on the facts of this case, due to the overwhelming nature of the evidence against the Respondent and the frivolous nature of his defense.

The relief which we would request from the Court is, as an initial matter, that the Eleventh Circuit's finding that there was a Sandstrom violation in the case be reversed and that the case be remanded for consideration of the other issues because the only issue that the Eleventh Circuit decided was, in fact, the Sandstrom violation issue.

If this Court should determine that an

affirmance of the Eleventh Circuit's finding on the Sandstrom violation is appropriate, we would then ask that the Court go ahead in its authority and apply the harmless error rule to the facts of this case, and therefore prohibit the granting of federal habeas corpus relief under these facts.

And again, of course, a remand would be necessary in either case because of the fact the other issues were not decided.

If there are no further questions, I will reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr Tabak.

ORAL ARGUMENT OF RONALD J. TABAK, ESQ.

ON BEHALF OF THE RESPONDENT

MR. TABAK: Mr. Chief Justice, and may it please the Court, I'd like to address first the issue of whether this charge was unconstitutional under Sandstrom, and later cover the harmless error point.

I think it's interesting to note that the Eleventh Circuit panel that decided this case included Judge Hill who was on the panel which decided the Corn case which you have been hearing so much about. I believe that this indicates that while the Eleventh Circuit does have numerous cases involving Sandstrom

errcrs and alleged Sandstrom errcrs, they are perfectly capable of not adopting some bright line test. They are capable of looking carefully at the charge as a whole and deciding whether a reasonable juror could have been misled by that into effectively shifting the burden of persuasion.

And I would also indicate that Sandstrom itself makes clear that although it's possible that reasonable jurors could view the charge in different ways, that the facts that you must look at it is that if one of those ways in which a reasonable jurcr could have construed the charge is an unconstitutional way that shifts the burden of proof, the mere fact that other reasonable jurors might have interpreted differently does not make the charge constitutional.

And that is squarely indicated in the Sandstrom holding itself, and the State's position tc the contrary ignores Sandstrom.

Now, looking at the charge in this case, the jury was first told as a precursor to these charges that they were about to hear legal definitions from the Georgia Criminal Code. And then, in language very reminiscent of the Sandstrom case's language, they were told that acts of person of a sound mind and discretion are presumed to be the product of the person's will, and

that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.

In Sandstrom, these presumptions were held unconstitutional under either of two possible interpretations. The first was that this was an irrebutable conclusive presumption. But the second one is that it was a rebuttable mandatory presumption, and that second interpretation is the one that applies here.

Presumption that the jury is required to use unless it is rebutted is unconstitutional under Sanstrom, unless, as never occured here, the jury is told by what quantum of evidence the presumption must be rebutted. Sandstrom held that that kind of presumption is unconstitutional because a reasonable juror might construe it as requiring considerably more than some evidence to rebut it; therefore, had the effect of shifting the burden of persuasion.

The same constitutional problem is present here because the jury was given what were billed as legal definitions, and was told that they are to be presumed -- this is to be presumed -- were not given any ifs, ands, or buts about it; all they were told is that it was rebuttable, but they were not told at all what

quantum of evidence was required to rebut this charge.

Now, the State claims that the charge's language on rebuttability distinguishes the case from Sandstrom; that that, first of all, ignores the fact that Sandstrom held that a rebuttable presumption which the jury is required to use is unconstitutional unless the nature of the rebuttability is explained so that a reasonable juror could not believe that considerably more than some evidence was required to rebut it.

QUESTION: Well, let's presume the presumption -- everybody would agree that the instruction indicated a rebuttable presumption.

What if there weren't any evidence from the Defendant at all?

MR. TABAK: In that case, I would say that there is a Sandstrom violation. However, I would indicate --

QUESTION: Yes, but would you say that the instruction should -- in order to violate Sandstrom, would have to tell the jury that in the absence of any evidence by the Defendant, you must find intent?

MR. TABAK: I would --

QUESTION: Or, would you say that it's enough to violate Sandstrom to tell a jury that in the absence of any evidence from the Defendant, you may infer

intent, but you are not required to?

