IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)) Plaintiff and Respondent,) vs. Domingo Rodas) Defendant and Appellant.)	Cal. Supreme Court No. S237379 Court of Appeal No. B255598 Superior Court No. BA360125

APPELLANT'S OPENING BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the trial court violate appellant's constitutional right to due process by failing to suspend proceedings after his attorney declared a doubt as to his competence?

INTRODUCTION

Appellant Domingo Rodas was found guilty of murder and attempted murder. (2 CT 282-85, 288-89.) On appeal, he argued the trial court erred in failing to suspend proceedings under Penal Code section 1368 and continuing with the trial after defense counsel expressed doubt on his competency. The Court of Appeal rejected appellant's argument, finding the trial judge was not presented with substantial evidence of appellant's incompetence and therefore had no duty to conduct a further competency hearing. (Ct. App. Opn. pp. 13-14.) For the reasons set forth in his opening brief, the trial court erred in failing to suspend proceedings under Penal Code section 1368, violating appellant's constitutional right to due process. Appellant had a long history of mental

illness, multiple hospitalizations, and had been found incompetent to stand trial beginning back in the 1980's based on the same mental illness and symptoms, e.g., paranoid schizophrenia, delusional thinking, "thought disordered with evidence of word salad and incoherence." (E.g., 2 CT 193, 201, 204, 205, 209.) At the time of his trial, he could not consult with his lawyer with any degree of logical understanding, failed to demonstrate he understood the trial proceedings and manifested the same behavior when previously found incompetent to stand trial. In short, the trial was one of an incompetent defendant. The judgment should be reversed.

STATEMENT OF THE CASE

An amended information filed on October 27, 2011 charged appellant with the murder of Keith Fallin (Count I), Roger Cota (Count III) and Frederick Lombardo (Count V) (Pen. Code, §187, subd. (a)), and the attempted premeditated murder of Ronald Vaughn (Count II) and Kenneth McFetridge (Count IV) (Pen. Code, §§187, subd. (a); 664).[1] On all counts the information alleged appellant personally used a deadly and dangerous weapon, a knife (Pen. Code, § 12022, subd. (b)(1)). On Counts I, III and V, the information alleged the special circumstances of multiple murders in one proceeding (Pen. Code, §190.2, subdivision (a)(3)), and that the victims were intentionally killed due to race (Pen. Code, §190.2, subd. (a)(16)). The information further alleged on Count I that appellant committed the offense by means of lying in wait (Pen. Code, § 190.2, subd. (a)(15)), and on Counts II and IV that he personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)). The information also alleged appellant suffered three prior convictions that qualified as strikes (Pen. Code, §§ 1170.12, subd. (a)-(d), 667, subd. (b)-(i)) and serious felonies (Pen. Code, §667, subd. (a)(1)). (1 CT 167-72.)

[1] Counts I through IV alleged the offense occurred on or about August 6, 2009. On Count V, the offense was alleged to have occurred on or about July 18, 2009. (1 CT 167-72.)

On February 3, 2012, appellant was found not competent to stand trial (Pen. Code, § 1368). (2 CT 190.) Criminal proceedings resumed on May 10, 2013. (2 CT 212.) Appellant pled not guilty and denied the special allegations. (2 CT 226.) The trial court granted appellant's Penal Code section 995 motion on the special circumstance allegations under Penal Code section 190.2, subdivision (a)(16). (2 CT 246-47.)

A jury found appellant not guilty on Counts III and V, guilty of first-degree murder on Count I, and guilty of attempted premeditated murder on Counts II and IV. On Count I, the jury found true the special circumstance allegation that appellant committed the offense by means of lying in wait, and found not true the multiple murder special circumstance allegation. The jury also found true the deadly weapon and great bodily injury enhancement allegations. (2 CT 282-85, 288-89.)

