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SULLIVAN v. LOUISIANA 113 S. Ct. 2078 (1993)

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require the defendant to testify.\textsuperscript{12} Instead, the Court noted that
the prosecution would have been content with testimony by acquaintances
of the defendant.\textsuperscript{13} Finally, the Court addressed charges from the
dissent that the holding weakened the presumption of innocence: "Once the
defendant has been convicted fairly in the guilt phase of the trial the
presumption of innocence disappears."\textsuperscript{14}

\section*{ANALYSIS/APPLICATION IN VIRGINIA}

The United States Supreme Court held in \textit{Lashley} that, even
assuming the application of the presumption of innocence at a capital
penalty trial, defendants are not entitled to an instruction to any greater
degree than those that have not yet been convicted. Referring to the guilt/
innocence portion of the trial, the Court ruled that "[u]nder our precedents,
the instruction would have been constitutionally required only if the
circumstances created a genuine risk that the jury would conclude,
from factors other than the state's evidence, that the defendant had
committed other crimes."\textsuperscript{15}

The fact that the defendant does not have a criminal history is a
statutory mitigating factor under both Missouri and Virginia law.\textsuperscript{16}
Missouri, however, places the burden of proof on the defendant as to the
existence of this mitigating factor. It is also worth noting that, while
juries cannot be limited to consideration of only statutorily enumerated
mitigating factors, instructions should be requested to the effect that the
Virginia legislature has highlighted a certain element such as a lack of
criminal history as mitigating.\textsuperscript{17} It is not irrational to argue that \textit{Lashley}'s
holding (that no instruction is required in the absence of evidence) means
that an instruction is required when the evidence exists.

After \textit{Lashley}, it is clear that an attorney may be forced to prove that
something did not happen. Virginia law permits counsel to offer proof
by use of any form of admissible evidence.\textsuperscript{18} In a similar situation to
\textit{Lashley}'s, a defense attorney could ask the Commonwealth's attorney to
stipulate to the lack of criminal history. If the Commonwealth's attorney
refuses, the defense attorney may then subpoena the custodians of the
records in every jurisdiction where the defendant has resided in order to
prove the necessary elements.

Summary and analysis by:
Cameron P. Turner

\begin{itemize}
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id. at 1226.
\item \textsuperscript{15} Id. See, \textit{e.g.}, \textit{Kentucky v. Whorton}, 441 U.S. 786, 788-89 (1979).
\item \textsuperscript{16} Mo. Rev. Stat. § 565.012.3(1) (Vernon 1979) (current version Mo.
\item \textsuperscript{17} These elements are found in Va. Code Ann. § 19.2-264.4(B)(I) (1990).
\item \textsuperscript{18} In \textit{Bunch v. Commonwealth}, 225 Va. 423, 436-37, 304 S.E.2d
271, 278 (1983), the Supreme Court of Virginia held that, once the trial
court deemed the evidence (photographs of the deceased) admissible, the
defense could not preclude use of the pictures by offering to stipulate that
the victim had been murdered in the way that the prosecution claimed;
therefore, the prosecution had the right to offer the photographs.
\end{itemize}

\section*{SULLIVAN v. LOUISIANA}

\textbf{113 S. Ct. 2078 (1993)}

\textit{United States Supreme Court}

\section*{FACTS}

The Louisiana Criminal District Court, Parish of Orleans, convicted
John Sullivan of first-degree murder in the course of committing an
armed robbery and sentenced him to death. Michael Hillhouse, a
convicted felon and his alleged accomplice, identified Sullivan at trial as
the murderer. Hillhouse testified pursuant to a grant of immunity. Of the
many people at the bar during the crime, only one
—who had not been able to identify Hillhouse or Sullivan at a lineup
—testified that the two had committed the robbery and that she had seen Sullivan hold a gun to
the victim's head. Other circumstantial evidence tended to show that
Sullivan had been the triggerman. Defense counsel argued that there was
reasonable doubt concerning both the murderer's identity and intent.

In instructing the jury, the trial judge defined "reasonable doubt" in
a way that was, as the State conceded, essentially identical to the
definition found unconstitutional in \textit{Cage v. Louisiana}.\textsuperscript{1} The Supreme
Court of Louisiana held on direct appeal that the erroneous instruction
was harmless beyond a reasonable doubt.\textsuperscript{2} The United States Supreme
Court granted Sullivan's petition for certiorari.

\begin{itemize}
\item \textsuperscript{1} 498 U.S. 39 (1990) (per curiam). The instruction in \textit{Cage} said in
part: "\textbf{It must be such doubt as would give rise to a grave uncertainty,...It is an actual substantial doubt. ...What is required is not an
absolute or mathematical certainty, but a moral certainty.}" Id. at 40. See
\item \textsuperscript{2} \textit{State v. Sullivan}, 596 So.2d 177, 186 (La. 1992).
\item \textsuperscript{3} \textit{Sullivan v. Louisiana}, 113 S. Ct. 2078, 2083 (1993).
\item \textsuperscript{4} Id. at 2080.
\item \textsuperscript{5} Id. (citing \textit{In re Winship}, 397 U.S. 358, 361-364 (1970)).
\end{itemize}

\section*{HOLDING}

The United States Supreme Court reversed the conviction and held
that a constitutionally deficient reasonable doubt instruction cannot be
harmless error.\textsuperscript{3} The Court based its holding on two settled principles.
First, the Sixth Amendment right to a trial by jury is fundamental. Its
most important element is the right to have the jury, not the judge, find
guilt.\textsuperscript{4} Second, the Due Process Clause requires that the prosecution bear
the burden of proving all elements of the offense and the facts necessary
to establish each element "beyond a reasonable doubt."\textsuperscript{5}

\section*{ANALYSIS/APPLICATION IN VIRGINIA}

The Court concluded that the Sixth Amendment right to have a
jury find the defendant guilty is interrelated with the Due Process
requirement of proof beyond a reasonable doubt. The Sixth Amendment
would be violated if a judge were allowed to determine that the defendant
was guilty beyond a reasonable doubt after the jury had determined only
that he was probably guilty. The instruction given to the \textit{Sullivan} jury

\begin{itemize}
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\item \textsuperscript{1} These elements are found in Va. Code Ann. § 19.2-264.4(B)(I) (1990).
\item \textsuperscript{2} In \textit{Bunch v. Commonwealth}, 225 Va. 423, 436-37, 304 S.E.2d
271, 278 (1983), the Supreme Court of Virginia held that, once the trial
court deemed the evidence (photographs of the deceased) admissible, the
defense could not preclude use of the pictures by offering to stipulate that
the victim had been murdered in the way that the prosecution claimed;
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\end{itemize}
did not produce a jury verdict of guilt beyond a reasonable doubt. It was, therefore, constitutionally deficient; it denied Sullivan his Sixth Amendment right to a jury trial.

All constitutional errors do not, however, require reversal. In concluding that a Sullivan-type error is not amenable to harmless-error analysis, the Court distinguished a situation such as that found in Sandstrom v. Montana. The Sandstrom trial court — at the request of the state and over the objection of the defendant — instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." On appeal, the United States Supreme Court held "that the law presumes that a person intends the ordinary consequences of his voluntary acts." On appeal, the United States Supreme Court held that the instruction was unconstitutional because the jury might have interpreted the presumption as being conclusive, or as shifting the burden of persuasion, and either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. The Sullivan court explained that when the jury is instructed to presume an element of the offense, it must still make a finding beyond a reasonable doubt as to the facts upon which the presumption is based. Therefore, if the predicate facts are closely related to the presumed fact, and no reasonable juror could find one without finding the other, the court may be able to conclude that the presumption did not influence the jury's findings.

The Sullivan court further articulated a standard for determining whether constitutional errors are indeed harmless: "The inquiry ... 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." Because in the Sullivan case there was in effect no jury verdict of guilty beyond a reasonable doubt, there can be no meaningful question of whether the same verdict of guilty beyond a reasonable doubt would have been rendered without the constitutional error.

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6 Chapman v. California, 386 U.S. 18 (1967) (holding that even errors of constitutional magnitude may be harmless, but that a reviewing court must consider the error's actual effect on the jury verdict to determine whether it was harmless).
8 Id. at 512.
9 Id. at 514-527.
10 Sullivan, 113 S. Ct. at 2082.
11 Id. at 2081.
13 The Virginia Capital Case Clearinghouse offers the following instruction as a guideline:

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MUELLER v. VIRGINIA

113 S. Ct. 1880 (1993)
United States Supreme Court

FACTS

Authorities arrested Everett Lee Mueller for the rape and murder of ten-year old Charity Powers after her body was found in a shallow grave near his home. The police advised the defendant of his Miranda rights and he agreed to talk to authorities. At one point during the questioning Mueller asked the detective, "[D]o you think I need an attorney here?" The detective shook his head and shrugged. He then said, "[y]ou're just talking to us." Shortly thereafter, Mueller confessed to the rape and murder.

The defendant moved to suppress the confession, claiming it was obtained in violation of Edwards v. Arizona. The trial court denied the