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No. S075727

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CEDRIC JEROME JOHNSON,

Defendant and Appellant.

Los Angeles County
Sup. Ct. No. TA037977-01

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, County of Los Angeles

HONORABLE JOHN J. CHEROSKE, JUDGE

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CEDRIC JEROME JOHNSON, Defendant and Appellant.	Cal. Supreme Ct. No. S075727 (Los Angeles County Sup. Ct. No. TA037977-01)

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

18.

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED MR. JOHNSON'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE DEATH VERDICT BY FAILING IN ITS DUTY TO INITIATE COMPETENCY PROCEEDINGS

A. Introduction

Cedric Johnson did not assist his counsel in a rational manner because he was unable to do so. Mr. Johnson believed that his appointed attorney, Mr. Hauser, was conspiring with the trial court and the prosecution to "railroad" him to a death sentence. As a result of this profoundly disordered thought process, Mr. Johnson was incapable of participating rationally – or at all – in his own defense. When presented with such substantial evidence of incapacity, in the constitutional sense, due to a mental, cognitive or emotional disorder, courts are required, as a first

resort, to seek a professional determination of the defendant's competency to stand trial. Here, instead, the court chose to use exclusively punitive measures, ranging from shackling and restraints, to muzzling, to excluding Mr. Johnson from his own capital trial and then deception.[1] Due to the trial court's failure to employ procedures to protect against the trial of an incompetent defendant, Mr. Johnson was deprived of his due process right to a fair trial, requiring reversal of his conviction and death judgment. (*Pate v. Robinson* (1966) 383 U.S. 375, 377 (*Pate*.)

B. Factual Background

Mr. Johnson's and respondent's original briefing summarized in great detail the conduct that is also the focus of this supplemental argument. Notably, even in respondent's telling, the vast majority of the offending conduct is verbal, mainly expressions of Mr. Johnson's fixed, irrational belief that counsel and court were conspiring to "railroad" him.

Indeed, Mr. Johnson's distorted thinking and defective understanding of the judicial process are reflected in his early letter to the prosecutor offering to compromise – that is, he would not pursue a conspiracy suit or a civil suit, and leave town, if the prosecutor would vacate the charges. (1RT 137.) Later that same day, Mr. Johnson's defense

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[1] In raising this supplemental challenge to the trial court's exclusively punitive response to Mr. Johnson's irrational speech and conduct when there was substantial evidence that the offending conduct resulted from involuntary, disordered thought processes and perceptions, Mr. Johnson is neither waiving nor conceding any of the claims presented in Arguments 1-6 of his opening brief. (See AOB 23-224.) Rather, this supplemental briefing is complementary to the arguments in the opening brief, by examining the same contested judicial actions through the lens of legal competency and the attendant constitutional and statutory duties imposed on the trial court.

counsel, Mr. Hauser, informed the court, in Mr. Johnson's absence, that he had "absolutely no cooperation from [Mr. Johnson] at all." (1RT 145.) The reason for this lack of cooperation became evident at Mr. Johnson's next court appearance. Mr. Johnson objected to Mr. Hauser serving in any capacity in his case because, "I feel that he's going to be a witness in here, a material witness, on outrageous government misconduct. He have been in complicity . . . with the D.A. ." (1RT 149.)

Not long after, Mr. Johnson requested a *Marsden*[2] hearing because of an "obvious conflict between Mr. Hauser and myself." (2RT 365.) The court told Mr. Johnson that it would not hear anything about his attorney, and when Mr. Johnson persisted, the court ordered that a stun belt should be placed on him at all times. (2RT 367.) In objecting to the stun belt, Mr. Johnson again accused Mr. Hauser of "trying to dump [him]," and the court of racism. (2RT 369, 370.)

During jury selection at his first trial, Mr. Johnson accused the court of being up to "its neck in complicity" with counsel and others. When then asked by the court whether he thought the accusation was rude and disruptive, Mr. Johnson responded with the example of a Pennsylvania case where the judge, prosecutor and lawyers were in complicity to railroad an innocent defendant on murder charges. (2RT 419.) The court clarified: "[s]o it's your position, then, that each of the judges that have heard this case are in some kind of complicity or conspiracy in order to avoid giving you a fair trial." Mr. Johnson answered, "yes," adding, "I'm going to note everything you do is illegal. I'll be glad when the news media get here," and then alleged that he thought the jury had been "contaminated" or

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[2] *People v. Marsden* (1970) 2 Cal.3d 118.

