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 REPLY 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

In his opening brief on the merits, appellant argues the trial court erred in failing to suspend proceedings under Penal Code section 1368 after his attorney declared a doubt as to his competence, violating his constitutional right to due process. In response, the attorney general argues there was no error because there was no substantial evidence of appellant's incompetence. Appellant's statements, including "You are the one that murdered a series of persons in a tunnel" respondent says "were not far removed from

what actually occurred." Further, counsel's assertions were insufficient to require another competency hearing. (Respondent's Answer Brief On The Merits ("RB" at pp. 6-7, 15, 21.)

This Court should reject respondent's contentions. Appellant's constitutional right to due process, a fair trial, was violated by the trial court's failure to suspend proceedings and protect against the trial of an incompetent defendant. Appellant had no rational comprehension of the evidence against him, could not speak intelligibly to counsel, and was unable to assist in his defense. The judgment should be reversed.

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

Respondent asserts that there was no abuse of discretion by the trial court in ordering the trial to continue because there was no substantial change in circumstances or new evidence to cast doubt on a prior court's earlier finding of competency. Respondent says that counsel's expressed doubt on appellant's competency was insufficient to require a second competency hearing, comparing this case to *People v. Lawley* (2002) 27 Cal. 4th 102 where the Court found that a substantial change of circumstances did not exist for a second competency hearing. (RB, at pp. 15-16.) Appellant disagrees.

The applicable test is as follows:

> "When a competency hearing has already been held and the defendant has been found competent to stand trial ... a trial court need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change of circumstances or with 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.)

"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 [sic] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency." (*Moore v. United States* (9th Cir. 1992) 464 F.2d 663, 666.)

Contrary to respondent's contention, "[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.) "[D]efense counsel will often have the best-informed view of the defendant's ability to participate in his defense" (*Medina v. California* (1992) 505 U.S. 437, 450 [112 S. Ct. 2572 , 120 L. Ed. 2d 353.) "[J]udges must depend to some extent on counsel to bring issues into focus." (*Drope v. Missouri* (1975) 420 U.S. 162, 176-77 [95 S. Ct. 896, 43 L. Ed. 2d 103].)

This case is not like *People v. Lawley, supra,* 27 Cal. 4th 102. In that case, this Court found no error in the trial court not conducting a second competency hearing. According to this Court, the defendant did not present any new evidence or change in circumstances casting doubt on the initial finding of competency. Instead, "[o]n examination, however, each such instance [of alleged incompetence] appears either to manifest the same arguably delusional beliefs reported by Dr. Berg and Dr. Trompetter in their competency evaluations or to reflect the ineptitude frequently exhibited by self-represented defendants." (*Id.* at pp. 136-38.) In *People v. Lawley, supra,* the defendant appeared articulate. One doctor found the content of the defendant's thinking "contained nothing bizarre or grossly illogical; his intelligence was above average and he could concentrate and attend without difficulty; and he currently showed none of the symptoms of schizophrenia." (*Id.* at p. 135.) As to the prosecutor's request that he be examined for signs of being under the influence of controlled substances, this Court found that contrary

to the defendant's argument, such request was not the equivalent of a declaration of doubt as to defendant's competency within the meaning of section 1367. (*Id.* at p. 139.)

By contrast, here, appellant's communication with counsel the day before counsel expressed a doubt on his competence was bizarre and illogical despite respondent's claims it was not. Appellant wrote: "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.) On the second page was: "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 referred to the videos as assimilations and said that two police officers visited him in jail (which counsel said was not true). (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 – polysyllabic words that do not make sense. (2 RT 306.)

Respondent cites to *People v. Rodriguez* (2014) 58 Cal. 4th 587 and *People v. Blacksher* (2011) 52 Cal. 4th 769 in support of its argument that appellant demonstrated competence. (RB at p. 16.) Both cases are distinguishable. In *People v. Rodriguez*, *supra,* 58 Cal. 4th 587, the defendant had a demonstrated history of competent behavior observed by the trial court. "[N]ot only did the court have the opportunity to observe defendant during trial, it had the opportunity to observe her at many pretrial hearings at which she often spoke at great length." This Court found no error in the trial court failing to inquire into the defendant's mental state more than it did. The record contained no substantial evidence that she was incompetent to stand trial, i.e., that she was unable to consult with her attorney with a reasonable degree of understanding or lacked a rational and factual understanding of the proceedings. This Court found that the defendant's many lengthy statements before the court, including during the *Marsden* hearing held a few days before trial, showed she was articulate, understood the charges against her, and was able to assist counsel. (*Id.* at pp. 624-25.) In *People v. Blacksher*, *supra,* 52 Cal. 4th

769, the defendant was found to be able to formulate a defense to the charges and discuss his legal situation coherently. (*Id.*, at p. 798.)

