No. S075727

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CEDRIC JEROME JOHNSON,<br><br>Defendant and Appellant. | Los Angeles County<br>Sup. Ct. No. TA037977-01 |

**APPELLANT'S SUPPLEMENTAL REPLY BRIEF**

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

HONORABLE JOHN J. CHEROSKE, JUDGE

MARY K. MCCOMB
State Public Defender

NINA WILDER
Supervising Deputy State Public Defender
State Bar No. 100474

1111 Broadway, 10th Floor
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712
E-mail: nina.wilder@ospd.ca.gov

Attorneys for Appellant

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**APPELLANT'S SUPPLEMENTAL REPLY BRIEF**

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**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**

In his opening brief, appellant argued that he was denied his state and federal constitutional rights to due process and a fair trial on the ground that the trial court was not impartial, in the sense that it prejudged appellant and therefore failed to inquire into the validity of his various objections and requests. In his supplemental brief, appellant challenged the trial court's same lack of impartiality on an alternative ground, namely, its failure to inquire into appellant's competency to stand trial despite substantial

evidence that he could not rationally participate in the preparation or presentation of his defense. Indeed, it was respondent's recitation of appellant's increasingly and patently delusional beliefs regarding the courtroom conspiracy against him that compelled the argument raised in his supplemental brief.

Appellant's alternative characterization of the trial court's errors does not in any way refute the arguments raised in his opening brief, but rather raises an additional constitutional violation, namely, appellant's due process right not to be tried and sentenced to death while unable to rationally assist in his own defense at any phase of his trial.[1] In short, the arguments in the supplemental brief and herein are not intended as a waiver or concession of any other arguments made by appellant.

### B. Appellant's Inability to Assist His Counsel in a Rational Manner or Rationally Participate in His Own Trial Raised a Reasonable Bona Fide Doubt as to His Competency

In his supplemental opening brief, appellant adopted respondent's detailed recounting of appellant's irrational and delusional beliefs – initially involving the court and prosecutor, but, of key importance here, ultimately focused on his trial counsel. This history was presented for context and

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[1] Effective assistance of appellate counsel may require, as in this case, the presentation of alternative interpretations of the same proceedings under different constitutional or statutory standards. For example, in *People v. Halvorsen* (2007) 42 Cal.4th 379, appellant argued both that the trial court committed reversible error in failing to declare a doubt as to his competency at guilt and penalty (*id*. at pp. 401-407), or wrongly denied appellant's right under *Faretta v. California* (1975) 422 U.S. 806 to self-representation (*id*. at pp. 431-434). This Court dealt with the two arguments independently, did not treat either as a concession of the other, and in the end reversed for *Faretta* error. (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 434.)

with reference to the high court's recognition that the persistence of symptoms of incompetence support their genuineness. (See *Cooper v. Oklahoma* (1996) 517 U.S. 348, 365.) Moreover, inasmuch as respondent detailed appellant's conduct over the course of his case to support the trial court's decisions stripping appellant of his constitutional rights at the retrial, that history is equally pertinent to the instant claim that the trial court should have declared a doubt as to appellant's competency to stand trial.

As for respondent's question – when should a doubt have been declared – the answer is, no later than the date the trial court barred appellant from the courtroom for the duration of his retrial. (SRB 7; 17RT 2-25.)

That earlier in the proceedings, despite expressed delusional thinking and mistrust of counsel (in every status), appellant was capable of participating more fully in his defense is significant, but not for the reasons respondent has advanced. (SRB 8.) Specifically, appellant complained that defense counsel had lied to him about the law (2RT 400), and that his counsel either had no trial strategy, or, if he had one, had not informed appellant of his strategy (2RT 415-416). Appellant then queried the court, in relation to its refusal to remove his counsel, "What obvious sinister diabolical act [*sic*] going on? There is nothing ethical. And the record should reflect that." (2RT 418-419.)

Nevertheless, appellant was able to testify effectively at his first trial, resulting in a mistrial. (SRB 8, citing 12RT 2784, 2862; 18CT 5333.) However, a few months later, at the call of the retrial, appellant's dissatisfaction with his counsel had escalated from lack of strategy and non-communication to a florid conspiracy theory, leading to the altercation with his counsel and appellant's outburst to prospective jurors accusing his

counsel of "intentionally dumping" him at trial and other illegalities. (17RT 2-23.) At that point, appellant was banished from the courtroom, and had no further participation in his trial except for his aborted attempt to testify, and to again inform the jury directly that counsel and the court were colluding to "dump" his case. (23RT 1364-1367.)

Far from showing, as respondent contends, that appellant was acting on a rational understanding of the evidence to disrupt the proceedings (SRB 14),[2] the progression of appellant's delusional disorder simply underscores the complex relationship between mental illness and incompetence to stand trial. (See *People v. Romero* (2008) 44 Cal.4th 386, 420 [distinguishing doubt as to competency from doubt as to the existence of a mental disorder or disability].)

At common law, and until 1974 in California, the competency standard was framed in terms of insanity. (See *Godinez v. Moran* (1993) 509 U.S. 389, 406; Pen. Code, § 1367 (enacted 1872 [amended by Stats. 1974, c. 1511, p. 3316, § 2]) [providing that no person shall be "punished for a public offense, while he is insane"].) In *Dusky v. United States* (1960) 362 U.S. 402, the United States Supreme Court re-focused the competency inquiry on the defendant's rational participation in and understanding of the proceedings against him. (*Ibid*. [a defendant is incompetent if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as

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[2] Contrary to respondent's suggestion that appellant's conduct was explained by the strength of the prosecution's case (SRB 14), the evidence of appellant's guilt was in fact weak – so weak that the first jury hung and the second jury deliberated for four days after less than five days of evidence. (See, e.g., AOB 236-240.)

factual understanding of the proceedings against him"]; *People v. Lightsey* (2012) 54 Cal.4th 668, 691 [noting that "the applicable state statutes essentially parallel the state and federal constitutional directives"].) Or, as the high court more recently emphasized,

> "[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so."

(*Cooper v. Oklahoma*, *supra*, 517 U.S. at p. 354 [citation omitted].)

The focus of the competency inquiry is therefore a functional one. (*Watts v. Singletary* (11th Cir. 1996) 87 F.3d 1282, 1286.) The inquiry focuses on the criminal defendant's capacity to contribute sufficiently to his own defense to allow a fair trial and, ultimately, to protect both the defendant and society against erroneous convictions. (*Ibid.*, citing ABA Criminal Justice Mental Health Standards (2d ed. 1986) § 7-4.1 (c).)

Here, there was substantial, observable evidence that appellant had no capacity to contribute rationally – or at all – to his own defense or to the exercise of the most rudimentary trial rights for two reasons: first, because he believed that his own counsel, the court and the prosecutor were conspiring against him; and second, because the court deprived him of those rudimentary rights without any inquiry into his competency.

Evidence of incompetence may emanate from observations by defense counsel or the trial court of a defendant's demeanor or irrational behavior. (See *People v Rogers* (2006) 39 Cal.4th 826, 847.) Defense counsel's opinion is significant because – and only to the extent that – he or she interacts with the defendant on a daily basis. (*Id*. at p. 848, citing *Odle*

*v. Woodford* (9th Cir. 2000) 238 F.3d 1084, 1088-1089.) At the retrial, appellant's counsel had the same interactions with appellant as the trial court, and everyone else involved in the case – and in all those interactions appellant was paranoid and irrational to an incapacitating degree.

Faced with appellant's extreme irrationality, which both rendered him incapable of participating in his defense and met the criteria for well-recognized psychiatric disorders, the trial court had no discretion except to suspend the criminal proceedings and conduct a competency inquiry. (*People v. Mickel* (2016) 2 Cal.5th 181, 195 [where substantial evidence raises a doubt as to competency, the defendant is entitled to and the court is bound to hold a competency hearing].)

While the trial court may be in the best position to appraise the functional dimension of competency, neither the trial court nor defense counsel has the expertise required to make a diagnostic assessment. (Cf. *Odle v. Woodford*, *supra*, 238 F.3d at pp. 1088-1089 [observing that defense counsel are not trained mental health professionals].) Such assessments are typically left to psychiatrists and other qualified mental health professionals. Even so, the high court acknowledged the inexactness of such psychiatric diagnoses,

> Our cases recognize that "[t]he subtleties and nuances of psychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered thorough the experience of the diagnostician."

