

# The Burger Court Opinion Writing Database

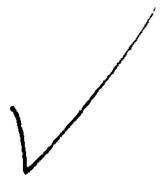
## *Connecticut v. Johnson*

460 U.S. 73 (1983)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
THE CHIEF JUSTICE

October 16, 1982

Re: 81-927 - Connecticut v. Johnson, Lindsay

Dear Lewis:

Since you were for a remand, will you take on a dissent in this case if a Kirvda type remand is not feasible?

Bill Rehnquist, Sandra and I could join in John's idea of a remand here to let the State Court decide whether a harmless error solution is acceptable.

Regards,

Justice Powell

Copies to: Justice Rehnquist  
Justice O'Connor

*Nothing was  
ever done about  
this.  
The CJ asked  
me to write the  
dissent.*

Supreme Court of the United States  
Washington, D. C. 20543

File  
—

CHAMBERS OF  
THE CHIEF JUSTICE

Personal

December 9, 1982

Re: Connecticut v. Johnson, No. 81-927

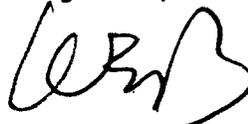
Dear Lewis,

I will await your dissent in this case. In brief, my thoughts about the case are as follow.

In his draft opinion in the above case, Harry concedes that Sandstrom error can, in some cases, be harmless. Where the "defendant himself has taken the issue of intent away from the jury," p. 13, a reviewing court can safely say that the erroneous instruction played no role in the jury's verdict. In such circumstances, the error would be harmless. However, Harry states, where the defendant contests intent, or simply relies on the presumption of innocence and puts the State to its proof, Sandstrom error can never be harmless, no matter how overwhelming the evidence on intent is. Here, respondent contested intent and so the error was not harmless. He is dead wrong, for me. He would negate the rule.

Because he concedes that some Sandstrom error can be harmless, the opinion will not do quite the mischief I had feared. However, he errs in equating an instruction that requires the jury to find intent with a directed verdict. But the two in no sense are "functional equivalents." A mandatory instruction on intent leaves ample scope for a jury to acquit notwithstanding the law and the evidence. I assume that you will make this point in your dissent and explain why a reviewing court should be able to examine the evidence of intent in determining whether Sandstrom error is harmless.

Regards,



Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

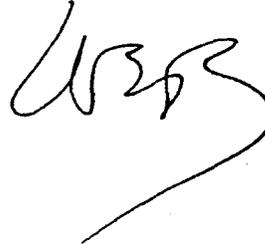
December 22, 1982

RE: 81-927 - Connecticut v. Johnson

Dear Lewis:

I join your dissent.

Regards,

A handwritten signature in black ink, appearing to be 'WJP', with a long, sweeping underline that extends to the right.

Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

✓  
I agree &  
will do

February 4, 1983

Re: No. 81-927 - Connecticut v. Johnson

Dear Lewis:

I am, of course, with you in this dissent. However, since a plurality does not create a binding precedent would it not be helpful to insert for the word "is" on line 4 page one, something like:

"if it became a binding holding  
of the Court would be..."

Regards,

LPB

Justice Powell

cc: Justice Rehnquist  
Justice O'Connor

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: The Chief Justice

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1st Draft

No. 81-927, Connecticut v. Johnson

THE CHIEF JUSTICE, dissenting:

JUSTICE STEVENS' opinion concurring in the judgment prompts me to comment briefly. JUSTICE STEVENS reads the plurality opinion as not requiring reversal for every Sandstrom error; as I read it, however, the plurality would have us adopt a per se rule of reversal in cases of Sandstrom error. I agree with JUSTICE STEVENS that this Court has heretofore neither "held nor intimated ... that every Sandstrom error requires an automatic reversal." Ante, at 2, n.3. On the contrary, the Court rejected, in Chapman v. California, 386 U.S. 18, 21-22 (1967), a rule of automatic reversal for constitutional error. Thus, I would reverse.

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: The Chief Justice

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2d Draft

No. 81-927, Connecticut v. Johnson

THE CHIEF JUSTICE, dissenting.

I join JUSTICE POWELL's dissenting opinion, and write separately only to emphasize that the Court today does not adopt a rule of automatic reversal for Sandstrom error. Only four justices would adopt a rule requiring reversal for Sandstrom error, whether harmless or not, in all cases. Such a rule is contrary to this Court's holding, with only one dissent, in Chapman v. California, 386 U.S. 18, 21-22 (1967), which rejected a rule of automatic reversal for all constitutional errors.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

October 15, 1982



RE: No. 81-927 Connecticut v. Johnson

Dear Chief:

Harry has agreed to undertake the opinion for the  
Court in the above.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 29, 1982

RE: No. 81-927 Connecticut v. Johnson

Dear Harry:

I agree.

