SUPREME COURT OF THE UNITED STATES

No. 92–5129

JOHN SULLIVAN, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[June 1, 1993]

CHIEF JUSTICE REHNQUIST, concurring.

In *Arizona* v. *Fulminante*, 499 U. S. —— (1991), we divided the class of constitutional violations that may occur during the course of a criminal proceeding, be it at trial or sentencing, into two categories: one consisting of "trial error[s]," which "may . . . be quantitatively assessed in the context of other evidence presented," *id.*, at —— (slip op., at 6) (opinion of REHNQUIST, C.J., for the Court), and are amenable to harmless-error analysis; the other consisting of "structural defects," which "affec[t] the framework within which the trial proceeds," *id.*, at —— (slip op., at 8), and require automatic reversal. There is a "strong presumption" that any error will fall into the first of these categories. *Rose* v. *Clark*, 478 U. S. 570, 579 (1986). Thus, it is the rare case in which a constitutional violation will not be subject to harmless-error analysis. See *Fulminante*, *supra*, at —— (slip op., at 8) (listing examples of structural errors).

The Court holds today that the reasonable-doubt instruction given at Sullivan's trial, which (it is conceded) violates due process under our decision in *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*, amounts to structural error, and thus cannot be harmless regardless of how overwhelming the evidence of Sullivan's guilt. See *ante*, at 6–7. It grounds this conclusion in its determination that harmless-error analysis cannot be conducted with respect to error of this sort consistent with the Sixth Amendment right to a jury trial. We of course have long since rejected the argument that, as a general matter, the Sixth Amendment prohibits the

application of harmless-error analysis in determining whether constitutional error had a prejudicial impact on the outcome of a case. See, *e.g.*, *Rose*, *supra*, at 582, n. 11. The Court concludes that the situation at hand is fundamentally different, though, because, in the case of a constitutionally deficient reasonable-doubt instruction, "the entire premise of *Chapman* [harmless-error] review is simply absent." *Ante*, at 5.

Where the jury views the evidence from the lens of a defective reasonable-doubt instruction, the Court reasons, there can be *no* factual findings made by the jury beyond a reasonable doubt in which an appellate court can ground its harmless-error analysis. See *ante*, at 6. The Court thus distinguishes our cases in which we have found jury instructions that create an unconstitutional presumption regarding an element of the offense subject to harmless-error review. In *Rose* v. *Clark*, *supra*, for example, we held that harmless-error analysis may be applied in reviewing instructions that violate the principles of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), and *Francis* v. *Franklin*, 471 U. S. 307 (1985). The "malice instruction" in *Rose* shifted the burden of proof on the issue of intent, in violation of due process under our decision in *Sandstrom*. Because the jury was instructed to presume malice from certain predicate facts, *and it was required to find those facts beyond a reasonable doubt*, we held that the *Sandstrom* error was amenable to harmless-error analysis. 478 U. S., at 580. See also *Connecticut* v. *Johnson*, 460 U. S. 73, 96–97 (1983) (Powell, J., dissenting).

There are many similarities between the instructional error in *Rose* and the one in this case. In the first place, neither error restricted the defendants' "opportunity to put on evidence and make argument to support [their] claim[s] of innocence." 478 U. S., at 579. Moreover, "[u]nlike [structural] errors such as judicial bias or denial of counsel, the error[s] . . . did not affect the composition of the record." *Id.*, at 579, n. 7. Finally, neither error removed an element of the offense from the jury's consideration, *id.*, at 580, n. 8, or prevented the jury from considering certain evidence. (In this regard, a trial in which a deficient reasonable-doubt instruction is given seems to me to be quite different from one in which no reasonable-doubt instruction is given at all.) Thus, in many respects, the *Cage* violation committed at Sullivan's

trial bears the hallmark of an error that is amenable to harmless-error analysis.

One may question whether, even in the case of *Sandstrom* error, the ability to conduct harmless-error review is dependent on the existence of "beyond a reasonable doubt" jury findings. In the typical case, of course, a jury does not make explicit factual findings; rather, it simply renders a general verdict on the question of guilt or innocence. Thus, although it may be possible to conclude from the jury's verdict that it has found a predicate fact (or facts), the reviewing court is usually left only with the record developed at trial to determine whether it is possible to say beyond a reasonable doubt that the error did not contribute to the jury's verdict. Moreover, any time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict. Cf. *Pope* v. *Illinois*, 481 U. S. 497, 503, n. 6 (1987). Yet harmless-error review has become an integral component of our criminal justice system. See *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986); *Chapman* v. *California*, 386 U. S. 18, 22 (1967).

Despite these lingering doubts, I accept the Court's conclusion that a constitutionally deficient reasonable-doubt instruction is a breed apart from the many other instructional errors that we have held *are* amenable to harmless-error analysis. See, *e.g.*, *Carella* v. *California*, 491 U. S. 263 (1989) *(per curiam)* (instruction containing erroneous conclusive presumption); *Pope* v. *Illinois*, *supra* (instruction misstating an element of the offense); *Rose* v. *Clark*, *supra* (instruction containing erroneous burden-shifting presumption). A constitutionally deficient reasonable-doubt instruction will always result in the absence of "beyond a reasonable doubt" jury findings. That being the case, I agree that harmless-

error analysis cannot be applied in the case of a defective reasonable-doubt instruction consistent with the Sixth Amendment's jury-trial guarantee. I join the Court's opinion.