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Constitutional Law--Comment on Defendant's Failure to Testify--Harmless Error [*People v. Hadgins*, 236 Cal. App. 2d 578, 46 Cal. Rpt 199 (1965), *vacated and remanded per curiam*, 386 U.S. 265, *affd on remand*, 60 Cal. Rptr. 176 (1967)]

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CONSTITUTIONAL LAW — COMMENT ON DEFENDANT'S  
FAILURE TO TESTIFY — HARMLESS ERROR

*People v. Hudgins*, 236 Cal. App. 2d 578, 46 Cal. Rptr. 199 (1965), *vacated and remanded per curiam*, 386 U.S. 265, *aff'd on remand*, 60 Cal. Rptr. 176 (1967).

In 1965, the Supreme Court in *Griffin v. California*<sup>1</sup> held unconstitutional the provision of the California constitution<sup>2</sup> permitting comment by the trial court or prosecution on the defendant's failure to testify at his trial.<sup>3</sup> Prior to *Griffin*, 44 States had prohibited such comment either by statute or by judicial decree.<sup>4</sup> Yet, even after *Griffin*, neither the hegemony of these 44 States nor the *Griffin* decision itself appeared to inhibit the California appellate courts from affirming convictions containing clear violations of the *Griffin* no-comment rule, on the ground that the comment was not prejudicial, in light of the State harmless error statute.<sup>5</sup>

In 1967, certiorari was granted in *Chapman v. California*<sup>6</sup> to deal with the following problem: "where there is a violation of *Griffin* . . . can the error be held to be harmless, and . . . if so, was the error harmless in this case?"<sup>7</sup> The Supreme Court concluded "that there may be some constitutional errors which in the setting

<sup>1</sup> 380 U.S. 609 (1965). The case held that comment on a defendant's failure to testify violated the self-incrimination clause of the fifth amendment as made applicable to the States through the 14th amendment in *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>2</sup> CAL. CONST. art. I, § 13.

[I]n any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.

<sup>3</sup> 380 U.S. at 613.

<sup>4</sup> *Id.* at 611-12. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 419 (1966), which held that *Griffin* did not apply retroactively, listed California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio as States that permitted some form of comment in 1965, indicating that in these States a retroactive application of *Griffin* would have a devastating effect on the administration of criminal justice.

<sup>5</sup> *People v. Bostick*, 62 Cal. 2d 820, 402, P.2d 529, 44 Cal. Rptr. 649 (1965), held that although comment on a defendant's failure to testify was error, such error did not require automatic reversal since the State harmless error statute, CAL. CONST. art. IV, § 4½, was applicable; it provides:

No judgment shall be set aside, or new trial granted, in any case, 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.

<sup>6</sup> 386 U.S. 18 (1967).

<sup>7</sup> *Id.* at 20.

of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."<sup>8</sup> Further, the Court remonstrated "that before a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt,"<sup>9</sup> requiring also "the beneficiary of a federal constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."<sup>10</sup> Applying this apparently strict harmless error standard to the proceeding questioned in *Chapman*, the Court reversed, stating that "it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the . . . comments . . . did not contribute to petitioners' convictions."<sup>11</sup>

One week after deciding *Chapman*, the Court applied the new standard to another California case, *Phillips v. California*,<sup>12</sup> in which the defendant was also prejudiced by a typical *Griffin* error. In a memorandum decision, the Court reversed the conviction by merely citing *Chapman*.<sup>13</sup> But within the following 2 weeks, when presented with a group of California cases containing the same constitutional error as that invalidated in *Griffin*, *Chapman*, and *Phillips*, the Court, in per curiam memorandum decisions, vacated and remanded the cases to the California appellate courts for further consideration in light of *Chapman*.<sup>14</sup> In addition to negating Justice Stewart's warning that the adoption of any harmless error rule would commit the Supreme Court to a case-by-case examination to determine the extent that a comment influenced a particular trial,<sup>15</sup>

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<sup>8</sup> *Id.* at 22.

<sup>9</sup> *Id.* at 24.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 26.

<sup>12</sup> 240 Cal. App. 2d 197, 49 Cal. Rptr. 480 (1966), *rev'd per curiam*, 386 U.S. 212 (1967).