In a jury-waived proceeding, the trial court found the priors allegations true. It granted the defense's motion to strike appellant's three first-degree burglary priors. (2 CT 294, 333; 3 RT 1207-08, 1502, 1506.) The trial court sentenced appellant to a total term of life in prison without possibility of parole plus two life terms plus 14 years composed of the following: a) on Count I, life without possibility of parole plus one year for the deadly weapon enhancement plus five years for the serious felony prior; b) on Count II, life plus one year for the deadly weapon enhancement plus three years for the great bodily injury enhancement; and c) on Count IV, life plus one year for the deadly weapon enhancement plus three years for the great bodily injury enhancement, all sentences to run consecutively. Appellant was ordered to pay fees, assessments, and restitution. (2 CT 333-36; 3 RT 1507-09.)

A notice of appeal was timely filed. (2 CT 339.) On appeal, appellant raised several issues, including the one raised here, that the trial court erred in failing to suspend proceedings under Penal Code section 1368, violating his constitutional due process rights. In rejecting appellant's contention, the Court of Appeal acknowledged that counsel's description of appellant's note and behavior suggested mental illness. However, it found these comments did not constitute substantial evidence of appellant's

incompetence. It decided his responses to the trial court showed competence. As to appellant's failure to take his medication, the Court of Appeal found no medical report from 2014 describing the effect of appellant's failure to take his medication and therefore declined to assign any significance to this. (Ct. App. Opn. pp. 13-14.) The Court of Appeal affirmed the judgement as modified to correctly reflect sentences for the enhancements. This Court granted appellant's petition for review.

STATEMENT OF FACTS

A. Prosecution Case

1. The Incidents

a. July 19, 2009[2]

On July 19th at 10:49 p.m., police were called to 6174 Santa Monica Boulevard. Frederick Lombardo had been fatally assaulted. (2 RT 358-60, 415-16.)

b. August 6th

On August 6th around 1:15 p.m., Wilford Tui was working at the Osh on Sunset Boulevard. He left for lunch and went to his car in the parking lot. He saw a man walking towards him. The man looked homeless and was pushing a stroller. Tui called 911 after seeing the man fall. (2 RT 351-53.) Officer Ordonez arrived and tried to speak to the man. The man said his name was Roger and that he did not know who attacked him. (2 RT 412-14.)

Ronald Vaughn was homeless and had a storage locker on Argyle Street in Hollywood. On August 6th, he visited the locker around 1:00 p.m. and again at 5:45 p.m. (2 RT 378-79.) While he walked on Yucca Street carrying a bag, Vaughn saw a black man behind him. Vaughn stepped aside and felt a punch to his chest. (2 RT 381-85.) He returned to

[2] All date references pertaining to the incidents refer to the year 2009.

the storage locker for help and was transported to the hospital where he had surgery for a stab wound. (2 RT 386-89.) At trial, Vaughn looked at appellant's photograph and identified appellant as the one who stabbed him. (2 RT 392.)

Ashli Hughes worked at Fonda Theater in Hollywood, located on the corner of Hollywood and Gower. On August 6th at 1:27 p.m., she was outside the theater hanging posters. (2 RT 326, 338.) She saw appellant standing around; he had been there for about thirty minutes and wore a plaid shirt. (2 RT 327-28.) Hughes also saw a man lying down on the sidewalk. (2 RT 328.) Shortly before 2:00 p.m., Hughes went inside for a few minutes. When she came back outside, she saw that the man on the sidewalk had been stabbed. (2 RT 328-29, 341.) That man was Keith Fallin. (2 RT 330, 332-33; 3 RT 614-15; Pros. Ex. Nos. 1, 4.) The theater had a video surveillance system that was working properly on that day. (2 RT 331; Pros. Ex. No. 5.)

On August 6th, Kenneth McFetridge[3] was homeless. That afternoon, he napped on the sidewalk on Yucca Avenue, between Wilcox and Cahuenga. (3 RT 604.) He woke up with a pain in his chest. He asked the police for an ambulance. Officers offered to take him to the hospital; but, they would not take his belongings. Angry, McFetridge declined. (3 RT 605-06.) Two hours later he was in more pain. An ambulance was called and he was driven to the hospital. McFetridge sustained puncture wounds in his chest. (3 RT 606-07.)

