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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

Petition From A Judgment Of The Court Of Appeal, State Of California, Second Appellate District, Division Three

PETITION FOR REVIEW

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Attorney for Appellant/Defendant

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT FOR THE STATE OF CALIFORNIA:

Domingo Rodas, petitioner and defendant, through counsel, respectfully petitions this Honorable Court for review in the above-entitled matter after decision affirming the conviction rendered by the Court of Appeal of the State of California, Second Appellate District, Division Three, filed on August 15, 2016. A copy of the opinion of the Court of Appeal is attached as an appendix.

ISSUES PRESENTED FOR REVIEW

1. Did The Court Of Appeal Err In Finding No Error In The Court Proceeding With The Trial Without A Proper Competency Hearing Under Penal Code Section 1368, Violating Petitioner's Constitutional Right To Due Process, A Fair Trial?
2. Did The Court Of Appeal Err In Finding No Error In The Trial Court Failing To Suspend Proceedings Under Penal Code Section 1368 And Continuing With The Trial After Defense Counsel Expressed Doubt On Petitioner's Competency, Violating Petitioner's Constitutional Right To Due Process, A Fair Trial?
3. Did The Court Of Appeal Err In Finding No Error In The Trial Court Allowing The Prosecution To Elicit Expert Testimony That Essentially Provided An Opinion That Petitioner Premeditated And Deliberated The Crimes, Implicating Petitioner's Constitutional Right To A Fair Trial?

GROUNDS FOR REVIEW

Review is necessary to settle important questions of law and to secure uniformity of decision. (Cal. Rules of Court, 8.500 (b).) Review is also necessary because petitioner must exhaust his claims in state court prior to seeking federal relief. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 840-42 [119 S. Ct 1728, 144 L.Ed.2d 1].)

INTRODUCTION

In his appeal, petitioner argued the court erred in proceeding with the trial without a proper competency hearing under Penal Code section 1368 and the trial court later erred in not suspending proceedings under Penal Code section 1368 after defense counsel expressed a doubt on petitioner's competency. Also, the trial court prejudicially erred in allowing the prosecution to elicit improper expert opinion testimony. Other than modifying the judgment for sentencing errors, the Court of Appeal found no error and affirmed the judgment.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Petitioner adopts the statement of facts and procedural background in the Court of Appeal's opinion attached hereafter as an appendix.

NECESSITY FOR REVIEW

I. REVIEW IS NECESSARY TO DECIDE IF A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL IS VIOLATED WHEN THE COURT PROCEEDS WITH THE TRIAL WITHOUT A PROPER COMPETENCY HEARING UNDER PENAL CODE SECTION 1368 WHEN THE RECORD DID NOT SUPPORT A FINDING OF COMPETENCY

On this issue, the Court of Appeal found no error. It concluded a stipulation was not required and absent a request for further hearing, the court could summarily approve prior certification that his competency was restored. According to the Court of Appeal, Judge Olmedo did make comments that could be interpreted as referring to a competency hearing held before another bench officer that defense counsel was unaware of; but this interpretation was "strained" and the record showed the only other competency hearing was the one before Judge Schnegg on February 3, 2012. There was no showing that petitioner's counsel at the May 10 hearing was confused on the issue. (Ct App. Opn. p. 12.) Further, as to petitioner's claim that evidence that he was not taking his medication constituted substantial evidence he was not competent, there was no showing of mental decompensation that he was no longer competent. (Ct. App. Opn. pp. 12-13.) Petitioner disagrees.

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. Hale* (1988) 44 Cal. 3d 531, 539; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.)

The 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. (*People v. Rogers* (2006) 39 Cal. 4th 826, 846-47; *People v. Murdoch* (2011) 194 Cal. App. 4th 230, 236; Pen. Code, § 1368.)

Here, contrary to the Court of Appeal's opinion, the court erred in proceeding with the trial without a proper hearing on petitioner's competency. There was no agreement that the matter would be submitted based on the doctor reports without a hearing and no indication in the record that the attorney standing in for petitioner during the May 10, 2013 proceeding knew that a prior hearing on competency had not been held. (Supp. RT 6, 10.) Further, the medical reports and evidence that petitioner was currently not taking his medication supported the conclusion that he was not competent to stand trial. Contrary to what the Court of Appeal decided, the doctor reports did condition petitioner's competency on him taking his medication. According to the medical reports, without his medication, petitioner would decompensate. (2 CT 209, 202, 205.) At the May 10, 2013 proceeding, counsel appearing for petitioner sought a medical order as to petitioner's medication and stated: "he's not getting his medication; which would certainly affect this case." (2 RT C3.)

Additionally, as reflected in the medical reports, petitioner 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.) The current proceedings, appellant suffering from mental illness and exhibiting signs of decompensation and incompetency, were no different.

In short, the court erred in proceeding with the trial and the Court of Appeal erred in deciding otherwise. The error violated petitioner's constitutional right to due process. (*Pate v. Robinson, supra,* 383 U.S. 375, 377-78; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.) This court should grant review, examine the decision and reverse.

II. REVIEW IS NECESSARY TO DECIDE WHETHER A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS IS VIOLATED WHEN A TRIAL COURT FAILS TO SUSPEND PROCEEDINGS UNDER PENAL CODE SECTION 1368 AND CONTINUES WITH THE TRIAL AFTER DEFENSE COUNSEL EXPRESSED DOUBT ON THE DEFENDANT'S COMPETENCY

Here, citing *People v. Mai* (2013) 57 Cal.4th 986, the Court of Appeal decided there was no substantial evidence petitioner was incompetent and proceedings should have been adjourned. Although counsel's description of her client's note and behavior suggested mental illness, this was not substantial evidence. Instead, petitioner's responses to Judge Perry suggested he was competent. He knew he was in a jury trial and recited the charges. He knew counsel was defending him and was willing to help. He also apologized for his obstructive behavior. (Ct. App. Opn. p. 13.) As to petitioner's failure to take his medication, he still showed some understanding of the nature of the criminal proceedings. There was no current medical report from 2014 describing the effect of Rodas's failure to take his medication. (Ct. App. Opn. p. 14.) Petitioner disagrees.

The conviction of an accused person who is legally incompetent violates due process. (*Pate v. Robinson, supra,* 383 U.S. 375, 377-78; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.) A defendant is incompetent to stand trial if he or she lacks a sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and a rational as well as a factual understanding of the proceedings. (*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].)

Here, contrary to what the Court of Appeal concluded, the trial court erred in failing to suspend proceedings under Penal Code section 1368 and continuing with the trial, violating petitioner's constitutional due process rights. (*Pate v. Robinson, supra,* 383 U.S. 375, 377-78; *People v. Murdoch* (2011) 194 Cal. App. 4th 230, 237-39; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.) The psychiatric reports for the Penal Code section 1368 proceeding the year before did condition petitioner's competency on him continuing to take his medication. At the time the reports were written, April of 2013, petitioner was found compliant in taking his medication. (2 CT 202, 205, 206, 209.) Almost a year later when counsel expressed her concern about petitioner's competency, he was not taking his medication and his behavior was exactly as that described in the competency reports that manifested his mental illness. (E.g., 2 CT 204.) Although the Court in *People v. Mai, supra,* 57 Cal. 4th 986, stated that counsel's assertion that his or her client is or may be incompetent does not, in the absence of substantial evidence to that effect, require the court to hold a competency hearing (*id.* at p. 1033), it also stated that "[c]ounsel's assertion of a belief in a client's incompetence is entitled to some weight." (*Id.*) In any respect, counsel also described notes appellant made which showed his incompetence to proceed with the trial. Appellant had written down: "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.) 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.)

On this issue, the Court of Appeal found *People v. Murdoch, supra,* 194 Cal. App. 4th 230 not relevant as in that case the defendant had already stopped taking the medication at the time the report was made and was showing signs of decompensation. (Ct. App. Opn. p. 14.) Petitioner disagrees; the case is relevant. In *People v. Murdoch, supra,* 194 Cal. App. 4th 230, the defendant was known to be mentally ill. The experts concluded that while the defendant was competent at the time he was examined, competence was dependent upon medication compliance. Additionally, one doctor's report stated the defendant had stopped taking his medication. The defendant told another doctor the medication did not help him, he did not like taking it, and only took it sometimes. (*Id.* at pp. 237-39.)

Similarly, here, the medical reports consistently reflected the doctors' opinions that petitioner had to be on his medication in order to retain competency to stand trial. Further, there was evidence petitioner had stopped taking his medication. Counsel at the May 10, 2013 hearing sought an order for petitioner to take his medication. (2 RT C3.) Almost a year later, defense counsel informed the trial court petitioner told her he was not taking his medication. He told the trial court the same thing. His behavior, despite an ability to recite the general charges, reflected nonsensical statements and delusions. (2 RT 306-07, 311.) He did not show a logical understanding of the current proceedings. His counsel could not ascertain what he wanted. His behavior was the same as that described for his prior competency proceedings, beginning decades ago. He could not have

consulted with his counsel with any rational understanding. (2 CT 202, 204, 205, 206, 209; 2 RT 311.)

In sum, the trial court erred in failing to suspend proceedings under Penal Code section 1368, violating petitioner's constitutional due process rights. In his condition, he was unable to consult with his lawyer with any degree of logical understanding and failed to demonstrate he understood the import of the proceedings. (*Pate, supra,* 383 U.S. 375, 377-78; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.) The Court of Appeal erred in deciding otherwise. This court should grant review, examine the decision and reverse.

III. REVIEW IS NECESSARY TO DETERMINE IF A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL IS VIOLATED WHEN THE TRIAL COURT ALLOWS THE PROSECUTION TO ELICIT EXPERT TESTIMONY THAT ESSENTIALLY PROVIDES AN OPINION THAT THE DEFENDANT PREMEDITATED AND DELIBERATED THE CRIMES

For this issue, the Court of Appeal rejected petitioner's argument, finding the hypotheticals were appropriate tools of impeachment to attack Dr. Morris's suggestion on direct examination that a schizophrenic is impulsive and lacks reasoning and logic. The prosecution countered this with questions designed to show that a schizophrenic can be goal oriented and plan. The prosecutor stopped short of asking whether the hypothetical person premeditated and deliberated. (Ct. App. Opn. p. 18.) Petitioner disagrees.

An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7, 15.) Any expert testifying about a defendant's mental illness,

mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states; this is a question to be decided by the jury. (Pen. Code, § 29.) Expert testimony may not invade the province of the jury to decide a case. (*People v. Lowe* (2012) 211 Cal.App.4th 678, 684.)

Here, contrary to what the Court of Appeal decided, the prosecution's question, asking Dr. Morris whether "that person not only conceal[ing] the knife, but looks for an opportunity where nobody's around before the person takes the act in killing . . . [was] thinking methodically, planning out his course of action, goal oriented" (3 RT 924), sought Dr. Morris's opinion on whether petitioner premeditated and deliberated the crimes. This was improper. The jury, not Dr. Morris, had to decide petitioner's intent. "Counsel was simply planning by means of the hypothetical to do indirectly what he could not do directly under the statute, namely, elicit an opinion from [Dr. Morris] regarding defendant's specific intent." (*People v. Bordelon* (2008) 162 Cal. App. 4th 1311, 1327; *People v. Pearson* (2013) 56 Cal. 4th 393, 444.)

The error was also prejudicial. Testimony on the subject was harmful for the defense. The expert's responses to hypotheticals based on the circumstances of these crimes focused on whether the particular conduct showed planning and goal oriented behavior. Given the lack of other witnesses to testify on the subject, the jurors likely used the testimony to conclude petitioner premeditated and deliberated the crimes. Also, the prosecution lacked an overwhelming case against petitioner on the question of premeditation and deliberation. Although evidence showed possession of a weapon, there was no evidence of planning activity or motive.

In short, the trial court erred in overruling the defense's objections to the prosecution's questions to Dr. Morris, seeking an opinion on whether petitioner premeditated and deliberated the crimes. The resulting testimony was improper

and impinged on the jury's function. The error implicated petitioner's constitutional right to a fair trial. (U.S. Const. Amend. V, XIV; Cal. Const. Art. I, § 7.) The Court of Appeal erred in deciding otherwise. This court should grant review, examine the decision and reverse.

CONCLUSION

This case involves important constitutional issues, including an accused's federal constitutional rights to due process, a fair trial. The Court of Appeal's decision, finding no error or constitutional violation, conflicts with established law pertaining to this right and thereby justifies this court's review of petitioner's case. Should this court grant review, petitioner submits that the case be resolved in petitioner's favor. For these and the foregoing reasons, petitioner requests that this court grant his petition for review.

DATED: _____, 2016

Respectfully Submitted,

_____

Joanna McKim
California Bar No. 144315
Attorney for Petitioner

Certification Regarding Petition For Rehearing And Word Count

A petition for rehearing was not filed in the appellate court for this defendant. Further, the word count is 2694 words according to my Microsoft Word program. (Cal. Rules of Court, Rule 8.504.)

I declare under penalty of perjury that this statement is true.
Executed on _____, 2016, at San Diego, California,

Signature: _____, Name:

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APPENDIX

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DOMINGO RODAS,

Defendant and Appellant.

B255598

(Los Angeles County
Super. Ct. No. BA360125)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Modified and, as modified, affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Domingo Rodas was charged with multiple counts of murder and attempted murder. He was found incompetent to stand trial. Criminal proceedings were adjourned, and Rodas was remanded to a treatment facility. After the trial court found that Rodas's competency had been restored, he was tried by a jury and found guilty. Rodas's primary contention on appeal is there was substantial evidence he was not competent to stand trial. We conclude, however, that there was insufficient evidence he was incompetent, and therefore the trial court did not err by refusing to hold further competency proceedings. Although we reject this and Rodas's other contentions, we modify the judgment to correct sentencing errors. The judgment is affirmed as modified.

BACKGROUND

I. Factual background

A. *The murder of Frederick Lombardo on July 19, 2009*

On the evening of July 19, 2009, officers responded to a report of a "man down" at 6174 Santa Monica Boulevard near El Centro. The man, identified as Lombardo, died from a chest stab wound.

B. *The murders of Roger Cota and Keith Fallin and attempted murders of Ronald Vaughan and Kenneth McFetridge on August 6, 2009*

Less than a month after Lombardo's murder, four similar incidents occurred on August 6, 2009 in the Hollywood area, within a mile to half-mile of each other.

At approximately 1:15 p.m., Wilford Tiu was in a parking lot on Sunset Boulevard. A man who looked homeless and was later identified as Roger Cota walked slowly toward Tiu. Cota said he'd been shot, but he didn't know who did it. Cota had been stabbed, not shot, and he died from his wound.

Ashli Hughes was working at the Fonda Theatre, near Hollywood and Gower. While she was outside, Hughes noticed Rodas, who had been "hanging out" for 20-to-30 minutes. Another man, Keith Fallin, was sleeping on the street. At just before 2:00 p.m.,

Hughes briefly went back into the theatre. When she came back out, Fallin had been stabbed in the chest.[1] He died from his wound.

Kenneth McFetridge was homeless. While on Yucca, between Wilcox and Cahuenga, he took a nap on the sidewalk about midafternoon. When he awoke it was "coming on evening" and he had severe chest pain. At approximately 4:00 p.m., firefighters responded, but McFetridge refused to be taken to the hospital without his belongings. McFetridge eventually went to the hospital, where he was treated for a stab wound.

Ronald Vaughan was homeless. While walking on Yucca Avenue at approximately 5:45 p.m., he noticed a Black man behind him. When Vaughan stepped aside to let the man pass, the man "hit" Vaughan, or so he thought. In fact, Vaughan had been stabbed. He survived.

C. *The investigation*

Officers investigating the crimes on August 6, 2009 received a description of the suspect as a "male Black" wearing a black and white long sleeved shirt with black pants and a green backpack. When officers searched the area around Yucca and Argyle, they saw Rodas on Gower and detained him. In his sleeve, he had a knife with a black handle wrapped in a homemade sheath.

A DNA mixture of three individuals, including victims Lombardo and Fallin, was on the knife handle. A DNA mixture of at least two individuals was on the knife's blade, and the majority profile matched Lombardo. A DNA mixture of at least three individuals was on the knife sheath, and the major profile matched Fallin. A swab from a red stain on the sheath matched Lombardo's DNA profile. McFetridge's DNA was on Rodas's shirt.

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1 The incident was captured by surveillance cameras.

D. *Rodas's testimony*

Rodas testified in his defense. He asked the court to "order the three video record exhibition and report for video filming in the nature exhibited, the copy from the Hollywood Police Department, the copy that Carole Telfer [his public defender] showed me at Wayside Honor Ranch, and the copy in the nature that is being exhibited here at the courtroom . . . ." He also said that officers "committed" him to "the statements to the four video record copies that you are the one that committed a serious of murders in a tunnel." Rodas's testimony was stricken and the jury was ordered not to consider it.

E. *Defense expert testimony*

Dr. Raphael Morris, a psychiatrist, was asked to form an opinion on whether Rodas has a mental illness. Based on his review of Rodas's police records, military records, psychiatric evaluations, and state hospital records, Dr. Morris diagnosed Rodas with "schizophrenia, undifferentiated type, subtype."

II. Procedural background

In 2011, an information was filed alleging three counts of murder and two counts of attempted murder, with special circumstances and weapons allegations, against Rodas. In 2012, Rodas was found incompetent to stand trial. Proceedings were adjourned but resumed in 2013 after a certification of restoration of mental competency was filed.

Rodas was then tried by a jury, which rendered its verdict on March 24, 2014. The jury found Rodas guilty of count 1, the first degree murder by lying in wait of Fallin (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(15)),[2] and of counts 2 and 4, the willful, deliberate and premeditated attempted murders of Vaughan and of McFetridge (§§ 187, subd. (a), 664)). As to all counts, the jury found true weapon allegations (§ 12022, subd. (b)(1)). As to counts 2 and 4, the jury found true personal infliction of great bodily injury allegations (§ 12022.7, subd. (a)). The jury found Rodas not guilty of count 3, the murder of Cota, and of count 5, the murder of Lombardo.

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[2] All further undesignated statutory references are to the Penal Code.

On April 14, 2014, Rodas was sentenced, on count 1, to life without the possibility of parole, plus one year for the use of a weapon. The court imposed a five-year term for a prior conviction found true by the court. On count 2, the court sentenced Rodas to a consecutive life term, one year for the use of a weapon, and three years for the personal infliction of great bodily injury enhancement. On count 4, Rodas was sentenced to a consecutive life term, one year for the use of a weapon, three years for the personal infliction of great bodily injury enhancement, and five years for a prior conviction that the court found true.

CONTENTIONS

Rodas contends **I.** there was substantial evidence he was incompetent to stand trial, **II.** the prosecutor elicited improper testimony from Dr. Morris that Rodas had the specific intent to commit the crimes, and **III.** the abstract of judgment must be corrected.

DISCUSSION

I. Rodas's competence to stand trial

A. *Background regarding the competency proceedings*

Defense counsel declared a doubt as to Rodas's competency in September 2011. The court then appointed psychiatrists to examine Rodas. After the People's and the defense's doctors found Rodas to be incompetent, Judge Patricia Schnegg, on February 3, 2012, found that Rodas was not presently mentally competent to stand trial. Proceedings were adjourned, and Rodas was remanded to a treatment facility.

A certification of Rodas's restored mental competency was filed by the medical director of Atascadero State Hospital on May 10, 2013, and a hearing was held that day before Judge Charlaine Olmedo. The report accompanying the certification recommended that Rodas be found competent to stand trial. It also recommended he remain on his medication regimen once returned to custody to prevent "mental decompensation" and to maintain competency-related abilities. At the May 10 hearing, Judge Olmedo did not have Rodas's "case file"; she only had a "docket sheet." But it

was the court's "understanding that he's been found competent." No objections to that understanding were raised by any counsel.

Instead, the public defender assigned to the courtroom asked the court to sign a medical order, because "[a]pparently, he's not getting his medication; which would certainly affect this case." When Rodas's public defender arrived, the court repeated that Rodas had been found competent. Without objection, all counsel agreed to a trial date. And when the court asked defense counsel if there was a medical order he wanted filled out concerning Rodas's medication, counsel replied, "I'm not quite certain I'm going to fill this out today, but I'll – can I let you know later?" The court told counsel to "let me know either way on the record, or, if not, there's an actual order form you fill out. If you choose to do it and you want us to know, check the box that indicates that the court wants to be apprised of the results, and then you will get a court letter on whether or not he is getting his medication."

Because of ambiguities in the record, a hearing was held on December 5, 2014 to settle the record from the May 10, 2013 proceeding.[3] Judge Olmedo had no independent recollection of the case. In reviewing the transcript and docket sheet, "it appears . . . I had a dummy file, not the case file before me." In the dummy file was a letter from the doctor finding Rodas competent. The court said it had found Rodas was competent and that neither side objected to that finding, and defense counsel did not ask for a hearing on Rodas's competency. Judge Olmedo said, "So it is clear, in settling the record, I believe that I – if it's not clear from my words, but that I inferentially found him competent based upon the doctor's letter, that both sides submitted based upon that letter, and that there was no objection to the court relying upon it to resume the criminal proceedings and find the defendant competent [to] go forward."[4]

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[3] We ordered the trial court to settle the record "with respect to the competency hearing held between April 18, 2013 . . . and May 10 of 2013."

[4] Carole Telfer, defendant's trial counsel, was not present at the May 10, 2013 hearing and therefore could not help settle the record.

On March 18, 2014, after a jury had been sworn in, defense counsel again declared a doubt as to Rodas's competency. During an in camera hearing,[5] defense counsel represented that although Rodas had previously said he wanted a jury trial and did not want to testify or to raise an insanity defense, Rodas now was saying he wanted to testify. He gave counsel a note that said, "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." The note had "transcriptures"[6] of "acquittal of execution, transcriptures of the advance of the court date from May 2nd, 2012 from April 6th, 2012, and transcriptures of the name Plake, . . . Rodas, Domingo to Doudley Brown . . . ."[7]

When counsel tried to discuss the note with Rodas, it seemed to her "he was indicating something about the video, but was asserting that the video they had, all three of them were assimilations and were not the correct video." She didn't know what Rodas meant by "assimilations." She also didn't know why he said officers visited him in jail, because that was inaccurate. When she asked what he meant by "transcriptures of acquittal of execution," he responded in a word salad, i.e., "using a lot of polysyllabic words that go around in a circle and don't really make sense."

Rodas also talked about sentencing in a way that caused counsel to explain he was still in trial and had not yet been found guilty or innocent or been sentenced. Rodas talked about his commitment to Patton State Hospital, and "then regarding the name change, he got very angry at me and again started doing this word salad" and talking about forgery, and how could they say he was Doudley Brown. Counsel couldn't understand his point about forgery. Counsel said that whenever Rodas was "1368 [referring to incompetency] he used this word salad," although in the past he'd used it in

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5 The reporter's transcript of the in camera hearing was unsealed.

6 It is unclear if this was counsel's or Rodas's word.

7 Rodas's birth name was Dudley Kenneth Brown.

Spanish and was now using it in English. Counsel said: "I don't know what he's saying, I don't know what he wants, and he wants – apparently wants to testify and I'm afraid to put him on the stand because I don't know what's going to come out of his mouth." Rodas had also told counsel he was not taking his medication.

The court then addressed Rodas:

"[The court]: Mr. Rodas how you doing?

"[Rodas]: I'm fine, thank you, your Honor. 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 that was the person means. I was being belligerent as how the – antagonistic as how the person said, and I didn't know that I was being obstructive or confrontive, or con –

"The court: Confrontational.

"[Rodas]: Yeah, confrontational. And I didn't know that I was being by anyone – being obstructive against the person.

"The court: Well, how are you feeling today?

"[Rodas]: I feel perfectly fine, your Honor. I don't – I don't consider – I only 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. I didn't know, at least the first time I spoke to the person admittedly, and I didn't know that I was being – that the person was considering me to be confrontative [*sic*] or obstructive.

"The court: Well, let's slow down here. [¶] You know what we have a jury now?

"[Rodas]: Yes, your Honor.

"The court: And we're set to start the trial?

"[Rodas]: Yes, your Honor.

"The court: And do you understand that you've been charged with some serious crimes?

"[Rodas]: Yes, your Honor.

"The court: You've been – can you tell me what you've been charged with?

"[Rodas]: Yes, I understood yesterday the proceedings were going over and that I was being charged with three counts of murder and two counts of attempted murder.

"The court: And you know Ms. Telfer is here to defend you on those charges?

"[Rodas]: Yes, your Honor.

"The court: And are you willing to help her to the best of your ability?

"[Rodas]: Yes, your Honor."

The court said it was "impressed with his clarity of speech and apparent clarity of reasoning in addressing the court. He understands the charges. He says he's willing to help you." The court then asked Rodas if he wanted to proceed with trial, and Rodas said, "Yes, your Honor. That will be properly fine, yes, your Honor." The court confirmed that was Rodas's "request." When the court asked Rodas if he was taking his medication, Rodas replied, "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 or confrontative." Rodas said he understood what was going on and would try to help his counsel with his defense. The court said, "I think we should go forward." Counsel replied, "Fine. I just wanted to make a record."

Trial went forward.

B. *Proceedings to determine mental competency*

The due process clause of the Fourteenth Amendment and state law prohibit trying or convicting a defendant while he or she is mentally incompetent. (*People v. Mai* (2013) 57 Cal.4th 986, 1032; *People v. Rogers* (2006) 39 Cal.4th 826, 846; § 1367, subd. (a).) A defendant is mentally incompetent if, as a result of mental disorder or developmental disability, he or she is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (§ 1367, subd. (a); *Mai*, at

p. 1032.) Competence to stand trial requires a defendant's sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding or a rational and factual understanding of the proceedings. (*Dusky v. United States* (1960) 362 U.S. 402.) Proceedings must be suspended and a competency hearing held if a trial court is presented with substantial evidence the defendant is incompetent. (*Mai*, at p. 1032.)

"Substantial evidence of incompetence exists when a qualified mental health expert who has examined the defendant states under oath, and ' " 'with particularity,' " ' a professional opinion that because of mental illness, the defendant is incapable of understanding the purpose or nature of the criminal proceedings against him, or of cooperating with counsel. [Citations.] [¶] The defendant's demeanor and irrational behavior may also, in proper circumstances, constitute substantial evidence of incompetence." (*People v. Mai*, *supra*, 57 Cal.4th at pp. 1032-1033.) Substantial evidence is evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 847.) Although a counsel's assertion of a belief in a client's incompetence is entitled to some weight, such an assertion, in the absence of substantial evidence to that effect, does not require the court to hold a competency hearing. (*Mai*, at p. 1033.)

Once the defendant comes forward with substantial evidence of mental incompetence, due process requires that a full competency hearing be held. (*People v. Stankewitz* (1982) 32 Cal.3d 80, 92.) "In that event, the trial judge has no discretion to exercise. [Citation.] As we also have noted, substantial evidence of incompetence is sufficient to require a full competence hearing *even* if the evidence is in conflict." (*People v. Welch* (1999) 20 Cal.4th 701, 738; see also *People v. Young* (2005) 34 Cal.4th 1149, 1216.) A failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence requires reversal of the judgment of conviction. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 847.)

But when "the evidence casting doubt on an accused's present competence is less than substantial" it is "within the discretion of the trial judge whether to order a competence hearing. When the trial court's declaration of a doubt is discretionary, it is clear that 'more is required to raise a doubt than mere bizarre actions [citation] or bizarre statements [citation] or statements of defense counsel that defendant is incapable of cooperating in his defense [citation] or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense [citation].' [Citation.]" (*People v. Welch*, *supra*, 20 Cal.4th at p. 742; see also *People v. Panah* (2005) 35 Cal.4th 395, 432 ["Absent substantial evidence of a defendant's incompetence, 'the decision to order such a hearing [is] left to the court's discretion.' "]; *People v. Mai*, *supra*, 57 Cal.4th at p. 1033; *People v. Rogers*, *supra*, 39 Cal.4th at p. 847.)

If the defendant is found to be incompetent after a competency hearing, the defendant is committed to a treatment facility for restoration of competency. (§§ 1368, 1370, subd. (a)(1)(B).) When the facility's director certifies that competency has been restored, the defendant is returned to court. (§§ 1370, subd. (a)(1)(C), 1372, subd. (a)(1).) Absent a request for a hearing, the court has authority to summarily approve the certification without further hearing. (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1480.)

C. *The May 10, 2013 hearing*

At the May 10, 2013 hearing, Judge Olmedo had a certificate of restoration of Rodas's mental competency, which was accompanied by a medical report. The court accordingly found Rodas to be competent to stand trial. No party objected or requested further proceedings. No evidence was presented that Rodas was incompetent. (See *People v. Mixon*, *supra*, 225 Cal.App.3d at p. 1480.) We therefore discern no error.

Rodas, however, assigns three errors to the hearing. First, there was "no stipulation the matter would be submitted based on the doctor reports without a hearing."

A stipulation was not required.[8] Rather, Rodas had been found incompetent to stand trial at the hearing in 2012, and he was referred to treatment. His competency was restored, and he was returned to court in May 2013, per the certification. Absent a request for a further hearing, the court could summarily approve that certification. (*People v. Mixon*, *supra*, 225 Cal.App.3d at p. 1480.) As we have said, there was no such request or other objection to the court accepting the certification.

Second, Rodas argues that there was "no indication . . . that the attorney standing in [for defense counsel] during the May 10, 2013 proceeding knew that a prior hearing on competency had not been held." By this, Rodas appears to refer to an ambiguity in the record. At the May 10 hearing, Judge Olmedo made comments that could be interpreted as referring to a competency hearing held before another bench officer that Rodas's counsel was unaware of. Although such an interpretation is strained and the record shows that the only other competency hearing was the one before Judge Schnegg on February 3, 2012, Judge Olmedo made it clear in her settled statement that her comments referred to the doctor's competence finding "not to another bench officer making a finding of competency." There is no showing that Rodas's counsel at the May 10 hearing was confused about this issue.

Finally, Rodas argues that evidence he wasn't taking his medication constituted substantial evidence he was incompetent to stand trial. But all the medical report stated was Rodas should remain on his medication regimen "to maintain psychiatric stability and competency" and "to prevent mental decompensation and maintain competency related abilities." Defense counsel at the May 10 hearing said that Rodas "apparently" wasn't taking his medication and counsel might need a medical order. Even assuming

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[8] The cases Rodas cites (*People v. McPeters* (1992) 2 Cal.4th 1148, superseded by statute as stated in *People v. Boyce* (2014) 59 Cal.4th 672, 707 & *People v. Weaver* (2001) 26 Cal.4th 876) to suggest that a stipulation was required before the court could proceed are inapposite. Those cases simply hold parties may stipulate to the court considering the issue of competency based on doctor reports, without violating a defendant's due process rights.

Rodas stopped taking his medication, there was no showing of a consequent "mental decompensation" to the extent he was no longer competent. As we said, his defense counsel made no such representation or showing at the May 10, 2013 hearing.

D. *The March 18, 2014 hearing*

Rodas contends there was substantial evidence he was incompetent at the March 18, 2014 hearing, and proceedings should have been adjourned then. To the contrary, Judge Perry was not presented with substantial evidence of Rodas's incompetence, and the court therefore had no duty to conduct a further competency hearing.