Here, however, although he could recite the charges, what appellant wrote to counsel the day before made no sense and she could not understand it either. (2 RT 305.) None of it was even close to formulating a defense to the charges, discussing his legal situation coherently, or identifying and understanding the evidence against him. Further, the trial court was not the court making the initial competency finding the year before. At the time counsel declared a doubt on appellant's competency, the trial was just starting. The trial court lacked a history of court proceedings where it could have watched and listened to appellant communicate. (2 RT C1-C6; 3 RT 301-02.)

In support of its position, respondent claims that appellant's reliance on *People v. Murdoch* (2011) 194 Cal. App. 4th 230 is not apt because in that case the defendant's behavior was more extreme. Also, appellant's behavior was not as bad as when he was declared incompetent to stand trial back in 2012. (RB at p. 18, 20.) Appellant disagrees. In *People v. Murdoch*, *supra,* 194 Cal. App. 4th 230, the defendant was known to be mentally ill and reports informed the court that the defendant had stopped taking his prescribed medication, warning 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.) Similarly, here, the medical reports were consistent in reflecting the doctors' opinions that appellant had to be on his medication in order to retain 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 already stopped taking his medication and admitted he did not want to take it. (2 RT 308-09, 311.) His behavior, making nonsensical and delusional statements, reflected the same symptoms of his mental illness precluding a finding of competency, exactly what doctors warned would happen when he did not take his medication. (2 RT C3, 306-07, 311; 2 CT 204; Appellant's Opening Brief

On The Merits ("AOB") at p. 21.) On this point, respondent tries to compare appellant's responses back in 2013 as shown in one doctor's report with the statements he made at trial, arguing that back then, he used the word "conflictionary" and was still found to be competent. (RB at p. 20.) Respondent fails to cite the rest of what appellant said as set forth in that report when asked about the evidence and charges. Appellant was clear in identifying the specific evidence used by the prosecution. According to the report, appellant "identified the surveillance video, the knife, fingerprints and witnesses as possible evidence against him." (2 CT 207.) This response is vastly different than his references to "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.)

Respondent additionally asserts that the doctor reports from 2013 "did not necessarily condition Rodas's mental competence on his use of medication." (RB at p. 19.) Further, there was nothing from 2014 discussing the impact of his failure to take his medication. (RB at p. 19.) Contrary to what respondent has asserted, the medical reports were clear. Appellant had to be on medication to retain his mental 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.)

The lack of a medical report from 2014 is not determinative. The existing reports of 2013 stated the manifestations of appellant's mental illness stemming back to the 1980's. There was an undisputed decades long history of the same mental illness and symptoms. 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.)

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. Substantial evidence was already at hand. Another medical report was unnecessary to raise a bona fide doubt on appellant's competence. (AOB at pp. 19-20.)

Respondent argues that appellant's competency was shown by his appropriate responses to the trial court's questions, that this showed he understood the proceedings and was capable of assisting in his defense. (RB at p. 16.) Yet, uncontradicted evidence of irrational behavior cannot be ignored. In *Pate v. Robinson* (1966) 383 U.S. 375 [86 S. Ct. 836, 15 L. Ed. 2d 815] the United States Supreme Court stated:

"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.)

So, despite appellant's ability to recite the charges, if appellant's trial counsel could not understand what he was saying as she so indicated to the trial court (2 RT 308), and he was not capable of communicating comprehensibly with her or assisting in his defense, these additional circumstances are not only crucial but required to be considered by the court in deciding whether to hold a hearing on the issue. (*People v. Rogers* (2006) 39 Cal.4th 826, 846-47 [sufficient ability of defendant 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 are required for a finding of competency]; *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.)