MR. TABAK: Well, Justice White, I --

QUESTION: Or do both violate Sandstrom?

MR. TABAK: My view is that it would violate Sandstrom. However, relief should not be granted because under our view of the plurality opinion in Connecticut v. Johnson, where there is no evidence at all by the Defendant or by anybody else that would go against the presumption, then I would view this as a situation in which that would be a case of harmless error beyond a reasonable doubt, because analytically I would view it as if there had been a charge in which someone was told that any evidence is enough to rebut. And where there is a charge that any evidence is enough to rebut, and that's clearly stated, then the Court has held that a different kind of test would apply because that is merely a burden of production. It would clearly be a burden of production.

Here, where even though --

QUESTION: You don't think this putting a burden of production on the Defendant is unconstitutional?

MR. TABAK: Well, in some circumstances, putting a burden of production can be unconstitutional.

QUESTION: Well, what if the jury is told that

you must infer intent unless the Defendant produces some evidence?

MR. TABAK: Well, if the State had produced no evidence, then I would say that that would be unconstitutional.

QUESTION: Well, but the State produces the evidence on which the presumption is built; he pulled the trigger. And the State argues that that is enough evidence to justify a finding of intent. As a matter of fact, the judge instructs that you may infer intent from that, and unless the Defendant comes forward with some evidence, you either must or you may find intent.

MR. TABAK: Well, if they were instructed that you must find intent, I would believe that the charge would be constitutional, but if there had been no evidence, I still would say that it would be harmless error.

QUESTION: Why is that?

MR. TABAK: Because the --

QUESTION: Why must the Defendant come forward with some evidence?

MR. TABAK: Where the -- it is necessarily true with every presumption, but if under the -- I'm thinking of a different line of cases where we don't have the -- where it's just a burden of production, and

in that line of cases, where sometimes a reasonable person could make the presumption as a matter of logic and it is merely either permissible or it definitely only raises a burden of production and there is no question that that's all that it does, and that any evidence could satisfy it, the Court has looked to whether it is reasonable, either if it's a statutory presumption in cases in general, or they might look at the particular case.

That is not the question we have in this case, but that's what I have in mind in answering Your Honor's questions.

QUESTION: Is the burden suggested by Justice White's question any different from the "burden" that this Court has placed on the person found in possession of recently stolen property, and from evidence that the Defendant was found in possession of recently stolen property, the jury may infer that he was the thief?

MR. TABAK: That is the kind of case --

QUESTION: Does it shift the burden any more in the case I've just cited than in the one Justice White propounded?

MR. TABAK: Well, Justice Burger, it was -- the kind of case that you were referring to is the kind of holding of this Court that I was thinking of that is

different from a Sandstrom context in which it is slightly different from, I believe, the hypothetical, because in the hypothetical Justice White posed, at least one of the examples said that any evidence would be enough to respond to it.

But I believe that they are quite similar to each other. The reason why they're different from this one, however, and different from Sandstrom, as Sandstrom made clear, is because this just said "may be rebutted." It is a presumption that is to be applied unless it is rebutted.

If the jury had been told that any evidence whatever will satisfy to rebut it, no matter what the evidence is, there is no longer a presumption at that time, then the Court's decision in Sandstrom indicates that that might be viewed as the equivalent as merely shifting burden of production and would present different -- a different line of cases would then be looked to.

However, where it does not indicate that any evidence could satisfy it and the question is left unclear and a reasonable juror might believe that considerably more than some evidence is needed to satisfy it, then that is very different from both of your hypotheticals, in my view, and it is very much, in

fact virtually identical to the situation discussed in Sandstrom.

QUESTION: But this instruction didn't say that the Defendant had to bear the burden of proof, did it?

MR. TABAK: Did not specifically say that, but --

QUESTION: It just talked about a presumption.

MR. TABAK: It did talk about a presumption.

QUESTION: And it was rebuttable.