2. Police Investigation

On August 6th, Officer Kim responded to Hollywood and Gower based on a report of a stabbing victim. The suspect was described as a black male wearing a black and white long sleeve shirt and black pants, carrying a green backpack. (2 RT 396-98.) Later, Officer Kim received a call about another stabbing at Yucca and Argyle. He searched the area and saw the suspect, later identified as appellant, walking on Gower. After detaining

[3] McFetridge's testimony from the preliminary hearing was read to the jury after the trial court found him unavailable as a witness. (3 RT 601-02.)

him, Officer Kim found a knife in a homemade sheath in appellant's right sleeve. Appellant wore a black and white long-sleeve shirt, a green backpack and black pants. (2 RT 398-400.)

Hollywood and Gower is just over a mile from the Osh, and about half a mile from the area of Wilcox and Yucca. (2 RT 445.) Wilcox and Yucca is a quarter mile from Argyle and Yucca. (2 RT 445.) Argyle and Yucca is also a quarter mile from Hollywood and Gower. (2 RT 445.)

A swab of the knife handle showed a DNA mix of three individuals, including Lombardo and Fallin. (2 RT 457.) The probability of pulling a random person from the general population and being able to include the person in that mixture profile was one in 89,000. (2 RT 457.) A swab from the blade showed a mix of two profiles; the major profile matched that of Lombardo. (2 RT 458.) The statistic for this probability was one in 23 quadrillion. (2 RT 458.) A cutting from the sheath showed a DNA mix of at least three people. A major DNA profile matched that of Fallin. The statistics for this match were one in 131 quadrillion. (2 RT 462-63.) A swab of the stain on the sheath showed a DNA profile matching that of Lombardo; the statistics were 1 in 23 quadrillion. (2 RT 463-64.) A swab from appellant's shirt showed a DNA mix of two people, McFetridge and appellant. The mix statistic was one in 52,000. (2 RT 464-66.) A mix of at least two persons was obtained from a cutting of the shirt; a major profile matched that from McFetridge. The statistic related to this finding was one in a quintillion. (2 RT 466-67.) Appellant's DNA was found on the jeans, with a statistic of 1 in 184 quadrillion. (2 RT 468.) A partial DNA profile was obtained from the backpack and matched that obtained from appellant. (2 RT 468.)

Police showed Vaughn photographs and Vaughn picked photo number one as showing a person who looked like the one who stabbed him. (2 RT 391.)

3. Medical Testimony

The cause of death for Fallin, Cota and Lombardo was a stab wound to the chest. (3 RT 615, 622, 636.)

A person suffering from mental illness can form the intent to commit crimes. (3 RT 926.) Dr. Morris, the defense's expert, did not speak to appellant. (3 RT 927.)

B. Defense Case

1. Appellant's Testimony

The extent of appellant's testimony consisted of him asking about videotapes, "if it was possible to order the three video record exhibition and report for video filming in the nature exhibited the copy from the Hollywood police department" and that police officers "committed me the statements to the four video record copies that you are the one that committed a serious of murders in a tunnel." The trial court granted the prosecution's requests to strike the testimony. (3 RT 652-55.)

2. Medical Testimony

Dr. Morris, a psychiatrist, examined appellant's military records from the 1970s and state hospital records from Patton State Hospital, beginning in the 1980s up to the present. (3 RT 903, 906-07.) According to him, appellant suffered from schizophrenia, undifferentiated type. (3 RT 907.) Symptoms include paranoia, hallucinations, and disorganization, e.g., speaking in a garbled manner. (3 RT 907-08.) Schizophrenia can affect reasoning and logic, and cause impulsivity, affecting even the basic functions. (3 RT 908-09.)

