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# Harmless Constitutional Error - A Louisiana Dilemma?

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# COMMENTS

## HARMLESS CONSTITUTIONAL ERROR— A LOUISIANA DILEMMA?

Where a federal constitutional right has been violated at the trial level, reviewing courts often have been reluctant to apply the harmless error doctrine. The United States Supreme Court has reversed convictions in a variety of situations without finding prejudice to the defendant where such a constitutional violation occurred.[1] In *Kotteakos v. U.S.*,[2] the Court stated in dicta that the federal harmless error rule might be inapplicable in the face of a constitutional violation.[3] Accordingly, it has been urged that harmless constitutional error does not exist and that a rule of automatic reversal is appropriate.[4] On the other hand, harmless error has been found in some instances involving constitutional violations.[5] And in 1963, in *Fahy v. Connecticut*,[6] the majority of the Court found it unnecessary "to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error'. . . ."[7] Finally, in *Chapman v. California*,[8] the Court took the position that harmless error might apply in some cases of constitutional error.[9]

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1. The violations include the following: pre-trial community-wide broadcast of defendant's confession, Rideau v. Louisiana, 373 U.S. 723 (1962); trial for felony offense without counsel, Gideon v. Wainwright, 372 U.S. 335 (1962); arraignment for capital offense without counsel, Hamilton v. Alabama, 368 U.S. 52 (1961); admission of coerced confession, Payne v. Arkansas, 356 U.S. 560 (1957); incorrect presumption given in charge to jury, Bollenbach v. United States, 326 U.S. 607 (1945); trial with a biased judge, Tumey v. Ohio, 273 U.S. 510 (1927); admission of involuntary confession, Bram v. United States, 168 U.S. 532 (1897).

2. 328 U.S. 750 (1946).

3. The Court said: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, *except perhaps where the departure is from a constitutional norm . . . .*" *Id.* at 764-65. (Emphasis added.)

4. *See* Comment, 20 STAN. L. REV. 83 (1967) and Note, 36 BROOKLYN L. REV. 139 (1969).

5. *See* Lutwak v. United States, 344 U.S. 604 (1953) and Motes v. United States, 178 U.S. 458 (1900). Both violations involved the right to confrontation guaranteed by the sixth amendment.

6. 375 U.S. 85 (1963).

7. *Id.* at 86.

8. 386 U.S. 18 (1966).

9. Concluding that some constitutional errors could be deemed harmless, the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt . . . . Applying the foregoing standard, we have no doubt that the error in these cases was not harmless to the petitioners." *Id.* at 24.

*The Chapman Rule*

By establishing in *Chapman* the doctrine of harmless constitutional error, the Court did three things: (1) divided constitutional error into two types, one calling for automatic reversal and the other allowing a finding of harmless error;[10] (2) formulated and applied the new federal test;[11] (3) made mandatory the application of this test by both federal and state appellate courts in order to find harmless constitutional error.[12] It is submitted that, of the three, only the third statement was made sufficiently explicit to require no further discussion.[13] The method of distinguishing the two types of constitutional error is unclear from the language of *Chapman*, and has been discussed elsewhere.[14] This Comment will focus on two objectives: first, to determine as nearly as possible the formulation and proper method of applying the rule of harmless constitutional error and, second, to analyze the effects of this rule on the Louisiana jurisprudence and procedure concerning harmless error.

*Verbalization of the Rule*

Any analysis of the rule of harmless constitutional error must be based necessarily on the language of the Supreme Court decisions. Since *Chapman*, the Court has ruled in three separate cases,[15] all ostensibly affirming[16] the rule of *Chapman*. It is

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10. *Id.* at 22.

11. The language of the Court in *Chapman* was "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and that "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 24.

12. In speaking of whether a state harmless error rule could apply where a federal right had been violated, the Court said: "With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Id.* at 21.

13. *But see* State v. Hills, 259 La. 436, 250 So.2d 394 (1971) where the Louisiana supreme court read *Chapman* as allowing the application of the Louisiana harmless error rule.

14. *See generally* Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519 (1969) and Comment, 18 U.C.L.A. L. REV. 202 (1970) for excellent analyses distinguishing types of constitutional error. Such a distinction is unnecessary for present purposes since this paper will be limited to situations in which harmless error *is* to be applied.