The evidence before Judge Perry consisted of defense counsel's statements about her client's conduct and Rodas's statements to the court. Counsel's description of her client's note and behavior certainly suggested mental illness. Counsel's comments, however, did not necessarily constitute substantial evidence of defendant's incompetence. (*People v. Mai, supra*, 57 Cal.4th at p. 1033.) Instead, Rodas's responses to Judge Perry suggested competence: Rodas knew he was in a jury trial; he recited the charges against him with precision; he knew that Ms. Telfer was defending him; he was willing to help her; he wanted to go forward with trial; and he apologized for his "obstructive" and "belligerent" behavior. The record therefore shows that Rodas understood the nature of the criminal proceedings and could assist counsel in the conduct of a defense in a rational manner.[9]

This distinguishes Rodas from the defendant in *People v. Murdoch* (2011) 194 Cal.App.4th 230. In *Murdoch*, after the defendant's arraignment, competency proceedings were instituted. (*Id.* at p. 233.) Two experts concluded that the defendant

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[9] We review the propriety of a trial court's ruling on competency based on the time it was made without reference to evidence produced later. (*People v. Panah, supra*, 35 Cal.4th at p. 434, fn. 10.) We note, however, that during trial the trial court and Rodas discussed his right to testify several times, and Rodas's responses were clear and appropriate. Counsel also represented that she explained Rodas's rights, and he understood.

suffered from mental illness, but he was presently competent due to his medication. (*Ibid.*) The doctors noted that the defendant had stopped taking his medication and warned of decompensation if he continued to refuse medication. (*Id.* at pp. 233, 237.) Just before opening arguments, the self-represented defendant told the court his defense was the victim was not human. During trial, he defended himself on that theory. (*Id.* at pp. 234-235.) The defendant's "statements taken together with the experts' reports provide the substantial evidence necessary to demonstrate a reasonable doubt as to whether he had in fact decompensated and become incompetent as the experts had warned." (*Id.* at p. 238.) The trial court therefore erred in not conducting a hearing to determine the defendant's competence.

Although the 2013 medical report about Rodas, like the report in *Murdoch*, connected taking medication to maintaining competence,[10] Rodas's characterization of the report as "conditioning" competence on maintaining his medication regimen is an overstatement. The defendant in *Murphy* had already stopped taking his medication at the time the medical report was authored and was showing signs of decompensation. The only medical report about Rodas is the one from 2013. There was no current medical report from 2014 describing the effect, if any, of Rodas's failure to take his medication. Rodas thus asks us to assign a significance to his failure to take medication that is not in the record. And although Rodas began to use the "word salad" that typified his prior descent into section 1368 status, he nonetheless demonstrated an understanding of the nature of the criminal proceedings and a willingness to assist counsel with his defense in a rational manner when questioned by the court. That understanding—not his verbiage—

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[10] The cover letter, signed by Atascadero State Hospital's medical director, stated, "[Rodas] 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 . . . ." Rodas was then compliant with his medications and should "remain on his current medication regimen to maintain psychiatric stability and competency" and to "prevent mental decompensation and maintain competency related abilities while he waits to return to court".

is the sine qua non of competence. We therefore cannot find that the court erred by failing to conduct a further competency hearing.

II. Expert testimony

Next, Rodas contends that the trial court prejudicially erred by allowing the prosecution to elicit Dr. Morris's opinion that Rodas had the specific intent to commit the crimes. We disagree.

A. *Dr. Morris's testimony*

On direct examination, Dr. Morris testified that schizophrenia can cause impulsivity and affect reasoning and logic. Schizophrenics have trouble with their "executive functioning," which is the ability to weigh pros and cons of any decision and whether to act on an impulse. They can also have delusions related to identity and have memory problems.

On cross-examination, the prosecutor asked Dr. Morris whether a way to determine if someone is schizophrenic is to examine if they are "goal-oriented." The doctor responded that schizophrenia affects different parts of functioning, so "[i]t doesn't necessarily make a person globally incompetent to do anything in their life on any level." It "depends on the situation." A schizophrenic person can make a "plan." The prosecutor then suggested a hypothetical:

"[The prosecutor]: . . . If a person plans on killing somebody, he wakes up that morning and he arms himself with a knife. Okay. And not a wet noodle or a nerf knife. That person has taken a small step towards achieving the goal of killing somebody, is that correct, and he's planning; is that correct?

"A. Potentially, yes.

"Q. And that person then takes that same knife and instead of wielding it out in the open where everybody can see it, but conceals that knife on that person's arm or something like that where it can't be seen by the public in an effort towards achieving the goal of killing somebody, that person is taking yet another step towards that ultimate plan

of killing somebody. That person is not disorganized, but that person is planning; is that correct?

"A. I would object to saying whether – depending on the person, they still could be disorganized. A person can still have some level of planning. The two things are not mutually exclusive. . . .

"[¶] . . . [¶]

"Q. . . . [H]e can be globally suffering from a mental illness as you say, but in that aspect, in that tiny aspect in his life he's goal oriented; is that correct?

"A. Potentially, depending on what the goal is. And if there's a level of paranoia that's driving the behavior, if the person thinks that someone is trying to hurt them. You have to factor in all those things.

"Q. But even if that person suffers from paranoia, assuming that you're right and that that person in this hypothetical suffers from paranoia and he thinks that the person may be hurting him or something, regardless of that, if he takes the step in killing the person that he thinks is going to kill him and he takes small steps in achieving that goal, he still is planning, he's goal oriented.[11]

"[¶] . . . [¶]

"Q. Even if the person is hearing voices, right, in this hypothetical, and he takes steps towards eliminating the person that he thinks is going to kill him, he's still taking tiny steps and planning toward – to achieve that goal of killing a person; right? I mean, he has to plan it out?

"A. Potentially, yes.

"Q. In that same hypothetical, that person not only conceals the knife, but looks for an opportunity where nobody's around before the person takes the act in killing the victim. That person is thinking methodically and planning out his course of action, goal oriented; is that correct?"

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11 Defense counsel's objection that the question called for a legal conclusion was overruled.

Defense counsel objected that the hypothetical assumed a fact not in evidence and went to the "legal conclusion in this case." At sidebar, the trial court told the prosecutor to "tighten your questions up" and that the questions were better argued to the jury. Back before the jury, Dr. Morris agreed that a mentally ill person can form the intent to commit crimes. He also agreed that whether the person is goal-oriented is "part of" the way to assess whether a mentally ill person has the specific intent to commit crimes.

B. *Dr. Morris did not testify that Rodas premeditated and deliberated.*

California law permits a person with "special knowledge, skill, experience, training, or education" in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (Evid. Code, § 801). A trial court has broad discretion to admit or exclude expert testimony. (*People v. McDowell* (2012) 54 Cal.4th 395, 426.) But the testimony experts may provide in criminal cases is limited. Section 28, subdivision (a), for example, prohibits "[e]vidence of mental disease, mental defect, or mental disorder . . . to show or negate the capacity to form any mental state, including, but not limited to" intent, premeditation, deliberation or malice aforethought. Such evidence "is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (*Ibid.*) Section 29 prohibits an expert testifying about a defendant's mental illness from discussing "whether the defendant had or did not have the required mental states . . . for the crimes charged," a question that is reserved for the trier of fact. (See also *People v. Coddington* (2000) 23 Cal.4th 529, 582, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1327.) To ask whether a hypothetical avatar in the defendant's circumstances would have had the specific intent required for a crime is the functional equivalent of asking whether the defendant had that intent. (*Bordelon*, at p. 1327.) Such a hypothetical would therefore violate section 29. (*Bordelon*, at p. 1327; see *People v. Larsen* (2012) 205 Cal.App.4th

810, 828 [testimony about hypothetical situations similar to the actual case would "come dangerously close to the territory *precluded* by sections 28 and 29"].)

Rodas contends that the prosecutor's hypotheticals violated section 29 and *Bordelon*, because they elicited an opinion that Rodas premeditated and deliberated. The hypotheticals, however, were appropriate tools of impeachment to attack Dr. Morris's suggestion on direct examination that a schizophrenic is impulsive and lacks reasoning and logic. The prosecutor countered that suggestion with questions designed to show that a schizophrenic can be "goal-oriented" and can plan. He therefore asked about specific acts a hypothetical person might take, for example, arming himself with a knife and concealing it. Could such acts, the prosecutor asked, show that the person is planning? Of course, the suggestion implicit in the questions was that a person who engages in such acts or "planning" can premeditate and deliberate a murder. (See generally *People v. Gonzalez* (2012) 54 Cal.4th 643, 663-664 [planning activity is evidence of premeditation and deliberation].) But establishing that a person with schizophrenia can plan is not the same as asking whether this hypothetical person premeditated and deliberated. The prosecutor stopped short of asking that question.[12] We therefore discern no error.

III. Corrections to the abstract of judgment.

The abstract of judgment fails to reflect the one-year terms imposed under section 12022, subdivision (b)(1), as to counts 1, 2 and 4. The abstract of judgment also incorrectly states that one-year terms under section 12022.7, subdivision (a), were imposed on counts 2 and 4. The abstract of judgment must be modified accordingly.

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[12] The hypothetical that perhaps came closest to the line drawn by section 29 was the last one: "[T]hat person not only conceals the knife, but looks for an opportunity where nobody's around before the person takes the act in killing the victim. That person is thinking methodically and planning out his course of action, goal oriented; is that correct?" But defense counsel objected, and it went unanswered.

DISPOSITION

The abstract of judgment is modified to strike the one-year terms imposed under section 12022.7 as to counts 2 and 4. The abstract of judgment is modified to reflect that one-year terms were imposed under section 12022, subdivision (b)(1) as to counts 1, 2 and 4. The clerk of the superior court is directed to modify the abstract of judgment and to forward the modified abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.

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 Sept. ___, 2016 I served the document described as:
Re: Appellant's Petition for Review, People v. Rodas, B255598/BA360125

on the interested party/parties in this action as set forth below:
_x__ (By Mail) I caused such copies of the document to be sealed in an envelope and deposited such envelope in the United States mail in San Diego, California. The envelope was mailed with postage thereon fully prepaid addressed to:

Office of the Attorney General, E-service
300 South Spring St.
Los Angeles, CA 90013

CAP-LA, E-service
520 S. Grand Ave. 4th Fl.
Los Angeles, CA 90071

Superior Court
210 W. Temple St.
Los Angeles, CA 90012

Court of Appeal
300 S. Spring St. Second Fl.
Los Angeles, CA 90013

Domingo Rodas, AT3891
PVSP
POB 8500
Coalinga, CA 93210

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Sept. ___, 2016 in San Diego, California.

_____
Joanna McKim