SUPREME COURT COPY

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July 16, 2014

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

SUPREME COURT
FILED

JUL 16 2014

Frank A. McGuire Clerk

Deputy

Re: *People v. Grimes*, S076339

Dear Mr. McGuire:

I represent Gary Grimes, appellant in the above-captioned case. The case was argued and submitted on May 28, 2014. On June 18, 2014 the Court vacated submission of the case and requested the parties to file supplemental letter briefs to respond to three questions:

"1. Does the Attorney General's failure to argue in the answer brief that an alleged error is harmless constitute forfeiture of any harmless error argument regarding either state law errors or federal constitutional errors?

"2. Assuming the trial court erred in excluding the hearsay statements of John Morris to Misty Abbott and Albert Lawson that were proffered by defendant as statements against interest, does the error require reversal of the special circumstances or death sentence?

"3. Assuming that the trial court did not err in excluding Morris's statement to Abbott that after Morris killed the victim, defendant looked at him as if he were surprised, but that the trial court did err in excluding Morris's statements to Abbott and Lawson that defendant was not involved in the actual killing, does the error require reversal of the special circumstance findings or death sentence?"

I would appreciate it if you would bring this letter brief to the Court's attention. The short answers to the Court's questions, discussed in greater detail below, are as follows:

DEATH PENALTY

1. Article VI, section 13 of the California Constitution places the burden of proving prejudice squarely on defendants in connection with all errors of state law. As such, the Attorney General's decision not to dispute prejudice in its principal brief does *not* forfeit the harmless error issue itself as to state law errors. In this situation, however, the Court may not deny relief based on a harmless error finding without permitting adversarial briefing and oral argument on the question. As to errors of federal law -- which place the burden of proving harmlessness squarely on the state -- the Attorney General's decision not to dispute prejudice in its principal brief *does* forfeit the issue. In this situation, as courts around the country have concluded, the state is to be treated like any other litigant, subject to the same rules of procedure and fairness.

2. If the trial court erred in excluding the hearsay statements of John Morris to Misty Abbott and Albert Lawson, that error requires reversal of the special circumstance findings because it undercuts the testimony of Jonathan Howe, the only witness to support the state's intent-to-kill theory. But even putting this aside, reversal of the penalty phase would be required because the excluded evidence undercut key circumstances of the crime supporting the state's position that death was the proper punishment.

3. For the same reasons, even if the trial court's only error was in excluding Morris's statements to Abbott and Lawson that Grimes was not involved in the actual killing, both the special circumstance and penalty phase verdicts must be reversed.

I. Although The State's Failure To Argue Prejudice Does Not Forfeit The Harmless Error Issue As To State Law Errors Which Require Mr. Grimes To Prove Prejudice, It Does Forfeit The Harmless Error Issue As To Federal Constitutional Violations Which Require The State To Prove Errors Harmless Beyond A Reasonable Doubt.

A. The Relevant Facts: The State Does Not Raise Harmless Error In Its Brief, But Waits More Than Three Years And Raises It Without Any Notice For The First Time During Oral Argument.

Mr. Grimes was charged with murder during a robbery, along with robbery and

burglary special circumstance allegations. Because he was not the killer, jurors could not find the special circumstances true unless he (1) aided the felonies with a specific intent to kill or (2) was a major participant who acted with reckless indifference to human life. (Penal Code § 190.2, subdivision (c), (d).) The jury found the special circumstance allegations true and imposed death.

Mr. Grimes filed an Appellant's Opening Brief ("AOB") in this Court in June 2009. In Argument IV of that brief, Mr. Grimes contended that the felony murder special circumstances and the death sentence had to be reversed because the trial court improperly excluded evidence that another person -- John Morris -- admitted acting alone in killing the victim and said that Mr. Grimes was not involved. After laying out the relevant facts, this 17-page argument had three separate components, each with a separate heading:

1) The trial court's exclusion of this evidence violated state law. (AOB 77-82.)

2) The trial court's exclusion of evidence violated federal law. (AOB 82-88.)