15. Milton v. Wainwright, 92 S. Ct. 2174 (1972); Schneble v. Florida, 92 S. Ct. 1056 (1972); and Harrington v. California, 395 U.S. 250 (1969).

16. In *Harrington*, the Court stated: "We do not depart from *Chapman*; nor do we dilute it by inference. We reaffirm it." Harrington v.

believed that reconciliation of the later decisions with *Chapman*, while difficult, is possible.

In *Chapman*, petitioner argued that a violation of a federal constitutional right could never be harmless. Alternatively, he argued that should harmless error be applicable, a federal standard should be used rather than the state rule by which his conviction was affirmed. The Court rejected the first contention but upheld the second, stating that the formulation of a harmless error rule to be applied where federal rights are violated is a question of federal law.[17] Accordingly, the Court proceeded to fashion an appropriate rule. Both the federal statutory rule[18] and the California constitutional rule[19] were cited and seemingly rejected, while language used in an earlier decision of the Court was approved:

> "We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut* . . . . There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction . . . .' There is little, if any, difference between our statement in *Fahy v. Connecticut* . . . and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold as we do now, that before a federal constitutional error can be held harmless, the court

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California, 395 U.S. 250, 254 (1969). Justice Brennan, however, dissented: "The Court today overrules *Chapman v. California*, . . . the very case it purports to apply." *Id.* at 255. *See* 36 BROOKLYN L. REV. 139, 143 (1969). The majority opinions in *Schneble* and *Milton* also cited *Chapman* in finding harmless error.

17. For possible theories to support this contention of a federal question, *see* Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519 (1969) and Comment, 20 STAN. L. REV. 83, 88 n.40 (1967).

18. Harmless Error Rule, 28 U.S.C. § 2111 (1970) provides: "On the hearing of any appeal . . . the court shall give judgment . . . without regard to errors . . . which do not affect . . . substantial rights . . . ." The phrase "affects substantial rights" has been interpreted by at least one writer to require an appreciable degree of probability that the error contributed to the verdict before it is considered prejudicial. Note, 47 COLUM. L. REV. 450, 451 (1947). This is clearly a greater requirement than *Chapman's* "reasonable possibility," supporting that decision's rejection of the federal rule.

19. CAL. CONST. art. VI, § 4½.

must be able to declare a belief that it was harmless beyond a reasonable doubt."[20]

Thus, the test after *Chapman* was "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction"[21] and that "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt."[22] This language was repeated verbatim in many subsequent applications of the test.[23] The crucial question, however, is the *meaning* of the language—the manner in which an appellate court must review the record to determine harmless error. There are three possible approaches. An appellate court may limit its inquiry either to (1) the amount of evidence untainted by the error, or (2) the effect of the error itself on the conviction, or (3) it may look to a combination of both factors.

The Court in *Chapman* spoke disparagingly of the California court's emphasis on "overwhelming evidence"[24] apart from the error in finding it harmless. Further, the standard applied in *Fahy*, which was adopted by the Court in *Chapman*, expressly rejected consideration of whether there was sufficient untainted evidence to support a finding of harmless error.[25] The critical difference between the two tests is this. If an appellate court must be convinced beyond a reasonable doubt that the error had *no* effect on the jury's determination of guilt before it can conclude harmless error, then any doubt as to the effect of the error, regardless of the other evidence, must dictate reversal.[26] However, by using a standard of independently sufficient evidence, a court can find harmless error if enough untainted evidence exists to support the conviction, regardless of the effect

20. Chapman v. California, 386 U.S. 18, 23-24 (1966).
21. *Id.* at 24.
22. *Id.*
23. *See, e.g.*, Dutton v. Evans, 400 U.S. 74 (1970); Gilday v. Scafati, 428 F.2d 1027 (1st Cir. 1970); Brown v. Beto, 425 F.2d 246 (5th Cir. 1970); United States v. Clark, 416 F.2d 63 (9th Cir. 1969); Dean v. Hocker, 409 F.2d 319 (9th Cir. 1969); Solomon v. United States, 408 F.2d 1306 (D.C. Cir. 1969); United States v. LaVallee, 391 F.2d 123 (2d Cir. 1968).
24. Chapman v. California, 386 U.S. 18, 23 (1966).
25. The majority in *Fahy* said: "We are not concerned here with whether there was sufficient evidence on which petitioner could have been convicted without the evidence complained of." Fahy v. Connecticut, 375 U.S. 85, 86 (1963). Justice Harlan, dissenting, said this test was "a much stricter standard than that of independently sufficient evidence . . . ." *Id.* at 95.
26. *Cf.* Pearson v. United States, 389 F.2d 684 (5th Cir. 1968).

