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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
FAUSTINO PEREZ,  
Defendant and Appellant.

A131866  
(San Francisco County  
Super. Ct. No. 201068)

In this appeal, defendant and appellant Faustino Perez seeks to reverse his judgment of conviction for attempted murder, assault with a firearm and possession of a firearm by a felon, on the grounds that the trial court should have declared a doubt as to his competency to stand trial, suspended trial proceedings and ordered a hearing to evaluate his competency, pursuant to Penal Code section 1368.<sup>1</sup> Having carefully

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise noted. Section 1368 provides: “If, 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, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. “(b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant’s mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally

reviewed the record on this point, we conclude defendant's contention is supported by substantial evidence, therefore the trial court abused its discretion by failing to proceed pursuant to section 1368. Accordingly, we reverse the judgment and remand the matter for further proceedings consistent with this opinion.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### ***A. Pretrial Proceedings***

In March 2006, the San Francisco District Attorney (DA) filed a felony complaint alleging, among other offenses, that defendant attempted to murder Jerry Jones in violation of section 187. Defendant appeared with counsel at a preliminary hearing in February 2007 and was held to answer on felony charges of attempted murder and being a felon in possession of a firearm, in violation of section 12021, subdivision (a)(1).

At a trial calendaring hearing held on April 1, 2008, defense counsel expressed his doubt as to defendant's competency. Pursuant to section 1368, the trial court ordered criminal proceedings suspended and appointed two psychologists, Dr. Jeffrey Gould and Dr. Jonathan French to examine defendant and report specific findings to the court as to the nature of defendant's mental disorder, if any, and defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of his defense in a rational manner. Subsequently, on May 28, 2008, the court ordered another competency examination pursuant to section 1369, to be conducted by Dr. Novak. All three doctors tendered reports to the court reflecting their examination and opinions regarding defendant's competence to stand trial.

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competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.

“(c) Except as provided in Section 1368.1, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined. If a jury has been impaneled and sworn to try the defendant, the jury shall be discharged only if it appears to the court that undue hardship to the jurors would result if the jury is retained on call. If the defendant is declared mentally incompetent, the jury shall be discharged.”

In his report, Dr. Gould stated defendant denied suffering from any psychiatric symptoms. Defendant was uncooperative throughout the 90 minute interview and often spoke loudly and angrily over Dr. Gould's attempts to question him; however, no other abnormal motor activity was noted. Defendant's thought process "was often circumferential, discussing many irrelevant topics before eventually reaching his conclusion. He was resistant to being interrupted or redirected to the relevant topic matter." Dr. Gould concluded that on the date of the interview defendant was not competent to stand trial.

Dr. French interviewed defendant at county jail and reviewed records provided by Jail Psychiatric Services (JPS). In his report, Dr. French stated that he discovered no formal inpatient psychiatric history on defendant, but records provided by JPS reflect that the defendant has received all manner of psychiatric diagnoses over the years, and that his clinical presentation has varied considerably. Dr. French opined defendant "appears to be an accomplished thespian, and a most unreliable historian." Dr. French noted that during the interview, defendant was "alert and well-orientated" but his manner "was so tense and calculated for effect that it was difficult to discern if bona fide psychiatric symptoms were present." Although given to "lengthy narratives which were intense and occasionally loud," defendant "was able to speak in a linear, goal-directed manner free of much tangential thinking or loosened associations." Regarding the nature of defendant's mental disorder Dr. French concluded defendant does not suffer from "a major Axis I condition" but probably suffers from "borderline personality disorder, with antisocial features." Dr. French came to the "somewhat ambivalent conclusion that [defendant] is currently competent to stand trial" and also noted "[h]e will continue to pose major management problems for any attorney representing him, but that is the character of the man."

