

# The Burger Court Opinion Writing Database

## *Rose v. Clark*

478 U.S. 570 (1986)

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



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

## SUPREME COURT OF THE UNITED STATES

No. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER *v.*  
 STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

CHIEF JUSTICE BURGER, concurring.

I join the entirety of the Court's opinion except for its conclusion that the case should be remanded for application of harmless error analysis.

The evidence in this case showed that respondent stalked the victims by car for about an hour. After trapping the victims' truck in a private driveway, respondent fired four shots at point blank range killing both victims. Two young girls, ages 3 and 6, were in the truck and witnessed the slaying. Their mother was one of the victims. After the murder, respondent left the scene but was apprehended by the police after a high-speed chase.

In my view, such evidence overwhelmingly demonstrates that respondent acted with malice. Accordingly, any violation of *Sandstrom v. Montana*, 442 U. S. 510 (1979) in this case was clearly harmless, and there is no need for a remand.

Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **The Chief Justice**

2nd DRAFT

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*Changes marked*

**SUPREME COURT OF THE UNITED STATES**

No. 84-1974

**JIMMY C. ROSE, WARDEN, PETITIONER v.  
 STANLEY BARHAM CLARK**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE SIXTH CIRCUIT

[July 2, 1986]

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, although I see no need for re-  
 manding for application of harmless error analysis.

The evidence in this case showed that respondent stalked  
 the victims by car for about an hour. After trapping the vic-  
 tims' truck in a private driveway, respondent fired four shots  
 at point blank range killing both victims. Two young girls,  
 ages 3 and 6, were in the truck and witnessed the slaying.  
 Their mother was one of the victims. After the murder,  
 respondent left the scene but was apprehended by the police  
 after a high-speed chase. In my view, such evidence over-  
 whelmingly demonstrates that respondent acted with malice.

[ ]

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 8, 1986

No. 84-1974

Rose v. Clark

Dear Thurgood, Harry and John,

We four are in dissent in the  
above. Would you, Harry, be willing to  
take it on?

Sincerely,



Justice Marshall

Justice Blackmun

Justice Stevens

153

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 5, 1986

No. 84-1974

Rose v. Clark

Dear Lewis,

I await the dissent.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 30, 1986

No. 84-1974

Rose v. Clark

Dear Harry,

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 31, 1986

MEMORANDUM TO THE CONFERENCE

84-1974 - Rose v. Clark

I vote to reverse in this case but would  
remand for determination of whether the  
Sandstrom error was harmless.

B.R.W.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 5, 1986

84-1974 - Rose v. Clark

Dear Lewis,

Please join me.

Sincerely yours,



Justice Powell

Copies to the Conference

100-100000-1000

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 2, 1986

Re: No. 84-1974-Rose v. Clark

Dear Lewis:

I await the dissent.

Sincerely,



T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 30, 1986

Re: No. 84-1974 - Rose v. Clark

Dear Harry:

Please join me in your dissent.

Sincerely,

*JM.*

T.M.

Justice Blackmun

cc: The Conference

MM

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 8, 1986

Re: No. 84-1974, Rose v. Clark

Dear Bill:

I shall be glad to try my hand at a dissent in this case.

Sincerely,

HAB

Justice Brennan

cc: Justice Marshall  
Justice Stevens

10 766-8 63 40

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 6, 1986

Re: No. 84-1974, Rose v. Clark

Dear Lewis:

In due course, I shall try my hand at a dissent in this case.

Sincerely,



Justice Powell

cc: The Conference

MAY 11 11 30

MAY 11 11 30

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

From: Justice Blackmun

Circulated: JUN 30 1986

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HAB  
Re on own me in your dissent  
74

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER *v.*  
STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[July —, 1986]

Join

JUSTICE BLACKMUN, dissenting.

Stanley Clark was deprived of two rights: the right guaranteed by the Due Process Clause of the Fourteenth Amendment to compel the State of Tennessee to prove beyond a reasonable doubt every element of the crimes with which he was charged, and the right guaranteed by the Sixth Amendment to have a jury of his peers determine whether the State had met that burden. Today, the Court focuses entirely on the former right and disregards totally the latter. A reviewing court's conclusion that the record would support a conviction by a properly instructed jury has no bearing on the question whether a defendant was denied the right to have the jury that actually tried him make that determination. "To conform to due process of law, [defendants are] entitled to have the validity of their convictions appraised on consideration of the case . . . as the issues were determined in the trial court." *Cole v. Arkansas*, 333 U. S. 196, 202 (1948). A trial that was fundamentally unfair at the time it took place, because the jury was not compelled to perform its constitutionally required role, cannot be rendered fundamentally fair in retrospect by what amounts to nothing more than an appellate review of the sufficiency of the evidence. I therefore dissent from the Court's holding that harmless-error analysis should be applied.

To: The Chief Justice  
Justice Brennan

From: Justice Blackmun

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

Recirculated: JUL 1 1986

SUPREME COURT OF THE UNITED STATES

No. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER *v.*  
STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[July 2, 1986]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and  
JUSTICE MARSHALL join, dissenting.

Stanley Clark was deprived of two rights: the right guaranteed by the Due Process Clause of the Fourteenth Amendment to compel the State of Tennessee to prove beyond a reasonable doubt every element of the crimes with which he was charged, and the right guaranteed by the Sixth Amendment to have a jury of his peers determine whether the State had met that burden. Today, the Court focuses entirely on the former right and disregards totally the latter. A reviewing court's conclusion that the record would support a conviction by a properly instructed jury has no bearing on the question whether a defendant was denied the right to have the jury that actually tried him make that determination. "To conform to due process of law, [defendants are] entitled to have the validity of their convictions appraised on consideration of the case . . . as the issues were determined in the trial court." *Cole v. Arkansas*, 333 U. S. 196, 202 (1948). A trial that was fundamentally unfair at the time it took place, because the jury was not compelled to perform its constitutionally required role, cannot be rendered fundamentally fair in retrospect by what amounts to nothing more than an appellate review of the sufficiency of the evidence. I therefore dissent from the Court's holding that harmless-error analysis should be applied.

Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Powell**

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

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER *v.*  
 STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE SIXTH CIRCUIT

[May —, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the harmless error standard of *Chapman v. California*, 386 U. S. 18 (1967), applies to jury instructions that violate the principles of *Sandstrom v. Montana*, 442 U. S. 510 (1979), and *Francis v. Franklin*, 471 U. S. — (1985).<sup>1</sup>

I

On December 30, 1978, Charles Browning and Joy Faulk were shot to death while they sat in Browning's pickup truck

<sup>1</sup>In *Connecticut v. Johnson*, 460 U. S. 73 (1983), the Court was equally divided on the question whether ordinary harmless error analysis was appropriate in cases of *Sandstrom* error. Compare *id.*, at 85-87 (plurality opinion) (such error "is the functional equivalent of a directed verdict" on intent, and is therefore harmless only when the defendant concedes intent) with *id.*, at 95-99 (POWELL, J., dissenting) (*Chapman* standard applies to *Sandstrom* error). Cf. *id.*, at 88 (STEVENS, J., concurring in judgment) (joining affirmance of state court decision that *Sandstrom* error could not be harmless, but on the ground that the decision was actually one of state law). The *Johnson* plurality noted that state and federal courts were in conflict on this issue. *Id.*, at 75, n. 1 (collecting cases). Due in part to the divided views in *Johnson*, that conflict has persisted. Compare, e. g., *Tucker v. Kemp*, 762 F. 2d 1496, 1501-1503 (CA11) (en banc) (applying *Chapman* harmless error analysis), cert. pending, No. 85-6447, with *In re Hamilton*, 721 F. 2d 1189, 1190-1191 (CA9 1983) (holding that *Sandstrom* error would be harmless only if intent was not contested at trial).

Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

Stylistic Changes throughout.

From: **Justice Powell**

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

Recirculated: \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER *v.*  
 STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE SIXTH CIRCUIT

[July —, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the harmless error standard of *Chapman v. California*, 386 U. S. 18 (1967), applies to jury instructions that violate the principles of *Sandstrom v. Montana*, 442 U. S. 510 (1979), and *Francis v. Franklin*, 471 U. S. — (1985).<sup>1</sup>

### I

On December 30, 1978, Charles Browning and Joy Faulk were shot to death while they sat in Browning's pickup truck

<sup>1</sup> In *Connecticut v. Johnson*, 460 U. S. 73 (1983), the Court was equally divided on the question whether ordinary harmless-error analysis was appropriate in cases of *Sandstrom* error. Compare *id.*, at 84-87 (plurality opinion) (such error "is the functional equivalent of a directed verdict" on intent, and is therefore harmless only when the defendant concedes intent), with *id.*, at 95-99 (POWELL, J., dissenting) (*Chapman* standard applies to *Sandstrom* error). Cf. *id.*, at 88 (STEVENS, J., concurring in judgment) (joining affirmance of state court decision that *Sandstrom* error could not be harmless, but on the ground that the decision was actually one of state law). The *Johnson* plurality noted that state and federal courts were in conflict on this issue. *Id.*, at 75, n. 1 (collecting cases). Due in part to the divided views in *Johnson*, that conflict has persisted. Compare, e. g., *Tucker v. Kemp*, 762 F. 2d 1496, 1501-1503 (CA11 1985) (en banc) (applying *Chapman* harmless-error analysis), cert. pending, No. 85-6447, with *In re Hamilton*, 721 F. 2d 1189, 1190-1191 (CA9 1983) (holding that *Sandstrom* error would be harmless only if intent was not contested at trial).

June 23, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Kemp v. Corn, No. 85-1218. Respondent was charged and convicted of the murder of a convenience store cashier. The cashier was struck in the face and head and stabbed repeatedly in the chest; her body was found in the store's storage area. After his arrest, respondent admitted killing the cashier, but stated that he "didn't mean to." At trial, respondent, who has an I.Q. of 69, raised an insanity defense. The TC instructed the jury that "[t]he law presumes every homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation, or excuse," and that "the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but this presumption may be rebutted." Respondent was convicted of murder and robbery and sentenced to death.

The DC denied habeas relief, and CALL (Hill, Henderson, Garza) affirmed in June 1983, finding that the challenged instruction was not erroneous under Sandstrom v. Montana, 442 U.S. 500 (1979). CALL then denied rehearing en banc, and issued its mandate on June 20, 1984. On June 26, 1984, the court recalled the mandate pending disposition of three cases then pending en banc. On August 26, 1985, the court (same panel) reversed itself, finding that the challenged instruction was "virtually identical" to the one disapproved in Francis v. Franklin, 105 S.Ct. 1968 (1985). In a brief footnote, the court found that the error was "clearly not harmless," on the ground that "the evidence of intent must be overwhelming before [a Sandstrom] error can be deemed harmless. ... No such evidence exists in this case." Pet. App. 65, n. 2.

The State's cert petition argues first that CALL erred in recalling the mandate in this case. Second, the State argues that the challenged instruction is distinguishable from the instruction in Francis v. Franklin. Third, the State argues that the instruction was harmless under the Chapman standard.

I will vote to deny cert on questions 1 and 2, as these claims appear meritless. On question 3, I will vote to GVR in light of Rose v. Clark, No. 84-1974. CALL seems to have required evidence that bore directly on intent as a

June 23, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

(5) Kemp v. Thomas, No. 85-736. After robbing the murder victim, respondent and an accomplice took the victim to a deserted woods, struck him with a hammer, shot him several times, and then buried him. The victim was conscious and struggling to speak when he was buried; an autopsy later showed that he suffocated to death. Respondent confessed to the murder in some detail. At trial, respondent claimed that he remembered neither the crime nor his confession; respondent's counsel argued to the jury that respondent could not have had the requisite intent to kill. The trial court instructed the jury that "[t]he acts of a person of sound mind ... are presumed to be a product of the person's will, but the presumption can be rebutted." Respondent was convicted of murder and sentenced to death. The DC denied habeas relief.

CALL reversed. The court first found that the instruction was error under Francis v. Franklin, 105 S.Ct. 1965 (1985). Turning to the question whether the error was harmless, the court stated the standard as follows:

"[H]armless error analysis is appropriate for Sandstrom violations (1) where the evidence of the defendant's guilt, including intent, was overwhelming; and (2) where the required intent was not made an issue of controversy at trial." 766 F.2d 452, 455 (1985), citing Davis v. Kemp, 752 F.2d 1515, 1521 (CALL 1985) (en banc), cert. denied, 105 S.Ct. 2689 (1985).

