IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. JAMES O'MALLEY, Appellant.	S024046 Santa Clara Case No. 131339-0

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal From The Judgment Of The Superior Court

Of The State Of California, Santa Clara County

Honorable Hugh F. Mullin, III, Judge

CLIFF GARDNER
(State Bar No. 93782)
LAZULI WHITT
(State Bar No. 221353)
1448 San Pablo Avenue
Berkeley, CA 94702
Tel: (510) 524-1093
Fax: (510) 527-5812

Attorney for Appellant
James O'Malley

DEATH PENALTY

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I. THE TRIAL COURT ERRED IN REFUSING TO RELEASE BRANDI HOHMAN'S MEDICAL RECORDS.

The state charged Mr. O'Malley with three separate killings. (24 CT 5394, 5395, 5396.) It is fair to say that the main witness as to all three charges was Brandi Hohman. After all, Hohman testified that Mr. O'Malley confessed to all three killings. (26 RT 5573; 27 RT 5791; 28 RT 5851, 5860-5961.) As the prosecutor himself admitted, Hohman was "the chief witness," she was "critical [and] crucial to this case" and the entire prosecution was "a credibility case." (RT 3/5/91 at 94; 53 RT 10839.)

At the preliminary hearing Hohman testified that in September 1987 she had attempted suicide because she was afraid of Mr. O'Malley and thought that he would kill her and wanted to kill herself first. (5 CT 1238.) She provided similar testimony at trial. (28 RT 5975.)

On January 16, 1991 trial counsel issued a subpoena for Hohman's medical records from the Santa Clara County Mental Health Administration. (23 CT 5159.) The Santa Clara County Counsel moved to quash the subpoena. (23 CT 5153.) After performing an in camera review of the documents, the trial court found that they were not

"essential to vindicate the defendant's right to cross examine [Hohman]." (2/19/1991 RT 9; 3/1/91 RT 3-4.)

On appeal, because of the importance of Ms. Hohman to the state's case, Mr. O'Malley filed a motion in this Court for access to these medical records. This Court denied that motion without explanation on October 13, 2004.

Because Mr. O'Malley has been denied access to these records, he cannot present the facts relevant to this issue in any detail at all. "Parties who challenge on appeal trial court orders withholding information as privileged or otherwise nondiscoverable 'must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record.'" (*People v. Price* (1991) 1 Cal.4th 324, 493, *quoting People v. Collins* (1986) 42 Ca1.3d 378, 395, fn. 22.)

The trial court's ruling denying access to these medical records was incorrect. Because counsel for Mr. O'Malley has been denied access to the facts on which this claim is based, and pursuant to *Price*, he requests this Court to "objectively review[] the whole record" to determine if the material in the sealed records would have assisted counsel in cross-examining Hohman or developing either impeaching, exculpatory or mitigating evidence.

There is ample reason to think that Hohman's psychiatric records would have been important for the defense case and to therefore doubt the propriety of the trial court's ruling. First, Hohman was one of the prosecution's key witnesses; she was so important to the prosecution's case that she was afforded complete immunity for all three homicides and any other crimes committed in connection with those homicides in exchange for her statements and testimony. Her testimony covers over six hundred pages of reporter's transcript, and she provided testimony about numerous alleged confessions of Mr. O'Malley to all three crimes as well as to other criminal conduct. Had the jurors found her to be mentally unstable and untruthful, their confidence in the entirety of her testimony and, as a result, the state's case against Mr. O'Malley would have been significantly undermined.

Moreover, there was ample reason to believe that Hohman had serious psychiatric problems that could impact her credibility and that the records would have been relevant to the defense. Hohman testified that she had attempted suicide because she feared Mr. O'Malley, thought he was going to kill her, and wanted to kill herself first. Obviously this was very damaging testimony which simultaneously prejudiced the jury against Mr. O'Malley while making them sympathetic to Ms. Hohman. The records of her treatment after that suicide attempt would certainly have been relevant to the accuracy and reliability of her testimony. (*See People v. Gurule* (2002) 28 Cal.4th 557, 592 ["Of

course, the mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, if such illness affects the witness's ability to perceive, recall or describe the events in question."]; *United States v. Smith* (D.C. Cir. 1996) 77 F.3d 511, 516 [finding that "[m]ental records can be material as impeachment evidence because they can cast doubt on the accuracy of a witness's testimony" in case involving witness who suffered chronic depression]; *United States v. Lindstrom* (11th Cir. 1983) 698 F.2d 1154, 1160-1161 [cataloguing a number of ways in which mental illness produces bias in and skews a witness's testimony and recognizing that serious mental illness, including suicide attempt and drug overdose, may impair one's capacity to observe, correlate, or recollect actual events] *United States v. Partin* (5th Cir. 1974) 493 F.2d 750, 762 [explaining that mental incapacity is just as likely as an impairment of sight or hearing to adversely affect the ability to comprehend, know, and correctly relate the truth].)

Given the importance of Hohman to the state's case -- conceded by the prosecutor -- any improper limitation of counsel's ability to cross-examine her cannot be found harmless. This is especially true in light of the fact that the objective record of jury deliberations show this was a close case -- the guilt phase jury deliberations lasted more than 32 hours and the jury unanimously acquitted Mr. O'Malley of the count two conspiracy. (25 CT 5553-5555, 5556-5567, 5569-5583. *See People v. Rucker* (1980) 26

Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation shows close case]; *People v. Epps* (1981) 122 Cal.App.3d 691, 698 [refusal to convict on all charges shows close case].) Considered either alone, or in conjunction with the other errors identified on this appeal, this error requires reversal.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE STATE TO CALL GLENN JOHNSON AS A REBUTTAL WITNESS.

Glenn Johnson testified on behalf of Mr. O'Malley at trial. (33 RT 6912-6919.) In a nutshell, he testified that he had picked Mr. O'Malley up at San Francisco International Airport in late April or early May, 1986. (33 RT 6915-16.) The defense introduced this testimony to support Mr. O'Malley's alibi defense to the murder of Sharley German charged in count one. The prosecutor cross examined Johnson. (33 RT 6919-6930.) Each party conducted additional examination. (33 RT 6931-6932).

In its rebuttal case the prosecution recalled Glenn Johnson. (51 RT 10495.) Defense counsel objected that "this has already been gone over on cross examination." (51 RT 10496.) The trial court overruled the objection and the prosecutor continued his examination. (51 RT 10502.)

During this rebuttal testimony the prosecution elicited from Johnson that he had been arrested for driving under the influence several weeks before he picked Mr. O'Malley up from the airport and that he had made a mistake about the address at which he said he was living when he picked up Mr. O'Malley. (51 RT 10496-10497.) While this was certainly appropriate fodder for cross examination, it appears the prosecution -- having failed to ask these questions during cross-examination -- simply used rebuttal as

an opportunity to reopen cross examination, apparently because the state had discovered new information.

There was no legitimate reason for re-calling Glenn Johnson and, as his testimony demonstrates, it did not rebut anything that came after Johnson testified in the defense case. Rebuttal testimony "is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*People v. Young* (2005) 34 Cal.4th 1149, 1199.) Rebuttal testimony may not serve generally as a substitute for cross-examination. (*See People v. Katz* (1962) 207 Cal.App.2d 739, 750.) Here, the record shows that the state's rebuttal testimony was simply a Trojan horse for evidence the state had failed to introduce during its cross-examination. This not only violated state law regarding proper rebuttal testimony, but Mr. O'Malley's state and federal due process rights to a fair trial. Given the importance of Johnson's testimony to the defense theory in connection with the Sharley German homicide and the closeness of the state's case on this charge, considering this issue by itself or in combination with the other errors identified in this appeal, reversal of the count one murder charge is required.

III. THE TRIAL COURT ERRED IN DENYING MR. O'MALLEY'S MISTRIAL MOTION AFTER THE PROSECUTOR ASKED HIM ABOUT NUMEROUS WITNESSES TAKING THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

Mr. O'Malley testified in his own defense. During cross-examination, the prosecutor asked a series of questions designed to suggest that Mr. O'Malley had fabricated his testimony:

"Q. You also had the opportunity prior to your testimony to look at and consider which witnesses have made themselves unavailable to testify; isn't that so?

"A. I don't know what you mean.

"Q. Well, you know which witnesses have made themselves unavailable to be called into court; correct?

"A. No. I have no idea who was here and who's not here. I don't know what you mean by 'who's unavailable.'

"Q. Which witnesses have been here to testify, which ones have made themselves unavailable; correct?

"A. I'm not sure what you mean. You mean by pleading the fifth?

"Q. Yeah.

"A. I've seen who was called in here and who pled the fifth and who didn't plead the fifth.

"Q. So you knew who would be here and who wouldn't be?

"A. No. I didn't." (50 RT 10387.)

At this point defense counsel objected. The objection was sustained and the jury was admonished to disregard the testimony. (50 RT 10387-10388.) Defense counsel moved for a mistrial as soon as he was able to do so. (50 RT 10394.) In the colloquy regarding the mistrial motion the prosecutor -- who had acknowledged during the cross-examination itself that his questions were asking about the witnesses who had claimed the Fifth Amendment -- denied any intent to elicit a reference to the Fifth Amendment from Mr. O'Malley, asserting that he had only expected a yes or no answer. (50 RT 10395.) The trial court denied the mistrial motion. (50 RT 10397.)

This was improper. As trial counsel pointed out, up to this point the court had gone to great lengths to make sure that the jury did not know that any potential witness had asserted the Fifth Amendment. The prosecutor's questioning was designed to perform an end run around this limitation. While there are circumstances in which a prosecutor may comment on the absence of a witness, such comments are not permitted where the witness has refused to testify based on an assertion of the Fifth Amendment privilege. The fact that this information was revealed as a result of the prosecutor's misconduct only made a mistrial more necessary.

This was especially true here. The prosecutor's question insinuated that the witnesses in question "made themselves unavailable." However, it was the prosecutor

(and secondarily the lawyers who advised them), rather than the witnesses themselves who made these witnesses unavailable. After all, once the witnesses invoked their privileges against self-incrimination, only the prosecutor could grant them immunity under California law and present their testimony.

The prosecutor's conduct was worse for another reason as well. The prosecutor had not merely elicited the fact that certain witnesses had not testified because they had asserted their Fifth Amendment privilege, he suggested to the jury that Mr. O'Malley took advantage of this fact in order to fabricate his story. This suggestion is even more indefensible here because, with one exception, the witnesses who exercised their Fifth Amendment privilege were called by the prosecution. (*See* 14 RT 3034 [Rex Sheffield]; 18 RT 3600 [Geary German]; 22 RT 4438 [Joseph Martinez]; 22 RT 4449 [Carol Hosac]; 22 RT 4470 [Steve Dyson]; 24 RT 4942 [Gail Sheffield]; 30 RT 6426 [Greg Hosac].) The prosecution was fully empowered to grant those witnesses immunity if it thought their testimony was critical and certainly should not have been allowed to benefit from its decision to call those witnesses and then decline to grant them immunity.[1]

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[1] The one defense witness who asserted a Fifth Amendment privilege was Connie Ramos, who Mr. O'Malley asserted was the actual murderer of Sharley German. The state's position was that Ms. Ramos was innocent and thus its decision not to grant her immunity and then benefit from that decision to Mr. O'Malley's detriment is also inexcusable.

In sum, the trial court's failure to grant a mistrial in the face of such prosecutorial misconduct prejudiced Mr. O'Malley by improperly suggesting that he had fabricated his testimony. The mistrial motion should have been granted. (*See People v. Ledesma* (2006) 39 Cal.4th 641, 683 ["A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction."]. *Accord People v. Alexander* (2010) 49 Cal.4th 846, 915; *People v. Jennings* (1991) 53 Cal.3d 334, 380.) In a case as close as this -- where the guilt phase jury deliberations lasted more than 32 hours and the jury unanimously acquitted Mr. O'Malley of of the count two conspiracy (25 CT 5553-5555, 5556-5567, 5569-5583, 5585) -- this error requires reversal whether considered alone or in combination with any of the other errors identified in this appeal. (*See People v. Rucker*, *supra*, 26 Cal.3d at p. 391 [nine-hour jury deliberation shows close case]; *People v. Woodard*, *supra*, 23 Cal.3d at p. 341 [six-hour deliberation]; *People*

v. Epps, *supra*, 122 Cal.App.3d at p. 698 [refusal to convict on all charges shows close case].)[2]

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[2] As noted, the trial court sustained defense counsel's objection and admonished the jury to ignore this information. (50 RT 10387-10388.) The state may argue this admonition cured any harm since the jury is presumed to have followed the court's instruction.

But the law is actually a bit more nuanced than such an argument would suggest. In fact, where a jury has seen or heard something that could be highly prejudicial to a defendant, courts have long recognized that curative instructions may not be sufficient. (*See*, *e.g.*, *United States v. Hale* (1975) 422 U.S. 171, 175, n.3 [introduction of evidence that defendant remained silent was not cured by jury instruction telling jurors to ignore the evidence]; *Bruton v. United States* (1965) 391 U.S. 123, 125-126 [where case against defendant was close, reviewing court could not rely on instruction advising jurors to ignore prejudicial and inadmissible evidence]; *Jackson v. Denno* (1964) 378 U.S. 368, 387-388 [refusing to assume jury would follow instruction advising it to disregard involuntary confession of defendant].) The Supreme Court has proposed a common sense guide; in deciding the effect of a curative instruction which advises a jury to disregard what it has seen or heard, the question is "plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208.) Here, given the closeness of the case and the nature of the misconduct -- suggesting that Mr. O'Malley fabricated his testimony based on his knowledge that certain witnesses would not testify -- the court cannot assume all 12 jurors followed the admonition.

IV. THE TRIAL COURT ERRED IN BARRING DEFENSE COUNSEL FROM CROSS-EXAMINING PROSECUTION WITNESS THOMAS MCNEEL ABOUT HIS JUVENILE PROBATION.

During the guilt phase, the prosecution called Thomas McNeel, the son of homicide victim Sharley German. McNeel found his mother's body and testified that his mother always kept either the inside door or screen door locked and that anyone coming in through the backyard would have to contend with the dogs; he further testified that finding the front door unlocked when he came home from school the day Sharley German was killed was unusual. (14 RT 2870-2872.)

This testimony about the door being unlocked was important to the state. It allowed the prosecutor to argue during closing argument that the jury should ignore evidence pointing towards Connie Ramos as a suspect in the German homicide because Sharley German would not have let Connie Ramos in during the ongoing feud between the two families. (53 RT 10868.) Because of the importance of the evidence it was equally important to impeach McNeel.

On direct examination the prosecutor elicited from McNeel the fact that he had previously been convicted of second degree burglary, a felony. (14 RT 2883.) On cross examination, trial counsel attempted to elicit the sentence that McNeel received. (14 RT

2914.) Defense counsel was allowed to elicit the fact that McNeel had been sentenced to probation. (14 RT 2914.) But the court sustained the prosecutor's objection when defense counsel attempted to elicit the period of probation and whether McNeel was currently on probation. (14 RT 2914.)

The court's limitation on defense counsel's asking McNeel about whether he was currently on probation -- and therefore had an ongoing motive to cooperate with the state -- was error. There is no question as a matter of constitutional law that the witness's sentence, and particularly the fact that he was currently subject to probation supervision, were proper areas for cross examination to reveal that the witness had a bias to testify in a way that would assist law enforcement and the prosecution. (*See Davis v. Alaska* (1974) 415 U.S. 308 [defendant charged with burglary, state relies on eyewitness, trial court excludes evidence showing eyewitness was on probation at the time of his testimony; held, trial court's ruling violated the Sixth Amendment].) And because this is constitutional error, the state bears the burden of proving the error harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Moreover, as a factual matter it is clear that McNeel was on probation at the time of trial. He gave an affirmative answer when asked if he was on probation, but the answer was stricken. (14 RT 2914.) Given that a major thrust of the defense to the

Sharley German homicide was to implicate Connie Ramos, and given also the importance the prosecutor himself placed on McNeel's testimony in undercutting this part of the defense theory, the state will be unable to prove this constitutional violation harmless beyond a reasonable doubt. (*See People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [same].) Considered either alone, or in combination with any of the other errors identified in this appeal, reversal of the count one conviction is required.

V. THE TRIAL COURT ERRED IN PERMITTING OFFICER COLLAMATI TO TESTIFY TO STATEMENTS MADE BY JAMES O'MALLEY JR. AS TO PROBLEMS HE WAS HAVING WITH THE DEFENDANT.

During the state penalty phase rebuttal case, the prosecution called Joseph Collamati, a Wrentham, Massachusetts, police sergeant. (58 RT 12081.) Over defense objection, Collamati was permitted to relate hearsay statements that Mr. O'Malley's father had made about Mr. O'Malley including that his son was "running wild," that he "could not control him," and that he was almost in tears on occasion as a result. (58 RT 12084-12085.)

The trial court admitted these statements under the state of mind exception to the rule against hearsay set forth in Evidence Code section 1250. (58 RT 12084.) The trial court erred.

Evidence Code section 1250, subdivision (a), provides as follows:

> "Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> > "(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

> "(2) The evidence is offered to prove or explain acts or conduct of the declarant."

Here, the state offered this evidence to establish the state of mind of appellant's father, James O'Malley Jr. (58 RT 12084.) But pursuant to the plain language of section 1250, these statements were only admissible if the state of mind of appellant's father was "itself an issue in the action." Because the state of mind of appellant's father did not rebut any of the mitigating evidence put forth during the penalty phase, this evidence was not admissible under section 1250. The trial court's ruling not only violated state law and allowed admission of improper rebuttal and irrelevant evidence, but permitted admission of evidence not subject to cross-examination, thereby undercutting Mr. O'Malley's Sixth Amendment right to confrontation and Eighth Amendment right to a reliable penalty phase. Once again, given the closeness of the penalty phase case -- the penalty phase jury deliberated more than 20 hours over six days (25 CT 5715-5722) -- the admission of this unreliable evidence should not be found harmless under any proper standard whether considered alone, or in conjunction with any of the other errors impacting the penalty phase identified in this appeal.

CONCLUSION

For all these reasons, and for the reasons set forth in Mr. O'Malley's opening and reply briefs, reversal is required.

DATED: 4/8/13

Respectfully submitted,

Cliff Gardner
Attorney for Appellant
James O'Malley III

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 3502 words in the brief.

Dated: 4/8/13.

Cliff Gardner

CERTIFICATE OF SERVICE

The undersigned is over 18 years of age. My business address is 1448 San Pablo Avenue, Berkeley, California, 94702. I am not a party to this action. On April 9, 2013, I served the

APPELLANT'S SUPPLEMENTAL BRIEF

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

Richard Neuhoff
11 Franklin Square
New Britain, Conn. 06051

Office of the Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

Mr. James O'Malley
H-18000
San Quentin State Prison
San Quentin, CA 94974

HCRC
303 Second Street,
Suite 400 South
San Francisco, CA 94107

Santa Clara Superior Court
Hon. Hugh F. Mullin, III
191 N. First Street
San Jose, CA 95113-1090

Santa Clara District Attorney
West Wing, 5th floor
70 W. Hedding St.
San Jose, CA 95110

I declare under penalty of perjury that the foregoing is true. Executed on April 9, 2013 in Berkeley, California.

Cliff Gardner