The trial court appointed a third psychologist, Dr. Novak, to examine defendant. Dr. Novak prepared his report after interviewing defendant for almost two hours and reviewing police reports and the competency evaluations by Doctors Gould and French. In the course of the interview with Dr. Novak, defendant stated he had a history of

auditory hallucinations, the most recent occurred in 2004, in which “he would hear voices ‘like a spirit.’ ” The voices “would say to kill someone.” Novak stated that defendant was “articulate at times but would also become tangential, disorganized and agitated. . . . At times he was calm and cooperative but he would also become agitated, irritable and angry. At other times [he] would laugh and appear excited if not somewhat euphoric.” Dr. Novak concluded that defendant’s manic state is consistent with a diagnosis of bipolar disorder and that due to his manic state he “cannot concentrate and focus well enough to consistently assist his attorney.” According to Novak, the results of psychological testing for competency were “contradictory”—a passing score on the Georgia Court Competency test and a score on the “minimal/no impairment range of the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)” was evidence defendant understood the legal system and suggested his competence to stand trial, but on the other hand his mania-induced difficulty with the “reasoning and appreciation sections” of the MacCAT-CA test indicated lack of competency. Based on his evaluation of defendant and the records he reviewed, Dr. Novak opined defendant was currently not competent to stand trial.

The court held a competency hearing on July 7, 2008. At the outset of the hearing the court informed the parties that it agreed with Dr. Novak’s analysis that defendant’s difficulty in relating to his counsel “stems from his mental illness.” Defense counsel concurred. The court found defendant was not competent to stand trial. In addition, the court determined that defendant did not have the capacity to consent to medication, therefore the facility to which he was committed could involuntarily medicate defendant. On July 30, 2008, the trial court conducted a placement hearing and committed defendant to Napa State Hospital (Hospital).

The court received a report from the Hospital in December 2008 certifying defendant was competent to stand trial at that time; however, in January 2009, the Hospital moved to withdraw its certification and retain defendant for further treatment and observation. In July 2009, the Hospital submitted a competency assessment report (July 2009 report) stating that defendant is not yet competent to stand trial and he

required further treatment. The assessment report notes defendant reported experiencing symptoms indicating psychosis (for example, he has reportedly experienced paranoia and auditory hallucinations but posited the symptoms may not be genuine. The report concluded further assessment was required to evaluate the veracity of defendant's reported symptoms and recommended defendant was not yet competent to stand trial.

By October 2009, however, the Hospital recommended defendant be returned to court as competent to stand trial. In the October 2009 competency assessment report (October 2009 report), staff noted that in the last six months defendant has not demonstrated "labile affect" (disorganized and tangential thoughts). Furthermore, observations by staff and treatment team members in the past three months indicate no impairments in thought processes or memory, suggesting defendant has been "feigning lack of knowledge or inability to recall legal information." The assessment report also recommended defendant continue to take the medication he is currently prescribed upon return to custody.<sup>2</sup>

Coterminous with the resumption of criminal proceedings, on November 30, 2009, the court relieved attorney Whelan and appointed Spanish-speaking counsel Furst. Thereafter, on December 4, 2009, the trial court found defendant had been restored to competency and ordered criminal proceedings reinstated. In October 2010, defendant filed a Marsden motion, which the court denied. In November 2010, the DA filed a first amended information charging defendant with the attempted murder of Jerry Jones (§§ 664/187, subd. (a)) (count 1), assault with a semi-automatic firearm (§245, subd. (b)) (count 2), and possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 3). Counts 1 and 2 were accompanied by allegations defendant inflicted great bodily injury and intentionally used and discharged a firearm (§ 12022.7, subd. (a); § 12022.53, subd. (d); § 12022.5, subd. (a).) On December 10, defendant appeared before the trial court having filed a second Marsden motion. However, during the hearing defendant informed

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<sup>2</sup> The competency assessment reports of July and October 2009 are discussed in greater detail below, (see Discussion, *post*).

the court that he no longer wished to replace counsel. The court agreed to appoint attorney Andrews as co-counsel to assist primary counsel in screening of jurors.

