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Criminal Law - Presumptions and Burden of Proof - Permissive Presumption of Possession Meeting Subjective More-Likely-Than-Not Standard Deemed Constitutional

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RECENT CASES

CRIMINAL LAW—PRESUMPTIONS AND BURDEN OF PROOF—PERMISSIVE PRESUMPTION OF POSSESSION MEETING SUBJECTIVE MORE-LIKELY-THAN-NOT STANDARD DEEMED CONSTITUTIONAL.

Three adult males and a sixteen-year-old girl[1] were arrested for possession of two loaded handguns when the car in which they were riding was stopped for speeding.[2] The handguns were found in the girl's open handbag, which was positioned in the car between the door and the front seat.[3] The New York trial court, relying on a statutory presumption that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons occupying the vehicle,[4] convicted the four individuals of

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1. As an adjudicated youthful offender, the girl, Jane Doe, was tried with the other defendants and was sentenced to five years' probation. People v. Lemmons, 40 N.Y.2d 505, 507 n.1, 354 N.E.2d 836, 837 n.1, 387 N.Y.S.2d 97, 98 n.1 (1976). Her case was not before the federal courts. Allen v. County Court, Ulster County, 568 F.2d 998, 1000 n.2 (2d Cir. 1977).

2. County Court of Ulster County v. Allen, 442 U.S. 140, 143-44 n.2 (1979). The arrest was made by two state troopers. One officer approached the driver, advised him that he was going to issue a ticket for speeding, requested identification, and returned to the patrol car. After a radio check indicated that the driver was wanted in Michigan on a weapons charge, the second officer returned to the vehicle and placed the driver under arrest. Proceeding to the right side of the car, the officer observed a .45 caliber automatic pistol protruding from an open purse. The officer opened the car door, removed that gun, and saw a .38 caliber revolver in the same handbag. The two remaining male passengers, who had been sitting in the rear seat, and Jane Doe, who had been sitting in the front seat with the driver, were arrested. A search at the police station disclosed a pocketknife and marihuana concealed on Jane Doe's person. *Id.*

3. *Id.* at 144. The purse was located on the passenger side of the front seat where Jane Doe was sitting. It was positioned crosswise on either the front floor or the front seat of the car. *Id.* at 143.

4. *Id.* at 145. New York Penal Law section 265.15(3), under which the presumption arises, provides:

> The presence in an automobile, other than a stolen one or a public omnibus, of any firearm. . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

N.Y. PENAL LAW § 265.15(3) (McKinney 1967).

illegal possession of firearms.[5] Counsel for all four defendants objected to the introduction of the guns into evidence, arguing that the State had not adequately demonstrated a connection between the guns and the defendants.[6] The trial court overruled the objection,[7] and the New York intermediate appellate court[8] and the New York Court of Appeals[9] affirmed the convictions on appeal. The federal district court issued a writ of habeas corpus, reasoning that the mere presence of two guns in a woman's handbag in a car could not reasonably give rise to the inference that the three male defendants were in possession of the firearms.[10] The United States Court of Appeals affirmed the granting of the writ of habeas corpus by the federal district court, holding that the statutory presumption was unconstitutional on its face.[11] The United States Supreme Court reversed, and *held* in a 5-4 opinion that the application of the New York statutory presumption comported with due process standards.[12] *County Court of Ulster County v. Allen,* 442 U.S. 140 (1979).

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5. People v. Lemmons, 49 A.D.2d 639, ____, 370 N.Y.S.2d 243, 244 (1975). The statute under which the defendants were actually charged and convicted was New York Penal Law section 265.05(2), which provides:

> Any person who has in his possession any firearm which is loaded with ammunition, or who has in his possession any firearm and, at the same time, has in his possession a quantity of ammunition which may be used to discharge such firearm is guilty of a class D felony. Such possession shall not, except as provided in subdivision three of this section, constitute a felony if such possession takes place in such person's home or place of business.

N.Y. PENAL LAW § 265.05(2) (McKinney 1967).

6. 442 U.S. at 144.

7. *Id.* The trial court denied the objection, relying on the statutory presumption of possession. *Id.* at 144-45.

8. 49 A.D.2d at ____, 370 N.Y.S.2d at 244. A majority of the intermediate appellate court affirmed the convictions in a memorandum decision. The dissent argued that the presumption of possession should not arise against the three male defendants. *Id.* at ____, 370 N.Y.S.2d at 245-46.

