LAW OFFICE OF CLIFF GARDNER
1448 SAN PABLO AVENUE • BERKELEY, CA • 94702
PHONE: 510-524-1093 • FAX: 510-527-5812
Website: CliffGardner.com

July 22, 2014

Mr. Frank A. McGuire
Office of the Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Gary Lee

Re: *People v. Grimes*, S076339

Dear Mr. McGuire:

After May 28, 2014 oral arguments in the above-captioned case, the Court ordered supplemental opening and reply briefs on three distinct questions. All three questions related to the trial court's exclusion of evidence that John Morris said he alone killed the victim. Both parties filed their initial briefs on July 16, 2014. I would appreciate if you would bring this reply brief to the Court's attention.

I. Although The State Has Not Forfeited A Harmless Error Argument In Connection With State Law, It Has Forfeited The Argument In Connection With Federal Law.

Prior to oral arguments, Mr. Grimes served and filed a focus letter stating that he would be discussing the John Morris issue. Deputy Attorney General Stephanie Mitchell, representing the state, filed a focus letter indicating the state would "prepare[] to address any focus issues specified by counsel for appellant and to answer any questions posed by the Court at oral argument." (*People v. Grimes*, S076339, Respondent's Letter of May 7, 2014.) Of course, it stands to reason this preparation included reviewing Mr. Grimes's reply brief on the John Morris issue which noted that in its Respondent's Brief the state did "not dispute that if error occurred, reversal of both the special circumstance and penalty phase verdicts is required." (Appellant's Reply Brief 32.)

At oral argument, and in response to a question from the bench, counsel for Mr. Grimes reiterated that the state had never disputed harmless error. Deputy Attorney General Mitchell -- *the very same Deputy Attorney General who actually wrote the state's brief and who specifically prepared to address the John Morris*

issue -- was asked if the state had omitted harmless error from its brief. She candidly conceded that the state had indeed omitted harmless error from its brief:

> [T]he harmless error [argument] was omitted from our briefing . . . . (*People v. Grimes*, S076339, Oral Argument CD of May 28, 2014 ("CD") at 3:02:37-3:03:04.)

In light of the state's brief, and the state's concession, the Court requested briefing on whether "the Attorney General's failure to argue in the answer brief that an alleged error is harmless constitute[d] forfeiture of any harmless error argument regarding either state law errors or federal constitutional errors?"

The state now argues that for three reasons, it has not forfeited anything. First, the state argues that Mr. Grimes (in his reply brief and oral argument), Deputy Attorney General Mitchell (in her oral argument) and the Court (in its order requesting briefing) were all wrong. According to the state's newest position, the state *did* raise a harmless error argument and Mr. Grimes was "on notice" all along that the state was disputing harmless error. (Respondent's Supplemental Letter Brief ("RSLB") 1-2.)

Second, any failure on the state's part "to comply with court rules concerning the content and form of briefs should not result in forfeiture." (RSLB 2.) This is so, the state argues, because the state raised harmless error at oral argument "before the matter was submitted" and went on to instruct the Court "that any omission of a harmless error argument in the answer brief should not be interpreted as a forfeiture." (RSLB 2.)

Third, even if it did omit a harmless error argument from its brief the state argues there is no forfeiture. (RSLB 3-5.) This is so as to both (1) errors of state law which require the defendant to prove the error prejudicial and (2) errors of federal law which require the state to prove the error harmless. (RSLB 3 [state law errors], 3-5 [federal law errors].)

Mr. Grimes will address each of these contentions. As he noted in his initial letter brief, the state's view that there is no forfeiture as to state law errors is correct. Beyond that, however, the state's arguments are meritless: (1) the state was correct at oral argument when it conceded that harmless error had never been raised, (2) a party's failure to properly raise an argument in its briefs cannot be cured by raising the argument without notice at oral argument and advising the reviewing court that

no forfeiture was intended and (3) as courts throughout the country have held, the state's failure to dispute prejudice when it has the burden of proving an error harmless constitutes a forfeiture.

A. The State's Newly Minted Argument That It Raised Harmless Error In Its Brief Ignores The State's Explicit Concession That Harmless Error "Was Omitted From Our Briefing" And The Actual Record.

As noted, the state conceded at oral argument that "the harmless error [argument] was omitted from our briefing . . . ." In light of the structure and content of the state's brief, there was good reason for this candid concession. The headings of the state's brief made very clear it was only contesting the existence of error. (RB 72, 76.)

But resolution of this issue does not depend on the state's headings. The arguments in respondent's brief that followed these headings had *nothing* to do with harmless error. In fact, these arguments discuss (and dispute) only the existence of error. (RB 72-76, 76-77.) They fail to discuss -- or even mention -- prejudice standards or the concepts of prejudice or harmless error.

This failure stands in stark contrast to the other instances in the state's brief where the state actually *did* dispute prejudice. (*Compare* RB 72-77 *with* RB 95 [in making an alternative prejudice argument, the state argues that an alleged error was not "prejudicial under any standard"]; 156-157 [in making an alternative prejudice argument, the state cites both *Watson* and *Chapman* and argues that the state and federal prejudice standards have not been met]; 162 [in making an alternative prejudice argument, the state argues that "[a]ppellant cannot demonstrate any prejudice."]; 165-166 [in making an alternative prejudice argument, the state argues that "appellant has not demonstrated any prejudice under either the state or federal harmless-error standards . . . ."]; 191-192 [in making an alternative prejudice argument, the state argues that "even assuming [error] . . . there was no prejudice."]; 201 [in making an alternative prejudice argument, the state cites *Watson* and argues that "even assuming [error] . . . any error was harmless].)

