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SPELLING GUILT OUT OF A RECORD?
HARMLESS-ERROR REVIEW OF CONCLUSIVE
MANDATORY PRESUMPTIONS AND
ELEMENTAL MISDESCRIPTIONS

JOHN M.M. GREABE*

[T]he question is not whether guilt may be spelt out of a record, but
whether guilt has been found by a jury according to the procedure and
standards appropriate for criminal trials . . . .

INTRODUCTION

For nearly fifty years, Justice Frankfurter's precept has guided the
development of criminal harmless-error doctrine. The precept is a natu-
ral outgrowth of the Sixth Amendment, which establishes the right to
trial by jury in serious criminal proceedings. As a result, courts properly
conducting harmless-error review in criminal cases have respected the
jury's constitutional role as factfinder, and have refrained from interpos-
ing themselves into the process as some sort of "super-jury."

All of this may be changing. In a series of recent cases, the Supreme
Court has sent conflicting signals regarding how reviewing courts should
analyze certain jury instruction errors—conclusive mandatory presump-
tions and elemental misdescriptions (or omissions)—each of which tend

* Law Clerk to the Honorable Hugh H. Bownes, Senior Judge of the United States
thank the Honorable Norman H. Stahl, Professor Larry Yackle, Ernest Young,
Jennifer Olsson, Jonathan Zasloff, and Jonathan Klavens for reading and commenting
upon earlier versions of this article. I also thank Janet Judge and Ken Lehman for
their willingness to discuss issues raised by the Article. Most importantly, I thank my
wife, Martha Madsen, and my son, Nathaniel, for their support and understanding
while I was writing.


2 In pertinent part, the Sixth Amendment provides that "[i]n all criminal prosecu-
tions, the accused shall enjoy the right to a speedy and public trial, by an impartial
jury." U.S. CONST. amend. VI.

3 See Sullivan v. Louisiana, 113 S. Ct. 2078, 2080 (1993) (recalling that the "right to
trial by jury in serious criminal cases [is] 'fundamental to the American scheme of
justice' " (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968))).

4 An instruction containing a conclusive mandatory presumption informs the jury
that once the prosecution has proved some predicate fact or facts, it must presume
that the prosecution has established an element of the crime. This, of course, removes
to prevent the jury from fully considering and finding every element of the offense charged. In one line of these cases, the Court seems to have endorsed the harmless-error test that Justice Scalia proposed in his con-
currence in Carella v. California. This “Carella test” assumes that the presence of jury findings on each element of the offense charged is an integral part of the criminal trial structure. In another line of precedent, however, the Court has implied that reviewing courts may, after reviewing the whole record, supply missing elemental determinations based upon their view of what the jury would have done had the error not occurred. Unfortunately, there has been a distinct trend among lower courts, especially lower courts conducting collateral review, to disregard Sixth Amendment concerns and follow the latter line of authority.

This Article contends that courts should always apply the Carella test, and not traditional whole-record review, when assessing the harmlessness

that element of the crime from the jury’s consideration. See Francis v. Franklin, 471 U.S. 307, 314 n.2 (1985); see also infra part II.C.

5 An elemental misdescription is an instruction that incorrectly defines an element of the offense charged. An elemental omission is an instruction that completely fails to define an element. Like conclusive mandatory presumptions, misdescriptions and omissions deprive the jury of its factfinding role by effectively removing an element of the crime from the case. See Carella v. California, 491 U.S. 263, 270 (1989) (Scalia, J., concurring in judgment); see also infra part II.D. For simplicity’s sake, I will call both types of error elemental misdescriptions.

6 Carella, 491 U.S. at 270-71 (Scalia, J., concurring in judgment) (identifying the “rare situations” in which conclusive mandatory presumptions and elemental mis-
descriptions can be harmless error).

7 See, e.g., Green v. Peters, 36 F.3d 602, 607-08 (7th Cir. 1994) (reviewing the whole record and finding that evidence of guilt rendered an instructional error harm-
less); Kontakis v. Beyer, 19 F.3d 110, 116 (3d Cir. 1994) (similar), cert. denied, 115 S. Ct. 215 (1994); O’Neal v. Morris, 3 F.3d 143, 145-47 (6th Cir. 1993) (similar), cert. granted on other grounds sub nom. O’Neal v. McAninch, 114 S. Ct. 1396 (1994); see also United States v. Williams, 935 F.2d 1531, 1536-37 (8th Cir. 1991) (suggesting that “overwhelming” record evidence of guilt renders an elemental misdescription harm-

It is surprising how frequently courts must review the effects of instructional error upon the jury’s factfinding role. For example, the First Circuit addressed this concern, either directly or in dictum, five times between March and November 1994. See United States v. Whiting, 28 F.3d 1296 (1st Cir. 1994) (elemental misdescription), cert. denied, 115 S. Ct. 378 (1994), cert. denied, 1994 WL 57020 (U.S. Nov. 7, 1994) (No. 94-6372), cert. denied, 1994 WL 570803 (U.S. Nov. 7, 1994) (No. 94-6363), and cert.
vel non of conclusive mandatory presumptions and elemental misdescriptions. The problem with the whole-record approach is that it treats these instructional errors as minor defects in the presentation of the case, and loses sight of the constitutional rights they undermine. The resolution of this issue is important; indeed, it is not an exaggeration to say that the future of all harmless-error review depends upon it. After all, if record evidence of guilt renders harmless those instructional errors that deprive a defendant of the basic right to a jury trial, why should it not render harmless all other constitutional errors?

I will offer three arguments in support of my thesis. First, harmless-error analysis, while perhaps not itself of constitutional origins, runs afoul of the Constitution if it fails to take into account the Sixth Amendment's guarantee of a jury verdict on each element of the offense charged. This is true for both direct and collateral review. Second, the Sixth Amendment's jury-verdict guarantee confers upon a criminal defendant a concomitant right to have the jury consider all evidence admitted at trial that is relevant to each element of the crime charged (hereinafter “admitted, elementally relevant evidence”). Third, traditional harmless-error review looks solely to whether the jury's findings have been critically affected by an error, and therefore presupposes jury findings. In other words, it cannot legitimately proceed in the absence of jury findings. Thus, a different type of harmless-error test should be employed when error has precluded the jury from making elemental findings.

Part I of this Article summarizes the history of harmless-error review. Part II explains more fully the constitutional infirmities generated by conclusive mandatory presumptions and elemental misdescriptions, and demonstrates that the unique nature of these infirmities complicates the question of how courts should review them for harmlessness. It also examines the Supreme Court's attempts to answer the questions of whether, and how, conclusive mandatory presumptions and elemental misdescriptions should be reviewed for harmlessness. In so doing, it focuses particularly on how these attempts have been undermined by the Court's failure to take account of the structural rights undermined by these errors. Finally, Part III argues that the Constitution, relevant Supreme Court precedent, and policy considerations require application of the Carella test when courts confront challenges to conclusive

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8 In a recent article, Professor Daniel Meltzer acknowledged that the federal harmless-error rules cannot be traced to any particular constitutional provision, but argues that they are rooted in constitutional common law. See Daniel J. Meltzer, Harmless Error and Constitutional Remedies, 61 U. CHI. L. REV. 1, 26-34 (1994).

mandatory presumptions and elemental misdescriptions. It also contends that this test should apply on direct and collateral review.

I. Harmless-Error Review: The Road to Brecht

In both England and the United States, the development of the criminal harmless-error doctrine has been a conservative's, or at least a Burkean conservative's, nightmare. Rather than cautiously evolving in one general direction, prevailing conceptualizations of “harmlessness” have, within relatively short periods of time, been entirely disregarded in favor of nearly opposite approaches. The following is a brief overview of the harmless-error doctrine's rather tumultuous history.

A. Early Approaches to Error

In the eighteenth and nineteenth centuries, the English common-law approach to the problem of trial error swung like a pendulum between two extremes. The eighteenth-century rule was that trial error required the reversal of a conviction only when it appeared that the error resulted in an incorrect verdict. In the early to mid-1800s, however, with the passage of the Exchequer Rule, the English courts completely abandoned this approach. Under the Exchequer Rule, a trial error as to the admission of evidence gave rise to a presumption of prejudice and almost automatically required a new trial. This presumption, designed to ensure that appellate courts would not encroach upon the jury's factfinding authority, “applied to even the most insignificant items of evidence.” It also arose when the trial judge erred in instructing the jury. As a result, retrials became so routine that English cases “seemed to survive until

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10 See Ernest Young, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, 72 N.C. L. REV. 619, 654-56 (1994) (discussing Edmund Burke's preference for slow and incremental reform so that each step in the process can be tested for consistency with the accepted customs, traditions, and beliefs of the government and society).

11 See 1 JOHN H. WIGMORE, EVIDENCE § 21, at 884-87 & nn.2-5 (Peter Tillers rev. 1983) (showing that regardless of prejudicial impact, a new trial occurred only when the appellate court disagreed with the verdict); see also Craig Goldblatt, Comment, Disentangling Webb: Governmental Intimidation of Defense Witnesses and Harmless Error Analysis, 59 U. CHI. L. REV. 1239, 1241 (1992) (same).


13 See TRAYNOR, supra note 12, at 4-7.

14 3 LAFAVE & ISRAEL, supra note 12, at 257.

15 See id.
Parliament responded to this unacceptable situation with the Judicature Act of 1873, which contained new harmless-error legislation. This Act rejected the approach of the Exchequer Rule, directing appellate courts not to order a new trial on the basis of "the improper admission or rejection of evidence" or a "misdirection" to the jury "unless . . . some substantial wrong or miscarriage has thereby been occasioned." American courts, which had adopted the Exchequer Rule as part of their common-law inheritance from England, were slow to follow suit. Hence, American retrials were common, and American appellate courts came under criticism for "‘tower[ing] above the trials of criminal cases as impregnable citadels of technicality.’" Indeed, as the Supreme Court noted in Kotteakos v. United States, "So great was the threat of reversal in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained."

By the early part of this century, the efforts of American reformers seeking the adoption of a more permissive harmless-error doctrine began to produce results, and in 1919, Congress established a federal harmless-error rule. Unlike England's Judicature Act of 1873, the American harmless-error rule was not limited to specific types of errors; instead, it only distinguished between errors that had engendered miscarriages of justice and errors that had not infringed any party's substantial rights. In other words, the American rule was concerned "not merely with putting technical error in its place, but also with precluding reversal when the..."
denial or impairment of a substantial right had caused no injury.

