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SUPREME COURT
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JUN 26 2015

Frank A. McGuire Clerk

Deputy

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent,	)	S076339
v.	)	Superior Court (Shasta) 95F7785
GARY GRIMES, Appellant.	)	

SUPREME COURT
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APPELLANT'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

Appeal From The Judgment Of The Superior Court

Of The State Of California, Shasta County

Honorable Bradley L. Boeckman, Judge

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DEATH PENALTY

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INTRODUCTION

Mr. Grimes was convicted of murder and sentenced to death. He appealed. On January 5, 2015 the Court issued a 4-3 decision affirming both the conviction and sentence. Mr. Grimes filed a timely Petition for Rehearing which was granted on March 11, 2015.

On April 15, 2015 the Court filed an order stating it was "presently preparing to hear reargument" and requiring any "supplemental briefing upon new authorities or issues which arose subsequent to the completed briefing in this case to be filed on or before June 15, 2015." The Court ordered that "[t]he reply to each of those briefs, if any, is to be filed within 20 court days after the initial supplemental brief is filed . . . ." On June 15, 2015 the state filed a Supplemental Brief to discuss *United States v. Brooks* (9th Cir. 2014) 772 F.3d 1161 "which was decided after the completed briefing in this case." (Respondent's Supplemental Brief ("RSB") at 1.) The state recognizes that *Brooks* fully supports Mr. Grimes' position that a new penalty phase is required, but argues that it should not be followed. (RSB 1-8.)

PROCEDURAL AND FACTUAL BACKGROUND

In 1995 John Morris killed Betty Bone during a robbery. Gary Grimes was an

accomplice to that robbery. At all times the prosecutor acknowledged that Morris was the actual killer and that Mr. Grimes had not killed anyone. (5 RT 876.)

Morris killed himself shortly after he was arrested. (32 RT 9637.) The state then sought death against Mr. Grimes. To support its relatively unusual request for the jury to impose death on a non-killer, the state introduced statements from jailhouse snitch Jonathan Howe that Grimes allegedly confessed to (1) ordering Morris to kill, (2) watching the killing and (3) enjoying the killing. (31 RT 8381, 8501.) But the trial court refused to allow the defense to rebut Howe's testimony by introducing contrary admissions Morris made to several witnesses that (1) he (Morris) acted alone, (2) Grimes was surprised at -- and took no part in -- the killing and (3) Grimes was not even in the room when the killing occurred. (24 RT 6747-6750, 6797.) The prosecutor then took full advantage of the court's ruling, urging jurors to impose death because "they've never given you a reason to doubt [Howe's] testimony." (41 RT 10879-10880.)

On appeal, Mr. Grimes' major claim of error was that the trial court's exclusion of this mitigating evidence violated both state and federal law and required a new penalty phase. In its brief, although the state vigorously contended that no error had occurred it never contended that if error *had* occurred, it was harmless.

The case was fully briefed for 37 months, and argued on May 28, 2014. In the middle of oral argument the state took a completely different tack. Without any notice at all, the state shifted gears completely and argued for the first time that if the trial court erred, any error was harmless.

Because the state had never raised this argument, the Court vacated submission of the case and ordered supplemental briefing on (1) whether there was any consequence to the state's failure to brief harmless error and, if not, (2) the merits of the newly raised issue. In supplemental briefing the state argued that its failure to brief harmless error was of no consequence in light of Article VI, § 13 of the California Constitution. (Respondent's Supplemental Letter Brief ("RSLB") of July 16, 2014 at 2-5.) The state went on to present a detailed, 15-page single-spaced argument on the merits of the harmless error question. (RSLB 5-20.)

As noted above, a 4-3 majority affirmed both the conviction and sentence. The majority held (1) there was no consequence to the state's decision to raise harmless error for the first time at oral argument and (2) any error in excluding the evidence was not prejudicial. Mr. Grimes filed a timely Petition for Rehearing addressing each of these holdings. The rehearing petition was granted.