Respondent also asserts that the doctor reports directing that appellant stay on medication to avoid mental decompensation was not a recent development anyway because he had been off the medication for a year and no one raised a concern. (RB at p. 17.) Respondent is incorrect. When appellant was found competent to stand trial, he was taking his medication. The doctors in the reports set forth the requirement that appellant remain on his medication to prevent mental decompensation. (2 CT 209, 202, 205.) The substantial change in circumstances was his noncompliance with this requirement and manifestations of his mental illness since that prior competency finding. As to respondent's claim that no one raised a concern between May 2013 and March 2014, respondent fails to cite to the record to support its claim. (Supp. CT 26-31.) (Contrast *People v. Weaver* (2001) 26 Cal.4th 876, 954 [no substantial change in circumstances where defendant presented no new evidence to support a claim of incompetence; short observation by doctor in courtroom without seeing defendant converse with his counsel or responsively answer questions did not suffice]; *People v. Marshall* (1997) 15 Cal. 4th 1, 32-34 [where the two experts' opinions were "tenuous" on defendant's competency to

stand trial and undermined by testimony of witnesses, and jury had decided defendant was competent to stand trial, defendant's subsequent bizarre statements were insufficient to show a substantial change in circumstances to require a second competency hearing].) (RB at pp. 17, 21.)

Respondent claims that a case appellant relies on, *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561 (AOB at p. 19), is not apt because in that case the defendant's behavior was more extreme. Respondent says appellant did not engage in disruptive behavior or try and kill himself. Also, after the March 2014 hearing, defense counsel never again expressed any concern about appellant's ability to communicate with her. (RB at p. 22.) Appellant disagrees. Respondent fails to acknowledge that the court in *Maxwell, supra*, 606 F.3d 561 found the defendant's condition had significantly deteriorated since the initial pretrial competency determination and that "[a]fter [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." (*Id.* at pp. 574-76.) A most similar situation exists here. The prior competency finding was the year before. At that time, appellant was compliant with the requirement of taking his medication. Appellant's condition had deteriorated considerably since that time. Although not trying to kill himself, he was making incomprehensible statements and showed no rational understanding of the evidence against him. (2 CT 202, 204, 205, 206-209; 2 RT 311, 352-55.) That counsel did not keep arguing to the trial court appellant's lack of mental competence after the trial court decided to continue with the trial in no way concedes the issue. In any respect, appellant's mental incompetence was evident from his testimony to the jury. (3 RT 652-55.)

Respondent also asserts that although appellant's behavior is to be assessed at the time of the trial court's ruling on competency, appellant understood his right to testify as evidenced during discussions about him testifying before the jury. (RB at p. 23.) Yet, even the trial court indicated that it was not a good idea for appellant to testify. Counsel stated: "and also, I have advised him I don't think it's a good thing to testify." (3 RT

651.) The trial court responded: "Oh, sure. I thought that was implicit through all of this. Thank you for making that exceptionally clear." (3 RT 651.)

As to what appellant did testify to, respondent claims that it only shows that he was talking in a confusing manner, but not that he was unable to rationally assist counsel with his defense or did not understand the proceeding. Also, he may have been more comfortable speaking in Spanish. (RB at p. 25.) Respondent is wrong. As set forth in the reporter's transcript, appellant made no sense and hindered his defense:

> "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" . . . 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 physical material copies in the fact of knowledge identified consistency, a prototype of the nature of the assimilated nature" . . . he was visited at "Wayside Honor Ranch" by two police officers, and that he "understand that their visiting is in file copy." (3 RT 652-55.)

There was no indication appellant felt ill at ease speaking in English and this was the reason his testimony reflected the "word salad" typical of his mental illness.

In sum, respondent's arguments should be rejected. 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 and evidence against him. The trial court erred in failing to suspend proceedings under Penal Code section 1368 and the trial was one of an incompetent defendant, violating appellant's constitutional right to due process. (*Pate, supra,* 383 U.S. 375, 377-78, 385 ["the conviction of an accused person while he is legally incompetent violates due process,. . .The court's failure to make [the] inquiry thus deprived [appellant] of his constitutional right to a fair trial."]; *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; *People v. Lightsey* (2012) 54 Cal.4th 668, 703-05; *Drope, supra,* 420 U.S. at p. 183; *Pate, supra,* 383 U.S. at pp. 385-87.)

CONCLUSION

Based on the foregoing, and those in his opening brief, appellant requests this Court to reverse the judgment.

DATED: 6/13, 2017

Respectfully Submitted,

Joanna McKim
California Bar No. 144315
Attorney for Appellant Rodas

Certification Regarding Word Count

The word count in appellant's reply brief on the merits is 3520 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 6/13/17 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 10/13, 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 6/13, 2017 in San Diego, California.

Joanna McKim