9. 40 N.Y.2d at 507, 354 N.E.2d at 837, 387 N.Y.S.2d at 98. The New York Court of Appeals affirmed the convictions of the male defendants, relying on the statutory presumption of possession. The court supported the use of such a presumption because of the difficulty in proving actual possession by any of the occupants. The conviction of the girl was also affirmed by the New York Court of Appeals, but because she had admitted that the handbag was hers the court did not have to rely on the presumption to prove possession. *Id.* at 509-11, 354 N.E.2d at 839-40, 387 N.Y.S.2d at 99-101.

10. Allen v. County Court, Ulster County, 568 F.2d 998, 1001 n.8 (2d Cir. 1977). The writ was granted on the ground that the statutory presumption was unconstitutional as applied to the facts of the case. *Id.*

11. *Id.* at 999. The United States Court of Appeals for the Second Circuit found that there was not a substantial assurance that the presumed fact (possession of a gun by occupants of an automobile) is more likely than not to flow from the proven fact (presence of the gun in the automobile), and therefore concluded that the statutory presumption was unconstitutional on its face. The court stated that it failed to find any rational basis for such an inference, noting that many occupants may not know that they are riding in a car in which a gun is present, and many who may be aware of the presence of a gun may not be permitted access to it. *Id.* at 1007, 1009.

12. 442 U.S. at 167. Another issue raised in *Allen* was whether the federal district court had validly exercised jurisdiction. The United States Supreme Court held that the district court had jurisdiction to entertain the defendants' claim that the statutory presumption was unconstitutional. The Court found that there was no support in New York law or in the history of this litigation for an inference that the New York courts decided the claim on an independent and adequate state procedural ground which would bar the federal courts from addressing the issue on habeas corpus.

Presumptions are evidentiary devices which allow or require a finder of fact to draw inferences from facts that are proven.[13] Because of a logical connection between the proved fact, Fact A, and the presumed fact, Fact B, courts have allowed the factfinder to infer the existence of Fact B upon proof of Fact A.[14] The use of a presumption in a criminal trial creates a problem in that the prosecutor's burden of proof may be reduced to the point that the defendant's constitutional rights are jeopardized.[15] Due process[16] requires that every element of a crime be proved beyond a reasonable doubt.[17] If Fact B is an element of the crime, the defendant's right to have that fact proved beyond a reasonable doubt may be violated if the factfinder is allowed to infer the existence of Fact B upon proof of Fact A.[18]

The use of legal presumptions has not been a recent development. Judicially created presumptions were acknowledged

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The Court stated that if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court will imply no disrespect for the state by entertaining the claim. *Id.* at 154. *See* Comment, 45 BROOKLYN L. REV. 1209 (1979).

13. *Id.* at 156. A problem which often arises in any discussion of presumptions is one of definition. Dean McCormick has described the term "presumption" as the "slipperiest member of the family of legal terms, except for its first cousin, 'burden of proof'." C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 342, at 802-03 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]. McCormick makes several distinctions concerning presumptions and inferences: (1) A rational inference arises where the judge uses his ordinary reasoning and determines that fact B might be reasonably inferred from fact A. Such an inference is sufficient to get beyond a directed verdict; (2) A standardized inference arises where the judge goes beyond his own mental process and experience and finds that prior decisions or statutes have established that proof of A is sufficient to permit a jury to infer B. Although this is a standardized practice, it still remains an inference rather than a presumption; (3) A presumption arises when the establishment of a fact is sufficient to satisfy a party's burden of producing evidence with regard to fact B, and at least compels the shifting of the burden of production to his adversary. *Id.*

One noted commentator has stated that the ambiguity of terms complicates the situation, and distinguishes presumptions and inferences as follows: (1) A presumption is a rule of law which attaches to one evidentiary fact certain procedural consequences as to the duty of production of evidence, in that it will shift that burden to the adversary; (2) Presumptions of fact are "but mere arguments" as to the probative value of the evidentiary fact. "[T]here is no rule of law attached to them, and the jury may give to them whatever force or weight it thinks best,—just as it may to other evidence." 9 J. WIGMORE, EVIDENCE § 2491, at 288 (3d ed. 1940) [hereinafter cited as WIGMORE]. *See generally* Brosman, *The Statutory Presumption* (pts. 1 & 2), 5 TUL. L. REV. 17, 178 (1930); Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L. REV. 1325 (1979); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931); Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970); Comment, 1973 WASH. U.L.Q. 897.