3. Additional Testimony

Selba Rea is appellant's sister. She knows appellant as Dudley Kenneth Brown. She is unfamiliar with the name Domingo Rodas. (3 RT 643.) Within the last two years she visited appellant while he was in jail. Other than appellant crying when he saw her, she was unable to converse with him. (3 RT 645.)

Vaughn told the police he did not know the suspect. In the photo line-up, only the first person was black. Vaughn did not remember what the perpetrator wore. (2 RT 393-94.)

Detective Bynum investigated Lombardo's homicide. She detained a suspect, Adrian Johnson and contacted Stephen Tucker. Lombardo was homeless and had convictions for battery and assault. (2 RT 427-31.)

A conclusion could not be made as to the minor alleles in the DNA mix on the knife blade. (2 RT 475.)

On the day he was stabbed, McFetridge was drinking alcohol. He does not know how he was stabbed or when it happened. He also does not know appellant. (3 RT 609-10.)

ARGUMENT

THE TRIAL COURT'S FAILURE TO SUSPEND PROCEEDINGS UNDER PENAL CODE SECTION 1368 AFTER DEFENSE COUNSEL EXPRESSED DOUBT ON APPELLANT'S COMPETENCY RESULTED IN APPELLANT BEING TRIED AND CONVICTED WHILE INCOMPETENT TO STAND TRIAL, VIOLATING HIS CONSTITUTIONAL RIGHT TO DUE PROCESS, A FAIR TRIAL

A. Procedural History

Prior to trial starting, on February 3, 2012, appellant was found incompetent to stand trial and proceedings were adjourned under Penal Code section 1368. (RT B1-9; 2 CT 190.) According to the doctor reports submitted, appellant suffered from schizophrenia and was required to be on medication. He had a history of mental illness and for his prior criminal proceedings, beginning in 1983, had been found not competent to stand trial. (E.g., 2 CT 193, 201, 204, 205, 209.) On May 10, 2013, Judge Olmedo said appellant had been previously found competent and a date for further proceedings set. (2 RT C1-C6.)

On March 18, 2014, before opening statements, defense counsel declared a doubt on appellant's competency. (2 RT 301-02.) She read to the trial court what appellant had written down the day before:

"playing record Hollywood Department westside honor ranch L.A. County. Two police officers visiting. Four records. Call to testify in court. Statement you are the one that murdered a series of persons in a tunnel." (2 RT 305.)

Counsel said that the second page had written: "has transcriptures (sic) of acquittal of execution, transcriptures of the advance of the court date. . . and transcriptures of the name Plake Rodas, Domingo to Doudley Brown." (2 RT 305.) Appellant had referred to the videos as assimilations. (2 RT 306.) He also said that two police officers visited him in jail. Counsel said this was not correct. He further had said: "you are the one that murdered a series of person in a tunnel." Counsel said she asked where this was from. Appellant said the police told him when arrested. (2 RT 306.) When counsel asked him what he meant by "transcriptures of acquittal of execution," appellant started talking in what is called a word salad –the use of polysyllabic works that do not make sense. (2 RT 306.) Counsel said she thought he might be talking about sentencing. She told him he had not been sentenced. Appellant then started speaking about Patton State Hospital. (2 RT 306-07.) Counsel said appellant was angry about the name change and again started making statements that did not make sense, speaking about forgery and how could they say he was Doudley Brown. Counsel said this was his family name based on contact with his family. (2 RT 307.) Counsel said she was concerned because for prior Penal Code section 1368 proceedings, starting back in the 1980s, appellant engaged in the same behavior, using the word salad. The only difference between then and now was that then he used it in Spanish; now he is doing it in English. Counsel did not know what appellant actually wanted and was afraid to put him on the stand because she did not know what he would say. (2 RT 308.) Counsel also said that appellant told her he did not want to take his medication. At Patton, he was given medication on an involuntary basis. At Twin Towers, where he was now, he was not taking his medication. (2 RT 308-09.)

