SUPREME COURT COPY

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July 23, 2014

Supreme Court of the State of California
San Francisco Branch
350 McAllister Street
San Francisco, CA 94102-4797

RE: People v. Grimes
Case No. S076339

Dear Honorable Chief Justice Tani Cantil-Sakauye and Honorable Associate Justices:

This is respondent's supplemental reply to the three questions posed in this Court's June 28, 2014, order. Appellant concedes that any failure by respondent to include a harmless error argument in the respondent's brief does not forfeit the issue under state law. Appellant, however, argues that respondent forfeited a harmless error argument under federal law, and any error in the exclusion of John Morris's additional statements to Misty Abbott and Albert Lawson was prejudicial in the guilt and penalty phases. Respondent disagrees. Appellant's convictions and death sentence should be affirmed.

1. 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?

Appellant concedes that respondent's failure to argue harmless error does not forfeit the question of whether an error is harmless under state law. But he argues that respondent does forfeit the issue as to errors under the federal Constitution. Appellant contends that the state's alleged failure to brief whether his alleged error was harmless as a matter of constitutional law means that the state concedes that reversal is required if this Court does find that error occurred. (Appellant's Supplemental Letter Brief at p. 4 (hereafter, ASLB).) Appellant misapprehends the law and purpose of harmless error.

"[B]efore a federal constitutional error can be held harmless, *the court must be able to declare a belief that it was harmless beyond a reasonable doubt.*" (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), italics added.) "Constitutional error alone does not entitle a defendant to *automatic reversal*. Instead, most constitutional errors can be harmless." (*Washington v. Recuenco* (2006) 548 U.S. 212, 218-219 (*Recuenco*), italics added.)

As this Court has observed:

> "[T]he harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence [citation], and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it")." (*Rose v. Clark, supra*, 478 U.S. at p. 577, 106 S.Ct. 3101, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

(*People v. Flood* (1998) 18 Cal.4th 470, 507.)

Thus, "a state court, without violating the federal Constitution, [may] affirm a conviction despite the erroneous admission of an involuntary confession, when the trial record establishes that the admission of the confession was harmless beyond a reasonable doubt. (*People v. Cahill* (1993) 5 Cal.4th 478, 482, discussing *Arizona v. Fulminante* (1991) 499 U.S. 279, 295-296.) That is, "reversal of a judgment is unwarranted when the record on appeal is devoid of evidence that" the error had any adverse effect. (*People v. Jackson* (2014) 58 Cal.4th 724, 740.) To hold that federal constitutional error can be found over opposition from the People and result in reversal without any consideration of whether that error was harmless merely because of an omission in briefing would result in "an absolutist approach to the adversary system [in which] courts must never address unargued issues, no matter how obvious their proper resolution may be." (*United States v. Pryce* (D.C. Cir. 1991) 938 F.2d 1343, 1348 (lead opn. of William, J.).)

Appellant's confusion appears to rest in the language from Chapman regarding which party carries the burden of proving any error was harmless. Yet this Court has noted, "the 'state-burden' language in Chapman does not literally mean that an appellate court must reverse the judgment because the prosecution has failed to place evidence in the record showing that the error was harmless." (*People v. Whitt* (1990) 51 Cal.3d 620, 649; cf. Recuenco, supra, 548 U.S. at pp. 218-219 ["Constitutional error at trial alone does not entitle a defendant to automatic reversal."].) *Chapman* harmless error analysis, rather, is consistent with the principles of appellate review. (*Whitt*, at p. 649.) "[T]he question ... the reviewing court [must] consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks ... to the basis on which 'the jury actually rested its verdict.'" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Harmless-error analysis asks "what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome[.]" (*Rose v. Clark* (1986) 478 U.S. 570, 582, fn. 11; *Neder v. United States* (1999) 527 U.S. 1, 20.)