MR. TABAK: It was rebuttable, just like the presumption in Sandstrom could have been construed as being, and just like, if Your Honor will recall, the Hankerson case where the jury was told with respect to self-defense that the Defendant had to -- that presumption would apply unless the Defendant satisfied the jury on the issue of self-defense.

QUESTION: Well, the jury is told that you may infer or presume intent from the pulling of the trigger, this is a presumption, but it's rebuttable. And the next sentence is: But, remember, the prosecution has the burden of proving every element of the case, including intent.

MR. TABAK: If that had occurred, there would

be several distinctions from this case. First of all, they would have been told you may infer. Here, they were told this is to be presumed. Moreover, in that case, they would have been told specfically that the -- reminded about the prosecution's burden of proof on intent.

Here, in stark contrast, on the one charge that came anywhere near close to talking about intent, the jury was instructed with respect to accident that they shall not find anybody not guilty when he claims accident unless it satisfactorily appears that there was no accident.

And maybe in your hypothetical, there might be a different outcome. That is the kind of distinction that the Eleventh --

QUESTION: That isn't this case.

MR. TABAK: That is certainly not. And my point is that the Eleventh Circuit judges have faced other situations with other language, with other things that are more like this hypothetical, and they have come out the other way.

Judge Tjoflat who wrote this opinion has concurred in opinions recently denying relief in Sandstrom cases. I mentioned that Judge Hill in the Corn case was able to make distinctions that were

pointed cut earlier by Justice Stevens. And these distinctions are very important in determining what a rascnable juror could have concluded.

And the Eleventh Circuit is not going off on some wild expedtion to rule in favor of all Sandstrom claims. However, when they are presented with a case such as this one, which is virtually identical to the problem posed in Sandstrom, they have chosen tc grant relief.

The other language in this charge which has been pointed to did not eliminate this problem. The charge on criminal intent not being presumed, at best, was a conflict with the charge cn intent shall be presumed. If it meant the same intent, first they're told in cne sentence, intent shall be presumed; then they're told it shall not be presumed.

If it was the same thing, we would have nc way of knowing which of those two conflicting charges they had follcwed, and under Stromberg v. California, as well as Sandstrom, we would have to hold the charge unconstitutional.

But, in fact, as the Eleventh Circuit carefully pointed out, they could have made them consistent because what makes intent criminal in a malice murder case is that it be without mitigation,

justification, or excuse. And they might well have realized that they could use the mandatory presumption in order to find the intent to kill, and then they would not be allowed to presume the absence of mitigation, justification, or excuse.

We have talked about the fact that here the charge said that the burden of proof was on the State and no burden on the Defendant to prove anything, but that is similar to the charge in Sandstrom; that the State had the burden of proof, and that the -- to prove that the Defendant killed purposely or knowingly. These do not eliminate the danger that the jury could use the presumption as a means by which the State satisfied the burden of proof unless the Defendant presented considerably more than some evidence in rebuttal.

Finally, the State has pointed to the charge the Defendant need not produce evidence of mitigation, justification, or excuse, but as I've just pointed out, that refers to the malice part of the charge which has the unlawful, deliberate intention to kill, without justification, mitigation, or excuse.

Now, the defense in this case was that the Defendant did not intend to kill. Look at the opening statement of the defense counsel; he stated Defendant went to that house without any intention to kill

anycne. Throughout his cross-examination of the various State witnesses, his whole purpose was to show a lack of intent. He never tried tc show scmething like self-defense. He did not claim that there was a heat of passion cn sudden provocaticn cr anything else. His defense was Defendant did nct have the intent to kill.

As I've mentioned, this accident charge actually increased the danger that the jury would effectively place on the Defendant the burden of persuasicn cn intent, because the jury as repeatedly told -- and as Justice Stevens, I believe, noted -- during their deliberations were again told that a person shall not be found guilty of a crime ccmmitted by misfortune or accident where it satisfactorily appears there was nc criminal scheme or undertaking cr intention or criminal negligence.

Under this instructicn, the only way tc find someone not guilty where the Defendant contends that there was an accident, is if it satisfactorily appears that that there was no intenticn.