<sup>13</sup> It is interesting to note that Justices Black and Clark were not in favor of reversal, but instead were of the opinion that the judgment should be vacated and the case remanded for further consideration in light of *Chapman*. Their view was to prevail within the next 2 weeks. See cases cited note 14 *infra*.

<sup>14</sup> *People v. Boyden*, 237 Cal. App. 2d 695, 47 Cal. Rptr. 136 (1965), *vacated and remanded per curiam*, 386 U.S. 278 (1967); *People v. Fontaine*, 237 Cal. App. 2d 320, 46 Cal. Rptr. 855 (1965), *vacated and remanded per curiam*, 386 U.S. 263 (1967); *People v. Hudgins*, 236 Cal. App. 2d 578, 46 Cal. Rptr. 199 (1965); *vacated and remanded per curiam*, 386 U.S. 265 (1967); *People v. Erb*, 235 Cal. App. 2d 650, 45 Cal. Rptr. 503 (1965), *vacated and remanded per curiam*, 386 U.S. 273 (1967); *People v. Propp*, 235 Cal. App. 2d 619, 45 Cal. Rptr. 690 (1965), *vacated and remanded per curiam*, 386 U.S. 275 (1967).

<sup>15</sup> *Chapman v. California*, 386 U.S. 18, 45 (1967) (concurring opinion).

these decisions indicate a willingness to afford the States an opportunity to cleanse their own opinions. In *Chapman*, the Court promulgated the federal harmless error standard because it apparently was of the opinion that the States could not be left to formulate rules protecting their citizens from infractions of constitutionally guaranteed rights.<sup>16</sup> But, the remanded California cases seem to indicate a renewed confidence in the States by allowing *them* to determine whether violations of certain rights in State trials, specifically the no-comment right, are harmless error.

In one of the remanded cases, *People v. Hudgins*,<sup>17</sup> the defendant was convicted of second-degree murder for the slaying of his wife's alleged paramour. In the course of the trial, the prosecution commented on the defendant's failure to testify and the trial court gave an instruction to the jury which allowed them to consider the defendant's failure to testify. On appeal in 1965, after *Griffin*, the California appellate court found the prosecutor's comment and the court's instruction to the jury to be harmless in light of the State harmless error statute.<sup>18</sup> The Supreme Court remanded the case in light of *Chapman*, and the conviction was again affirmed by the California appellate court, which purported to meet the *Chapman* standard by virtually duplicating its former decision, changing only 45 words of the 3500-word opinion to declare its belief that the error was harmless beyond a reasonable doubt.<sup>19</sup> It is noteworthy that in three other cases of the remanded group that have been reconsidered by the California appellate courts,<sup>20</sup> the same controversial approach was used. In two of them, *People v. Propp*<sup>21</sup> and *People v. Fontaine*,<sup>22</sup> the court incorporated all of the previous opinion by reference except for the portion dealing with the application

<sup>16</sup> *Id.* at 21.

<sup>17</sup> 236 Cal. App. 2d 578, 46 Cal. Rptr. 199 (1965), *vacated and remanded per curiam*, 386 U.S. 265, *aff'd on remand*, 60 Cal. Rptr. 176 (1967).

<sup>18</sup> *Id.*

<sup>19</sup> *People v. Hudgins*, 60 Cal. Rptr. 176 (1967). The court of appeals even went to the extent of recalling the retired justice who had written the former opinion to sit under assignment on this case.

<sup>20</sup> *People v. Boyden*, 237 Cal. App. 2d 695, 47 Cal. Rptr. 136 (1965), *vacated and remanded per curiam*, 386 U.S. 278, *aff'd on remand*, 60 Cal. Rptr. 271 (1967); *People v. Fontaine*, 237 Cal. App. 2d 320, 46 Cal. Rptr. 855 (1965), *vacated and remanded per curiam*, 386 U.S. 263, *aff'd on remand*, 60 Cal. Rptr. 325 (1967); *People v. Propp*, 235 Cal. App. 2d 619, 45 Cal. Rptr. 690 (1965), *vacated and remanded per curiam*, 386 U.S. 275, *aff'd on remand*, 59 Cal. Rptr. 700 (1967).

<sup>21</sup> 235 Cal. App. 2d 619, 45 Cal. Rptr. 690 (1965), *vacated and remanded per curiam*, 386 U.S. 275, *aff'd on remand*, 59 Cal. Rptr. 700 (1967).

<sup>22</sup> 237 Cal. App. 2d 320, 46 Cal. Rptr. 855 (1965), *vacated and remanded per curiam*, 386 U.S. 263, *aff'd on remand*, 60 Cal. Rptr. 325 (1967).

of the State harmless error provision to the alleged *Griffin* error. Thus, the question arises as to whether the *Chapman* harmless error standard or, more precisely, California's mode of applying the standard, does in fact adequately protect the accused's right not to be punished for exercising the fifth amendment right to be silent.

The approach used in *Hudgins* and in the other California cases on remand is, on its face, subject to criticism. While in the opinions the requisite legal conclusion demanded by *Chapman* was enunciated, it was done without any different legal analysis than that renounced in *Chapman*. Clearly, *Chapman* rejected California's approach to harmless error,<sup>23</sup> which did not render a "miscarriage of justice" reversible if proof of the defendant's guilt was established in the record by other "overwhelming evidence."<sup>24</sup> In setting forth its preference for the *Faby v. Connecticut*<sup>25</sup> approach to harmless error, the Court also demanded that there be proof beyond a reasonable doubt that the error complained of did not contribute to the conviction.<sup>26</sup> This indicates, therefore, that the Supreme Court did not recognize "overwhelming evidence" of guilt as conclusively bearing upon the question of whether the error contributed to the conviction. In *Chapman*, the Court looked to the nature and extent of the comment, and finding that it was calculated to make the defendant's version of the evidence worthless, it could not state that the error was harmless.<sup>27</sup> Thus, it appears that the approach of the California appellate courts did not actually meet the Supreme Court's constitutional standard because its conclusions were not based on an analysis different from that rejected in *Chapman*, and because in none of the remanded cases does it appear that the nature or extent of the comment was reconsidered in relation to the verdict obtained.

Troubled by opinions<sup>28</sup> which found *Griffin* errors to be harmless, Chief Justice Traynor of the California Supreme Court, in a forceful dissenting opinion, presented an incisive analysis of the *Chapman* standard.<sup>29</sup> Although his opinion represents a conscientious and comprehensive attempt to determine what *Chapman* re-

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<sup>23</sup> 386 U.S. at 23.

<sup>24</sup> *Id.*

<sup>25</sup> 375 U.S. 85 (1963). In this case the question was whether there was a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.* at 86.

<sup>26</sup> 386 U.S. at 24.

<sup>27</sup> *Id.* at 24-26.

<sup>28</sup> Cases cited note 14 *supra*.

<sup>29</sup> *People v. Ross*, 429 P.2d 606, 60 Cal. Rptr. 254 (1967) (dissenting opinion).

quires, the fact that Traynor was compelled to make an extensive review of prior Supreme Court harmless error cases,<sup>30</sup> and to delve into the legislative history of the federal harmless error statute,<sup>31</sup> indicates the lack of clarity inherent in the standard.<sup>32</sup> Traynor concluded that the Supreme Court apparently requires a two-step procedure to establish that a constitutional error was not prejudicial. First, after a review of the evidence, the court must conclude beyond a reasonable doubt that the result would not have been different absent the error. Second, the court must consider the part the error may have played at the trial and must then profess a belief beyond a reasonable doubt that the error could not have played a substantial part in the jury's reaching its verdict.<sup>33</sup> Thus, once it has been established that the comments and instructions constituted a substantial part of the prosecutor's case, as in *Chapman*, the comments cannot be deemed harmless.<sup>34</sup> Although only a minority of the California Supreme Court have accepted this rationale, it would seem that under this approach all the remanded cases would have to be reversed on appeal, for this writer cannot imagine that a prosecutor's comments and a court's instruction to the jury that permit unfavorable inferences to be considered in evidence against the defendant could be considered a technical, as opposed to a substantial, part of the prosecution's case.<sup>35</sup>

Other difficulties inhere in the *Chapman* standard in relation to the entire problem of appellate review. By requiring proof beyond a reasonable doubt that the error complained of did not contribute to the conviction,<sup>36</sup> the Court implied that the considerations contributing to a jury's reaching its verdict are separable and ascertainable. This implication was seemingly rejected in *Jackson v.*

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<sup>30</sup> See *Kotteakos v. United States*, 328 U.S. 750 (1946); *Bihn v. United States*, 328 U.S. 633 (1946); *Bollenbach v. United States*, 326 U.S. 607 (1946); *Weiler v. United States*, 323 U.S. 606 (1945); *Bruno v. United States*, 308 U.S. 287 (1939).

<sup>31</sup> 28 U.S.C. § 2111 (1964); see *People v. Ross*, 429 P.2d 606, 619-20, 60 Cal. Rptr. 254, 267-68 (1967) (dissenting opinion).

<sup>32</sup> Concerning the clarity of the *Chapman* standard, Traynor indicated that the language used in the opinion is subject to two interpretations. 429 P.2d at 620, 60 Cal. Rptr. at 268.

<sup>33</sup> *Id.* at 621, 60 Cal. Rptr. at 269.

<sup>34</sup> *Id.*; see *Chapman v. California*, 386 U.S. 18, 26 (1967).

<sup>35</sup> The federal rules stress the substantial, as opposed to the technical, rights of the defendant. 28 U.S.C. § 2111 (1964); FED. R. CRIM. P. 52(a). For a discussion illuminating the difficulty in demonstrating that a *Griffin* error is harmless, see Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 587-89 & nn.263-66 (1968).

<sup>36</sup> *Chapman v. California*, 386 U.S. 18, 24 (1967).

*Denno*,<sup>37</sup> wherein it was stated that it is difficult, if not impossible, for a reviewing court to prove what influenced the verdict or to determine to what extent other evidence affected the result. *Jackson*, and the assumption therein, directly reflect upon the soundness of the *Chapman* standard, for if on review it cannot be ascertained what contributed to a verdict, a fortiori, it *cannot* be proven beyond a reasonable doubt that a comment did not contribute to the result.<sup>38</sup> Although the prediction had been made that the *Chapman* standard might prove to be so strict so as to invariably require reversal,<sup>39</sup> — and in light of the above this would seem sound — the California experience has shown that in practice this has not been the result.

*People v. Modesto*,<sup>40</sup> a recent California Supreme Court case, illustrates that *Chapman* has neither proved to be an efficient safeguard of constitutional rights, nor an effective sanction for prosecutors whose livelihood induces them to take the chance that a comment will be held harmless on review. *Modesto* concerned a brutal sex slaying for which the defendant had to be tried three times.<sup>41</sup> In the third trial, the prosecutor, for the third time, commented quite extensively on the defendant's failure to testify. In holding the error harmless the majority of the California Supreme Court stated: "Although we cannot dismiss that comment as an inadvertent and irrelevant breach in trial etiquette, we are convinced beyond a reasonable doubt that its presence . . . contributed neither to his conviction . . . nor to the imposition of the death penalty,"<sup>42</sup> even

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<sup>37</sup> 378 U.S. 368 (1964).

<sup>38</sup> See *People v. Ross*, 429 P.2d 606, 621, 60 Cal. Rptr. 254, 269 (1967) (dissenting opinion), wherein Justice Traynor states:

Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

<sup>39</sup> See 19 CASE W. RES. L. REV. 157, 167 (1967), wherein it is stated that the "beyond a reasonable doubt" standard may be "so strict as to impose indirectly a test which makes any trial error ground for automatic reversal."

<sup>40</sup> 427 P.2d 788, 59 Cal. Rptr. 124 (1967).

<sup>41</sup> In all three trials there was comment by the prosecutor on the defendant's failure to testify. In the first two, comment was permitted under CAL. CONST. art. I, § 13 which was subsequently invalidated by *Griffin*. The conviction at the first trial was reversed on the ground that the court erred in refusing to instruct the jury on the issue of manslaughter. *People v. Modesto*, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963). The defendant was convicted again, but it was reversed on the ground that the conviction rested in part on statements obtained in violation of *Escobedo v. Illinois*, 378 U.S. 478 (1964). *People v. Modesto*, 62 Cal. 2d 436, 398 P.2d 753, 42 Cal. Rptr. 417 (1965).

<sup>42</sup> *People v. Modesto*, 427 P.2d 788, 801, 59 Cal. Rptr. 124, 137 (1967).

though the court admitted, and the record indicated, that the comment was purposely included in the prosecution's case.<sup>43</sup>

The confusion generated by the *Chapman* standard is highlighted by the fact that some courts have apparently disregarded harmless error provisions in cases tainted by unconstitutional comment.<sup>44</sup> Although this approach is at the opposite end of the spectrum from that of *Hudgins*, it is probably more inconsistent with *Chapman*, because the majority therein specifically rejected the view that all violations of *Griffin* are harmful per se, requiring automatic reversal.<sup>45</sup> However, this is the approach suggested by Justice Stewart in his concurring opinion to *Chapman*.<sup>46</sup> After listing other constitutional errors which have never been deemed harmless,<sup>47</sup> Justice Stewart concludes, "I see no reason to break with settled precedent in this case, and promulgate a novel rule of harmless error applicable to clear violations of *Griffin* . . . ."<sup>48</sup>

The language of *Griffin* lends itself to the per se analysis. Therein the Court acknowledged that the jury might draw a natural and irresistible inference of guilt from the defendant's failure to testify,<sup>49</sup> and with this in mind it stated: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."<sup>50</sup> Thus, it seems that the *Griffin* Court was less concerned with the inference of guilt contributing to the jury's verdict, since it was primarily determined to curtail any State action that might tend to magnify that inference.

Implicit in the per se approach is the assumption that the right of the accused to remain silent without suffering the slightest degree of prejudice therefrom is basic to our accusatorial system of justice,

<sup>43</sup> The Supreme Court, in *Bruno v. United States*, 308 U.S. 287, 294 (1939), stated that the federal harmless error statute, now 28 U.S.C. § 2111 (1964), is intended "to prevent matters concerned with the mere etiquette of trials . . . from touching the merits of the verdict."

<sup>44</sup> See *Smith v. Decker*, 270 F. Supp. 225 (N.D. Tex. 1967); *Jones v. State*, 197 So. 2d 308 (Fla. Dist. Ct. 1967); *State v. Smith*, 10 Ohio App. 2d 186, 226 N.E.2d 807 (1967). *State v. Smith* is significant because Ohio was one of the six States that allowed comment before *Griffin*.

<sup>45</sup> *Chapman v. California*, 386 U.S. 18, 22 (1967).

<sup>46</sup> *Id.* at 45.

<sup>47</sup> Mr. Justice Stewart lists involuntary confessions, denial of counsel at trial, adverse interests of trial judges, publicity highly adverse to a defendant, jury instructions of unconstitutional presumptions, and discrimination in the selection of grand or petit jurors as errors that are per se grounds for reversal. *Id.* at 42-44.

<sup>48</sup> *Id.* at 45.

<sup>49</sup> *Griffin v. California*, 380 U.S. 609, 614 (1965).

<sup>50</sup> *Id.*



and as such, violations of this right are always so serious as to affect substantially the rights of the defendant. Judge Ely of the Ninth Circuit Court of Appeals expressed this view in a dissent to an opinion which found a *Griffin* violation to be harmless under *Chapman*:

I hold the view that when it was not unlawful to use it, the prosecutor's most destructive weapon was comment upon a defendant's failure to testify . . . . For that reason I could not say, in any case, wherein there is evidence . . . which might have supported acquittal, that the prosecutor's unconstitutional comments were "harmless beyond a reasonable doubt."<sup>51</sup>

Also implicit in the per se approach is the belief that the only effective way to protect the right of the accused to remain silent without suffering adverse inferences, is to impose the sanction of reversal for every violation of that right. One judge, in a United States district court case<sup>52</sup> reversing a conviction based on a statement that might not have even constituted a *Griffin* error,<sup>53</sup> concluded that courts should reverse when prosecutors use this tactic. He stated:

The oath taken by all attorneys to "uphold the Constitution of the United States" is no formalistic fancy . . . . Mere condemnation is not the safeguard of due process and tacit approval of such pointed and obvious abuse of these principles . . . fails to close the judicial door on such practices by attorneys."<sup>54</sup>

That comment on a defendant's failure to testify has long been recognized as inimical to the accusatorial system of justice gives greater weight to the argument that clear violations of *Griffin* should result in automatic reversal.<sup>55</sup> As the Supreme Court noted in 1893 when it was first presented with a *Griffin*-like violation: "Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence . . . [than to allow adverse comment on the defendant's refusal to take the stand]."<sup>56</sup> Also, a landmark Supreme Court case on harmless error has warned "that what may seem technical may embody a great tradition of justice."<sup>57</sup>

In light of the great tradition of justice surrounding the fifth

<sup>51</sup> *Wilson v. Anderson*, 379 F.2d 330, 335-36 (9th Cir. 1967); *accord*, *State v. Chase*, 230 A.2d 51 (Conn. Cir. Ct. App. 1967).

<sup>52</sup> *Smith v. Decker*, 270 F. Supp. 225 (N.D. Tex. 1967).

<sup>53</sup> The problem of exactly what need be said to constitute a *Griffin* error has been a raging controversy in the State and federal courts since 1965, and is a significant problem related to, but not included in this article. See *Lewis, supra* note 35, at 588 n.268.

<sup>54</sup> *Smith v. Decker*, 270 F. Supp. 225, 226-27 (N.D. Tex. 1967).

<sup>55</sup> *Chapman v. California*, 386 U.S. 18, 42 (1967) (Stewart, J., concurring).

<sup>56</sup> *Wilson v. United States*, 149 U.S. 60, 66 (1893).

<sup>57</sup> *Kotteakos v. United States*, 328 U.S. 750, 761 (1946).

amendment and the accusatorial system developed in this country, it would seem that the *Hudgins* application of the federal harmless error standard is clearly inadequate to protect or to enforce the traditional right of the accused to rest upon his silence and his presumption of innocence. Perhaps, the Supreme Court has not yet spoken the final word in *Hudgins*, judging from the Court's disposition of remanded cases in other areas.<sup>58</sup> Indeed, in light of the foregoing it becomes questionable whether the federal standard itself, as announced in *Chapman*, affords the protection for which it was promulgated. On the other hand, it would seem that the solution to this problem would be a return to the position that constitutional error can never be disregarded as "harmless." The per se approach to unconstitutional comment would effectively ensure all defendants "trials free from the pressures of unconstitutional inferences"<sup>59</sup> and would effectively discourage comment by prosecutors because the sanction of automatic reversal would eliminate their gambling. In conclusion, the per se approach would clarify the entire issue, a result which the Supreme Court through *Chapman* has failed to achieve.

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<sup>58</sup> The disposition of *McLeod v. Ohio*, 381 U.S. 356 (1965) (mem.), presents many parallels to the approach in *Hudgins*. In *McLeod*, the defendant was convicted after volunteering a confession, without first being apprised of his right to counsel. The Ohio Supreme Court dismissed the defendant's appeal, but the United States Supreme Court vacated the conviction and, in a memorandum per curiam decision, remanded the case for consideration in light of *Massiah v. United States*, 377 U.S. 201 (1964). *McLeod v. Ohio*, 378 U.S. 582 (1964), *vacating and remanding per curiam* 173 Ohio St. 520, 184 N.E.2d 101 (1962). The Ohio Supreme Court affirmed the conviction, distinguishing *Massiah* on its facts, but the United States Supreme Court again issued a memorandum decision, this time maintaining: "[T]he judgment is reversed. *Massiah v. United States* . . ." *McLeod v. Ohio*, 381 U.S. 356 (1965), *rev'g per curiam* 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964). While the first three steps in *McLeod* are directly parallel to those in *Hudgins*, it can only be conjectured whether the final step in *McLeod* will be duplicated in *Hudgins*. See Lewis, *supra* note 35, at 634-35.

One rationale for the Supreme Court's practice of remanding is that the State court is given the opportunity to reverse itself in view of recent cases the Court considers germane to the issue. See *State v. McLeod*, 1 Ohio St. 2d 60, 63-66, 203 N.E.2d 349, 352-54 (dissenting opinion), *rev'd per curiam*, 381 U.S. 356 (1965).

<sup>59</sup> *Chapman v. California*, 386 U.S. 18, 26 (1967).