The trial court spoke with appellant and asked how he was doing. Appellant said he was fine, and that:

"since I have returned from Atascadero Hospital, that I've been proved mentally competent to stand trial, it is the first time that I made those notes and I had a conversation with Carole Telfer just yesterday. And I really didn't mean to be obstructive to the person's attention. I didn't know that there was the person means. I was being belligerent as how – antagonistic as how the person said. .." (2 RT 309.)

The trial court again asked appellant how he felt today. Appellant said he felt "perfectly fine. . and wanted to ask the person's pardon if I possibility was being obstructive that I made up those notes, and I really don't mind how the person to continue defending my case for me and I do mean to keep quiet." (2 RT 309-310.)

Appellant answered: "yes" when the judge asked if he knew that they had a jury and was to start trial. Appellant also said: "yes" when asked if he understood he was charged with serious crimes. The trial court asked what he was charged with. Appellant said three counts of murder and two counts of attempted murder. Appellant answered: "yes" to the trial court's question if he knew Ms. Telfer was there to defend him and that he would help her. (2 RT 310.) When asked if it was fine to proceed with the trial, appellant said: "That will be properly fine, yes." (2 RT 311.) When the trial court asked if he had been taking his medicine, appellant said:

"No, your honor. I've been doing without the medication. I've been doing fine. I've been getting along well. I've been there about a year already. I returned from Atascadero Hospital since May of last year and I've been doing fine. I have been doing without my medications. It was just the notes that I made to Ms. Telfer and she thought I was being obstructive. . .." (2 RT 311.)

Appellant answered: "yes" to the trial court's question if he knew what was going on. The trial court said the trial should proceed. (2 RT 312.)

B. The Trial Court's Failure To Suspend Proceedings Under Penal Code Section 1368 Violated Appellant's Constitutional Right To Due Process

A trial court's failure to employ procedures to protect against trial of an incompetent defendant deprives that defendant of his or her due process right to a fair trial and requires reversal of the conviction. (*Pate v. Robinson* (1966) 383 U.S. 375, 377-78 [86 S. Ct. 836, 15 L. Ed. 2d 815]; *Drope v. Missouri* (1975) 420 U.S. 162, 171-72 [95 S. Ct. 896, 43 L. Ed. 2d 103]; *People v. Lightsey* (2012) 54 Cal.4th 668, 690; *People v. Hale* (1988) 44 Cal. 3d 531, 539; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.) Competence to stand trial is rudimentary because upon it depends the rights deemed essential to a fair trial, e.g., the right to effective assistance of counsel, the rights to summon, confront, and cross-examine witnesses, and the right to testify on one's own behalf. (*Drope, supra,* 420 U.S. 162, 171-172.)

A defendant is incompetent to stand trial if he or she lacks sufficient ability to consult with his or her lawyer with a reasonable degree of rational understanding as well as a rational and factual understanding of the proceedings. (*Drope, supra,* 420 U.S. at p. 171; *Dusky v. United States* (1960) 362 U.S. 402 [80 S. Ct. 788, 4 L. Ed. 2d 824]; *People v. Rogers* (2006) 39 Cal.4th 826, 846-47.)

The trial court's duty to conduct a competency hearing may arise at any time prior to judgment. Due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, i.e., evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations. (*Medina v. California* (1992) 505 U.S. 437, 448 [112 S. Ct. 2572, 120 L. Ed. 2d 353]; *People v. Rogers, supra,* 39 Cal. 4th 826, 846-47; *People v. Murdoch* (2011) 194 Cal. App. 4th 230, 236; *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 575; *Drope, supra,* 420 U.S. at p. 180; Pen. Code, § 1368.)

"Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court in applying *Pate*'s substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? It sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue." (*Moore v. United States* (9th Cir. 1992) 464 F.2d 663, 666.)

"When defense counsel has presented substantial evidence that a defendant is incompetent to stand trial, the trial court must declare a doubt as to the defendant's competence and suspend proceedings even if the court's own observations lead it to believe the defendant is competent." (*People v. Jones* (1991) 53 Cal.3d 1115, 1153.)

