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Silence Cannot Be Harmless

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Case Note

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United States v. Rogers, 94 F.3d 1519 (11th Cir. 1996).

Thirty years ago in *Chapman v. California*,[1] the Supreme Court permitted the application of harmless error analysis to constitutional errors in criminal cases. Since then, courts have had to decide which errors are subject to such review and which produce automatic reversal. The Supreme Court has attempted to develop a standard that distinguishes trial errors that "occur[] during the presentation of the case to the jury"[2] and are subject to harmless error analysis, from structural defects, which affect the entire trial process and do not undergo *Chapman* analysis.[3] This delineation, however, is of questionable validity and is quite difficult to apply.[4]

In several instances the Supreme Court has found that jury instruction errors should undergo harmless error review;[5] nevertheless, the Court has remained committed, at least nominally, to the jury's responsibility to find guilt beyond a reasonable doubt on all elements of an offense.[6] This tension between the expansion of areas in which *Chapman* review applies[7] and the desire to protect the province of the jury has appeared once again in *United States v. Rogers*.[8] In *Rogers*, the Eleventh Circuit became the latest court of appeals to examine whether an omitted jury instruction is subject to harmless error review.[9] The court found that harmless error review was appropriate, a

1. 386 U.S. 18 (1967).
2. Arizona v. Fulminante, 499 U.S. 279, 307 (1991)
3. *See, e.g., id.* at 310; Rose v. Clark, 478 U.S. 570, 577–78 (1986)
4. *See, e.g., Fulminante*, 499 U.S. at 291 (White, J., dissenting).
5. *See, e.g., Rose*, 478 U.S. at 579–82.
6. *See, e.g.*, Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993); *see also In re* Winship, 397 U S 358, 364 (1970).
7. For a list of errors subject to harmless error review, see *Fulminante*, 499 U S at 306–07
8. 94 F.3d 1519 (11th Cir. 1996).
9. *Compare* United States v. Pettigrew, 77 F.3d 1500, 1511 (5th Cir. 1996) (holding that harmless error analysis does not apply), *with* Roy v. Gomez, 81 F.3d 863, 866–67 (9th Cir. 1996) (en banc) (holding that harmless error analysis does apply). Several circuits, including the Eleventh, have asked the Supreme Court to resolve this split, *see Rogers*, 94 F.3d at 1524 n.11; Hennessy v. Goldsmith, 929 F.2d 511, 515 n.2 (9th Cir. 1991), and at least two former Justices have agreed that the issue needs to be addressed, *see*

decision that undermines the jury's critical role in the criminal process. This Case Note argues that to protect this function, omitted jury instructions should not be subject to *Chapman* review but should instead produce automatic reversal.

I

On its facts, *Rogers* appears simple enough. After police arrested George Rogers for driving while intoxicated, they found a number of firearms including a machine gun (a "MAC-11") and an unregistered silencer without a serial number in his vehicle.[10] While being interviewed by agents of the Bureau of Alcohol, Tobacco, and Firearms, Rogers denied owning the firearms but spoke of his expertise in weapons and identified the MAC-11 and silencer.[11] He was indicted on three different charges: knowingly possessing a machine gun; knowingly possessing a silencer not registered to him; and knowingly possessing a silencer without a serial number.[12] When Rogers testified at trial, he denied ownership but again identified the firearms at issue.[13] Over defense counsel's objection, the trial judge refused to instruct the jury that the government had to prove beyond a reasonable doubt that Rogers knew that these items were firearms.[14] He was then convicted on all three counts.

Shortly thereafter, the Supreme Court held in *Staples v. United States*[15] that mens rea is required for a conviction under the National Firearms Act.[16] As *Staples* required the government to prove beyond a reasonable doubt that the defendant knew the weapon was a *machine* gun, the appeals court reversed Rogers's conviction on the first count.[17] Although the court had little trouble deciding that the omitted instruction on the additional counts was a constitutional error,[18] it found that the omission was not a structural defect.[19] The court then adopted the logic of Justice Scalia's concurrence in *Carella v. California*,[20] which applied harmless error analysis to the use of a conclusive

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Teel v. Tennessee, 498 U.S. 1007 (1990) (White, J., joined by Marshall, J., dissenting from denial of certiorari).

10. *See Rogers*, 94 F.3d at 1521.