"tampered with." (2RT 419, 420, 421.)

Mr. Johnson continued to call Mr. Hauser a "dump," and accused the court of covering up for Mr. Hauser. (2RT 427, 428.) The court responded, "I suggest you do not be derogatory to the court by indicating or implying that the court is in some kind of complicity or conspiracy or doing something other than provide you with a fair trial." To which Mr. Johnson responded, "I can direct – circumstantial evidence can prove that my due process and constitution and civil rights have been violated." (2RT 429.)

Later, Mr. Johnson accused Mr. Hauser of being high on marijuana. (2RT 503.) Mr. Hauser noted that he had a psychiatrist examine Mr. Johnson, but the examination "wasn't very extensive because there was no cooperation." (2RT 572.) Mr. Johnson also objected to Mr. Hauser's obtaining his medical (or psychiatric) records, even if the information would be helpful to his defense. (3RT 741-743.)

There ensued an in camera hearing, during which Mr. Hauser stated that he had tried to speak to Mr. Johnson but that he had refused to speak with him and instead responded with a "continuous tirade." (5RT 1048, 1055.)

Following the jury deadlock at Mr. Johnson's first trial, the court noted that Mr. Johnson had twice spit at Mr. Hauser. (16RT 3498.) Mr. Johnson responded with a tirade. (16RT 3501-3502.) He alleged that Mr. Hauser was upset by the outcome, that Mr. Hauser expected a guilty verdict because he and the prosecutor "were in complicity." (15RT 3497.) At the next court appearance, when Mr. Johnson's insults directed at the court and counsel continued, the court ordered the bailiff to put Mr. Johnson in a belt and bring a muzzle next time. (16RT 3510, 3514.)

During jury selection for the retrial, Mr. Johnson struck Mr. Hauser,

and then tried to voice his complaints about him to the prospective jurors. (17RT 23-24, 27, 49.) The court then ruled that Mr. Johnson would not be permitted back in the courtroom. (17RT 25.)

In response to the court's suggestion that he withdraw as counsel, Mr. Hauser responded that he did not believe Mr. Johnson could carry out any of his verbal threats. (17RT 48-49.) He further explained that there had been no threats to him prior to the attack in front of the prospective jurors, and there was no breakdown in communication because there "just wasn't any communication at all." (17RT 69.)

Mr. Johnson wanted to testify at the retrial, as he had at the first trial. (23RT 2-1297.) It was first decided that Mr. Johnson would be allowed to testify before the jury through a video-feed from his holding cell into the courtroom. (23RT 2-1293, 1297.) But then, without advising Mr. Johnson, the court agreed to do a test run, without the jury present. (23RT 2-1361-1362.) When asked the first question, Mr. Johnson responded by addressing the jury – so he thought – directly, to protest what was going on. (23RT 2-1365.) The court then informed Johnson that the jury was not present and that he would not be allowed to testify. (23RT 2-1366-1367.)

In addition to Mr. Johnson's repeated manifestations of delusional, distorted and self-defeating ideation, the record included Mr. Hauser's fee proposal with his observation that Mr. Johnson "appears to be mentally unstable," (AOB 146; 1CT 46); and a series of in-camera hearings involving Mr. Johnson's noncustodial and custodial psychiatric records. (AOB 176-177; 2RT 571; 3RT 582, 739-745; 5RT 1049.)

At the penalty phase, Dr. Marshall Cherkas, a psychiatrist, testified for the defense. Dr. Cherkas was able to spend no more than five minutes with Mr. Johnson. However, after reviewing some of Mr. Johnson's

medical and school records, some of which suggested problems of actual brain function, Dr. Cherkas concluded that Mr. Johnson appeared to be illogical and irrational and had an underlying psychotic core that manifested a thinking disorder and distorted perception. (25RT 2-1742, 1743, 1745-1751.)

It did not require a psychiatrist, however, to observe over the course of the proceedings that Mr. Johnson's thinking, and consequently, his behavior, was irrational, possibly delusional, and likely rooted in a serious mental or developmental disorder or disability.