3) The trial court's exclusion of evidence required reversal under either the state or federal standard of prejudice. (AOB 88-91.)

Fully 20 months later the state filed its Respondent's Brief ("RB"). Five separate members of the Attorney General's office are listed on the caption of this brief, including one Deputy Attorney General, one Supervising Deputy Attorney General, one Senior Assistant Attorney General and one Chief Assistant Attorney General. In connection with Argument IV in the opening brief there were two legal components to the state's argument:

1) The trial court's exclusion of the evidence did *not* violate state law. (RB 72-76.)

2) The trial court's exclusion of the evidence did *not* violate federal law. (RB 76-77.)

Although the state plainly disputed the existence of error in its brief, the state's lawyers elected *not* to dispute Mr. Grimes's argument that if error occurred, it required reversal of the special circumstance and penalty phase verdicts. (RB 72-

76.) This was in stark contrast to many, many other occasions in respondent's brief where the state *did* elect to raise alternative harmless error arguments. (*See, e.g.*, RB 95, 156-157, 162, 165-166, 191-192, 201.)

In his reply brief filed in April 2011, Mr. Grimes did not hide the ball, but instead specifically noted this precise point. In discussing the exclusion of statements from John Morris, Mr. Grimes wrote as follows:

> Respondent does not dispute that if error occurred, reversal of both the special circumstance and penalty phase verdicts is required. (Appellant's Reply Brief ("ARB") 32.)

The case was set for oral argument in May of 2014 -- a full 37 months *after* Mr. Grimes filed his reply brief. In that 37-month period the state did nothing to place harmless error at issue. In that 37-month period, the state did nothing to alert either the Court or Mr. Grimes that despite its decision not to dispute harmless error in its brief, the state intended to place it at issue at oral argument.

On May 9, 2014 -- 19 days prior to oral argument -- Mr. Grimes filed a focus letter with the Court, serving the Attorney General. This letter stated that the issue involving exclusion of Morris's statement was one of three issues selected for oral argument. Aware that this issue was going to be argued, the Attorney General still did nothing to put harmless error at issue.

To be sure, the Attorney General also filed a focus letter with the Court. The Attorney General recognized that the purpose of the focus letter was "for the parties to advise the court and opposing counsel of those issues on which counsel expects to focus their arguments." Nevertheless, the Attorney General still did nothing to put harmless error at issue.

At the May 28, 2014 oral argument however, and in response to questions from the bench, it finally became clear that the Attorney General had changed course and *did* intend to dispute prejudice. Deputy Attorney General Stephanie Mitchell, arguing the case for the state, had the following exchange with Justice Liu:

> Justice Liu: "Let me ask you counsel. Suppose, suppose we were to disagree with you and find that this was erroneous, the exclusion [of evidence] was erroneous. Is your opponent correct that you didn't argue that this is harmless error?

> Counsel: "Ah, no. Um . . . the harmless error was omitted from our briefing but it wasn't an act of forfeiting such a claim." (*People v. Grimes*, S076339, Oral Argument CD of May 28, 2014 ("CD") at 3:02:37-3:03:04.)

Because no notice of this change in course had been given either to the Court or counsel for Mr. Grimes, and in light of the Attorney General's decision to omit harmless error from its briefing on this issue, the Court has asked whether the state has "forfeit[ed] . . . any harmless error argument regarding either state law errors or federal constitutional errors?"

B. Background: The Principle Of Party Presentation.

This question involves application of what the United States Supreme Court has called the "principle of party presentation:"

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. . . . [A]s a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."

(*Greenlaw v. United States* (2008) 554 U.S. 237, 243-244, citation omitted.) The Court has described the principle of party presentation as "basic to our system of adjudication." (*Arizona v. California* (2000) 530 U.S. 392, 413.)

California courts have with some consistency applied the principle of party presentation to criminal defendants who fail to raise a particular argument in their principal brief. Where a criminal defendant omits an argument from his principal brief, but raises it for the first time in a reply brief, courts routinely refuse to consider it even though the state has time to prepare a response prior to oral argument. (*See, e.g.*, *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; *People v. Carroll* (2014) 222 Cal.App.4th 1406, 1412 fn. 5; *People v. Mitchell* (1995) 36 Cal.App.4th 672, 674 fn.1; *People v. King* (1991) 1 Cal.App.4th 288, 297 fn.12.)

Mr. Grimes has no quibble with this approach. It is, after all, premised on a basic sense of fairness central to the adversary system:

> Obvious considerations of fairness in argument demand that the appellant present all of her points in the opening brief. To withhold a point until the closing brief would deprive the People of the opportunity to answer it or require the effort and delay of an additional brief by permission.

(*People v. Carroll*, *supra*, 222 Cal.App.4th at p. 674, fn.1.)[1]

Mr. Grimes recognizes that the fairness concerns which preclude defendants from raising arguments for the first time in a reply brief apply with even greater force to arguments which they never raise in writing at all, but seek to inject into a case for the first time at oral argument. Permitting a defendant to raise arguments for the first time at oral argument not only deprives the People of a chance to respond to the argument in writing, but it deprives them of an opportunity to present prepared oral argument on the point. Thus, it makes perfect sense that criminal defendants may *not* surprise the state by raising arguments for the first time at oral argument either. (*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.)

The question presented here is whether the state should be held to the same standard of practice as other litigants in the adversary system. Put another way, does the principle of party presentation applied so routinely to criminal defendants -- and the fairness rationale on which it is based -- also apply to the state in connection with harmless error?

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[1] Indeed, the principal of fairness to the respondent is so basic to the adversary system that even when a defendant *does* raise an issue in his principal brief, if the issue is not supported by sufficient argument courts will "treat it as waived, and pass it without consideration." (*People v. Stanley* (1995) 10 Cal.4th 764, 793. *Accord People v. Ashmus* (1991) 54 Cal.3d 932, 985 fn.15; *People v. Marshall* (1990) 50 Cal.3d 907, 945, fn.9; *People v. Woon Tuck Wo* (1898) 120 Cal. 294, 297.) Here too this rule is based upon simple fairness; in this situation too the respondent has inadequate notice of the argument and is, therefore, unable to respond. (*See, e.g.*, *Duncan v. Ramish* (1904) 142 Cal. 686, 689.)

The Court's existing precedents on the general subject of the state's decision not to respond to an argument do not resolve the question. (*Compare People v. Bouzas* (1991) 53 Cal.3d 467, 480 [concluding without discussion that the state's decision not to respond to an appellant's argument in its principal brief constitutes a concession] *with People v. Hill* (1992) 3 Cal.4th 959, 995, fn.3 [concluding without discussion that the state's decision not to respond to an appellant's argument in its principal brief does *not* constitute a concession].) As discussed below, in connection with harmless error, the consequences of the state's decision not to dispute prejudice depends on whether state or federal error is involved.

C. Although The State's Decision Not To Dispute Harmless Error Analysis In Connection With Errors Of State Law Does Not Forfeit The Issue, It Does Require That The State And Defense Be Given An Opportunity To Brief And Argue The Issue.

Errors which violate state law are subject to a prejudice standard set forth in the California Constitution at Article VI, § 13. This standard permits reviewing courts to reverse for state law error only where "defendant has established there exists a reasonable probability he would have obtained a more favorable result if the error had not occurred." (*People v. Montes* (2014) 58 Cal.4th 809, 876.) Under this standard, the burden of demonstrating prejudice at all points remains with the defense. (*See People v. Weaver* (2001) 26 Cal.4th 876, 968.)

Accordingly, when an error of state law is involved -- and the state does not dispute prejudice -- Article VI, § 13 still precludes this Court from granting relief unless the defendant has proven prejudice. In this situation, the state has *not* forfeited the issue of harmless error by failing to raise it since the burden of demonstrating prejudice remains with the defense.

As discussed above, however, "[o]bvious considerations of fairness" caution against permitting the state to "withhold a point" until oral argument. Similar considerations caution against courts generally stepping into the role of advocate and raising arguments the state has elected not to make. In this situation too the defense is deprived of an adequate opportunity to address points which the state never made, but which the court came up with on its own. Moreover, it would tax scarce judicial resources to impose on reviewing courts a general duty to scour the record for arguments which the state did not make in order to preserve a conviction. Such an approach also implicates the separation of powers doctrine, thrusting the judiciary into the role of the executive in defending a conviction, and

places judges in the constitutionally untenable position of having to rule on arguments that they themselves have advanced in a particular case.

For all these reasons, although the state's decision not to argue harmless error as to state law error may not forfeit the general issue itself, it does at a minimum require that the adversary system be permitted to function in connection with the issue and (1) the state be invited to brief the issue, (2) the defense be given a chance to file responsive briefing and (3) the defense be offered a full opportunity for oral argument. Anything less and the state would actually gain a tactical advantage by electing not to raise harmless error in its brief, thereby denying defendants the opportunity to address the state's argument in a meaningful way in writing or at oral argument. And in capital cases such as this one, preventing counsel for a capital appellant from having the opportunity to file responsive briefing and make responsive oral arguments would not only deprive defendants of their state and federal rights to due process on appeal but their Eighth Amendment rights to reliable procedures in capital cases. (*See Evitts v. Lucey* (1985) 469 U.S. 387, 396-397 [depriving defendants of the effective assistance of counsel on appeal violates due process]; *Parker v. Dugger* (1991) 498 U.S. 308, 321 [stressing the importance of "meaningful" appellate review in reducing the risk of arbitrary and irrational imposition of a death sentence].)

D. The State's Decision Not To Dispute Harmless Error Analysis In Connection With Errors Of Federal Law Forfeits The Issue.

As courts around the nation have recognized, there is a very different answer to the forfeiture question in connection with federal constitutional errors. In contrast to the standard of prejudice applicable to state law error -- which requires reversal only where defendant carries his burden of proving prejudice -- the standard of prejudice applied to federal constitutional errors is quite different. Federal constitutional errors put the burden squarely on the state and require reversal unless the state proves the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24.) Since the burden is on the state to prove federal errors harmless, 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 [state fails to argue harmless error in its brief as to errors on which it had the burden of proof under *Chapman*, state raises harmless error at oral argument; held, harmless error argument not properly raised]; *Polk v. State* (Nev. 2010) 233 P.3d 357, 359-361 [same]. *Compare Rose v. United States* (D.C. 1993) 629 A.2d 526, 534 [once the state assumes the role of

advocate, reviewing courts may not second-guess the state without "coming perilously close to exercising an executive branch function" which would be "inconsistent with the neutrality expected of the judiciary in our adversary system of justice."].) One court has concisely explained this rationale as follows:

> In this case, the government advances no argument that the evidentiary error was harmless. Usually when the government fails to argue harmlessness, we deem the issue waived and do not consider the harmlessness of any errors we find. . . . This approach makes perfect sense in light of the nature of the harmless-error inquiry: it is the government's burden to establish harmlessness, and it cannot expect us to shoulder that burden for it.

(*United States v. Gonzales-Flores* (9th Cir. 2005) 418 F.3d 1093, 1100.)

Other federal courts have taken a similar approach. The general rule is that the government's failure to raise harmless error in its principal brief on appeal "means that harmless error is waived." (*United States v. Davis* (3rd Cir. 2013) 726 F.3d 434, 445, n.8. *Accord United States v. Cacho-Bonilla* (1st Cir. 2005) 404 F.3d 84, 90; *Hargrave v. McKee* (6th Cir. 2007) 248 Fed.Appx. 718, 729 [harmless error argument waived where raised for the first time at oral argument]; *United States v. Montgomery* (8th Cir. 1996) 100 F.3d 1404, 1407 ["The government does not raise harmless error in its appellate brief, thus waiving the argument on appeal."); *United States v. Pablo Varela-Rivera* (9th Cir. 2002) 279 F.3d 1174, 1180 ["[T]he government here did not argue that this error was harmless and thus waived the argument."]; *United States v. Vallejo* (9th Cir. 2001) 237 F.3d 1008, 1026 ["The Government does not argue that this error was harmless and thus waives that argument."].)

These courts often recognize a narrow exception to this forfeiture rule. Under the terms of this exception, a reviewing court can overlook the state's forfeiture of harmless error where (1) the record is short and straightforward and the court can easily determine prejudice on its own, (2) the harmless error question is in no doubt and (3) a remand would be futile. (*See United States v. Giovannetti* (7th Cir. 1991) 928 F.2d 225, 226-227 [refusing to apply exception where harmless error was not clear and a new trial would not necessarily be futile]; *United States v. McGlaughlin* (7th Cir. 1997) 126 F.3d 130, 135 [refusing to apply exception where the record was complex]; *Lufkins v. Leapley* (8th Cir. 1992) 965 F.2d 1477, 1481-1482 [applying exception where the record was "short and straightforward" and

remand would be futile since defendant confessed to the crime]; *United States v. Kloehn* (9th Cir. 2010) 620 F.3d 1122, 1130 [refusing to apply exception].)

Several judges -- even those embracing this approach -- have noted legitimate concerns with a rule which exempts the state from the rules applicable to other advocates, and permits courts to step in and raise issues on the state's behalf:

> Where a court analyzes the harmless error issue wholly on its own initiative, it assumes burdens normally shouldered by government and defense counsel. This drain on judicial resources inevitably causes delay for parties in other cases. . . . More important, where the case is at all close, defense counsel's lack of opportunity to answer potential harmless error arguments may lead the court to miss an angle that would have shown the error to have been prejudicial.

(*United States v. Pryce* (D.C. Cir. 1991) 938 F.2d 1343, 1347-1348.)

Dissenters have gone further, noting the strict forfeiture rules which apply to criminal defendants and concluding that "waiver must be a two-way street." (*Lufkins v. Leapley, supra*, 965 F.2d at p. 1485, Heaney, J., dissenting. *Compare State v. Jones* (Md. App. 2001) 771 A.2d 407, 440 [state's failure to raise argument in its principal brief forfeits the issue because "the State is . . . held to the same rules of practice and procedure as other litigants."].) Others have noted the potential separation of powers issues implicated when a reviewing court independently puts harmless error at issue -- in this situation the court has "encroach[ed] into the executive branch's prosecutorial function." (*United States v. Pryce*, *supra*, 938 F.2d at 1354, Silberman, J., dissenting.)

In this case, there is no need to decide whether the stricter forfeiture rule applies or whether the exception adopted by some courts should apply. Obviously, if the stricter rule applies, the state has forfeited the harmless error issue as to the federal constitutional claim at issue here. Although the state raised numerous alternative harmless error arguments throughout its brief, it elected *not* to make any similar argument in connection with this issue. (*Compare* RB 95, 156-157, 162, 165-166, 191-192, 201.) Moreover, this was not some throw-away issue; it was a 17-page argument which was the very first issue presented in Appellant's Opening Brief after the voir dire issues were discussed. Finally, not only did the state elect not to raise harmless error in its brief, but after Mr. Grimes made it clear in his reply brief that the state had elected not to dispute prejudice, the state did nothing for 37

months until belatedly trying to put harmless error at issue at oral argument.

But even if the Court followed those authorities permitting a reviewing court to excuse forfeiture of harmless error in some cases, this would be a singularly inappropriate case in which to do so. This is a capital case. The record on appeal contains more than 15,000 pages (exclusive of jury questionnaires) -- it is anything but "short and straightforward." Since guilt as to the underlying crime was conceded by the defense, the only real questions for the jury involved the special circumstance allegations and the issue of penalty. As more fully discussed below, as to the special circumstances the error here involved the exclusion of evidence which directly undercut the state's theory that Mr. Grimes harbored the requisite mental state required for the special circumstances (either an intent to kill or reckless indifference to human life). As to the question of penalty, the error here directly undercut the state's theory as to the circumstances of the crime. In other words, and as suggested by the state's original decision not even to dispute harmless error, it is anything but clear that the errors here were harmless.

Finally, given the record of this case a remand would certainly not be futile. Not only does the excluded evidence rebut important prosecution evidence as to both the specials and the death sentence, but at the original trial there was substantial mitigation presented, including unrebutted evidence of retardation, a difficult childhood and positive contributions. (AOB 23-34; RB 23-37.) Equally important, a remand would not be futile because the penalty phase in this case was held before the Supreme Court decided that the mentally retarded could not be executed and -- as respondent itself recognizes -- there was substantial evidence of mental retardation presented below. (AOB 1-2, 24-28; RB 31, 34; ARB 1-3.) Given the record here, even if this Court followed the case law permitting an exception to the forfeiture rule when the state elects not to argue harmless error, under the limits imposed by those very same cases this is an entirely inappropriate case in which to apply the exception.

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

Putting aside the forfeiture question, the Court's second question assumes the trial court erred in excluding Morris's statements to Misty Abbott and Albert Lawson and asks whether "the error require[s] reversal of the special circumstances or death sentence?" As explained below, it requires reversal of both.

A. Facts Relevant To The Court's Second Question.

At all times the state recognized that Grimes himself did *not* kill Ms. Bone, but that she was killed by Morris. As noted, this meant the jury could not find true the robbery and burglary special circumstance allegations unless the state proved Mr. Grimes either (1) aided the felonies with a specific intent to kill or (2) was a major participant who acted with a reckless indifference to human life. (*See* Penal Code § 190.2, subdivision (c), (d); *Tison v. Arizona* (1987) 481 U.S. 137, 158.)

To provide an evidentiary basis for such findings, the state called jailhouse informant Jonathan Howe to testify. Under questioning by the prosecutor Howe told the jury that during a jailhouse conversation Mr. Grimes confessed "that he ordered . . . Morris to kill the person he's accused of killing." (31 RT 8380.) In addition, and as relevant to both the special circumstance inquiry and the question of punishment, according to Howe:

> [Mr. Grimes said he] was standing there watching [the killing]. . . . [Mr. Grimes said] he enjoyed watching it. (31 RT 8501.)

In urging the jury to find the special circumstances true, the prosecutor relied on both the intent to kill and reckless disregard theories. (35 RT 9212-9213, 9293-9294 [prosecutor relies on an intent to kill theory] and 35 RT 9203-9211 [prosecutor relies on reckless indifference theory].) Significantly, *and in the prosecutor's very own words*, the intent-to-kill theory relied "primarily" on the testimony of Jonathan Howe 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.)

In urging the jury to give death the prosecutor relied heavily on the circumstances of the crime. She urged jurors to look "at Mr. Howe's statement" and pointed them to a glaring evidentiary gap in the defense case, telling them the defense had "never given you a reason to doubt [Howe's] testimony." (41 RT 10879-10880.)

The prosecutor's heavy reliance on Howe made sense. Obviously, if the jury believed Howe that Grimes had ordered the killing, it would find that Grimes had a specific intent to kill and find the special circumstances true. Similarly, evidence from Howe that Grimes admitted ordering the killing, watched the murder and enjoyed it supported the prosecutor's thesis that death was the proper punishment. Ultimately, the jury agreed with the prosecutor that there was no reason to doubt Howe, finding the special circumstance allegations true and imposing death. (6

CT 1296-1297, 1438.)

The excluded evidence would have filled the evidentiary gap so forcefully relied on by the prosecutor. Prior to his suicide, John Morris made statements to Misty Abbott and Albert Lawson. The court admitted evidence that Morris told Lawson he fatally stabbed Ms. Bone after strangling her did not work. (24 RT 6747, 6749-6750, 6796, 6798.) Over defense objection, however, 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.) Likewise, the court 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.)

B. Because The Excluded Evidence Squarely Rebutted The Primary Evidence On Which The State Relied To Prove The Intent-To-Kill Theory, The Special Circumstance Finding Should Be Reversed.

As noted above, to prove the special circumstance allegations true, the prosecutor contended at least in part that Mr. Grimes aided the felonies with a specific intent to kill. (35 RT 9212-9213, 9293-9294.) This theory was based entirely on the testimony of Jonathan Howe. (35 RT 9212.) The excluded evidence would have impeached Howe's testimony in two ways.

First, it would have directly rebutted it. Morris told Abbott that when Grimes saw what he (Morris) had done, he (Grimes) was shocked at what had happened. Obviously if Grimes had planned for and ordered Morris to kill the victim, he would not have been surprised.

Second, the excluded evidence would have impeached Howe's credibility more generally. Howe said that Grimes admitted watching and enjoying the killing. But Morris told Lawson 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.

The prosecutor forthrightly admitted that her intent-to-kill theory for the special circumstance was based on Howe's testimony that Mr. Grimes ordered the killing. (35 RT 9212.) The prosecutor later noted, with some accuracy on the existing record, that the defense had "never given you a reason to doubt [Howe's]

testimony." (41 RT 10879-10880.) The excluded evidence would have done just that. The state cannot establish the exclusion of Howe's statements was harmless beyond a reasonable doubt. The special circumstances should be reversed.

C. Separate And Apart From The Special Circumstance Findings, Because The Excluded Evidence Undercut Important Circumstances Of The Crime Supporting Death, Reversal Of The Penalty Phase Verdict Is Required.

Even if the special circumstance findings could be affirmed, reversal of the penalty phase is required. For obvious reasons, among the most important considerations any capital jury considers in deciding whether to impose death are the particular circumstances of the crime. Here, among the circumstances of the crime which the jury had before it in deciding whether Mr. Grimes would live or die were the following, directly attributable to jailhouse informant Jonathan Howe:

(1) Mr. Grimes admitted ordering Wilson and Morris to tie up the victim;

(2) Mr. Grimes admitted ordering Wilson and Morris to kill the victim;

(3) Mr. Grimes admitted watching Morris as he killed the victim, and

(4) Mr. Grimes admitted that he enjoyed watching the killing.

As noted above, in asking the jury to impose death the prosecutor not only relied generally on the circumstances of the crime, but she specifically told the jury that the defense had "never given you a reason to doubt [Howe's] testimony." In assessing prejudice from the exclusion of Morris's statements, and the prosecutor's consequent reliance on Howe's unrebutted testimony, it is therefore important to keep in mind Judge Kozinski's observation in the context of assessing prejudice that "closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1324.) This Court has long taken the identical approach, holding that a prosecutor's reliance on certain evidence in closing argument is a sound reflection of the importance of that evidence to the state's case. (*People v. Powell* (1967) 67 Cal.2d 32, 55-57.) When the prosecutor herself treats evidence as important to her case "[t]here is no reason why we should treat this evidence as any less 'crucial' than the prosecutor -- and so presumably the jury -- treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 868.)

Here, the prosecutor -- "and so presumably the jury" -- treated circumstances of the crime generally, and Howe's testimony specifically, as important to the state's case for death. With good reason. Evidence that Mr. Grimes ordered the killing, watched it and enjoyed it points unmistakably and powerfully to death. As such, the state will be unable to prove beyond a reasonable doubt that evidence rebutting Howe's testimony was harmless as to penalty. A new penalty phase is required.

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.

The Court's third question assumes (1) the trial court did *not* err in excluding Morris's statement to Abbott that after Morris killed the victim, defendant looked at him as if he were surprised but (2) *did* err in excluding Morris's statements to Abbott and Lawson that defendant was not involved in the actual killing. The Court asks whether this more narrow error "requires reversal of the special circumstance findings or death sentence?" The answer is yes.

Before addressing these points, however, it is worth noting that based on authority from this Court decided after the close of briefing -- but which Mr. Grimes called to the Court's attention prior to oral argument -- the trial court's ruling excluding Morris's statements about the look on defendant's face was plainly improper. Morris was a percipient witness and was therefore competent to testify to Grimes's demeanor. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1086 [state could properly call percipient witness to crime to testify about look on defendant's face at the time of the crime].) And for all the reasons set forth in Mr. Grimes's opening and reply brief, as well as oral argument, evidence from Morris himself supporting the thesis that he acted alone -- even if that evidence was Morris's assessment of defendant's demeanor -- was against his penal interest. (*See* AOB 78-81.)

But even putting this error aside, as the Court's question requires, reversal of the special circumstance is required. As discussed in connection with the Court's second question, the prosecutor relied at least in part on an intent-to-kill theory in connection with the special circumstance findings. By the prosecutor's own admission, this theory depended entirely on Howe's credibility.

The excluded evidence would have allowed defense counsel to attack that credibility. After all, Howe said Grimes admitted (1) ordering the killing, (2) watching the killing and (3) enjoying the killing. But Morris told Lawson 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." If this statement to Lawson is credited, then Howe -- an in-custody informant -- was lying. Given the importance placed by the prosecutor herself on Howe's credibility, the state will be unable to prove harmless beyond a reasonable doubt the trial court's exclusion of evidence which would have permitted the defense to directly impeach Howe's credibility.

And for very much the same reasons as discussed above in connection with the Court's second question, assuming the special circumstance findings could be affirmed, the penalty would have to be reversed even under the narrower finding of error assumed in the Court's third question. Yet again, the jury deciding whether Mr. Grimes would die heard that he watched and enjoyed the killing. The same witness testified that, in fact, Grimes ordered the killing. The prosecutor told jurors that the defense had given them no reason to doubt this witness.

Put simply, the jury did not hear the other side of the story. The jury did not know that Morris himself had said that Grimes was not even around when the killing happened, and therefore could neither have seen, much less enjoyed watching it. If believed, this meant Howe was lying about these statements. And if Howe was lying about this, the jury could reasonably have found he was also lying about the other statements he purportedly heard. This conclusion would certainly have been consistent with other evidence, which the jury did not hear, that Howe had failed a voice stress test as to his credibility, and then he failed a polygraph test as well -- both administered by the prosecution. (30 RT 8228-8229; 5 CT 1026.) For these reasons, the state will be unable to prove that as to the jury's normative decision to impose death the trial court's error was harmless beyond a reasonable doubt.

CONCLUSION

The state's decision not to dispute harmless error in its brief did not forfeit the state law component of Mr. Grimes's claim, but it did forfeit the federal component. Ultimately, however, there is no need to reach the question of

forfeiture. Even if the state had not forfeited the harmless error issue, the error was prejudicial under both state and federal law and reversal is therefore required.[2]

Respectfully submitted,

Cliff Gardner

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[2] In his briefing and oral argument, Mr. Grimes explained why the trial court's error violated the federal constitution and was therefore reviewable under *Chapman*. (AOB 82-88; ARB 36-40.) In its briefing, respondent argued that only state-law error was involved. (RB 76-77.) Even assuming *arguendo* that respondent is correct, reversal is still required.

State law penalty phase errors are reviewed under a standard of prejudice which is in "substance and effect" identical to *Chapman*. (*People v. Abilez* (2007) 41 Cal.4th 472, 525-526. *Accord People v. Jackson* (2014) 58 Cal.4th 724, 748; *People v. Salcido* (2008) 44 Cal.4th 93, 164-165.) Accordingly, for the very same reasons discussed above in connection with the *Chapman* standard, any error -- be it state or federal -- requires reversal of the penalty phase. And for the same reasons discussed in text above, the court's exclusion of evidence directly undercutting Howe's testimony cannot be found harmless as to the special circumstances even under the state-law test for prejudice.

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 16, 2014, I served the within

***PEOPLE V. GRIMES*, S076339, SUPPLEMENTAL BRIEF (7-16-14)**

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
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Mr. Gary Grimes
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Sent via USPS mail & Electronic Service:
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I declare under penalty of perjury that the foregoing is true. Executed on July 16, 2014, in Berkeley, California.

Declarant