A reasonable juror could easily construe this as effectively putting cn the Defendant the burden cf persuasion, of disproving intention, because who else but the Defendant would want tc make it satisfactorily appear that there was nc intention? Only the Defendant

would want to make that satisfactorily appear.

And the language "appear that there be no intention" seems to require an affirmative finding of no intention, not that the prosecutor failed to prove intention beyond a reasonable doubt.

And thus, I would submit that when the charge as a whole is considered, the danger does remain that a reasonable juror could have construed the presumption here as requiring rebuttal by considerably more than some evidence. And, therefore, under Sandstrom this charge was unconstitutional.

QUESTION: Mr. Tabak, in the -- I think it's the second footnote to the opinion of the Court of Appeals, which is at 37a of the Joint Appendix, the footnote says: "The charge to the jury in relevant part read as follows; the challenged intent instruction is italicized."

And then you have roughly three pages of small print as to the charge. Now, what do the asterisks represent? Other parts of the charge to the jury that didn't deal with intent?

MR. TABAK: I believe that at least one of the asterisks deals with the charge on the kidnapping claim, and so that is the asterisk on page 38a. The charge -- the asterisks on 37a, I believe, refer -- have no

bearing on this point, but I'm not certain of what they include, although I have notes here that would indicate that.

QUESTION: Do you have any idea how long the jury charge took to give?

MR. TABAK: I believe it was certainly no more than a half hour and probably was less than that. And what we do know is that the one thing the jury had very well impressed on them when they came back was this accident charge, because that they heard three times and they heard it the third time when they came back to ask for a definition of accidental to be given again, as well as the charge on malice.

And as I pointed out, that one in particular reemphasized the danger of a misconstruction of who really had the burden of satisfying the jury with respect to the element of intent.

Now, turning then to whether this was a harmless error, unless there are more questions about --

QUESTION: Before you go into that, counsel, the Court of Appeals stated that the Defendant admitted that he fired the gun. I suppose in almost every capital case one could contend after he fired a gun that he hadn't intended to do it deliberately; that it went off accidentally. But very few guns go off

accidentally; in particular, when you have to cock them.

Was this a revolver?

MR. TABAK: This was a revolver and it was one where testimony was that the Defendant had it cocked before he got to the door.

QUESTION: What is the purpose of that, unless he intended to shoot somebody?

MR. TABAK: No. He intended to -- he testified that his normal habit was, for whatever reason, to cock guns. The other -- well, the fact is that he did cock it and did not fire it on two subsequent occasions, which I think demonstrates my point, as strange as it may seem.

QUESTION: He did threaten one of them, the daughter.

MR. TABAK: He did threaten -- he threatened two people, but the fact is they did not give him what he wanted, and he did not fire that gun, even though the gun was cocked.

And so the mere facts in his case, the jury could have had a reasonable doubt as to whether he intended to fire it, because he demonstrated by actions throughout the day when he had this gun cocked --

QUESTION: How would you account for him

cocking it the second time?

MR. TABAK: I would account for it by the fact that he was startled by the first shot. He himself wasn't even certain what had happened with that first shot or who had fired it even. And the second shot --

QUESTION: Do you think he was unfamiliar with guns? Does the record indicate that?

MR. TABAK: it doesn't indicate he was totally unfamiliar with it, but he was not as familiar as he might have been.

QUESTION: Well, you have just told us that he habitually cocked a gun when he was carrying it around.

MR. TABAK: On that day, I said, Your Honor, not habitually.

QUESTION: Oh, I thought you said habitually.

MR. TABAK: No. I may have misconstrued what I intended to indicate by that, but what I indicated was that on that day that people testified and he testified that he cocked the gun. But regardless of his experience, the fact is that if he really were an experienced shooter, why would his second shot go in a totally different direction and come nowhere near close to hitting anybody?

Now, there was a lot of misstatement before of what happened with the second shot. But the testimony

not of the very confused wife of the victim, who testified incorrectly that the second shot went into a wall rather than in the ceiling, said it went past her into the wall, but the actual evidence of the State's expert witness on the subject was that this was immediately inside the house.