Here, the court concluded, "intent was made an issue for the jury to decide" since respondent denied intending to kill. Accordingly, the error could not be harmless.

The State argues in its cert petition that CALL applied the wrong harmless error standard.

I will vote to GVR in light of Rose v. Clark, No. 84-1974. In Rose, we specifically disapprove the notion that harmless error analysis in Sandstrom cases turns on whether intent is contested. See 1st Circulating Draft at 11-12. And under a proper Chapman analysis, it seems clear that the

June 23, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

(3) Kemp v. Brooks, No. 85-553. Respondent confessed to raping and killing a 23-year-old woman; the death occurred as a result of a gunshot wound to the neck. According to respondent's confession, he threatened the victim with a pistol, putting the gun to her head and pulling back the hammer. The gun then "went off." Respondent did not testify at trial, but he apparently argued to the jury that the victim's death was accidental. The TC instructed the jury that malice was presumed, but the presumption was rebuttable. Cf. Francis v. Franklin, 105 S.Ct. 1965 (1985). Respondent was convicted of armed robbery, rape, kidnapping, and malice murder, and was sentenced to death.

The DC denied respondent's habeas petition, and CALL reversed en banc, finding that the erroneous instruction was not harmless.<sup>1</sup> The court correctly stated the Chapman test, and then stated that under Davis v. Kemp, 752 F.2d 1515 (CALL 1985) (en banc), cert. denied, 105 S.Ct. 2689 (1985), "the nature of the defense at trial is an important factor in assessing whether there is overwhelming evidence of intent." 762 F.2d 1383, 1390 (1985). Here, respondent not only argued that he wasn't the killer; he also raised a defense of accident. And, the court noted, "it is of course possible to kidnap, rob, rape and even threaten without intending to kill." Id., at 1393. The court then concluded that the erroneous instruction was not harmless beyond a reasonable doubt. Judge Kravitch, joined by two colleagues, dissented, arguing that no reasonable jury could have failed to infer intent to kill from the evidence that respondent purposely put the gun to the victim's head and purposely pulled back the hammer.

I will vote to GVR in light of Rose v. Clark, No. 84-1974. In Rose, we specifically disapprove the notion that harmless error analysis in Sandstrom cases turns on whether

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<sup>1</sup>In addition to the Sandstrom harmless-error issue, the court addressed a number of other claims that are not at issue here.

June 23, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Kemp v. Drake, No. 85-556. Respondent was charged with armed robbery and murder in connection with the death of the proprietor of a barber shop. The victim was beaten with a hammer and stabbed repeatedly with a pocket knife. At trial, the state's theory was that respondent and one Campbell cooperated in robbing and killing the victim. Campbell testified that respondent actually killed the victim. Respondent denied being present when the killing occurred, and presented an alibi defense.

The TC instructed the jury as to three theories under which respondent could be guilty of murder: malice murder, felony murder during the course of a robbery, and aiding and abetting a murder committed by someone else (here, Campbell). The TC also gave a mandatory rebuttable presumption instruction similar to the one disapproved in Francis v. Franklin, 105 S.Ct. 1965 (1985). The jury found respondent guilty of murder without specifying the applicable theory.

At the sentencing phase, the prosecutor in his closing argument quoted the following lines from a 100-year-old Georgia Supreme Court decision:

"We have ... no sympathy with that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for a crime. It may be the sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that criminals be punished, and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society. ... We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist on mercy to society. ... [A] stern, unbending, unflinching administration of the penal laws ... is the highest mark of civilization, and it is also the surest mode to prevent the commission of offenses."

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Hagler v. Callahan, No. 85-1394; Callahan v. Hagler, No. 85-1550. Hagler was charged with murder in the shooting death of one Ellington. The evidence against Hagler was circumstantial; he presented an alibi defense at trial. The TC instructed the jury that "[t]he law presumes that every person intends the natural and probable consequences of his own act," an instruction similar to the one disapproved in Sandstrom v. Montana, 442 U.S. 510 (1979). Hagler was convicted of second-degree murder.

On state habeas, Hagler raised the Sandstrom issue for the first time. The court applied a state-law version of the Wainwright v. Sykes test to determine whether to hear the challenge. The court found no actual prejudice, and therefore denied relief.

On federal habeas, the DC reached the Sandstrom issue, found that the instruction was erroneous and that the error was not harmless. CA9 reversed, noting that Hagler had relied on an alibi defense at trial (and thus had not seriously contested intent). In addition, the court emphasized that "the facts most strongly reflecting on intent are undisputed: the victim was shot three times, twice in the head, and one of the shots was fired at point-blank range." Based on these facts, the court concluded that the Sandstrom error was harmless beyond a reasonable doubt.

Hagler's petition for cert (No. 85-1394) argues that CA9 erred in analyzing the harmless-error issue. The State's cross-petition (No. 85-1550) argues that the Sandstrom claim was barred by Sykes, and thus should never have been reached by the DC or CA9.

I will vote to deny both cert petitions. CA9's harmless-error analysis was consistent with Rose v. Clark, No. 84-1974, and consequently the judgment below is correct regardless of how the Sykes issue is resolved.

L.F.P., Jr.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Church v. Kincheloe, No. 85-6022. Petitioner and a friend hailed a cab outside a restaurant where they had been drinking; petitioner promptly passed out. When he came to, he mistakenly thought the cab was going the wrong way, and started assaulting the cab driver, striking him several times in the head. The driver ultimately delivered petitioner to his house. Petitioner was charged with unlawful imprisonment (for threatening the cab driver) and assault. Both offenses require knowledge.

The TC instructed the jury that "the law presumes that every person intends the natural and probable consequences of their own acts." Petitioner's counsel did not object to this instruction. Petitioner was convicted of both charges.

On federal habeas, petitioner raised (i) a Sandstrom claim, and (ii) a claim that counsel was ineffective for failing to object to the Sandstrom instruction. The DC denied relief, and CA9 affirmed. CA9 concluded that the Sandstrom error was harmless beyond a reasonable doubt under the Chapman standard, because intent was unconstested at trial. Petitioner's theory at trial had been that he honestly believed the driver was kidnapping him, and thus had every right to resist with force. Petitioner thus conceded that he intended to commit the acts charged, but claimed that he should be excused by his mistake of fact. The erroneous instruction could not have affected the jury's determination of that defense.