Respondent ignores all of this entirely. Instead, the state now argues that Deputy Attorney General Mitchell was wrong at oral argument when she conceded that harmless error had been omitted from the brief she herself wrote.

The state accurately notes that in its Respondent's Brief it advanced the argument that because the trial court had admitted *some* of Morris's statements "appellant has not demonstrated that the trial court's exclusion of evidence under state law violated his federal constitutional rights." (RSLB 1-2, *citing* RB 77.) According to the state's new position, its specific argument that there was no federal constitutional error "would have put appellant on notice" that the state was not just disputing whether there was federal constitutional error but was disputing prejudice as well. (RSLB 1-2.)

First things first. The irony of the state's position should not escape this Court.

At oral argument the deputy attorney general who wrote the paragraph on which the state now relies admitted the state had *not* placed harmless error at issue. In other words, the very same paragraph which the state now claims should "have put appellant on notice" that the state was raising harmless error *did not even put the deputy attorney general who wrote the paragraph on notice that she herself had raised harmless error.* Charitably put, the state's suggestion that Mr. Grimes should have gleaned from this paragraph what the author herself did not requires an unfair prescience on the part of appellant's counsel.

Nor does the actual language of Respondent's Brief remotely support the state's new position. As noted above, in this section of its brief the state argued that because the trial court did not exclude *all* of Morris's statements "appellant has not demonstrated that the trial court's exclusion of evidence under state law violated the federal constitution." (RB 77.) The meaning of this argument is plain: the state was *not* making a harmless error argument at all, but was arguing that because some of Morris's statements were admitted, the court's ruling did not rise to the level of a federal constitutional violation. As the state's frank concession at oral argument suggests, recharacterizing this argument now with the benefit of hindsight (and the Court's request for supplemental briefing) does not change what all parties know was actually argued.

In short, when the state wanted to raise an alternative harmless error argument, it knew how to do so. It argued that there was no prejudice, or it argued that any assumed error was harmless, or it cited *Watson*, or it cited *Chapman*. Or it did all of these. (RB 95, 156-157, 162, 165-166, 191-192, 201.) What it did *not* do was fail to mention prejudice, harmless error, *Watson* or *Chapman* and instead argue simply that an error did not "violate the federal constitution."

The state got it right at oral argument. It never raised harmless error in its brief.[1]

B. The Fact That The Attorney General Injected Harmless Error At Oral Argument Has No Bearing On The Question Of Forfeiture For Failing To Brief Harmless Error.

The state accurately notes that it disputed harmless error at oral argument "before the matter was submitted." (RSLB 2.) The state suggests that any failure "to comply with court rules concerning the content and form of briefs" has therefore been cured because the harmless error argument was orally raised "before the matter was initially submitted." (RSLB 2.) The state cites no authority in support of its position.

This argument should not long detain the Court. The state does not dispute that where a *defendant* has failed to raise an argument in his principal brief, the argument has been forfeited, and the reviewing court should not grant relief based on such an argument precisely because the state never had a fair chance to respond. (RSLB at 1-5; *see People v. Duff* (2014) 58 Cal.4th 527, 550, fn.9; *People v. Gonzales* (2011) 51 Cal.4th 894, 957 fn.37; *People v. Harris* (2008) 43 Cal.4th 1269, 1290; *People v. Alvarez* (1996) 14 Cal.4th 155, 241 fn.38.) Nor does the state dispute that where a *defendant* tries to raise an issue for the first time at oral argument -- even if it is "before the matter [is] submitted" -- the argument is forfeited, and the reviewing court should not grant relief based on such an argument because the state has not had a fair chance to respond. (RSBL at 1-5; *see, e.g., People v. Crow* (1993) 6 Cal.4th 952, 960 fn.7; *People v. Dixon* (2007) 153 Cal.App.4th 985, 996; *People v. Norman* (1999) 75 Cal.App.4th 1234, 1241 fn.4; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 248 fn. 4.)

Mr. Grimes will be clear about his position. The state never explains why it alone among all litigants in the state should not be subject to the same rules that apply to

---

[1] In evaluating the state's most recent position, it is worth noting that in contrast to the two sentences which the state now says comprised its harmless error argument in the Respondent's Brief, the state's current harmless error argument comprises 15 single-spaced pages, refers both to prejudice and harmless error and cites both *Watson* and *Chapman*. The suggestion that the state raised this harmless error argument in Respondent's Brief is made not by relying on what the state actually wrote in Respondent's Brief, but by ignoring it almost entirely.

everyone else. No logical reason exists.

The rule the state seeks here -- in which it is allowed to raise arguments for the first time at oral argument "before the matter [is] submitted" -- has *never* been the rule in California. It should not be the rule now. But if the Court is inclined to depart from its longstanding approach -- and permit parties to raise arguments for the first time at oral argument -- then that rule should apply to both the state and the defense.[2]

C. Although There Is No Forfeiture As To State Law, The State has Forfeited The Harmless Error Argument As To Federal Law.

