Criminal Law and Procedure -- Harmless Error

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senting opinions of the Chief Justice and Justice Fortas,[26] joined by Justices Brennan and Douglas in a separate dissent.[27] Nor is there much comport for the proponent of the *Status quo* in the majority's reluctant affirmance.[28] The announcement by Justice Clark, who voted with the majority, that he intends to retire from the Court[29] further weakens the holding of *Spencer* and leaves to speculation whether his replacement would vote for or against affirming if and when the question is again presented. More importantly, two of the dissenting Justices felt that the common law procedure for applying recidivist statutes "undermined 'the very integrity of the fact finding process' "[30] and would have applied their dissents retroactively. As is noted in the North Carolina Attorney General's amicus curiae brief, to strike down the common law procedure would be to nullify North Carolina statutes and holdings.[31] To apply such a decision retroactively would also nullify convictions obtained using these procedures. Thus, it would seem prudent to consider changing the statute on these very practical grounds as well as on the policy basis discussed above.

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Criminal Law and Procedure—Harmless Error

The harmless-error statutes and rules[1] now utilized by all the states and in the federal judicial system[2] are the product of judicial

[26] 87 Sup. Ct. at 656.
[27] *Id.* at 666.
[28] See notes 14 and 15 *supra* and accompanying text.
[29] Time, Mar. 10, 1967, p. 22.
[30] 87 Sup. Ct. at 666. *Compare*, Gideon v. Wainwright, 372 U.S. 335 (1965).
[31] Brief of the Attorney General of North Carolina as Amicus Curiae, p. 2, Spencer v. Texas, 87 Sup. Ct. 648 (1967).

[1] Typical of the harmless-error provisions is the California harmless-error provision which 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.

CAL. CONST. art. VI, § 4½.

[2] 28 U.S.C. § 2111 (1965) provides:

On the hearing of any appeal or writ of certiorari in any case, the

reform early in this century. They arose from the desire to allow appellate courts to judge whether minor trial errors materially affect the outcome of a trial.[3] In effect, they provide that there may be some errors which in the setting of a particular case may be deemed harmless, thus not resulting in automatic reversal. In *Chapman v. California*,[4] the United States Supreme Court restricted state harmless-error provisions as applied to denial of rights guaranteed by the Federal Constitution. The rule announced by Mr. Justice Black for the Court states that where there is an error of state procedure or state law, the states may continue to apply their harmless-error rules.[5] However, state appellate judges may overlook federal constitutional violations only if the court is able to find that the error is "harmless beyond a reasonable doubt."[6]

Ruth Elizabeth Chapman and Thomas LeRoy Teale were convicted of a 1962 robbery-slaying. At the time of the trial, Article I, § 13 of the California Constitution provided that a defendant's failure to testify could be commented upon and could be considered by the court or jury.[7] Neither defendant testified at the trial and the prosecutor, relying on Article I, § 13, filled his argument to the jury from beginning to end with numerous references to their silence and inferences of their guilt resulting therefrom.[8] The judge also charged the jury that they could draw adverse inferences from the failure to testify.[9] After trial, but before petitioners appeal had

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.

FED. R. CRIM. P. 52(a) provides:

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

See also FED. R. CIV. P. 61.

[3] See, Kotteakos v. United States, 328 U.S. 750, 759-60 (1946).

[4] 386 U.S. 18 (1967).

[5] *Id.* at 21.

[6] *Id.* at 24.

[7] CAL. CONST. art. I, § 13 provides:

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.

[8] Excerpts of the prosecutor's argument are reproduced in the appendix of the majority opinion. 386 U.S. at 26-42.

[9] The trial judge charged the jury:

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely on his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or ex-

been considered by the California Supreme Court, the United States Supreme Court declared in *Griffin v. California*[10] that such comment was a violation of the Fifth Amendment privilege against self incrimination.[11] When the California Supreme Court heard the appeal of Chapman,[12] the court, while admitting that petitioners had been denied a federal constitutional right by the comments on their silence, nevertheless ruled that the convictions could stand because the comments to the jury were harmless errors that did not affect the verdict.[13] Applying the new test announced in his opinion, Mr. Justice Black held that California had failed to show the error was harmless beyond a reasonable doubt and thus reversed the conviction.[14]

One question which *Chapman* presents is whether the Court has the power to declare this rule. This power seems questionable for two reasons. First, nowhere does the Court state that the California harmless-error provision is a violation of due process.[15] Also, the Court appears to acknowledge that other harmless-error formulations would be constitutionally permissible.[16] The Court simply states that the rule they announced will "provide a more workable standard."[17] Second, the Court in effect has assumed a general supervisory power over the trial of federal constitutional issues in a state court. While the Fourteenth Amendment protects individuals from invasion of fundamental rights,[18] nothing in the Fourteenth Amendment gives federal courts supervisory power in the affirma-

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plain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence or as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. . . .

Id. at 19.

[10] 380 U.S. 609 (1965).

[11] *Id.* at 615. Tehan v. United States, 382 U.S. 406 (1966), determined that the law as declared in *Griffin* was applicable to all cases that were still pending on direct review at the time that *Griffin* was announced.

[12] People v. Teale, 45 Cal. Rptr. 729, 404 P.2d 209 (1965).

[13] *Id.* at 741, 404 P.2d at 220.

[14] 386 U.S. at 26.

[15] In his dissent, Mr. Justice Harlan argues that the provision does not violate due process. *Id.* at 47.

[16] *Id.* at 46. Justice Black states that Congress could make a different formulation.

[17] *Id.* at 24.