(*Medina v. California* (1992) 505 U.S. 437, 451, quoting *Addington v. Texas* (1979) 441 U.S. 418, 430.)

Insofar as the trial court's resort to exclusively punitive measures reflected a predetermination that appellant's irrationality and lack of cooperation with his counsel were willful, the court had neither the training

nor the expertise needed to make this determination. The only determination the court was actually in the "best position" to make was whether there was "sufficient triggering evidence" showing that appellant might be functionally incompetent due to a mental illness. There was, and the court ignored it.

Respondent remarks on appellant's reliance on Ninth Circuit cases, then contends that those particular cases, *Torres v. Prunty* (9th Cir. 2000) 223 F.3d 1103 (*Torres*) and *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561 (*Maxwell*), are factually distinguishable from this case. (SRB 15-17.) Respondent's contentions are misconceived. First, appellant relied on cases from a number of federal courts, including the Ninth Circuit, for their common recognition of the connection between the type of paranoid, delusional thinking appellant consistently exhibited and his impaired functioning during the legal proceedings. (See SAOB, 13-16; e.g., *Lafferty v. Cook* (10th Cir. 1991) 949 F.2d 1546, 1556 [defendant suffering from paranoid delusions not competent to make rational decisions about his defense]; *United States v. Pfeiffer* (M.D. Ala. 2015) 121 F.Supp.3d 1255, 1257 [persecutory and paranoid delusions prevented defendant from having a factual and rational understanding of the proceedings against him and assisting his attorney in his legal defense].)

Respondent seeks to distinguish *Torres* and *Maxwell* on the basis that these cases included additional facts not found in appellant's case. True. But then, every competency case will present a different constellation of facts and information. That being said, in each of the cited Ninth Circuit cases, the principal reasons for reversal were the same type of thought disturbance – paranoid delusion – and the same disruptive behavior and severely impaired communications with defense counsel that are found

throughout appellant's case.

By comparison, none of the cases cited by respondent have this critical combination of disordered thinking focused on the court proceedings, self-defeating, irrational behavior, and bizarre interactions with trial counsel. Respondent relies on a series of cases to make the single, uncontroversial point that a mental disorder does not in itself make a defendant incompetent. (SRB 14.) For example, respondent cites *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 403, for the proposition that the fact the defendant suffered from a psychotic mental illness did not compel a declaration of a doubt as to competency. Appellant agrees, since in addition to this diagnosis, the forensic psychiatrist who examined Halvorsen concluded that he was competent to testify despite his illness.[3] And then, unlike in appellant's retrial, Halvorsen testified extensively in his own defense. (*Id*. at pp. 393-396; see also *People v. Rogers*, *supra*, 39 Cal.4th at p. 849 [trial court had opportunity to observe the defendant's testimony and demeanor during trial; the defendant testified coherently and articulately and there was nothing in his testimony that raised a doubt as to whether he understood the proceedings or was able to cooperate with counsel].)

In *People v. Ramos* (2004) 34 Cal.4th 494, this Court rejected the defendant's argument that the trial court was required to conduct a

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[3] In *Halvorsen*, the trial court appointed a different psychiatrist, pursuant to Evidence Code section 730 to report to the court as to whether Halvorsen had the mental capacity to represent himself. (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 404.) That psychiatrist concluded that Halvorsen understood the nature and purpose of the proceedings and had the capacity to rationally and consistently cooperate with his attorney – i.e., he was competent. (*Ibid*.)

competency hearing before accepting a guilty plea to a capital crime where the evidence of incompetence comprised the defendant's psychiatric history, erratic and violent behavior while incarcerated and his desire to receive the death penalty. (*Id.* at pp. 508-509.) Since none of the defendant's prior violent acts or bizarre behavior affected his demeanor or behavior in court during the proceedings, this Court accepted the trial court's conclusion that it had "'no reason whatsoever to question [defendant's] competence to enter into [the guilty plea].'" (*Id*. at p. 509.) Here, in contrast, all of appellant's bizarre ideation and behavior, calling his competency into question, were on full display during the criminal proceedings.

*People v. Mai* (2013) 57 Cal.4th 986 (*Mai*), on which respondent also relies (SRB 7, 9, 10), is instructive and, on closer consideration, supportive of appellant's position. In *Mai*, the defendant argued on appeal both that his trial counsel were ineffective in failing to seek a competency hearing and that the trial court erred by failing, sua sponte, to declare a doubt as to competency. (*Mai*, *supra*, 57 Cal.4th at p. 1024.) Both claims were based on evidence that the defendant's mental and emotional condition had deteriorated significantly due to the "draconian" conditions of his confinement. (*Ibid*.) As a result, the defendant was experiencing various psychological symptoms, including overreactions to the smallest frustrations, outbursts and volatile behavior. (*Id.* at pp. 1025-1035.)

Although not a competency hearing, the trial court did conduct an Evidence Code section 402 hearing regarding the defendant's conditions of confinement and their effect on penalty phase preparation. (*Mai*, *supra*, 57 Cal.4th at p. 1027.) A clinical psychologist testified that the defendant had, for several reasons, become emotionally unstable and distrustful of the

defense team, but that he "'was certainly not out of touch with reality at all, and certainly not unable to discuss.'" (*Ibid*.) Indeed, the defendant was sufficiently in touch with reality and had sufficient insight that he requested to be shackled out of concern that he might not be able to control himself. (*Id.* at p. 1030.) Although a subsequent disruption did result in the defendant's temporary exclusion from the courtroom, he otherwise participated fully in the penalty phase, made reasoned tactical decisions and testified in his own behalf.[4] (*Id*. at pp. 1030, 1035.)

The contrasts between *Mai* and this case further demonstrate that appellant was entitled to, and the trial court was required to conduct, a competency evaluation. While Mai's instability and outbursts resulted from an external change in circumstances, namely his conditions of confinement, appellant's arose from internal, pathological, probably psychotic, distorted thinking processes. While Mai was aware of his emotional volatility, appellant had no insight whatsoever and was completely out of touch with reality in connection with his trial. Finally, while Mai was able to participate fully and rationally in his trial, appellant's behavior at the retrial was completely erratic and in complete conflict with his counsel's, or any rational, defense strategy. And, unlike any of the defendants in the cases cited by respondent, appellant's courtroom conduct was so manifestly irrational and uncontrollable that he was stripped of his most basic constitutional rights.

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[4] Although trial counsel disagreed with the defendant's decisions to dispense with mitigating evidence and to invite the jury to return a death verdict, this Court has repeatedly stated that such decisions are not, by themselves, sufficient evidence to trigger an incompetency inquiry. (*Mai*, *supra*, 57 Cal.4th at p. 1035, cases cited therein.)

As respondent has acknowledged, when the court is presented with substantial evidence – that is, sufficient triggering evidence – of present mental incompetence, the defendant is entitled to a competency hearing as a matter of right.[5] That test is unquestionably met here. The record, even in respondent's telling, demonstrates that appellant suffered from fixed, persistent and uncontrolled delusions regarding defense counsel, the prosecutor, the court and the entirety of the proceedings against him.

By the time of his retrial, as evident on the record, appellant no longer had the capacity to function rationally in relation to his counsel or in the presentation of his own defense. He was entitled to a competency evaluation as a matter of law, and certainly before, the trial court stripped him of the rudimentary constitutional rights which ensure a fair trial, and protect both the defendant and society against erroneous convictions and death judgments.

In short, because appellant was forced to trial and sentenced to death without any evaluation of his competency, despite substantial evidence that he was incapable of rationally assisting counsel or participating in his defense, the judgment in this case must be reversed.

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[5] Respondent's statement that the defendant must raise a "substantial doubt" is incorrect. (SRB 7.) The requirement in this context is "substantial evidence" which means only a reasonable or bona fide doubt. (*People v. Townsel* (2016) 63 Cal.4th 25, 36-37, citing *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 401.)

## CONCLUSION

For the reasons set forth above and in appellant's supplemental opening brief, the entire judgment must be reversed.

DATED: May 9, 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 3004 words in length, excluding the tables and this certificate.

Dated: May 9, 2018

/s/ Nina Wilder
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Nina Wilder

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Los Angeles County Superior Court
ATTN: Criminal Clerk's Office, 4th Floor, Rm. 403
200 W. Compton Blvd.
Compton, CA 90220

Steven K. Hauser
P.O. Box 331
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 May 9, 2018, at Oakland, California.

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