The state argues alternatively that even if it did omit a harmless error argument from its brief, and even if that omission was not cured by seeking to raise the issue for the first time at oral argument, there is no forfeiture either (1) as to errors of state law which require the defendant to prove the error prejudicial or (2) as to errors of federal law which require the state to prove the error harmless. (RSLB 3 [state law errors], 3-5 [federal law errors].) The state is partially right and partially wrong.

As Mr. Grimes recognized in his initial brief, as to errors of state law raised in an appeal, the state is correct. (*See* Appellant's Supplemental Letter Brief ("ASLB")

---

[2] The state adds that it "explicitly stated at oral argument that any omission of a harmless error argument in the answer brief should not be interpreted as a forfeiture." (RSLB 2.) This is true. But the legal relevance of this observation is difficult to fathom.

The ability of a party to raise an argument for the first time at oral argument has never depended on an inquiry into whether the party subjectively intended to forfeit the argument when it failed to raise the argument in its principal brief. It almost goes without saying that the state cites no case from anywhere advancing such a proposition. Yet again, however, if the Court is inclined to carve out a new rule in this area -- and permit parties to raise arguments for the first time at oral argument so long as they assure the Court at oral argument that they never intended to forfeit anything -- then that rule should apply to both the state and the defense. This will, of course, dramatically change both briefing and oral argument.

7-8.) The state correctly notes that as to state-law errors, "appellant . . . [has the] burden to demonstrate prejudice." (RSLB 3.) The state correctly reasons that since the burden of proving prejudice as to state-law errors remains with the defense, the state's omission of harmless error from its principal brief does not forfeit the state-law issue. (RSLB 3; *see* ASLB 7-8.)

As Mr. Grimes also noted in his initial brief, in this situation the Court must take several procedural steps to avoid providing the state with a windfall when the state omits harmless error from its briefing. Thus, the Court may not become an advocate for one side, but instead must offer both sides the opportunity to (1) brief the harmless error issue and (2) orally argue the issue once it is fully briefed. Any other approach permits the state to actually profit from omitting harmless error from its brief, by depriving a defendant of the opportunity for responsive briefing and responsive oral argument.[3]

As to errors of federal law raised on appeal, however, the state is wrong. Indeed, the very same rationale which the state correctly employs to show there was no forfeiture as to state-law errors -- an analysis of the burden of proof in showing prejudice -- shows why the state is wrong.

The state recognizes, as it must, that the burden as to prejudice in connection with errors of federal law on appeal is very different from the burden imposed as to state-law errors. In contrast to state-law errors (where the burden is placed on the defense to affirmatively show prejudice), federal constitutional errors put the burden on the state to prove that a particular error was harmless. (RSLB 4; *see Chapman v. California* (1967) 386 U.S. 18, 24 [holding that "the beneficiary of a constitutional error [must] . . . prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."]. *Accord Arizona v. Fulminante* (1991) 499 U.S. 279, 295; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258; *Rose v. Clark* (1986) 478 U.S. 570, 586.)

---

[3] In a footnote the state suggests that it has a "strong adversarial incentive, without the threat of forfeiture, to argue harmless error." (RSLB 5, fn. 1.) That very well may be. The procedural protections discussed above -- providing the parties with an opportunity for both adversarial briefing and oral argument after the argument is fully briefed -- ensure that the state has no similarly "strong adversarial incentive" to obtain a tactical advantage by omitting harmless error from its briefs.

Given the clarity of the Supreme Court's language in *Chapman* and its progeny, there should be no doubt that when there is a federal constitutional error on direct appeal, the state has the burden of proving the error harmless and it must do so beyond a reasonable doubt. Despite this clear language, however, the state actually suggests there *is* a doubt as to this fundamental principle. The state cites *O'Neal v. McAninch* (1995) 513 U.S. 432 for the proposition that "confusion . . . arises when a prejudice determination is discussed in terms of a party's burden of proof." (RSLB 4.)

The application of *Chapman* to federal constitutional errors is really not all that confusing. Indeed, *O'Neal* did not even involve the standard of prejudice to be applied to constitutional errors on direct appeal. Instead, it involved application of a more deferential standard of prejudice applied to such errors in federal habeas proceedings. That is why in cases after *O'Neal*, neither this Court nor the United States Supreme Court has expressed any "confusion" at all on this issue: errors of federal law raised on direct appeal place the burden squarely on the state to prove the error harmless beyond a reasonable doubt. (*See, e.g., Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *People v. Neal* (2003) 31 Cal.4th 63, 86.)[4]

And because the burden of proving a federal constitutional error harmless is on the state, as state and federal courts around the country have concluded, the state's failure to even offer an argument in its principal brief to satisfy that burden forfeits the issue on appeal. (*See, e.g., State v. Almaraz* (Id. 2013) 301 P.3d 242, 256-257; *Polk v. State* (Nev. 2010) 233 P.3d 357, 359-361; *United States v. Davis* (3rd Cir. 2013) 726 F.3d 434, 445, fn.8; *Hargrave v. McKee* (6th Cir. 2007) 248 Fed.Appx. 718, 729; *United States v. Gonzales-Flores* (9th Cir. 2005) 418 F.3d 1093, 110; *United States v. Cacho-Bonilla* (1st Cir. 2005) 404 F.3d 84, 90; *United States v. Pablo Varela-Rivera* (9th Cir. 2002) 279 F.3d 1174, 1180; *United States v. Vallejo* (9th Cir. 2001) 237 F.3d 1008, 1026; *United States v. Montgomery* (8th Cir. 1996) 100 F.3d 1404, 1407.)