14. 442 U.S. at 156.

15. *Id.*

16. The fifth amendment to the United States Constitution provides: "[N]or shall any person . . . be deprived of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. V.

The fourteenth amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV.

17. Morissette v. United States, 342 U.S. 246, 273-76 (1952) (requiring that the prosecution prove the element of criminal intent beyond a reasonable doubt); *cf.* Leland v. Oregon, 343 U.S. 790, 799 (1952) (upholding the state's requirement that the defendant has the burden of proving the affirmative defense of insanity).

18. 442 U.S. at 156. *See also* McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916). The Court in *McFarland* stated that it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. The legislature is limited to creating presumptions which meet the rational-connection standard. *Id.*

by English courts as early as 1881.[19] Legislative presumptions have been recorded as early as the reign of King Ine of Wessex (A.D. 688-725).[20] The United States Supreme Court has recognized the use of legislative presumptions at least since 1910.[21] The Supreme Court has determined that for a legislative presumption to comport with due process requirements "it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed."[22] Although this rational-connection standard was initially applied in a civil case,[23] the Court subsequently extended its application to criminal cases.[24]

Two deviations from the rational-connection standard have been made. The first, "greater includes lesser," recognized that the greater power of the legislature to prohibit certain conduct includes the lesser power to create inferences as a means of proof.[25] Soon after its conception, this rationale was rejected by the Court on the ground that due process sets limits upon the legislature's power to eliminate the proof of ultimate facts.[26] The second deviation, "comparative convenience," allowed a legislature to create a presumption when it would elicit evidence that was more convenient for the defendant to produce than for the prosecution to discover.[27] This rationale was also rejected when the Court subsequently stated that comparative convenience is not an independent test but is a mere corollary to the rational-connection standard.[28]

In 1965, the Court applied the original rational-connection standard[29] to two statutory presumptions involving liquor prosecutions. In *United States v. Gainey,*[30] the Court sustained the

19. Dalton v. Angus, 6 App. Cas. 740 (H.L. 1881); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313 (1898) [hereinafter cited as THAYER].

20. THAYER, *supra* note 19, at 316.

21. Mobile, J. and K.C.R.R. v. Turnipseed, 219 U.S. 35, 43 (1910) (upholding presumption that injuries to railroad employees on the job were prima facie evidence of the railroad's negligence).

22. *Id.*

23. *Id.*

24. Tot v. United States, 319 U.S. 463 (1943). The Court struck down a statutory presumption for lack of a rational connection. The presumption provided that when a person who had been convicted of a crime was found in possession of a firearm or ammunition it was to be presumed that the article was received by him in interstate or foreign commerce.

25. Ferry v. Ramsey, 277 U.S. 88, 94 (1927). The presumption in *Ferry* was held to be consistent with due process requirements. The statutory presumption provided that, in suits holding a bank director liable for deposits, the fact of a bank insolvency when deposits are accepted shall be prima facie evidence that the bank director knew or should have known of the insolvency. The United States Supreme Court stated that "the statute might have made directors personally liable to depositors in every case. . . . The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." *Id.*

26. 319 U.S. at 466-67.

27. Morrison v. California, 291 U.S. 82, 88-89 (1934).

28. 319 U.S. at 467.

29. 219 U.S. at 43.

30. 380 U.S. 63 (1965). The presumption in question provided:

validity of a presumption which provided that presence at the site of a still was sufficient to convict a defendant of carrying on the illegal business of distilling.[31] *Gainey* was later distinguished in *United States v. Romano,*[32] in which the Court struck down a statutory presumption, stating that presence at a still site was insufficient evidence to find that the individual possessed the still.[33] The *Romano* Court found that, since many people might be present at the still site without being guilty of possession, there was not a sufficient rational connection between presence and the crime of possession.[34]

In *Leary v. United States,*[35] the Court reformulated the rational-connection standard, stating that the connection between the fact presumed and the fact proved must at least be such that the presumed fact "is more likely than not to flow from the proved fact" to comport with due process.[36] Concluding that the presumption in question failed to meet even the lesser more-likely-than-not standard, the *Leary* Court declined to consider whether the more stringent beyond-a-reasonable-doubt standard should also be met.[37] When confronted with statutory presumptions in two cases subsequent to *Leary,* the Supreme Court again chose not to determine whether the reasonable-doubt or the more-likely-than-not standard should apply.[38]

> Whenever on trial for violation of subsection (a) (4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury.

26 U.S.C. § 5601 (b) (2) (1958).

31. United States v. Gainey, 380 U.S. 63, 68 (1965).

32. 382 U.S. 136 (1965).

33. United States v. Romano, 382 U.S. 136, 141 (1965).

34. *Id.*

35. 395 U.S. 6 (1969).

36. Leary v. United States, 395 U.S. 6, 36 (1969). The presumption in *Leary* was provided in 21 U.S.C. § 176(a), which stated in part: "Whenever . . . the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." 21 U.S.C. § 176 (a) (1964).

The more-likely-than-not standard strengthens the rational-connection standard, because the relation between the proven fact and the presumed fact for the connection must be so strong that it is more likely than not that the presumed fact will exist if the proven fact does. Yet the strength of the rational connection necessary to satisfy this standard may not be sufficient to satisfy the beyond-a-reasonable-doubt standard. The reasonable-doubt standard requires that the evidence be sufficient for a rational juror to find the presumed fact beyond a reasonable doubt. Barnes v. United States, 412 U.S. 837, 843 (1973).

37. 395 U.S. at 36 n.64.

38. Barnes v. United States, 412 U.S. 837 (1973); Turner v. United States, 396 U.S. 398 (1970). The presumption at issue in *Turner* was practically identical to the presumption in *Leary*, except that it applied to possession of heroin and cocaine rather than marihuana:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation,

The United States Supreme Court, in *County Court of Ulster County v. Allen,*[39] was again faced with the issue of due process limitations on statutory presumptions in criminal cases. Once again the Court declared the need for the state to prove the elements of the crime beyond a reasonable doubt.[40] The Court explained that the limitations on statutory presumptions in criminal cases depend upon the type of presumption that is being used.[41] The Court in *Allen* distinguished between a mandatory presumption and a permissive presumption,[42] determining that a mandatory presumption *requires* that the trier of fact find the presumed fact upon proof of the basic fact unless the defendant has come forward with some evidence to rebut the presumption.[43] It

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> concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

21 U.S.C. § 174 (1964).

The *Turner* Court made an extensive review of legislative records and narcotic cases, and concluded that heroin consumed in the United States is illegally imported and that Turner must have known this fact. The Court therefore upheld the presumption as applied to the illegal importation of heroin. 396 U.S. at 415-16. The Court struck down the same presumption with regard to the illegal importation of cocaine, however, stating that it "could not be sufficiently sure either that the cocaine that Turner possessed came from abroad or that Turner must have known that it did." *Id.* at 419.

In *Barnes,* the Court applied the rationale of earlier cases to a common-law presumption. The presumption provided that the unexplained possession of recently stolen goods (Treasury checks in this case) implies knowledge that the goods are stolen. The Court upheld the presumption, concluding that the rational connection between the fact proved and the fact presumed satisfied the beyond-a-reasonable-doubt standard as well as the more-likely-than-not standard. Because the more stringent test was met, it was not necessary for the Court to determine whether the lesser test also comported with due process. 412 U.S. at 845-46.

39. 442 U.S. 140 (1979).

40. *Id.* at 156. The Court stated as follows:

> The value of these evidentiary devices [inferences and presumptions], and their validity under the Due Process Clause, vary from case to case. . . . [I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

Id.

See also Mullaney v. Wilbur, 421 U.S. 684, 702-03 n.31 (1974) (State was required to prove beyond a reasonable doubt that the defendant in a homicide case had not acted in the heat of passion); *In re* Winship, 397 U.S. 358, 364 (1970) (State was required to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged).

41. 442 U.S. at 157.

42. *Id.* at 157-60.

43. *Id.* at 157. The United States Supreme Court in *Allen* explained that to defeat a mandatory presumption the defendant must come forward with at least some evidence to rebut the presumption. *Id.* This is the generally accepted view of the consequences of a "presumption." 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 300[01] (1978) [hereinafter cited as WEINSTEIN]. See also McCormick's and Wigmore's definitions of "presumptions," which both coincide with the United States Supreme Court's definition of a mandatory presumption. *See supra* note 13.

There is a divergence of views, however, regarding the amount of evidence that is required to rebut a mandatory presumption. The *Allen* Court recognized both of these views, stating that there

was recognized that the use of a mandatory presumption in a criminal case may jeopardize a defendant's due process rights, and that such a presumption will be upheld only when the extent to which the proved and presumed facts coincide is determined.[44]

A permissive presumption *allows,* but does not require, the trier of fact to infer the presumed fact, and places no burden of proof of any kind on the defendant.[45] Inference of a permissive presumption endangers the beyond-a-reasonable-doubt standard only when there is no rational way for the trier of fact to make the connection permitted by the inference.[46] After distinguishing the two types of presumptions, the Court in *Allen* found that, since the jury had not been required in the trial court's instructions to infer the presumed fact, the presumption was a permissive one.[47]

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are two classes of mandatory presumptions. The first class "merely shifts the burden of production to the defendant." 442 U.S. at 157-58 n.16. According to this view, which is espoused by Thayer, Wigmore, and the Federal Rules of Evidence (for civil cases only), the opponent to the presumption is required merely to come forward with any evidence. Once the opponent has produced some evidence, a directed verdict is avoided and the presumption is destroyed. FED. R. EVID. 301; THAYER, *supra* note 19, at 337; 9 WIGMORE, *supra* note 13, at § 2491 (2). This view has been labeled the "bursting bubble" theory, because once evidence in regard to the presumed fact is produced the presumption is defeated and disappears. MCCORMICK, *supra* note 13, at § 345(A); 1 WEINSTEIN, *supra,* at ¶ 300[01].

The other class of mandatory presumptions which the United States Supreme Court recognized in *Allen* was the type which "entirely shifts the burden of proof to the defendant." 442 U.S. at 158 n.16. This type of presumption places a greater burden on the opponent to the presumption. The opponent is required to come forward with some evidence (the burden of production is shifted to him), and that evidence must be sufficient to convince the factfinder of the nonexistence of the presumption (the burden of persuasion is therefore also shifted to him). This view, usually named after its advocate, Edmund Morgan, has been adopted by North Dakota as applied to presumptions in civil cases. N.D.R. EVID. 301. *See* Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof,* 47 HARV. L. REV. 59, 83 (1933). The constitutionality of shifting the entire burden of proof in a civil case was upheld in Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) (North Dakota presumption imposed on defendant the burden of proving that the death of the insured was due to suicide).

The Supreme Court in *Allen* cautioned that "[a] mandatory presumption is a far more troublesome evidentiary device [than a permissive presumption]. For it may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden . . . . " 442 U.S. at 157.

44. 442 U.S. at 157-59. The Court explained that the validity of a mandatory presumption is not "based on an independent evaluation of the particular facts presented by the State, [but] the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases." *Id.* at 159.

45. *Id.* at 157. The Court's use of the term "permissive presumption" denotes the device which is not generally considered a "presumption" at all, but which rather is generally referred to as an "inference." *See* 1 WEINSTEIN, *supra* note 43, at ¶ 300[01]. Presumptions and inferences are also distinguished by McCormick and by Wigmore, who refers to inferences as "presumptions of fact." *See supra* note 13.

46. 442 U.S. at 157.

47. *Id.* at 160-62. The instructions to the jury, in relevant part, were as follows:

> "Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession."
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> "In other words, [from] these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced."

The Court then discussed the rational basis of the presumption of possession. Although noting the improbability of the girl retaining sole custody of two large guns,[48] the Court concluded from the facts of the case that it was rational to presume that the male defendants were fully aware of the presence of the guns.[49] It was also held to be a valid presumption, based upon the facts of the case, that the male defendants had the ability and the intent to exercise dominion and control over the weapons.[50] Therefore, the Court found that there was a rational connection between the proved fact (presence of the two firearms in the automobile) and the presumed fact (possession by all the occupants), and the presumed fact of possession was more likely than not to flow from the proved fact of presence.[51] The Court concluded that, because the presumption was a permissive one, the connection between the presumed fact and the proved fact need not meet the more stringent beyond-a-reasonable-doubt test.[52] Because the permissive presumption had met the more-likely-than-not test, as applied to the circumstances, the Court held that the statutory presumption had not violated the defendants' constitutional rights.[53]

Justice Powell's dissent in *Allen,* however, refused to recognize a precedent for the Court's distinction between the types of presumptions.[54] Powell emphasized that, even where a presumption does not shift the burden of proof, it cannot be used to prove an element of the offense if the facts proved would not permit a reasonable mind to find the presumption beyond a reasonable doubt.[55] While adhering to this reasonable-doubt standard, Powell

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> "The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of evidence in the case."

442 U.S. at 161 n.20 (transcript citations omitted).

48. *Id.* at 163. The Court reviewed the facts of the case, which suggested that the guns were in fact in the sole possession of Jane Doe. The Court stated that the handbag was open, within easy reach of the driver, and perhaps within reach of the two defendants sitting in the back seat. The Court also noted:

> As a sixteen year old girl in the company of three adult men she was the least likely of the four to be carrying one, let alone two, heavy handguns. It is far more probable that she relied on the pocketknife found in her brassiere for any necessary self-protection . . . . [I]t was not unreasonable . . . for the jury to infer that when the car was halted for speeding, the other passengers in the car anticipated the risk of search and attempted to conceal their weapons in a pocketbook in the front seat.

Id. at 163-64.

49. *Id.* at 164.

50. *Id.* at 164-65.

51. *Id.* at 165.

52. *Id.* at 167.

53. *Id.* at 164-66.

54. *Id.* at 170 n.3 (Powell, J., dissenting) ("I have found no recognition in the Court's prior decisions that this distinction is important in analyzing presumptions used in criminal cases.").

55. *Id.* at 169 n.2 (Powell, J., dissenting).

also attacked the application of the more-likely-than-not standard,[56] stating that an individual's mere presence in an automobile where there is a handgun does not make it more likely than not that the individual possesses the weapon.[57] Rejecting the subjective standard used by the Court, Powell indicated that the Court had ignored prior decisions by not analyzing the presumption on its face.[58] Previous Court decisions required that presumptions reflect some valid general observation about the natural connection between events as they occur in our society.[59] Powell's dissent contended that the Court's novel approach of allowing the inference to be found reasonable based upon evidence adduced at trial would permit the use of any inference, no matter how facially irrational it may be.[60]

After *Allen,* the constitutional limitations on statutory presumptions are still unclear. The *Allen* Court did, however, bring some of the limitations into sharper focus. The Court for the first time distinguished between permissive presumptions, or "inferences," which merely *allow* the factfinder to make the inference, and mandatory presumptions, or "presumptions," which *require* the factfinder to make the inference.[61] Although the Court commented extensively on the use of mandatory presumptions, it avoided defining the precise limits of such presumptions.[62] A per-

56. *Id.* at 168-77 (Powell, J., dissenting).

57. *Id.* at 168 (Powell, J., dissenting).

58. *Id.* at 170 (Powell, J., dissenting).

59. *Id.* (Powell, J., dissenting). In Tot v. United States, 319 U.S. 463, 468 (1943), the Court concluded that a valid presumption may be created upon a view of relation broader than that which a jury might take in a specific case. In Leary v. United States, 395 U.S. 6, 46-48 (1969), the Court invalidated a statute, finding an insufficient basis in fact for the conclusion that "one in possession of marihuana is more likely than not to know that his marihuana was illegally imported." Citing Barnes v. United States, 412 U.S. 837, 844-45 (1973), Powell's dissent asserted that the Court had declared "that it was well founded in history, common sense, and experience . . . that those in the unexplained possession of recently stolen property know it to have been stolen." 442 U.S. at 172 (Powell, J., dissenting).

60. 442 U.S. at 177 (Powell, J., dissenting).

61. 442 U.S. at 154-63.

62. *Id.* In a case decided subsequent to *Allen,* the United States Supreme Court determined that in criminal cases in which a jury instruction could be interpreted by the jury as a conclusive (irrebuttable) or persuasion-shifting (rebuttable) presumption, and the presumption concerns an element of the crime charged, there is a violation of the fourteenth amendment requirement that the State prove every element of a criminal offense beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 520-21 (1979).

In *Sandstrom,* the Court determined that, because intent was an element of the "deliberate homicide" charge, the State could not shift the burden of proving intent to the defendant. *Id.* The Court held that the trial court's instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" shifted the burden of proof to the defendant. *Id.* at 517 (emphasis omitted). The Court stated that, although the Supreme Court of Montana had determined that the presumption required only that the defendant produce some evidence to rebut the presumption (that is, the presumption only shifted the burden of production), the jury may have interpreted the presumption as conclusive or persuasion-shifting; therefore, the State had effectually deprived the defendant of his fourteenth amendment right of due process. *Id.* at 519

The United States Supreme Court in *Sandstrom* did not determine whether a mandatory (rebuttable) presumption which concerns an element of the crime charged and which shifts only the burden of production could be deemed constitutional.

missive presumption, the Court held, may be found nonviolative of due process, provided that the fact presumed is more likely than not to flow from the fact proved when the presumption is applied to the evidence adduced at trial.[63] Additionally, although the Court reviewed the merits in this case, it did not expressly preclude itself from in the future striking down a presumption as unconstitutional on its face.[64]

Based on *Allen,* North Dakota's general statute on criminal presumptions,[65] which differs considerably from its civil presumption rule,[66] would most likely be found constitutional. The statute meets and goes beyond the constitutional requirements laid down in *Allen* in two respects. First, although in *Allen* the United States Supreme Court did not condemn the use of mandatory presumptions in criminal cases,[67] the North Dakota rule does not provide for the use of such presumptions.[68] Second, the North Dakota rule requires that a presumption in a criminal case must be established beyond a reasonable doubt,[69] whereas in *Allen* the Court required that the presumption only meet the lesser standard of the more-likely-than-not test.[70]

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63. 442 U.S. at 154-63.

64. *Id.* at 156.

65. N.D. CENT. CODE § 12.1-01-03 (1976) (North Dakota's general statute on criminal presumptions); N.D.R. EVID. 303.

Section 12.1-01-03(4) of the North Dakota Century Code provides:

> When a statute establishes a presumption, it has the following consequences:
> a. If there is sufficient evidence of the facts which give rise to the presumption, the presumed fact is deemed sufficiently proved to warrant submission of the issue to a jury unless the court is satisfied that the evidence as a whole clearly negates the presumed fact.
> b. In submitting the issue of the existence of the presumed fact to a jury, the court shall charge that, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the facts giving rise to the presumption as strong evidence of the fact presumed.

N.D. CENT. CODE § 12.1-01-03 (4) (1976).

66. N.D.R. EVID. 301. Rule 301(a) of the North Dakota Rules of Evidence describes the effect of the civil case presumption:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, if facts giving rise to a presumption are established by credible evidence, the presumption substitutes for evidence of the existence of the fact presumed until the trier of fact finds from credible evidence that the fact presumed does not exist, in which event the presumption is rebutted and ceases to operate. A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

N.D.R. EVID. 301(a).

The procedure committee notes to rule 301 make it clear that the civil case presumption shifts the entire burden of proof to the opponent to the presumption: "Rule 301, as an expression of the theory expressed by Morgan, provides that a presumption imposes upon the party against whom it is directed the burden of providing its non existence." N.D.R. EVID. 301, Procedure Committee Note. *See also supra* note 43, for an explanation of the Morgan theory.

67. 442 U.S. at 157-60.

68. N.D. CENT. CODE § 12.1-01-03 (1976); N.D.R. EVID. 303.

69. N.D. CENT. CODE § 12.1-01-03 (1976); N.D.R. EVID. 303.

70. 442 U.S. at 156-67.

The constitutionality of North Dakota's version of the New York firearm presumption may be dependent upon its usage and effect.[71] The North Dakota statute provides that the presence of a pistol in an automobile shall be evidence sufficient to establish that all of the occupants had possession of the handgun.[72] Although this statute raises a presumption of possession,[73] a problem arises because North Dakota law does not specifically require that this presumption have the effect defined in North Dakota's general criminal presumption statute.[74] Because the statute does not expressly state the effect of the presumption which it creates, the courts of North Dakota may be required to do so. In addressing this question, courts should be aware of the *Allen* decision and the limits and standards of presumptions set forth therein.

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71. Section 62-01-03 of the North Dakota Century Code provides:

> The presence in an automobile, other than a public omnibus, of a pistol not on the person of any occupant shall be evidence sufficient to justify a court or jury in finding that each of the persons in the automobile was in illegal possession of the pistol. This section shall not apply if any person in such automobile not under duress has with him a valid license to carry the pistol so found or may legally carry it without a license, or to the regular and ordinary transportation of pistols as merchandise, or to a duly licensed driver of the automobile lawfully operating it for hire in the due, lawful, and proper pursuit of his trade.

N.D. CENT. CODE § 62-01-03 (1960).

72. *Id.*

73. *Id.*

74. N.D. CENT. CODE § 12.1-01-03 (1976); N.D.R. EVID. 303.