***B. Trial Proceedings and Sentencing***

On the morning of December 20, 2010, jury selection was interrupted when defendant began yelling obscenities at the top of his lungs from the holding cell adjacent to the courtroom. The court excused the jury and discussed the defendant's outburst with counsel. Defendant's counsel expressed a doubt as to defendant's competency, stating defendant "is totally incapable of judging the issues in the case, . . . of assisting me in defending himself [and] [] seems not to understand the process of the court." The court stated it was "not going to bring these proceedings to a halt" until presented with sufficient evidence showing "a change in circumstances from his previous restoration," adding: "It appears to the court that the defendant has voluntarily, knowingly and intentionally engaged in such loud and violent yelling that has had the effect of bringing these proceedings to a halt. I can barely hear my own self speak with his yelling in the background right now. [¶] I have seen defendant being calm, friendly, moderate, apparently rational. I have seen him in that state with you. . . . [¶] I am not going to stop the trial based upon a claim of incompetence when it's perfectly clear to the court that the defendant has a bad temper and he has bad judgment and he doesn't realize the effect this is having perhaps on his trial. But nonetheless it's not the product of any mental defect or disease at this point, but it's sheerly out of a temper, anger and bad judgment on his part. [ ]That does not amount to inability to stand trial because of mental issues."

The court asked the bailiff to open the door so the court could talk to defendant and ordered defendant to stop yelling or he would be escorted upstairs and the trial would continue in his absence. The transcript of the proceedings indicates that defendant stopped yelling and listened to the court for about five to ten seconds, then started yelling again and the court ordered the bailiff to take defendant upstairs. At this point, defense counsel moved for a mistrial, noting that "some members of the jury venire were laughing out loud when defendant was yelling." The court denied the motion. Jury selection continued that afternoon in defendant's absence.

The next day, December 21, court reconvened with only counsel present. Defense counsel filed a motion requesting a judicial declaration of doubt as to defendant's competency. In the motion, counsel argued that that defendant's recent display of uncontrolled, belligerent behavior established a change in circumstances warranting a declaration of judicial doubt. The court took the motion under submission and issued an order authorizing defense counsel to retain a psychologist or psychiatrist to assess defendant's current competency. Defendant was brought into the courtroom from the holding cell. The court addressed defendant and asked "whether you are going to behave in court and not yell and scream like you were doing yesterday." Defendant replied, "No. No. Tell him that I will be calm. Tell him that I got angry yesterday because I told him not to keep falsifying papers. I have asked him for the police report." Thereafter, the jury entered the courtroom and voir dire continued.

After some time, the court called a recess and ordered defendant back to the holding cell. The court told the jury panel, "Do not be affected by this outburst by the defendant. Kindly leave the courtroom and come back in about 10 minutes." The court then stated for the record: "In the immediate view and presence of the court, the defendant stood up and began yelling in mostly Spanish and unintelligible English. It wasn't quite as loud as it was yesterday coming from the holding cell, but it had the immediate effect of startling everybody in the courtroom. And he refused to stop despite the best efforts of counsel and the court to have him sit down. And he stood up and started pointing his finger and yelling. . . . [¶] I am not going to let defendant's outburst poison this jury panel . . . His conduct, which I find to be intentional and malicious—and I don't find any hint of any mental incompetence or mental defect or delusion. . . . [¶] . . . [¶] His conduct is clearly under his control. He sat here for about 45 minutes as pleasant and as calm and nice as could be. When he hears something that he doesn't like, he becomes very, very vocal." The court ordered the bailiff to return defendant to jail and jury selection was completed in his absence. The presentation of evidence began that afternoon in defendant's absence.

The next morning, December 22, 2010 defendant appeared with counsel and the court asked defendant, “Do you want to be present today for trial? Yes or no?” Defendant replied, “Yes. Yes. Tell him I want to, but I don’t want him to continue representing me.” The court agreed to take up the matter of representation later and defendant agreed he would behave and not disrupt the proceedings. Presentation of evidence continued with the defendant present for the remainder of the day through the recess of proceedings the following day when the court adjourned trial for the Christmas holiday recess. After the jurors were released, the court thanked defendant “for your courtesy to the court in not speaking out inappropriately. I think you have restrained yourself pretty well today and yesterday. The court appreciates that. And it shows to me that you have the good judgment to do that and not make outbursts in front of the jury.”

Over the holiday recess, Richard P. Delman, Ph.D., a licensed California psychologist appointed by the court, conducted an hour-long examination of defendant at the San Francisco County jail with the aid of a Spanish interpreter. Delman prepared a report dated December 29, 2010 and submitted it to the parties and the court. Addressing the issue of competency, Delman opined defendant was psychotic and his thinking delusional. Delman also opined defendant was not malingering and concluded defendant was not competent to stand trial; rather, Delman stated defendant should be hospitalized and forcibly medicated until he can be returned to competency.<sup>3</sup>

The trial resumed after the holiday break on January 3, 2011, with further presentation of evidence by the prosecution. Defense counsel, relying on Delman’s report, filed “Supplemental Authorities in Support of Motion to Declare Defendant Incompetent.” On January 6, 2011 the court entertained oral argument on defendant’s competency motion, which included Delman’s December 29th report. Following argument of counsel, the court stated that it had read all the psychological reports on defendant, including those by Dr. French, Dr. Gould, Dr. Novak, Dr. Delman and those authored by Napa State hospital physicians. The court ruled that no substantial change in

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<sup>3</sup> Delman’s observations and opinions are discussed in greater detail below, (see Discussion, *post*).

circumstances had occurred warranting a declaration of doubt regarding defendant's competency. On January 12, 2011 the court also rejected defense counsel's request for reconsideration of its ruling regarding defendant's competency. In so ruling, the court rejected defense counsel's argument that the court failed to properly weigh Dr. Denham's report and placed undue reliance upon the report of Dr. French in arriving at its decision. In denying defendant's request for reconsideration, the court stated that Dr. French's report was mere corroboration of the final Napa report restoring defendant to competency and clarified that its ruling was based "on the totality of the evidence in this case."

On January 18, 2011 the prosecution concluded its case and defendant took the stand as the sole witness for the defense. Defendant testified in narrative form. He told the jury he was "a victim of an attack . . . by three black men" and that he stands "falsely accused of having fired some shots." According to defendant, on the day in question he bought a bottle of brandy at the liquor store then headed along Jones Street. He saw a prostitute named Jessica with several black men, one of whom is named Jerry Jones. Defendant said hello to Jessica. He pulled out his bottle of brandy to take a drink and the men attacked him; one of them hit him on the back of the neck and he fell to the ground; the men punched and kicked him; they took his wallet and three gold chains he was wearing. A short time later, defendant met a Mexican friend named Raul Pacheco. Defendant told Pacheco he had been jumped by "some black men" and Pacheco said, "Let's go look for them." Defendant did not know Pacheco had a gun. On Golden Gate, defendant saw Jerry Jones and said to Pacheco, "Look, that's one of the black men who jumped me." Jones came at defendant, punching him, and Jessica was hitting him with an umbrella. Pacheco started to exchange blows with Jones. Another black man jumped into the fight, and that's when Pacheco pulled out the gun. Defendant tried to grab the gun, saying, "No, no, no." Jerry Jones pulled out a knife and advanced towards them. As defendant struggled with Pacheco, the gun went off. Pacheco ran off down Leavenworth. Defendant stayed at the scene for "a little while," then ran off after a black man punched him. Defendant met up with Pacheco again down on Seventh Street. Pacheco sold the

gun to a Mexican man in a yellow jacket. Defendant got on a bus going along Market Street. Police stopped the bus at Fourth Street.

Defendant told the jury he was an innocent victim of an attack. He asserted there was a conspiracy against him, that the police falsified the video from the camera on the Muni bus and that his former attorney told him the police would falsify DNA evidence to use against him.<sup>4</sup>

On January 19, 2011 counsel delivered closing arguments and the jury left the courtroom to begin its deliberations. Just prior to the evening recess, the court thanked defendant “for his decorum in the courtroom the last . . . week or so and particularly here today. [¶] The defendant was cooperative with the court and was cooperative with the interpreters by speaking in a sentence or two and then waiting for the interpreters to interpret those sentence. [¶] Also, in testifying at times in a slow fashion so that the interpreters could simultaneously interpret what he was saying in Spanish.” The following day the jury returned its verdict. The jury found defendant guilty of the attempted murder of Jerry Jones (count 1) and that the attempted murder was not willful or premeditated. The jury also found defendant guilty of assault with a semiautomatic firearm on Jones (count 2) and guilty of possession of a firearm (count 3). Also, the jury found true the section 12022.53, subdivision (d) allegation that defendant personally and

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<sup>4</sup> The prosecution case against defendant was very strong. In this regard, the victim, Jerry Jones, testified defendant pulled out a gun and shot him twice after defendant knocked into Jones on the street and a minor verbal altercation ensued. The shooting was witnessed by Donald Demarche, who identified defendant as the shooter at an in-field show-up after defendant was apprehended. Seconds after hearing shots, a witness saw defendant running from the scene “down Leavenworth towards Market Street between Golden Gate and McAllister.” Another witness saw defendant run onto Market from McAllister, breathless and frantic; defendant tried to get rid of his jacket before boarding an east bound bus towards the Ferry Building. When police boarded the bus a few blocks further down Market Street, defendant immediately switched seats. Police detained defendant because he matched the suspect’s description and found a gun under the seat where defendant had previously been sitting. Forensic evidence showed the gun found on the bus fired the bullets that struck Jones. Also, gunshot residue was found on defendant’s right hand and DNA testing on the gun showed defendant was a possible contributor to the mixture of DNA found on the grip of the gun.

intentionally discharged a firearm causing great bodily injury to Jones, as well as the section 12022.7, subdivision (a) allegation that defendant personally inflicted great bodily injury on Jones in the commission of a felony.

On March 30, 2011, defense counsel filed a motion for a new trial or to set aside the verdict on the grounds defendant was tried while incompetent. The trial court denied the motion and proceeded to sentence defendant to the mid-term of seven years on count one (attempted murder) and to a consecutive term of 25-years to life on the section 12022.53, subdivision (d) allegation. On count 2, the trial court imposed a sentence of 13 years, stayed pursuant to section 654. On count 3, the court imposed a term of three years to run concurrent with the sentence imposed in count 1. Defendant filed a timely notice of appeal on April 21, 2011.

## **DISCUSSION**

### **A. *Applicable Legal Standards***

“Both federal 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, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. [Citations.] The court's duty to conduct a competency hearing may arise at any time prior to judgment. [Citation.] Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations. [Citations.]” (*People v. Rogers* (2006) 39 Cal.4th 826, 847.)

Under California law, once a competency hearing has been held and thereafter defendant is “found competent to stand trial, a *second competency hearing* is required only if the evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant's competence. [Citations.]” (*People v. Medina* (1995) 11 Cal.4th 694, 734 [italics added].) To warrant a second competency hearing, “[m]ore is required than just bizarre actions or statements by the defendant to raise a doubt of competency. [Citation.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 33; accord *People v. Marks* (2003) 31 Cal.4th 197, 220.)

Also, “when . . . a competency hearing has already been held, the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant’s mental state. This is particularly true when . . . the defendant has actively participated in the trial.” (*People v. Jones* (1991) 53 Cal.3d 1115, 1153.)

The evidence disclosing a substantial change of circumstances sufficient to warrant a second competency hearing must itself be substantial. (See *People v. Kaplan* (2007) 149 Cal.App.4th 372, 384-385 [in deciding whether changed circumstances warrant a second competency hearing, trial court does not weigh the evidence; rather, as in assessing the need for initial competency hearing, trial court applies the substantial evidence standard of proof].) “In determining the substantiality of the evidence, we look to the record as a whole. [Citation.] Evidence that is ‘ ‘ ‘reasonable in nature, credible, and of solid value’ ’ ’ is substantial evidence. [Citation.]” (*People v. Frye* (1998) 18 Cal.4th 894, 1004, disapproved on a different point by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) We review the decision whether to conduct a second competency hearing for an abuse of discretion, mindful that “ ‘ “[a]n appellate court is in no position to appraise a defendant’s conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.” ’ ” (*Marshall, supra*, 15 Cal.4th at p. 33.)

## **B. Analysis**

Defendant contends the trial court abused its discretion by failing to conduct a second competency hearing when presented with substantial evidence of changed circumstances and substantial new evidence raising serious doubt as to his competency. Defendant’s contention has merit.