The court also found that counsel was not ineffective, since the defense strategy did not require an objection to the TC's instruction. Petitioner challenges both of the court's determinations in his cert petition.

I will vote to deny cert. The harmless-error determination is consistent with Rose v. Clark, both because petitioner appeared to concede intent at trial, and because the acts themselves seem inherently intentional. It follows that the ineffective assistance claim is meritless--if the Sandstrom error was harmless, there can be no prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

My vote is to deny.

L.F.P., Jr.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Martin v. Foltz, No. 85-5913. Petitioner and an accomplice shot and killed one Archie Walker in an airport parking garage; petitioner was charged with murder. Police picked him up near the garage shortly after the shooting, and he stated that he had just come from his car, a blue Ford. Police gave petitioner Mirnada warnings and then looked for petitioner's car, which was nowhere to be found. At trial, the prosecutor elicited testimony from the officer to the effect that petitioner remained silent while the police were looking for his car. In addition, the prosecutor's closing argument included the statement that "[w]e would certainly hope that you folks would never find Morris Martin not guilty when we have a dead man who had every right to live and was ... killed."

The TC instructed the jury that "malice is implied from any guilt or cruel [sic] against another however sudden." Petitioner was convicted of first-degree murder.

The DC denied petitioner relief on federal habeas, and CA6 affirmed. The court found that the comment on petitioner's silence, if error, was harmless beyond a reasonable doubt; that the prosecutor's closing argument did not render the trial fundamentally unfair; that the evidence on premeditation was sufficient to support petitioner's conviction; and that assuming Sandstrom error was committed, it too was harmless. On the last point, the court reasoned that the only issue at trial had been whether petitioner had participated in the killing, not whether the participants had acted with malice. As the TC noted, "an inference of malice was inescapable" from the nature of the killing: the killers grabbed the victim, held him down, and fired several shots into him.

I will vote to deny cert. CA6's decision on the Sandstrom issue is consistent with Rose v. Clark, and the other issues are uncertworthy.

My vote is to deny.

L.F.P., Jr.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Russell v. California, No. 85-5589. Petitioner accosted and shot a woman as she was leaving a bank and then stole her purse. The jury was instructed that they could find petitioner guilty of murder if the State proved either (i) an intentional killing or (ii) a killing during the course of a felony. The jury found petitioner guilty, and also found the statutory "special circumstance" of murder committed during a robbery. Because of this "special circumstance" finding, petitioner was sentenced to life without possibility of parole.

The California Court of Appeals affirmed. The court found that as a matter of state law, the "special circumstance" required a finding of intent to kill. Relying solely on state cases, the court then found that while the jury had not been instructed to find intent, the error was harmless, since intent was clear on these facts. The California Supreme Court denied review.

Petitioner contends that the California Court of Appeals' decision conflicts with Connecticut v. Johnson, 460 U.S. 73 (1983).

I will vote to deny cert. Although the jury was not required to find intent, it was required to find that petitioner committed the killing, and the facts of the killing conclusively establish intent: petitioner grabbed his victim from behind and shot her through the heart. The state court's decision is thus consistent with Rose v. Clark.

My vote is to deny.

L.F.P., Jr.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Lescallett v. California, No. 85-6045. After abandoning a stolen car, petitioner and two accomplices hitched a ride from a 79-year-old woman. After a brief ride, the three forced the woman to get into the car trunk. After driving a ways further, petitioner and one of the accomplices returned to the trunk and sexually assaulted her with a cane. When they determined that she was still alive, the two men then stabbed the victim eight or ten times. She died of the stab wounds. Petitioner recounted these facts in the course of conversations with another inmate after his arrest.

Petitioner was convicted of murder, with the special circumstance of kidnapping for the purpose of robbery. Because of the special circumstance finding, petitioner was sentenced to life imprisonment without possibility of parole. Under a line of California Supreme Court decisions, the special circumstance requires a finding of intent to kill or to assist in a killing, but the jury had not been instructed that such a finding was necessary.

The California Court of Appeals affirmed, finding that the failure to instruct the jury as to intent was harmless. Relying on state cases, the court applied a four-part test, finding that (i) the parties recognized that intent was an issue at trial; (ii) they presented all the evidence they had on that issue; (iii) the record establishes intent "as a matter of law"; and (iv) any contrary evidence in the record "is not worthy of consideration." Since all four of these factors were satisfied,<sup>1</sup> the court found that intent was established as a matter of law. The California Supreme Court denied review. Petitioner argues that the Court of

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<sup>1</sup>The court noted that the second of these four elements "has a very limited ... role to play in cases in which the defendant presents an alibi defense" rather than actually contesting intent. In this case, petitioner relied on an alibi defense at trial.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Koehler v. McGhar, No. 85-1309. Respondent was charged with assault with intent to kill and mayhem under the following facts. After an evening of drinking, respondent got into a fight with one of his companions in the latter's apartment. Respondent grabbed a samurai sword and attacked his companion for about 4 minutes, causing severe injuries.

At trial, respondent claimed he was too drunk to form the requisite intent. The jury instructions on the mayhem count included the statement that "the law presumes that every man intends the legitimate consequences of his own act." Respondent was convicted on both counts.

The DC granted habeas relief, finding that the instruction violated Sandstrom v. Montana and that the error was not harmless. The DC purported to apply Chapman's harmless-error standard, but noted that "the prejudicial effect of a Sandstrom error is mostly a function of [the] defense[s] advanced at trial." Pet. App. 14a. Here, the court noted, although the crime was one of "overwhelming brutality," id., at 17a, intent was clearly in issue. The court placed heavy reliance on Engle v. Koehler, 707 F.2d 241 (CA6 1983), aff'd by an equally divided Court, \_\_\_ U.S. \_\_\_ (1984). CA6 affirmed the DC in a 2-page per curiam, stating that "[w]e are unable to conclude beyond a reasonable doubt that the jury could not have applied the erroneous intent instructions to both counts." Pet. App. 2a.

The State's cert petition argues that the Sandstrom error was harmless as to the assault count, since the TC expressly instructed the jury to consider the two counts separately.