Sincerely,

*Bill*

Justice Blackmun

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

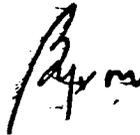
November 24, 1982

Re: 81-927 - Connecticut v. Johnson

Dear Harry,

Please join me.

Sincerely yours,



Justice Blackmun

Copies to the Conference

cpm

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 3, 1982

Re: No. 82-927 - Connecticut v. Johnson

Dear Harry:

I am in agreement with nearly all of your proposed opinion. I am concerned, however, that pp. 13-14 of the opinion may be read as suggesting that a Sandstrom error can be harmless when a defendant raises a defense such as alibi, insanity, or self-defense, but, without admitting intent, does not specifically contest the issue of intent. The phrase "affirmative choice not to challenge" coupled with the second sentence of n. 15 may suggest that a defendant who raises a defense may, by his mere silence concerning intent, bring the harmless error rule into play. For the following reasons, I believe this portion of the opinion should be modified so that it is not open to this reading.

As you state at n. 15, a defendant is entitled to present no defense and rely solely on the presumption of innocence and the state's burden of proof as to each element of the crime. A Sandstrom error in such a situation could not be harmless.

A defendant is also entitled to raise a defense that specifically challenges only certain aspects of the case against him. By resting solely on a defense such as insanity, self-defense, or alibi, he does not thereby relieve the state of its burden of proving all elements of the crime, including those elements not specifically challenged. Even if the jury rejects the proffered defense theory, the defendant is nevertheless entitled to have the jury determine whether the state

has proved all the elements of the crime beyond a reasonable doubt. A judge surely could not enter a directed verdict as to the unchallenged elements and instruct the jury to consider only those elements specifically negated by the defense.

In my view, therefore, a Sandstrom error can be harmless only if, in presenting its case, the defense has affirmatively admitted intent. Such an admission can take the form, for example, of a stipulation, or of an express statement by defense counsel or admission by defendant that intent is not being disputed.

If you agree that the harmless error rule should be limited in this fashion, or at least that the question should not be reached in this case, the opinion could be modified along the following lines:

P. 13, paragraph beginning "There may be ...". In the third sentence, replace the phrase "'effectively conceded'" with the word "conceded" (without quotation marks), and rewrite the fourth sentence to read: "In presenting a defense such as alibi, insanity or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing...". Finally, omit the second sentence of n. 15.

Sincerely,



T.M.

Justice Blackmun

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 15, 1982

Re: No. 81-927 - Connecticut v. Johnson

Dear Harry:

Please join me.

Sincerely,

*T.M.*  
T.M.

Justice Blackmun

cc: The Conference

COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-927

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[November —, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Sandstrom v. Montana*, 442 U. S. 510 (1979), this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that “the law presumes that a person intends the ordinary consequences of his voluntary acts.” *Id.*, at 512. We expressly left open in that case the question whether, if a jury is so instructed, the error can ever be harmless. *Id.*, at 526–527. Since *Sandstrom*, courts have taken different approaches to the harmless error problem.<sup>1</sup> We therefore granted certiorari in this litigation to resolve the conflict. 455 U. S. — (1982).

<sup>1</sup>Several state and federal courts have assumed or held that *Sandstrom* errors may well be harmless, and have then gone on to decide whether the evidence of guilt was overwhelming. See, e. g., *Lamb v. Jernigan*, 683 F. 2d 1332, 1342–1343 (CA11 1982); *Jacks v. Duckworth*, 651 F. 2d 480, 487 (CA7 1981), cert. denied, 454 U. S. 1147 (1982); *People v. Wright*, 408 Mich. 1, 30–32, 289 N.W. 2d 1, 10–12 (1980); *State v. McKenzie*, — Mont. —, —, 608 P. 2d 428, 458–459, cert. denied, 449 U. S. 1050 (1980). Other courts have taken a narrower view, holding that whether an unconstitutional presumption is harmless depends on whether intent was a disputed issue in the case. See, e. g., *United States v. Winter*, 663 F. 2d 1120, 1144–1145 (CA1 1981), cert. pending, No. 81-1392; *McGuinn v. Crist*, 657 F. 2d 1107, 1108–1109 (CA9 1981), cert. denied, 455 U. S. — (1982); *Washington v. Harris*, 650 F. 2d 447, 453–454 (CA2 1981) (dictum), cert. denied, 455 U. S. 951 (1982); see also *People v. Thomas*, 50 N.Y. 2d

STYLISTIC CHANGES

4 p. 12

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-927

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[December —, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Sandstrom v. Montana*, 442 U. S. 510 (1979), this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that “the law presumes that a person intends the ordinary consequences of his voluntary acts.” *Id.*, at 512. We expressly left open in that case the question whether, if a jury is so instructed, the error can ever be harmless. *Id.*, at 526-527. Since *Sandstrom*, courts have taken different approaches to the harmless error problem.<sup>1</sup> We therefore granted certiorari in this litigation to resolve the conflict. 455 U. S. — (1982).