In making a contrary argument, the state does not discuss or even cite any of these

---

[4] Curiously, in arguing there was no forfeiture as to any state-law error which occurred here, the state expressed no "confusion" at all in asserting -- correctly -- that "appellant . . . [has the] burden to demonstrate prejudice." (RSLB 3.) The state's apparent thesis is that burdens of proof in connection with prejudice only cause "confusion" in connection with federal law.

cases. Instead, the state argues that in assessing harmless error, a reviewing court is obligated to review the trial record. Implicit in the state's argument is that this obligation to review the trial record exists regardless of whether the state elects to argue harmless error. The state cites three cases to support its position. (RSLB 4, *citing Arizona v. Fulminante* (1991) 499 U.S. 279, 297, *People v. Aranda* (2012) 55 Cal.4th 342, 367 and *People v. Cahill* (1993) 5 Cal.4th 478, 482.) In each of these cases the reviewing courts made clear that in assessing prejudice, it was proper to review the trial record.

None of these cases come even remotely close to supporting the state's hypothesis. In *none* of these cases did the state seek to inject harmless error into the case for the first time at oral argument without ever having briefed it. Rather, in each of these cases the state presented the harmless error issue in its briefs, and the defendant responded in writing prior to oral argument. (*See Arizona v. Fulminante*, Petitioner's Brief on the Merits, 1990 WL 507415 at * 14-20; *Arizona v. Fulminante*, Respondent's Brief on the Merits, 1990 WL 507414 at * 28-31; *People v. Aranda*, Appellant's Opening Brief on the Merits, 2011 WL 4014410 at * 63-64; *People v. Aranda*, Respondent's Brief on the Merits, 2011 WL 6841142 at * 37-40; *People v. Cahill*, Appellant's New Brief on the Merits, 1991 WL 11014960 at * 60-74; *People v. Cahill*, Respondent's New Brief on the Merits, 1991 WL 11014959 at * 31-34.) Thus, any decision by the reviewing courts in these cases to examine the trial record says nothing at all about whether such review is required when the state elects *not* to brief harmless error.

In the final analysis, the forfeiture question as to errors of federal law is simple. The state had the burden of proof on this issue and it did not dispute the issue. The state gives no reason why it alone should be treated differently from every other litigant in the adversary system who fails to properly raise an argument. No reason exists. The state has forfeited the issue.

II. The Trial Court's Erroneous Exclusion Of John Morris's Statements Requires Reversal Of The Special Circumstances And Death Sentence.

A. The Special Circumstance.

At trial, the state called Jonathan Howe to testify. Howe testified that Mr. Grimes confessed "that he ordered . . . Morris to kill" Ms. Bone. (31 RT 8380.) Howe also told police that Grimes said he (1) "was standing there watching [the killing]" and (2) "enjoyed watching it." (31 RT 8501.)

Because Grimes was not the actual killer, the jury could not find the special circumstance allegations true unless the state proved Mr. Grimes either (1) aided the felonies with a specific intent to kill or (2) was a major participant in the felonies who acted with a reckless indifference to human life. (*Tison v. Arizona* (1987) 481 U.S. 137, 158.) At trial, the prosecutor relied on both the intent to kill and reckless disregard theories. (35 RT 9212-9213, 9293-9294 [intent to kill] and 35 RT 9203-9211 [reckless indifference theory].) According to the prosecutor herself, her intent-to-kill theory relied "primarily" on Howe's testimony that Mr. Grimes "went into the residence with Wilson and Morris and he told them to tie up and kill Betty Bone." (35 RT 9212-9513.)

The defense sought to impeach Howe by introducing statements from Morris. Although the court admitted evidence that Morris admitted stabbing Ms. Bone, the trial court excluded Morris's statements to Lawson that Grimes was "in the house but took no part in the actual killing and [was] in some other place in the house." (24 RT 6747, 6797.) The court also excluded Morris's statements to Abbott that (1) Grimes "did not take part in the killing," (2) Mr. Grimes had not "participated in the killing" and (3) after he "did the lady" Mr. Grimes "looked at him as if [he] were saying, what in the hell are you doing, dude." (24 RT 6750, 6797.)

In his July 16, 2014 brief (as well as his Appellant's Opening Brief), Mr. Grimes contended that exclusion of Morris's statements to Misty Abbott and Albert Lawson required reversal of the special circumstance verdicts. (ASLB 11-14.)

Mr. Grimes's thesis was not complicated: the excluded evidence would have directly rebutted Howe's testimony. Morris told Abbott that when Grimes saw what he (Morris) had done, he (Grimes) was shocked at what had happened. Morris told both Abbott and Lawson that Grimes "took no part in" the killing and had not "participated in the killing." Taken together, this evidence would have supported the defense thesis that Mr. Grimes had "no part in" planning the killing, nor did he even see it happen. Obviously if Grimes had planned for and ordered Morris to kill the victim, he would not have been surprised.