C. The Trial Court Violated Mr. Johnson's Due Process Rights When it Failed to Inquire into His Competency to Stand Trial Despite Substantial Evidence That He Could Not Rationally Assist Counsel or Aid in His Own Defense Because His Thinking and Perceptions Were Distorted Due to a Mental or Developmental Disorder

"It has long been established that the conviction of an accused person while he is legally incompetent violates due process." (*Pate v. Robinson*, *supra*, 383 U.S. at p. 377.) The failure of a trial court to protect against the trial of a legally incompetent defendant violates due process and deprives the defendant of a fair trial. (*Ibid*.; *Drope v. Missouri* (1975) 420 U.S. 162, 171-172 (*Drope*); *People v. Hale* (1988) 44 Cal.3d 531, 539.) A defendant is deemed incompetent to stand trial if he lacks """sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him.""" (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354, quoting *Dusky v. United v. States* (1960) 362 U.S. 402 (*Dusky*). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to

stand trial." (*Drope*, *supra*, 420 U.S. at p. 181.)

The federal Constitution requires that "[w]here the evidence raises a "'bona fide doubt'" as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury to conduct a [competency] hearing." (*Pate, supra*, 383 U.S. at p. 385.) It is the judge's obligation to "satisfy himself that the defendant is able to understand the proceedings against him and assist counsel in preparing his defense." (*Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1087.) Accordingly, where there is a bona fide doubt about the defendant's competency, the court must order a hearing on its own motion. (*Ibid*.) These constitutional protections are codified in Penal Code section 1367, et seq.

Section 1367, subdivision (a) provides that a defendant is mentally incompetent to stand trial when, "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." Section 1368 provides for a multi-step inquiry by the court "[i]f, during the pendency of an action and prior to judgment,. . . a doubt arises in the mind of the judge as to the mental competence of the defendant."[3]

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[3] The procedure set forth in section 1368 includes soliciting defense counsel's opinion of the defendant's competency. However, irrespective of counsel's opinion, the court may nevertheless order a hearing. (§ 1368, subds. (a), (b); see *People v. Castro* (2000) 78 Cal.App.4th 1402, 1416 ["the court has the initial and primary duty to act when the facts demonstrate the defendant's possible incompetency; it is the failure of the trial court to raise the issue and suspend proceedings, not the failure of defense counsel to raise the issue, which constitutes the jurisdictional error"].) Here, very early in the proceedings, Mr. Hauser questioned whether this was a "1368 case," but deferred on the issue until he had an

This Court has interpreted section 1368 to require that the trial court conduct a competency hearing if there is substantial evidence of the defendant's incompetence to stand trial. (*People v. Welch* (1999) 20 Cal.4th 701, 737-738 (*Welch*), citing *Pate*, *supra*, 383 U.S. at pp. 384-386.) Substantial evidence is that which raises a reasonable doubt as to the defendant's competency. (*Welch*, *supra*, 20 Cal.4th at p. 738.)

In determining whether a competency hearing is necessary, the United States Supreme Court has focused on the following factors: a history of irrational behavior; the defendant's demeanor at trial; and prior medical opinions of the defendant's competency. (*Drope*, *supra*, 420 U.S. at p. 180.) However, in some circumstances, even just one of these factors may be sufficient. (*Ibid*.)

The focus of the inquiry must be whether the defendant has a rational as well as a factual understanding of the proceedings against him, and sufficient present ability to consult with his attorney and assist in his defense in a rational manner. (*Drope*, *supra*, 420 U.S. at p. 171; *Dusky*, *supra*, 362 U.S. at p. 402.) A defendant lacks the requisite rationality "if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him." (*Lafferty v. Cook* (10th Cir. 1991) 949 F.2d 1546, 1551 [inability to distinguish reality from unreality due to suspicions and confused thinking, both products of the defendant's paranoid delusional system].) A factual understanding of the

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opportunity to review Mr. Johnson's psychiatric records and obtain a professional examination and opinion. (2RT 297.) Of course, counsel is not a trained mental health professional, and his failure to raise the defendant's competency does not establish that the defendant was competent. (*Odle v. Woodford*, *supra*, 238 F.3d 1084 at p. 1088-1089.)

proceedings is not sufficient. "[A] proper competency determination under *Dusky* requires *both* a factual understanding and cognitive ability, *and* perceptions that are grounded in reality." (*People v. Mondragon* (Colo. Ct.App. 2009) 217 P.3d 936, 941 (italics in original), citing *Lafferty v. Cook*, *supra*, 949 F.2d at pp. 1551-1555.)

