IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. GARY GRIMES, Appellant.	S076339 Superior Court (Shasta) 95F7785

APPELLANT'S PETITION FOR REHEARING

Appeal From The Judgment Of The Superior Court

Of The State Of California, Shasta County

Honorable Bradley L. Boeckman, Judge

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INTRODUCTION

Gary Grimes was charged with murder in the 1995 death of Betty Bone. At all times the trial prosecutor acknowledged that Mr. Grimes had not killed anyone, that the real killer was John Morris, and that Mr. Grimes was instead an accomplice to felony murder.

Morris killed himself shortly after he was arrested. The prosecutor then sought death against Mr. Grimes. Although Grimes had not killed anyone, the prosecutor relied on testimony from a jailhouse snitch that Grimes confessed to ordering the killing, watching the killing and enjoying the killing. The trial court excluded admissions Morris made that he acted alone, that Grimes was surprised at and took no part in the killing and that he was not even in the room when it occurred. On appeal, Mr. Grimes's major claim of error was that the trial court's exclusion of this evidence violated both state and federal law and required a new penalty phase.

Throughout the course of briefing, the state vigorously contended that no error had occurred. The state did not, however, dispute that if error *had* occurred, a new penalty phase was required. In the middle of oral argument, the state took a completely different tack, arguing for the first time that even if error did occur, it was harmless. After argument, this Court vacated submission of the case and gave the state a second bite at the apple, soliciting supplemental briefing on the merits of the harmless error issue. Resolving an issue of first impression for California courts -- and as Justice Liu noted in his dissenting opinion -- a majority of the Court ultimately found "no legal or practical

significance in" and "assign[ed] no consequence" to the Attorney's General's decision not to address harmless error in its briefing. This Court then divided 4-3 on whether the error was harmless.

In a dissenting opinion, Justice Werdegar reviewed both the mitigating and aggravating evidence presented at trial, as well as the prosecutor's closing argument focusing on the jailhouse snitch. She noted the evidence on the defense side of the scale included evidence of intellectual disability, brain damage and schizophrenia, a dysfunctional childhood, family members expressing love for defendant and numerous acts of kindness defendant had committed in his life. After reviewing *both* sides of the penalty phase case, Justice Werdegar noted the "relative equipoise of evidence at the penalty phase" and concluded that the improperly excluded evidence "would likely have been decisive in convincing the jury to disregard" the jailhouse snitch's testimony that Mr. Grimes ordered, watched and enjoyed the killing.

In a separate dissenting opinion, Justice Liu noted the penalty phase lasted 11 days and involved 25 witnesses. Like Justice Werdegar, Justice Liu reviewed *both* the aggravating and mitigating evidence and noted the prosecutor's explicit reliance on the jailhouse snitch in his closing argument. After reviewing both sides of the penalty phase case, Justice Liu concluded he "would not find the error harmless at the penalty phase."

In a short section of its opinion, however, the majority disagreed, finding any error harmless as to the penalty phase. In making this determination, the majority did not reference *any* of the mitigating evidence presented at trial. Nor did the majority reference

the prosecutor's explicit reliance on the jailhouse snitch in her argument urging the jury to impose death.

Rehearing is appropriate for two reasons. First, as noted, the state did not even brief harmless error in its Respondent's Brief. For sound policy reasons, there are serious consequences when a *defendant* fails to raise an issue in his briefing to this Court. As Justice Liu observed in his dissent, the majority's refusal to apply a similar rule when the *state* fails to raise an issue in its brief not only marks a novel departure from the uniform approach followed throughout the country on this very issue, but "cannot be squared with elemental notions of fair play and this court's role as a neutral arbiter in the adversarial process." Moreover, regardless of how the asymmetric rule announced by the majority works in this Court, the rule is entirely unworkable in the intermediate appellate courts which issued a total of 9,429 written opinions in fiscal year 2013 in appellate matters alone, including nearly 5,000 criminal appeals.

Second, rehearing is appropriate in connection with the merits of the majority's harmless error analysis. The majority recognized that "the prosecution presented no evidence that defendant had actually participated in the homicidal act" and no evidence "suggested that defendant assisted Morris in killing [Ms.] Bone." Thus, the jury was being asked to take the relatively unusual step of sentencing a conceded non-killer to death. The trial court had excluded evidence from the actual killer that Grimes was surprised at the killing, took no part in the killing and was not even in the room when it occurred. In assessing whether the state had carried its burden of proving beyond a reasonable doubt that exclusion of this evidence was harmless, federal and state law

required the Court to consider *both* the aggravating and mitigating evidence presented at trial. The conclusion of the 4-3 majority that exclusion of this evidence constituted harmless error simply cannot be squared with the facts of this case or the rigorous standard of harmless error review which must be applied to constitutional errors in capital cases.

STATEMENT OF FACTS

In 1995, Betty Bone was killed during a burglary of her home in Redding. At trial, there was no dispute that the murder was committed by John Morris and that Mr. Grimes had never killed anyone. The parties also recognized that Mr. Grimes was involved in the underlying burglary and robbery, and was therefore guilty of murder as an accomplice. Mr. Grimes offered to plead guilty prior to trial, an offer which the state declined.

The real question came down to whether the jury would sentence Mr. Grimes to die. At the penalty phase, the jury was presented with both aggravating and mitigating evidence.

It is rare for the death penalty to be applied to a defendant who has not killed. As Justice Liu noted in his dissenting opinion, "[a]mong the nearly 1,400 executions in the United States since 1976, only 20 involved a capital defendant who did not actually kill . . . ." (*People v. Grimes*, *supra*, 2015 WL 47493 at * 61.) To support its relatively unusual case for death for an acknowledged non-killer, the state presented evidence regarding Mr. Grimes's criminal history, as well as victim impact evidence. (36 RT 9824-9625, 9701, 9583-9648, 9753-9778, 9764-9765.) In addition, the state relied on jailhouse snitch Jonathon Howe. Howe testified that during a jailhouse conversation Mr. Grimes told him "he ordered . . . Morris to kill the person he's accused of killing." (31 RT 8380.) According to Howe "[Mr. Grimes said he] was standing there watching [the killing]. . . . [Mr. Grimes said] he enjoyed watching it." (31 RT 8501.)

With respect to mitigation, the defense presented expert testimony that Mr. Grimes was currently mentally retarded, testing from his teenage years showing mental retardation at that time, detailed school records confirming his intellectual disabilities, evidence of organic brain damage and a dramatically dysfunctional childhood. (37 RT 9803-9836, 9818-9836, 9858-9859, 9962-9966, 9991; 38 RT 10028; 39 RT 10262, 10269-10272, 10434, 10462.) The defense also presented testimony from numerous family members about their love for Mr. Grimes, and evidence of good deeds he had performed in his life despite the obstacles he had faced. (38 RT 10037, 10067-10068, 10097, 10099-38100, 10165-10166, 10113-10115, 10122-10124; 39 RT 10458.) Finally, the defense presented evidence from people who knew Mr. Grimes as passive and a follower throughout his life. (37 RT 9967, 9993; 38 RT 10032.) Counsel argued that in light of the expert testimony showing Mr. Grimes's severe intellectual disabilities, and the confirming lay testimony that he had always been passive and a follower, the state's suggestion that Mr. Grimes had masterminded and ordered the killing, playing the leadership role, was simply not credible. (41 RT 10866, 10868, 10869.)

