STATE OF CALIFORNIA — Edmund G Brown Jr., *Governor*

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July 22, 2014

Mr. Frank A. McGuire
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Grimes*, S076339

Dear Mr. McGuire:

On June 18, 2014, the Court invited the parties in the above case to file supplemental letter briefs in response to three questions. By the motion accompanying this letter brief, the Office of the State Public Defender (OSPD) seeks to file this pleading addressing only Question No. 1, which asks:

> Does the Attorney General's failure to argue in the answer brief that an alleged error is harmless constitute forfeiture of any harmless error argument regarding either state law errors or federal constitutional errors?

Because OSPD takes a broader view of the significance of this question than reflected by the approach of the parties, OSPD files this letter brief in support of neither party. The issue OSPD addresses, however, is a necessary byproduct of the question presented by the Court and should be answered when the Court resolves this question in its opinion.

I. The Issue Of Ultimate Import Reflected By This Court's Query Is Not Necessarily Whether The Attorney General Has Forfeited The Right To Make A Harmless Error Argument, But Rather How This Court Should Address The Consequences Of Its Failure To Argue Harmless Error.

The Court understandably has phrased its question in terms of what happened during the presentation of an issue in appellant's case: the Attorney General failed in its briefing in the Court to present an argument that the error at issue was harmless, but then attempted to assert that position at oral argument. (See Grimes Supplemental Letter

Brief, pp. 2-5.) While an appropriate matter of inquiry, the issue of whether the state has forfeited its right to make a harmless error argument is merely the initial point of inquiry. Answering only that question leaves unanswered the more essential inquiry: And then what happens, i.e., what are the consequences of the forfeiture?

It is this question – the "and then what happens" part of the overall issue – that gives broader meaning to the Court's inquiry and presents a question of broader import to the appellate process. If the answer is that nothing much happens because the Court will proceed to resolve an appeal in the same manner it would have if the state had briefed harmlessness, then OSPD submits that great damage will be done to the appellate system as a whole. It is this broader prospect that OSPD addresses in this letter brief.

II. The Appellate System Depends Upon The Parties Litigating And The Reviewing Court Deciding The Claims Raised On Appeal.

By dint of constitutional provision, statutory direction, and procedural rule, all of the participants in the review process in this state have defined roles to play. In a criminal case, the defendant has the right to review by an appellate court, providing the claims are presented in a prescribed manner and according to procedural dictates. The state then has an opportunity to respond and present argument as to why the judgment should stand. The role of the reviewing court is to assess the merits of these competing views and render a decision either affirming or reversing the judgment below. This system does not contemplate that the reviewing court should also play the role of litigant and proffer independent reasons as to why a judgment should be affirmed or reversed where a party has failed to take such a position. OSPD urges this Court to reaffirm this procedural construct by clarifying that it is not the proper role of a reviewing court to raise independently, and subsequently rule upon, the prejudice component of a defendant's claim when the state has not placed that aspect of the claim into question.

The general premise of the adversary system is that we rely upon the opposing parties to present issues upon which there is a controversy and then rely upon the courts to act as neutral arbiters of those issues. The operative presumption is that the opposing parties have a vested interest in best presenting their views and will advance the facts and arguments which entitle them to relief. (*Greenlaw v. United States* (2008) 554 U.S. 237, 243-244.) For this reason, the role of the courts is a more passive one than may exist in other countries in that courts here "wait for cases to come to [them], and when they do [courts] normally decide only questions presented by the parties." (*United States v. Samuels* (8th Cir. 1987) 808 F.2d 1298, 1301 (Arnold J., conc. opn. in denial of reh'g en banc); see Kaplan, *Civil Procedure–Reflections on the Comparison of Systems* (1960) 9 Buffalo L. Rev. 409, 431-432 [United States system "exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge"].)