of the error.[27] The former test, concentrating on the effect of the error, seemed to be endorsed by *Chapman*. If followed strictly, though, this test seems almost tantamount to automatic reversal,[28] since it would be extremely difficult for a court to find beyond a reasonable doubt that a constitutional error had *no* effect on the jury's verdict.

*Harrington*

The strict requirements and uncertain meaning of the *Chapman* test led to the second Supreme Court decision on harmless constitutional error. In *Harrington v. California*,[29] the Court again went through the process of applying and supposedly clarifying the test, but while expressly stating a reaffirmation of *Chapman*,[30] the Court arguably modified the test,[31] concluding that "apart from [the tainted confessions] the *case against Harrington was so overwhelming* that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt . . . ."[32] (Emphasis added.) Thus, the Court here considered the amount of untainted evidence in finding harmless error. Further, the Court rejected the petitioner's contention that they must reverse if there was a possibility that a single juror reached his verdict because of the error:

> "We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury."[33]

Whether the Court in *Harrington* was merely trying to clarify

27. In his dissent in *Fahy*, Justice Harlan stated that an affirmance by this test still allows the possibility that the jury relied on the tainted evidence and, therefore, would have reached a different verdict otherwise. In *People v. Ross*, 60 Cal. Rptr. 254, 269, 429 P.2d 606, 621 (1967), Chief Justice Traynor explained in his dissent that "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."

28. *See The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 205 (1967).

29. 395 U.S. 250 (1969).

30. *See* note 16 *supra*.

31. *See* note 25 *supra* for the analysis of the Court in *Fahy*, adopted in *Chapman*, which rejected consideration of the sufficiency of the untainted evidence.

32. Harrington v. California, 395 U.S. 250, 254 (1969).

33. *Id.* Arguably, this differed from *Chapman* in that here the Court looked to the *probable* impact of the error, while in *Chapman* the Court stated that to find harmless error they must believe *beyond a reasonable doubt* that the error played no role in the conviction.

the meaning intended in *Chapman* is uncertain.[34] The language of the two decisions, however, clearly justifies the argument that different tests were used.

*Recent Decisions*

The trend in *Harrington* away from the strict language of *Chapman* emphasizing the effect of the error and toward a more expansive consideration of the untainted evidence apart from the error was continued in the two most recent Supreme Court decisions on harmless constitutional error. In *Schneble v. Florida*[35] and in *Milton v. Wainwright*,[36] both 1972 decisions, the Court found constitutional violations harmless error. In *Schneble*, as in *Harrington*, the violation consisted of the admission into evidence of statements of a co-defendant who did not testify. The Court found the independent evidence of guilt, which included petitioner's own confession, overwhelming. *Milton* involved an allegedly illegal confession, admitted over objection, which petitioner claimed violated his sixth amendment right to assistance of counsel as interpreted in *Massiah v. United States*.[37] However, noting that "no less than three full confessions were made by petitioner"[38] in addition to the challenged confession, the Court was satisfied that the error, if any, was harmless.

The dissent in *Schneble* attacked the sufficiency of the independent evidence which the majority found to support the conclusion of harmless error. Justice Marshall, writing for the minority, protested what he termed an extension of *Harrington* in that in the instant case the evidence of guilt apart from the error—petitioner's confession—was itself in controversy. The jury had been charged to determine the voluntariness of the confession before considering it. Questioning the majority's assumption that the jury must have ruled the confession voluntary since they "could on no rational hypothesis have found Schneble guilty without reliance on his confession,"[39] Justice Marshall