I will vote to GVR in light of Rose v. Clark, No. 84-1974. In Rose, the CA6, relying on Engle v. Koehler, supra, found that Sandstrom error could not be harmless if intent was at issue. We found that that standard was erroneous. 1st Circulating Draft at 11-12. Here, the DC likewise focused on whether intent was at issue in the trial, and likewise relied on Engle v. Koehler. CA6 simply affirmed without discussion. I therefore think a GVR is appropriate, if only to force CA6 to clarify the basis for its decision.

L.F.P., Jr.

June 25, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Brooks v. Kemp, No. 85-5802. This petition is curvelined with Kemp v. Brooks, No. 85-553; a hold memo in that case already has circulated. Petitioner Brooks confessed to raping and killing a 23-year-old woman. He was convicted of armed robbery, rape, kidnapping, and malice murder, and was sentenced to death. In his closing argument at the sentencing proceeding, the prosecutor told the jury that "I believe in the death penalty," and urged the jury not to spare petitioner, saying:

"If he's given life, it cost[s] money to keep him, thousands of dollars a year to keep a prisoner housed, fed and clothed ....

"We're at war ... against the criminal element in this country. ... If we can send a seventeen-year-old young man overseas to kill an enemy soldier, is it asking too much to ask you to go back and vote for the death penalty in this case?"

Petitioner's counsel did not object to the prosecutor's argument.

The DC denied habeas relief on petitioner's prosecutorial misconduct claim. The CALL affirmed en banc, finding that the arguments were not egregious enough to render the sentencing proceeding fundamentally unfair. Petitioner argues that CALL's decision conflicts with Caldwell v. Mississippi, 105 S.Ct. 2633 (1985).

I will vote to deny cert. CALL applied the correct standard under Darden v. Wainwright, No. 85-5319, and the application of that standard to these facts is too fact-bound for review here.

My vote is to deny.

L.F.P., Jr.

June 25, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Hamilton v. Louisiana, No. 85-6240. Petitioner killed a cashier in a liquor store. According to his confession, petitioner entered the store intending to rob it, but then accidentally shot the cashier and fled. No witnesses saw the shooting. The cashier's wallet, containing a small amount of money, was found undisturbed by the body, and the cash register was unopened. Petitioner was charged with first-degree murder. At trial, the State's theory was that petitioner shot the cashier intentionally, but was unable to get the cash register open before he had to flee. The State put on evidence showing that the trigger on petitioner's gun (a .38) was hard to pull, so an accidental shooting was unlikely.

The TC instructed the jury that "[t]he law holds that a sane person is presumed to intend the natural and probable consequences of his own deliberate acts" (emphasis added). The instructions also stated that "[i]f for instance a man armed with a deadly weapon should suddenly, with little or no apparent cause or provocation, kill another, the law would presume that such a killing was deliberate and intentional" (emphasis added). Petitioner did not object to these instructions.

The Louisiana Supreme Court reversed petitioner's death sentence on an unrelated ground, but affirmed the conviction. The court found that although the instruction violated Sandstrom v. Montana, 442 U.S. 510 (1979), it was harmless because the unconstitutional presumption did not take effect unless petitioner deliberately fired his gun. Petitioner does not claim that he purposely fired the gun but did not intend to kill the cashier. Since the jury was still required to find that the gun was fired deliberately, the Sandstrom error was irrelevant to the jury's decision.

The cert petition raises two claims. First, petitioner argues that the Sandstrom error could not have been harmless since intent was squarely at issue. Second, petitioner makes a Grigsby claim, noting that 27 venirepersons were excluded based on their views about the death penalty.

June 25, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

There are now 23 cert petitions being held for Rose v. Clark. Although the decision in that case will not be announced this week, I thought it best to circulate about half of the "hold memos" now, for consideration at tomorrow's conference. This will enable us to avoid being too swamped with holds next week. Accordingly, I would like to have the following held cases discussed at tomorrow's conference:

Kemp v. Brooks, No. 85-553  
Brooks v. Kemp, No. 85-5802  
Kemp v. Drake, No. 85-556  
Kemp v. Thomas, No. 85-736  
Kemp v. Corn, No. 85-1218  
Koehler v. McGhar, No. 85-1309  
Hagler v. Callahan, No. 85-1394  
Callahan v. Hagler No. 85-1550  
Russell v. California, No. 85-5589  
Martin v. Foltz, No. 85-5913  
Church v. Kincheloe, No. 85-6022  
Lescallet v. California, No. 85-6045  
Hamilton v. Louisiana, No. 85-6240

The orders in these cases can be held pending the announcement of Rose v. Clark.

I also would like to relist the following cases for discussion at a later conference (perhaps on Monday):

McCleskey v. Kemp, No. 84-6811  
Bosque v. Henderson, No. 84-6983  
United States v. Ben M. Hogan Co., No. 85-1067  
Aiken v. Hyman, No. 85-1461  
Hyman v. Aiken, No. 85-6638  
Potts v. Kemp, No. 85-5513  
Bowen v. Kemp, No. 85-6329  
Tucker v. Kemp, No. 85-6447  
Roberts v. Aiken, No. 85-6671  
Williams v. Kemp, No. 85-6818

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

Bosque v. Henderson, No. 84-6983. Petitioner was charged with second-degree murder and possession of a dangerous weapon; the theory of the prosecution was that petitioner aided in killing the murder victim, though petitioner was not himself the triggerman. At trial, the State relied on the testimony of one Senquis, who identified petitioner as one of two men who were seen running away from the place where the victim was shot shortly after the murder. Petitioner challenged Senquis' identification, because he had first identified petitioner when the police showed him a single photograph--petitioner's--not long after the crime. The TC found that Senquis' identification rested on factors independent of the photo ID: Senquis had seen petitioner many times before, and got a good view of him after the murder.

The TC instructed the jury that "the law says that a person intends the logical and natural consequences of his acts." Petitioner did not object to this charge. He was convicted on both counts. On appeal, the Appellate Division found that petitioner's Sandstrom claim was barred because petitioner had not objected at trial. The court found no error in the admission of Senquis' in-court identification.

On federal habeas, the DC denied relief. The court found that petitioner's Sandstrom claim was barred by Wainwright v. Sykes, 433 U.S. 72 (1977). While petitioner might have suffered prejudice from his counsel's default, there was no "cause" to justify it. Counsel's inadvertence does not satisfy the "cause" prong of Sykes. The court also found no error in the admission of the in-court identification. CA2 affirmed in a brief per curiam.