The statutes and rules that regulate the appellate process in this state recognize these general themes. For example, the Rules of Court set forth a regimented procedure for the parties to follow in filing briefs presenting their side of the controversy (Cal. Rules of Court, rule 8.360), and there is a specific statute that prevents a reviewing court from rendering a decision based on an issue that the parties have not had the opportunity to brief (Gov. Code, § 68081). Further, as appellant points out, reviewing courts have consistently refused to consider claims that were not asserted in a manner that enables the opposing party to respond as contemplated by the appellate structure of this state. (See Grimes Supplemental Letter Brief, pp. 5-6.)

There is also a constitutional component embedded in the concept that the parties present arguments and the courts adjudicate the arguments presented: the separation of powers doctrine. The California Constitution provides that the powers of state government are divided between the legislative, executive, and judicial branches and that one branch may not exercise a power of the other except as permitted by the Constitution. (Cal. Const., art. III, § 3.) Basically, one branch cannot arrogate to itself the core functions of another branch. (*In re Lira* (2014) 58 Cal.4th 573, 583; see *Perez v. Richard Roe* (2006) 146 Cal.App.4th 171, 176-177 [doctrine prevents overreaching by one branch against another].) This does not mean that one branch may not perform a function that affects another branch, but rather means that the exercise of such a function may not materially impair the exercise of a power of the other branch. (*In re M.C.* (2011) 199 Cal.App.4th 784, 804.) For example, the judiciary has the core power to decide whether a law passed by the Legislature is arbitrary for constitutional purposes, but the judiciary may not inquire into the wisdom of the underlying policy choice the Legislature made in passing the law. (*People v. Bunn* (2002) 27 Cal.4th 1, 17.) This Court has recognized that even though the Constitution suggests a sharp demarcation between the three branches of government, the reality is that there is some mutual dependence. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53.) The Court has also recognized, however, that the separation of powers doctrine unquestionably places limits upon the actions of each branch with respect to the other branches. (*Ibid.*) The action that a reviewing court takes when confronted with a situation such as that presented in this case is affected by these principles and implicates the core functions of both the judiciary and the executive branches.[1]

[1] The Attorney General and district attorney offices are considered part of the executive branch for separation of powers purposes. (See *People v. Parmar* (2001) 86 Cal.App.4th 781, 797; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 854.)

III. The State's Decision To Not Contest The Harmfulness Of An Error Impacts The Manner In Which This Court Undertakes Its Prejudice Analysis.

Examining the rules, statutes, constitutional provisions, and case law yields the conclusion that when the state fails to present argument regarding the prejudice component of an error, a reviewing court must alter its approach in deciding whether that error warrants relief.[2] To proceed as if it is "business as usual" disregards the nature and purpose of the adversary system.

The most blatant affront to the adversary system occurs when the respondent totally abdicates its role by failing to file a brief in the reviewing court. In that situation, courts have differed in how to approach resolution of the appeal. The differing views include that such a failure raises at least an inference the party concedes the appeal has merit (see *People v. Carson* (1970) 4 Cal.App.3d 782, 784-785); that the failure is a consent to a reversal (*Grand v. Griesinger* (1958) 160 Cal.App.2d 397, 407); or that the failure is an abandonment of any attempt to support the judgment (*Roth v. Keene* (1967) 256 Cal.App.2d 725, 727-728). There is also the view that reversal is not automatic because the burden is always on appellant to show error. (*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226-227.) Finally, there is a view that seems to reflect the position taken by the current iteration of the Rules of Court. In *Walker v. Porter* (1974) 44 Cal.App.3d 174, 177, the court of appeal held that "the better rule is to examine the record on the basis of appellant's brief and to reverse only if prejudicial error is found." This approach seems compatible with the provision in the Rules of Court that when a respondent fails to file a brief, the court decides the appeal on the record, the opening brief, and any oral argument by appellant. (Cal. Rules of Court, rule 8.360(c)(5)(B).)

The foregoing approach reflects the situation where there has been a total failure of advocacy, which is not the situation when, as in *Grimes*, the state simply fails to make a prejudice argument, but otherwise contests the specific assertion of error, as well as seeks to support the judgment as a whole. The dynamic presented by the latter situation is different than that presented by a total failure to contest the appeal. When the respondent fully addresses a claim but does not argue prejudice, the reasonable inference is that there has been a conscious decision that prejudice cannot be refuted. Indeed, that is what this

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[2] OSPD is aware that this Court has invited further briefing that has yielded a harmless error argument by respondent. (See Respondent's Supplemental Letter Brief, pp. 5-19.) However, unless this Court imposes upon itself and the intermediate courts of appeal the requirement that in all cases where the respondent has failed to address prejudice, the reviewing court must affirmatively reach out and invite further briefing, the manner of resolving the prejudice issue without input from the respondent is one that this Court should address.

Court has specifically held. In *People v. Johnson* (1980) 26 Cal.3d 557, this Court noted:

> Defendant does not assert that the delay actually prejudiced his defense. Indeed, defendant by his silence on this issue essentially concedes the absence of prejudice . . .

(*Id.* at p. 574 [addressing prejudice component on speedy-trial claim on appeal].) This is logical, and OSPD urges the Court to continue to follow this approach.

The assumption that the failure to argue lack of prejudice constitutes an implicit concession that prejudice exists is supported by many of the legal principles discussed previously in this letter brief. For example, under the theory that our adversary system relies upon opposing parties to present competing views for adjudication by an impartial and detached judiciary, the assessment of a party that there is no adversarial position to be taken on the issue of prejudice certainly is entitled to deference. This also makes sense because of the nature of the prejudice determination. The "question as to whether the error was sufficiently prejudicial to require a reversal must be determined from the circumstances of the particular case." (*People v. La Verne* (1957) 148 Cal.App.2d 605, 610.) The parties are in a unique position to make this assessment. As one judge has observed:

> Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us.

(*United States v. Samuels, supra*, 808 F.2d at p. 1301 (Arnold, J., conc. opn. in denial of reh'g en banc).) Judge Arnold's words ring just as true when "State of California" is substituted for "United States."

Accepting the implicit concession of the prejudicial effect of an error that arises from the state's decision to not present a prejudice argument also honors the separation of powers doctrine. One must assume that when the state files a lengthy brief responding to an appellant's contentions as to why reversal is warranted, the failure to include a prejudice argument as to a claim of error was a prosecutorial decision. After all, prejudice is a component of virtually all claims placed before a reviewing court, so it is not something likely to be overlooked. Consequently, it is reasonable to conclude that the representative of the state has made a decision to not advance such an argument. This is a core function of the executive branch, and the "[s]eparation of powers doctrine precludes

courts from interfering with executive decisions of prosecutorial authorities."[3] (*People v. Honig* (1996) 48 Cal.App.4th 289, 355.)

IV. This Court's Role Should Be That Of A Detached Arbiter Assessing The Merits Of The Issues In The Manner In Which They Are Presented By The Parties.

The ultimate question for resolution by this Court is how a reviewing court should approach its task of deciding a claim of error when the respondent has not addressed the prejudice component of a claim. To that end, the discussion until this point has provided a backdrop for answering that question. The answer varies depending upon the type of error at issue.

If the error being considered is federal constitutional error, the resolution is fairly straight-forward. OSPD agrees with the analysis set forth in Grimes's Supplemental Letter Brief at pages eight through twelve, and urges the Court to make clear the principle that when the state fails to assert an argument that the federal error at issue is harmless beyond a reasonable doubt, they have conceded that issue. After all, that is what this Court has held regarding the defendant's failure to assert prejudice. (See *People v. Johnson*, *supra*, 26 Cal.3d at p. 574.)