In addition, Howe said Grimes admitted watching and enjoying the killing. But Morris said that when he killed the victim, Grimes was "in the house but took no part in the actual killing and [was] in some other place in the house." This directly contradicts Howe's testimony that Grimes saw and enjoyed the killing. Because the prosecutor forthrightly admitted that her intent-to-kill theory for the special circumstance was based on Howe's testimony, the exclusion of evidence which

would have impeached Howe cannot be harmless under either state or federal law. (ASLB 11-14.)

The state disagrees. To its credit, the state concedes that "to prove that appellant had the intent to kill . . . the prosecutor relied on Jonathan Howe's testimony . . . ." (RSLB 7.) The state also concedes that jurors were told they could find the special circumstance true without agreeing on whether the state had proven an intent to kill or reckless indifference to human life. (RSLB 7.) Thus all 12 jurors may have relied on the intent-to-kill theory. Nevertheless, for three reasons the state argues that any error in excluding Morris's statements was harmless.

First, the state argues the trial court's exclusion of evidence from Abbott and Lawson was harmless because Abbott and Lawson were not credible. (RSLB 11-13.) Second, the state argues that the excluded evidence was cumulative to evidence which was admitted. (RSLB 11, 13-15.) Finally, the state argues that -- in fact -- the excluded evidence does not really impeach the state's case because "[a]ppellant's interpretation of the meaning of the excluded statements is unsupported by any evidence in the record." (RSLB 11.)

Each of these arguments will be addressed in turn. Each is without merit. Reversal of the special circumstance finding is required.

1. Because assessments of credibility are uniquely within the province of the jury, the state's suggestion that this Court may find the error harmless by itself finding that Abbott and Lawson were not credible must be rejected.

The state accurately notes that the witnesses to Morris's statements were Misty Abbott and Albert Lawson. The state argues that the trial court's exclusion of evidence from Ms. Abbott and Mr. Lawson is harmless because neither witness was worthy of belief. (RSLB 11-13.)

The argument has no place in this Court. It is, of course, well established that in deciding whether to admit defense evidence in a criminal case, a trial court may *not* weigh the credibility of witnesses, a task which is reserved exclusively for the jury. (*See, e.g., People v. Cudjo* (1993) 6 Cal.4th 585, 607-608; *People v. Alcala* (1992) 4 Cal.4th 742, 790; *People v. Hall* (1986) 41 Cal.3d 826, 834.) The state's argument here is that although a trial court may not consider credibility in deciding the admissibility of evidence, a reviewing court *may* consider credibility in

assessing whether the exclusion of evidence was prejudicial.

The United States Supreme Court has specifically rejected this approach to *Chapman* harmless error review. When a trial court has improperly excluded evidence in violation of the federal constitution, the harmless error inquiry proceeds not by speculating that jurors would have *discredited* the excluded testimony, but by assuming that "the damaging potential of the [evidence] were fully realized." (*See Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684. *Accord Olden v. Kentucky* (1988) 488 U.S. 227, 232 [in applying *Chapman* where the trial court excluded evidence during cross-examination "the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt."].) Just as in *Van Arsdall* and *Olden*, in assessing prejudice from the trial court's exclusion of evidence, this Court too must assume jurors would have credited the excluded evidence, not ignored or discredited it. Any other approach would be inconsistent with the Sixth Amendment right to a jury trial.

This Court has long reached an identical conclusion in the context of prejudice. Thus, in assessing prejudice from a trial court's failure to give a proper instruction, the reviewing court "must assume that the jury might have believed the evidence upon which the instruction . . . was predicated." (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673-674. *Accord Clement v. State Reclamation Board* (1950) 35 Cal.2d 628, 643-644; *Logacz v. Limansky* (1999) 71 Cal. App. 4th 1149, 1156. *Compare People v. Flannel* (1979) 25 Cal.3d 668, 684 [reviewing court may not assess credibility of defendant's testimony in assessing whether instructional error occurred, but must assume the evidence is credible].) The same approach is warranted here.

Even if *Van Arsdall*, *Olden* and the California precedents were ignored, however -- and the Court assumed the role of a juror and inquired into credibility -- the inquiry does not aid the state. The state notes that had Abbott's testimony been introduced, the defense would have "had to walk a difficult line to convince the jury that Abbott was being truthful [as to her defendant-favorable testimony] but that other portions of Abbott's testimony were unworthy of belief." (RSLB 12.) It is certainly a valid observation.

But the state never explains why defense counsel's position would have been any more difficult then that of the prosecutor. Had Abbott's testimony been

introduced, the prosecutor, too, would have "had to walk a difficult line to convince the jury that Abbott was being truthful" as to her state-favorable testimony "but that other portions of Abbott's testimony were unworthy of belief." (*See* RSLB 12.) Given that both parties would have faced the *identical* credibility hurdle as to Abbott, the state never explains how this carries its burden of proving the error harmless beyond a reasonable doubt. It does not.[5]

2. The excluded evidence was not cumulative to evidence which was admitted.

The trial court admitted evidence from Morris that he killed Ms. Bone by stabbing her. (24 RT 6747-6750, 6796, 6798.) The state argues that the excluded evidence "was cumulative of other evidence already presented to the jury in which Morris admitted killing Bone . . . ." (RSLB 11.) The state's argument reflects a fundamental misunderstanding of the factual issues before the jury in connection with both the special circumstance verdicts and the penalty phase decision.