The prosecutor responded to this argument in the rebuttal portion of her closing argument. Asking jurors to impose death, the prosecutor urged them to look "at Mr. Howe's statement." (41 RT 10879.) With respect to Mr. Grimes's role in the offense, the prosecutor pointed to what she alleged was a glaring evidentiary gap in the defense case, telling jurors that the defense had "never given you a reason to doubt [Howe's] testimony." (41 RT 10879-10880.) The jury imposed death. (6 CT 1438.)

In fact, however -- and as the prosecutor knew full well -- there was good reason to doubt Howe's testimony and find the defense position credible. Shortly before his suicide, John Morris made statements to his friend, Misty Abbott. He also talked to fellow jail inmate Albert Lawson. The trial 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.) But 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) Grimes had not "participated in the killing" and (3) after Morris "did the lady" Grimes "looked at him as if [he] were saying, what in the hell are you doing, dude." (24 RT 6750, 6797.)[1]

Of course, any juror hearing that Grimes "did not take part in the killing" and was in "some other place in the house" when the killing occurred could reasonably have credited the defense theory as to Grimes's limited role in the offense and just as reasonably doubted Howe's account that Grimes actually ordered Morris to kill. Similarly, any juror hearing that Grimes expressed surprise or alarm at the killing ("what in the hell are you doing?") could have again reasonably credited the defense theory and doubted Howe's account that Grimes ordered and enjoyed watching the killing.

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[1] Unbeknownst to the jury, there were substantial other reasons to doubt Howe's credibility. Because the state itself was concerned about Howe's credibility, it administered several tests. Howe first failed a voice stress test as to his credibility; three different state examiners concluded he was lying. (5 CT 1026; 30 RT 8228-8229.) He then failed a lie detector test. (30 RT 8228-8229.) When Howe finally passed a second lie detector test -- his third test overall -- the state deemed him reliable and called him as a witness. (31 RT 8344.)

In light of the trial court's ruling, on appeal Mr. Grimes contended that the trial court's exclusion of evidence which directly supported the defense theory of Mr. Grimes's role in the offense, undercutting Howe's credibility and rebutting the most damaging inferences from his testimony, required reversal of the death sentence. (Appellant's Opening Brief ("AOB") 74-91.) Specifically, Grimes contended the trial court's exclusion of this evidence (1) violated state law, (2) violated federal law and (3) was prejudicial. (AOB 74-91.)

The state responded. The state filed a written brief contending only that (1) the trial court's ruling did not violate state law and (2) the trial court's ruling did not violate federal law. (Respondent's Brief ("RB") 72-77.) The state did *not* dispute that if error occurred, a new penalty phase was required. This was in stark contrast to the 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.)

The case was set for argument more than three years later -- on May 28, 2014. At oral argument, and in response to questions from the bench, the state admitted it had not placed harmless error at issue in its brief, but announced for the first time that it was now advancing a new theory that any error was harmless. (*People v. Grimes*, S076339, Oral Argument CD of May 28, 2014 ("CD") at 3:02:37-3:03:04.) After argument, the Court solicited supplemental briefing from the parties as to (1) whether the state could raise harmless error for the first time at oral argument and (2) if so, whether the error was harmless. The Court then set the case for a second oral argument. On January 5, 2015 the Court issued a sharply splintered 4-3 decision.

Four justices ruled that (1) the state's failure to raise harmless error in its briefing was of no consequence at all and (2) any error in excluding the evidence was harmless as to the penalty phase. (*People v. Grimes* (2015) 2015 WL 47493 at * 18-22.) In a dissenting opinion, Justice Werdegar found (1) the trial court erred in excluding Morris's statements and (2) the error was prejudicial as to the penalty phase under the "rigorous standard of review" applied to penalty phase errors. (*Id.* at * 44-46.) Accordingly, Justice Werdegar had no occasion to (and did not) address the separate question whether there was any consequence to the state for failing to raise harmless error. (*Ibid.*) In a separate dissenting opinion, Justice Liu (joined by Justice Zelon sitting by designation) agreed that exclusion of the evidence was error and went on to conclude (1) the Court could *not* simply ignore the state's failure to raise harmless error, (2) there was a well-developed and uniform body of case law from around the country which explained exactly how to perform harmless error analysis in this situation and (3) applying that body of case law, a new penalty phase was required here. (*Id.* at * 48, 48-63.)

As mentioned above, rehearing is appropriate for two reasons. First, the majority resolved a question of first impression in California, addressing whether the state could forbear from raising harmless error in its briefing but then raise the issue for the first time at oral argument. The majority permitted this practice, allowing the state to brief the issue for the first time *after* oral argument. This rule departs from the uniform weight of authority in virtually every jurisdiction in the country to have addressed this identical issue, creates a manifestly unfair distinction between parties in the criminal justice system and is entirely impractical when applied to the thousands of criminal cases resolved by the intermediate appellate courts of this state.

Second, rehearing is appropriate in connection with the majority's 4-3 conclusion that exclusion of the actual killer's critical admissions that Mr. Grimes played no role in the killing of Ms. Bone was harmless error. The penalty phase theory of defense was that Mr. Grimes did not deserve to die. Instead, the mitigating evidence of mental retardation, organic brain damage and mental illness, a dysfunctional childhood, family members expressing love for defendant and numerous acts of kindness was sufficient to call for mercy when balanced against the aggravating evidence, especially in light of the defense evidence that Mr. Grimes had no leadership role in the crime. Again and again, defense counsel explained the defense theory that defendant was merely a follower. (41 RT 10866, 10868, 10869.) Yet the trial court had excluded evidence directly supporting this theory -- evidence that the actual killer himself admitted he acted alone and that Grimes was surprised at and took no part in the killing. In finding the error harmless, the 4-3 majority did not consider, or even reference, either the defense theory or *any* of the supporting mitigating evidence. As discussed below, the majority's conclusion that the death sentence should stand despite the exclusion of critical evidence pays insufficient heed to what Justice Werdegar in her separate opinion correctly called the "rigorous standard of review" applicable to penalty phase errors in capital cases.

For either or both of these reasons, rehearing is proper.