When a defendant has already been found competent to stand trial, a trial court need not suspend proceedings to conduct a second competency hearing unless presented with a substantial change of circumstances or new evidence casting a serious doubt on the validity of that finding. (*People v. Mendoza* (2016) 62 Cal. 4th 856, 884; *People v. Kelly* (1992) 1 Cal. 4th 495, 542.)

Here, the trial court erred in failing to suspend proceedings under Penal Code section 1368, violating appellant's constitutional due process rights, because it was presented with evidence of a substantial change of circumstances and evidence casting doubt on the initial competency finding. (*Pate v. Robinson*, *supra,* 383 U.S. 375, 377-78; *Cacoperdo v. Demosthenes* (9th Cir. 1994) 37 F.3d 504, 510; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.) The medical reports had conditioned appellant's competency on his compliance with taking his medication. (2 CT 209, 202, 205.) At the time the reports were written, April of 2013, appellant was taking his medication. (2 CT 202, 205, 206, 209.) Almost a year later when counsel expressed her concern about his competency, he

was not taking his medication and his behavior was exactly as that set forth in the medical reports describing the manifestations of his mental illness. (E.g., 2 CT 204.) With the trial court not suspending proceedings and continuing with the trial, appellant was tried and convicted while incompetent to stand trial.

This case is similar to *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561 where the federal appellate court reversed a judgment based on the trial court's failure to declare a bona fide doubt as to the defendant's competency to stand trial and failure to conduct a competency hearing, thereby violating the defendant's due process rights. There, the defendant exhibited bizarre, irrational behavior. Counsel alerted the trial court to his history of mental health problems. The appellate court found the defendant's condition had significantly deteriorated since the initial pretrial competency determination. "After [13 months] had passed the trial court would have been unreasonable in relying solely on a stale competency determination in the face of contradictory evidence." (*Maxwell, supra*, 606 F.3d at pp. 574-76.)

Here too, appellant exhibited irrational, delusional behavior that reflected a deterioration in his mental condition since when he had been found competent to stand trial the year before. (2 CT 202, 204, 205, 206, 209; 2 RT 311; 3 RT 352-55.) The trial court's failure to correctly follow procedures to protect appellant's right not to be tried or convicted while incompetent deprived him of his constitutional due process right to a fair trial. (*Drope, supra*, 420 U.S. at p. 172; *Medina, supra*, 505 U.S. at p. 449 ["the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."]; U.S. Const., Amend. V, XIV; Cal. Const. Art. 1, § 7.)

The Court of Appeal's determination that there was no significance to the failure of appellant to take his medication because there were no 2014 medical reports describing what happens when he was not compliant with taking his medication should be rejected. The medical reports of 2013 described the symptoms of appellant's mental illness. These

manifestations of his mental illness went back to the early 1980's. The April 2013 medical report stated:

> "In 1983 he was found not competent to stand trial due to symptoms of psychosis including bizarre and fragmented reasoning and delusional and tangential thinking. He has a history of being diagnosed with paranoid Schizophrenia. . . Upon admission to DSH-P in April of 2012, . . .[h]is speech was rapid, loud and his thought processes were circumstantial and tangential. During previous hospitalizations at DSH-P, it was noted that Mr. Rodas was described as delusional, paranoid, thought disordered with evidence of word salad and incoherence. He expressed paranoid ideation about people poisoning his food. . . During the PC 1368 evaluations (K. Knapke, MD dated January 4, 2012), Mr. Rodas was rambling in a nonsensical manner, . . was not making sense and used 'bizarre words and syntax.' Mr. Rodas' presentation was also similar during the evaluation with S. Arroyo, PhD (July 17, 2011) where he appeared irrational, incoherent, used neologisms, word salad, and presented with thought fragmentation." (2 CT 204.)

Doctors warned that appellant had to take his medication to "maintain psychiatric stability and competency. . . [and] to prevent mental decompensation. . .." (2 CT 205, 206.) Appellant's present behavior while off his medication was consistent with that described in these medical reports when he was found not competent due to symptoms of his mental illness. These symptoms had been the same for decades. Because substantial evidence was already at hand, another medical report was unnecessary to raise a bona fide doubt on appellant's competence.

In *People v. Murdoch* (2011) 194 Cal. App. 4th 230, the appellate court found the trial court should have instituted competency proceedings. The defendant was known to be mentally ill. The reports informed the court that the defendant had stopped taking his prescribed medication and warned of decompensation. The experts concluded that while the defendant was competent when examined, competence was dependent on medication

compliance. The defendant told a doctor the medication did not help, he did not like taking it, and only took it sometimes. (*Id.* at pp. 237-39.)

In this case too, the medical reports were consistent in reflecting the doctors' opinions that appellant had to be on his medication in order to retain competency. Doctors wrote:

> "It is recommended that Mr. Rodas continue to take the medication he is being prescribed to prevent mental decompensation and maintain competency related abilities. . . The above-named individual is being returned to court on psychotropic medication. It is important that the individual remain on this medication for his own personal benefit and to enable him to be certified under Section 1372 of the Penal Code. . .[appellant] should continue to remain on his current medication regimen to maintain psychiatric stability and competency." (2 CT 209, 202, 205.)

When doctors found him competent in 2013, appellant was taking his medication. (2 CT 205.) By the time of his trial, about a year later, appellant had stopped taking his medication. (2 RT 308-09, 311.) His behavior, making nonsensical and delusional statements, reflected the symptoms of his mental illness precluding a finding of competency and was what doctors warned would happen when he did not take his medication. (2 RT C3, 306-07, 311; 2 CT 204.) This constituted more than sufficient evidence of a substantial change in circumstances or new evidence casting doubt on the initial finding of competency. (Contrast *People v. Medina* (1995) 11 Cal.4th 694, 734 [where Court found no substantial evidence of a change in circumstances, counsel conceded there was no new evidence to introduce at a second hearing].)

This Court should also reject the Court of Appeal's finding that because appellant seemed willing to help counsel and could recite the charges, he was competent to stand trial. (Ct. App. Opn. p. 14.) Although when a competency hearing has already been held, the trial court may take its personal observations into account in determining whether there has been some significant change in the defendant's mental state (*People v. Mendoza, supra,* 62 Cal. 4th 856, 885; *People v. Jones, supra,* 53 Cal.3d 1115, 1153),

this would presume the trial court would have had an opportunity to observe and converse with the defendant throughout the trial. (*People v. Mendoza, supra,* 62 Cal.4th at p. 894.) Here, the trial court was not the court making the initial competency finding the year before. Further, at the time counsel declared a doubt on appellant's competency, the trial was just starting. The trial court had no basis to compare appellant's behavior from when he was found competent to the present proceedings. (2 RT C1-C6; 3 RT 301-02.)

This point aside, although respectful, appellant made statements during trial that made no sense and demonstrated he was still showing symptoms of his mental illness and not competent. His testimony for the jury is one example. Appellant testified:

> "if it was possible to order the three video record exhibition and report for video filming in the nature exhibited the copy from the Hollywood police department" and that police officers "committed me the statements to the four video record copies that you are the one that committed a serious of murders in a tunnel." (3 RT 652-55.)

It cannot be said appellant was able to assist in his defense or communicate in a rational, manner to counsel and the jury in his defense. (*Drope, supra,* 420 U.S. at p. 171.) The trial court was wrong in relying on appellant's ability to recite the charges in the face of substantial evidence casting doubt on his competency. (*Moore v. United States*, *supra,* 464 F.2d 663, 666.)