11. *See id.* at 1522 & n.2.

12. He was charged under, respectively, 18 U.S.C. § 922(o) (Supp. 1997) and 26 U.S.C. §§ 5861(d), 5861(i), 5871 (1994).

13. *See Rogers*, 94 F.3d at 1522 & n.3.

14. *See id.* at 1522–23. This decision by the trial judge followed Eleventh Circuit law at the time. *See* United States v. Gonzalez, 719 F.2d 1516, 1522 (11th Cir. 1983).

15. 511 U.S. 600 (1994).

16. 26 U.S.C. §§ 5801–72 (1989). Although the first count of Rogers's conviction does not fall under this Act, both the Eleventh Circuit and the government recognized that the holding in *Staples* also applied to 18 U.S.C. § 922(o). *See Rogers*, 94 F.3d at 1523 & n.5.

17. *See Rogers*, 94 F.3d at 1523.

18. *See id.* at 1524.

19. *See id.* at 1525.

20. 491 U.S. 263, 270 (1989) (Scalia, J., concurring).

presumption in the jury instruction. Because Rogers had admitted both to the police and on the stand that he knew what the silencer was, the court held that the government had "'prove[n] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[21] Thus the convictions on the latter two counts were upheld.

II

While the *Chapman* Court found that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,"[22] in more recent opinions the Court has held that most constitutional errors should undergo harmless error analysis.[23] *Rogers* forces us to question the extent to which this desire to import harmless error analysis can be realized. The decision of the Eleventh Circuit to employ *Chapman* analysis in *Rogers* runs afoul of two central protections of the Due Process Clause. The Supreme Court has long held that fundamental to the right of trial by jury is the principle that defendants can only be found guilty if the *jury* so finds "upon proof *beyond a reasonable doubt* of *every fact necessary* to constitute the crime with which he is charged."[24] Employing harmless error analysis when an instruction is omitted makes it impossible to determine whether a jury has found the existence of "every fact necessary" and, even if it has, whether it has done so beyond a reasonable doubt.

In holding that harmless error review was appropriate, the *Rogers* court analogized the situation it faced to examining *Sandstrom* error, an unconstitutional shifting of the burden of proof in jury instructions.[25] As *Rogers* is also a case about jury instructions, the Eleventh Circuit's choice of analogy is not a surprising one. Jury instructions create the framework within which the jury is to deliberate. Because "[j]urors are not experts in legal principles[,] to function effectively, and justly, they must be accurately instructed in the law."[26] Although the Court has recognized that the jury will not always heed its instructions,[27] their importance is signified by the weight that jurors are obliged to give them.[28]

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21. *Rogers*, 94 F.3d at 1527 (quoting Chapman v. California, 386 U.S. 18, 24 (1967))

22. *Chapman*, 386 U.S. at 23.

23. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 306 (1991) (stating that "most constitutional errors can be harmless"); Rose v. Clark, 478 U.S. 570, 578 (1986) ("[W]hile there are some errors to which *Chapman* does not apply, they are the exception and not the rule")

24. *In re* Winship, 397 U.S. 358, 364 (1970) (emphases added) For a discussion of the history of this standard, see *United States v. Gaudin*, 115 S. Ct. 2310, 2313–14 (1995)

25. *See Rogers*, 94 F.3d at 1525–26. The error is named after *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Sandstrom* error was found to be subject to harmless error review in *Rose*. *See Rose*, 478 U.S. at 581–82.

26. Carter v. Kentucky, 450 U.S. 288, 302 (1981)

27. *See, e.g.*, Bruno v. United States, 308 U.S. 287, 294 (1939)

28. *See, e.g.*, Lakeside v. Oregon, 435 U.S. 333, 340 (1978). Because the instructions so shape deliberations, it is unclear why an instructional error is not structural and therefore subject to automatic