[18] See, Palko v. Connecticut, 302 U.S. 319 (1937).

tive sense of *McNabb v. United States*.[19] As Mr. Justice Cardozo had occasion to remark, a state rule of law "does not run foul of the Fourteenth Amendment because another method may seem . . . to be fairer or wiser or to give a surer promise of protection to the prisoner at bar."[20]

But assuming that the Court has this power, there remains the basic question of whether this new rule "will provide a more workable standard." In *People v. Watson*,[21] the California court, in defining its harmless-error provision, stated that reversal would be required only when "it is reasonably probable that a result more favorable to the appealing party would have been reached," and this judgment "must necessarily be based upon reasonable probabilities rather than upon mere possibilities."[22] Thus, the difference between the California "miscarriage of justice" test for harmless error and the "harmless beyond a reasonable doubt" test announced by Mr. Justice Black would seem to be largely verbalistic. However, the desirability of a uniform standard for determining whether a federal constitutional error is harmless is apparent from an examination of numerous past attempts to formulate a rule.[23] Applying this rule to all state courts will eliminate the need to determine whether each state harmless-error provision is consistent with the due process clause of the Fourteenth Amendment.

However, whether the California court is applying its rule of "miscarriage of justice" or the new rule of "harmless beyond a

[19] 318 U.S. 332 (1943). The Court held that incriminating statements elicited from defendants during unlawful detention by federal officials are inadmissible in federal courts. The Court stated that "the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity." *Id.* at 340.

[20] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). See also Spencer v. Texas, 385 U.S. 554 (1967) where the Court holds that the Constitution does not ordain the Supreme Court with authority as rule-making organ for promulgation of state rules of criminal procedure. *Id.* at 569.

[21] 46 Cal. 2d 818, 299 P.2d 243 (1956).

[22] *Id.* at 837, 299 P.2d at 255.

[23] See, Kotteakos v. United States, 328 U.S. 750 (1946) where the Court stated the material factors of the harmless-error rules to be the character of the proceedings, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole. *Id.* at 762. In Fahy v. Connecticut, 375 U.S. 85 (1963) the majority of five held the test of harmless error to be whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.* at 86-87. The four dissenters said the standard was a determination that exclusion of the unconstitutional evidence could not have changed the outcome of the trial. *Id.* at 95.

reasonable doubt," the same question will remain—is the application of the rule to the alleged error a reasonable one or was the rule applied arbitrarily to destroy or dilute constitutional guarantees? To answer this question, the Court, under whatever rule it promulgates, will have to look to each state court decision to see if the rule was reasonably applied. This will entail not only looking at the case in dispute but looking at previous applications of the rule.

Furthermore, it seems that the impact of the new rule is weakened by the fact that state courts can continue to apply their state harmless-error statutes to state errors.[24] That a state judge will mentally shift gears and consider one set of criteria to see if there is a miscarriage of justice and another set of criteria to see if the error is harmless beyond a reasonable doubt seems unlikely. In California, the holding in *Chapman* would probably be the same whichever criteria is used.[25]

Apart from the question of whether this new rule "will provide a more workable standard" is the question of whether a violation of *Griffin* should ever be subject to a harmless-error rule. It is conceded by the Court that there can be errors which in a particular setting may be so insignificant that they can be considered harmless.[26] Also, it is stated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error and will result in automatic reversal.[27] The majority opinion would seem to indicate that in a particular context a violation of *Griffin* could be harmless. This view seems to be in direct contravention of *Griffin* which held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[28] A more desirable result to the case is found in the concurring opinion of Justice Stewart. He holds that violation of Griffin should

[24] 386 U.S. at 21.

[25] The California court held that there was no miscarriage of justice because the proof of guilt was overwhelming. 45 Cal. Rptr. 729, 740-41, 404 P.2d 209, 220 (1965).

[26] Snyder v. Massachusetts, 291 U.S. 97 (1934) (denial of permission to accused to attend a view held harmless); Motes v. United States, 178 U.S. 458 (1900) (erroneous admission of written statement not prejudicial error).

[27] Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge). The concurring opinion of Mr. Justice Stewart expands this list considerably. 386 U.S. at 42-45.

[28] 380 U.S. at 615.

never be treated as harmless error and should result in automatic reversal.[29] Harmless-error statutes are designed to stop reversals due to unimportant technicalities. But a violation of *Griffin* is a conscious act on the part of the prosecution or the court. To hold out the possibility that this violation could be harmless would only seem to tempt the unethical and award the ignorant.

The adoption of this harmless-error rule has thus committed the Court to a case-by-case determination of the extent to which unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial; *i.e.*, was the comment "harmless beyond a reasonable doubt?" This substantial burden could have been avoided by placing *Griffin* violations in the category of Constitutional rights so basic that infractions can never be harmless error and will result in automatic reversal. Thus, the most that can be said at present is that *Chapman* has clouded the holding of *Griffin*, a cloud which hopefully will be dispelled in further decisions.[30]

EUGENE W. PURDOM

Federal Practice—Sovereign Immunity and Counterclaims Against the Government under the Tucker Act

A problem that has arisen time and again under the Tucker Act[1] involves the question of whether a defendant who has a claim against the Government, which claim could be the subject of an original suit under the Tucker Act, may assert it as a counterclaim in an action brought by the Government against him in a federal court. Any discussion of this problem must begin with the general proposition that the Government cannot be sued unless it has consented to be sued and then only in the manner in which it has so

[29] 386 U.S. at 45. See also O'Connor v. Ohio, 385 U.S. 92 (1966) where the Court reversed a *Griffin* violation without even mentioning harmless error.

[30] The question remains as to what other constitutional violations will be subject to the harmless-error test. In Cooper v. California, 386 U.S. 58 (1967), a companion case of *Chapman*, the Court did not reach the question of whether the harmless-error test should be applied to Fourth Amendment violations, as it ruled that the search was not a violation of the Fourth Amendment. *Id.* at 59.

[1] 24 Stat. 505 (1887).