Thus, in finding substantial evidence to raise a reasonable or bona fide doubt regarding a defendant's competency to stand trial, courts have consistently relied on the defendant's irrational or unusual behavior, including outbursts and disturbances, inside and outside of the courtroom (*Drope*, *supra*, 420 U.S. at pp. 179-180; *Torres v. Prunty* (9th Cir. 2000) 223 F.3d 1103, 1109 [continually disrupting proceedings – prompting defendant's removal – and threatening to assault attorney]; *United States v. Williams* (10th Cir. 1997) 113 F.3d 1155, 1160 ["outbursts, interruptions of the attorneys and defiance of the [court's] instructions"]; *Chavez v. United States* (9th Cir. 1981) 656 F.2d 512, 519 [emotional outburst resulting in defendant's forcible removal].)

For example, in *Torres v. Prunty*, *supra*, 223 F.3d 1103, the Ninth Circuit held that the California Court of Appeal's findings that there was no reasonable or bona fide doubt justifying a competency hearing were "'unreasonable'" under 28 U.S.C. section 2254, subdivision (d)(2), where "Torres's paranoid delusion that he was the victim of a medical conspiracy had expanded to include his counsel and the court raised a bona fide doubt that he was no longer able to '"consult with his lawyer with a reasonable degree of rational understanding."'" (223 F.3d at p. 1110, citing *Dusky*, *supra*, 362 U.S. at p. 402; see also *United States v. Pfeifer* (M.D. Ala. 2015) 121 F.Supp.3d 1255, 1257 [finding of continuing mental incompetency where defendant's thinking dominated by persecutory and paranoid

delusions, including that his criminal case is the product of an ongoing government cover-up]; *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 569 [defendant's uncontrolled behavior in the courtroom and signs of irrationality and paranoia when it came to his own defense should have raised a doubt as to his competency; instead, he was removed from the courtroom].)

Similarly here, Mr. Johnson's persecutory and delusional thinking, which fixated on a perceived conspiracy between his counsel, the prosecutor and the court, should have raised a bona fide doubt as to his mental competency to stand trial.[4] Believing that he was being "railroaded" to a death sentence, Mr. Johnson could not rationally assist his counsel or aid in his own defense; indeed, his every action was irrational and self-defeating. (See *Torres*, *supra*, 223 F.3d at p. 1109 [explaining that "defendant's self-defeating behavior in the courtroom" is a factor that "suggest[s] that an inquiry into competence [is] required"].)

It is difficult to conceive of more self-defeating behavior than Mr. Johnson's irrational, sometimes violent outbursts, which – instead of a mandated court-ordered competency evaluation – led to escalating punitive and exclusionary measures. The denial of Mr. Johnson's right to be present at his capital trial and his right to testify compound the constitutional concerns in this case.

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[4] The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) (1994), includes "Delusional Disorder" with "Schizophrenic and Other Psychotic Disorders." (DSM-IV, 297.1 (1994) pp. 296-301.) A subtype of this diagnosis is "Persecutory Type" when the central theme of the delusion involves, inter alia, the person's belief that he or she is being conspired against. Differential diagnoses included Mood Disorders with Psychotic Features and Psychotic Disorder Not Otherwise specified.

1. Denial of the Right to Be Present

A defendant has a right under the Sixth Amendment to be present throughout his criminal trial. (*Lewis v. United States* (1892) 146 U.S. 370, 373.) The United States Supreme Court demands that the trial court satisfy certain strict requirements before expelling a noncapital defendant from any part of his trial. (AOB 56; citing *Illinois v. Allen* (1970) 397 U.S. 337, 343, 347.) Nonetheless, if a defendant's behavior is voluntarily disruptive, disorderly and disrespectful, the trial court ordinarily has the power to have the defendant removed from the courtroom and to continue the trial in his or her absence. (*Id.* at p. 346; § 1043, subd. (b)(1).)