Petitioner renews his Sandstrom claim and his claim that Senquis' identification testimony rested on improperly suggestive police practices.

I will vote to deny cert. In Murray v. Carrier, No. 84-1554, we held that ordinary attorney inadvertence does not constitute "cause" for purposes of applying Sykes. The

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

*Vacate*

Bowen v. Kemp, No. 85-6329. Petitioner was charged with raping and murdering a 12-year-old girl. The victim was stabbed fourteen times in the face, chest, and abdomen; she died from the stab wounds. At trial, petitioner relied on an insanity defense. The TC charged the jury that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted." Petitioner was convicted of murder and rape.

At his sentencing proceeding, petitioner claimed that he had converted to Christianity and could now be a model citizen. The prosecutor responded very harshly to this line of reasoning in his closing argument, analogizing petitioner to Hitler:

"Yeah, I guess he can be rehabilitated. Hitler could have been. I believe in about six or eight months if I'd had him chained to a wall and talked to him and beat him on one side of the head for a while with a stick telling him you believe this don't you then beat him on the other side with a stick telling him you believe that don't you I believe I could have rehabilitated Hitler."

The prosecutor also hinted that if petitioner was spared he might "pick up another little twelve year old girl," and called petitioner "a beast." Petitioner objected to these statements, but the objection was overruled.

On federal habeas, the DC found (i) Sandstrom error, and (ii) improper prosecutorial argument. The DC also found that neither error was harmless. Call reversed. The court agreed that the instruction was erroneous, but found the error harmless. First, the evidence of intent was "overwhelming," given the number of the victim's stab wounds. Second, the erroneous presumption only applied if the jury found that petitioner was "a person of sound mind and discretion." Thus, the jury must already have rejected peti-

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

*Vault*  
Re: Cases held for Rose v. Clark, No. 84-1974.

Roberts v. Aiken, No. 85-6671. This case comes to us on state habeas. Petitioner and two accomplices abducted and shot three men. At petitioner's murder trial, the critical testimony was provided by one of his accomplices, one Coker, who was promised immunity on the condition that someone other than Coker shot the victims. The TC instructed the jury that "malice is implied or assumed from the willful, deliberate and intentional doing of an unlawful act without just cause and excuse." Petitioner was convicted of three counts of murder, and was sentenced to death.

Petitioner filed for post-conviction relief in state court, making the following claims: (i) the TC committed Sandstrom error; (ii) the immunity agreement with Coker violated due process by giving Coker an improper incentive to finger someone else; (iii) the prosecution violated Brady v. Maryland by failing to give the defense certain exculpatory evidence before trial; and (iv) a Grigsby claim. The state court denied relief on all claims. The court found that, assuming Sandstrom error was committed, it was harmless, since the killings were inherently intentional: the victims were shot more than once, and after being abducted. Coker's immunity agreement did not violate due process, since the agreement required only Coker's truthful testimony, and was not conditioned on Coker's fingering anyone else. Moreover, the jury had before it the facts surrounding the immunity agreement, and could take those facts into account in evaluating his credibility. The court found that the various items of undisclosed evidence either did not exist or were not exculpatory, and hence that there was no Brady violation. Finally, the court denied the Grigsby claim on the merits.

The South Carolina Supreme Court denied review. Petitioner renews his claims in this Court.

I will vote to deny cert. In my view, the quoted instruction did not violate Sandstrom, but if it did, the state court's harmless-error finding is consistent with Rose v. Clark. The Grigsby claim was rejected in Lockhart v. McCree, No. 84-1865. The other claims are fact-bound, and best left for federal habeas.

My vote is to deny.

*L.F.P.*  
L.F.P., Jr.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

*Vacated*  
Re: Cases held for Rose v. Clark, No. 84-1974

Tucker v. Kemp, No. 84-6447. Petitioner kidnapped a 55-year-old woman and forced her to drive to a secluded area, where he robbed her and clubbed her to death. Petitioner was charged with malice murder and kidnapping. The TC instructed the jury that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." Petitioner was convicted on both counts.

At petitioner's capital sentencing proceeding, the prosecutor (i) told the jury that this was only the seventh time in seven years that he had asked for the death penalty; (ii) argued that petitioner had probably forced the victim to commit oral sodomy before her death; and (iii) raised the possibility that if petitioner were spared, some future Parole Board might set him free. Petitioner raised both the Sandstrom claim and a prosecutorial misconduct claim on federal habeas. The DC denied relief.

CALL affirmed en banc. The court found the Sandstrom error harmless beyond a reasonable doubt, both because petitioner's sole defense was non-participation in the murder, and because it was clear that whoever committed the murder did so intentionally. The victim was killed by a very hard blow to the head struck with a metal pipe. Such a blow could not have been accidental. Thus, the erroneous presumption could not have affected the jury's decision.

On the prosecutorial misconduct issue, the court acknowledged the impropriety of the challenged statements, but found that they did not render the sentencing proceeding fundamentally unfair because there was no reasonable probability that the improper statements affected the outcome. The prosecutor should not have invoked the infrequency of his own requests for capital punishment, but the offending remark was brief and isolated. Though the prosecutor's statement concerning oral sodomy was unsupported, there was substantial evidence in the record to support an inference that petitioner raped his victim before killing her. And there was also evidence in the record that petitioner had

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

YJR  
United States v. Ben C. Hogan Co., No. 85-1067. Respondent participated in a bid-rigging conspiracy involving various state construction projects. For this conduct, respondent was charged with criminal violations of the Sherman Act, as well as with other offenses not at issue here. In charging the jury on the Sherman Act violation, the DC stated:

"Certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on interstate commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matter. Conduct regarded as unreasonable per se includes price fixing, division of markets and bid rigging."

Respondent was convicted of the Sherman Act charges.

On appeal, respondent noted that one of the elements of a Sherman Act offense is an effect on interstate commerce, and argued that the challenged instruction created an unconstitutional presumption as to that element. CAB agreed, and reversed the Sherman Act conviction. The court reasoned that the challenged instruction "could have been understood by the jury to include an unconstitutional conclusive presumption of an effect on interstate commerce." The court went on to state that "[i]f ever there could be a case where the giving of a jury instruction that included a conclusive presumption concerning an element of a crime amounted to harmless error, this would be the case," since there was ample evidence of effect on interstate commerce. Pet. App. 7a. But, the court found, under the plurality opinion in Connecticut v. Johnson, 460 U.S. 73 (1983), such error could not be harmless--at least not where the issue was not conceded. Accordingly, the conviction must be reversed.