34. *See* Note, 83 HARV. L. REV. 814 (1969) maintaining that the Court in *Chapman* did in fact consider the untainted evidence when they determined that the jury might have returned a not-guilty verdict in the absence of the tainted evidence. This supports the contention that *Harrington*, while considering the amount of untainted evidence, merely clarified *Chapman*.
35. 92 S. Ct. 1056 (1972).
36. 92 S. Ct. 2174 (1972).
37. 377 U. S. 201 (1964).
38. Milton v. Wainwright, 92 S. Ct. 2174, 2175 (1972).
39. Schneble v. Florida, 92 S. Ct. 1056, 1059 (1972).

maintained that the Court had no way of knowing whether the jury actually ruled the confession voluntary. Certainly, it was possible that the confession was disregarded and the conviction based instead to some degree on the statement of the co-defendant. Similar doubt was expressed by Justice Stewart in his dissent for the minority in *Milton*. However, the thrust of his argument centered on the effect of the error, the corroborating effect that the illegal confession might have on the weight given by the jury to the confessions:

> "Surely there is *at the least* a reasonable doubt whether in these circumstances the introduction of Langford's testimony did not contribute to the verdict of first degree murder returned by the jury . . . ."[40]

In summary, these four decisions seem to indicate a trend toward a liberal rule of harmless constitutional error, characterized by a greater emphasis on the untainted evidence of guilt rather than on the effect of the error only.

*Reconcilation: The Meaning of the Rule*

It is submitted that the probable intention of the Court is to consider both factors—the untainted evidence *and* the error's effect on the jury—in applying the test. The Court used the word "overwhelming" rather than "sufficient" to describe the necessary untainted evidence. Evidence *sufficient* in the judgment of a reviewing court to support a conviction does not rule out the possibility that the jury would have acquitted without the tainted evidence, since they could have failed to consider some of the untainted evidence, basing the conviction largely on the erroneously admitted evidence.[41] But the more *overwhelming* the untainted evidence, the less likely is the possibility that the jury failed to consider also enough untainted evidence for the conviction, thus making the error truly harmless. Thus if the evidence is overwhelming enough, the court could say that the effect of the error was harmless, at least beyond a reasonable doubt. At the same time, the more grievous the error, the more pernicious its effect on the guilt determination process—the more overwhelming would be the evidence required. Consequently, some errors could never be held harmless, regard-

40. Milton v. Wainwright, 92 S. Ct. 2174, 2181 (1972).
41. *See* note 34 *supra*.

less of the amount of untainted evidence,[42] since it would be virtually impossible to determine how much other evidence was overshadowed by and overlooked because of the influence of the error.[43] The difference between this test and that of independently sufficient evidence is admittedly one of degree. However, by qualifying the amount of evidence needed by the magnitude of the error, this rule has the virtue of protecting the defendant without nullifying the contribution of the doctrine of harmless error to judicial economy.

*Louisiana and Harmless Constitutional Error: The Beginnings*

The federal rule, then, allows a finding of harmless constitutional error only where the reviewing court, after examining the entire record, finds the untainted evidence of guilt so overwhelming that the court is satisfied beyond a reasonable doubt that the error complained of could not have affected the result. The fact that this rule must be applied by Louisiana appellate courts before constitutional error can be found harmless raises several problems, the clarification of which may be effected by an analysis of the Louisiana decisions since *Chapman* involving constitutional error.

The first case in which the harmless constitutional error rule was an issue was *State v. Hopper*.[44] Defendant, in a joint trial, was convicted of manslaughter. Neither defendant testified, but testimony of the oral confessions of each, both implicating the confessor and his co-defendant, was admitted with limiting instructions by the trial judge. Defendant Hopper appealed, and his conviction was affirmed.[45] Subsequently, the United States Supreme Court granted writs and remanded[46] the case for further consideration in light of *Bruton v. United States*[47] and *Roberts v. Russell*.[48] The Louisiana supreme court, on remand,

42. "We admonished in *Chapman* . . . against giving too much emphasis to 'overwhelming evidence' of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless." Harrington v. California, 395 U.S. 250, 254 (1969).

43. *See* Note, 83 HARV. L. REV. 814 (1969).

44. 253 La. 439, 218 So.2d 551 (1969).

45. 251 La. 77, 203 So.2d 222 (1967).

46. 392 U.S. 658 (1967).

47. 391 U.S. 123 (1967). In *Bruton*, the Court held that the admission at a joint trial of a co-defendant's extrajudicial confession implicating petitioner, despite limiting instructions, violated petitioner's rights under the sixth amendment.

48. 392 U.S. 293 (1968). *Roberts* made the rule of *Bruton* retroactive.

held that, although Hopper's sixth amendment right was violated, the error was harmless under Louisiana's harmless error rule, since the violation was "technical" rather than "substantial."[49] Justice Barham dissented on the ground that the *Chapman* mandate clearly prohibited the application of the state harmless error rule in such a case.[50] Further, he argued that automatic reversal was appropriate for this type of constitutional error.[51]

*Anderson: Defining the Problem*

Soon after *Hopper*, the court decided *State v. Anderson*,[52] which also involved a Bruton violation. Again the court affirmed, stating that "[t]he harmless error rule applies to the use of such confessions at a joint trial"[53] and citing the Louisiana harmless error rule, *Harrington*, and *Hopper*. Again Justice Barham dissented, pointing out that "the admission of evidence which violates a federal constitutional right can be ruled harmless only *under the federal standard for harmless error* . . . ."[54] Justice Barham then listed the steps to be followed in applying the federal rule, one of which is that the reviewing court, to determine whether the admissible evidence overwhelmingly supports the verdict, must examine the *complete* record, including *all* testimony and evidence adduced at trial.[55] This single requirement is the basis for the dilemma in which the Louisiana supreme court finds itself on harmless constitutional error.[56]

49. State v. Hopper, 253 La. 439, 447-48, 218 So.2d 551, 553-54 (1969). LA. CODE CRIM. P. art. 921 reads: "A judgment or ruling shall not be reversed by an appellate court on any ground unless in the opinion of the court after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

50. 253 La. at 466, 218 So.2d at 560.

51. *Id.* Although *Harrington* subsequently held the harmless error rule applicable to the same constitutional violation, there is some support for the contention that such a violation of sixth amendment rights should call for automatic reversal. *See* Note, 36 BROOKLYN L. REV. 139 (1969).

52. 254 La. 1107, 229 So.2d 329 (1969).

53. *Id.* at 1129, 229 So.2d at 337.

54. *Id.* at 1141, 229 So.2d at 341.

55. The Court in *Harrington* said: "Our judgment must be based on our own reading of the record . . . ." 395 U.S. at 254. *Accord*, Ignacio v. Territory of Guam, 413 F.2d 513 (9th Cir. 1969); United States v. Johnson, 412 F.2d 753 (1st Cir. 1969); United States *ex rel.* Chambers v. Maroney, 281 F. Supp. 96 (W.D. Penn. 1968).

56. LA. CODE CRIM. P. art. 921 (harmless error rule) requires "an examination of the entire record" and would seemingly pose the same dilemma as the federal test. However, the "record" has been held to include only the evidence appended to and made part of a perfected bill of exceptions. State v. Cooper, 241 La. 757, 131 So.2d 55 (1961).

The Louisiana bill of exception procedure[57] is a set of formal and technical rules limiting the appellate court's consideration to only that evidence which is pertinent to the questioned ruling and which is formally attached to a perfected bill of exceptions. Courts refuse to review any evidence not so attached, even where the complete transcript is available for other reasons.[58] Also, article VII[59] of the Louisiana Constitution limits review in criminal cases to questions of law, which, according to the jurisprudence,[60] does not include inquiry into the sufficiency of the evidence supporting a verdict.

Given the mandate and method of the federal rule of harmless constitutional error, the problem in Louisiana becomes clear. The federal rule demands an examination of the entire record and a finding of overwhelming untainted evidence before a constitutional error can be deemed harmless. The Louisiana supreme court is simply unable to apply this rule and at the same time remain consistent to the Louisiana rules of procedure and jurisprudence.

*Attempted Resolutions by the Court*

With this background, one can readily appreciate the dilemma of the court after the *Chapman* decision. As has been noted,[61] the court in *Hopper* failed to consider the federal mandate. The majority in *Anderson* seemingly recognized the persuasiveness of Justice Barham's dissent in *Hopper* and cited both the Louisiana statutory rule and *Harrington*, but were still unable to apply the federal rule correctly without the complete record. Then in *State v. McGregor*[62] and *State v. Mixon*,[63] the court indicated an application of the federal rule, citing *Harrington*. Such an application was *possible* in these two cases since the complete transcripts were in fact before the court, though

57. LA. CODE CRIM. P. arts. 841-45.

58. State v. Barnes, 257 La. 1017, 245 So.2d 159 (1970). In *Anderson*, the court said: "No verbatim transcript is required, nor would this court review it if it had been transmitted." *Id.* at 1139, 229 So.2d at 340.

59. LA. CONST. art. VII, § 10 provides in part: "In criminal matters, its [Louisiana supreme court] appellate jurisdiction extends to questions of law only."

60. State v. Hudson, 253 La. 992, 221 So.2d 484 (1969); State v. Vines, 245 La. 977, 162 So.2d 332 (1964).

61. *See* text accompanying notes 49 and 50 *supra*.

62. 257 La. 956, 244 So.2d 846 (1971).

63. 258 La. 835, 248 So.2d 307 (1971).

not made part of the bills reserved on the constitutional error. While applying the federal rule, however, the court made no mention of prior inconsistent cases[64] pertaining to the limitation of the scope of review under the bill of exceptions procedure and the prohibition against review of the sufficiency of evidence. Further, the application of the federal rule in cases like these raises heretofore dormant equal protection problems.[65]

Finally, in *State v. Hills*,[66] the Louisiana supreme court again reverted to the use of the state rule in the face of constitutional error. The court supported this by language from *Chapman* supposedly permitting the application of the state rule.[67] This conclusion, however, is questionable in light of pertinent language to the contrary in the same decision.[68]

*Conclusion—Possible Solutions*

The Louisiana supreme court could avoid the harmless error dilemma simply by refusing to apply *either* harmless error rule

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64. *See* notes 58 and 60 *supra*.

65. Because of the limitations on appellate review in Louisiana criminal cases, the equal protection-free transcript relationship was not so acute. In *Draper v. State of Washington*, 372 U.S. 487 (1963), the Supreme Court said that a state had a duty to provide indigents only as adequate a review as that given appellants with funds, and that the bill of exception procedure was not inherently inadequate. However, if the Louisiana supreme court in the *McGregor* and *Mixon* decisions was initiating the use of the federal rule whenever the complete transcript was in fact before the court, then inequality would result. *See* State v. McGregor, 257 La. 956, 244 So.2d 846 (1971) (Barham, J., dissenting). A defendant who made the complete transcript part of the record would be at a comparative disadvantage (for purposes of determining harmless error) to a defendant who did not; assuming, of course, that in the latter case the court, recognizing its inability to apply the federal rule without the full transcript before it, would have no choice but to reverse automatically without necessarily finding prejudice.

66. 259 La. 436, 250 So.2d 394 (1971).

67. The following language was quoted from *Chapman*: "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. . . . We decline to adopt any such rule. All 50 States have harmless-error statutes or rules . . . . None of these rules . . . distinguishes between federal constitutional errors and errors of state law . . . . All of these rules, state or federal, serve a very useful purpose . . . . We conclude that there may be some constitutional errors which in the setting 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." *Id.* at 452-53, 250 So.2d at 400. It is submitted, however, that this language only establishes that harmless error may now be found in some cases of federal constitutional violations; it does not authorize the use of state rules in such a determination.

68. *See* note 12 *supra*.

and instead reversing the conviction automatically whenever it is determined that a violation of a federal constitutional right has occurred.[69] As Justice Barham pointed out,[70] the United States Supreme Court requires the federal rule to be applied *only if* harmless error is to be determined. As a practical matter, this approach seems unacceptable to the writer. The great disadvantage of automatic reversal lies in sacrificing judicial economy by requiring re-trial of *all* cases tainted by constitutional error, regardless of how overwhelming the evidence of guilt and how certain the reconviction. The doctrine of harmless error was itself specifically designed to remedy these very shortcomings.

A more viable solution could be effected by legislation amending the bill of exception procedure to allow the necessary record to be brought up on appeal. This could be accomplished with a procedure similar to the appendix[71] used in federal courts. The defendant-appellant would indicate those parts of the record supporting his claim of error, and the state would add to the appendix whatever would be necessary, in the prosecutor's opinion, to allow a finding of harmless error, including the entire record. The defendant could then be allowed to add further testimony to refute the contention of harmless error.

In the absence of legislative action, another solution might consist of the court on its own motion ordering up complete transcripts whenever harmless error is contended. In so doing, the court would face a major, though not insurmountable, obstacle in article VII of the Louisiana constitution, presently interpreted as prohibiting review of the sufficiency of evidence for conviction. The language of article VII, however, prohibits review of only *questions of fact*; the jurisprudence has included the sufficiency of evidence in this prohibition. It is believed that such an interpretation is not compelling, especially in light of authority to the contrary.[72]

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69. All that is necessary is a determination from a set of facts whether or not the alleged violation occurred. This can be done with the bill of exceptions procedure without looking to the rest of the evidence to determine the effect of the error or the amount of untainted evidence.

70. State v. Anderson, 254 La. 1107, 1140, 229 So.2d 329, 341 (1969) (Barham, J., dissenting).

71. *See* FED. R. APP. P. 30.

72. *See* Abrams v. United States, 250 U.S. 616 (1919); Coronado v. United States, 266 F.2d 719 (5th Cir. 1959), *cert. denied*, 361 U.S. 851 (1959); Karn v. United States, 158 F.2d 568 (9th Cir. 1946); Yoffe v. United States, 153 F.2d 570 (1st Cir. 1946). *See also* Note, 30 LA. L. REV. 492 (1970).

In conclusion, it is clear that harmless constitutional error remains an unsolved problem in Louisiana criminal procedure. In the opinion of this writer, the proper application of the federal rule conflicts with present statutory provisions. Hopefully, a solution will be found that not only resolves the dilemma but also benefits our system of criminal justice.

*E. B. Dittmer II*

## AGREEMENTS NOT TO COMPETE

American courts traditionally have refused to enforce agreements not to compete in a business, profession or trade unless such restrictive covenants are merely incidental to the primary purpose of a larger lawful transaction.[1] Usually an ancillary agreement between competitors which limits competition is presumed to be an unreasonable restraint of trade in violation of the federal antitrust laws;[2] frequently, however, noncompetition agreements are used in connection with interests thought to require protection, such as the sale of a business,[3] a lease,[4] a partnership dissolution[5] or a contract of employment.[6] In most jurisdictions these noncompetition agreements will be considered reasonable, and thus enforceable, if considering the subject matter, the type of business and the relationship of the parties, the restriction is intended to afford fair protection to the interests of the covenantee and not so comprehensive as to impinge unreasonably upon the public interest or to place undue hardship on the party restricted.[7] This broad rule has resulted in varying interpretations and applications throughout the American court system.[8]

1. Irving Inv. Corp. v. Gordon, 3 N.J. 217, 69 A.2d 725 (1949).

2. Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1890).

3. Tri-Continental Fin. Corp. v. Tropical Marine Enterprises, 164 F. Supp. 1 (S.D. Fla. 1958), *aff'd*, 265 F.2d 619 (5th Cir. 1959); Hirsh v. Miller, 249 La. 489, 187 So.2d 709 (1966).

4. Goldberg v. Tri-States Theatre Corp., 126 F.2d 26 (8th Cir. 1942); M. M. Ullman & Co. v. Levy, 172 La. 79, 133 So. 369 (1931).

5. McCray v. Blackburn, 236 So.2d 859 (La. App. 3d Cir. 1970); Schlag v. Johnson, 208 S.W. 369 (Tex. Civ. App. 1919).

6. Electrical Prod. Consol. v. Howell, 108 Colo. 370, 117 P.2d 1010 (1941); Aetna Fin. Co. v. Adams, 170 So.2d 740 (La. App. 1st Cir. 1964), *cert. denied*, 247 La. 489, 172 So.2d 294 (1965).

7. Ceresia v. Mitchell, 242 S.W.2d 359 (Ky. App. 1951).

8. The first case to reach the courts on noncompetition agreements was the *Dyer* case, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414), and the court struck the covenant down as a restraint on economic freedom, regardless of its reasonableness. The first case to uphold such an agreement was