It is worth emphasizing here that Mr. Grimes is *not* arguing that the trial court's exclusion of evidence requires reversal of his murder conviction. It does not. Under principles of accomplice liability, the specifics of Mr. Grimes's role in the actual killing simply do not matter. Once he was liable as an accomplice to the underlying robbery and burglary, his guilt of felony murder was established.

---

[5] As to Lawson, the state presents a different credibility argument. The state notes that when Lawson initially spoke with police in October of 1995, he told them Morris confessed to killing Ms. Bone. When he spoke with police again in March, 1998 he recalled that Morris also said Grimes was in another part of the house and took no part in the killing. (RSLB 12.) According to the state, because Grimes was in the same part of the county jail as Lawson for "five or six days" in October 1995, when Lawson spoke with police *more than two years later* (in March of 1998) Lawson's recollection of an additional statement was a lie. (RSLB 12-13.) Given that so much time had passed since Lawson and Grimes had been in the same unit, it seems unlikely that jurors would have accepted the premise that the mentally retarded Grimes had choreographed such an elaborate, long-delayed remembrance. Certainly the possibility that one or more jurors would have accepted such a theory does not establish harmlessness beyond a reasonable doubt.

But as to the special circumstances verdict, because Mr. Grimes was not the actual killer, the jury could not find the special circumstance true without finding either that he intended to kill or harbored a reckless indifference to human life. And of course, as to the decision on whether Mr. Grimes would live or die, it was critical for the jury to know exactly who did what in connection with the crime.

As to these specific inquiries, the evidence excluded was certainly not cumulative to that which was introduced. As noted, the court introduced Morris's statements that he fatally stabbed the victim. But the court excluded Morris's statements that (1) when he killed Ms. Bone, Mr. Grimes was "in the house but took no part in the actual killing and [was] in some other place in the house" (2) Grimes "did not take part in the killing," (3) Mr. Grimes had not "participated in the killing" and (4) after he "did the lady" Mr. Grimes "looked at him as if [he] were saying, what in the hell are you doing, dude?" (24 RT 6747, 6750, 6797.)

With respect to the special circumstance verdicts, the admitted evidence that Morris stabbed Ms. Bone conveys no specifics about Grimes's role. In contrast, the excluded evidence conveys information which is not only in-and-of-itself directly relevant to whether Mr. Grimes harbored either an intent to kill or a reckless indifference to human life, but which also impeaches the evidence from Howe which supported the state's intent-to-kill and reckless indifference theories.

In short, in light of the state's theory of the case, the evidence which was admitted -- that Morris alone killed Ms. Bone -- had little or no probative value in connection with the intent to kill and reckless disregard theories. In contrast, the evidence which was excluded -- that Grimes could not have seen the killing, was elsewhere in the house when it happened, had no role in it and was surprised when he learned about it -- was directly relevant to both of these theories. The excluded evidence here was not cumulative to the evidence which was admitted.

3. Not only did the excluded evidence directly undercut Howe's evidence, but the state's concession that the excluded evidence would have proved "that appellant . . . [was] in the house, doing something else, when Morris killed Bone" requires reversal.

The state alternatively argues that any error in excluding testimony from Abbott and Lawson was harmless because the excluded evidence does not really undercut the state's case. The state basically makes two arguments. In making these two

arguments, however, the state makes a critical concession.

The state's first argument is that there was no prejudice from the trial court's exclusion of Morris's statements that Mr. Grimes did not participate in the murder, and was in another part of the house at the time. In making this argument, the state concedes that the excluded evidence (if believed) would have "prove[n] . . . that appellant . . . [was] in the house, doing something else, when Morris killed Bone." (RSLB 14.) This concession should end whatever harmless error issue has not been forfeited.

According to Howe, Grimes said he (1) "was standing there watching [the killing]" and (2) "enjoyed watching it." (31 RT 8501.) But the state itself now concedes that the trial court excluded evidence which "prove[s] . . . that appellant . . . [was] in the house, *doing something else, when Morris killed Bone.*" (RSLB 14, emphasis added.) In other words, the state concedes the excluded evidence would have directly impeached Howe. After all, if Grimes was "in the house doing something else when Morris killed Bone," Grimes could not have been "standing there watching" and enjoying the killing as Howe testified. And if Howe was lying when he said that Grimes admitted watching and enjoying the killing, the jury could certainly find he was also lying about Grimes having ordered the killing. In short, the state's concession itself shows exactly how the excluded evidence could have been used to rebut Howe's evidence and credibility.