The SG has petitioned for cert, claiming that the court's harmless-error analysis is incorrect.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

*Vacate*

Williams v. Kemp, No. 85-6818. The murder victim, petitioner's grandfather, was struck several times on the head with a blunt instrument; subsequently his house was set afire. He died either from the head wounds or from carbon monoxide poisoning. Shortly before the body was found, petitioner bragged to an acquaintance that he had killed his grandfather; he was covered with blood at the time. Petitioner later told police that an accomplice committed the murder. At trial, the TC charged the jury that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." Petitioner was convicted of murder, and was sentenced to death.

On state habeas, petitioner claimed that the TC's instruction violated Sandstrom v. Montana, 442 U.S. 510 (1979). The state court found no error. This Court then GVR'd in light of Francis v. Franklin, 105 S.Ct. 1965 (1985). On remand, the state court found that the instruction was error under Francis, but that the error was harmless beyond a reasonable doubt. The court noted that petitioner's sole defense was that another man committed the killing, not that the killing itself was accidental. And the manner in which the killing was committed--repeated blows to the head followed by torching the house--was necessarily intentional. The Georgia Supreme Court denied review.

Petitioner argues in this Court that the state court's harmless-error determination was wrong.

I will vote to deny cert. The state habeas court's analysis of the harmless-error issue is consistent with Rose v. Clark, No. 84-1974.

My vote is to deny.

*L. F. P.*  
L. F. P., Jr.

June 27, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

McCleskey v. Kemp, No. 84-6811. Petitioner was charged with murder and armed robbery in connection with the shooting death of a policeman. He was convicted and sentenced to death. The case is here on petitioner's first federal habeas petition; the DC granted relief and CALL reversed en banc. The cert petition raises four claims. For the sake of simplicity, I'll discuss the facts relating to each of petitioner's claims separately. These claims are discussed in the same order that they appear in the questions presented in the cert petition.

1 & 2. Discriminatory Application of Georgia's Death Penalty: Relying on a complex statistical study (the Baldus Study), petitioner contends that the race of the murder victim is a statistically significant factor in the imposition of the death penalty in Georgia. The study analyzes a stratified sample of all Georgia murder arrests between March 1973 through December 1978. Before controlling for any other variables, this sample shows that the death penalty is imposed 11 times more often in cases where the murder victim is white than where the murder victim is black. The Baldus study sought to determine how much of this effect was due to other variables and how much was due to the victim's race. After controlling for some 230 variables, including various kinds of aggravating and mitigating factors, the location of the crime, etc., the 1100% disparity based on the victim's race had been reduced to 6%. When 20 more variables were added--and when the effect of state Supreme Court review was considered--this disparity was reduced further to 4%. On the other hand, Baldus' analysis of his data suggested that in "close" cases, the disparity rose to roughly 20%. (The study does not define what cases are close ones.) Significantly, the study did not detect any appreciable disparity based on the race of the defendant; the only claim of discrimination is based on the disparity that assertedly derives from the race of the victim.

The DC found as a factual matter that the Baldus study was not trustworthy, due principally to errors allegedly made in encoding the data. 580 F. Supp. 338, 354-360 (ND Ga. 1984). The court also found that petitioner's claim

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 27, 1986

MEMORANDUM TO THE CONFERENCE

GVR  
Re: Cases held for Rose v. Clark, No. 84-1974

Aiken v. Hyman, No. 85-1461; Hyman v. Aiken, No. 85-6638. Hyman and several accomplices robbed two elderly men. In the course of the robbery, one of the men was beaten to death and the other was seriously injured. Hyman was charged with capital murder and robbery. The TC instructed the jury that "malice is ... presumed from the willful, the deliberate, the intentional doing of an unlawful act without just cause or excuse. ... Malice is presumed or implied from the use of a deadly weapon." Hyman was convicted on both charges.

At the close of the sentencing proceeding, and after several hours of deliberations, the jury asked the TC whether the jury had to find that Hyman actually killed the victim in order to impose capital punishment. The TC offered a vague answer, the gist of which was that if Hyman did not kill the victim, that was a mitigating circumstance. The instruction implied that Hyman could nevertheless be sentenced to death. The jury returned with a recommendation of death, and Hyman was sentenced accordingly.

The DC denied Hyman's federal habeas petition, and CA4 reversed in part. As to the Sandstrom issue, the court found that the TC's instruction violated Francis v. Franklin, 105 S.Ct. 1965 (1985), but nevertheless concluded that Hyman's conviction should not be reversed because it did not render his trial fundamentally unfair. As to the TC's supplemental instruction at sentencing, the court concluded that the instruction violated Enmund v. Florida, 458 U.S. 782 (1982), because it suggested that Hyman could be sentenced to death even if he was not personally responsible for the murder. Accordingly, the court vacated Hyman's death sentence. Both the State and Hyman have petitioned for cert.

In No. 85-1461, the State argues that CA4's Enmund analysis conflicts with Cabana v. Bullock, 106 S.Ct. 689 (1986), which was decided after CA4's decision was announced. The TC on state habeas made an explicit factual finding that petitioner intended to cause death. That is sufficient to sustain Hyman's death sentence under Cabana.

In No. 85-6638, Hyman argues that the court applied the wrong standard in determining whether the Sandstrom

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 28, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Rose v. Clark, No. 84-1974

GVR

Potts v. Kemp, No. 85-5513. Petitioner was charged with kidnapping and murdering one Michael Priest. The kidnapping took place in Cobb County, Georgia, and the murder took place in Forsyth County. Petitioner was tried and convicted of kidnapping with bodily injury in Cobb County. He then was tried and convicted of malice murder in Forsyth County. At the murder trial, the TC charged the jury that "[t]he acts of a person of sound mind and discretion are presumed to be the product of that person's will," but that this presumption may be rebutted.

