In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **GARY LEE GRIMES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S076339

Shasta County Superior Court Case No. 95F7785
The Honorable Bradley L. Boeckman, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This Court affirmed appellant's conviction for first degree murder and his sentence of death on January 5, 2015. On March 11, 2015, this Court granted appellant's petition for rehearing. In preparing for reargument, this Court has provided the parties with the opportunity to "submit supplemental briefing in reliance upon new authorities or issues which arose subsequent to the completed briefing in this case . . . ." This supplemental brief addresses the Ninth Circuit's decision in *United States v. Brooks* (9th Cir. 2014) 772 F.3d 1161 (*Brooks*), which was decided after the completed briefing in this case. *Brooks* addresses the consequences of the government's waiver of harmless error in federal court, and it was discussed in Justice Liu's concurring and dissenting opinion in this case and appellant's petition for rehearing. For the reasons that follow, and the reasons discussed in respondent's previous briefing in this case, respondent respectfully asks that this Court affirm appellant's convictions and death sentence.

ANY OMISSION OF A HARMLESS ERROR ARGUMENT IN THE RESPONDENT'S BRIEF DOES NOT RESULT IN THE APPLICATION OF A "HARMLESSNESS-PLUS" STANDARD FOR REVIEWING PREJUDICE

Despite any omission by respondent in its brief, this Court must independently review the trial record to determine whether the error complained of "resulted in a miscarriage of justice" before reversing a judgment. (Cal. Const., art. VI, § 13.) For nonconstitutional errors, the "miscarriage of justice" standard is explained in *People v. Watson* (1956) 46 Cal.2d 818, which asks if it is reasonably probable that a result more favorable to the defendant would have been reached absent the error. (*Id.* at p. 836.) For federal constitutional errors, the standard is set forth in *Chapman v. California* (1967) 386 U.S. 18, which asks whether the error

complained of is harmless beyond a reasonable doubt. (*Id.* at p. 24.) For errors occurring during the penalty phase of a capital trial, the harmlessness test is effectively the same as the *Chapman* standard of review. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

Respondent has not found any case in which a California court has applied a more stringent standard of harmless error review when the respondent's brief omits a harmless error argument, and it appears appellant has neither. Instead, appellant relies on cases from the federal Courts of Appeals and out-of-state cases for this proposition. (See Pet. R'hrng at 16-17.)

For instance, the Ninth Circuit in *Brooks* applied a harmlessness-plus standard of review when it sua sponte undertook a harmless error analysis after it found that the government had waived the issue by noting in its brief, but not arguing, harmless error. (*Brooks*, *supra*, 772 F.3d at pp. 1171-1173.)[1] In doing so, the Ninth Circuit observed that it had "discretion to consider harmlessness sua sponte in extraordinary cases." (*Id.* at p. 1171.) But whether to exercise that discretion depended on three factors: "(1) 'the length and complexity of the record,' (2) 'whether the harmlessness of an error is certain or debatable,' and (3) 'the futility and costliness of reversal and further litigation.'" (*Ibid.*, quoting *United States v. Gonzalez-Flores* (9th Cir. 2005) 418 F.3d 1093, 1101 (*Gonzalez-Flores*).) For the court, "'[t]he second factor—the court's certainty as to the harmlessness of the error—is of particular importance,' and sua sponte

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[1] Respondent uses the term "waived" as opposed to "forfeited" if used by the court deciding the case. As this Court has recognized, "'[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." [Citations.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.)

recognition 'is appropriate *only* where the harmlessness of the error is not reasonably debatable.'" (*Brooks*, at p. 1171, quoting *Gonzalez-Flores*, at p. 1101 (original italics).) Thus, where the claim involves federal constitutional error, a court "exercising [its] discretion to find a constitutional error harmless under *Gonzalez-Flores* requires a double level of certainty: [it] must be convinced that the error was 'harmless beyond a reasonable doubt' and that 'satisfaction of that standard is beyond serious debate.'" (*Brooks*, *supra*, 772 F.3d at p. 1171, quoting *United States v. Pryce* (D.C. Cir. 1991) 938 F.2d 1343, 1347-1350 (opn. of Williams, J., announcing the judgment) (*Pryce*).[2])

In *Gonzalez-Flores*, the Ninth Circuit found that the government had waived harmless error by mentioning that a harmless error analysis applied, but making no further argument on the point. (*Gonzalez-Flores*, *supra*, 418 F.3d at p. 1100 & fn. 4.) But the court also found "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." (*Id.* at p. 1100.) In making this determination, the Ninth Circuit found "helpful" the three factors discussed above, which originated from the Seventh Circuit's decision in *United States v. Giovannetti* (7th Cir.

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[2] The *Pryce* court was fragmented on the effect of the government's failure to argue harmless error in its brief. Judge Williams, announcing the judgment of the court, would "deem errors 'harmless' only where satisfaction of that standard is beyond serious debate." (*Pryce*, 938 F.2d at p. 1348 (opn. of Williams. J., announcing the judgment).) Judge Randolph, in a concurring opinion, found harmless error unwaivable because "the government's litigating position did not relieve [the court] of [its] duty to disregard harmless errors." (*Id.* at p. 1351 (conc. opn. of Randolph, J.).) And Judge Silberman, in a dissenting opinion, would not consider the harmlessness of the error in the absence of briefing by the government. (*Id.* at pp. 1352-1355 (dis. opn. of Silberman, J.).)

