SUPREME COURT COPY

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July 29, 2014

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

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:

The Office of the State Public Defender (OSPD), as amicus curiae "in support of neither party," asks this Court to consider "the consequences of the forfeiture" of a harmless error argument in respondent's initial brief.

OSPD claims that if reviewing courts are free to address whether an error is harmless without the advantage of briefing by respondent on the issue, "great damage will be done to the appellate system as a whole." (OSPD at p. 2.) This is because "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." (*Ibid.*) According to OSPD, this construct would place the court in the role of an advocate instead of a neutral arbiter and violate the separation of powers doctrine. (See *id.* at pp. 2-3, 5-6.)[1]

Respondent submits that the state has an enormous incentive to include harmless error arguments in the respondent's briefs. On those limited occasions when an inadvertent failure

[1] Reviewing courts have rejected *explicit* concessions of error by the state (see, e.g., *People v. Turner* (2002) 96 Cal.App.4th 1409, 1415; *People v. Thompson* (1990) 221 Cal.App.3d 923, 934; *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1021), and may decide issues not raised by the parties (see, e.g., *People v. Hill* (1992) 3 Cal.4th 959, 1017 fn. 1 (Mosk, J. (conc. opn.), overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Gordon* (1990) 50 Cal.3d 1223, 1250) without violating the separation of powers doctrine and causing damage to the appellate system.

DEATH PENALTY

might occur, "great damage" will not be done should a reviewing court occasionally engage in a sua sponte analysis of prejudice.[2]

In any event, OSPD's argument is based on a faulty premise. OSPD acknowledges that respondent "contest[ed] the specific assertion of error" and sought "to support the judgment as a whole" in the respondent's brief. (OSPD letter at p. 4.) But OSPD claims, "When the

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[2] Conspicuous by its absence in OSPD's brief is any reference to the substantial importance of the harmless error doctrine to the judicial system as a whole:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. See *Morris v. Slappy*, 461 U.S. 1, 14[ ] (1983). The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle v. Isaac*, 456 U.S. 107, 127-128[ ] (1982). Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," *id.*, at 128[ ], and thereby "cost society the right to punish admitted offenders." *Id.*, at 127[ ]. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's "interest in the prompt administration of justice," *United States v. Hasting*, *supra*, 461 U.S., at 509[ ], and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

(*United States v. Mechanik* (1986) 475 U.S. 66, 72.)

"The 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, *United States v. Noble*, 422 U.S. 225, 230[ ] (1975), 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.')." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

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." (OSPD at p. 4.)

It is true that respondent omitted a separately captioned harmless error argument in the respondent's brief, but the brief does include reasons why any error in the trial court's ruling excluding Morris's additional hearsay statements to Misty Abbott and Albert Lawson was harmless. (RB 77.) Read as a whole, there can be no question that respondent did not concede in the respondent's brief that if the trial court erred in excluding Morris's hearsay statements reversal was required. But even assuming, for argument's sake, that the respondent's brief failed to address prejudice, silence is not an "implicit concession" of prejudice. (OSPD at p. 5.)

OSPD's reliance on *People v. Johnson* (1980) 26 Cal.3d 557 for support is misplaced. The issue before this Court in *Johnson* was whether a violation of the defendant's statutory right to a speedy trial required reversal of his conviction. (*Id.* at p. 574.) A defendant alleging a violation of his statutory right to a speedy trial post-conviction "must prove not only unjustified delay in bringing his case to trial but also prejudice flowing from that delay." (*Ibid.*) The defendant in *Johnson* did not address the prejudice component of his claim. Based on its absence, the plurality observed that the "defendant by his silence on this issue essentially concedes the absence of prejudice, urging that we overrule [prior case law] and reverse his conviction without proof of prejudice." (*Ibid.*)

The defendant in *Johnson* was not entirely "silent." Instead, the defendant ignored the prejudice component of the claim and urged the Court to adopt a new rule that would not require a showing of prejudice. Given the manner in which the issue was argued, the plurality reasonably found that the defendant "essentially concede[d] the absence of prejudice." (*People v. Johnson*, 26 Cal.3d at p. 574.) Despite the concession, the plurality went on to address prejudice and found that the "record shows no prejudice to defendant arising from the delay." (*Ibid.*) In requiring a showing of prejudice post-conviction, the plurality explained, "[O]nce a defendant has been tried and convicted, the state Constitution in article VI, section 13, forbids reversal for nonprejudicial error. When a defendant has received a fair trial, we believe, neither the public interest nor the scope of article VI, section 13, call for reversal of that conviction because of nonprejudicial error in the scheduling of that trial." (*Id.* at p. 575.) The harsh rule advocated by OSPD is neither supported by *Johnson* nor consistent with article VI, section 13 of the California Constitution.

In fact, OSPD's position is directly contrary to this Court's decision in *People v. Hill*, *supra*, 3 Cal.4th 959. In *Hill*, the defendant argued that respondent had "conceded" *Aranda-Bruton* error because the issue was not addressed in the respondent's brief. (*Id.* at 995, fn. 3.) This Court rejected "this novel contention" for three reasons, two of which are implicated here. First, the defendant forfeited the issue on appeal by failing to raise it in the trial court. (*Ibid.*) Second, respondent did "fully respond" to the defendant's "primary argument" against the admission of the extrajudicial statements, and the defendant did not contend otherwise. (*Ibid.*) Third, this Court "decline[d] to find a waiver based on nothing more than respondent's failure to respond" to the defendant's *Aranda-Bruton* argument, which itself was raised for the first time

on appeal. (*Ibid.*) Respondent acknowledges that the first reason identified by *Hill* is not present here, but that should not prevent this Court from applying *Hill*'s reasoning to this case. Respondent fully addressed appellant's claim that the trial court abused its discretion by excluding Morris's additional hearsay statements to Abbott and Lawson, and appellant does not contend otherwise. Respondent did state reasons why any error in the trial court's ruling should be found harmless (see RB 77), but even assuming, arguendo, that this Court finds respondent's prejudice argument insufficient, that inadequacy is not a concession.

*Hill* observed that "[a] failure to respond to an opponent's argument may be unwise as a tactical matter, but such failure does not warrant the inflexible rule proposed by defendant." (*People v. Hill, supra*, 3 Cal.4th at p. 995, fn. 3.) Such a harsh rule "would require a party to respond to his opponent's every argument, subargument, and allegation, no matter how meritless or briefly made." (*Ibid.*) In rejecting the defendant's request to find an implied concession, *Hill* "disapprove[d] of the brief and unsupported suggestion to the contrary in *People v. Adams* (1983) 143 Cal.App.3d 970, 992." (*Ibid.*)

In *People v. Adams, supra*, 143 Cal.App.3d 970, the appellate court found that respondent's silence on prejudice in the respondent's brief "must be viewed as a concession that if error occurred, reversal is required." (*Id.* at p. 992.) This is the same rule proposed by OSPD and explicitly disapproved of in *Hill*. Silence in a respondent's brief on the issue of prejudice is not an implied concession that if there was error, reversal is required.

Respondent has already addressed the effect any omission in the respondent's brief of a prejudice argument has on state and federal harmless error review and will not repeat those arguments here. Suffice it to say, OSPD's proposed approach for reviewing harmless error in the absence of any prejudice argument made by the state is not only wrong but unworkable. OSPD proposes that the reviewing court "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," but the reviewing court "should not go further and posit other theories about why the error was harmless . . . ." (OSPD at p. 8.) This makes no sense. A reviewing court cannot evaluate the entire record to determine prejudice *and*, at the same time, not consider evidence relevant to a prejudice determination, for example, the strength of a witness's testimony in relation to other evidence contained in the record.

Respondent has not thought is necessary to address every argument, subargument, and allegation made by OSPD in its amicus letter. Respondent's decision in that regard is not a concession that those arguments, subarguments and allegations have merit.

In closing, OSPD states that it "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 . . . ." (OSPD at p. 8.) But that is exactly what OSPD advocates. Criminal convictions are reversed based on structural errors that affect the entire framework of the trial and trial errors

that prejudice the defendant. Presumptively valid criminal convictions are not reversed based on an unwise or inadvertent omission of a harmless error argument by the state.

Dated: July 29, 2014

Respectfully submitted,

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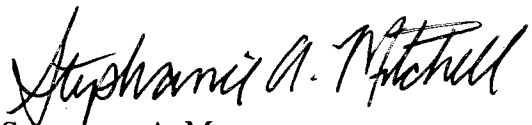

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## DECLARATION OF SERVICE BY U.S. MAIL

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 29, 2014, I served the attached **ANSWER TO AMICUS LETTER 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 July 29, 2014, at Sacramento, California.

M. Latimer

Declarant

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