ARGUMENT

I. THE MAJORITY DECISION PERMITTING THE STATE TO IGNORE THE RULES OF APPELLATE PROCEDURE, AND RAISE HARMLESS ERROR FOR THE FIRST TIME AT ORAL ARGUMENT, IGNORES DECADES OF PRECEDENT THROUGHOUT THE COUNTRY, TREATS THE PARTIES IN CRIMINAL CASES IN A PATENTLY DISPARATE MANNER, AND ARTICULATES A RULE WHICH IS UNWORKABLE IN THE INTERMEDIATE COURTS OF APPEAL.

The state did not raise harmless error in its briefing. It remained mum on the issue until the middle of oral argument when -- after testing the waters in connection with the existence of error -- it first raised harmless error. The state was then simply permitted to brief harmless error after the initial oral argument.

This approach to the state's decision to omit harmless error from its briefing but raise it for the first time at oral argument constitutes a stark departure from the consistent approach followed throughout the country on this very issue. Moreover, as Justice Liu noted in his concurring and dissenting opinion, in light of the consequences imposed on criminal defendants who fail to properly raise issues in their briefing, the decision "cannot be squared with elemental notions of fair play and this court's role as a neutral arbiter in the adversarial process." Finally, the Court's solution to this problem -- soliciting supplemental briefing from the parties on the harmless error question after argument -- is an utterly impractical solution for intermediate appellate courts faced with the task of issuing written opinions in many thousands of criminal cases per year. Rehearing is proper.

A. The Majority's Decision Departs From Decades Of Precedent On This Very Issue.

The United States Supreme Court has long noted that "in our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation." (*Greenlaw v. United States* (2008) 554 U.S. 237, 243-244.) The principle of party presentation "reli[es] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present." (*Ibid.*) It is a principle that is "basic to our system of adjudication." (*Arizona v. California* (2000) 530 U.S. 392, 413.)

There is no mystery to the principle of party presentation in an adversary system. The idea that the parties (rather than the court) must frame the issues at trial and on appeal is premised on a basic understanding as to the proper role of courts and judges in an adversary system. As this Court has noted:

> "[J]udges . . . cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law [citation] who apply the law uniformly and consistently."

(*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 910.)

But the principle of party presentation is also premised on considerations of basic fairness to the litigants. As one court has stated in applying the principle of party presentation on appeal:

> "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* (2014) 222 Cal.App.4th 1406, 1412, fn.5.)

California courts have consistently applied this principle to criminal defendants. Where a criminal defendant fails to raise a particular argument in his opening brief, there is a consequence: the court will not consider the issue even though the state has time to prepare a response prior to oral argument.[2] Where a criminal defendant raises an issue in his opening brief, but fails to support the issue with sufficient argument, there is a consequence: courts will "treat it as waived, and pass it without consideration."[3] Where a criminal defendant raises an issue for the first time at oral argument, there is a consequence: the issue will be deemed waived.[4]

Here, of course, the state violated every one of these rules. The state withheld a harmless error argument from its brief, said nothing about harmless error in the 37 months

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[2] *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.

[3] *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.

[4] *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 case was awaiting oral argument, and then raised harmless error without any notice for the first time quite literally in the middle of oral argument. Thus, the issue squarely presented here is whether the state is exempt from the basic rules of fairness referenced above which impose a consequence for the failure to brief an issue.

This is an issue of first impression for this Court. Although prior California cases generally assumed that the fairness rules applicable to defendants also applied to the state, none of those cases discussed the matter in any detail. (*See People v. Bouzas* (1991) 53 Cal.3d 467, 480 [the state's failure to respond to an appellant's argument in its principal brief constituted a concession of the point]; *People v. Isaac* (2014) 224 Cal.App.4th 143, 147 [same]; *People v. Werner* (2012) 207 Cal.App.4th 1195, 1212 [same]. *But see People v. Hill* (1992) 3 Cal.4th 959, 995, fn.3 [state's failure to respond is not a concession].) Resolving this new issue, and departing from the weight of California authority, the majority here held that *none* of these rules applied to the state in this capital case. In contrast to the cases cited above -- where this Court consistently imposed a consequence on *defendants* who failed to properly raise an issue -- the majority here held there was *no consequence at all* for the state's identical failure.

But the majority did not just depart from the general trend of California case law. In fact, the identical issue has arisen in both federal and state courts around the country for decades. And the decisions of these many courts, over many years, reflects a remarkable consistency. While the rule applied virtually everywhere in the country does *not* impose a strict rule of forfeiture on the state, neither does it simply ignore the state's

decision not to present harmless error in its brief. Instead, the general rule eschews reliance on either of these polar extremes and charts a middle course.

There are good reasons for this. On the one hand, imposing a strict forfeiture rule on the state in this situation -- and holding that the state's failure to brief the issue requires automatic reversal no matter how technical the error -- would result in an unjustified windfall to defendants. It would require new trials (and the use of scarce judicial resources) in many cases involving minor or technical errors, where a new trial is totally unwarranted. (*See, e.g., United States v. Giovannetti* (7th Cir. 1991) 928 F.2d 225, 226-227; *United States v. Gonzales-Flores* (9th Cir. 2005) 418 F.3d 1093, 1100.)

On the other hand, however, simply ignoring the state's failure to brief harmless error presents numerous problems as well. As several courts have noted, there is an obvious unfairness in a rule which permits the state to (1) forbear from briefing harmless error, (2) test the waters in connection with arguments solely directed to the existence of error and (3) add a harmless error argument at the eleventh hour as a fallback position if it looks like the court is going to find error. (*See, e.g., United States v. Giovannetti, supra,* 928 F.2d at p. 226; *United States v. Gonzales-Flores, supra,* 418 F.3d at p. 1100. *See United States v. Rose* (1st Cir. 1997) 104 F.3d 1408, 1414-1415.) Courts have also recognized that addressing an issue which the state did not properly raise in its briefing comes "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." (*Rose v. United States* (D.C. 1993) 629 A.2d 526, 534. *See also United States v. Pryce* (D.C. Cir. 1991) 938 F.2d 1343, 1354 [Silberman, J., dissenting].) Justice Liu

noted both of these concerns in his concurring and dissenting opinion. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 57 [noting the potential for manipulative lawyering] and 59 [noting separation of powers implications].)