1991) 928 F.2d 225 (*Giovannetti*). (*Gonzalez-Flores*, *supra*, at p. 1101.) And, as discussed above, it found the "second factor—the court's certainty as to the harmlessness of the error---[] of particular importance." (*Ibid.*) The court reasoned that "[i]f the harmlessness of the error is at all debatable, prudence and fairness to the defendant counsel against deeming that error harmless without the benefit of the parties' debate" because "'where the case is at all close, defense counsel's lack of opportunity to answer potential harmless error arguments may lead the court to miss an angle that would have shown the error to have been prejudicial.'" (*Ibid.*, quoting *Pryce*, *supra*, 938 F.2d at p. 1347 (opn. of Williams, J., announcing the judgment).)

In *Giovannetti*, the Seventh Circuit disagreed with the government that Rule 52(a) of the Federal Rules of Criminal Procedure prohibited the court from finding harmless error waivable. (928 F.2d at p. 226.) Rule 52(a) states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[3] The Seventh Circuit acknowledged that it "cannot reverse a conviction because of a harmless error," but that did not mean that "even if the government does not argue harmless error, [it] must search the record—without any help from the parties—to determine that the errors [it] find[s] are prejudicial, before [it] can reverse." (*Ibid.*) The court observed that to find harmless error nonwaivable might require it to overrule some of its precedent that "declined to consider the question of harmlessness because the government

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[3] Compare article VI, section 13 of the California Constitution, which provides, in pertinent part: "No judgment shall be set aside . . . in any cause, on the ground . . . of the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

did not raise it[.]" (*Ibid.*) Having found that the government could waive harmless error, the Seventh Circuit also found that it had discretion to overlook such a waiver, and the government could even, "by way of petitioning for rehearing, invite [the court] to consider the point provided it is not in effect filing a new brief, this time on the issue of harmlessness." (*Id.* at pp. 226-227.)

In deciding whether it should exercise its "discretion to overlook a failure to argue harmlessness, and in deciding whether to exercise that discretion," *Giovannetti* set forth the now-familiar three considerations: "the length and complexity of the record, whether the harmlessness of the error or errors found is certain or debatable, and whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court." (*Giovannetti, supra*, 928 F.2d at p. 227.) In *Giovannetti*, the court declined to relieve the government of its failure to raise harmless error in its brief because "[t]he certainty of harmlessness does not appear with such clarity from an unguided search of the record that [it] should raise the issue on [its] own motion." (*Ibid.*)

The rule from *Brooks*, and the cases it relies upon, should not be adopted by this Court for three reasons.

First, the federal circuit courts apparently have no sua sponte duty to review the record for prejudice despite an omission of a harmless error argument in the government's brief. For sound policy reasons, however, some federal courts have adopted factors to consider when deciding whether to conduct a harmless error analysis sua sponte. The result is a type of harmlessness-plus inquiry where, for federal constitutional errors, the court "must be convinced that the error was 'harmless beyond a reasonable doubt' and that 'satisfaction of that standard is beyond serious debate.'" (*Brooks, supra*, 772 F.3d at p. 1171, quoting *Pryce, supra*, 938 F.2d at p. 1348 (opn. of Williams, J., announcing the judgment).)

But unlike the federal rules, the California Constitution requires the reviewing court to review the trial record sua sponte before reversing a judgment. (Cal. Const., art. VI, § 13.) Therefore, there is no need for a threshold inquiry as to the closeness of the harmless error question before proceeding to the harmless error analysis itself, because a California reviewing court – unlike a federal court – does not have the option whether or not to consider an error's harmlessness. The California Constitution requires that it conduct a harmlessness analysis before reversing a judgment.

Second, to "forfeit" is "[t]o lose, or lose the right to, by some error, fault, offense, or crime." (Black's Law Dictionary (Abridged 6th Ed. 1991), p. 449.) The right that is lost when respondent omits a harmless error argument in a brief, whether intentionally or through unfortunate inadvertence, is respondent's opportunity to assist the reviewing court in determining the harmlessness of the error. It is not the loss of the appropriate standard of harmless error review for non-constitutional or constitutional error. As stated by Judge Randolph in *Pryce*:

> We would not say that because a party failed to invoke a controlling precedent the party has waived it and the court must therefore disregard *stare decisis* in reaching its decision. Neither would we review the evidence supporting a conviction *de novo* just because the government neglected to mention the standard governing review . . .. Nor would we automatically reverse a criminal conviction if the government confessed error on appeal.

(*Pryce*, *supra*, 283 F.3d at p. 1351 (conc. opn. of Randolph, J.).) And neither should a reviewing court heighten the standard for harmless error review by adding a second layer to the inquiry and require the error to be "harmless beyond serious debate" simply because respondent failed to argue harmlessness in its brief.

Third, both respondent *and appellant* had the opportunity to brief harmless error after it was requested by this Court. In that way, appellant was able to respond to respondent's harmless error argument and make additional arguments of his own. Thus, the fairness concerns underlying the federal courts' decisions on whether to address harmless error sua sponte are simply not present in this case. (See *Gonzalez-Flores*, *supra*, 418 F.3d at p. 1101; *Pryce*, *supra*, 283 F.3d at p. 1347 (opn. of Williams, J., announcing the judgment).)

The People have a strong adversarial incentive to include a harmless error argument in its brief without the threat of forfeiture and the application of a harmlessness-plus standard for reviewing constitutional and nonconstitutional errors for prejudice. This Court should decline appellant's invitation to adopt the federal standard of punishing the People for the occasional omission, whether intentional or inadvertent, of a harmless error argument in its brief.

CONCLUSION

For the reasons stated here and in the respondent's brief and supplemental briefs filed in this case, respondent respectfully urges this Court to affirm appellant's convictions and sentence of death.

Dated: June 12, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 1,819 words.

Dated: June 12, 2015

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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 June 12, 2015, I served the attached:

RESPONDENT'S SUPPLEMENTAL BRIEF

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 June 12, 2015, at Sacramento, California.

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