"The terms 'burden of proof' and 'burden of persuasion' are synonymous." (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436, fn. 17, citing (1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 3, p. 157; see also *United States v. Olano* (1993) 507 U.S. 725-734-735 ["In a harmless error inquiry, the government bears the burden of persuasion with respect to showing that the error was harmless."].) Yet to say that the People bear the "burden" to prove constitutional error is harmless beyond a reasonable doubt is not the same thing as saying that the People bear the burden of arguing that point. To state that the People bear the burden of proof or persuasion is to mean that it is the people who lose if the court finds the matter equally balanced. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56 (quoting 2 J. Strong, McCormick on Evidence § 342, p. 433 (5th ed.1999).) In other words, the party benefiting from the error must lose if the court finds itself "in virtual equipoise as to the harmlessness of an error." (*O'Neal v. MacAninch* (1995) 513 U.S. 432, 435.) Although the term "proof" is used in connection with the People's burden to show that federal constitutional error is harmless beyond a reasonable doubt, this is merely a recognition that "the risk of doubt " as to the effect of such error is on the People regardless of any argument made. (See *id.* at p. 439.)

Just as does state harmless error review, "*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." (*United States v. Hasting* (1983) 461 U.S. 499, 509, fn. 7.) "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." (*Rose v. Clark*, *supra*, 478 U.S. at p. 579.)

Harmless error is not merely an alternative argument offered in the event that the reviewing court accepts the appellant's contention error occurred. Rather, harmless error is part of the evaluation of the impact of that error on the overall reliability of the truth-finding process. (Cf. *Flood*, *supra*, 18 Cal.4th at p. 507.) Thus, on appeal where an appellant has alleged constitutional error, the question is not whether the respondent offered an alternative argument that, if such error is found, it was harmless. The question is whether the record of the conviction, proved to the jury beyond a reasonable doubt, is such that the court can affirmatively declare that any constitutional error found was also harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at 24.) Logically, regardless of any proof or persuasion the party benefiting from the error may offer or fail to offer, if the court finds itself "in virtual equipoise as to the harmlessness of an error," such error cannot be said to be harmless beyond a reasonable doubt. (*O'Neal v. MacAninch*, *supra*, 513 U.S. at p. 435.)

Appellant notes the general rule that the federal courts impose forfeiture where the government fails to argue harmless error. (See ASLB at pp. 8-9.) But, in *United States v. Giovanetti* (7th Cir. 1991) 928 F.2d 225 (*Giovanetti*), the Seventh Circuit determined that an appellate court had discretion to overlook the government's failure to argue harmless error. (*Id.*

at 227.) The court identified several factors to consider in exercising its discretion, particularly the state of the record and whether the arguments that the government does make assist the court on the question of harmlessness. (*Ibid.*; *United States v. Rose* (1st Cir. 1997) 104 F.3d 1408, 1415.) The *Giovanetti* court reasoned that reversal was an excessive sanction for the mere failure to argue harmless error, at least where the error was readily discernible. (*Giovanetti*, at p. 227.) *Giovanetti*'s reasoning has been followed or approved of by every circuit that considered it. (*United States v. Pryce* (D.C. Cir. 1991) 938 F.2d 1343, 1348; *United States v. Vontsteen* (5th Cir. 1992) 950 F.2d 1086, 1091-1092; *Lufkins v. Leapley* (8th Cir. 1992) 965 F.2d 1477, 1481; *United States v. Rose*, *supra*, 104 F.3d at p. 1415; *United States v. Torrez-Ortega* (10th Cir. 1999) 184 F.3d 1128, 1136; *United States v. Gonzales-Flores* (9th Cir. 2005) 418 F.3d 1093, 1100;[1] *United States v. Rodriguez* (5th Cir. 2010) 602 F.3d 346, 360; *Grover v. Perry* (6th Cir. 2012) 698 F.3d 295, 300-301; *United States v. Holness* (4th Cir. 2013) 706 F.3d 579, 592 [citing *Giovanetti* approvingly and noting court's ability to disregard parties' inattention to an argument or issue]; cf., *In re Detention of Blaise* (Iowa 2013), 830 N.W.2d 310, 319-321 [sua sponte harmless error analysis where People implicitly addressed prejudice].)

Similarly, in *People v. Braxton* (2004) 34 Cal.4th 798, the defendant argued that the People had forfeited issues raised in the petition for review because those issues had not been raised in the court of appeal. (*Id.* at p. 809.) This Court observed that the rule prohibiting new issues from being raised was not absolute and that the Court had the power to decide issues that the case presented. (*Ibid.*; see Cal. Rules of Court, rules 8.500(c)(1), 8.516(b).)

But, whatever the merits of the *Giovanetti* discretionary approach, it should not control here. Even if harmless error was an alternative argument, where the People dispute the existence of federal constitutional error, yet nevertheless fail to discuss whether the alleged error was

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[1] Appellant quotes from *Gonzalez-Florez*, suggesting that the Ninth Circuit holds a contrary view. (ASLB at 9.) However, the sentence following appellant's quote states: "However, we recognize that no interest is served—and substantial time and resources are wasted—by reversal in those unusual cases in which the harmlessness of any error is clear beyond serious debate and further proceedings are certain to replicate the original result. Fortunately, our precedents do not foreclose the position that an appellate court's sua sponte consideration of harmless error is appropriate on occasions of this type. . .We find the Seventh Circuit's analysis persuasive, and we agree that the government's failure to argue that an error is harmless does not categorically preclude our consideration of that question." (*Gonzalez-Flores*, *supra*, 418 F.3d at pp. 1100-1101.) Just as significantly, *Gonzalez-Flores* notes if there is any question as to the harmlessness of error, "prudence and fairness to the defendant counsel against deeming that error harmless without the benefit of the parties' debate." (*Id.* at 1101.) In this case, of course, appellant has had the opportunity to debate respondent's argument in its briefing that Morris's excluded statements were not "material," at oral argument, and now through this supplemental briefing. (See also *United States v. Vontsteen*, *supra*, 950 F.2d at 1092 ["Moreover, *Vontsteen* cannot now claim prejudice, because we requested the parties to specifically brief the appropriate standard of review after we took this case en banc."].)

harmless, no true forfeiture has occurred. Forfeiture is the loss of a right through the failure to make a timely assertion. (*People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 6.) If the People have lost any "right" through forfeiture, at most it can only be the opportunity to argue the effect of the error. (*United States v. Pryce*, *supra*, 283 F.2d at 1351 (conc. opn. of Randolph, J. conc.).

This is because as a matter of state law, no court can reverse a judgment without examining the entire cause and concluding that a miscarriage of justice occurred. (Cal. Const. art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The People's failure to argue harmless error can never relieve a state court of its obligation to consider the effect.[2] Appellant concedes that respondent has not forfeited the issue of harmless error as a matter of state law. Accordingly, regardless of any amount of briefing by the parties on the issue of harmless error under state or federal law, a state court will necessarily have considered the entire record before passing on the effect of that error as a matter of state constitutional law. (Cal. Const., art VI, § 13; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Under those circumstances, there is no reason for the court not to also consider harmless error under the federal *Chapman* standard.

2. Assuming the trial court erred in excluding the hearsay statements of John Morris to Misty Abbott and Albert Lawson that were proffered by defendant as statements against interest, does the error require reversal of the special circumstances or death sentence?

Appellant claims that it does. Appellant's argument that the jury's special circumstance findings must be reversed focuses solely on the prosecution's intent-to-kill theory and the testimony of Jonathan Howe. (ASLB at pp. 13-14.) As discussed in respondent's supplemental letter brief, any error in excluding Morris's additional hearsay statements is harmless under both the intent to kill and reckless indifference to human life theories.

Respondent has already explained the credibility issues inherent with any testimony from Abbott and Lawson regarding Morris's hearsay statements, and the unlikelihood the jury would have credited this testimony. But assuming the jury would have given any consideration to the excluded evidence, Morris's statements that appellant did not participate in the killing or did not participate in the actual killing is reasonably understood to mean that Morris alone killed Betty Bone. This is consistent with appellant's statement to the detectives and Howe's testimony that appellant ordered Wilson to tie up and kill Bone. Morris's statement that appellant and Wilson were "surprised" by the killing does not prove that appellant did not order the killing. Instead, Morris's statement is reasonably understood to mean that appellant was "surprised" by the brutal manner in which Morris killed 98-year-old Bone.

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[2] Thus, this Court's constitutional duty already imposes the duty to examine the record for prejudice despite the lack of any guidance or argument from respondent. Just as does state harmless error review, "*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." (*United States v. Hasting* (1983) 461 U.S. 499, 509, fn. 7.)

Appellant claims that Morris's statement to Lawson that appellant was in some other place inside the house when the killing occurred would have contradicted Howe's testimony that appellant told Howe that he watched Bone get killed and "enjoyed" it. (ASLB at p. 13.) Howe testified that he could not remember if appellant told him that he "enjoyed watching" Bone being killed, but appellant did tell Howe that he "enjoyed" the fact that she was killed. (31RT 8382.) Howe's testimony was impeached with evidence that he previously told Detective O'Connor that appellant told him he had watched Bone being killed and "enjoyed watching it." (31RT 8500-8501.) Whether appellant "enjoyed" the fact that Bone was killed or "enjoyed watching" Morris kill Bone, appellant's own statements describing the killing prove that he saw Morris kill Bone.[3]

To reverse the jury's penalty verdict, appellant argues that without evidence of Morris's additional hearsay statements the jury was left with testimony from Howe that appellant ordered Wilson and Morris to tie up and kill Bone, and appellant watched and enjoyed Bone's killing. According to appellant, this evidence "points unmistakably and powerfully to death." (ASLB at pp. 14-15.)

As explained in respondent's supplemental letter brief, the prosecutor urged the jury that death was the appropriate punishment based on the circumstances surrounding Bone's murder, appellant's prior crimes of violence and felony convictions, the impact Bone's murder had on Bone's daughter and granddaughters, appellant's lack of remorse following the crimes, and rebutting appellant's evidence in mitigation. The prosecutor did not remind the jury of Howe's testimony, and she did not ask the jury to return a death verdict based on his testimony. Whether appellant "enjoyed watching" Bone being killed or whether he "enjoyed" the fact that she was killed, appellant's own statement to detectives powerfully demonstrates that he watched Morris kill Bone. Morris's excluded statements do not contradict this evidence. The excluded statements also do not contradict evidence that after Bone's killing appellant and Wilson were laughing together and calling each other "down white boys." (35RT 9231.)

As discussed more fully in respondent's supplemental letter brief, reversal of the jury's special circumstance findings and penalty verdict is unwarranted under either the state or federal harmless error standards.

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[3] There was also evidence that Shane Fernalld told detectives shortly after Bone's killing that appellant stated about Bone's murder, "[T]he old bitch deserved it." (30RT 8125-8126, 8173, 8176, 8205; see also 27RT 7478-7479.) Fernalld denied at trial that he told this to the detectives. (27RT 7478.) He also started to question whether appellant had told him that Bone "deserved it" or "didn't deserve it" after speaking to a defense investigator. (30RT 8177, 8179-8180.)

3. Assuming that the trial court did not err in excluding Morris's statement to Abbott that after Morris killed the victim, defendant looked at him as if he were surprised, but that the trial court did err in excluding Morris's statement to Abbott and Lawson that defendant was not involved in the actual killing, does the error require reversal of the special circumstance findings or death sentence?

Appellant again claims that it does. In doing so, appellant ignores the importance he has previously placed on Morris's excluded statement describing appellant's and Wilson's expressions after Bone's killing. (ASLB at pp. 15-16.) Without this evidence, appellant is left with Morris's hearsay statements that appellant did not participate in the killing or did not participate in the actual killing. Neither of these statements is inconsistent with Howe's testimony that appellant told Morris and Wilson to tie up and kill Bone. Neither of these statements is inconsistent with evidence that appellant "enjoyed" the fact that Morris killed Bone or that he "enjoyed watching" Morris kill Bone.

As discussed more fully in respondent's supplemental letter brief, reversal of the jury's special circumstance findings and penalty verdict is unwarranted under either the state or federal harmless error standards.

CONCLUSION

For the foregoing reasons and all arguments raised previously, respondent respectfully urges this Court to affirm appellant's convictions and sentence to death.

Dated: July 23, 2014

Respectfully submitted,

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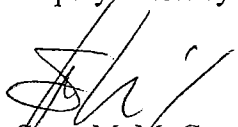

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Grimes**
No.: **S076339**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 23, 2014, I served the attached:

RESPONDENT'S SUPPLEMENTAL REPLY

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 23, 2014, at Sacramento, California.

_____
Declarant

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