The premise of this power is that a defendant who knowingly and voluntarily chooses to so misbehave waives his right to be present at trial. (*United States v. Hemsi* (2nd Cir. 1990) 901 F.2d 293, 296.) However, when the defendant's misconduct is the result of a mental disease or defect, he or she cannot be said to have made an intelligent or voluntary choice. (Cf. *Pate*, *supra*, 383 U.S. at p. 384.) Thus, in *Torres v. Prunty*, *supra*, 223 F.3d 1103, the Ninth Circuit held that the defendant was entitled to a competency hearing where he requested that his attorney be fired, threatened to assault his attorney, insisted on being shackled, and continually disrupted the trial until he was removed. (*Id*. at pp. 1109-1110.) Similarly, in *Maxwell v. Roe*, *supra*, 606 F.3d at p. 569, the court held that the defendant's uncontrolled behavior in the courtroom and signs of irrationality and paranoia when it came to his own defense should have raised a doubt about his mental competency. (*Id*. at p. 569.)

Although paranoia does not, as a matter of law, compel a

competency inquiry,[5] here, Mr. Johnson's torturous, paranoid delusions rendered him incapable – not merely unwilling – of having a rational understanding of the proceedings or assisting his counsel in a rational manner. As such, it was incumbent upon the trial court to conduct a competency inquiry before resorting to penalties that denied Mr. Johnson fundamental constitutional rights and impaired his ability to have a fair trial.

2. Denial of the Right to Testify

As noted in Mr. Johnson's opening brief, a defendant has a fundamental right to testify in his own defense under the due process clauses of the federal and state Constitutions. (AOB 92, citing *Rock v. Arkansas* (1987) 483 U.S. 44, 51-53.) That same right exists during the penalty phase of a capital trial. (AOB 92, citing *People v. Nakahara* (2003) 30 Cal.4th 705, 717.) Although the decision to place a defendant on the stand is ordinarily made by counsel, a defendant who insists on testifying may not be deprived of doing so even though counsel objects. (*People v. Robles* (1970) 2 Cal.3d 205, 214-215.) While the defendant thus has a right to testify over defense counsel's objection, the defendant must timely and adequately assert that right. (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231-1232 [defendant never clearly asserted his right to testify where his comments during the trial made no reference to desire to take the stand].) A defendant may forfeit his right to testify on account of his disruptive behavior. (RB 119, citing *People v. Hayes*, *supra*, 229 Cal.App.3d at pp. 1233-1234.)

Mr. Johnson testified at his first trial, which resulted in a deadlocked jury, and demanded to testify at his retrial. (23RT 2-1296-1297.) The trial

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[5] See *People v. Welch*, *supra*, 20 Cal.4th at p. 742.

court told Mr. Johnson that he would be allowed to testify to the jury – through a video feed from his holding cell – provided that he followed the rules. If he did not, the court would cut off the audio and video transmission. (AOB 94; 23RT 2-1298.) However, instead of activating the audio/video connection and unbeknownst to Mr. Johnson, the court agreed with Mr. Hauser and the prosecutor to conduct a test run outside the presence of the jury. (23RT 2-1302-1303; 1361-1362 [court directed bailiffs to tell the defendant that "he's about to be on the hookup"].) Mr. Johnson proceeded to testify – which, in Mr. Johnson's mind, meant informing the jury, among other things, of his belief that Mr. Hauser and the prosecutor were working together in an illegal, "concerted effort to intentionally dump [him] in that courtroom." (23RT 2-1365-1366.) At which point, the court "surprised" Mr. Johnson by telling him the jury was not present and that he would not be allowed to testify. (23RT 2-1366.)

In his opening brief, Mr. Johnson complained about the deception – especially ill-advised in this case where it would tend to validate Mr. Johnson's paranoid belief that the court, defense counsel and the prosecutor were colluding against him. They clearly were in this instance. (AOB 51-53.) The question posed here, however, is whether a defendant can be denied his or her constitutional right to testify when the conduct found to forfeit that right is the product of the defendant's delusions and distorted perceptions of reality – i.e., a severe mental disorder. The answer, under high court precedents, is no. (*Dusky*, *supra*, 362 U.S. at p. 402; *Pate*, *supra*, 383 U.S. at p. 385.) Mr. Johnson's mental instability, psychiatric history and uncontrollable paranoid delusions focused on his counsel, the court and the prosecutor, raised a sufficient doubt about his competency to stand trial, at which point the court should have suspend the proceedings and had him

professionally evaluated. The court's failure to do so constitutes fundamental constitutional error.