Accordingly, although some states have in fact taken the strict approach to the state's failure to brief harmless error -- applying the same strict rule of forfeiture applied to defendants[5] -- the vast majority of jurisdictions take a more moderate approach. Where, as here, the burden is on the state to prove an error harmless, and the state does not brief the harmless error question, virtually every state and federal court in the nation has concluded there *is* a consequence for the state's failure to dispute harmless error. In that situation, a reviewing court may find the error harmless only where (1) the record is short and straightforward and the court can easily determine prejudice on its own, (2) the harmless error question is beyond debate and (3) a remand would be futile. (*See United States v. Giovannetti*, *supra*, 928 F.2d at pp. 226-227. *Accord United States v. Rodrigues Cortes* (1st Cir. 1991) 949 F.2d 532, 543; *United States v. Mclaughlin* (3rd Cir. 1997) 126 F.3d 130, 135; *Nelson v. Quarterman* (5th Cir. 2006) 472 F.3d 287, 332 [Dennis, J., concurring]; *Grover v. Perry* (6th Cir. 2012) 698 F.3d 295, 300-301; *United States v. McGlaughlin* (7th Cir. 1997) 126 F.3d 130, 135; *Lufkins v. Leapley* (8th Cir. 1992) 965 F.2d 1477, 1481-1482; *United States v. Kloehn* (9th Cir. 2010) 620 F.3d 1122, 1130; *United States v. Torres-Ortega* (10th Cir. 1999) 184 F.3d 1128, 1136; *United States v. Pryce* (D.C. Cir. 1991) 938 F.2d 1343, 1347-1348; *State v. Porte* (Minn. 2013) 832 N.W.2d 312, 314; *Harlow v. State* (Wyo. 2003) 70 P.3d 179, 195; *Randolph v. United*

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[5] *See, e.g., State v. Almaraz* (Id. 2013) 301 P.3d 242, 256-257 [for the first time at oral argument the state argues harmless error; held, because the state has forfeited the claim, reversal is required]; *Polk v. State* (Nev. 2010) 233 P.3d 357, 359-361 [same].

States (D.C. Ct. Ap. 2005) 882 A.2d 210, 223.) As one court has characterized this approach, in order to affirm a conviction in this situation, this standard "requires a double level of certainty: [the reviewing court] must be convinced that the error was 'harmless beyond a reasonable doubt' and that 'satisfaction of that standard is beyond serious debate.'" (*United States v. Brooks* (9th Cir. 2014) 772 F.3d 1161, 1171.)

Justice Liu applied this moderate approach here and found the error prejudicial. With respect to the first factor, Justice Liu noted that the record in this case was "lengthy and complex." (*People v. Grimes, supra*, 2015 WL 47493 at * 63.) Justice Liu was correct; the record on appeal contains more than 15,000 pages (exclusive of jury questionnaires) -- it is anything but "short and straightforward" -- and the penalty phase alone lasted 11 days and involved 25 witnesses. With respect to the second factor -- whether the harmless error question was subject to debate -- the fact of the matter is that four justices found the error harmless while three found it prejudicial. The 4-3 split on the question of prejudice shows that the harmless error issue here was certainly *not* beyond debate. Indeed, the majority opinion candidly recognizes that the reason it was permitting the state a second bite at the apple -- and allowing post-argument briefing as to harmless error -- was precisely because the "record is complex" and "the harmless error issue is a debatable one." (*People v. Grimes, supra*, 2015 WL at * 20.)[6]

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[6] The majority's approach not only departs from the rule followed in the rest of the country, but it actually turns this rule on its head. Those cases uniformly hold that where the state has failed to brief harmless error, a reviewing court may *not* find the error harmless where the record is complex and the harmless error question is open to serious debate. The majority decision here turns every one of these cases around, holding that where the "record is complex" and "the harmless error issue is a debatable one," California reviewing courts may give the state a second bite at the apple, require supplemental briefing and argument and find the error harmless.

The third criteria identified in the case law requires an assessment of whether a remand would be futile. To some degree, of course, this inquiry mirrors the inquiry as to whether the harmless error issue is subject to serious debate. In cases where the harmlessness of an error is clear, a remand would be futile since a new trial would likely reach the same result. On the other hand, where (as here) the harmlessness of an error is not clear -- as noted, the majority itself recognizes the issue is subject to serious debate and this Court ultimately split 4-3 on this issue -- a remand would certainly *not* be futile since a new result might very well occur at a new trial absent the error.[7]

The majority recognized this extensive authority on the very question before it but noted that none of the case law was "binding on this court." (*People v. Grimes*, *supra*, 2015 WL 47493 at * 19.) This is correct. But the mere fact that case law from throughout the country is not technically binding on this Court is not, in and of itself, a particularly satisfying reason to depart so dramatically from that consistent authority. The competing policy considerations discussed in that extensive body of case law are equally applicable to California; as a result, the same rule -- which accommodates these competing concerns -- should apply here as well.

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[7] This case involves an additional and unusual wrinkle as to this factor. The original trial here was in 1998, before the Supreme Court overruled its prior authority and held that the state could not execute the mentally retarded. (*See Atkins v. Virginia* (2002) 536 U.S. 304.) Mr. Grimes was diagnosed as mentally retarded as a teenager, current tests given prior to trial showed that he tested mentally retarded in 7 of 12 areas, he scored a 60 on the Weshler Memory Scale III, well below the cut-off for mentally retarded, his working memory score was 67, and his Wide Range Achievement score was 62. (37 RT 9803-9836, 9818-9836, 9858-9859; 39 RT 10256-10258.) On appeal, both parties noted the substantial evidence of mental retardation presented below. (AOB 1-2, 24-28; RB 31, 34; ARB 1-3.) On this record, a remand would not be futile since it is likely Mr. Grimes will be categorically exempt from the death penalty at any new trial.

Seeking to distinguish this authority, the majority correctly note that Article VI, section 13 of the California Constitution provides "[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . improper . . . rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The majority -- as well as the three dissenting justices -- all held that this provision requires the Court to address harmless error even where, as here, the state elects not to brief it. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 19 [majority opinion]; * 44 [Werdegar, J., concurring and dissenting] and * 48, 56 [Liu, J., concurring and dissenting].) In light of this constitutional provision, the state's decision not to brief harmless error does not constitute a complete forfeiture of the issue.

But as Justice Liu also noted, although Article VI, section 13 requires this Court to assess harmless error, it says nothing at all about *how* to address the issue when the Attorney General has elected not to brief it. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 56.) Put another way, nothing in this constitutional provision explains why this Court should depart from the approach taken by virtually every other court in the country on this identical issue. And not only does the majority fail to cite a single case which has ever embraced a decision to give the state a second bite at the briefing apple after hearing oral argument, but -- as Justice Liu also noted -- in light of the rules applied to defendants who fail to present certain issues in their briefing, the majority's approach reflects an "obvious unfairness." (*People v. Grimes*, *supra*, 2015 WL 47493 at *57.) It is to that unfairness Mr. Grimes now turns.

B. The Majority's Decision Creates An Unfair Distinction, Permitting The State Alone To Refrain From Briefing Harmless Error, Test The Waters At Oral Argument, Raise Harmless Error For The First Time At Oral Argument And Then Brief The Issue Fully.

As noted above, based on legitimate concerns about unfairness to the state, where a criminal defendant fails to raise a particular argument in his opening brief, courts will not consider the issue. (*See, e.g., People v. Duff, supra*, 58 Cal.4th at p. 550, fn.9; *People v. Gonzales, supra*, 51 Cal.4th at p. 957 fn.37.) Based on similar concerns about unfairness to the state, where a criminal defendant raises an issue in his opening brief, but fails to support the issue with sufficient argument, courts will "treat it as waived, and pass it without consideration." (*People v. Stanley, supra*, 10 Cal.4th at p. 793. *Accord People v. Ashmus, supra*, 54 Cal.3d at p. 985 fn.15.) Finally, and again based on this identical concern about fairness to the state, where a criminal defendant raises an issue for the first time at oral argument, the issue will be deemed waived. (*See, e.g., People v. Crow, supra*, 6 Cal.4th at p. 960 fn.7.) As the majority in this case correctly noted, "to allow an appellant to raise a new issue in its reply brief or at oral argument 'would be unfair to the respondent, and would increase the labors of the court.'" (*People v. Grimes, supra*, 2015 WL 47493 at *18.)

According to the majority, however, these rules do not apply to the state. Thus, the state may refrain from raising harmless error in its brief, it may test the waters at oral argument in connection with the existence of error and then elect -- without any notice -- to raise harmless error for the first time at oral argument and in post-argument briefing. All without any consequence at all.

The majority does not explain why a *defendant's* failure to properly brief an issue is fundamentally unfair to the state, but the *state's* identical failure to properly brief an issue is perfectly fine. The majority never explains why a *defendant's* attempt to raise an issue at oral argument is fundamentally unfair to the state, but the *state's* identical attempt to do so is perfectly fine. In short, the majority correctly recognizes that "allow[ing] an appellant to raise a new issue in its reply brief or at oral argument would be unfair to the respondent, and would increase the labors of the court." But the majority never explains why allowing the state to raise new issues at oral argument is not equally "unfair to the appellant" or why it does not also "increase the labors of the court."

To the contrary, the majority recognizes that the approach it advocates will result in an increased burden "on a reviewing court's part." (*People v. Grimes*, *supra*, 2015 WL 47493 at *20.) The majority suggests, however, that this burden is worth it; permitting the state to raise harmless error at oral argument and then soliciting additional briefing (as was done here) "is fair to the parties and gives the court the benefit of the parties perspectives on an issue that we are obligated to address." (*Ibid.*) The burden on this Court is worth it because the likelihood of a correct result is enhanced by adversarial briefing. (*Ibid.*)

The majority's untested assumption is that allowing this departure from procedural norms -- and permitting the state to raise new claims at oral argument and then brief them after argument -- will increase the likelihood of a correct result. The assumption is questionable at best. Especially in capital cases (which often present many issues in the briefing), defendants select which one or two issues to argue based on a variety of factors

-- including the position taken by the state in its briefing. Allowing the state to sandbag the defense decision as to which issues to argue by omitting harmless error from its briefing does nothing to increase the reliability or fairness of the appellate process.

Moreover, as noted in the case law, the approach embraced by the majority permits the state to test the waters in briefing and argument as to the existence of error and then -- if the waters are not to its liking -- shift to a harmless error strategy without any notice at all. Permitting the state alone to bifurcate the presentation of its position in this way is certainly not fair, nor will it necessarily result in a more accurate appellate resolution. As to the harmless error question on which the state has the burden of proof, it allows the state to brief the issue after gaining whatever insights it can from the "dress rehearsal" oral argument. As one court has noted in this precise context, permitting the state to raise harmless error for the first time at oral argument:

> "would invite salami tactics. In its main brief and at oral argument the government would argue that there was no error, hoping to get us to endorse its view of the law. If it failed in that endeavor it would [then raise harmless error], arguing as it does in this case that it should win anyway because the error was harmless. Such tactics would be particularly questionable in a case such as this where the defendant goes out of his way to argue that the error of which he complains was prejudicial, and the government by not responding signals its acquiescence that if there was error, it indeed was prejudicial."

(*United States v. Giovannetti*, *supra*, 928 F.2d at p. 226. *Accord United States v. Gonzales-Flores*, *supra*, 418 F.3d at p. 1100. *See United States v. Rose*, *supra*, 104 F.3d at pp. 1414-1415.)

The majority's legitimate concern for processes that enhance the reliability of this Court's decision making does not really address the larger inequity here at all. There can be no real dispute that the accuracy of this Court's decision making is enhanced by adversarial briefing. But as Justice Liu observed, "[w]hen a defendant omits a particular argument in the opening brief and attempts to raise it in the reply brief or at oral argument, we do not typically pardon the oversight for the sake of greater accuracy in determining whether the trial court reached the correct result." (*People v. Grimes*, *supra*, 2015 WL 47493 at * 57.)

As Justice Liu's observation suggests, it is important to encourage adversarial briefing in the context of a set of procedural rules that are fairly applied to *both* parties. If the Court believes that permitting new arguments to be raised at oral argument, followed by post-argument briefing, will enhance the accuracy of the Court's decisions, it is free to permit such practices. But as Justice Liu's observation suggests, both fairness and logic require that this approach apply to *both* parties. If, on the other hand, the Court believes that waiting until oral argument to inject issues into a case is unfair, it is free to impose consequences for such conduct -- again, so long as consequences apply to both parties. What the majority has done here is mix and match: defendants may *not* raise new issues at oral argument because that would be unfair, but the state *can* raise new arguments because this will enhance the reliability of the appellate process. It is a classic case of "heads I win, tails you lose."

The majority was sensitive to the suggestion that the rule it was announcing treated the state differently from the defendant. Thus, the majority noted two occasions where

this Court exercised its discretion to permit a criminal defendant to file "supplemental briefs raising new issues in capital appeals." (*People v. Grimes*, *supra*, 2015 WL 47493 at * 20, *citing People v. Howard* (2010) 51 Cal.4th 15 and *People v. Carrington* (2009) 47 Cal.4th 145, 187.)

The problem is this. The stark differences between *Howard* and *Carrington* on the one hand, and this case on the other, do not *resolve* what Justice Liu called the "obvious unfairness" of the majority's rule, they actually *confirm* it.

In *Howard*, defendant filed a supplemental brief after the close of briefing but a full two years *prior* to oral argument, when a new lawyer took over his case. He did so only after seeking permission by filing a November 10, 2008 motion showing good cause for his request to raise additional issues after the close of briefing. (*See People v. Howard*, S050583, Docket Entries.) *Carrington* was similar; four years *before* oral argument, defendant filed a supplemental brief after seeking permission by filing an October 7, 2005 motion showing good cause for his request. (*See People v. Carrington*, S043628, Docket Entries.)

Mr. Grimes has no issue with the rule -- applied in both *Howard* and *Carrington* -- which permits a party to present supplemental briefing on a showing of good cause. That is an evenhanded rule which can be fairly applied to both parties. And as the facts of both *Howard* and *Carrington* show, this rule can be applied in a manner which does not result in patent unfairness (and surprise) at oral argument.

But that is not what happened here, nor is it even very close. In contrast to the defendants in *Howard* and *Carrington*, the state here did *not* make a showing of good cause, and seek to raise an additional issue, years before oral argument. Instead, the state simply raised the new issue in the middle of oral argument, with *no* prior request, and without the remotest suggestion it had good cause for doing so.[8]

In short, neither *Howard* nor *Carrington* involved allowing an *appellant* to come to oral argument, raise a new issue in the middle of that argument, and then present post-argument briefing on that issue. But that is exactly what the majority permitted the state to do here. Justice Liu's conclusion that the majority's approach "cannot be squared with elemental notions of fair play and this court's role as a neutral arbiter in the adversarial process" was correct. Rehearing is appropriate.

C. The Majority's Decision To Permit The State To Raise Harmless Error For The First Time At Oral Argument, With Full Post-Argument Briefing Followed By A Second Oral Argument, Imposes An Unworkable And Impractical Rule On The Intermediate Appellate Courts.

The majority addressed the appropriate remedy when the state first raises harmless error at oral argument. The rule announced by the majority requires post-argument briefing from both sides on the merits of the new issue and a second oral argument. As discussed below, even assuming this solution is practical for a court of limited jurisdiction

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[8] Indeed, as Justice Liu has noted, at the second oral argument the state itself affirmatively conceded that because of the state's inaction, the Court "shouldn't be hearing from" the state on the merits of the harmless error issue. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 47.)

(like this one), it is entirely impractical when applied to appellate courts with general jurisdiction.

In fiscal year 2013, this Court issued a total of 94 written opinions. (*See* Judicial Council, 2013 Court Statistics Report, Statewide Caseload Trends, 2002-2003 Through 2012-2013 at p. xiv.) From a practical standpoint, the new rule embraced by the majority -- where the court permits the state to raise harmless error for the first time at oral argument, brief the matter after argument and argue the issue at a second oral argument -- may not be impractical in a court of limited jurisdiction which may have the resources to address the problem in this way. But the same cannot be said in connection with the intermediate courts of this state who have general appellate jurisdiction.

In fiscal year 2013, the intermediate appellate courts issued 9,429 written opinions on appeal. (*Ibid.*) Of these, the appellate courts resolved 4,854 appeals in criminal cases. (*Ibid.*) In addition, the appellate courts resolved 7,371 original proceedings as well as 3,426 additional appeals without a written opinion. (*Ibid.*) The approach the majority has now charted -- permitting the state to raise issues for the first time at oral argument, obtain post-argument briefing and a second oral argument -- would require enormous resources when applied to the many, many thousands of cases decided by the intermediate appellate courts.

To be sure, if the Court is going to permit new arguments to be raised at oral argument, it should indeed permit full briefing from both sides and an opportunity for oral argument. Setting aside for the moment the concerns expressed in Arguments I-A and B

above, this approach at least gives both parties a chance to address the issues. But the consequences on the intermediate appellate courts of the unprecedented alternative solution adopted by the majority are grave: faced with resolving nearly 10,000 appeals, and 7,000 more original proceedings, the intermediate appellate courts simply do not have the time or resources to follow the majority's new rule. Indeed, as the Court's experience in dealing with the post-argument briefing in this single case should show -- involving four additional briefs and an additional oral argument -- efforts of the intermediate appellate courts to follow this new rule will result in vastly increased delay and a substantial expenditure of judicial resources. Rehearing is appropriate.

II. THE MAJORITY'S PREJUDICE ANALYSIS REGARDING THE EXCLUSION OF MORRIS'S STATEMENTS DOES NOT RECOGNIZE OR APPLY THE RIGOROUS STANDARD OF REVIEW APPLIED TO PENALTY PHASE AND FEDERAL CONSTITUTIONAL ERRORS IN CAPITAL CASES.

At the guilt phase of a trial, jurors make binary determinations of fact, deciding (for example) whether or not defendant committed a certain act. At the penalty phase of a capital trial, however, jurors are called upon to make a very different determination. The penalty phase decision requires jurors to make an essentially normative determination as to whether a defendant will live or die. Under California law, the jury's role is to decide whether the aggravating evidence was "so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (*People v. Boyde* (1988) 46 Cal.3d 212, 254.)

In making this determination, the jury considers all mitigating evidence presented by the defense, defined as any evidence which "might serve as a basis for a sentence less than death." (*Tennard v. Dretke* (2004) 542 U.S. 274, 287.) The jury also considers aggravating evidence presented by the state, including the circumstances of the crime presented at the guilt phase. (*See* Penal Code section 190.3, subdivision (a).)[9]

As discussed below, all parties agreed Mr. Grimes was not the actual killer. Part of the defense case in mitigation was to present mitigating evidence and argument as to Mr. Grimes's role in the actual killing -- the defense theory was that Mr. Grimes was

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[9] In this case, as in most, this was accomplished by instructing the penalty phase jury that in deciding upon the proper punishment, it could consider "evidence which has been received during any part of the trial of this case." (41 RT 10801.)

simply a follower. The state disagreed, arguing that although Mr. Grimes was not the actual killer, death was proper because he was the leader and had ordered the killing.

As to this critical point of disagreement, the trial court excluded evidence as to Mr. Grimes's lack of any role in the actual killing: statements from the actual killer that he acted alone, that Grimes was surprised at and that he took no part in the killing and was not even in the room when it occurred. Obviously, this evidence would have supported the defense theory; just as obviously, it would have undercut the state's theory. The question on which the majority and dissenting justices disagreed was whether the trial court's exclusion of this evidence was harmless or prejudicial.

As also discussed below, the state was not only required to prove that exclusion of this evidence was harmless, it was required to prove this beyond a reasonable doubt. Because the mitigating and aggravating evidence here was closely balanced, and in light of the nature of the evidence excluded, the state did not carry its burden. Rehearing is proper.

A. The Penalty Phase Evidence And Arguments And The Evidence Excluded.

In her dissenting opinion, Justice Werdegar described the "relative equipoise of evidence at the penalty phase" between the state and the defense. The description was accurate.

In mitigation, the defense presented expert testimony showing current mental retardation, testing from Mr. Grimes's teenage years showing mental retardation, school records confirming his intellectual disabilities at that time, evidence of organic brain damage and a difficult childhood. (37 RT 9803-9836, 9818-9836, 9858-9859, 9962-9966, 9991; 38 RT 10028; 39 RT 10262, 10269-10272, 10434, 10462.) The defense also called numerous family members to testify as to good deeds and kind acts Mr. Grimes had performed in his life, to confirm their love for Mr. Grimes and to show he had expressed remorse for his role in the crimes. (38 RT 10037, 10067-10068, 10097, 10099-38100, 10165-10166, 10113-10115, 10122-10124; 39 RT 10454-10458.) In aggravation the state introduced evidence of (1) prior felony convictions, (2) prior acts of violence and (3) victim impact. (36 RT 9824-9625, 9701, 9583-9648, 9753-9778, 9764-9765.) Justice Werdegar summarized the competing evidence as follows:

> "Although the prosecution presented defendant's prior criminal behavior as aggravating evidence, the defense met that evidence with mitigating evidence detailing defendant's dysfunctional childhood, mental problems, possible intellectual disability, brain damage and schizophrenia. Victim impact evidence from the surviving family was met with evidence from defendant's sister, mother, ex-wife and others proclaiming their love for defendant. Evidence suggesting defendant lacked remorse over Bone's murder was counterbalanced with defense evidence that defendant was the only one to have come to the aid of a prisoner being assaulted by others, and evidence describing a traumatic incident in which defendant's fiancée was killed in a traffic accident when defendant went to the aid of her mother, who was being harassed by the mother's ex-husband."

(*People v. Grimes*, *supra*, 2015 WL 47493 at * 46.)

As both Justice Werdegar and Justice Liu concluded, given that both parties recognized Mr. Grimes was not the actual killer but simply an accomplice, the jury's

balance of aggravating and mitigating evidence could very well have depended in large part on the specific role Mr. Grimes played in the killing. (*People v. Grimes, supra*, 2015 WL 47493 at * 46 [Werdegar, J., concurring and dissenting] and * 62 [Liu, J., concurring and dissenting].) Although acknowledging that Mr. Grimes was not the actual killer, the state argued aggravation nevertheless outweighed mitigation because Mr. Grimes had ordered the killing. As noted above, the prosecutor introduced evidence from jailhouse snitch Jonathan Howe that Mr. Grimes admitted to ordering the killing. (31 RT 8381.) In addition, according to Howe Mr. Grimes said he "was standing there watching [the killing]. . . . [and Mr. Grimes said] he enjoyed watching it." (31 RT 8501.) And in closing argument the prosecutor repeatedly urged the jury to dismiss the defense theory that Mr. Grimes was merely a follower. (41 RT 10814, 10877, 10878.)

The defense position that Mr. Grimes was merely a follower was supported by significant mitigating evidence presented through both expert and lay witnesses. As noted above, the defense presented substantial (and largely unrebutted) evidence showing Mr. Grimes's severe intellectual deficits and mental retardation. In addition, defense counsel presented evidence from people who knew Mr. Grimes throughout his life as passive and a follower. (37 RT 9967, 9993; 38 RT 10032.) Counsel relied on this evidence to argue that "Gary is not a leader. He never was a leader, never will be a leader." (41 RT 10868.) This evidence showed that Gary "was a follower his entire life, and now you are being asked to believe that he was the leader on this awful incident that occurred out there. Gary has never been a leader. He's not a leader. He's been a follower all of his life." (41 RT 10868-10869.) Defense counsel was explicit: "[W]hat

Jonathan Howe had to say is not believable. Remember he testified that Gary ordered the killing. That's not believable." (41 RT 10866.)

The connection defense counsel made between the evidence of intellectual disability he had introduced and the probability that Mr. Grimes took a leadership role in the crime has long been noted by the courts. As the United States Supreme Court concisely observed after reviewing the professional literature:

> "[T]here is abundant evidence that [the mentally retarded] often act on impulse rather than pursuant to a premeditated plan, *and that in group settings they are followers rather than leaders.*"

(*Atkins v. Virginia* (2002) 536 U.S. 304, 307, emphasis added.)[10]

The prosecutor responded to defense counsel's argument about Mr. Grimes's role in the offense. The prosecutor urged the jury to "look[] at Mr. Howe's statement." (41 RT 10879.) She told jurors that the defense had "never given you a reason to doubt his testimony." (41 RT 10879.)

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[10] The evidence does indeed support this view. (*See, e.g.*, Ellis & Luckasson, Mentally Retarded Criminal Defendants (1985) 53 Geo. Wash. L.Rev. 414, 429; Levy–Shiff, Kedem, & Sevillia, Ego Identity in Mentally Retarded Adolescents (1990) 94 Am. J. Mental Retardation 541, 547; Whitman, Self Regulation and Mental Retardation (1990) 94 Am. J. Mental Retardation 347, 360; Everington & Fulero, Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation (1999) 37 Mental Retardation 212, 212–213, 535.) This explains why many courts other than the Supreme Court have also recognized that people with severe intellectual deficits are more likely to be followers than leaders. (*See In re Campbell* (5th Cir. 2014) 750 F.3d 523, 531-532*; Byrd v. State* (Ala. 2009) 78 So.3d 445, 457; *State v. Hooks* (Oh. 1988) 529 N.E.2d 429, 432. *See generally United States v. McDade* (11th Cir. 2010) 399 Fed. Appx. 520, 525.)

Of course, the trial court had excluded statements of the actual killer Morris to Misty Abbott that Grimes did not take part in the actual killing and that upon seeing the killing, he looked at Morris as if to say "what in hell are you doing." (24 RT 6750, 6707.) The trial court also excluded Morris's statements to Lawson that Grimes took no part in the killing and was in another part of the house when the killing occurred. (24 RT 6747, 6797.) A 4-3 majority held that exclusion of this evidence was harmless.

B. The State Did Not Carry Its Burden Of Proving Beyond A Reasonable Doubt That Exclusion Of The Evidence Was Harmless.

Generally, federal constitutional errors require reversal unless the state -- as the beneficiary of the error -- proves beyond a reasonable doubt that the error is harmless. (*Chapman v. California* (1967) 384 U.S. 18, 24.) Under this Court's precedent, errors which occur at the penalty phase of a capital trial -- even if they are errors of state law -- also require application of the *Chapman* test and require the state to prove the errors harmless beyond a reasonable doubt. (*People v. Abilez* (2007) 41 Cal.4th 472, 525-526.)

In applying the *Chapman* test, the Supreme Court has long made clear that "the whole record be reviewed in assessing the significance of the errors." (*Yates v. Evatt* (1991) 500 U.S. 391, 409. *Accord, e.g., Rose v. Clark* (1986) 478 U.S. 570, 583; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *United States v. Hasting* (1983) 461 U.S. 499, 509 (1983). This Court too has recognized that *Chapman* requires the reviewing court to consider the *entire* record, not just evidence supporting the conviction. (*See People v. Mil* (2012) 53 Cal.4th 400, 417-418; *People v. Taylor* (1982) 31 Cal.3d 488, 499-500; *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1013.) The Court has also

long noted that in applying *Chapman*, reviewing courts must examine the prosecutor's closing argument to see if an alleged error impacted a point on which the prosecutor "and so presumably the jury" placed great reliance. (*People v. Powell* (1967) 67 Cal.2d 32, 56-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence].)

The dissenting opinions followed these authorities. In finding the trial court's error prejudicial as to the penalty phase, these opinions examined both the aggravating and mitigating evidence, as well as the prosecutor's argument about Howe. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 45, 46 [Werdegar, J., concurring and dissenting] and * 62 [Liu, J., concurring and dissenting].) Both opinions concluded that the excluded evidence could reasonably have led one or more jurors to doubt Howe's testimony as to Grimes's role in the killing. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 46 [Werdegar, J., concurring and dissenting] and * 62 [Liu, J., concurring and dissenting].) As both opinions noted, this was especially important here, where the prosecutor told the jurors that the defense had "never given you a reason to doubt [Howe's] testimony." (*People v. Grimes*, *supra*, 2015 WL 47493 at * 46 [Werdegar, J., concurring and dissenting] and * 62 [Liu, J., concurring and dissenting].) Equally important, the excluded evidence could also reasonably have led one or more jurors to credit the central defense theory that in light of Mr. Grimes's intellectual deficits and the lay testimony describing him as a follower his whole life, he was unlikely to have ordered his cohorts to do anything at all, much less commit murder. Considering both the mitigating and aggravating evidence, and the prosecutor's argument, both Justices Werdegar and Liu concluded that the state could not prove exclusion of this evidence was harmless. (*People*

v. Grimes, *supra*, 2015 WL 47493 at * 44-46 [Werdegar, J., concurring and dissenting] and * 63 [Liu, J., concurring and dissenting].)

But the majority opinion took a different approach. The majority found the error harmless as to the penalty phase without even referring to any of the mitigating evidence. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 21-22.) As a consequence, of course, the majority did not discuss the impact of the trial court's exclusion of evidence on (1) the defense's main argument that Gary Grimes was not and had never been a leader or (2) the unrebutted mitigating evidence of his severe intellectual disability which provided strong support for this argument. (*Ibid.*) Nor did the majority take any note at all of the prosecutor's explicit argument that the defense had "never given you a reason to doubt [Howe's] testimony." (*Ibid.*)

Instead, the majority concluded that there was "no reasonable possibility that the admission of Morris's statements would have changed the jury's view of Howe's testimony." (*People v. Grimes*, *supra*, 2015 WL 47493 at * 22.) This conclusion is hard to square with the evidence that was actually excluded.

To be sure, it may be true -- as both Justice Liu and the majority recognized -- that the excluded evidence is not *necessarily* inconsistent with Howe's testimony. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 21 [majority] and * 62 [Liu, J., concurring and dissenting].) Thus, evidence that Mr. Grimes was surprised at the killing does not necessarily mean that he did not order it: it is at least theoretically conceivable that a juror could find that he was surprised at the *method* of killing, not the *fact* of killing. Similarly,

evidence that Mr. Grimes took no part in the killing, and was elsewhere in the house at the time, does not *necessarily* mean he did not see some of or enjoy the killing.

But in light of the beyond-a-reasonable-doubt burden placed on the state to prove the error harmless, the mere fact that the state can conceive of an interpretation of the excluded evidence that is consistent with Howe's damaging testimony and the state's theory does not end the analysis. The fact of the matter, as both Justices Liu and Werdegar concluded, is that a jury hearing the excluded evidence -- that Grimes was surprised at and took no part in the killing and was not even in the room when it occurred -- could reasonably have reached a view precisely contrary to Howe's testimony and found that Grimes was *not* the leader and had *not* watched or enjoyed the killing. (*People v. Grimes*, *supra*, 2015 WL 47493 at * 46 [Werdegar, J., concurring and dissenting] and * 62 [Liu, J., concurring and dissenting].) A jury hearing this excluded evidence could just as reasonably have decided to credit the defense lay and expert testimony that Mr. Grimes was not a leader and never had been. In this situation the state has simply not carried its burden.

The problem with the majority's failure to reference any mitigation in its prejudice analysis is evident in its conclusion that jurors would not have credited the excluded evidence because of statements Mr. Grimes made to police that he saw some of Morris's actions. (*People v. Grimes*, *supra,* 2015 WL 47493 at * 22.) The fact of the matter is that there were also strong mitigating inferences to be drawn from Grimes's statement to police, inferences the majority did not address at all. For example, Grimes told police he did not know how the victim died: he was in a back bedroom of the house, and when he

came back into the main room Morris had killed her. (28 CT 8305-8306.) Defense counsel relied heavily on this specific statement to support the defense theory as to Grimes's limited role in the murder. (35 RT 9270-9274.) Based on this statement, defense counsel urged the jury to find Grimes may have heard Morris kill, but he did not stand and witness it; "he was not present, he was in the back doing the burglary . . . ." (35 RT 9274.)

The excluded statement from Morris that Grimes was "in the house but took no part in the actual killing and [was] in some other place in the house [at the time of the killing]" parallels *almost exactly* this critical part of Mr. Grimes's statement to police. As such, the excluded evidence would have directly corroborated this part of Grimes's statement to police and just as directly supported the defense interpretation of this statement. In other words, precisely because the parties below had conflicting interpretations of Mr. Grimes's statement to police, the trial court's error in excluding evidence corroborating the defense interpretation was *more* prejudicial, not less. The majority's approach to harmless error analysis -- its failure to examine the mitigation side of the scale -- cannot be reconciled with *Chapman*'s rigorous requirement that *both* sides of the record be considered in any harmless error analysis.

At the end of the day, establishing that the improper exclusion of mitigation from a capital penalty phase is harmless is a heavy burden. It is supposed to be. If even a single juror had found that the excluded evidence supported the defense theory that Mr. Grimes was not a leader, or undercut Howe's testimony, a more favorable penalty phase verdict was indeed likely. (*See People v. Soojian* (2010) 190 Cal.App.4th 491, 521 [hung jury is

a more favorable verdict for purposes of assessing prejudice]; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736 [same]; *People v. Brown* (1988) 46 Cal.3d 432, 471 n.1 [Broussard, J., concurring].) In light of all the aggravating and mitigating evidence presented, and the prosecutor's argument, the state simply cannot establish *beyond a reasonable doubt* that upon hearing the excluded evidence regarding Mr. Grimes's actual role in the offense, no juror could reasonably have changed their view as to whether death was appropriate. Because the state cannot meet this heavy burden, rehearing is appropriate.

CONCLUSION

For all these reasons, rehearing is appropriate.

DATED: 1/14/15

Respectfully submitted,

CLIFF GARDNER
CATHERINE WHITE

By Cliff Gardner
Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

I certify that the accompanying Petition for Rehearing is double spaced, that a 13 point proportional font was used, and that there are 10702 words in the brief.

Dated: 1/14/15.

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 January 15, 2015, I served the within

PETITION FOR REHEARING

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:

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I declare under penalty of perjury that the foregoing is true. Executed on January 15, 2015, in Berkeley, California.

Declarant