<sup>1</sup>Several state and federal courts have assumed or held that *Sandstrom* errors may well be harmless, and have then gone on to decide whether the evidence of guilt was overwhelming. See, e. g., *Lamb v. Jernigan*, 683 F. 2d 1332, 1342-1343 (CA11 1982); *Jacks v. Duckworth*, 651 F. 2d 480, 487 (CA7 1981), cert. denied, 454 U. S. 1147 (1982); *People v. Wright*, 408 Mich. 1, 30-32, 289 N.W. 2d 1, 10-12 (1980); *State v. McKenzie*, — Mont. —, —, 608 P. 2d 428, 458-459, cert. denied, 449 U. S. 1050 (1980). Other courts have taken a narrower view, holding that whether an unconstitutional presumption is harmless depends on whether intent was a disputed issue in the case. See, e. g., *United States v. Winter*, 663 F. 2d 1120, 1144-1145 (CA1 1981), cert. pending, No. 81-1392; *McGuinn v. Crist*, 657 F. 2d 1107, 1108-1109 (CA9 1981), cert. denied, 455 U. S. — (1982); *Washington v. Harris*, 650 F. 2d 447, 453-454 (CA2 1981) (dictum), cert. denied, 455 U. S. 951 (1982); see also *People v. Thomas*, 50 N.Y. 2d

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Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

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3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-927

**CONNECTICUT, PETITIONER v.  
LINDSAY B. JOHNSON**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT**

[December —, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Sandstrom v. Montana*, 442 U. S. 510 (1979), this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that “the law presumes that a person intends the ordinary consequences of his voluntary acts.” *Id.*, at 512. We expressly left open in that case the question whether, if a jury is so instructed, the error can ever be harmless. *Id.*, at 526–527. Since *Sandstrom*, courts have taken different approaches to the harmless error problem.<sup>1</sup> We therefore granted certiorari in this litigation to resolve the conflict. 455 U. S. — (1982).

<sup>1</sup>Several state and federal courts have assumed or held that *Sandstrom* errors may well be harmless, and have then gone on to decide whether the evidence of guilt was overwhelming. See, e. g., *Lamb v. Jernigan*, 683 F. 2d 1332, 1342–1343 (CA11 1982); *Jacks v. Duckworth*, 651 F. 2d 480, 487 (CA7 1981), cert. denied, 454 U. S. 1147 (1982); *People v. Wright*, 408 Mich. 1, 30–32, 289 N.W. 2d 1, 10–12 (1980); *State v. McKenzie*, — Mont. —, —, 608 P. 2d 428, 458–459, cert. denied, 449 U. S. 1050 (1980). Other courts have taken a narrower view, holding that whether an unconstitutional presumption is harmless depends on whether intent was a disputed issue in the case. See, e. g., *United States v. Winter*, 663 F. 2d 1120, 1144–1145 (CA1 1981), cert. pending, No. 81-1392; *McGuinn v. Crist*, 657 F. 2d 1107, 1108–1109 (CA9 1981), cert. denied, 455 U. S. — (1982); *Washington v. Harris*, 650 F. 2d 447, 453–454 (CA2 1981) (dictum), cert. denied, 455 U. S. 951 (1982); see also *People v. Thomas*, 50 N.Y. 2d

pp. 12 + 13

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 21, 1982

Corrected Copy

MEMORANDUM TO THE CONFERENCE

Re: No. 81-927 - Connecticut v. Johnson

In response to Lewis' dissent, I shall add a new footnote appended to the third sentence of the paragraph beginning on page 12 of the text. That footnote reads as follows:

<sup>15</sup>The dissent recognizes that even when the evidence of intent is "ample," the jury "may rely on the presumption" rather than that evidence. Post, at 3. It then asserts that when the evidence of intent is "overwhelming," the "possibility that reasonable jurors would have relied on the presumption" disappears. Post, at 4. Apparently, the dissent believes that a jury first evaluates the evidence of intent and then decides whether to apply the conclusive presumption; it assumes that the jury turns to the presumption only when the evidence is not "overwhelming." Because we lack the dissent's confidence in predicting the sequence of a jury's deliberations, we find it impossible to conclude that a conscientious jury, following instructions, will necessarily evaluate the evidence of intent and reach a conclusion on that issue before considering the applicability of the conclusive presumption about which it has been instructed. As we note in the text, if the jury simply applies the presumption at the outset of its deliberations, it will have no need to consider the evidence of intent.

The present footnote 15 will then be renumbered.

The first full sentence on page 14 will be revised to read "The conclusive presumption the jury was instructed to apply permitted the jury to convict respondent without ever examining the evidence concerning an element of the crimes charged."