Significantly, the state does not dispute that Howe was important to the state's intent-to-kill theory of the special circumstance. Nor could it -- the prosecutor herself said that the state's theory depended "primarily" on Howe. (35 RT 9212-9213.) And because the jury rendered a general verdict on the special circumstance allegation, it is impossible for the state to prove that even a single juror did not actually rely on the intent-to-kill theory. Thus, reversal is required based solely on the trial court's exclusion of evidence which would have proved that "appellant . . . [was] in the house, doing something else, when Morris killed

Bone." (RSLB 14.)[6]

The state's second argument is that there was no prejudice from the trial court's exclusion of Morris's statement that Grimes was surprised when he saw what Morris had done. The state argues that this evidence "is too vague" and "does not prove that appellant was 'surprised' that Morris killed Bone." (RSLB 14.) The state offers a different interpretation, suggesting Morris really meant: (1) Grimes was "shocked at the brutality of the killing" and "about how Bone was killed not that she was killed." (RSLB 14.)

As an initial matter, because the trial court's exclusion of evidence showing that

---

[6] Howe's evidence was also important to the state's alternative reckless indifference theory. As a result, excluding evidence which impeached Howe would also taint a reckless indifference verdict.

The reckless indifference theory required jurors to determine if Mr. Grimes exhibited a reckless indifference to human life. As noted above, separate and apart from his testimony that Grimes admitted ordering the killing (which was directly relevant to the intent-to-kill theory), Howe told police that Grimes said he "was standing there watching [the killing] and "he enjoyed watching it." (31 RT 8501.) As the United States Supreme Court has itself concluded, in seeking to prove that an accomplice harbored reckless indifference to human life, the state may rely on evidence showing that the defendant "watched the killing" and then acted to aid the killer but not the victim. (*Tison v. Arizona* (1987) 481 U.S. 137, 152. *See People v. Mora* (1995) 39 Cal.App.4th 607, 617 [fact that defendant watched the killing, did nothing to stop it and aided the killer supported a finding of reckless indifference to human life]; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754 [fact that defendant watched the killing and did nothing to try and stop it supported a finding of reckless indifference].)

In light of the case law, the state does not dispute that Howe's statements were directly relevant to the calculus of whether Mr. Grimes exhibited a reckless indifference to human life. Thus, the trial court's exclusion of evidence which could have impeached Howe would have been prejudicial even as to the reckless indifference theory. But because of the general verdict - and the impossibility of determining if even a single juror relied on the reckless indifference theory -- there is no need for the Court to reach this issue here.

"appellant . . . [was] in the house, doing something else, when Morris killed Bone" requires reversal for the reason discussed above, there is no need for the Court to reach the separate question of whether excluding this distinct evidence requires reversal too. Nevertheless, and as he did at oral argument, Mr. Grimes recognizes there can be differing interpretations of Morris's statement that Grimes was surprised when he saw what Morris had done. Two points are worth noting.

First, the state's current interpretation takes Morris's statement entirely out of context, ignoring not only the other statements Morris made, but other facts in the record. Morris did *not* simply say that Grimes was surprised at what he (Morris) had done. If that was all the record showed, then the state's suggested interpretation might be considered plausible.

But the record shows more than this. The record shows Morris said (1) Grimes took no part in the killing, (2) Grimes was in another part of the house when the killing occurred and (3) Grimes was surprised when he saw what Morris had done. Moreover, the evidence showed Bone was unconscious when Grimes entered the house, and they had given false names when they came to the door of Ms. Bone's house. Thus, not only was there no need to kill, but the use of false names would have been unnecessary if a killing had even been anticipated. In context, the more reasonable interpretation of Morris's statement is that Grimes was not making a comment on the manner of killing but on the fact that Bone had been killed. That is why Grimes was surprised at what Morris had done.

But even putting aside the logic of Mr. Grimes's position, and assuming arguendo that the state suggested an alternative interpretation which was equally plausible, reversal would be required. Even if the state's explanation was equally plausible, the existence of an equally plausible (and state-friendly) explanation for excluded evidence does not carry the state's burden of proving error in excluding that testimony harmless beyond a reasonable doubt.

4. Summary.

In the final analysis, the harmless error argument here is straightforward. The only genuine issue for the jury in connection with the special circumstance verdict was whether Mr. Grimes either intended to kill or harbored reckless indifference to human life. The state introduced statements from jailhouse informant Howe that Mr. Grimes (1) conceded he "ordered . . . Morris to kill" Ms. Bone, (2) admitted "standing there watching [the killing]" and (3) confessed that "he enjoyed

watching it." (31 RT 8380, 8501.) The state itself now concedes that the excluded evidence would have permitted Mr. Grimes to rebut Howe's evidence and credibility. Given the importance the prosecution itself placed on Howe in the determination of special circumstances, and the fact that the jury rendered a general verdict which did not indicate what theory any of the jurors relied on, the error requires reversal under any standard of prejudice.

B. The Death Sentence.

In deciding whether Mr. Grimes should live or die, the jury was told to consider the "circumstances of the crime." Based on Howe's statements, the jury deciding whether Mr. Grimes would live or die knew that Mr. Grimes admitted (1) ordering Wilson to kill the victim, (2) watching Morris as he killed the victim, and (3) enjoying watching the killing. In urging the jury to impose death the prosecutor referenced "Mr. Howe's statement" and told jurors that the defense had "never given you a reason to doubt [Howe's] testimony." (41 RT 10879.)

In his supplemental letter brief, Mr. Grimes contended that evidence he ordered the killing, watched it and enjoyed it pointed unmistakably and powerfully to death. (ASLB 12.) The evidence excluded -- showing that Morris admitted Grimes did not see the killing, was elsewhere in the house when it occurred and was surprised by it -- rebutted each of these terribly prejudicial circumstances of the crime. As such, Mr. Grimes contended that even if the special circumstance did not have to be reversed, reversal of the death verdict was required. (ASLB 14-15.)

The state does not dispute that the deliberating penalty phase jurors were presented with evidence from Howe that Grimes admitted ordering, watching and enjoying the killing. (RSLB 15-19.) Nor does the state dispute that this evidence points to death. (RSLB 15-19.) And as noted above, the state recognizes that Howe could have been impeached with the excluded evidence since it "prove[s] . . . that appellant . . . [was] in the house, doing something else, when Morris killed Bone." (RSLB 14.) Nevertheless, the state argues the trial court's exclusion of impeaching evidence does not require reversal of the penalty phase for two main reasons.

The state repeats its argument that any error was harmless because Abbott and Lawson were not credible. (RSLB 15, 19.) Because Mr. Grimes has addressed this issue above, there is no need to repeat that discussion. Suffice it to say here that both this Court and the United States Supreme Court have long rejected this

approach to harmless error review.

The state then argues that the prosecutor did not rely on Howe in her closing argument asking the jury to impose death. (RSLB 15-17, 19.) As noted above, the argument is simply wrong; respondent itself concedes elsewhere in its brief, and as the record shows, during her closing argument in the penalty phase the prosecutor specifically referenced "Mr. Howe's statement" and told jurors that the defense had "never given you a reason to doubt" Howe. (41 RT 10879. *See* RSLB 18.)

But even putting this aside -- and assuming the prosecutor had *not* specifically referenced Howe's testimony during her penalty phase closing argument -- reversal would still be required. For all the jury knew, Howe was right when he testified that Grimes ordered, watched and enjoyed the killing. If Abbott and Lawson are believed, however, Howe was lying; Morris said Grimes did not see the killing, was elsewhere in the house when it occurred and was surprised by it.

It does not matter whether the prosecutor focused the jury's attention on Howe's devastating statements. As Justice Brown noted some time ago, a "juror is not some kind of a dithering nincompoop, brought in from never-never land . . . ." (*People v. Guiuan* (1998) 18 Cal.4th 558, 578 [Brown, J., concurring and dissenting].) The jurors heard this plainly aggravating evidence of the worst sort. They did not need a road map. Exclusion of defense evidence which rebutted this evidence was not harmless under any standard.[7]

---

[7] The state adds that "Howe's testimony that appellant ordered Morris and Wilson to tie up and kill Bone was not part of the prosecution's case in aggravation." (RSLB 19.) As a factual matter the assertion is difficult to follow; Howe's testimony was certainly not part of the defense case in mitigation.

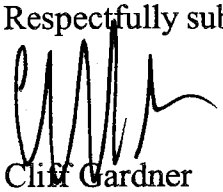
The state may have meant to say that Howe's testimony was not formally introduced as aggravating evidence at the penalty phase, but instead came in at the guilt phase. If so, as a legal matter the assertion is equally difficult to follow. In accord with standard jury instructions, the jury here was specifically told that in deciding what penalty to impose, it was to consider "evidence which has been received during any part of the trial of this case." (41 RT 10801.)

III. The Trial Court's Erroneous Exclusion Of Morris's Statements That Mr. Grimes Was Not Involved In The Actual Killing Requires Reversal Of The Special Circumstance Findings And Death Sentence.

In his July 16, 2014 supplemental brief, Mr. Grimes argued that even if the trial court's error was simply in excluding the statements about Mr. Grimes's actual role in the killing, reversal of both the special circumstance and penalty phases is still required. (ASLB 15-16.) In its supplemental brief the state argues that any errors were harmless, incorporating its "analysis in question 2."

Because that analysis has already been discussed, no further reply is necessary. The state's recognition that the excluded evidence "prove[s] . . . that appellant . . . [was] in the house, doing something else, when Morris killed Bone" shows that even the narrower ruling which is the subject of the Court's third question involved the exclusion of evidence which would have allowed defense counsel to attack Howe's credibility. On the record of this case, for the same reasons discussed above, the erroneous exclusion of such evidence is prejudicial as to both the special circumstance verdict and the penalty phase under either state or federal law.

Respectfully submitted,



Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Avenue, Berkeley, California 94702. I am not a party to this action.

On July 22, 2014, I served the within

***PEOPLE V. GRIMES*, S076339, SUPPLEMENTAL BRIEF (7-22-14)**

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

Shasta County Superior Court
1500 Court Street
Redding, California 96001

Shasta County District Attorney
1525 Court Street
Redding, California 96001

Mr. Gary Grimes
CDC: P-27200
San Quentin State Prison
San Quentin, California 94974

California Appellate Project
101 Second Street
Suite 600
San Francisco, California 94105

Stephanie Mitchell
Office of the Attorney General
P.O. Box 944255
Sacramento, California 94244-2550

I declare under penalty of perjury that the foregoing is true. Executed on July 22, 2014, in Berkeley, California.

Declarant