The Eleventh Circuit relied heavily on its analogy between improper burden shifting in instructions and omitted instructions. While the Supreme Court has differentiated between rebuttable presumptions and conclusive presumptions in applying *Chapman* analysis,[29] the Eleventh Circuit viewed an omitted instruction as closer to the latter.[30] Were it proper to draw an analogy between *Sandstrom* error and omitted instructions, the Eleventh Circuit's decision would be correct, but the court overlooked a critical difference.[31] As the Supreme Court has noted, when an improper burden shift occurs, the jury "still must find the existence of those [predicate] facts beyond a reasonable doubt."[32] In such cases, the jury has considered the issue in at least some form and has made some finding on it; this does not occur when the instruction is omitted in its entirety. In the latter case, a court cannot ask what evidence the jury considered on a particular issue because the omitted instruction has made the issue irrelevant to the determination of guilt. By allowing harmless error review to take place in such cases, the court substitutes its own view for that of the jury on an issue that the jury has not even considered. Such a result directly conflicts with a fundamental longstanding constitutional protection: the prohibition on directed guilty verdicts.[33]

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reversal. The distinction the Court drew between trial errors that "occur[] during the presentation of the case to the jury," *Fulminante*, 499 U.S. at 307, and "structural defects in the constitution of the trial mechanism," *id.* at 309, places jury instructions, if anything, in the latter camp and thus subject to automatic reversal. The proper trial mechanism of a jury finding guilt beyond a reasonable doubt on all the elements of an offense would be undermined by improper instructions. *Rose*, however, indicates that at least some instructional error is subject to harmless error review. Taking this decision as settled law, we will see that a significant difference exists between *Rose* and *Rogers* that makes the holding of the former inapposite in resolving the latter. *See infra* text accompanying notes 32–36.

29. *Compare* Yates v. Evatt, 500 U.S. 391, 404–06 (1991) (laying out test for harmless error review of rebuttable presumption), *with* Carella v. California, 491 U.S. 263, 271 (1989) (Scalia, J., concurring) (discussing standard for conclusive presumption).

30. *See Rogers*, 94 F.3d at 1526. While the court never discussed any differences between these two types of presumptions, it simply adopted the approach expounded by Justice Scalia in examining conclusive presumptions. *See Carella*, 491 U.S. at 271 (Scalia, J., concurring). Justice Scalia found only "rare situations" in which the use of a conclusive presumption could be harmless: (1) when the defendant was acquitted and the instruction did not affect any other charges; (2) when the presumption was "with regard to an element of the crime that the defendant in any case admitted"; and (3) when the predicate facts are so "closely related to the ultimate fact" that "no rational jury could find those facts without also finding that ultimate fact." *Id.* at 270–71 (Scalia, J., concurring). It is the second of these three situations that the *Rogers* court relied upon in finding harmless error. *See Rogers*, 94 F.3d at 1526–27.

31. While the Eleventh Circuit recognized that "there are some important differences between the incomplete instructions in this case and the *Sandstrom* violation at issue in *Carella*," *Rogers*, 94 F.3d at 1526, it failed to discuss these differences and their ramifications.

32. Rose v. Clark, 478 U.S. 570, 580 (1986); *see also Yates*, 500 U.S. at 404 (holding that in reviewing *Sandstrom* error, a court "must ask what evidence the jury actually considered in reaching its verdict").

33. *See, e.g.*, Sullivan v. Louisiana, 508 U.S. 275, 277 (1993); United States v. Martin Linen Supply Co., 430 U.S. 564, 572–73 (1977). The Eleventh Circuit's movement toward a directed guilty verdict indicates that the error cannot be deemed harmless. *Cf.* Hoover v. Garfield Heights Mun. Ct., 802 F.2d 168, 177 (6th Cir. 1986) (holding that omitted instruction is "equivalent to a directed verdict on that issue and therefore cannot be considered harmless"). The reason for prohibiting such action by a court is that "the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578; *see also Carella*, 491 U.S. at 269 (Scalia, J., concurring). Furthermore, the Court in *Rose* noted that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury." *Rose*, 478 U.S. at 578.

Where the jury does not find every fact necessary for a conviction, it also becomes impossible to determine whether the jury has found guilt beyond a reasonable doubt. This problem is illustrated by *Sullivan v. Louisiana*.[34] In *Sullivan*, the Court found that a constitutionally deficient reasonable doubt instruction was not subject to harmless error review. Justice Scalia, writing for the Court, stated that "to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee."[35] In *Sullivan*, the jury had considered all the issues but simply had not applied the proper standard; in *Rogers*, the jury failed to consider a necessary element of the offense. It is difficult to imagine why harmless error review should be applied in the latter situation when such review is inappropriate in the former.[36] By completely undermining the promise of trial by jury, an omitted instruction should lead to automatic reversal.