The state has now filed a supplemental brief on the forfeiture issue. The state discusses *United States v. Brooks*, *supra*, 772 F.3d 1161, and reiterates its position that in light of Article VI, § 13, the state's decision not to brief harmless error -- whether "intentional[] or . . . inadverten[t]" -- is of no consequence. (RSB 2-3, 6.) In the state's view, it can "intentionally" decide not to brief harmless error in any criminal case safe in the knowledge that California reviewing courts will -- indeed must -- nevertheless step into the state's role as advocate and independently place harmless error at issue. (RSB 1-8.)

The state ignores entirely what the Supreme Court has called "the principle of party presentation." (*Greenlaw v. United States* (2008) 554 U.S. 237, 243-244; *see* RSB 1-9.) Although the state relies on Article VI, § 13 it ignores entirely the legislative history to that section. Nor does the state address any of the practical problems with the rule it urges this Court to adopt given the traditional role of advocates in an adversary system. (RSB 1-8.)

This reply follows.

ARGUMENT

I. NEITHER ARTICLE VI, § 13 OF THE CALIFORNIA CONSTITUTION NOR BASIC NOTIONS OF FAIRNESS PERMIT THE STATE TO SIMPLY IGNORE THE RULES OF APPELLATE PROCEDURE APPLICABLE TO EVERY OTHER LITIGANT IN THE CRIMINAL JUSTICE SYSTEM AND RAISE ARGUMENTS FOR THE FIRST TIME AT ORAL ARGUMENT.

The state has now filed three supplemental briefs on the forfeiture issue. Noticeable by its absence is any reference at all to what the Supreme Court has called "the principle of party presentation" which "reli[es] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present." (*Greenlaw v. United States*, *supra*, 554 U.S. at pp. 243-244.) The principle is "designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." (*Ibid.*)

The state's decision not to address this principle is surprising for two reasons. First, it is a principle "basic to our system of adjudication." (*Arizona v. California* (2000) 530 U.S. 392, 413.) Second, and more important, the state is quite familiar with the principle since -- far more often than not -- the state is the party benefitting from it. For example, where a criminal defendant fails to advance a particular argument in his opening brief, there is a consequence: the court will not consider the issue. (See, e.g., *People v.*

Duff (2014) 58 Cal.4th 527, 550, fn.9; *People v. Gonzales* (2011) 51 Cal.4th 894, 957 fn.37.) Where a criminal defendant raises an issue in his opening brief, but fails to support the issue with sufficient argument, there is a consequence: courts will "treat it as waived, and pass it without consideration." (*People v. Stanley* (1995) 10 Cal.4th 764, 793. Accord *People v. Ashmus* (1991) 54 Cal.3d 932, 985 fn.15; *People v. Marshall* (1990) 50 Cal.3d 907, 945, fn.9.) Where a criminal defendant raises an issue for the first time at oral argument, there is a consequence: the issue will be deemed waived. (See, e.g., *People v. Crow* (1993) 6 Cal.4th 952, 960 fn.7; *People v. Dixon* (2007) 153 Cal.App.4th 985, 996; *People v. Norman* (1999) 75 Cal.App.4th 1234, 1241 fn.4; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 248 fn. 4.)

These procedural norms of appellate practice properly ensure that the state is treated fairly in the system. Although they certainly disadvantage defendants in the criminal justice system, these rules are fair and Mr. Grimes has no quibble with them. But there is no logical reason that the principle of party presentation -- and the procedural norms which attend that principle -- should not also apply to the state. The state's position, of course, is that while these rules apply to defendants, they do *not* apply to the state when it elects to raise harmless error for the first time at oral argument. The state is wrong.

In theory there are three very different approaches which can be taken in this situation. At one extreme, a reviewing court could rigorously apply the same rules of appellate practice to the state, employ a strict rule of forfeiture and reverse without any inquiry into whether the prejudice issue is even arguable. Some courts take this strict approach. (See, e.g., *State v. Almaraz* (Id. 2013) 301 P.3d 242, 256-257 [for the first time at oral argument the state argues harmless error; held, because the state has forfeited the claim, reversal is required]; *Polk v. State* (Nev. 2010) 233 P.3d 357, 359-361 [same].)

At another extreme, a reviewing court could simply exempt the state from the normal rules of appellate practice and find there is no consequence at all for raising harmless error for the first time at oral argument. That is the approach the majority took in its January 5, 2015 opinion. Yet the state has not cited, and Mr. Grimes has not been able to find, any other jurisdiction following this entirely asymmetrical rule.

In between these two extremes is a more moderate approach, one which refuses to apply a strict rule of forfeiture yet at the same time refuses to simply excuse the state from following the rules of appellate practice applicable to everyone else. As the state itself recognizes, the Seventh and Ninth Circuits both follow this middle course, holding that where the state elects not to raise harmless error in its brief, a reviewing court may find an error harmless only where (1) the record is short and straightforward and the court can

easily determine prejudice on its own, (2) the harmless error question is beyond debate and (3) a remand would be futile. (RSB 2-5, *citing United States v. Giovannetti* (7th Cir. 1991) 928 F.2d 225, 226-227, *United States v. Brooks*, *supra*, 772 F.3d at pp. 1172-1173 and *United States v. Gonzales-Flores* (9th Cir. 2005) 418 F.3d 1093, 1100-1101.) As discussed below, it is this middle approach charted by the Seventh and Ninth Circuits which best accommodates both practical and fairness concerns and is appropriate under California law.[1]

At no point in any of its three supplemental briefs has the state argued that if this moderate approach is followed, the death sentence here may be affirmed. Instead, the state argues that for three reasons, this Court should not follow this middle course.

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[1] While accurate, the state's reference to the approach taken by the Seventh and Ninth Circuits is something of an understatement. In fact, virtually every state and federal court in the nation to address this issue -- including (in addition to the Seventh and Ninth Circuits) the First, Third, Fifth, Sixth, Eighth, Tenth and D.C. Circuits -- has adopted this middle course and rejected the argument that the state is free to simply ignore the rules of appellate procedure which apply to every other litigant. (See, e.g., *United States v. Rodrigues Cortes* (1st Cir. 1991) 949 F.2d 532, 543; *United States v. Mclaughlin* (3rd Cir. 1997) 126 F.3d 130, 135; *Nelson v. Quarterman* (5th Cir. 2006) 472 F.3d 287, 332 [Dennis, J., concurring]; *Grover v. Perry* (6th Cir. 2012) 698 F.3d 295, 300-301; *Lufkins v. Leapley* (8th Cir. 1992) 965 F.2d 1477, 1481-1482; *United States v. Torres-Ortega* (10th Cir. 1999) 184 F.3d 1128, 1136; *United States v. Pryce* (D.C. Cir. 1991) 938 F.2d 1343, 1347-1348; *State v. Porte* (Minn. 2013) 832 N.W.2d 303, 314; *Harlow v. State* (Wyo. 2003) 70 P.3d 179, 195; *Randolph v. United States* (D.C. Ct. Ap. 2005) 882 A.2d 210, 223.)

First, the state argues that Article VI, § 13 of the California Constitution distinguishes California from the jurisdictions in which the moderate approach has been embraced. (RSB 5-6.) Second, the state argues that in any event, the only consequence that can (or should) be imposed on the state is that it should lose the right to make a harmless error argument. (RSB 6.) Third, the state argues that there is no fairness issue here because both parties have briefed the harmless error issue in response to the Court's request for supplemental briefing. (RSB 7.)

Mr. Grimes will address each of the state's reasons for rejecting the moderate approach taken by almost every other court in the nation. As discussed below, taken either singly or together, none of these reasons compel this Court to embrace the extreme position the state is advocating.

A. Nothing In The Language Or History Of Article VI, § 13 Supports Departing From The Weight Of Authority Around The Country On This Issue.

The first reason the state offers to reject the approach taken by the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. circuits is premised on Article VI, § 13 of the California Constitution. But this provision will not support the weight the state seeks to place on it. As discussed below, Mr. Grimes agrees that Article VI, § 13 imposes

an obligation on this Court to determine whether the error requires reversal even though the state has failed to argue prejudice. Thus, the Court may not adopt the strict forfeiture rule followed in some states -- the extreme rule described above which holds the harmless error issue completely forfeited and requires reversal in all cases.

But Article VI, § 13 does no more than that. Contrary to the state's argument, it does *not* exempt the state from the normal rules of appellate practice which apply to every other party in the adversary system. It does not permit the state alone to simply opt out of arguing harmless error in its brief and spring the argument on defendants for the first time at oral argument. And it does not preclude the Court from adopting the middle course to this issue charted by almost every other court in the country.

Article VI, § 13 was originally enacted as Article VI, § 4 ½ by the electorate on October 10, 1911. As originally enacted Article VI, § 4 ½ provided as follows:

> No judgment shall be set aside, or new trial granted in any criminal case, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, 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.[2]

Of course, in applying this provision, the primary goal is to determine and effectuate the intent of the electorate. (See, e.g, *People v. Jones* (1993) 5 Cal.4th 1142, 1146; *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538.) In doing so, courts examine the materials in the voter pamphlet which accompanied the initiative. (See, e.g., *Amador Valley Joint Union High School District v. State Board of Equalization* (1977) 22 Cal.3d 208, 245-246; *Carter v. Commission of Qualifications of Judicial Appointments* (1939) 14 Cal.2d 179, 144.)

The ballot pamphlet which accompanied Article VI, § 4 ½ to the voters explained that its purpose was to permit appellate courts to assess prejudice by "review[ing] the facts of the particular case" and "look[ing] at the facts of the particular case." (Sect. of State, Proposed Amends. to Const. with Legis. Reasons, Special Elec. (Oct. 10, 1911)

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[2] The section has since been renumbered, and the wording changed slightly to make it applicable both to criminal and civil cases, and now appears in Article VI, § 13 as follows:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, 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.

Reasons Why Sen. Const. Amend. No. 26 Should Be Adopted.) The goal of the new provision was to ensure that "immaterial errors not affecting the cause would be disregarded on appeal" and to "render it impossible for the higher courts to reverse the judgments of our trial courts in criminal cases for unimportant errors." (*Ibid.*)

The state's position that Article VI, § 13 prevents this Court from employing the moderate approach used by virtually every other court in the nation cannot be squared with the plainly expressed intent of that section. After all, as noted by the cases *which the state itself cites*, the entire reason federal courts took this middle course -- rather than employ the strict approach used by some courts holding that the state forfeited the harmless error issue entirely -- was to prevent reversals in cases involving minor or technical errors only where a retrial is entirely unwarranted. (See *United States v. Giovannetti*, *supra*, 928 F.2d at pp. 226-227; *United States v. Gonzales-Flores*, *supra*, 418 F.3d at p. 1100.) In this respect, the goal of the approach adopted by the federal courts is *identical* to the goals specifically identified in the ballot pamphlet which accompanied Article VI, § 4 ½ to the electorate: to prevent retrials for "unimportant errors." In fact, that is *exactly* the type of error the approach charted by the federal courts will *prevent* being cause for retrial. And this approach specifically requires the court to

look at the "facts of the particular case" to assess whether the question of prejudice is open to debate and whether a retrial would be futile.

But this is not the only portion of the ballot pamphlet ignored by the state's argument. In the 1911 ballot pamphlet the drafters of the initiative explained that Congress had been presented with an "enactment governing procedure in federal courts, which is practically the same as our proposed constitutional amendment, except it would apply to civil as well as criminal cases" and that "[o]ne of the branches of congress has already acted favorably upon such a bill." (*Ibid.*)

This was entirely accurate. The federal bill to which the drafters referred was § 269 of the Judicial Code, also enacted in 1911, which later became 28 U.S.C. § 2111. Just as advertised, that section was indeed "practically the same" as Article VI, section 4 ½, it applied to both civil and criminal cases and provided as follows:

> On the hearing of any writ of error in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do

> not affect the substantial rights of the parties. (36 Stat. 1163 [Comp. St. § 1246] as amended February 26, 1919 [40 Stat. 1181, c.48].)[3]

In other words, pursuant to 28 U.S.C. § 2111, federal courts too may only "give judgment after an examination of the entire record" and must ignore all "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Like Article VI, § 13, 28 U.S.C. § 2111 precludes federal courts from employing a strict rule of forfeiture. Notwithstanding this -- and despite § 2111's limits on the power of federal reviewing courts to grant relief which are very similar to the limits in Article VI, § 13 --

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[3] Section 269 of the Judicial Code was later incorporated virtually word for word into the United States Code as 28 U.S.C. § 391:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

In turn, § 391 was incorporated into 28 U.S.C. § 2111 which currently provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties

Section 391 was also incorporated into Federal Rule of Criminal Procedure 52(a) which provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." The Advisory Committee Notes to Rule 52 quote the relevant language of 28 U.S.C. § 391 in full and state that "rule [52] is a restatement of existing law."

section 2111 has *never* been read to justify the extreme position taken by the state here and permit federal courts to simply ignore the state's failure to raise harmless error.

In short, 28 U.S.C. § 2111 and Article VI, § 13 may very well prevent federal and state courts respectively from employing a strict forfeiture rule. But contrary to the state's argument here, although Article VI, § 13 may require a harmless error inquiry, it has *never* mandated the form of that review. (See, e.g., *People v. Lightsey* (2012) 54 Cal.4th 668, 699-700 [miscarriage of justice provision permits reversal without any showing of prejudice]; *People v. Collins* (2001) 26 Cal.4th 297, 310-312 [same]; *People v. Ochoa* (1998) 19 Cal.4th 353, 479 [miscarriage of justice provision permits presumption of prejudice which requires the state to prove state-law penalty phase error harmless beyond a reasonable doubt]; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [same]; *People v. Anzalone* (2013) 56 Cal.4th 545, 553 [miscarriage of justice provision permits a presumption of harmlessness which requires defendants to prove error prejudicial].) Article VI, § 13 has never been the straightjacket the state is now making it out to be.

Put another way, and as Justice Liu noted in his original concurring and dissenting opinion in this case, nothing in Article VI, § 13 forces the Court "to displace the ordinary norms of the adversarial process or the ordinary expectation that the parties will argue the

merits of the issue." (*People v. Grimes* (2015) 2015 WL 47493 at * 56.) Just like its federal counterpart, nothing in Article VI, § 13 is inconsistent with the middle course taken by so many other courts.[4]

B. The Fact That The State Forfeits Its Right To Make A Harmless Error Argument Does Not Support Departing From The Middle Course Charted By Virtually Every Other Jurisdiction In The Country.

The state adds two additional reasons why this Court should depart from the weight of authority on this issue. First, the state argues that this authority should not be followed in California because when the state either "intentionally or through unfortunate

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[4] In additional to the various circuit courts discussed above, other states have also charted this same middle course. (See, e.g., *State v. Porte*, *supra*, 832 N.W.2d at p. 314 [Minnesota]; *Harlow v. State*, *supra*, 70 P.3d at p. 195 [Wyoming].)

Just like California, these jurisdictions also have firm rules precluding reviewing courts from reversing convictions based on technical errors which do not effect substantial rights. (See, e.g., Wyoming Rule of Appellate Procedure 9.04 ["Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded by the reviewing court."]; Wyoming Rule of Criminal Procedure 52(a) [same]; *State v. Brand* (Minn. 1914) 124 Minn. 408, 410 [under Minnesota law "technical errors which could not reasonably have affected the result [of trial] are disregarded"]; *State v. Nelson* (Minn. 1903) 91 Minn. 143, 144-145 [noting that new trials had been granted in criminal cases "with too much liberality" causing "much public discontent and . . . bring[ing] the administration of the criminal laws into disrespect" and announcing that henceforth relief was proper "only where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had."].) As the courts in these states have made clear, the existence of such salutary rules is not a barrier to joining the mainstream of litigation on this issue.

inadvertence" elects not to raise harmless error in its brief the only "right that is lost . . . is respondent's opportunity" to brief or argue the harmless error issue. (RSB 6.)[5]

Second, the state then advances precisely the opposite position. The state argues that the reason the weight of authority should not be followed is because -- far from forfeiting its right to make a harmless error argument -- the state actually *did* make a harmless error argument in supplemental briefing and therefore provided notice to Mr. Grimes of what the state's position was. (RSB 7.)

The tension between these two positions is obvious. The state argues that its failure to raise harmless error forfeited its right to brief harmless error but is of no consequence since, after all, the state later briefed harmless error.

The Court need not linger over the inconsistency. In the context of an adversary system, these two additional reasons offered by the state to justify departing from the general rule followed in the rest of the country leave a host of practical questions

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[5] The state made this same point at the second oral argument. There the state conceded that if had not raised harmless error in its original brief, then the Court should ignore the state's briefing on the merits of the harmless error question:

> You shouldn't be hearing from me then. (*People v. Grimes* S076339, Oral Argument of October 7, 2014 at 1:16:20-23.)

completely unaddressed.

Mr. Grimes will start with the state's first suggestion -- that the state simply loses its right to make any harmless error argument. According to the state this remedies the situation and counsels against following the middle course charted by so many other courts.

It does nothing of the sort. With all due respect, institutionalizing a system which requires this Court to resolve issues without adversarial briefing from the state is not the solution to the problem, it is the problem. Absent adversarial briefing from the state reviewing courts charged with determining whether the state has carried its burden of proving an error harmless will necessarily be required to step into the role of state's advocate and away from their traditional role as what this Court itself has described as "neutral arbiters of both fact and law . . . ." (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 910.)

Courts around the country have recognized this exact point. Requiring reviewing courts to resolve harmless error inquiries absent arguments from the state requires judges to do "a job the prosecutor is supposed to do and would be coming perilously close to exercising an executive branch function. This confusion of roles would be inconsistent

with the neutrality expected of the judiciary in our adversary system of justice." (*Rose v. United States* (D.C. 1993) 629 A.2d 526, 535. Accord *United States v. Gonzales, supra,* 418 F.3d at p. 1101 ["Even more troubling, the practice may unfairly tilt the scales of justice by authorizing courts to construct the government's best arguments for it . . . ."]; *United States v. Pryce* (D.C. Cir. 1991) 938 F.2d 1343, 1347 ["Where a court analyzes the harmless error issue wholly on its own initiative, it assumes burdens normally shouldered by government and defense counsel. . . . More important, 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."]; *Id.* at p. 1354, Silberman, J., dissenting [where a reviewing court independently puts harmless error at issue the court has "encroach[ed] into the executive branch's prosecutorial prerogatives."].) In his concurring and dissenting opinion Justice Liu noted these potential separation of powers concerns. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 59.)

The state's suggested solution ignores these practical problems entirely. Where (as here) the state elects not to carry its burden of proving an error harmless, the state never explains the process by which California reviewing courts can assess harmless error fairly to *both* sides in the context of an adversary system. This is particularly problematic with respect to errors which the state has the burden of proving harmless (like this one).

The state never explains how its rule is supposed to work in the vast majority of appeals handled by reviewing courts throughout the state. As Mr. Grimes noted in his Petition for Rehearing, in fiscal year 2013, California appellate courts resolved nearly 5,000 criminal appeals. When the state in some number of these 5,000 cases -- either "intentionally or through unfortunate inadvertence" -- elects not to raise harmless error, what is the reviewing court actually supposed to do?

Since the only right lost by the state is the right to brief the issue, should the reviewing court solicit briefing solely from the defense? As to errors which the state is required to prove harmless, should the reviewing court step into the role of advocate for the state and articulate points for the defense to respond to in briefing? If not, how is the defense to know what factors the reviewing court is considering in connection with the harmless error question? Should the reviewing court wait until oral argument to resolve these questions to see if the state raises harmless error at argument? If the state never raises harmless error -- either in its briefing or at oral argument -- can the reviewing court resolve the issue without giving the defense a chance to respond? If not -- that is, if fairness requires that the defendant be given a chance to brief the matter even though the state has never sought to carry its burden -- should the defendant be given a second oral argument? And if fairness does require the defense be offered a chance to respond, exactly what is the defense going to be responding to since (1) it is the state's burden to

prove the error harmless and (2) the state cannot brief or argue the issue? How should defendants be given a chance to respond if -- as is often the case in the intermediate appellate courts (and unlike this case) -- the case is not orally argued, but submitted on the briefs?

At first blush, one response to these many difficult questions is to adopt a procedure in which the reviewing court solicits supplemental briefs from both parties on the harmless error question and then provides oral argument. And indeed that is the essence of the state's final reason for not adopting the federal model. (RSB 7.)

But this approach has its own very practical problems which are not addressed anywhere in the state's supplemental briefing. As several courts have noted, there is an obvious unfairness in a rule which permits the state to (1) forbear from briefing harmless error, (2) test the waters at oral argument in connection with arguments solely directed to the existence of error and (3) add a harmless error argument at the eleventh hour as a fallback position if it looks like the court is going to find error. (See, e.g., *United States v. Giovannetti*, *supra*, 928 F.2d at p. 226; *United States v. Gonzales-Flores*, *supra*, 418 F.3d at p. 1100. *See United States v. Rose* (1st Cir. 1997) 104 F.3d 1408, 1414-1415.) Justice Liu noted this precise concern in his concurring and dissenting opinion. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 57 [noting the potential for manipulative

lawyering].)

Permitting the state alone among litigants to bifurcate the presentation of its position in this way is certainly not fair, nor will it necessarily result in a more accurate appellate resolution. The state's suggested approach allows the state to brief the harmless error issue after gaining whatever insights it can from the "dress rehearsal" oral argument. As one court has noted in this precise context, permitting the state to raise harmless error for the first time at oral argument:

> would invite salami tactics. In its main brief and at oral argument the government would argue that there was no error, hoping to get us to endorse its view of the law. If it failed in that endeavor it would [then raise harmless error], arguing as it does in this case that it should win anyway because the error was harmless. Such tactics would be particularly questionable in a case such as this where the defendant goes out of his way to argue that the error of which he complains was prejudicial, and the government by not responding signals its acquiescence that if there was error, it indeed was prejudicial.

(*United States v. Giovannetti*, *supra*, 928 F.2d at p. 226. Accord *United States v. Gonzales-Flores*, *supra*, 418 F.3d at p. 1100. See *United States v. Rose*, *supra*, 104 F.3d at pp. 1414-1415.)

This case presents a useful illustration. Here, in the state's original Respondent's

Brief it presented numerous harmless error arguments in connection with other contentions presented in Appellant's Opening Brief. (Respondent's Brief (RB) at 93-95, 155-156, 162, 165-166, 191-192, 201.) Many of these prejudice arguments are one-paragraph long. The longest is slightly more than two double-spaced pages. But after appearing at oral argument -- and perceiving that its argument as to error in connection with the trial court's exclusion of Morris's admissions might not fly -- *the state then provided the Court with a 15-page, single-spaced argument as to why any error was harmless.* (RSLB July 16, 2014 at 5-20.) This argument is nearly 15 times longer than any other harmless error argument the state presented in its Respondent's Brief and is the exact type of "salami tactic[]" referred to by the Seventh Circuit in *Giovannetti.*

To be sure, Mr. Grimes certainly recognizes the appeal of a solution which -- on its face -- seems evenhanded and simply requires the parties to brief an issue. After all, proper adversarial briefing can enhance the reliability of this Court's decision making. But this abstract principle does not address the larger inequity here at all. As Justice Liu observed in his concurring and dissenting opinion "[w]hen a defendant omits a particular argument in the opening brief and attempts to raise it in the reply brief or at oral argument, we do not typically pardon the oversight for the sake of greater accuracy in determining whether the trial court reached the correct result." (*People v. Grimes*, *supra*, 2015 WL 47493 at * 57.)

At the end of the day, as Justice Liu's observation suggests, whatever set of procedural rules the Court adopts to address a litigant's decision to raise an issue for the first time at oral argument, those rules should apply fairly to *both* parties in the system. It would certainly be reasonable for the Court to conclude that permitting new arguments to be raised at oral argument -- followed by post-argument briefing -- could enhance the accuracy of the Court's decisions. The Court could reasonably decide that the enhanced accuracy in such a system outweighs the potential increase in inefficiency. But as Justice Liu's observation suggests, both fairness and logic require that if this is the approach the Court adopts, it should apply to *both* parties.

On the other hand, the Court could just as reasonably decide that waiting until oral argument to inject issues into a case is unfair, and there should be some consequence for such conduct. This too is an entirely legitimate approach to the process of appellate decision making. Once again, however, if this is the approach the Court takes, it should in fairness apply to both parties.

But what the state seeks here is the best of both worlds. Under the state's approach, defendants may *not* raise new issues at oral argument because that would be unfair to the state. But the state is free to do so because this will enhance the reliability of the appellate process.

In the final analysis, the state's arguments for rejecting the model followed throughout the country not only ignore the principle of party presentation, but the intensely practical consequences which would result from an approach that permits the state to "intentionally or . . . inadverten[tly]" elect to wait until oral argument to raise harmless error as an issue. Contrary to the state's position, the very same policies and concerns which animated virtually every other court in the country to adopt a moderate approach to this issue apply here in California as well.

CONCLUSION

Instead of raising harmless error in its brief, the state surprised both the Court and Mr. Grimes by raising the issue for the first time at oral argument. Mr. Grimes recognizes that Article VI, § 13 precludes the Court from reversing simply because the state failed to brief harmless error. But nothing in that provision prevents the Court from adopting the approach set forth in *United States v. Brooks*, *supra*, 772 F.3d 1161, an approach the state does not dispute is being followed in almost every other jurisdiction to face this issue.

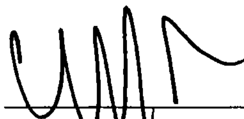
This approach certainly permits a finding of harmless error, but only when the record is not complex, the harmless error question can be easily determined by the reviewing court on its own and a retrial would be futile. The state's alternative

suggestion of a much more limited consequence to the state -- loss of the right to argue harmless error -- entirely ignores the nature of an adversary system, creates very practical problems and requires reviewing courts to abandon their historic and proper role as neutral arbiters and step into the role of advocates for the state.

Neither precedent nor policy counsel in favor of departing from the weight of authority around the country. Indeed, despite filing three supplemental briefs on this question, the state has never cited even a single case adopting the position it urges upon the Court here. There is no reason California should be so far out of the mainstream on this issue. Reversal of the penalty phase is required.[6]

DATED: 6\23\15

Respectfully submitted,



Cliff Gardner
Attorney for Appellant

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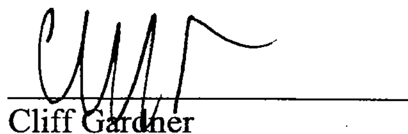
[6] As noted above, the state has conceded both orally and in writing that the Court should not consider any of its harmless error arguments. (RSB 6; *People v. Grimes* S076339, Oral Argument of October 7, 2014 at 1:16:20-23.) Regardless of whether the Court accepts the state's concession, if the Court finds the state has not carried its burden under *Chapman* of proving the error harmless beyond a reasonable doubt, there may be no need to resolve any of the forfeiture questions presented in this case. Obviously, if reversal is required under the *Chapman* test itself, it would also be required under the three-part test applied by the many federal and state courts discussed above.

CERTIFICATE OF COMPLIANCE

I certify that appellant's Reply to Supplemental Brief in *People v. Grimes*, S076339, is double spaced, that a 13 point proportional font was used, and that there are 6397 words in the brief.

Dated: 6/23/15.



Cliff Gardner

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CERTIFICATE OF SERVICE

I, the undersigned, declare as follows. I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Avenue, Berkeley, California 94702. I am not a party to this action.

On June 24, 2015, I served the within

REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

Shasta County Superior Court
1500 Court Street
Redding, California 96001

Shasta County District Attorney
1525 Court Street
Redding, California 96001

Mr. Gary Grimes
CDC: P-27200
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San Quentin, California 94974

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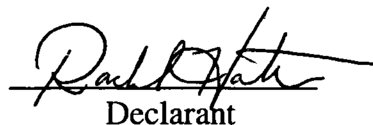
Stephanie Mitchell
Office of the Attorney General
P.O. Box 944255
Sacramento, California 94244-2550

I declare under penalty of perjury that the foregoing is true. Executed on June 24, 2015, in Berkeley, California.



Declarant