D. Allowing a Demonstrably Incompetent Defendant to Stand Trial in a Capital Case Requires Automatic Reversal of His Convictions and the Judgment of Death

The high court has treated an error in failing to hold a competency hearing as akin to the types of errors the court has deemed "structural,' requiring automatic reversal. (*Pate*, *supra*, 383 U.S. at pp. 386-387.) This Court has treated the failure to comply with section 1368 as also requiring complete reversal and retrial of the charges "because the statutory scheme implements the due process guarantee not to be tried while mentally incompetent." (*People v. Lightsey* (2012) 54 Cal.4th 668, 705, and cases cited therein.)

In addressing the applicable prejudice standard, the high court emphasized the difficulty of retrospectively determining an accused's competency to stand trial. (*Pate*, *supra*, 383 U.S. at pp. 386-387; *Drope*, *supra*, 420 U.S. at p. 183 ["Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances [citations omitted], we cannot conclude that such a procedure would be adequate here"].)

At some point, however, this language was parsed to treat the high court's rejection of the remedy of retrospective determination of competency as a practical criticism rather than a constitutional prohibition. (*People v. Lightsey*, *supra*, 54 Cal.4th at p. 705 (*Lightsey*).) *Lightsey* cited *Odle v. Woodson*, *supra*, 238 F.3d at p. 1089, for the proposition that a state can cure its failure to hold a competency hearing by conducting one retrospectively – provided, of course, the record contains sufficient information upon which to base a reasonable psychiatric judgment.

(*Lightsey*, *supra*, 54 Cal.4th at p. 706.) This Court also relied on an appellate court decision, *People v. Ary* (2004) 118 Cal.App.4th 1016, 1030 (*Ary*), the first state case to recognize the limited remand procedure for failure to hold a competency hearing. (*Lightsey*, *supra*, 54 Cal.4th at p. 706.)

In *Pate*, the high court noted that holding a hearing six years after the original proceedings aggravates the difficulties of a retrospective determination of competency. (*Pate supra*, 383 U.S. at p. 387.) In *Ary*, a noncapital case, approximately three years had elapsed between the appellate decision and the trial. (*Ary*, *supra*, 118 Cal.App.4th at p. 1016.)

In *People v. Robinson* (2007) 151 Cal.App.4th 606, 617, also cited with approval in *Lightsey*, the court stressed that a retrospective competency hearing was feasible where less than two years had elapsed between the original defective hearing and the court's proposed limited remand.

Although approximately 18 years had passed between the defendant's trial and the issuance of the opinion in *Lightsey*, this Court saw no reason not to "at least attempt to have the trial court resolve the matter [of competency] on remand." (*Lightsey, supra*, 54 Cal.4th at p. 709, citation omitted.) Of course, in *Lightsey*, there had actually been competency proceedings, defective for lack of appointment of counsel, so this Court could presume that contemporaneous evidence regarding the defendant's competency to stand trial existed. (*Ibid*.) Accordingly, the case was remanded for a preliminary determination whether a retrospective competency determination was feasible – i..e., "sufficient evidence to reliably determine the defendant's mental competence when tried earlier." (*Id*. at p. 710.)

Factors to be considered in assessing the feasibility of such a hearing

include: (1) the passage of time; (2) available contemporaneous medical evidence, including medical records and prior competency determinations; (3) any statements by the defendant on the trial record; and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with the defendant before and during trial. (*Lightsey*, *supra*, 54 Cal.4th at p. 710, citing *People v. Ary* (2011) 51 Cal.4th 510, 520, fn. 3 [on post-remand review].)