Sincerely,

HAB,  
By whom

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pp. 12-13, 14

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

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4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-927

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[December —, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Sandstrom v. Montana*, 442 U. S. 510 (1979), this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.*, at 512. We expressly left open in that case the question whether, if a jury is so instructed, the error can ever be harmless. *Id.*, at 526-527. Since *Sandstrom*, courts have taken different approaches to the harmless error problem.<sup>1</sup> We therefore granted certiorari in this litigation to resolve the conflict. 455 U. S. — (1982).

<sup>1</sup>Several state and federal courts have assumed or held that *Sandstrom* errors may well be harmless, and have then gone on to decide whether the evidence of guilt was overwhelming. See, e. g., *Lamb v. Jernigan*, 683 F. 2d 1332, 1342-1343 (CA11 1982); *Jacks v. Duckworth*, 651 F. 2d 480, 487 (CA7 1981), cert. denied, 454 U. S. 1147 (1982); *People v. Wright*, 408 Mich. 1, 30-32, 289 N.W. 2d 1, 10-12 (1980); *State v. McKenzie*, — Mont. —, —, 608 P. 2d 428, 458-459, cert. denied, 449 U. S. 1050 (1980). Other courts have taken a narrower view, holding that whether an unconstitutional presumption is harmless depends on whether intent was a disputed issue in the case. See, e. g., *United States v. Winter*, 663 F. 2d 1120, 1144-1145 (CA1 1981), cert. pending, No. 81-1392; *McGuinn v. Crist*, 657 F. 2d 1107, 1108-1109 (CA9 1981), cert. denied, 455 U. S. — (1982); *Washington v. Harris*, 650 F. 2d 447, 453-454 (CA2 1981) (dictum), cert. denied, 455 U. S. 951 (1982); see also *People v. Thomas*, 50 N.Y. 2d

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Justice Stevens  
Justice O'Connor

From: Justice Blackmun

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Pages 10, 12-13  
Footnotes renumbered

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-927

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[January —, 1983]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Sandstrom v. Montana*, 442 U. S. 510 (1979), this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that “the law presumes that a person intends the ordinary consequences of his voluntary acts.” *Id.*, at 512. We expressly left open in that case the question whether, if a jury is so instructed, the error can ever be harmless. *Id.*, at 526-527. Since *Sandstrom*, courts have taken different approaches to the harmless error problem.<sup>1</sup> We therefore granted certiorari in this litigation to resolve the conflict. 455 U. S. — (1982).

<sup>1</sup> Several state and federal courts have assumed or held that *Sandstrom* errors may well be harmless, and have then gone on to decide whether the evidence of guilt was overwhelming. See, e. g., *Lamb v. Jernigan*, 683 F. 2d 1332, 1342-1343 (CA11 1982); *Jacks v. Duckworth*, 651 F. 2d 480, 487 (CA7 1981), cert. denied, 454 U. S. 1147 (1982); *People v. Wright*, 408 Mich. 1, 30-32, 289 N.W. 2d 1, 10-12 (1980); *State v. McKenzie*, — Mont. —, —, 608 P. 2d 428, 458-459, cert. denied, 449 U. S. 1050 (1980). Other courts have taken a narrower view, holding that whether an unconstitutional presumption is harmless depends on whether intent was a disputed issue in the case. See, e. g., *United States v. Winter*, 663 F. 2d 1120, 1144-1145 (CA1 1981), cert. pending, No. 81-1392; *McGuinn v. Crist*, 657 F. 2d 1107, 1108-1109 (CA9 1981), cert. denied, 455 U. S. — (1982); *Washington v. Harris*, 650 F. 2d 447, 453-454 (CA2 1981) (dictum), cert. denied, 455 U. S. 951 (1982); see also *People v. Thomas*, 50 N.Y. 2d

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Pages 1, 10  
Footnotes 12-16 renumbered  
Page references changed

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Justice Brennan  
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Justice Stevens  
Justice O'Connor

From: Justice Blackmun

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6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-927

CONNECTICUT, PETITIONER v.  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[January —, 1983]

JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL joined.

In *Sandstrom v. Montana*, 442 U. S. 510 (1979), this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.*, at 512. We expressly left open in that case the question whether, if a jury is so instructed, the error can ever be harmless. *Id.*, at 526-527. Since *Sandstrom*, courts have taken different approaches to the harmless error problem.<sup>1</sup> We therefore granted certiorari in this litigation to resolve the conflict. 455 U. S. 937 (1982).

<sup>1</sup>Several state and federal courts have assumed or held that *Sandstrom* errors may well be harmless, and have then gone on to decide whether the evidence of guilt was overwhelming. See, e. g., *Lamb v. Jernigan*, 683 F. 2d 1332, 1342-1343 (CA11 1982); *Jacks v. Duckworth*, 651 F. 2d 480, 487 (CA7 1981), cert. denied, 454 U. S. 1147 (1982); *People v. Wright*, 408 Mich. 1, 30-32, 289 N.W. 2d 1, 10-12 (1980); *State v. McKenzie*, — Mont. —, —, 608 P. 2d 428, 458-459, cert. denied, 449 U. S. 1050 (1980). Other courts have taken a narrower view, holding that whether an unconstitutional presumption is harmless depends on whether intent was a disputed issue in the case. See, e. g., *United States v. Winter*, 663 F. 2d 1120, 1144-1145 (CA1 1981), cert. pending, No. 81-1392; *McGuinn v. Crist*, 657 F. 2d 1107, 1108-1109 (CA9 1981), cert. denied, 455 U. S. —

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 22, 1983

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 81-927, Connecticut v. Johnson

The following cases were held for Johnson.

1. Nos. 81-1389, 81-1392, and 81-1394, Goldenberg, Winter, and Price v. United States (curved-lined). These petitioners were convicted of racketeering and bribery offenses. The CAI found that there was Sandstrom error but affirmed the convictions, holding that the error was harmless. Petitioners never claimed that they lacked intent; rather, they denied doing what the Government claimed they did. The instruction was "so ill-suited to both the theory on which the case was tried and the evidence that was presented" that it could not have contributed to the convictions. The SG does concede that if a Sandstrom error is never harmless, the convictions should be reversed. In my estimation, the other issues in the cases are minor and do not warrant review.

I am inclined to deny in each of these three cases. The Court could GVR in light of Johnson and thereby enable the CAI to reconsider its harmless error holding in light of the Johnson opinions which do not establish any rule but which may aid the CAI in its analysis of the issue. The trouble with an outright grant is that, unlike the typical Sandstrom error, which occurs in a murder trial where the acts and their natural consequences are fairly clear, in a racketeering case the application of the presumption is far less clear. Petitioners claim that the presumption enabled the jury to convict them of RICO violations on proof of only the predicate acts. This may be, but since Sandstrom errors are more commonly a problem in case involving violent crimes, I would prefer such a case in which to consider once again the Johnson question.

2. No. 81-6152, Campbell v. Oklahoma. The trial court gave an erroneous presumption instruction during petitioner's trial for murder. On appeal, the Oklahoma Court of Criminal Appeals held that in light of other instructions, the challenged instruction created only a permissive inference. Therefore, it said, there was no constitutional error. The Oklahoma court may well have been wrong in holding that there was no Sandstrom error, because the "curative" instructions were boilerplate statements about burden of proof and the need to consider all the evidence. Cf. Sandstrom, 442 U.S., at 518, n. 7. Johnson, however, has nothing to do with the question whether there was

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AM

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 24, 1982

81-927 Connecticut v. Johnson

Dear Harry:

I will try a dissent, but probably won't get to it until after the December arguments.

Sincerely,

*Lewis*

Justice Blackmun

lfp/ss

cc: The Conference

COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

DEC 20 1982

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: DEC 20 1982

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-927

CONNECTICUT, PETITIONER v.  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[December —, 1982]

JUSTICE POWELL, dissenting.

The Court holds that an instruction given in violation of *Sandstrom v. Montana*, 442 U. S. 510 (1979), cannot be considered harmless except in certain "rare situations." Because the Court's decision places an unwarranted restriction on the application of the harmless error doctrine, I dissent.

I

In *Sandstrom* the trial court had instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.*, at 513. The resulting problem was twofold. To the extent the presumption was interpreted by the jury as conclusive, it posed a risk that the jury might find intent on facts that at worst would establish only criminal negligence. As the Court noted, on finding only that Sandstrom had caused the victim's death and had acted voluntarily, the jurors "could reasonably have concluded that they were directed to find against [the] defendant on the element of intent." *Id.*, at 523. Alternatively, an instruction that was viewed as shifting the burden of persuasion to the defendant could lead to a similar error. The jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing intent, the burden was shifted to the defendant to prove that

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January 4, 1983

81-927 Connecticut v. Johnson

Dear John:

I have had one of my clerks, Rives Kistler, take a look at the Connecticut cases. The enclosed copy of his memo to me of this date may be of interest.

It rather convincingly supports the view that the Connecticut court was applying what it perceives to be federal constitutional law. Of course, there was no mention in its opinion of the harmless error doctrine - a reason that prompts me to remand on this issue.

I am circulating a substantially revised draft, that I hope will commend itself to you.

Sincerely,

Justice Stevens

lfp/ss

JAN 4 1983

RECEIVED  
SUPREME COURT  
JUSTICE

Substantial changes throughout

'82 DEC 35 P1:35

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JAN 4 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-927

CONNECTICUT, PETITIONER v.  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF CONNECTICUT

[January —, 1983]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and  
JUSTICE REHNQUIST, join dissenting

The Court holds that an instruction given in violation of  
*Sandstrom v. Montana*, 442 U. S. 510 (1979), cannot be con-  
sidered harmless except in certain "rare situations." The ef-  
fect of its decision is to create an automatic reversal rule  
whenever a *Sandstrom*-type instruction is given, regardless  
of the conclusiveness of the evidence of intent. In my view,  
this is serious error.

I

In *Sandstrom* the trial court instructed the jury that "[t]he  
law presumes that a person intends the ordinary conse-  
quences of his voluntary acts." *Id.*, at 513. The Court held,  
where intent is an essential element of the crime, that the  
giving of such an instruction is constitutional error. As we  
noted, on finding only that *Sandstrom* had caused the victim's  
death and had acted voluntarily, the jurors "could reasonably  
have concluded that they were directed to find against [the]  
defendant on the element of intent." *Id.*, at 523. Alterna-  
tively, an instruction that was viewed as shifting the burden  
of persuasion to the defendant could lead to a similar error.  
The jury "could have concluded that upon proof by the State  
of the slaying, and of additional facts not themselves estab-

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JAN 7 1983

CHANGES 2, 3, 5, 6, <sup>8+9</sup> [redacted] and  
STYLISTIC CHANGES

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: 1/7/83

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-927

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF CONNECTICUT

[January —, 1983]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and  
JUSTICE REHNQUIST join, dissenting.

The Court holds that an instruction given in violation of  
*Sandstrom v. Montana*, 442 U. S. 510 (1979), cannot be con-  
sidered harmless except in certain "rare situations." The ef-  
fect of its decision is to create an automatic reversal rule  
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of the slaying, and of additional facts not themselves estab-

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January 19, 1983

81-927 Connecticut v. Johnson

Dear Chief, Bill and Sandra:

I send to each of you herewith a proposed 4th draft of our opinion. In view of the peculiar posture of the case resulting from John's opinion concurring in the judgment, it seems to me that something along the lines of the additions I propose (marked in the margin of the enclosed draft) are desirable.

It is perfectly clear, I think, that Connecticut applies the Chapman harmless error federal rule generally, and simply misinterpreted or misapplied it in this case.

If John remains of his present view, it seems to me that five of us would not hold - as HAB apparently would - that a Sandstrom error can never be harmless. John states that this Court has never adopted an automatic reversal rule, and he does not read Harry's opinion as doing so.

I will await your views as to whether you approve the changes made in this 4th draft.

Sincerely,

The Chief Justice  
Justice Rehnquist  
Justice O'Connor

lfp/ss

January 19, 1983

PERSONAL AND CONFIDENTIAL

81-927 Connecticut v. Johnson

Dear Chief:

John has concurred in the judgment in this case, but in his brief opinion he states that neither this Court previously, nor Harry in his present opinion, has adopted an automatic reversal rule where there has been a Sandstrom error.

Although I do not see how John can read Harry's opinion this way, at least implicitly John seems to be saying that he agrees with us that the harmless error question remains subject to judicial review.

It may be desirable to point this out. If you agree, I hope you will do so in a brief opinion. It would be more appropriate, and certainly carry more weight, if you do this.

I enclose a draft for your consideration. Perhaps we can discuss this at the conclusion of our Conference this afternoon.

I also would like to talk quite briefly about Byron's opinion in the airport search case (Royer).

Sincerely,

The Chief Justice

lfp/ss

CHANGES PAGES 1-10, 13  
STYLISTIC CHANGES THROUGHOUT

JAN 18 1983

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JAN 20 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-927

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF CONNECTICUT

[January —, 1983]

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

Today a plurality of this Court finds that an instruction given in violation of *Sandstrom v. Montana*, 442 U. S. 510 (1979), cannot be considered harmless except in certain "rare situations." The effect of the plurality's opinion is to create an automatic reversal rule whenever a *Sandstrom*-type instruction is given, regardless of the conclusiveness of the evidence of intent. In my view, this is serious error.

I

It is necessary to address the jurisdictional issue raised in JUSTICE STEVENS' concurring opinion before considering the plurality's disposition of the merits. JUSTICE STEVENS would not reach the merits because the Connecticut Supreme Court, when requested to determine whether the *Sandstrom* error was harmless, declined to do so. Accordingly he concludes that no federal question is presented. It is unclear whether he takes the view that a state court may apply the federal harmless error rule to provide a defendant with greater protection than *Chapman v. California*, 386 U. S. 18 (1967), would require or whether he finds that the state supreme court's refusal to consider this question rests on an independent and adequate state ground. In my opinion, each

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JAN 24 1983

Stylistic Changes Throughout

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

JAN 24 1983

STYLISTIC CHANGES THROUGHOUT

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JAN 25 1983

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-927

CONNECTICUT, PETITIONER v.  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF CONNECTICUT

[January —, 1983]

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

Today a plurality of this Court finds that an instruction given in violation of *Sandstrom v. Montana*, 442 U. S. 510 (1979), cannot be considered harmless except in certain "rare situations." The effect of the plurality's opinion is to create an automatic reversal rule whenever a *Sandstrom*-type instruction is given, regardless of the conclusiveness of the evidence of intent. In my view, this is serious error.

I

It is necessary to address the jurisdictional issue raised in JUSTICE STEVENS' concurring opinion before considering the plurality's disposition of the merits. JUSTICE STEVENS would not reach the merits because the Connecticut Supreme Court, when requested to determine whether the *Sandstrom* error was harmless, declined to do so. Accordingly he concludes that no federal question is presented. It is unclear whether he takes the view that a state court may apply the federal harmless error rule to provide a defendant with greater protection than *Chapman v. California*, 386 U. S. 18 (1967), would require or whether he finds that the state supreme court's refusal to consider this question rests on an independent and adequate state ground. In my opinion, each

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February 9, 1983

81-927 Connecticut v. Johnson

Dear Chief:

You may recall that Harry has been anxious to bring this case down for several weeks.

You were going to write a brief opinion concurring in my dissent but stating that the plurality and John's opinions make clear - when read together - that an absolute rule has not been adopted.

In view of all that you have had on your "plate" recently, perhaps this is still on the back of your desk.

I write also to say that the suggestion in your note of February 4 is a most important one, and I am making the change. Many thanks.

Sincerely,

The Chief Justice

lfp/ss

P. 1

Stylistic Changes Throughout

FEB 9 1983

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: FEB 9 1983 \_\_\_\_\_

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-927

CONNECTICUT, PETITIONER v.  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF CONNECTICUT

[February —, 1983]

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

Today a plurality of this Court finds that an instruction given in violation of *Sandstrom v. Montana*, 442 U. S. 510 (1979), cannot be considered harmless except in certain "rare situations." The effect of the plurality's opinion, if it became a binding holding of the Court, would be to create an automatic reversal rule whenever a *Sandstrom*-type instruction is given, regardless of the conclusiveness of the evidence of intent. In my view, this is serious error.

I

It is necessary to address the jurisdictional issue raised in JUSTICE STEVENS' concurring opinion before considering the plurality's disposition of the merits. JUSTICE STEVENS would not reach the merits because the Connecticut Supreme Court, when requested to determine whether the *Sandstrom* error was harmless, declined to do so. Accordingly he concludes that no federal question is presented. It is unclear whether he takes the view that a state court may apply the federal harmless error rule to provide a defendant with greater protection than *Chapman v. California*, 386 U. S. 18 (1967), would require or whether he finds that the state supreme court's refusal to consider this question rests on an in-

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February 17, 1983

81-927 Connecticut v. Johnson

Dear Chief:

My secretary was able to retrieve (from Atex, I suppose) the text of the little draft that I sent some time ago at your request.

I now enclose another copy.

I prefer my somewhat longer draft to what your clerk recently brought by my Chambers. I am afraid if we are too categoric that John Stevens may react, and make some further change in his opinion.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

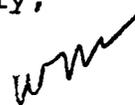
December 22, 1982

Re: No. 81-927 Connecticut v. Johnson

Dear Lewis:

Please join me in your dissent.

Sincerely,



Justice Powell

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 20, 1983

Re: No. 81-927 Connecticut v. Johnson

Dear Lewis:

I agree with the changes made in your 4th draft.

Sincerely,



Justice Powell

cc: The Chief Justice  
Justice O'Connor



To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated:          JAN 10 '83

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

          
No. 81-927  
        

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[January —, 1983]

JUSTICE STEVENS, dissenting.

If federal constitutional error occurs in a state criminal trial, federal law places certain limits on the state appellate court's disposition of the case. If the error is sufficiently grievous, it *must* reverse.<sup>1</sup> If the error is less grievous, it also must reverse unless it declares its conviction beyond a reasonable doubt that the federal error was harmless. But federal law does not *require* a state appellate court to make a harmless error determination; it merely *permits* the state court to do so in appropriate cases.<sup>2</sup> This is all the Court held in *Chapman v. California*, 386 U. S. 18 (1967).

---

<sup>1</sup> See *Chapman v. California*, 386 U. S. 18, 23 n. 8 (1967).

<sup>2</sup> I recognize that the state Attorney General has argued in this Court that the federal Constitution *requires* the Connecticut Supreme Court to make a harmless error determination in every case presenting a *Sandstrom* issue. Cross-petition for certiorari 7; transcript of oral argument 9-10. The following colloquy took place at oral argument:

"Petitioner: It appears that the Connecticut Supreme Court as a matter of federal constitutional law sometimes entertains the instruction—the challenge that the error was harmless and sometimes it does not. The only stated position that the Connecticut Supreme Court has given in this regard is the one in *State against Truppi*, is that we sometimes apply the harmless error rule. . . .

"Question: Well, is it your position that they must apply it in every case?

"Petitioner: No, Your Honor, my position is not that they must apply the

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

January 13, 1983

Re: 81-927 - Connecticut v. Johnson

Dear Chief:

There now appear to be four votes to affirm and four to reverse. I am not sure whether the present opinions will be published or remain unpublished in view of our normal practice when the Court is equally divided. If the respective authors propose to publish their opinions in all events, I would simply let mine stand as it is. If not, however, perhaps I could add the following at the end of my present draft to make it possible to publish the existing opinions:

"However, since eight Members of the Court have concluded that there is jurisdiction and since the practical effect of an affirmance is to allow the judgment of the Connecticut Supreme Court to stand, I so vote."

With this change, my opinion would go back to being an opinion concurring in the judgment rather than a dissent.

Perhaps we should discuss this somewhat unique problem at conference.

Respectfully,



The Chief Justice

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

Change 7.2

From: Justice Stevens

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-927

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[January —, 1983]

JUSTICE STEVENS, dissenting.

If federal constitutional error occurs in a state criminal trial, federal law places certain limits on the state appellate court's disposition of the case. If the error is sufficiently grievous, it *must* reverse.<sup>1</sup> If the error is less grievous, it also must reverse unless it declares its conviction beyond a reasonable doubt that the federal error was harmless. But federal law does not *require* a state appellate court to make a harmless error determination; it merely *permits* the state court to do so in appropriate cases.<sup>2</sup> This is all the Court held in *Chapman v. California*, 386 U. S. 18 (1967).

<sup>1</sup>See *Chapman v. California*, 386 U. S. 18, 23 n. 8 (1967).

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Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

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Recirculated: JAN 21 83

2.17.3

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-927

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[January —, 1983]

JUSTICE STEVENS, concurring in the judgment.

If federal constitutional error occurs in a state criminal trial, federal law places certain limits on the state appellate court's disposition of the case. If the error is sufficiently grievous, it *must* reverse.<sup>1</sup> If the error is less grievous, it also must reverse unless it declares its conviction beyond a reasonable doubt that the federal error was harmless.<sup>2</sup> But federal law does not *require* a state appellate court to make a harmless error determination; it merely *permits* the state court to do so in appropriate cases.<sup>3</sup> This is all the Court held in *Chapman v. California*, 386 U. S. 18 (1967).

<sup>1</sup>See *Chapman v. California*, 386 U. S. 18, 23 n. 8 (1967).

<sup>2</sup>The harmless error rule which may be applied when federal constitutional error has been committed, see *Chapman v. California, supra*, is not to be confused with either the federal harmless error rule that is applied in federal courts when nonconstitutional error occurs, see *Kotteakos v. United States*, 328 U. S. 750 (1946), or with a state's own harmless error rule applicable to errors of state law, see, e. g. Conn. Gen. Stat. § 52-265.

<sup>3</sup>I recognize that the state Attorney General has argued in this Court that the federal Constitution *requires* the Connecticut Supreme Court to make a harmless error determination in every case presenting a *Sandstrom* issue. Cross-petition for certiorari 7; transcript of oral argument 9-10. The following colloquy took place at oral argument:

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: \_\_\_\_\_

Recirculated: **FEB 18 '83**

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-927

CONNECTICUT, PETITIONER *v.*  
LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[February —, 1983]

JUSTICE STEVENS, concurring in the judgment.

If federal constitutional error occurs in a state criminal trial, federal law places certain limits on the state appellate court's disposition of the case. If the error is sufficiently grievous, it *must* reverse.<sup>1</sup> If the error is less grievous, it also must reverse unless it declares its conviction beyond a reasonable doubt that the federal error was harmless.<sup>2</sup> But federal law does not *require* a state appellate court to make a harmless error determination; it merely *permits* the state court to do so in appropriate cases.<sup>3</sup> This is all the Court held in *Chapman v. California*, 386 U. S. 18 (1967).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 24, 1982

No. 81-927 Connecticut v. Johnson

Dear Harry,

I will wait for the dissent before deciding  
whether to join your opinion.

Sincerely,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 13, 1983

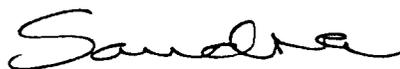
No. 81-927 Connecticut v. Johnson

Dear Lewis,

This has been a difficult case for me. As I indicated at Conference, my initial vote was tentatively to affirm the judgment. I have finally concluded that the better rule is the application of the harmless error principle in this case.

Please join me in your dissent.-

Sincerely,



Justice Powell

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 20, 1983

Re: 81-927 Connecticut v. Johnson

Dear Lewis,

I approve of the changes made in your 4th draft.

Sincerely,



Justice Powell

cc: The Chief Justice  
Justice Rehnquist