III

At the heart of this issue is the question of the function of the jury. The Court has often emphasized the critical role the jury plays in protecting the defendant from "arbitrary power" and allowing for community representation in the criminal process.[37] Although the Court has found that harmless error analysis is often appropriate because "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence,"[38] the very existence of the jury works at times against this goal.[39] Because the jury's function is not merely to act as the best finder of facts, these other purposes must determine whether *Chapman* analysis is proper in the case of omitted instructions.[40]

To illustrate the potential harm to the defendant, consider a case in which a defendant has admitted on the stand to having performed the crime with which he is charged, but alleges duress. As the defendant bears the burden of

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34. 508 U.S. 275 (1993).

35. *Id.* at 279.

36. The Third Circuit has come to a similar conclusion about the analogousness of *Sullivan*. *See* United States v. Edmonds, 52 F.3d 1236, 1243–44 (3d Cir. 1995).

37. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968) (stating that jury trial exists to "prevent oppression by the Government" and allow for "community participation in the determination of guilt or innocence").

38. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

39. *See, e.g.*, Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM L REV. 79, 88–90 (1988).

40. *But see id.* at 116–17. Stacy and Dayton argue against the Court's expansion of harmless error review but feel that an omitted jury instruction should undergo such analysis because the instructions on each element of an offense serve a truth-seeking function; moreover, they argue, the analysis is not difficult for an appellate court to undertake.

proof on this affirmative defense, he must convince the jury by a preponderance of the evidence that he acted under duress.[41] Under the *Rogers* court's logic, if the jury received no instruction on the crime itself but were only told that the defendant must prove duress, no error would have occurred.[42] The confession would go beyond the reasonable doubt standard, and the conviction should be upheld.[43] However, the lack of appropriate instructions would make a jury more likely to convict. Simply by the removal of the reasonable doubt language from the issue that it is considering, the jury is likely to focus solely on the one issue on which the defendant bears the burden of persuasion. The impossibility of measuring the effect of this kind of error provides further support for the insufficiency of harmless error review.

Critics of this approach would argue that by making omitted jury instructions subject to automatic reversal, the purpose of harmless error review—to preclude technicalities from reversing a conviction—is somewhat vitiated. The cost of having additional trials in cases where a defendant is surely guilty argues against such a rule.[44] However, such error is more than a mere technicality: It produces potential harm to the defendant and to the opportunity for community participation that cannot be measured.

An omitted instruction attacks the heart of the promise of trial by jury. The jury is a bulwark against the state and an opportunity for representatives of the community to determine the question of guilt or innocence. By ensuring that the jury is fully apprised of what it must find, this approach ensures that, to the extent possible, the jury will consider each case accurately according to the law. Although this rule places a burden on the judge and prosecutor, the cost to produce compliance is low in light of the defendant's right to jury protection and the central role of the jury as a legitimating institution of criminal law.

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41. *See, e.g.*, United States v. Bailey, 444 U.S. 394, 410–11 (1980); *see also id.* at 425–26 (Blackmun, J., dissenting) ("Circumstances that compel or coerce a person to commit an offense, however, traditionally have been treated as an affirmative defense, with the burden of proof on the defendant.").

42. Based on prior Court decisions, it would be necessary for some sort of reasonable doubt instruction to be given. *See* Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979). Such an omission is not subject to *Chapman* analysis. *See* Arizona v. Fulminante, 499 U.S. 279, 289–90 (1991) (White, J., dissenting). However, the automatic reversal rule in this situation indicates once again the tension between the Court's protection of the jury as a body required to find guilt beyond a reasonable doubt, *see, e.g., In re* Winship, 370 U.S. 358, 364 (1970), and the holding in *Rogers* (as well as the hypothetical) which appears to undermine this requirement. Thus some sort of reasonable doubt instruction must still be given even in the hypothetical, and the judge should frequently remind the jury of the standard throughout the trial.

43. Although it could be argued that this hypothetical is merely a slippery slope argument, the underlying premise, that a confession can make an omitted instruction harmless, is identical to that of *Rogers*.

44. Of course, in the *Rogers* situation, a new trial already occurs on the firearms charge. The additional cost of retrying him on the additional two charges would be minimal.

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