Petitioner filed a federal habeas petition, and then withdrew the petition before its merits had been decided. Petitioner reconsidered his decision to withdraw his petition, and filed a second federal habeas petition. That petition, which is before us here, challenged the kidnapping conviction based on the absence of certain jury instructions, and challenged the murder conviction based on (i) double jeopardy and (ii) Sandstrom error. The DC granted relief on the kidnapping conviction; that conviction is not at issue in this cert petition. The DC also denied relief on the murder conviction. A panel of CALL affirmed in an opinion issued in May 1984. Potts v. Zant, 734 F.2d 209 (1984). The court reasoned that the murder charge clearly required proof of different elements than the kidnapping with bodily injury charge, and the fact that both arose out of the same series of events did not foreclose the two prosecutions. On the Sandstrom issue, the court concluded that, in light of other passages in the jury instructions, the challenged "presumption" instruction did not have the effect of shifting the burden of proof. Accordingly, there was no error in sustaining petitioner's murder conviction.

The State filed a petition for rehearing, arguing that this second habeas petition should have been declared an abuse of the writ (and thus that the kidnapping conviction should not have been reversed). CALL denied the petition for rehearing, finding that the DC's decision to ad-

Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: Justice Powell

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER *v.*  
 STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE SIXTH CIRCUIT

[July —, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the harmless error standard of *Chapman v. California*, 386 U. S. 18 (1967), applies to jury instructions that violate the principles of *Sandstrom v. Montana*, 442 U. S. 510 (1979), and *Francis v. Franklin*, 471 U. S. — (1985).<sup>1</sup>

I

On December 30, 1978, Charles Browning and Joy Faulk were shot to death while they sat in Browning's pickup truck

<sup>1</sup>In *Connecticut v. Johnson*, 460 U. S. 73 (1983), the Court was equally divided on the question whether ordinary harmless-error analysis was appropriate in cases of *Sandstrom* error. Compare *id.*, at 84-87 (plurality opinion) (such error "is the functional equivalent of a directed verdict" on intent, and is therefore harmless only when the defendant concedes intent), with *id.*, at 95-99 (POWELL, J., dissenting) (*Chapman* standard applies to *Sandstrom* error). Cf. *id.*, at 88 (STEVENS, J., concurring in judgment) (joining affirmance of state court decision that *Sandstrom* error could not be harmless, but on the ground that the decision was actually one of state law). The *Johnson* plurality noted that state and federal courts were in conflict on this issue. *Id.*, at 75, n. 1 (collecting cases). Due in part to the divided views in *Johnson*, that conflict has persisted. Compare, e. g., *Tucker v. Kemp*, 762 F. 2d 1496, 1501-1503 (CA11 1985) (en banc) (applying *Chapman* harmless-error analysis), cert. pending, No. 85-6447, with *In re Hamilton*, 721 F. 2d 1189, 1190-1191 (CA9 1983) (holding that *Sandstrom* error would be harmless only if intent was not contested at trial).

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

July 1, 1986

MEMORANDUM TO THE CONFERENCE

 Re: Cases held for Rose v. Clark, No. 84-1974

California v. Hamilton, No. 85-1853. Respondent was charged with a particularly gruesome murder: the victim's body was found with multiple stab wounds, and both the head and the hands had been cut off. The jury found respondent guilty of murder, with "special circumstances" of robbery, burglary, and kidnapping. Respondent was sentenced to death.

Under a line of California Supreme Court decisions, the "special circumstance" finding requires a finding of intent to kill. The jury was not so instructed in this case. The California Supreme Court vacated respondent's death sentence, on the ground that the absence of an intent instruction was not harmless under People v. Garcia, 36 Cal.3d 539 (1984). The Court reasoned that a properly instructed jury might have found that respondent killed the victim accidentally, and then severed the victim's head and hands to cover up his involvement.

Justice Grodin concurred, and noted that the Garcia test rests "squarely on principles of federal constitutional law as declared by the Supreme Court" in Connecticut v. Johnson, 460 U.S. 73 (1983). Justices Lucas and Mosk dissented, arguing that there was no evidence to support the majority's accidental death theory.

The State applied to JUSTICE REHNQUIST for a stay of enforcement of the judgment pending disposition of its cert petition. JUSTICE REHNQUIST granted the stay. In its cert petition, the State argues that the harmless-error determination is wrong as a matter of federal law.

I will vote to GVR in light of Rose v. Clark, No. 84-1974. Since the majority's opinion relied exclusively on Garcia, it is possible that its harmless-error analysis is grounded in state law. But Justice Grodin's concurrence suggests that the court was applying federal harmless-error law. If so, its reasoning seems faulty: Chapman requires only that the error be harmless beyond a reasonable doubt, and absent some affirmative indication of accident in a case



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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 6, 1986

Re: No. 84-1974 Rose v. Clark

Dear Lewis,

Please join me.

Sincerely,

Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 31, 1986

MEMORANDUM TO THE CONFERENCE

Re: 84-1974 - Rose v. Clark

Because I believe the Court of Appeals can probably do a better job of harmless error analysis than we can, I believe I could go along with Byron's proposed disposition.

Respectfully,



MA

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 8, 1986

Re: 84-1974 - Rose v. Clark

Dear Harry:

Although I may have failed to mention it at Conference, I have tentatively come to the conclusion that I may be able to join an opinion remanding the case for a harmless error determination by the Court of Appeals. I make the point at this time to avoid the possibility that you might think your dissent had "unpersuaded" me.

Respectfully,



Justice Blackmun

cc: Justice Brennan  
Justice Marshall

APR 8 1986

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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**

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1974

**JIMMY C. ROSE, WARDEN, PETITIONER v.  
 STANLEY BARHAM CLARK**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE SIXTH CIRCUIT

[July —, 1986]

JUSTICE STEVENS, concurring in the judgment.

The Court correctly concludes that the harmless error standard of *Chapman v. California*, 386 U. S. 18 (1967) applies to the erroneous jury instructions in this case. I do not agree, however, with the Court's dictum regarding the nature of harmless error analysis.

I

According to the Court, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Ante*, at 8. This statement stands in sharp contrast with the Court's analysis in *Chapman* itself.

The principal question presented in *Chapman* was "whether there can ever be harmless constitutional error," 386 U. S., at 20. Without questioning the view that constitutional error is always sufficiently serious to create a presumption in favor of reversal, the Court refused "to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Id.*, at 21. Far from announcing any general principle that harmless error analysis is the rule rather than the exception, the Court stated its holding in this language: "We conclude that there may be some constitutional errors which in the setting of a

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 1, 1986

No. 84-1974 Rose v. Clark

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

Copies to the Conference

1986