An elucidation of the vague directives of the federal harmless-error statute occurred in Kotteakos v. United States. In Kotteakos, a jury had convicted the defendants of a single general conspiracy to violate the National Housing Act. The defendants challenged their convictions, arguing that the trial evidence "proved not one conspiracy but some eight or more different ones of the same sort." The issue presented was whether the variance between the crime charged in the indictment and the crime proved at trial had affected the substantial rights of the parties. In holding that it had, the Court explained that the determination hinged not upon whether the defendants were guilty or likely to be reconvicted, but upon whether "the error had substantial and injurious effect or influence in determining the jury's verdict." In an oft-quoted passage explaining this inquiry, Justice Rutledge stated:

[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. . . .

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . .

Justice Rutledge concluded this passage with dictum indicating that harmless-error analysis "perhaps" would not apply "where the departure is from a constitutional norm."
B. Constitutional Error

For the next twenty years or so, the Supreme Court continued to reverse convictions routinely upon finding constitutional error at trial. During this same period, the Court, over vigorous internal dissent and external criticism, significantly expanded procedural protections for criminal defendants. As a result, on the eve of the 1967 decision in Chapman v. California, constitutional criminal procedure was ripe for some sort of “taming” influence. Chapman and its progeny provided this influence in spades.

In Chapman, a prosecutor had violated the constitutional prohibition against commenting upon the silence of an accused at trial. The California Supreme Court applied that state’s harmless-error rule and affirmed the defendants’ convictions for murder, kidnapping, and robbery. The Supreme Court reversed, finding that the Griffin error the
prosecutor committed was not harmless. In a significant shift from prior practice, the Court stated that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may... be deemed harmless." At the same time, the Court took pains to point out that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

Chapman has been read as establishing a two-pronged test applicable to federal constitutional errors. The first prong, derived from the Court's observation that there are some errors that can never be considered harmless, asks if the error at issue is inherently amenable to harmless-error review. If it is, the second relevant question is whether "the beneficiary of a constitutional error [proved] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

The Chapman opinion provided little guidance as to specific methodologies appropriate for each prong of its test. In "explaining" which constitutional guarantees are "so basic to a fair trial that their infraction can never be considered harmless error," the Court merely noted three rights in the "never harmless" category—the right to counsel, the right to an impartial judge, and the right not to have a coerced confession introduced into evidence—and indicated that this list was not exhaustive. Although it has since placed certain other guarantees into this same category, over time it has made clear that the "errors to which Chapman constitutional provisions themselves mean, what they guarantee, and whether they have been denied").

See supra note 38.

Chapman, 386 U.S. at 24-26.

Id. at 22. This conclusion followed a rather brief discussion:

All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.

Id. (citation and footnote omitted).

Id. at 23.

Id. at 23-24.

Id. at 24. The Court, in constructing this prong of the test, looked to Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963) (indicating that the relevant question must be "whether there is a reasonable possibility that the [tainted] evidence complained of might have contributed to the conviction").

Chapman, 386 U.S. at 23 n.8 (citations omitted).

Id.

REVIEWING INSTRUCTIONAL ERROR does not apply . . . are the exception and not the rule."50 Until just a few years ago, however, the Court had provided no explicit framework to determine whether particular errors could ever be harmless.

Arizona v. Fulminante51 filled this analytical vacuum in Chapman's first prong. In Fulminante, a highly fractured Court52 upheld the Arizona Supreme Court's determination that law-enforcement personnel had coerced a confession from Oreste Fulminante,53 and ordered a new trial with exclusion of the confession.54 In so doing, however, a majority of the Court, per Chief Justice Rehnquist, rejected previous decisions to the contrary55 and held that the admission into evidence of a coerced confession can constitute harmless error.56

In reaching this conclusion, the Fulminante majority57 set forth a framework by which courts should determine whether challenged errors are amenable to harmless-error review. It did so by dividing constitutional errors into two types. First there are “trial errors,” i.e., “error[s] which occur[ ] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence (abridgment of the right to self-representation at trial); see Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 809-14 (plurality opinion) (1987) (court appointment of an interested party's attorney as prosecutor for contempt charges); Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (abridgment of the right to a public trial is never harmless); see also Vazquez v. Hillery, 474 U.S. 254, 263-64 (1986) (opinion of Marshall, J.) (mustering a plurality to declare never-harmless the unlawful exclusion of members of a defendant's race from the grand jury).

50 Rose v. Clark, 478 U.S. 570, 578-79 (1986) (citation omitted); see also United States v. Hasting, 461 U.S. 499, 509 (1983) (“It is the duty of a reviewing court . . . to ignore errors that are harmless, including most constitutional violations . . . .”).


52 Fulminante contained three separate 5-4 majorities: one on an issue of substantive law, another on the applicability of harmless-error analysis, and a third on the correct outcome of harmless-error analysis. Five members of the Court held that the confession at issue was coerced. Id. at 285-88 (White, J., joined by Marshall, Blackmun, Stevens, and Scalia, JJ.). A different majority of five held that coerced confessions could in some circumstances be harmless. Id. at 306-312 (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Souter, JJ.). Finally, because a majority of the Court believed harmless error analysis appropriate, a third majority of five held that, on the facts at hand, Arizona had not shown the error harmless. Id. at 295-302 (White, J., joined by Marshall, Blackmun, Stevens, and Kennedy, JJ.).

53 Id. at 285-88.

54 Id. at 302.


56 Id. at 310.

57 Because this Article focuses on the amenability of particular errors to harmless-error analysis, I shall use the term “Fulminante majority” to mean the majority that found harmless-error analysis applicable to coerced confessions. See supra note 52.
presented in order to determine whether [their] admission was harmless." 58 Second there are "structural errors," i.e., "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." 59 In the three years since Fulminante, the Court has twice reaffirmed that all "trial errors" are subject to harmless-error review. 60

Chapman was equally vague as to how courts should apply its second prong and determine whether the error "contribute[d] to the verdict obtained." 61 Resolving this question of "harmlessness" obviously requires an antecedent definition of the term "harm." To illustrate in extreme terms, if one believes that a defendant has been "harmed" whenever a constitutional error had even the slightest impact upon the jury, one will argue for reversal unless the government can show that the jury was completely unaffected by the error. On the other hand, if one believes that only an innocent defendant can be "harmed" by an error, one will look solely to whether the untainted evidence establishes guilt.

The Supreme Court has endorsed neither of these divergent polar definitions of "harm." Instead, it has experimented with three more moderate techniques for determining whether an error impermissibly contributed to the verdict obtained. 62 The first technique, suggested by language in Chapman, 63 looks solely at the incriminating nature of the erroneously admitted material, and ignores the untainted evidence, to make harmlessness assessments. 64 The second instructs reviewing courts to base their determinations on whether the error was "cumulative," that is, duplicative of untainted evidence tending to establish the same fact or facts as the erroneously admitted material. 65 The third approach examines whether the jury likely gave the erroneously admitted material sig-

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58 Fulminante, 499 U.S. at 307-08 (Rehnquist, C.J.).
59 Id. at 309. The Fulminante majority specifically noted the following as structural errors: (1) total deprivation of the right to counsel at trial; (2) a biased judge; (3) unlawful exclusion of members of the defendant's race from the grand jury; (4) deprivation of the right to self-representation; and (5) deprivation of the right to a public trial. Id. at 309-10.
63 See Chapman, 386 U.S. at 23-24 ("An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless.").
64 See Field, supra note 62, at 26-27.
65 Harrington v. California, 395 U.S. 250, 254 (1969); see also Field, supra note 62, at 37.
significant weight in light of the record as a whole.\textsuperscript{66}

Although it has not been entirely clear on this point, the Court seems to have settled upon the last of these three possible methodologies for Chapman's second prong.\textsuperscript{67} Thus, it now appears that the Chapman test involves a quantitative assessment of the erroneously admitted material in the context of the other evidence, with a view towards whether the jury likely gave the error significant weight.\textsuperscript{68}

C. Harmless Error on Collateral Review

From 1967 through 1993, the Supreme Court applied the Chapman harmless-error test on collateral review.\textsuperscript{69} In 1993, however, Chief Justice Rehnquist, writing for the majority in Brecht v. Abrahamson,\textsuperscript{70} announced that courts should apply the ostensibly "less onerous" Kotteakos harmless-error standard when evaluating constitutional trial error on collateral review.\textsuperscript{71} Thus, a habeas court assessing such a trial error should ask only whether it had a "'substantial and injurious effect or influence in determining the jury's verdict.'"\textsuperscript{72}

In Brecht, the prosecutor had impermissibly used the defendant's post-Miranda silence for impeachment purposes at trial.\textsuperscript{73} The issue presented was whether this use of the defendant's silence was harmless. The Court

\textsuperscript{66} See Yates v. Evatt, 500 U.S. 391, 403-04 (1991); 3 LaFave & Israel, supra note 12, at 281; Field, supra note 62, at 21-22.

\textsuperscript{67} See Yates, 500 U.S. at 403-04 (clarifying that Chapman requires reviewing courts to weigh the probative force of the untainted evidence considered by the jury against the probative force of the erroneously admitted material standing alone and to determine the significance of the error to reasonable jurors); see also 3 LaFave & Israel, supra note 12, at 281.

The Court has, at times and in contexts other than those analyzed in this Article, used language suggesting that the presence of overwhelming evidence of guilt alone is sufficient to render an error harmless. See, e.g., United States v. Hasting, 461 U.S. 499, 510-11 (1983) ("The question a reviewing court must ask is this: absent [the constitutional error], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?"); Milton v. Wainwright, 407 U.S. 371, 372-73 (1972) (similar); Schneble v. Florida, 405 U.S. 427, 431 (1972) (similar). Such formulations ignore the clear rejection in Fahy and Chapman of a "correct result" test. See 3 LaFave & Israel, supra note 12, at 279, 281. They also are patently at odds with the considered approach outlined in Yates and subsequently endorsed by a unanimous Court in Sullivan v. Louisiana, 113 S. Ct. 2078, 2081-82 (1993).

\textsuperscript{68} See Yates, 500 U.S. at 403-04.

\textsuperscript{69} E.g., id. at 402; Rose v. Clark, 478 U.S. 570, 579 (1986); Milton, 407 U.S. at 372-73 (1972); Anderson v. Nelson, 390 U.S. 523, 523-24 (1968) (per curiam).

\textsuperscript{70} 113 S. Ct. 1710 (1993).

\textsuperscript{71} Id. at 1722.

\textsuperscript{72} Id. (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

\textsuperscript{73} This violates a criminal defendant's due process rights. See Doyle v. Ohio, 426 U.S. 610, 618 (1976).
began by observing that there exists a "spectrum" of constitutional error. At one end of this spectrum are "trial errors," and at the other end are "structural defects in the constitution of the trial mechanism." The Court concluded that the error before it "fit[ ] squarely into the category of . . . trial error."

After reaching this conclusion, the majority focused upon whether the Chapman standard appropriately served certain interests implicated on collateral review. Emphasizing (1) the state's interest in finality of convictions that have survived direct review; (2) comity; (3) federalism; and (4) the interest in maintaining the prominence of the trial itself, the Brecht majority determined that application of the Chapman standard on habeas resulted in an "imbalance of . . . costs and benefits." As a result, the majority embraced the Kotteakos standard, holding that it applies "in determining whether habeas relief must be granted because of constitutional error of the trial type." The majority also emphasized that the Kotteakos inquiry determines harmlessness "in light of the record as a whole."

II. THE PROBLEMS POSED BY CONCLUSIVE MANDATORY PRESUMPTIONS AND ELEMENTAL MISDESCRIPTIONS

All of the cases discussed in the preceding section involved typical trial error: the erroneous introduction of tainted information—e.g., unconstitutionally obtained evidence or unconstitutional argument—at trial. For typical trial errors, Chapman's second prong provides a relatively straightforward method by which courts can conduct harmless-error review.

Constitutionally defective jury instructions, however, often present considerably more complicated questions. Instead of merely rendering elemental findings suspect, as typical trial errors do, instructional error can prevent the findings from taking place at all. This problem is most severe with conclusive mandatory presumptions and elemental misdescriptions.

A. The Universe of Presumptions

In the criminal law, a jury instruction establishing a presumption tells the jury that it can or must presume an element of the crime, e.g., intent, once the prosecution has proved some basic, predicate fact or facts, e.g.,

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75 Id. (citing Arizona v. Fulminante, 499 U.S. 279 (1991)).
76 Id.
77 Id. at 1720.
78 Id. at 1721.
79 Id. at 1722.
80 Id.
voluntary act. Before assessing the constitutionality of such a presumption-creating instruction, a court must determine the nature of the presumption established, i.e., whether the presumption was "mandatory" or "permissive." A mandatory presumption is one that orders jurors to presume the existence of any fact "necessary to constitute the crime . . . charged." A permissive presumption gives the jury the freedom to decide whether the predicate facts are sufficient to give rise to the conclusion. If there is a "reasonable likelihood" that the jurors interpreted the instruction as "requir[ing]" them to apply the presumption, a reviewing court must treat the presumption as mandatory.

If the presumption is mandatory, the court then must determine whether it is "conclusive" or "rebuttable." The Supreme Court has characterized the difference between conclusive and rebuttable presumptions in the following way:

A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted.

82 Id. at 523.
84 In Sandstrom, the Court looked to whether "a reasonable juror could . . . have viewed [the] instruction as mandatory." Sandstrom, 442 U.S. at 515. More recently, however, the Court has settled on a standard that asks whether there is a "reasonable likelihood" that the jury misinterpreted the instruction. See Boyde v. California, 494 U.S. 370, 378-80 (1990) (tracing the evolution of the Sandstrom standard).
85 See Sandstrom, 442 U.S. at 519 ("[T]he fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these . . . interpretations."). This approach takes into account the "sound presumption of appellate practice[ ] that jurors . . . generally follow the instructions they are given." Yates v. Evatt, 500 U.S. 391, 403 (1991).
86 Sandstrom, 442 U.S. at 517-19.
87 Francis, 471 U.S. at 314 n.2 (1985). Carella v. California, 491 U.S. 263 (1989) (per curiam), illustrates well the operation of a conclusive mandatory presumption. The defendant in Carella had failed to return a rented car. Id. at 263. At his trial, the court instructed the jury that it must presume embezzlement if it found that the defendant had not returned the car within five days of the expiration of the lease agreement. Id. at 264 n.2. Hence, once the state proved that the return of the car was untimely, other elements of the crime of embezzlement, e.g., intent, were effectively established and removed from the case.

If Carella had involved a rebuttable presumption, the elements would not have
Once again, the relevant question for a court determining the nature of a mandatory presumption is whether there is a reasonable likelihood that the jury "would interpret the instruction as automatically directing a finding of [the element to be presumed]." 88

B. The Constitutionality of Presumptions

Historically, the common law did not regard as problematic jury instructions that mandated the application of a presumption. 89 In Sandstrom v. Montana, however, the Court unanimously ruled that mandatory presumptions violate the Constitution. 90

Petitioner David Sandstrom challenged his conviction for deliberate homicide on the ground that a jury instruction given at his trial had relieved the prosecution of proving that he had committed the homicide intentionally. 91 The instruction stated that "the law presumes that a person intends the ordinary consequences of his voluntary acts." 92 In Sandstrom's view, this instruction directed the jury to infer intent once the state proved that death was an ordinary consequence of his voluntary acts. 93 He argued that this lowered the State's burden of proof, and deprived him of a jury verdict on the intent element of the offense. 94

The Sandstrom Court initially determined that a reasonable juror could have viewed the presumption as both mandatory and conclusive, and then proceeded to analyze whether such a presumption could comport with the Constitution. 95 Noting that "the Due Process Clause protects been removed from the case. Rather, the burden of proof would have shifted and the defense would have been required to demonstrate other facts indicating that the act was not embezzlement.

88 Sandstrom, 442 U.S. at 515-16 (emphasis added); see also supra note 84.
89 See, e.g., Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 304-05 (1850) (endorsing presumption-creating instructions by holding that malice, which is an element of the crime of murder, "is implied from any deliberate or cruel act against another, however sudden," that "the implication of malice arises in every case of intentional homicide," and that "[t]his rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts" (emphasis added)).
90 Sandstrom, 442 U.S. at 520-24.
91 Id. at 512-13. The issue raised went to the heart of Sandstrom's defense, as Sandstrom admitted that he had committed the homicide, but argued that he had not done so "purposely or knowingly." Id. at 512. Under Montana law, purposeful or knowing action constituted the intent element of the crime of deliberate homicide. MONT. CODE ANN. § 45-5-102(a) (1978) (amended 1979 & 1987); see Sandstrom, 442 U.S. at 512-13.
92 Sandstrom, 442 U.S. at 512.
93 Id.
94 Id.
95 Id. at 515-17.
the accused against conviction except upon proof beyond a reasonable
doubt of every fact necessary to constitute the crime with which he is
charged,' the Court found that a conclusive mandatory presumption
'would effectively eliminate [the element] as an ingredient of the
offense' by 'prejud[ing] a conclusion which the jury should reach of
its own volition.' This, in turn, 'would conflict with the overriding
presumption of innocence with which the law endows the accused and
which extends to every element of the crime,' and would 'invade [the] fact-finding function' which in a criminal case the law assigns solely to the
jury.' The Court also observed that a conclusive mandatory presumption
would deter the jury from looking at any evidence relevant to the
element other than that necessary to establish the predicate fact or
facts. Accordingly, the Court held that conclusive mandatory presumptions are unconstitutional.

Responding to Montana's alternative argument that even 'if viewed as
a mandatory presumption . . . the presumption did not conclusively estab-
lish intent but rather could be rebutted,' the Sandstrom Court also
analyzed whether a rebuttable mandatory presumption is constitutionally
permissible. After observing that such a presumption has the effect of
placing upon the defendant the burden of disproving an element of the
offense once the prosecution has established the predicate fact or facts,
the Court simply reaffirmed that the Due Process Clause requires the
government to 'prove every ingredient of an offense beyond a reason-
able doubt, and . . . not [to] shift the burden of proof to the defend-
ant.' Thus the Court easily concluded that an instruction establishing
a rebuttable mandatory presumption on an element of the crime charged
is unconstitutional. On several occasions subsequent to Sandstrom, the
Court has reiterated that an instruction setting up a mandatory presumption on an element of the offense charged, be the presumption conclusive or rebuttable, is unconstitutional.

96 Id. at 520 (quoting In re Winship, 397 U.S. 358, 364 (1970)).
97 Id. at 522 (quoting Morissette v. United States, 342 U.S. 246, 275 (1952)).
98 Id. at 523 (quoting Morissette v. United States, 342 U.S. 246, 275 (1952), and
United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978)).
99 See id. at 526 n.13; see also Yates v. Evatt, 500 U.S. 391, 406 n.10 ("[T]he terms
of a conclusive presumption tend to deter a jury from considering any evidence for
the presumed fact beyond the predicate evidence; indeed, to do so would be a waste
of the jury's time and contrary to its instructions . . .").
100 Sandstrom, 442 U.S. at 523.
101 Id. at 515.
102 Id. at 524.
103 Id. (quoting Patterson v. New York, 432 U.S. 197, 215 (1977)); see also Mulla-
ney v. Wilbur, 421 U.S. 684, 704 (1975) (preventing a state from burdening a murder
defendant with disproving malice to reduce murder to manslaughter).
104 Sandstrom, 442 U.S. at 524.
105 See Yates v. Evatt, 500 U.S. 391, 402 (1991) (rebuttable mandatory presump-
C. The Differences Between Conclusive and Rebuttable Mandatory Presumptions

Although conclusive and rebuttable mandatory presumptions are both unconstitutional, they differ in two important respects. First, a conclusive mandatory presumption altogether precludes the jury from making a determination of the element upon which the presumption was erected. On the other hand, a rebuttable mandatory presumption instead merely directs the jury to presume the elemental fact (upon finding the predicate fact or facts) unless and until the defendant has introduced sufficient evidence to rebut the improper presumption. Thus, although it impermissibly shifts the burden of proof to the defendant, a rebuttable mandatory presumption requires the jury to go beyond the presumption and make an independent finding of the element.

Second, a conclusive mandatory presumption deters the jury from looking at elementally relevant evidence. As Justice Scalia has pointed out, the description of a presumption as rebuttable "conveys to the reasonable jury that they not merely may but must determine whether [the presumption] has been rebutted." Accordingly, where there has been a rebuttable mandatory presumption, a reviewing court may safely assume that the jury considered all admitted evidence relevant to the element on which the presumption was established.

D. Elemental Misdescriptions

A jury instruction that misdescribes, or entirely fails to describe, an element of the offense charged works the same deprivation of a criminal defendant's rights as does a conclusive mandatory presumption. When

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107 See, e.g., Carella, 491 U.S. at 272-73 (Scalia, J., concurring in judgment); Francis, 471 U.S. at 333 (Rehnquist, J., dissenting) ("[T]he rebuttable presumption here indicates that the particular element is still relevant, and may be shown not to exist.").
108 Pope v. Illinois, 481 U.S. 497 (1987), provides a good example of how an elemental misdescription can operate. The defendants in Pope were convicted of selling "obscene" magazines. Id. at 499. At their trial, the court had instructed the jury to apply a "community standard" in making the elemental determination of whether the
a trial judge has given a jury instruction that incorrectly describes an element of the offense, the jury obviously will not have found that element as it is properly defined. Necessarily, then, the jury will not have found the element at all. Thus, in addition to eliminating the prosecution's burden of proving the element, such an instruction undermines the Constitution's guarantee of a jury finding on that element. So too does it deter the jury from considering any evidence relevant to the element correctly described, but irrelevant to the element as misdescribed. Accordingly, an instruction misdescribing an element of the offense is unconstitutional.

III. HARMLESS-ERROR ANALYSIS OF CONCLUSIVE MANDATORY PRESUMPTIONS AND ELEMENTAL MISDESCRIPTIONS

Having decided that jury instructions containing conclusive mandatory presumptions, rebuttable mandatory presumptions, and elemental misdescriptions are unconstitutional, the Supreme Court next faced the questions of whether and how to review such errors for harmlessness. One would have expected the Court to decide these issues in the order that Chapman prescribes, first settling whether the constitutional rights undermined by these errors are “so basic to a fair trial that their infraction can never be considered harmless,” and if not, deciding upon an appropriate methodology for determining whether the error was harmless. The inquiry has not, however, proceeded neatly along these lines.

A. Amenable to Harmless-Error Review?

1. The Johnson and Rose Decisions

After concluding that mandatory presumptions are unconstitutional, the Sandstrom Court specifically declined to address the argument that “an unconstitutional jury instruction on an element of the crime can

magazines were “utterly without redeeming social value.” Id. at 499-500 & n.1. The standard by which the jury should have made this determination, however, was whether a reasonable person would find serious literary, artistic, political, or scientific value in the material taken as a whole. Id. at 501. As a result, the jury never made the social value determination under the correct legal standard. This, of course, effectively removed the social value element from the case.

111 Id. at 508 (Stevens, J., dissenting) (“[T]he juries that found petitioners guilty . . . did not find one of the essential elements of [the] crime.”).

112 Id.

113 For example, if some state defined a malicious act as an intentional and cruel act committed in the absence of provocation, an instruction misdescribing a malicious act as only an intentional and cruel act would deter the jury from looking at any evidence relevant to whether the defendant was acting in response to provocation.

114 Pope, 481 U.S. at 501.

115 See supra notes 48-49 and accompanying text (discussing the Chapman analysis).
never constitute harmless error.”¹¹⁶ Four years later, in Connecticut v. Johnson,¹¹⁷ the Court confronted a subset of that question:¹¹⁸ whether a conclusive mandatory presumption on the subject of intent was properly subject to harmless-error analysis.

A jury convicted Lindsay Johnson of attempted murder, kidnapping, robbery, and sexual assault.¹¹⁹ The trial court’s general instruction regarding intent, however, contained a conclusive mandatory presumption.¹²⁰ In a plurality opinion, the Supreme Court affirmed the Connecticut Supreme Court’s reversal of the convictions.¹²¹

While allowing for the possibility of harmlessness, the plurality made clear that an instruction establishing a conclusive mandatory presumption almost always requires reversal. Specifically, the plurality stated that a conclusive mandatory presumption can only be harmless in “rare situations” where “the reviewing court can be confident that [the] error did not play any role in the jury’s verdict.”¹²² The Court identified two such situations: (1) “if the erroneous instruction was given in connection with an offense for which the defendant was acquitted and if the instruction had no bearing on the offense for which he was convicted;” and (2) “if the defendant conceded the issue [for which the presumption was erected].”¹²³

In conducting its analysis, the Johnson plurality did not emphasize the effects of the presumption upon the prosecution’s burden of proof, but looked primarily to how the presumption invades the jury’s factfinding function.¹²⁴ After noting two cases in which the Court reversed convictions on the basis of instructional error that had interfered with the jury’s

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¹¹⁸ Id. at 74-75 (plurality opinion).

¹¹⁹ Id. at 75.

¹²⁰ See id. at 78. The instruction stated: “[A] person’s intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act.” Id.

¹²¹ Justice Blackmun wrote the opinion for the four-Justice plurality. Justice Stevens concurred only in judgment, arguing that the appeal did not present a federal question because the Connecticut Supreme Court had merely (and permissibly) elected not to apply harmless-error analysis to the challenged error. Id. at 88-90.

¹²² Id. at 87 (plurality opinion).

¹²³ Id.

¹²⁴ Id. at 82-84.
ability to make elemental determinations, the plurality analogized conclusive mandatory presumptions to directed verdicts in favor of the prosecution. In fact, the opinion went so far as to state that “a conclusive presumption on [an elemental issue] is the functional equivalent of a directed verdict on that issue.”

Importantly, the plurality never explicitly stated that the invasion of the jury’s factfinding function occasioned by the conclusive mandatory presumption deprived Johnson of a constitutional right “so basic to a fair trial” that its infraction can never be treated as harmless error. It did, however, emphasize that a conclusive mandatory presumption deters the jury from considering any evidence relevant to the issue on which the presumption is erected, but not relevant to the predicate factual findings that serve to trigger the presumption. In fact, the plurality concluded that the right to have the jury consider all admitted, elementally relevant evidence is a “basic” right, the abridgment of which can never constitute harmless error.

Because Johnson was a plurality opinion and involved only a conclusive mandatory presumption, it is not surprising that the Court revisited the questions of whether and how harmless-error analysis should apply to mandatory presumptions in general. Three years after Johnson, in Rose v. Clark, the Court returned to these issues in a case involving a rebuttable mandatory presumption.

125 Id. at 82-83 (citing both Bollenbach v. United States, 326 U.S. 607, 613-15 (1946) (improper presumption on element of offense), and United Bhd. of Carpenters & Joiners v. United States, 330 U.S. 395, 408-09 (1947) (elemental misdescription)).
127 Johnson, 460 U.S. at 84. In so stating, the plurality did not directly respond to Justice Powell’s compelling argument that the directed-verdict analogy is imperfect because a jury instructed to apply a conclusive mandatory presumption upon making certain predicate findings still must find the predicate fact or facts before applying the presumption. Id. at 96-97 (Powell, J., dissenting).
128 Id. at 84-88 (plurality opinion).
129 Id. at 88.
130 Indeed, Chief Justice Burger wrote separately in Johnson “to emphasize that the Court today does not adopt a rule of automatic reversal for Sandstrom error.” Id. at 90 (Burger, C.J., dissenting). The dissenting Justices felt that conclusive and rebuttable presumptions were amenable to harmless-error review, and that the proper inquiry was “whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.” Id. at 97 n.5 (Powell, J., dissenting).
132 In the interim between the Johnson and Rose decisions, the Court did have occasion to review instructions containing a rebuttable mandatory presumption. See
A Tennessee jury had convicted Stanley Clark of first- and second-degree murder for two intentional homicides. An instruction given at his trial had established a rebuttable mandatory presumption on the issue of malice, an element of murder under Tennessee law. The Court, by a 6-3 majority, held that this type of error could be harmless. Surprisingly, however, given that it was reviewing only a rebuttable mandatory presumption, the Rose majority indicated that it was rejecting the plurality opinion in Johnson, and implied that its holding would govern all "Sandstrom error."

In formulating its holding, the Rose majority did not state that the general rights undermined by the two types of mandatory presumptions were not "basic to a fair trial." In fact, despite its facial applicability to all mandatory presumptions, the majority opinion made no mention at all of the fact that conclusive mandatory presumptions tend to undermine (1) the right to have the jury make all elemental determinations; and (2) the right to have the jury consider all admitted, elementally relevant evidence. Instead, it merely recited several errors that the Court had considered to fall within the "never harmless" category, observed that these errors "either aborted the basic trial process, ... or denied it altogether," and concluded from this that "[h]armless-error analysis ... presupposes [only] a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." Because a rebuttable mandatory presumption "does not com-

Francis v. Franklin, 471 U.S. 307 (1985). In Francis, however, the majority declined to resolve the question of whether this type of error is properly subject to harmless-error review because the error committed at defendant's trial could not be considered harmless "even under the harmless-error standard proposed by the dissenting Justices in [Johnson]." Id. at 325-26.

Rose, 478 U.S. at 574.

Id. at 572. The instruction stated:

All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.

Id. at 574 (ellipses omitted).

Id. at 579-80.

See id. at 580-82 (citing with approval the arguments of the Johnson dissent).

Id. at 580-81.

The majority did confirm, however, that a complete denial of the Sixth Amendment right to have a jury determine guilt can never be harmless error. Id. at 578.

See id. at 577-78 (listing the introduction of a coerced confession, complete denial of the right to counsel, and adjudication by a biased judge).

Id. at 578 n.6 (citations omitted).

Id. at 578.
pare" with these types of errors, the majority held "that the error at issue here—an instruction that impermissibly shifted the burden of proof on malice—is not so basic to a fair trial that it can never be harmless."

With regard to the inquiry into whether mandatory presumptions compromise "basic" rights, then, *Rose* contained two significant flaws. First, in deciding that the error before it did not undermine basic rights, the opinion focused on the nature of the error, finding it qualitatively different from other errors that the Court had decided are never harmless. Obviously, however, it is not the qualitative nature of the error that should determine suitability for harmless-error review; it is the qualitative nature of the constitutional rights undermined by the error.

Second, by carelessly describing the rebuttable mandatory presumption before it as "Sandstrom error" and indicating that its holding should govern all Sandstrom error, *Rose* improperly ignored important differences between conclusive mandatory presumptions and rebuttable mandatory presumptions. As I have explained, conclusive mandatory presumptions undermine two constitutional rights not infringed by rebuttable mandatory presumptions. As a result, in the wake of *Rose*, the Court has assumed, without ever having explicitly reached this conclusion, that the rights to have the jury make all elemental determinations and to consider all elementally relevant evidence are not "basic rights."

2. Subsequent Case Law

In 1989 the Supreme Court expressly confirmed that the *Rose* holding does govern conclusive mandatory presumptions. Moreover, despite the differences between rebuttable mandatory presumptions and elemental misdescriptions, the Court also has deemed the *Rose* holding applicable in cases involving elemental misdescriptions.

*Carella v. California*, a per curiam opinion, extended *Rose* to conclusive mandatory presumptions with no analysis of how such presumptions differ from rebuttable mandatory presumptions. This occurred despite Justice Scalia's compelling concurrence, which emphatically explained...
that (1) a rebuttable mandatory presumption merely effectuates an erroneous shift in the burden of proof, whereas a conclusive presumption precludes the jury from "mak[ing] any factual determination of the elemental fact"; and (2) a rebuttable mandatory presumption does not preclude the jury from weighing the relevant evidence.\textsuperscript{146}

Similarly, \textit{Pope v. Illinois}\textsuperscript{149} applied \textit{Rose} to elemental misdescriptions\textsuperscript{150} without taking note of the differences between elemental misdescriptions and rebuttable mandatory presumptions. The \textit{Pope} majority relied heavily on the fact that the jury had at least made a finding (albeit a tainted one) on the misdescribed element.\textsuperscript{151} Because it believed that this tainted finding might in some cases conclusively establish the missing element,\textsuperscript{152} the \textit{Pope} majority concluded that harmless-error analysis is appropriate in the case of an elemental misdescription.\textsuperscript{153} In a footnote it added: "To the extent that cases prior to \textit{Rose} may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, after \textit{Rose} . . . they are no longer good authority."\textsuperscript{154}

In dissent, Justice Stevens, joined by Justices Marshall, Brennan, and Blackmun, forcefully made the point that an elemental misdescription, unlike the rebuttable mandatory presumption at issue in \textit{Rose}, completely precludes the jury from making a finding on one of the elements of the crime charged.\textsuperscript{155} Thus, Justice Stevens argued:

\begin{quote}
[A]pplication of the harmless-error doctrine under these circumstances would not only violate petitioners' constitutional right to trial by jury, but would also pervert the notion of harmless error. When a court is asked to hold that an error that occurred did not interfere with the jury's ability to legitimately reach the verdict that it reached, harmless-error analysis may often be appropriate. But this principle cannot apply unless the jury found all of the elements required to support a conviction. The harmless-error doctrine may enable a court to remove a taint from proceedings in order to preserve a jury's findings, but it cannot constitutionally supplement those find-
\end{quote}

\begin{footnote}
\textsuperscript{146} Id. at 273 (Scalia, J., concurring in judgment) ("The Rose jury . . . was compelled to [ ] weigh the relevant evidence and decide whether the presumption had been overcome.").

\textsuperscript{149} 481 U.S. 497 (1987).

\textsuperscript{150} See id. at 497-504.

\textsuperscript{151} See id. at 502-03.

\textsuperscript{152} Id. at 503 (citing Rose v. Clark, 478 U.S. 570, 580-81 (1986)).

\textsuperscript{153} Id. at 503-04.

\textsuperscript{154} Id. at 503 n.7 (citing Cabana v. Bullock, 474 U.S. 376, 384 (1986), as a case superseded by \textit{Rose}).

\textsuperscript{155} Id. at 507-09 (Stevens, J., dissenting) (explaining that the trial court in \textit{Rose} had not removed the issue of intent from the jury's consideration, but instead had shifted the burden of disproving intent to the defendant).
\end{footnote}
REVIEWING INSTRUCTIONAL ERROR

B. How to Review for Harmlessness

The failures to take note of the rights undermined by mandatory presumptions, to explain why these are not basic rights, and to distinguish between conclusive and rebuttable mandatory presumptions were not the only significant defects in *Rose*. Unfortunately, that case also sent out conflicting signals as to how courts should determine whether mandatory presumptions are harmless.

On the one hand, the *Rose* majority seemed to suggest the use of some form of traditional whole-record harmless-error analysis. Justice Powell stated that "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." 157 On the other hand, the majority also offered a narrower test:

When a jury is instructed to presume [an element of the crime charged] from predicate facts, it still must find the existence of those predicate facts beyond a reasonable doubt. In many cases, the predicate facts conclusively establish [the presumed element] so that no rational jury could find [the predicate facts and not also find the element on which the presumption was constructed]. In that event . . . the jury has found . . . every fact necessary to establish [the] element of the offense beyond a reasonable doubt.

This ambiguity provided the impetus for Justice Scalia’s concurrence in *Carella v. California*. 159

Justice Scalia stated his premise and purpose at the outset of his opinion:

[T]he harmless-error analysis applicable in assessing a mandatory conclusive presumption is wholly unlike the typical form of such analysis. In the usual case the harmless ness determination requires consideration of the trial record as a whole in order to decide whether the fact supported by improperly admitted evidence was in any event overwhelmingly established by other evidence. Such an expansive inquiry would be error here, and I think it important both to explain why and to describe the mode of analysis that is appropri-

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156 Id. at 509-10 (footnote omitted).
158 Id. at 580-81 (citations and internal quotation marks omitted). This mode of analysis was first suggested in Justice Powell’s dissent in *Johnson*, see *Connecticut v. Johnson*, 460 U.S. 73, 96-97 (1983) (Powell, J., dissenting), and was subsequently employed by the *Pope* majority, see 481 U.S. at 503-04.
ate. The Court's mere citation of *Rose* is inadequate to those ends, since, for reasons I shall describe, ... that case itself is ambiguous.\(^{160}\)

Deemphasizing the presumption's effect on the prosecutor's burden of proof, Justice Scalia hinged his argument on the fact that a conclusive mandatory presumption invades the jury's factfinding function. Noting that the Sixth Amendment "right to a jury trial embodies 'a profound judgment about the way in which law should be enforced and justice administered,"\(^ {161}\) he argued that the right to have the jury find the facts at a criminal trial "is a structural guarantee that 'reflects a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.'"\(^ {162}\) This mistrust of judicial discretion, he pointed out, underlies the constitutional prohibition against allowing judges to direct verdicts for the prosecution in criminal cases.\(^ {163}\)

Justice Scalia asserted that the availability of harmless-error review should therefore be circumscribed in cases of conclusive mandatory presumptions and their analytical analogues, elemental misdescriptions.\(^ {164}\) This view derived from the principle that "the [harmless-error] question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials."\(^ {165}\) Where there have been no elemental findings by a jury, subsequent "findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of the defendant ..."\(^ {166}\) No matter how overwhelming the evidence of guilt in the record, "the error ... is that the wrong entity judged the defendant guilty."\(^ {167}\)

Having articulated the unique Sixth Amendment problems caused by instructional errors that tend to interfere directly with the jury's factfinding role, Justice Scalia nonetheless recognized that such errors can be harmless in a narrow set of circumstances where a "reviewing court can be confident that [they] did not play any role in the jury's verdict."\(^ {168}\) Building from the *Johnson* plurality\(^ {169}\) and the *Pope* majority,\(^ {170}\) he then proposed a three-part test for determining whether instructions contain-

\(^{160}\) Id. at 267 (citations and internal quotation marks omitted).

\(^{161}\) Id. (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

\(^{162}\) Id. (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

\(^{163}\) Id.

\(^{164}\) See id. at 269-71.

\(^{165}\) Id. at 269 (quoting *United States v. Bollenbach*, 326 U.S. 607, 614 (1946)).

\(^{166}\) Id. (quoting *Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986)).

\(^{167}\) Id. (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)).

\(^{168}\) Id. at 270 (quoting *Connecticut v. Johnson*, 460 U.S. 73, 87 (1983)).

\(^{169}\) See supra notes 122-23 and accompanying text (discussing *Johnson*'s reference to the two "rare situations" in which a conclusive mandatory presumption could not have affected the jury's verdict).

\(^{170}\) See supra note 149-54 and accompanying text (discussing the *Pope* majority's
ing conclusive mandatory presumptions and elemental misdescriptions are harmless. First, did the presumption or misdescription pertain only to an element of a crime of which the defendant was acquitted? Second, did the presumption or misdescription pertain only to an element to which the defendant admitted? Third, could no rational jury have made the findings that it did without also finding the presumed or misdescribed element? Unless the answer to one of these questions is yes, the error is not harmless because it is not "‘beyond a reasonable doubt’ ” that the jury found the facts necessary to support the conviction."

Justice Scalia ended his concurrence by arguing that Rose should not be read as endorsing typical whole-record harmless-error review of conclusive mandatory presumptions and elemental misdescriptions. He contended that even if whole-record review were somehow appropriate when the error at issue is a rebuttable mandatory presumption, courts should not apply the whole-record approach when the error completely deprives the jury of its factfinding role.

Since Carella, the Court has failed to clarify whether courts should review conclusive mandatory presumptions and elemental misdescriptions under the typical, whole-record harmless-error standard, or under the narrower Carella test. On one hand, dicta in Yates v. Evatt and indication that, in some cases, the facts found conclusively establish a misdescribed element).

\footnote{See Carella, 491 U.S. at 270-71 (1989) (Scalia, J., concurring in judgment). If the answer to this third question is "yes," the jury's actual findings are "functionally equivalent" to the missing findings. \textit{Id.}}

\footnote{Id. (quoting and applying the Chapman harmless-error standard).}

\footnote{Id. at 271-72.}

\footnote{In fact, subsequent to both Rose and Carella, the Court articulated a harmless-error methodology for reviewing rebuttable mandatory presumptions that, despite being "whole-record," is "more restrictive" than the "whole-record" harmlessness inquiry suggested by Rose. Yates v. Evatt, 500 U.S. 391, 402-03 n.8 (1991). Under Yates, courts reviewing for harmlessness the effects of rebuttable mandatory presumptions must (1) ask what evidence the jury actually considered in reaching its verdict; and (2) weigh the probative force of that evidence against the probative force of the presumption standing alone. \textit{Id.} at 404. Of course, because conclusive mandatory presumptions and elemental misdescriptions preclude the jury from considering evidence other than that relating to the predicate facts and misdescribed elements, a whole-record test would not be appropriate for courts reviewing the effects of these errors. See \textit{id.} at 405-06 & n.10 (noting the narrowing effect of a conclusive mandatory presumption and citing, seemingly approvingly, the Carella test as the appropriate standard for reviewing the effects of such a presumption).}

\footnote{See supra parts II.C-D (discussing the different effects of conclusive mandatory presumptions, rebuttable mandatory presumptions, and elemental misdescriptions).}

\footnote{500 U.S. at 406 n.10 ("For reviewing the effects of a conclusive presumption, a restrictive analysis has been proposed . . . ." (citing Carella, 491 U.S. at 271 (Scalia, J., concurring in judgment))).}
Sullivan v. Louisiana\textsuperscript{177} seem to support Justice Scalia's Carella approach. Moreover, the Yates Court all but repudiated the suggestion in Rose that evidence of guilt in the record as a whole is sufficient to render a mandatory presumption harmless.\textsuperscript{178} On the other hand, the Fulminante majority, in a lengthy string citation, listed conclusive mandatory presumptions and elemental misdescriptions as examples of trial errors,\textsuperscript{179} and then stated that trial errors are subject to a quantitative assessment in light of the whole record.\textsuperscript{180} Over the past few years, this ambiguity has fostered predictable confusion in the lower courts.\textsuperscript{181}

C. The Habeas Wild Card

Although the ambiguity discussed in the preceding subsection has proven problematic for reviewing courts, prior to Brecht v. Abrahamson\textsuperscript{182} these problems arose only in the context of Chapman's "harmless beyond a reasonable doubt" standard. In Brecht, however, the Court rejected the Chapman standard on collateral review.\textsuperscript{183} As a result, habeas courts inclined to apply the Carella test to conclusive mandatory presumptions and elemental misdescriptions confront an additional difficulty. Is Carella solely descendant from Chapman, and must it therefore give way on habeas to whole-record review? Or are the factors that drive the Carella test of sufficient gravity to mandate application of the Carella test on collateral review, even in the Brecht/Kotteakos regime?

Although several federal circuit courts have encountered collateral challenges to mandatory presumptions and elemental misdescriptions since Brecht, the First Circuit has grappled with the issues raised by such challenges most directly and extensively.\textsuperscript{184} In Libby v. Duval,\textsuperscript{185} the First Circuit, which previously had employed a form of the Carella test on

\textsuperscript{177} 113 S. Ct. 2078, 2082 (1993) (reciting what is, in essence, the Carella test).

\textsuperscript{178} Yates, 500 U.S. at 406-07 & n.11.


\textsuperscript{180} Id. at 307-08, 310.

\textsuperscript{181} Compare United States v. Williams, 935 F.2d 1531, 1536-37 (8th Cir. 1991) (suggesting that "overwhelming" record evidence of guilt renders an elemental misdescription harmless), cert. denied, 112 S. Ct. 1189 (1992) with United States v. Mendoza, 11 F.3d 126, 129 (9th Cir. 1993) (reviewing elemental misdescription under Carella's "functionally equivalent" test) and United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 55 n.20 (1st Cir. 1991) (similar).

\textsuperscript{182} 113 S. Ct. 1710 (1993).

\textsuperscript{183} As I have explained, habeas courts assessing the harmlessness vel non of a constitutional trial error should ask whether the error had "a substantial and injurious effect or influence in determining the jury's verdict." 113 S. Ct. at 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). This standard is ostensibly "less onerous" than the Chapman requirement that the error be harmless beyond a reasonable doubt. See generally supra part I.C.

\textsuperscript{184} See supra note 7 (collecting cases).

\textsuperscript{185} 19 F.3d 733 (1st Cir.), cert. denied, 115 S. Ct. 314 (1994).
direct review, \(^{186}\) refused to apply it on collateral review.\(^{187}\)

A Massachusetts jury convicted Clayton Libby of first-degree murder for a stabbing that took place in the course of a drunken brawl.\(^{188}\) At his trial, the judge instructed that malice, an element of the crime of first-degree murder, "is implied in every deliberate cruel act by one against another."\(^{189}\) The federal district court with which Libby filed his request for habeas relief ruled that the instruction unconstitutionally directed the jury to find malice upon finding a deliberate cruel act.\(^{190}\) That court further found, however, that the instruction was "harmless beyond a reasonable doubt."\(^{191}\)

On appeal from denial of the petition, the First Circuit agreed that the instruction constituted *Sandstrom* error, adding that it should be regarded as a conclusive mandatory presumption "because it was framed in irrefutable and unvarying terms" and was "at least reasonably likely [to have] completely removed the element of malice from the case once the Commonwealth established that petitioner had acted deliberately and cruelly."\(^{192}\) Thus, the court faced the question of whether the error was harmless. Because the Supreme Court had decided *Brecht* in the period of time between the district court's decision and the First Circuit's consideration of Libby's petition, the appellate panel relied upon it in deciding whether to conduct a whole-record review or to employ the narrower *Carella* test.\(^{193}\)

The majority acknowledged that whole-record review would require the court to supply the missing malice finding, and would entail analysis of malice-related evidence that the jury had not considered.\(^{194}\) Nonetheless, it believed itself "constrained" by both *Fulminante*'s indication that a conclusive mandatory presumption is a trial error and *Brecht*'s admonition that trial errors are subject to whole-record review under the "substantial and injurious effect or influence" standard.\(^{195}\) Thus, the majority

\(^{186}\) See *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 55 n.20 (1st Cir. 1991).

\(^{187}\) *Libby*, 19 F.3d at 740.

\(^{188}\) *Id.* at 734.

\(^{189}\) *Id.* at 735.

\(^{190}\) *Id.* at 736. There was evidence in the record that Libby was embroiled in "sudden combat." Under Massachusetts law, sudden combat is a mitigating circumstance sufficient to negate malice and to reduce a verdict of murder to manslaughter. See *Commonwealth v. Richard*, 384 N.E.2d 636, 638 (Mass. 1979). The instruction that Libby challenged, however, precluded the jury from considering this sudden combat evidence because it directed the jury to infer malice once it found that Libby had acted deliberately and cruelly.

\(^{191}\) *Libby*, 19 F.3d at 736.

\(^{192}\) *Id.* at 738.

\(^{193}\) *Id.* at 738-39.

\(^{194}\) *Id.* at 740.

\(^{195}\) *Id.* at 739.
examined the entire trial record and concluded that, even with correct instructions, it was "unlikely" that the jury would have reached a different verdict. Accordingly, the court regarded the conclusive mandatory presumption as harmless under Brecht.

In dissent, Judge Stahl argued that habeas courts should utilize the Carella test when evaluating the harmlessness of conclusive mandatory presumptions. He cited the need to preserve criminal defendants' constitutional rights (1) to have the prosecution prove all elements of the offense charged; (2) to have the jury make all elemental determinations; and (3) to have the jury consider all elementally relevant evidence. He also argued that Brecht should not be read as foreclosing application of the Carella test on collateral review.

Applying the Carella test, Judge Stahl argued that a rational jury could have found that Libby acted deliberately and cruelly, but also found that he was acting without malice in the course of sudden combat. In other words, the jury's finding of a deliberate and cruel act was not the functional equivalent of a finding of malice, and did not satisfy the third (and only applicable) prong of the Carella test. Thus, Judge Stahl deemed the error harmful.

IV. Honoring the Mandates of the Sixth Amendment: The Carella Test Should Apply on Both Direct and Collateral Review

How, then, should the concept of harmless error work in the context of conclusive mandatory presumptions and elemental misdescriptions? And should it work differently on collateral review than it does on direct review? The key to answering these questions lies in doing what Rose and its progeny failed to do: identifying the nature of the constitutional rights usually undermined by these two errors, particularly the rights to

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196 Id. at 740.
197 Id. A brief concurrence by Judge Cyr, the second member of the Libby majority, acknowledged the difficulty of the question:

Although I share my dissenting brother's belief that the Carella concurrence articulates compelling grounds for more narrowly confining "harmless error" review of a jury instruction mandating a conclusive presumption, I join the majority opinion because I am satisfied that the review required by the Court in Brecht encompasses the entire record.

Id. (concurring opinion).
198 Id. at 742 (Stahl, J., dissenting).
199 Id. at 741.
200 Id. at 743 (arguing that although Chapman "contemplates a whole-record review every bit as much as Brecht does . . . , the Court has made clear in the Chapman context that, when confronted with presumption error, the typical form of whole-record analysis does not apply").
201 Id. at 744-45.
202 Id.
have the jury make all elemental determinations and consider all admitted, elementally relevant evidence. Once these rights are understood as structural, it becomes clear that courts reviewing conclusive mandatory presumptions and elemental misdescriptions for harmlessness—unlike other structural errors, conclusive mandatory presumptions and elemental misdescriptions can be harmless in a few instances—should utilize the contextually sensitive Carella test.

A. Getting Back to Basics: The Nature of the Rights Undermined by Conclusive Mandatory Presumptions and Elemental Misdescriptions

As I have explained, the majority opinions in Rose, Carella, and Pope did not analyze the constitutional rights undermined by conclusive mandatory presumptions and elemental misdescriptions. It is therefore not surprising that the Court has not yet discussed how these rights fit into Fulminante's framework for distinguishing between errors suitable for harmless-error review and errors denying rights so basic to a fair trial that their commission can never be considered harmless—the trial-error/structural-error dichotomy. Fortunately, however, there are other guideposts available. The Court's very definition of the term "structural error," and its analysis of deficient reasonable-doubt instructions in Sullivan v. Louisiana, suggest that interference with the rights to have the jury make all elemental determinations and consider all admitted, elementally relevant evidence constitutes structural error.

As an initial matter, it is important to note the common constitutional origins of these two rights. The right to have the jury make all elemental determinations in a serious criminal case derives, of course, from the Sixth Amendment's jury-trial guarantee. In Sullivan, the Court described as "self-evident" the fact that (1) the Due Process Clause's guarantee that the prosecution persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each element of the offense charged; and (2) the Sixth Amendment's requirement of a jury verdict, combine to create a Sixth Amendment right to a jury verdict of guilty beyond a reasonable doubt. Similarly, the due process guarantee that the prosecution bears the burden of proving all elements of the offense charged and the Sixth Amendment's requirement of a jury verdict must be read together as creating within the jury-trial guarantee a right to a jury verdict on all elements of the offense charged.

203 See supra notes 136-56 and accompanying text.
204 See supra notes 51-60 and accompanying text.
206 Id. at 2080-81.
207 Id. at 2080 (citing Patterson v. New York, 432 U.S. 197, 210 (1977)).
208 Cf. id. at 2080-81 (stating that the Sixth Amendment requires the jury, rather than the judge, to reach the requisite finding of guilt, no matter how overwhelming the evidence of guilt may be).
Although it is less immediately apparent, the Sixth Amendment jury-trial right also encompasses the right to have the jury consider all admitted, elementally relevant evidence. If a guilty verdict premised upon a lesser quantum of proof than is constitutionally mandated denies the jury-trial right, so too must a guilty verdict arrived at by a jury precluded from considering admitted evidence certain to have affected the quantum of proof. Put another way, the verdict is no more valid when the jury finds guilt beyond a reasonable doubt without considering admitted evidence likely to have affected its level of doubt, than when the jury finds guilt despite possibly having had reasonable doubts. Therefore, the right to have the jury consider all elementally relevant evidence must be considered part of the Sixth Amendment's jury-trial guarantee.

This leads to the main point. In *Fulminante*, the Court described as never-harmless those errors that engender "structural defects in the trial mechanism." Chief Justice Rehnquist distinguished these errors from simple errors in the trial process, defining the former as breakdowns that affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds." As the Court noted, such errors deprive criminal defendants of basic protections, without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

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209 See id. at 2081 (observing that the Sixth Amendment's jury-trial right is not satisfied by a jury verdict finding that the defendant is "probably guilty," while leaving it up to the judge to decide whether the defendant is guilty beyond a reasonable doubt).

210 I note that while the plurality in *Johnson* characterized the latter right as "constitutional" and "basic to a fair trial," see supra note 129 and accompanying text, it never explicitly noted the origins of the right. See *Connecticut v. Johnson*, 460 U.S. 73, 87-88 (1983).

It might be objected that viewing the right to consideration of all elementally relevant evidence as part of the jury-trial guarantee would transform a trial judge's improper exclusion of relevant evidence into structural error—a position that the Court has not taken and will not take. This argument ignores the fact that the intentional (albeit improper) exclusion of elementally relevant evidence, although often as damaging as the narrowing effect engendered by conclusive mandatory presumptions and elemental misdescriptions, does not compromise the criminal trial structure surely contemplated by the Sixth Amendment: a jury returning a verdict after considering all the admitted evidence. But cf. *Gilmore v. Taylor*, 113 S. Ct. 2112, 2116-19 (1993) (holding, in the course of a *Teague v. Lane*, 489 U.S. 288 (1989), "new rule" analysis, that the Court's due process precedent had not foreordained that a jury instruction that precludes the jury from considering evidence relevant to a state law affirmative defense violates the Due Process Clause).


212 Id. at 309-10.

213 Id. (quoting *Rose*, 478 U.S. at 577-78).
Errors that deprive defendants of their Sixth Amendment right to a jury trial in serious criminal cases, and their concomitant rights to have the jury make all elemental determinations and consider all admitted, elementally relevant evidence, certainly meet this definition of "structural error." The presence of a jury of one's peers as factfinder is as integral, if not more so, to the framework within which a serious criminal trial proceeds as the other structural guarantees identified in *Fulminante*: counsel for the defendant, an impartial judge, a grand jury untainted by racial discrimination in its selection, the right to self-representation, and the right to a public trial.\(^{214}\) And, of course, the presence of a jury is rendered meaningless if it is precluded from fulfilling its factfinding function.

Moreover, the jury-trial right has been identified as "a fundamental right [that] . . . must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction."\(^{215}\) Although its primary purpose is "to prevent oppression by the Government,"\(^{216}\) the jury also serves to legitimize the trial process before the defendant and other observers. The Court has explained both of these functions:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.\(^{217}\)

Thus, if centrality to the American criminal justice system has any bearing on whether a right is a "basic protection" without which "no criminal punishment may be regarded as fundamentally fair," the jury-trial right would seem to qualify.

The argument that the jury-trial right and the rights subsumed by it are structural also finds significant support in current Supreme Court cases. Obviously, there is Justice Scalia's concurrence in *Carella*, which explic-

\(^{214}\) Id. at 310.


\(^{216}\) Id. at 155.

\(^{217}\) *Id.* at 156.
itly states that the jury-trial right is a "structural guarantee" and treats the right to have the jury make all elemental determinations as part and parcel of this right. More importantly, there is *Sullivan v. Louisiana*, a unanimous decision in which the Court observed that the jury-trial guarantee is a "‘basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." In *Sullivan*, the Court held that a deprivation of the right to a jury verdict of guilty beyond a reasonable doubt, a right encompassed by the jury-trial guarantee, "unquestionably qualifies as 'structural error.'" The very same logic compels the conclusion that a deprivation of the rights to have the jury make all elemental determinations and to consider all admitted, elementally relevant evidence—rights as much a part of the Sixth Amendment's jury-trial guarantee as the right to a jury verdict of guilty beyond a reasonable doubt—constitutes structural error.

The contention that a deprivation of these two rights constitutes structural error still confronts a significant obstacle—*Fulminante*’s indication, in a string citation, that conclusive mandatory presumptions and elemental misdescriptions are trial errors. A contextually sensitive reading of *Fulminante*, however, demonstrates that it should not be regarded as binding precedent on the categorization of these errors.

First, *Fulminante* did not involve conclusive mandatory presumptions or elemental misdescriptions; in fact, it was not concerned with instruc-

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218 Carella v. California, 491 U.S. 263, 267-71 (1989) (Scalia, J., concurring in judgment); cf. Rose v. Clark, 478 U.S. 570, 582 n.11 (1986) (reaffirming "that the determination of guilt or innocence . . . is for the jury rather than the court," but failing to note that some *Sandstrom* error circumvents the jury rather than merely affecting it).


220 Id.

221 See supra notes 205-10 and accompanying text.

222 Commentators have pointed out, with considerable justification, that the Court, while paying periodic lip service to the nature of the undermined right, really "is no longer valuing the nature of the right involved in its determination whether to apply harmless error analysis." See Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga. L. Rev. 125, 142-43 (1993); see also Ogletree, supra note 19, at 161-72 (arguing that the overemphasis on the accuracy of the trial result inhering in *Fulminante*’s trial-error/structural-error distinction has subverted the other important societal values served when courts vigilantly safeguard criminal defendants’ constitutional rights). Instead, these commentators have argued, the Court merely looks to whether "prejudice is difficult to calculate." Carter, supra, at 142.

Even assuming that such a force is at work in the Court’s harmless-error jurisprudence, the result I reach would be no different. If the Court did not regard the "fundamental" nature of the jury-trial right as important, *Sullivan* makes clear that the "unquantifiable and indeterminate" consequences of its denial render the denial structural error. See *Sullivan*, 113 S. Ct. at 2083.

tional error at all. Thus, courts deriving great significance from Fulminante’s reference to these types of instructional errors as trial errors are relying on unadulterated dictum from a case that was considering the effects of improperly admitted evidence, i.e., typical trial error.

More importantly, it is apparent that Fulminante did not rule that conclusive mandatory presumptions and elemental misdescriptions do not undermine structural guarantees. From context, it is clear that the majority included the string citation containing the reference to these errors only to point out: (1) that a wide array of constitutional errors have been subjected to harmless-error review; and (2) that the “common thread” connecting these errors was that they “occurred during the presentation of the case to the jury.” Nothing in the majority opinion even remotely suggests an intention to hold that all of the errors enumerated in the string citation should henceforth be reviewed for harmlessness in the traditional whole-record manner.

Thus, I construe Fulminante’s “trial error” characterization of the errors included in its string citation as merely meaning that these errors are amenable to harmless-error review. Similarly, I regard Fulminante’s statement that these errors “may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [their] admission was harmless beyond a reasonable doubt” as noncontextual overreaching. In so stating, I note that the majority’s use of the word “admission” in the preceding quotation makes it all but certain that it only had in mind the more typical form of trial error, i.e., improperly admitted evidence or argument, when it stated that trial errors should be quantitatively assessed for harmlessness in the context of the whole record.

To sum up, in deciding whether and how conclusive mandatory presumptions and elemental misdescriptions should be reviewed for harmlessness, courts should first recognize that these errors tend to undermine the Sixth Amendment rights to have the jury make all elemental determinations and to consider all admitted, elementally relevant evidence. Courts should then analyze these rights in light of the Supreme Court’s Sixth Amendment jurisprudence, which makes clear that their denial con-

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224 See supra notes 51-56 and accompanying text.
225 See Fulminante, 499 U.S. at 306-07.
226 Given that the effect of admitting constitutionally defective evidence is unquestionably subject to whole-record, quantitative assessment, there simply was no basis for the Court to have considered this issue.
227 See Libby v. Duval, 19 F.3d 733, 743 (1st Cir.) (Stahl, J., dissenting) (reading the string citation in Fulminante as merely indicating that a conclusive presumption is amenable to harmless-error review), cert. denied, 115 S. Ct. 314 (1994).
228 Fulminante, 499 U.S. at 307-08 (emphasis added).
229 See Libby, 19 F.3d at 743 (Stahl, J., dissenting) (refusing to apply a whole-record harmless-error test to these errors).
stitutes structural error. Finally, courts should not read *Fulminante* as overruling this jurisprudence *sub silentio*.

B. Courts Should Employ the Carella Test When Reviewing for Harmless Conclusive Mandatory Presumptions and Elemental Misdescriptions

If the Sixth Amendment rights undermined by conclusive mandatory presumptions and elemental misdescriptions are structural, deprivation of these rights can never be harmless. There are, however, certain "'rare situations' when 'the reviewing court can be confident that [such errors] did not play any role in the jury's verdict' " and did not deprive the defendant of these rights. These errors are, therefore, properly subject to *some* form of harmless-error review. Justice Scalia's *Carella* test is the proper means for conducting such a review.

First, the *Carella* test recognizes the structural nature of the constitutional guarantees that conclusive mandatory presumptions and elemental misdescriptions tend to undermine. In the case of ordinary whole-record harmless-error review, the question of whether an error denied a particular criminal defendant of rights (constitutional or otherwise) is not dispositive. Indeed, the whole-record reviews that *Chapman* and *Kotteakos* prescribe measure the likely impact of a given error on the jury, and thereby presuppose that the error resulted in a denial of rights. Clearly, therefore, reviewing courts cannot apply *Chapman* or *Kotteakos* when presented with conclusive mandatory presumptions and elemental misdescriptions, which by their nature are harmful whenever they have *any* impact on the jury. Instead, courts reviewing these errors must use a harmless-error test that focuses directly on whether the errors deprived a defendant of rights.

The *Carella* test is sensitive to this need. The test identifies those instances in which the absence of an elemental finding does not matter, because the finding is irrelevant, or because the jury, in effect, made the finding despite the presumption or misdescription. Thus, without being overinclusive, the test covers the universe of situations in which a reviewing court can say with near-total confidence and objectivity that the conclusive mandatory presumption or elemental misdescription had *no* effect upon the jury. Furthermore, it does so without speculation about what a properly instructed jury would have found.

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230 *See supra* note 59 and accompanying text (cataloguing structural errors).


232 Of course, deciding whether factual findings actually made by the jury are the "functional equivalent" of the presumed or misdescribed element at times involves subjective judgments. Nevertheless, as long as the question the reviewing court asks itself is "By finding X, did the jury in effect find Y as well?," and not "Having found X, would the jury also have found Y?," this subjectivity is highly cabined.
A second reason reviewing courts should use the Carella test is that the test is faithful to the theoretical underpinnings of harmless-error theory. As I have explained, the Carella test determines only whether the absence of a jury finding is irrelevant or whether there essentially has been a jury finding. The ordinary whole-record harmless-error tests prescribed by Chapman and Kotteakos, however, presuppose the existence of elemental jury determinations. They therefore cannot operate when such determinations are absent. In a direct review case, where Chapman would ordinarily apply, the Court has explained this infirmity:

Harmless-error review looks, we have said, to the basis on which the jury actually rested its verdict . . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because 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 . . . .

Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless-error review [where there has been no jury finding beyond a reasonable doubt] becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt—not that the jury’s actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough.233

C. Courts Should Apply the Carella Test on both Direct and Collateral Review

Even if one accepts that reviewing courts must apply the Carella test to conclusive mandatory presumptions and elemental misdescriptions in order to guard against usurpation of the jury’s factfinding function and to remain faithful to the theoretical underpinnings of harmless-error theory, one need not necessarily believe that the test should apply on both direct and collateral review. The Court has made it quite clear that “collateral

review is different from direct review,"\textsuperscript{234} and that "an error that may justify reversal on direct appeal will not necessarily support" the granting of a writ of habeas corpus.\textsuperscript{235} One therefore could accept the propriety of the Carella test on direct review and argue for whole-record review on habeas, even in the context of conclusive mandatory presumptions and elemental misdescriptions.

This argument, however, necessarily entails the view that habeas should only serve as a final check on whether an innocent person has been punished. Application of whole-record harmless-error review to conclusive mandatory presumptions and elemental misdescriptions would, after all, require a reviewing court to guess at what a properly instructed jury would have done. In other words, it would direct the court to determine whether guilt can be spelt out of the record. And as I stated in the introduction, if record evidence of guilt is sufficient to render harmless the denial of a criminal defendant's structural Sixth Amendment jury-trial right, it also should be sufficient to render harmless all other constitutional errors.

There is a significant problem with any theory of habeas review that would preclude the issuance of the writ if the court believed the petitioner guilty. Such a theory would set those interests most often advanced for a restrictive theory of habeas availability—finality, comity, federalism, and the primacy of the trial itself\textsuperscript{236}—above all other interests save that of preventing the punishment of an innocent person. To illustrate, the writ would not be available under this theory to apparently guilty defendants who did not have legal representation at trial, or whose trials were infected with racial or religious prejudice. These errors would be harmless so long as an appeals court could satisfy itself that the defendant had committed the crime. This would unconscionably underweigh society's interest in not depriving citizens of life or liberty without criminal trials that at least appear fundamentally fair.\textsuperscript{237}


\textsuperscript{235} Id. at 1720 (quoting United States v. Frady, 456 U.S. 152, 165 (1982)).

\textsuperscript{236} See, e.g., id. at 1720-21 (advancing arguments for a restrictive approach to habeas review).

\textsuperscript{237} One might, of course, argue that the states are fully willing and able, at least in this day and age, to make certain that fundamental federal constitutional rights are vindicated on direct review. This argument would answer the question whether there should be habeas review; it is not, however, responsive to the argument that collateral review, so long as we do have it, should safeguard constitutional rights that are essential to the appearance of fundamental fairness. The states are, after all, equally willing and able to make certain that the innocent are not incarcerated. But implicit in the existence of habeas is a desire for something more. Those who would accept habeas but argue that it should only protect against punishment of the innocent would need to explain why a desire to protect rights essential to the appearance of fairness should not be part of this "something more." I believe that any such argument would be unconvincing.
In fact, the Court's numerous pronouncements cutting back on the availability of federal habeas corpus reject exactly this sort of limited fact-bound role for collateral review. Of the cases that address the types of substantive claims amenable to review on habeas, *Herrera v. Collins* 238 most notably rejected the notion that federal habeas should serve only to check the factual innocence of incarcerated petitioners. The majority in that case clearly stated that federal collateral review exists to rectify violations of constitutional criminal procedure protections. 239 Similarly, *Teague v. Lane*, 240 though restricting collateral review to "old rules" of criminal procedure, made clear that such review exists in order to deter violations of the Bill of Rights. 241

Cases establishing procedural roadblocks to collateral review also demonstrate that habeas exists to remedy constitutional violations, and not to release the innocent. These decisions do establish a test for "actual innocence." 242 But that doctrine is merely a *gateway* to federal review of the merits of an otherwise-barred constitutional claim. 243 And though the Court justifies its gateway standards on grounds of comity, finality, and federalism, these interests are clearly subordinate to the primary purpose of collateral review: ensuring that convictions generally are not obtained in violation of the Bill of Rights. 244

At any rate, the question of whether collateral review should be available in the face of record evidence of guilt is, or rather should be, aca-

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239 Id. at 860 (Rehnquist, C.J.) (emphasizing the "principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact").
241 Id. at 305-08, 310 (plurality opinion).
242 See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (making explicit the bar against federal habeas review of procedurally defaulted claims unless a petitioner shows a "miscarriage of justice"); *McCleskey v. Zant*, 499 U.S. 467, 502-03 (1991) (noting that the miscarriage of justice exception allowing consideration of a petition that would otherwise constitute abuse of the writ does not apply when the violation complained of is misuse of an inculpatory statement); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (plurality opinion) (declaring that the "ends of justice" require federal courts to hear successive habeas petitions "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence").
243 *Herrera*, 113 S. Ct. at 862-63 (explaining that the actual-innocence doctrine exists to prevent "miscarriages of justice," but that it does not generally support free-standing claims of actual innocence).
244 *Withrow v. Williams*, 113 S. Ct. 1745, 1751 (1993) (allowing habeas review of *Miranda* violations and thereby refusing to extend the rule of *Stone v. Powell*, 428 U.S. 465 (1976) (precluding habeas review of claimed Fourth Amendment violations), because habeas works to deter violations of "trial right[s]" that assure the "fairness, and thus the legitimacy, of our adversary process" (internal quotation marks omitted)).
Habeas courts that have read *Brecht* as directing them to scan the record for evidence of guilt in conducting their harmless-error assessments have overlooked three things. First, *Brecht* adopts the *Kotteakos* harmless-error test. And if *Kotteakos* is clear on anything, it is that record evidence of guilt does not itself render an error harmless. Second, *Brecht* re-affirms *Fulminante's* indication that "structural defects . . . defy analysis by 'harmless-error' standards." Thus, habeas courts must take the nature of the error into account, and should not simply look for evidence of guilt in the record when they make their harmlessness assessments. Third, and finally, a unanimous Court in *Yates v. Evatt* clearly stated that whole-record review does not empower a court to spell guilt out of the record, or to consider evidence that the jury did not consider. It strains credulity to conclude that the four members of the *Brecht* majority who signed *Yates* changed their views on these matters within two years. And it strains credulity even more to deduce that they did so with nary a word on the subject. Reviewing courts, therefore,

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245 *See* Kotteakos *v.* United States, 328 U.S. 750, 764 (1946) (directing reviewing courts to inquire not whether the verdict was correct in spite of the error, but rather whether the error had any effect on the verdict). One predisposed towards the view that the *Carella* test is derivative of *Chapman* might contend that *Brecht's* adoption of the *Kotteakos* standard should dictate application of some "less rigorous" form of the *Carella* test on collateral review. An example might be altering the third prong of the test so that a habeas court would look at whether, in light of findings actually made, the jury "likely" would have made the missing finding. *Cf.* Libby *v.* Duval, 19 F.3d 733, 740 (1st Cir.) (holding it "extremely unlikely," that the jury would have failed to make the missing finding), *cert. denied*, 115 S. Ct. 314 (1994). Such an argument would fail for two reasons.

First, the *Carella* test is an all-or-nothing proposition; it is designed to determine, to a certainty, whether a conclusive mandatory presumption or elemental misdescription had any effect upon a jury's factfinding function. And it presumes that any such effect is harmful. Thus, to reduce the test's rigor is to ignore the principles underlying its creation.

Second, as the *Libby* court's alteration of the test suggests, a reduction in the test's rigor would necessitate the supplying of missing factual findings every bit as much as any whole-record harmless-error test. After all, what difference is there between (1) looking at all the evidence and determining what a correctly instructed jury would have found; and (2) looking at the facts actually found by the jury and determining, in light of these findings, whether the jury "likely" or "probably" would have found the missing element?


247 *See* Yates *v.* Evatt, 500 U.S. 391, 405-07 & nn.10-11 (1991) (holding that whole-record harmless-error analysis is inappropriate where the jury did not consider all the evidence because the trial court instructed it to draw a mandatory conclusion). Of course, because *Yates* predated *Brecht*, the *Yates* Court applied *Chapman*. As I have pointed out, however, the *Kotteakos* harmless-error test embraced by the *Brecht* majority, like the *Chapman* test, is whole-record. *See Brecht*, 113 S. Ct. at 1722.
should not construe Brecht so broadly that it sub silentio overrules Yates, as well as the settled authority warning against spelling guilt out of the record. Instead, they should restrict Brecht to its context, and read it as simply holding that courts reviewing collateral challenges to typical trial errors should employ the Kotteakos harmless-error test.

CONCLUSION

In a series of recent cases, the Supreme Court has used language that casts doubt on what once was a settled proposition: that courts conducting harmless-error review should not usurp the criminal jury’s factfinding function by finding an error harmless when the record spells out guilt. In so doing, the Court has (1) improperly treated as interchangeable rebuttable mandatory presumptions, conclusive mandatory presumptions, and elemental misdescriptions; (2) failed to take account of the very different constitutional rights that these types of instructional error undermine; and (3) incorrectly implied that all errors amenable to harmless-error review are amenable to a quantitative assessment in light of the whole record. As a result, at least in the context of instructional error that interferes with the jury’s factfinding function, several circuit courts of appeals are now disregarding Sixth Amendment concerns and making harmlessness rulings on the basis of prognostications about what correctly instructed juries would have done.

This development is regrettable for two reasons. First, courts supplying missing factual findings, whether on direct or collateral review, work from a cold record. They have not had the opportunity either to view the evidence first-hand or to evaluate such intangibles as the credibility and demeanor of the witnesses. This raises grave concerns about institutional competence. Second, and even more importantly, courts supplying missing factual findings deprive criminal defendants of a right fundamental to the American criminal justice system: the right to a jury trial in serious criminal cases.

The Supreme Court should reverse this development. At the earliest opportunity, the Court should clarify that the Sixth Amendment right to a jury trial, which encompasses the rights to have the jury make all elemental determinations and to consider all admitted, elementally relevant evidence, is structural. The Court should also make clear that a de facto deprivation of the jury-trial right can never be harmless. Finally, the Court should specifically hold that the harmless-error test suggested by Justice Scalia’s concurring opinion in Carella v. California provides the proper basis, on both direct and collateral review, for assessing the effect of instructional error that interferes with the jury’s factfinding role. In

249 See supra notes 7, 181 (listing cases in which reviewing courts have evaluated trial evidence to determine what the jury’s finding would have been).
the face of such error, only the Carella test preserves the Sixth Amendment jury-trial right and comports with the theoretical underpinnings of harmless-error analysis.