The question of the reviewing court's role in determining state law error is somewhat more complex and involves an integration of the roles of the parties in the appellate system with the mandate of the California Constitution that no judgment be set aside unless there has been a miscarriage of justice (Cal. Const., art. VI, § 13), which this Court has read to mean that the defendant need show there exists a reasonable probability that he or she would have obtained a more favorable result if the error had not occurred. (*People v. Montes* (2014) 58 Cal.4th 809, 876.) Consequently, the defendant bears a

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[3] In a broad sense, one might analogize this decision to the executive decision regarding whether to bring charges or not. (See *People v. Birks* (1998) 19 Cal.4th 108, [prosecution's sole authority to determine whom to charge based on separation of powers].) Certainly, in exercising its charging discretion the prosecutor assesses the evidence and determines whom to charge and what charge to bring. Part of this determination must necessarily be what evidentiary support is necessary to bring that charge. An inherent part of that determination is whether the prosecution would bring the charge without any particular piece of evidence. By reaching the conclusion that an error is not harmless, the prosecutor – in this case the Attorney General – is performing the same analysis that took place initially when exercising the charging function; the Attorney General is determining that the evidence at issue was crucial to being able to prove the case and that without it the charge would not have been brought. This is an executive function and not a judicial function.

burden to demonstrate prejudice resulting from the error, and the issue for resolution here is how a reviewing court approaches its role when the respondent has not affirmatively argued that the defendant has failed to carry that burden.

The initial question is whether the state's failure to contest whether the defendant has met this burden constitutes a concession on the part of the state that the burden has been met and the error meets the miscarriage of justice test. Given the authorities previously discussed in this letter brief, this Court could make such a finding. The real issue, however, is whether the Court is then bound by the concession and obligated to order a reversal of the judgment. Appellant Grimes indicates that because of the defendant's burden in this regard, the state's failure does not constitute a forfeiture, and the burden remains with the defendant to demonstrate prejudice. (Grimes Supplemental Letter Brief, p. 7.) Even if this is true, it does not resolve the question of the approach the reviewing court should adopt to decide the issue.

Appellant Grimes suggests that the reviewing court adopt a procedure that orders the state to respond to the issue, followed by a defense reply, and then an opportunity for oral argument. (Grimes Supplemental Letter Brief, p. 8.) Certainly, this would be an acceptable procedure. OSPD suggests, however, that it places the burden on the appellate courts to engage in another round of briefing and argument – a burden that is unwarranted when the state has already made an affirmative decision to proceed with the case as is. Thus, even if this procedure is suggested as an available option for reviewing courts, this Court should also address the proper approach for a reviewing court short of undergoing further briefing and argument.

OSPD submits that the proper approach is that envisioned by the Rules of Court. In the absence of the respondent contesting the defendant's prejudice argument, the reviewing court decides the issue by assessing the defendant's argument in light of the record of the case. (See Cal. Rules of Court, rule 8.360(c)(5)(B).) In other words, the reviewing court takes the argument presented at face value and determines whether that argument, when assessed against the record, demonstrates a miscarriage of justice. Under this approach, the reviewing court does not supply independent reasons that would more appropriately be raised by the respondent as to why appellant's argument does not show prejudice. This is the same general approach this Court has taken when defendants have failed to sufficiently construct arguments on their own behalf. For example, in *People v. Stanley* (1995) 10 Cal.4th 764, the defendant made a claim of insufficiency of the evidence, but merely referred the Court to his statement of facts rather than specify with particularity why the evidence was insufficient. This Court held that its role was not to "construct a theory supportive of his innocence and inconsistent with the prosecution's version of the evidence." (*Id.* at p. 793.) Similarly, it is not a reviewing court's role to construct such theories on behalf of a respondent who has chosen to not contest the

defendant's claim of prejudice.[4]