As to the Court of Appeal's finding that counsel's comments, although suggesting appellant had a mental illness, did not necessarily constitute substantial evidence of appellant's incompetence (Ct. App. Opn. pp. 13-14), the Court of Appeal was wrong; "[c]ounsel's assertion of a belief in a client's incompetence is entitled to some weight." (*People v. Mai* (2013) 57 Cal.4th 986, 1033.) "Such statements by counsel and conduct by defendant are, of course, relevant to the issue of defendant's competency." (*People v. Mendoza, supra,* 62 Cal.4th 856, 888; *Medina v. California* (1992) 505 U.S. 437, 450 [112 S. Ct. 2572 , 120 L. Ed. 2d 353] ["defense counsel will often have the best-informed view of the defendant's ability to participate in his defense"]; *Drope, supra*, 420 U.S. at

pp. 176–177 ["judges must depend to some extent on counsel to bring issues into focus"].) Further stated in *Pate, supra*, 383 U.S. 375, 385:

> "The Supreme Court of Illinois held that the evidence here was not sufficient to require a hearing in light of the mental alertness and understanding displayed in Robinson's 'colloquies' with the trial judge. . . . But this reasoning offers no justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior. While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." (*Id.* at pp. 385-86.)

Here, the record supports the finding counsel was accurate in her assessment and descriptions of appellant's behavior since his testimony about a "serious of murders in a tunnel" he had written the day before counsel declaring a doubt on his competency. (3 RT 652-55; 2 RT 305-06.) Her assertions were relevant and should have been given proper weight by the trial court.

Finally, if appellant's counsel could not understand what appellant was saying as she so indicated to the trial court (2 RT 308), despite appellant's ability to recite the charges and respectful behavior, he was not capable of communicating comprehensibly with counsel or assisting in his defense, required for a finding of competency. (*People v. Rogers, supra,* 39 Cal.4th at pp. 846-47; *Dusky v. United States* (1960) 362 U.S. 402 [80 S. Ct. 788, 4 L. Ed. 2d 824]; *Drope, supra,* 420 U.S. at p. 171.)

In sum, the trial court erred in failing to suspend proceedings under Penal Code section 1368, violating appellant's constitutional due process rights. Appellant was unable to consult with his lawyer with any degree of rational understanding and failed to demonstrate he had a rational and factual understanding of the proceedings. The trial was one of an incompetent defendant. (*Pate, supra,* 383 U.S. 375, 377-78; *Maxwell, supra,* 606 F.3d at p. 576 ["The state trial court's failure to declare a bona fide doubt as to Maxwell's competency to stand trial and its failure to conduct sua sponte a competency hearing violated Maxwell's due process rights. . ."]; *Cacoperdo v. Demosthenes* (9th Cir.

1994) 37 F.3d 504, 510; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.) The denial of due process is such that it requires reversal without regard to the facts or circumstances of the case. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681-682 [106 S.Ct. 1431, 89 L.Ed.2d 674]; *People v. Superior Court* (*Marks*) (1991) 1 Cal. 4th 56, 70; *Pate, supra,* 383 U.S. at pp. 385-87; *People v. Lightsey, supra,* 54 Cal. 4th 668, 703-05.)

CONCLUSION

Based on the foregoing, appellant requests this Court to reverse the judgment.

DATED: _____, 2017

Respectfully Submitted,

_____

Joanna McKim
California Bar No. 144315
Attorney for Appellant Rodas

Certification Regarding Word Count

The word count in appellant's opening brief on the merits is 5815 words according to my Microsoft Word program. (Cal. Rules of Court, Rule 8.520.)

I declare under penalty of perjury that this statement is true.
Executed on _____at San Diego, California,

Signature: _____, Name:

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DECLARATION OF PROOF OF SERVICE

I, Joanna McKim, declare that:

I am a member of the State Bar of California and attorney of record in this proceeding. I am over the age of 18 years, not a party to this action, and my place of employment is in San Diego, California. My business address is P.O. Box 19493, San Diego, California,

On Feb. ___, 2017 I served the document described as:
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Feb. ___, 2017 in San Diego, California.

Joanna McKim