Further, this Court stressed that the focus of the feasibility determination must be whether the retrospective hearing would provide the defendant a "*fair opportunity* to prove incompetence, not merely whether some evidence exists by which the trier of fact might reach a decision on the subject." (*Lightsey*, *supra*, 54 Cal.4th at p. 710.) Acknowledging the inherent difficulties of looking back to a past mental state, this Court placed the burden of persuasion on the prosecution to convince the trial court by a preponderance of the evidence that a competency hearing is feasible in the case. (*Id*. at pp. 710-711.) If the trial court determines that a retrospective competency hearing is not feasible or the defendant is found incompetent, then the only permissible remedy remains reversal of the judgment. (*Id*. at p. 709.)

This is not an appropriate case for a retrospective competency evaluation. First, unlike the approximately five year look-back in *People v. Ary*, *supra*, 51 Cal.4th at p. 515, such a hearing in this case would take place, at a minimum, 20 years after Mr. Johnson's trial. Second, unlike the situations in *Lightsey* and *Robinson*, where one or more competency hearings were held at the time of trial, the defendant was evaluated, and evidence from that time remained available, no competency hearing was held and no contemporaneous competency assessments were obtained in

Mr. Johnson's case. (Cf. *Lightsey*, *supra*, 54 Cal.4th at p. 690 [two competency hearings held]; *Robinson*, *supra*, 151 Cal.App.4th at pp. 610-611 [two competency hearings and two psychiatric reports on competency].)

Another difficulty in conducting a nunc pro tunc competency hearing in Mr. Johnson's case is that it would be inappropriate to remand it to the judge who presided at the trial based on his problematic treatment of Mr. Johnson. (See Code Civ. Proc., § 170.1, subd. (c).)[6]

More to the point, where a trial judge, by his or her comments or actions demonstrates bias against a defendant, on remand, the case must be heard before a different judge. (*People v. Enriquez* (2008) 160 Cal.App.4th 230, 244; cf. *United Farm Worker*s *of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104 ["if a reasonable man would entertain doubts concerning the judge's impartiality, disqualification is mandated"].)

In his opening brief, Mr. Johnson argued that his trial judge's actions – specifically excluding Mr. Johnson from the courtroom, refusing to consider his motions for the appointment of another attorney, and misleading Mr. Johnson about his testimony – demonstrated actual bias against him. (AOB 23-55.) The trial judge took these actions, moreover, despite strong indications that Mr. Johnson was mentally ill, and the probability that the punitive and collusive actions taken would only validate

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[6] Code of Civil Procedure section 170.1, subdivision (c), provides:

> At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.

Mr. Johnson's delusional, incapacitating thought processes.

Remanding to the judge who presided over Mr. Johnson's trial is also not necessary in this case because there is no reason to believe that he observed any behavior, relevant to the competency inquiry, that is outside the existing appellate record. Accordingly here, if remanding Mr. Johnson's case for a limited hearing is the remedy favored by this Court, both the appearance and the interests of justice weigh heavily in favor of remanding this case to a different judge,.

In short, because there was substantial evidence that Mr. Johnson was convicted and sentenced to death while he was legally incompetent to stand trial, the judgment in this case must be reversed.

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CONCLUSION

For all the reasons stated herein and in the opening brief, the judgment must be reversed in its entirety.

DATED: March 8, 2018

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

/s/ Nina Wilder
NINA WILDER
Supervising Deputy State Public Defender
Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Nina Wilder, am the Supervising Deputy State Public Defender assigned to represent appellant, Cedric Jerome Johnson, in this automatic appeal. I directed a member of our staff to conduct a word count of this supplemental reply brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 4996 words in length, excluding the tables and this certificate.

Dated: March 8, 2018

/s/ Nina Wilder
____
Nina Wilder

DECLARATION OF SERVICE BY MAIL

People v. Cedric Jerome Johnson Supreme Court No. S075727

I, the undersigned, declare as follows:

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Cedric Jerome Johnson, # K-61104
CSP-San Quentin
INF-39
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Hon. John J. Cheroske
Los Angeles County Superior Court
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Rm. 403
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Compton, CA 90220

Steven K. Hauser
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Camarillo, CA 93011

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on March 9, 2018, at Oakland, California.

/s/Tamara Reus
TAMARA REUS

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 3/14/2018 by Regine Ho, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Joseph Chabot
Signature

Chabot, Joseph (104810)
Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm