the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JAMES FRANCIS O'MALLEY,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S024046

Santa Clara County Superior Court Case No. 131339-0
The Honorable Hugh F. Mullin, III, Judge

PEOPLE'S RESPONSE TO APPELLANT'S "SUPPLEMENTAL OPENING BRIEF"

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INTRODUCTION

This automatic appeal has been fully briefed since April 26, 2010. The underlying judgment itself, which arises from crime(s) committed in 1986 and 1987, dates back to 1991. By order dated July 10, 2013, the Court allowed appellant to add five appellate claims to the 19 claims already pending before the Court and awaiting resolution.

None of the late claims derive from "new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." (Cal. Rules of Court, rule 8.20(d)(1).) To the contrary, each alleges trial error of the most ordinary variety—all claims that, *if* they were to be raised at all, could (and, according to appellant's separate habeas corpus counsel, *should*) have been raised in the opening brief filed on November 28, 2009. Indeed, it is habeas counsel's attacks on appellate counsel (presented in the petition filed in *In re O'Malley*, S187622, on October 26, 2010) that recently provoked appellate counsel to present the five new claims in a "Supplemental Opening Brief."

As appellate counsel has explained it, upon realizing that habeas counsel had criticized him for "fail[ing] to raise certain issues on appeal," appellate counsel "review[ed]" the attacks on his performance and then "prepared a . . . supplemental brief" that presents "several of the[] issues" he was criticized for omitting earlier.[1] Proceeding in this way, he has asserted, will "ensure all arguable issues are presented on appellant's

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[1] Counsel's "preparation" in this regard consisted largely of lifting selected passages from HCRC's papers and reproducing them in substantially identical form. (Compare, e.g., ASOB at pp. 3-4 with Reply to Informal Response, filed on Mar. 5, 2013, in S187622, at pp. 276-277.)

behalf." (Decl. of Cliff Gardner, Apr. 9, 2013, filed in support of "Application for Order Permitting Filing of Supplemental Brief.")[2]

I. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S DECISION TO QUASH THE SUBPOENA FOR BRANDI HOHMAN'S MEDICAL RECORDS

Appellant's trial counsel subpoenaed Brandi Hohman's mental health records. Acting on behalf of the custodian of those records, the Santa Clara County Counsel moved to quash the subpoena. The trial court granted county counsel's motion, finding that the records "are of no evidentiary value to the defense," that they "are in no way essential to vindicate the defendant's right to cross-examine" Hohman, and that "[t]here's no reasonable probability that the protected psychotherapy records could materially or in any way assist the defense." (3/1/91 RT 3-4.)

Appellant now concludes this ruling was "incorrect," although he also acknowledges that, because he has not seen those records, he has no basis for this conclusion. He merely observes that Hohman was an "important" witness, and insists that "ample reason" exists "to think that Hohman's psychiatric records would have been important for the defense case" and "to believe that Hohman had serious psychiatric problems that could impact her credibility." On the assumption that his theorizing might prove correct, he argues that the conviction must be reversed because "any improper limitation of counsel's ability to cross-examine [Hohman] cannot be found

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[2] The petition in S187622 alleges that appellate counsel provided ineffective assistance of counsel in *seven* separate respects, each corresponding to an identified appellate claim that HCRC has insisted counsel wrongly neglected to include in the opening brief. By now presenting supplemental briefing on only five of the claims, appellate counsel has indicated, quite correctly, that the remaining two claims identified by HCRC are not even "arguable." Moreover, as we shall next explain, the five claims that appellate counsel does raise are not arguable either, just as appellate counsel appeared to initially conclude.

harmless." He thus asks the Court to examine the records for itself and determine whether his speculation might actually find some support. (ASOB at pp. 1-4.)

Contrary to appellant's argument, there is absolutely no "reason to believe" that the trial court's ruling was incorrect. But even in the absence of such a reason, this Court *will* review the records and consider appellant's contention. (See, e.g., *People v. Martinez* (2009) 47 Cal.4th 399, 453-454.) We defer to that process, which is entirely appropriate under the circumstances here.

At this juncture, therefore, we will not address the unsubstantiated factual hypotheses on which appellant's attack rests. Instead, we will demonstrate that the inferences he draws from those assumptions, like his ultimate conclusion that he was necessarily prejudiced by any assumed error by the trial court, are almost certainly invalid.

To begin with, even if the records were to show that Hohman "had serious psychiatric problems," it hardly follows that the jury would think this "could impact her credibility" even as a general matter, let alone show that any particular feature of her testimony was necessarily "untruthful." Moreover, given that any "psychiatric problem" that might once have afflicted Hohman *was traceable to appellant himself*—that is, from her fear of appellant, from her belief that he would kill her, and from her erstwhile resolve to avoid that fate by taking her own life, it is difficult to conceive how losing the opportunity to further explore and belabor the subject before the jury would have occasioned appellant any prejudice.

II. THE TRIAL COURT PROPERLY ALLOWED GLENN JOHNSON'S REBUTTAL TESTIMONY

On rebuttal, the prosecution called Glenn Johnson, who had previously testified as a defense witness. (51 RT 10495; see also 33 RT 6912.) Appellant's trial counsel objected, contending that the subject of the

prosecutor's questioning "has already been gone over on cross-examination." (51 RT 10496.) Appellant now observes that Johnson's testimony on rebuttal established that he had been arrested for drunk driving several weeks before he claimed to have picked up appellant at San Francisco International Airport and that he had misstated the address of the location where he claimed to be living at the time he collected appellant from the airport. "While this was certainly appropriate fodder for cross-examination," appellant concedes, he complains that "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." (ASOB at pp. 6-7.)

Having failed to object on that ground below, indeed, having objected on precisely the *opposite* ground: that Johnson's testimony on rebuttal was *cumulative*, appellant has forfeited this complaint. (*People v. Tate* (2010) 49 Cal.4th 635, 692.) Moreover, appellant fails to appreciate that, quite apart from whether the prosecution was technically entitled to call Johnson as a "rebuttal" witness, the trial court surely would have acted within its discretion to allow the prosecution to "recall" Johnson. (See Evid. Code, §§ 772-774, 778.) And, if the prosecution's impetus for recalling Johnson was that "the state had discovered new information" in the interim, it is nearly certain that the court would have allowed it, in which case Johnson's testimony would have come out exactly as it did during the "rebuttal" appellant now claims was unauthorized.

Finally, appellant was not prejudiced by the events about which he now complains. Appellant's contrary assertion rests on the assumption that the jury not only would have credited Johnson's "alibi" testimony if only it had not learned about Johnson's earlier traffic arrest and his misstatement about his address, but it presumes that Johnson gave appellant a rock-solid

alibi. This is not the case, as Johnson never definitively testified as to the date he picked appellant up at the airport and, in fact, testified it could have been as early as April 22, 1986, or three days before Sharley Ann was killed. (See 33 RT 6915-6918.) In any event, the prosecution presented telephone records to the jury which showed it was likely that appellant actually left the east coast about two weeks before Sharley Ann was killed, and arrived home on April 10, 1986. (See 51 RT 10525-10528, 10555-10556; see also RB, Arg. III, § D, at pp. 81-82, and adopted herein.) Last, given appellant's multiple confessions to Sharley Ann's murder, and the overwhelming evidence to support his guilt of that crime (see RB, Arg. III, § D, at pp. 79-82, and adopted herein), in contrast to Johnson's equivocation on the date that he retrieved appellant, appellant cannot show it is reasonably probable his verdict would have been more favorable absent the challenged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.).

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL

Appellant also contends the trial court should have granted his motion for mistrial after appellant himself, under questioning by the prosecutor, referred to some unidentified potential witnesses having earlier "plead[ed] the Fifth." (ASOB at 8.) Appellant objected below and asked the trial court to instruct the jurors that the matter "should not have been brought to their attention." (50 RT 10387.) Appellant acknowledges that the trial court complied and that the jury is presumed to have followed that admonition. (ASOB at p. 12 fn.2; see also 50 RT 10387-10388; *People v. Ledesma* (2006) 39 Cal.4th 641, 684.) Nonetheless, appellant insists that the remedy he requested proved ineffective because of "the closeness of the case" and because the prosecutor's "misconduct" suggested that appellant "had fabricated his testimony based on his knowledge that certain witnesses would not testify." The claim fails.

To begin with, we dispute that this case was "close" (see generally RB at pp. 79-84),[3] and we are, at any rate, unaware of any authority suggesting that the presumption that jurors do as they are instructed turns on the "closeness" of the case. Moreover, appellant did not object to the prosecutor's questioning on the ground that appellant's responses suggested that appellant "took advantage" of others' invocation of their Fifth Amendment rights "in order to fabricate his story." (ASOB at p. 10.) It was *appellant* alone who mentioned the Fifth Amendment. The prosecutor, by contrast, sought no more than appellant's confirmation of something that was already obvious; that appellant, by the time he testified, was aware of who had (and had not) testified earlier and, having then been present for all the testimony received, knew its substance. If there was any doubt about the prosecutor's purpose in pursuing this line of questioning, that doubt was removed by the exchange that immediately followed appellant's objection and the trial court's admonition. (50 RT 10388.) That this later line of questioning proceeded, without objection, precisely as did the earlier line until interrupted by appellant's unresponsive interjection concerning the

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[3] We also dispute that length of jury deliberations is, as appellant argues (ASOB at pp. 4-5, 11), a meaningful indicator of evidentiary "closeness" as opposed to a highly reliable indicator of "the jury's careful consideration of the capital charges[.]" (*People v. Tate*, *supra*, 49 Cal.4th at p. 694; see also *People v. Walker* (1995) 31 Cal.App.4th 432, 439 ["[T]he length of the deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision"].) Moreover, application of the harmless error rule is an entirely *objective* enterprise, and thus it cannot be made to turn on how quickly one or more *particular jurors* came to be persuaded by the evidence establishing a defendant's guilt. (See *Strickland v. Washington* (1984) 466 U.S. 668, 695 ("The assessment of prejudice . . . should not depend on the idiosyncrasies of the particular decisionmaker"); *Dickson v. Sullivan* (9th Cir. 1988) 849 F.2d 403, 406 ("[T]he question of prejudice is an objective, rather than subjective, one").

Fifth Amendment, shows that that the earlier, nearly identical line of questioning was neither improper nor prejudicial.

Appellant also complains that the prosecutor had earlier referred to non-testifying witnesses having "made themselves unavailable." But appellant did not object to that reference below; rather, as we noted, he registered no displeasure with the prosecutor's questions at all until *appellant* referred to the witnesses "pleading the Fifth." Accordingly, appellant has forfeited this alternative basis for attacking the prosecutor. At any rate, the substance of appellant's complaint—that attributing the non-testifying witnesses' unavailability to their own conduct was misleading because "it was the prosecutor (and secondarily the lawyers who advised those witnesses), rather than the witnesses themselves who made these witnesses unavailable" (ASOB at pp. 9-10)—makes no sense. Apart from indulging a most strained theory of what really "causes" the unavailability of a witness who invokes his Fifth Amendment right not to testify, appellant's criticisms of the prosecutor points to no conceivable form of prejudice. Witness availability only mattered to the extent it affected what testimony was (and was not) before the jury by the time appellant took the stand. *Why* any witness was earlier unavailable was completely beside the point. More specifically, *who* was responsible for anyone's unavailability could have no bearing on the fairness of the proceedings, at least as long as no juror was left with the impression that *appellant* might have had some role in that matter. But nothing said or done by the prosecutor below remotely suggested that was the case.

Based on the foregoing, the trial court properly denied appellant's motion for a mistrial.

IV. THE TRIAL COURT'S RULING PRECLUDING APPELLANT FROM QUESTIONING THOMAS MCNEEL ABOUT HIS JUVENILE RECORD WAS PROPER

Prosecution witness Thomas McNeel acknowledged on direct examination that he had been convicted of second degree burglary, a felony. On cross-examination of McNeel, appellant was permitted to elicit that McNeel received probation for this conviction. Appellant, however, was not allowed to question McNeel concerning the duration of his status as a probationer, or whether that period had expired at the time he testified. (14 RT 2883, 2914.) These latter limitations, appellant contends, amounted to prejudicial "constitutional error." (ASOB at pp. 13-15, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) Not so.

As this Court explained in *People v. Rodriguez* (1986) 42 Cal.3d 730:

> *Van Arsdall* emphasized that a trial judge has broad latitude in restricting cross-examination which is repetitive or only marginally relevant. [Citation.] There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced 'a significantly different impression of [the witness's] credibility . . . .') [Citation.] If cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the witness, and the overall strength of the prosecution case. [Citation.]

(*Rodriguez*, *supra*, 42 Cal.3d at p. 751, fn.2.)

Regardless, even assuming arguendo the trial court improperly restricted appellant's cross-examination of McNeel, any alleged error was harmless under any standard. First, Reni Jensen testified that although Sharley Ann's dogs were "very vicious," she did not remember hearing the dogs bark the day of Sharley Ann's murder. (14 RT 2927.) Second, Diane Orvino testified that because Sharley Ann was afraid of and intimidated by

the Ramoses, she kept her doors locked when she was home. (15 RT 3170-3171.) Thus, McNeel's testimony as to Sharley Ann's habit of locking the door and/or the dogs' habit of barking at strangers was covered independent of his testimony. In any event, as noted *ante*, (see RB, Arg. III, § D, at pp. 79-82, and adopted herein), the evidence supporting appellant's guilt as to Sharley Ann's murder was overwhelming.

In light of the whole record, "we cannot believe the jury would have formed 'a significantly different impression of [McNeel's] credibility'" if it had learned minor additional details concerning the sentence he received for his felony conviction. (See *ibid.*) "For the same reason, we conclude that if any constitutional error occurred, it was harmless beyond a reasonable doubt." (*Ibid.*)[4]

V. THE TRIAL COURT PROPERLY ALLOWED OFFICER COLLAMATI TO TESTIFY AS TO STATEMENTS MADE BY APPELLANT'S FATHER

Finally, appellant contends the trial court erred in admitting, through testimony by a Massachusetts police officer, an account of statements made by appellant's father sometime around 1975-1977, that appellant was "running wild" and that his father "could not control him." (See SAOB 16-17; 58 RT 12084-12085.) Appellant contends that the admission of this evidence "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 violating appellant's "Sixth Amendment right to confrontation and Eighth Amendment right to a reliable penalty phase." (ASOB at 16-17.)

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[4] See also *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. McNeal* (2009) 46 Cal.4th 1183, 1202-1203 [applying *Watson* standard to claim of erroneous exclusion of evidence].

The record shows, however, that while the trial court initially purported to admit this evidence under the "state of mind" *exception* to the rule against hearsay (Evid. Code, § 1250), the court expressly instructed the jury that it was not received "for the truth of the matter asserted." (58 RT 12084-12085.) Thus, this evidence could not be used to prove that appellant actually *was* wild and uncontrollable, only that appellant's father so regarded him as such and was, on that account, deeply saddened. (58 RT 12085 ["Collamatti testifying that appellant's behavior bothered him quite a bit to the point where . . . he was almost in tears"]). Accordingly, the Sixth Amendment is not implicated, as appellant was afforded a full opportunity to cross-examine Sergeant Collamatti concerning the only issue on which the evidence was received; the basis for Collamatti's impression that appellant's father's seemed distraught by the direction in which appellant's life appeared to be turning.

The senior O'Malley's statements were clearly relevant, given that one of the major themes of appellant's case-in-chief was that his father beat him and his mother, and that appellant ultimately committed the instant crimes at least in part because of his father's demands on him, and his abuse of him both physically and emotionally. (See e.g., 56 RT 11617-11625, 11638; 57 RT 11816, 11820-11822.) The challenged statements revealed a state of mind contrary to the portrait appellant painted of the abusive father. It was thus properly admitted. Regardless, given all the evidence presented at trial to support the murders here (see RB, Arg. III, § D at pp. 79-84 and adopted herein), it is not reasonably probable that absent admission of the challenged evidence, appellant's verdict would have been more favorable. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 671 [applying *Watson* standard to claim of erroneous admission of evidence).)

CONCLUSION

The People again respectfully request that the judgment be affirmed.

Dated: July 30, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PEOPLE'S RESPONSE TO APPELLANT'S "SUPPLEMENTAL OPENING BRIEF" uses a 13 point Times New Roman font and contains 3,062 words.

Dated: July 30, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. O'Malley** (CAPITAL CASE) No.: **S024046**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 30, 2013, I served the attached **PEOPLE'S RESPONSE TO APPELLANT'S "SUPPLEMENTAL OPENING BRIEF"** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 30, 2013, at San Francisco, California.

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