I mean, one looks at the photographs that are in evidence, one will see that the first shot went through the screen door at this kind of angle, at the left angle, through the inner wooden door in a place that no one could see through, and then it hit Mr. Collie.

The second shot went through the screen door and then entered the glass pane of the wooden door on the way, right up into the ceiling. That shot didn't come close to hitting anybody, and when that shot was fired, what did Mr. Franklin do? If he had intended to shoot somebody with that shot and thought he had hit somebody, he would have then gone in the house, something like that.

What he did was to run away from the house. He ran off of the porch into the yard. And Ms. Heitmuller testified to that, and she testified that her impression at the time was that that second shot had come from inside the house. They were both very

confused about what even -- who had even fired that second shot which did not come close to hitting anybody.

QUESTION: So the question that he didn't know much about guns, but he did shoot the man through the heart, didn't he?

MR. TABAK: He did shoot the man through the heart. And I am not contending, Justice Marshall, that --

QUESTION: I'm only getting to your one point that you've been making, that he doesn't know anything about guns.

MR. TABAK: Your Honor, that -- I didn't say he doesn't know anything about guns. What I am saying is that from the facts in this case --

QUESTION: The story is that this man admitted that he, one, he carried a gun that day, the purpose for which he carried it, and that he kept it cocked.

Now, if you carry a cocked gun, it's awful hard to persuade me that you didn't mean to shoot him. Otherwise, why cock it?

MR. TABAK: Your Honor, to answer the question directly, he testified that the purpose of cocking it was to frighten people, and in any event --

QUESTION: Well, in the dark, the people can't

see whether it's cocked or not, can they?

MR. TABAK: I -- in the dark they cannot. In fact, the people inside the house could not see him, and he could not see them, except when Mr. Collie opened the door which was at nine in the morning, so it was not dark.

But the main point I would like to make is, I am not contending, and this case, we submit, does not decide -- the decision is not as was suggested before, whether I can persuade the Court that the Court should find reasonable doubt in this case. The question that we submit the legal standard is, even if one uses the dissents test in Connecticut v. Johnson, is whether, had the jury been properly charged, whether the evidence is so necessarily dispositive of the issue of intent that no rasonable juror could have had a reasonable doubt, had they been properly charged.

And we submit that under the facts here, that it is not up to this Court to make its decision as a jury whether -- how they would -- having not seen the Defendant's demeanor --

QUESTION: One other problem I have. Do you recognize the difference in the statement that "I pulled the trigger" and that "I deliberately shot him"?

MR. TABAK: I recognize the difference, but

the --

QUESTION: One is, it could be accidental, couldn't it?

MR. TABAK: Yes.

QUESTION: But you say you pulled the trigger. Can you accidentally pull a trigger?

MR. TABAK: The actual statement of the Defendant was, "The gun went off. I did not mean to hurt anybody." And that was his statment. What I believe was quoted before was the statement of his counsel.

QUESTION: How do you compare that with his statement that he was in for life before he had made this escape? He was in for life and had nothing to lose.

MR. TABAK: Well, the --

QUESTION: Don't you think there's a little inconsistency with your analysis and his own statement?

MR. TABAK: No. First of all, it shows that he isn't the most careful person because he wasn't in for life. He did not have any life sentence of any kind.

QUESTION: That's what he said.

MR. TABAK: I know he said it, because he did not want to be in jail. But that would be inconsistent

with having an intent to kill, because the only way he could have had something to lose if he really were in for life is if he committed a capital murder with intent to kill. And then he would have something to lose. He would have a death sentence.

But if he was really in for life and was not intending to kill, and was merely intending to escape, you don't get the death sentence for escaping.

QUESTION: My question is focused on your argument about the state of mind. You have made a great deal about this man's state of mind; that he really didn't intend to hurt anybody. But his own statement indicates that he thought he was in for life, as his statement appears in the record, and that he thought he had nothing to lose.

