2018

§3.14 Inferences in Criminal Cases

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For reasons examined in the previous section, presumptions relating to elements of the charged offense create constitutional error if they are deployed against criminal defendants in conclusive terms or use language that has burden-shifting effect. However, these problems are largely avoided if presumptions are conveyed by way of inference instructions that invite the jury to consider evidence on one or more points (the basic facts) as it may bear on another point at issue in the case (the inferred or presumed fact). In *United States v. Gainey*, for example, the Supreme Court upheld a statutory inference that presence at a still is "sufficient evidence to authorize conviction" for the crime of operating a still, which was conveyed by instructions emphasizing that the jury "may, if it sees fit," convict on such evidence but that it should also "analyze the evidence pro and con" and consider other "facts and circumstances."[1]

Urge, reassure

These instructions serve an important purpose. In effect, they urge the jury to consider the implications of circumstantial evidence and assure the jury that it may draw important conclusions from such evidence. An inference may also help establish the sufficiency of evidence on a particular point justifying submission of that issue to the jury. But even inference instructions raise some of the concerns mentioned in the prior section, and careless wording can improperly shift burdens to the accused. And instructions that avoid this problem face an additional constitutional hurdle: They must satisfy a rationality requirement imposed by the Due Process Clause, which requires that the fact to be inferred must follow more likely than not from the basic facts giving rise to the inference.

Rationality standard

It has long been understood that presumptions or inferences operating against defendants in criminal cases must satisfy a "rational connection" test.[2] For many years it was unclear exactly how this standard operated or what it meant. In *Gainey,* the Court concluded that the standard was satisfied without really saying what it meant. Some presumptions and inferences were approved when the basic facts made the invited conclusion true beyond a reasonable doubt, and others were disapproved because the basic facts did not even make the invited conclusion more probably true than not.[3] The test case, where the basic facts make the fact to be inferred more probably true than not but fail to prove it beyond a reasonable doubt, never arose. Observers were left wondering whether "rational connection" required the latter or could be satisfied by the former.

New look: *Allen* case

In 1979 the Supreme Court took a new look at its prior decisions and found a new and unexpected pattern. In *County Court of Ulster v. Allen*, it decided that there are actually two devices commonly described as "presumptions" and two standards of rational connection. One device is the "permissive presumption" or

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§3.14 1. United States v. Gainey, 380 U.S. 63, 69-70 (1965).

2. Leary v. United States, 395 U.S. 6, 36-37 (1969) (striking down as irrational and arbitrary a presumption that person possessing marijuana knows it is imported); Tot v. United States, 319 U.S. 463, 467 (1943) (invalidating presumption that possession is presumptive evidence that firearm was received in interstate commerce; statutory presumption is invalid "if there be no rational connection between the fact proved and the ultimate fact presumed").

3. *Compare* Turner v. United States, 396 U.S. 398, 405-419 (1970) (approving presumption, arising on proof of possession of heroin, that defendant knew it was imported, which satisfied beyond reasonable doubt standard; disapproving same presumption as to cocaine, which did not satisfy even more-likely-than-not standard) *with* Leary v. United States, 395 U.S. 6, 36-37 (1969) (disapproving presumption, arising on proof of possession of marijuana, that defendant knew it was imported, which did not satisfy preponderance standard).

inference that "allows" ("but does not require") the jury to reach the suggested conclusion. Such an inference is generally valid if the inferred fact follows from the basic facts more likely than not, because there is no more reason to impose a beyond reasonable doubt requirement for an inference that is merely part of the proof than there is "to require that degree of probative force for any other relevant evidence before it may be admitted."[4]

True presumption: Beyond reasonable doubt

The other device is what might be called a true presumption (described in *Allen* by the redundant term "mandatory presumption"), which is valid only if the basic facts make the presumed fact true beyond reasonable doubt.[5] According to *Allen*, the main distinguishing feature of these devices is that the former is conveyed to the jury in highly contextual instructions worded permissively while the latter is conveyed to the jury in stand-alone isolation stating that proof of the basic facts is deemed sufficient as a matter of law to establish the indicated conclusion.[6]

Inference: Preponderance

It follows, said the Court in *Allen*, that validity of the permissive inference is to be determined by reference to the evidence in the case and not by scrutinizing the presumption on its face, and it generally passes constitutional muster if it supports the invited conclusion more likely than not.[7] (Of course a guilty verdict in a case in which such an inference plays a role must be supported by a totality of evidence that persuades the jury of guilt beyond a reasonable doubt.) The validity of a mandatory presumption must be assessed "on its face" and not in the context of proof actually adduced at trial, and it passes muster only if it supports the invited conclusion beyond a reasonable doubt.[8]

In *Allen*, a bare 5-4 majority held that the inference in question met the rationality standard. *Allen* involved

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4. County Court of Ulster v. Allen, 442 U.S. 140, 167 (1979) (beyond reasonable doubt standard required where inference is "the sole and sufficient basis for a finding of guilt," but such cases are exceedingly rare). *See also* United States v. Warren, 25 F.3d 890, 898-900 (9th Cir. 1994) (approving inference instruction relating to intent in murder case; question is whether inference is justified by reason and common sense in light of proved facts).

5. In its long footnote 16, the Court in *Allen* made confusing comments: It said usually mandatory presumptions "merely shift the burden of production to the defendant," then referred to presumptions that "entirely shift the burden of proof" (citing no cases) and then remarked that "almost uniformly" the cases involve presumptions of the former kind. We know of no presumption establishing an element of a charged offense that allocates either the burden of production or the burden of persuasion to the defendant. Finally, the Court said a presumption that "imposes an extremely low burden of production" might well be analyzed as a permissive inference, a comment that is perhaps best understood to mean that virtually any inference puts some incremental pressure on the defense to explain or rebut the suggested conclusion, and the Court is willing to tolerate such effect.

6. *Allen* cites three decisions exemplifying mandatory presumptions: Turner v. United States, 396 U.S. 398, 408 (1970) (approving presumption, arising on proof that defendant possessed heroin, that he knew it was imported, since all heroin is imported); Leary v. United States, 395 U.S. 6, 30, 37 (1969) (striking down similar presumption, arising on proof that defendant possessed marijuana, since marijuana is grown domestically); United States v. Romano, 382 U.S. 136, 138 (1965) (striking down presumption that presence at still suffices to convict for controlling the still, as opposed to participating in its operation).

7. United States v. Verduzco, 373 F.3d 1022, 1032 n.5 (9th Cir. 2004) (inference instruction is constitutionally valid only if its suggested conclusion is justified by reason and common sense in light of proven facts).

8. The basic facts that give rise to inferences and presumptions (such as being present at a still or possessing drugs) might be shown by evidence that is itself contested or less than conclusive. Here it seems that evidence of such facts must satisfy the standard that applies to the inference or presumption itself. Hence evidence of the basic facts of a contextual inference must satisfy the preponderance standard, and evidence of the basic facts of a stand-alone mandatory presumption must satisfy the beyond reasonable doubt standard.

four persons traveling by car (three adult men and a 16-year-old girl) who were arrested and charged with possessing two guns found on the front seat or floor in a handbag apparently belonging to the girl, who was sitting in the front passenger seat. The Court approved inference instructions based on a statutory presumption arising on proof that the guns were in the car, that all four possessed the guns. The Court thought the instructions were contextual and fit the permissive inference category. And the Court commented that the invited inference seemed reasonable: It was "highly improbable" that the girl alone had the guns—they were too big to fit the handbag; as a juvenile in the company of three adult men, she was "least likely" to be carrying two heavy handguns, and it was "far more probable" that she relied for protection on the knife in her brassiere.[9]

Allen holds that a contextual inference instruction is proper if the conclusion suggested by the instruction, from the trained perspective of the trial judge and reviewing court in light of the evidence presented, follows more likely than not.[10] If this standard is not satisfied, the instruction should not be given. If the men in the backseat had been hitchhikers picked up shortly before the car was stopped, it could not have been said that the guns in the handbag in front probably belonged to them, and the *Allen* instruction would not have been proper with respect to them.

Form of instruction

Although *Allen* approved an instruction using the phrase "presumptive evidence," it is generally improper to use the term "presume" in jury instructions in this setting. That message was confirmed a few weeks later in *Sandstrom*[11] and driven home further in a case that condemned use of the term even though it appeared in the underlying statute (as indeed it did in *Allen*).[12] The problems with the term are that it is ambiguous and overdoes the message—wrongly suggesting that the presumption is conclusive or requires defendant to shoulder the burden of persuasion. Almost as bad are other strong linking terms like "require"[13] or legalistic phrases such as "the law implies"[14] or "prima facie evidence,"[15] which suggest that some high authority has already made the decision and that it is cloaked in special dignity meriting great respect.

It is also dangerous to use phrases that invite the jury to draw a conclusion unless it is persuaded to the contrary, or the suggested conclusion is outweighed by other evidence, or the defendant offers another explanation. Such words tend to shift the burden of persuasion to the defendant[16] and can sometimes be

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9. County Court of Ulster v. Allen, 442 U.S. 140, 163-164 (1979) (the presumption included an exception making it inapplicable if weapons were found "upon the person" of one occupant of the car).

10. *See* Hanna v. Riveland, 87 F.3d 1034, 1036-1037 (9th Cir. 1996) (permissive inference instructing inviting jury to infer recklessness from speeding failed to satisfy *Ulster County*'s "more likely than not standard," hence violated due process).

11. Sandstrom v. Montana, 442 U.S. 510 (1979) (invalidating instruction stating "the law presumes that a person intends the ordinary consequences of his voluntary acts").

12. Carella v. California, 491 U.S. 263, 266 (1989) (constitutional error to use presumption terminology even though taken directly from statute).

13. *See* State v. Short, 88 Or. App. 567, 746 P.2d 742 (1987) (error to tell jury that it was "not required to draw this inference" unless it found all the facts giving rise to it have been proved beyond reasonable doubt).

14. Hill v. Maloney, 927 F.2d 646, 649-650 (1st Cir. 1990) (error to instruct that "malice is implied from any deliberate or cruel act against another" because wording is not permissive in form).

15. State v. Jasper, 467 N.W.2d 855, 858-859 (Neb. 1991) (constitutional error to tell jury that prima facie evidence means "evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted," which shifts burden of persuasion to defendant; the term does not belong in jury instruction).

16. *See, e.g.*, United States v. Silva, 745 F.2d 840, 851-852 (4th Cir. 1984) (disapproving instruction that inference may be found "unless the contrary appears from the evidence"), *cert. denied*, 470 U.S. 1031; United States v. Garrett, 574 F.2d 778, 780-783 (3d Cir. 1978) (condemning introductory phrase "unless the evidence of a case leads you to a contrary conclusion"), *cert. denied*, 436

construed as an improper comment on his failure to testify.[17] Even though some language in *Allen* seems to approve instructions that invite inferences in the absence of explanation, such language would improperly shift to the defendant the burden of producing at least "some evidence" in refutation of an inference that applies to an element in the charged offense.[18] Of course it is not necessarily error to indicate that other evidence may undermine or explain away the suggested inference and that the jury need not draw the inference if such is the case.

"May infer" is preferable

Advising the jury that it "may infer" the suggested conclusion from the basic facts is preferable,[19] although it is doubtful that lay jurors who are not conversant in the ideas and concerns described here would be so attuned to semantic nuance that this milder term by itself would achieve the intended purpose (infer is obscure to many people who confuse it with imply).[20] Far more promising are instructions that highlight the basic facts while referring to all the evidence in the case and gently invite the jury to accord them their probative worth. At the very least, the instruction should stress that the suggested conclusion is not binding,[21] and perhaps the best approach is to tell the jury essentially that it is often possible to draw the indicated conclusion from the basic facts, while emphasizing the context of the case, the beyond reasonable doubt standard, and the jury's role as ultimate factfinder.[22]

Form of judicial comment

U.S. 919.

17. *See* Griffin v. California, 380 U.S. 609, 615 (1965) (commenting on defendant's failure to testify violates privilege against self-incrimination).

18. *See also* Barnes v. United States, 412 U.S. 837, 844-846 (1972) (approving instruction that possessing recently stolen property, "if not satisfactorily explained," is a circumstance from which jury may reasonably infer knowledge that it was stolen, which in light of all the evidence sufficed to indicate guilt beyond reasonable doubt of knowing possession of stolen Treasury check). *See generally* Nesson, Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen, 94 Harv. L. Rev. 1574, 1586 (1981) (arguing that an inference that comes into play due to absence of "explanation" by the defense is unconstitutional where there is insufficient other evidence to justify submitting case to jury).

19. United States v. Nelson, 277 F.3d 164, 197 (2d Cir. 2002) (instruction that jury "may infer and find that defendants intended all consequences that a person, standing in circumstances and possessing like knowledge, should have expected to result from acts he knowingly committed" does not violate *Sandstrom* as it merely let jury infer that accused intends consequences of actions).

20. *See* Harris, Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness, 77 J. Crim. Law & Criminology 308, 356 (1986) (whether jury would understand "you may infer" as being "substantially less coercive" than "the law presumes" seems doubtful).

21. *See* URE 303 and proposed FRE 303 (requiring instruction that would tell jury that it "may" but is "not required" to find the suggested conclusion). *See also* United States v. Warren, 25 F.3d 890, 898-900 (9th Cir. 1994) (in murder case, approving instruction stressing that jury "may find" malice from use of deadly weapon, absent explanatory or mitigating circumstances, that jury was "not obliged" to find intent and "may not find" guilt unless satisfied that each element is proved beyond reasonable doubt; also stressing that jury should consider all the evidence).

22. *See* Nesson, Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen, 94 Harv. L. Rev. 1574, 1589 (1981) (suggesting for the *Allen* case an instruction that "it is often possible to infer from the presence of loaded firearms in an automobile that the occupants" possessed the weapons, but that jury "must decide whether, in the context of this case, such a conclusion is justified" by considering "all the facts," including location of guns, whether they were in plain sight, and how easy they were to reach, and that in the end jury "must decide whether the prosecution has proved beyond reasonable doubt that each defendant is guilty").

An inference instruction is a form of judicial comment on the evidence because it tells jurors what conclusion might be drawn from particular evidence.[23] Traditionally state judges have less freedom to comment on evidence than their federal counterparts, and in keeping with this tradition some states do not permit even mild inference instructions of the sort considered here.[24]

Scrutiny on review

Since FRE 606(b) blocks attempts to learn how jurors actually interpret presumption or inference instructions, review proceeds on the basis of reasonable meaning and probable interpretation. How the state classifies the presumption does not matter,[25] and the question is what a reasonable juror would likely have thought the instruction meant[26] when considered in the context of the instructions as a whole.[27] Errors under *Sandstrom* can be harmless,[28] but a conviction that follows flawed presumption instructions is subject to a special form of the closer scrutiny that comes with the constitutional error standard, meaning that reversal is warranted if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.[29]

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23. Erickson v. Municipality of Anchorage, 662 P.2d 963, 966 (Alaska App. 1983) (presumptions in criminal cases have the same effect as a comment on the evidence).

24. *See, e.g.*, State v. Rainey, 693 P.2d 635, 640 (Or. 1985) (inference instruction ought not to be used against a defendant on an element of a crime; it is "the task of the advocate, not the judge," to comment on inferences).

25. Francis v. Franklin, 471 U.S. 307, 315-316 (1985) (Georgia interpreted instruction as raising only a permissive inference, but Court is not bound; critical issue for constitutional purposes is "what a reasonable juror could have understood the charge as meaning").

26. Sandstrom v. Montana, 442 U.S. 510, at 514 (1979) (focus must be on "the words actually spoken to the jury" and "the way in which a reasonable juror could have interpreted the instruction").

27. Francis v. Franklin, 471 U.S. 307, 315 (1985) (challenged instruction must be considered in context of charges as a whole because other instructions might explain the "particular infirm language" so that "a reasonable juror could not have considered the charge to have created an unconstitutional presumption").

28. Rose v. Clark, 478 U.S. 570, 580-581 (1986) (in some cases "the predicate facts conclusively establish intent, so no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury").

29. Estelle v. McGuire, 502 U.S. 62, 73 n.4 (1991) (adopting "reasonable likelihood" standard as single standard of review for jury instructions challenged as unconstitutional). *See also* Yates v. Evatt, 500 U.S. 391, 403-405 (1991) (test for harmless error for *Sandstrom* violation is "whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption").