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


In 1965, the Supreme Court in *Griffin v. California* held unconstitutional the provision of the California constitution permitting comment by the trial court or prosecution on the defendant's failure to testify at his trial. Prior to *Griffin*, 44 States had prohibited such comment either by statute or by judicial decree. 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.

In 1967, certiorari was granted in *Chapman v. California* 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?" The Supreme Court concluded "that there may be some constitutional errors which in the setting...

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1 380 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).

2 *Cal. Const.* art. I, § 13. (In 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.

3 380 U.S. at 613.

4 Id. at 611-12. *Tehan v. United States ex rel. Short*, 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.

5 *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, § 4 1/2, 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 manner 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.

6 386 U.S. 18 (1967).

7 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."\(^8\) 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,"\(^9\) 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."\(^10\) 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."\(^11\)

One week after deciding *Chapman*, the Court applied the new standard to another California case, *Phillips v. California*,\(^12\) 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*.\(^13\) 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*.\(^14\) 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,\(^15\)

\(^8\) Id. at 22.
\(^9\) Id. at 24.
\(^10\) Id.
\(^11\) Id. at 26.
\(^12\) 240 Cal. App. 2d 197, 49 Cal. Rptr. 480 (1966), rev'd per curiam, 386 U.S. 212 (1967).
\(^13\) 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.
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. 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, 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. 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. It is noteworthy that in three other cases of the remanded group that have been reconsidered by the California appellate courts, the same controversial approach was used. In two of them, People v. Propp and People v. Fontaine, the court incorporated all of the previous opinion by reference except for the portion dealing with the application

16 Id. at 21.
18 Id.
19 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.
22 237 Cal. App. 2d 320, 46 Cal. Rptr. 855 (1965), vacated and remanded per curiam, 386 U.S. 265, 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,\(^2\) 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."\(^2\) In setting forth its preference for the Fahy v. Connecticut\(^6\) approach to harmless error, the Court also demanded that there by proof beyond a reasonable doubt that the error complained of did not contribute to the conviction.\(^6\) 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.\(^2\)\(^7\) 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\(^2\)\(^8\) 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.\(^9\) Although his opinion represents a conscientious and comprehensive attempt to determine what Chapman re-

\(^2\) 386 U.S. at 23.
\(^4\) Id.
\(^5\) 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.
\(^6\) 386 U.S. at 24.
\(^7\) Id. at 24-26.
\(^8\) Cases cited note 14 supra.
\(^9\) 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, and to delve into the legislative history of the federal harmless error statute, indicates the lack of clarity inherent in the standard. 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. 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. 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.

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, 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.

32 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.
33 Id.; see Chapman v. California, 386 U.S. 18, 26 (1967).
34 Id.; see Chapman v. California, 386 U.S. 18, 26 (1967).
35 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).
Denno, 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. Although the prediction had been made that the Chapman standard might prove to be so strict so as to invariably require reversal, 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, 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. 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," even

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38 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."
39 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."
41 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).
though the court admitted, and the record indicated, that the com-
ment was purposely included in the prosecution's case. 43

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. 44
Although this approach is at the opposite end of the spectrum from
that of Hudgens, 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 re-
versal. 45 However, this is the approach suggested by Justice Stewart
in his concurring opinion to Chapman. 46 After listing other constitu-
tional errors which have never been deemed harmless, 47 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 ... ." 48

The language of Griffin lends itself to the per se analysis. There-
in the Court acknowledged that the jury might draw a natural and
irresistible inference of guilt from the defendant's failure to
testify, 49 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." 50 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,

43 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."

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.

46 Id. at 45.
47 Mr. Justice Stewart lists involuntary confessions, denial of counsel at trial, ad-
verse 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.
48 Id. at 45.
50 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."61

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 case62 reversing a conviction based on a statement that might not have even constituted a Griffin error,63 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."64

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.65 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]."66 Also, a landmark Supreme Court case on harmless error has warned "that what may seem technical may embody a great tradition of justice."67

In light of the great tradition of justice surrounding the fifth

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63 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.
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. 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" 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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58 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: "The judgment is reversed. Massiah v. United States . . . ." McLeod v. Ohio, 381 U.S. 356 (1965), rev'd 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, 203 N.E.2d 349, 352-54 (dissenting opinion), rev'd per curiam, 381 U.S. 356 (1965).