How this approach would operate can be seen with a hypothetical based on the claim in *Grimes* as presented by the parties in their briefing at the time of oral argument. At trial, prosecution witness A gave testimony supporting an element of the charged crime, and the trial court excluded testimony by defense witness Z that would have contradicted A. On appeal, defendant challenges, as state-law error, the exclusion of Z's testimony and argues the error was prejudicial because (1) Z would have directly refuted A, whose testimony was the primary proof of the element, and would have more generally impeached A's credibility and (2) in her closing argument, the prosecutor emphasized A's testimony as proving the element and noted that the defense did not impeach A on this point. In response, the state disputes the claim of error, but is silent as to the question of prejudice. Assuming that the trial court's ruling excluding Z's testimony was erroneous, the reviewing court should make its prejudice determination by assessing whether the record supports the arguments defendant makes and whether defendant's arguments demonstrate a reasonable probability that he would have obtained a more favorable verdict in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 837.) The reviewing court, however, should not go further and posit other theories about why the error was harmless, such as arguments that (1) A's testimony was not the primary or only evidence in support of the element or (2) A was impeached by defendant in other ways. Again, the reviewing court should limit its role to evaluating the arguments actually presented and accepting or rejecting them on their own merits. It should not reach out and sua sponte identify, articulate and judge harmless-error arguments that could have been, but were not raised, by the state.

V. CONCLUSION

OSPD urges the Court to provide guidelines for all reviewing courts in this state to follow regarding how to equitably approach a situation where the respondent in a criminal appeal has failed to contest the prejudice aspect of a claim. OSPD does not believe that criminal appeals should be determined by gamesmanship or in any manner other than on the merits of the claims being litigated, but does believe that in the long run the appellate

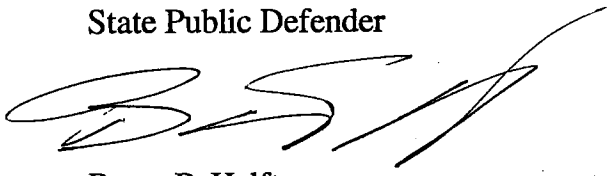
[4] Contrary to the state's unsupported suggestion, nothing in article VI, section 13 requires a different approach. (See Respondent's Supplemental Letter Brief, p. 3 [referring to the reviewing court's "independent state constitutional duty" to determine whether any error was harmless and its inability to reverse a conviction "without independently reviewing the trial court record"].) Certainly, an appellate court cannot reverse a judgment without finding there was a miscarriage of justice. But neither the text of the constitutional provision, nor the cases interpreting it, impose an obligation upon the appellate court to review the case "independently" of – that is, separately from – the prejudice arguments presented by the parties.

system functions best if both parties to the litigation play their roles and the appellate court acts as the detached and impartial arbiter that the system envisions. In that regard, guidelines are necessary so that reviewing courts are not placed in the untenable – and constitutionally questionable – position of substituting for the executive branch while carrying out their judicial branch functions. Such a posture benefits no one and harms the integrity of the judicial system.

Dated: July 22, 2014

Respectfully submitted,

Michael J. Hersek
State Public Defender



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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630)

I, Barry P. Helft, Chief Deputy State Public Defender, prepared the Amicus Letter being filed in support of neither party. I conducted a word count of this Amicus Letter using our office's computer software. On the basis of that computer-generated word count, I certify that this Amicus Letter is 3845 words in length.

Barry P. Helft
Attorney for Amicus Curiae

DECLARATION OF SERVICE

Re: *People v. Gary Grimes*

Superior Court No. 95F7785
Supreme Court No. S076339

I, KECIA BAILEY, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607, that I served a true copy of the attached:

AMICUS CURIAE LETTER BRIEF IN SUPPORT OF NEITHER PARTY

on each of the following, by placing the same in an envelope addressed (respectively) as follows:

Mr. Cliff Gardner
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Each said envelope was then, on July 22, 2014, sealed and deposited in the United States Mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 22, 2014, at Oakland, California.

DECLARANT