So if you're emphasizing his state of mind, you must take that into account. And I, for one, must take it into account.

MR. TABAK: I recognize that one must take into account his state of mind. But one must also take into account the fact that he was described by virtually every witness in this case as being extremely nervous. The deponent -- several of them said they had never seen anyone in their life that nervous.

And the person who he ran up to, Mr. Dempsey,

said that he was nervous and frightened. The woman, the neighbor of the victim, who certainly had no reason to be friendly to Mr. Franklin in his testimony -- in her testimony -- testified that Mr. Franklin, after the shooting, was like he was in shock, like he didn't know what had happened.

QUESTION: But he wasn't too nervous to manage to cock the gun twice and get two shots off, one of which killed this man.

MR. TABAK: My contention is that a jury could have, if properly charged, could have had a reasonable doubt about whether the nervousness caused this cocked gun to go off, because that gun, it was testified by the State's ballistic expert, could go off with only three pounds of pressure applied to it.

QUESTION: How about the second shot?

MR. TABAK: The second shot, I believe, was an nervous reaction to the first one, which he had never intended to fire, and went off -- if he had intended to shoot someone, Your Honor, he would not have shot it right up into the ceiling near no one.

That would not be -- and he would then not have run away from the house upon shooting that shot. That is not what he would have done.

But I must emphasize that while this sounds

like a closing argument to the jury, the point is that what should have happened is that the defense counsel who did make the closing argument to the jury should have made it to a jury who had been properly instructed with respect to the burden of persuasion on intent, because this is not like a case that was described in Connecticut v. Johnson's dissent, of people being shot 50 times in the chest, or being stabbed 42 times, and throwing somebody off of a bridge.

This was a very different event. And under these circumstances, whether or not I persuade you beyond a reasonable doubt or by a preponderance or anything else, the point is maybe I haven't persuaded you by a preponderance of the evidence, but that's the very problem; not because I'm not a good advocate, but the problem is that the burden of persuasion that the jury may actually have applied in this case would have required the defense counsel, or could have required the defense counsel to demonstrate the absence of intent by a preponderance of the evidence, and it is for that very reason that this charge is unconstitutional.

Now, it is possible that in a retrial, if the jury is properly charged on the issue of intent, maybe he will be found guilty again. But that's the right this Defendant has. He has the right, under the United

States Constitution, to be -- if he is found guilty of malice murder, he has the right to have had that trial done in conformance with due process, with a properly charged jury.

And that is why we believe that even under the dissents test in Connecticut v. Johnson, that this was not a harmless error. Now, we do believe that the plurality test in Connecticut v. Johnson does have application here, and should be applied here because this is not a case in which the Defendant did not have any evidence on his side and didn't have the matter in issue.

And therefore, to rule in -- using the dissent test in this case, would be to have this Court substitute itself for the jury. And that's what we would urge that it not be done, but again, even under that test, we submit that that's standard could not be met because a reasonable juror, properly instructed, might have found a reasonable doubt.

Thank you very much.

CHIEF JUSTICE BURGER: Do you have anything further, Ms. Boleyn?

ORAL ARGUMENT OF SUSAN V. BOLEYN, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MS. BOLEYN: Your Honor, we would just like to

reiterate for the Court's consideration that in considering both whether or not there was an initial Sandstrom violation and in considering the harmless error issue, that our view of the evidence is that it overwhelmingly showed the Respondent's intent to kill and that the true argument of defense counsel in his behalf was that he did not intend to kill anybody when he went to the house; that the purpose in going to the house of Mr. Collie was because there were three cars sitting in the yard, and he thought he could get a set of car keys to these cars at gunpoint and by cocking the gun and frightening these people.

So our view of the evidence is that it overwhelmingly establishes all of the essential elements of murder in the case.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted, and we will hear arguments next in United States v. Johns.

(Whereupon, at 10:58 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 83-1590 - ROBERT FRANCIS, WARDEN, PETITIONER V.

RAYMOND LEE FRANKLIN, RESPONDENT.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)