Preliminarily, because the trial court gave great weight to defendant’s treatment history at Napa State Hospital and the October 2009 restoration of competency report in rejecting appellant’s assertion of incompetence, we highlight below the salient findings in these reports to assist our evaluation of the trial court’s exercise of discretion. In this regard, the July 2009 report notes that the initial clinical presentation that caused

defendant to be declared incompetent included a diagnosis of a psychotic disorder, not otherwise specified, manifested in symptoms such as “labile affect, disorganized and tangential thoughts, irritability and pressured speech [] and paranoia related to his attorney and the legal system,” resulting in his inability to rationally assist his attorney in his defense. The report also noted that at the time of his admission in August 2008, defendant’s mental status was described by admission staff as follows; unkempt appearance, having “intense” eye contact, “agitated” motor activity, and “pressured” speech; his demeanor was described as “hostile, agitated, demanding and mistrustful” and his mood “irritable, angry and anxious.” At that time, defendant’s affect (observed mood) was described as labile (unstable), his thought process was described as “loose, racing and disorganized,” and he was noted to have persecutory delusions that there was a conspiracy against him by his lawyer, the district attorney and the judge.

Moreover, defendant’s relevant mental status as reflected in July 2009 report had improved compared to what it was at the time of admission in August 2008. The July 2009 report states defendant appeared “well groomed” and sat “calmly” while answering questions speaking “in a normal volume, and a normal rate,” pausing “for several seconds prior to answering most questions.” His mood was reported as “depressed or weak” and his affect (observed mood) was mostly neutral. “In regard to thought process, [defendant] answered questions directly in a goal-directed manner.” Notably, defendant continued to report feeling he was the victim of a conspiracy, but one in which authorities attempted to hold people in Napa State Hospital to remove their organs and sell them on the black market. Defendant also reported auditory hallucinations in which a low male voice spoke slowly into his right ear, but not his left ear, as well as symptoms of depression, including decreased energy and poor sleep.

The July 2009 report also addressed the subject of defendant’s discharge readiness and noted defendant had previously performed satisfactorily on the Georgia Court Competency Test, but when recently administered the same test, replied, “I don’t know” to many of the questions and refused to acknowledge he had any charges against him. The report also stated defendant’s reports of symptoms related to possible

delusional beliefs and auditory hallucinations are “atypical for individuals with genuine psychosis.” Due to uncertainty over whether defendant was malingering or was “truly paranoid,” the July 2009 report stated defendant’s “reported symptoms will be carefully monitored and compared with observable symptoms to evaluate the veracity of his reported symptoms, and their possible affect on [his] ability to rationally cooperate with his attorney. Additionally, [defendant’s] ability to work with unit staff will be carefully observed as he has reported believing that NSH is part of a conspiracy along with the courtroom personnel from San Francisco County.” Also, defendant’s “ability to understand basic unit rules and unit functions will be assessed as there was a concern [defendant] was not putting forth his full effort on most recent trial competency assessment.”

Following a period of observation as intimated in the July 2009 report, the October 2009 report recommended defendant be returned to court as competent to stand trial. The October 2009 report noted defendant has not demonstrated symptoms of mania seen at the time of his admission, such as pressured speech, decreased sleep and delusional beliefs since residing on his current unit. The report notes defendant has reported symptoms of psychosis, including paranoia, delusional beliefs and auditory hallucinations. However, the report stated defendant’s reported symptoms included those “used to screen for malingering of trial incompetency,” that his symptoms suddenly increased after defendant performed adequately in trial competency education, and that his behavior was not consistent with “someone experiencing genuine symptoms of psychosis.” Moreover, recent nursing weekly notes reported no paranoid behavior; rather, defendant was observed “socializing with peers” and reported as “calm and cooperative with staff.”

Based on these and similar observations of hospital staff, the October 2009 report concluded defendant was malingering on trial competency. The report states that observations by staff and treatment team members “demonstrate [defendant’s] knowledge of legal and socio-political issues with no impairments in thought process or memory,” suggesting defendant has been feigning lack of knowledge or inability to recall legal

information. Further, the assessment report concludes defendant's reports of symptoms of psychosis were unreliable and atypical because defendant tended to verbalize his paranoia, delusions and auditory hallucinations "only in the context of discussions of competency" and had not verbalized symptoms of psychosis in "any other context, such as interactions with staff or inmates." The October 2009 report recommended defendant be returned to court as competent to stand trial and that he "*continue to take the medication he is being prescribed at the time of discharge from the hospital for continuity of care.*"

This recap of defendant's treatment history at Napa State Hospital indicates that when defendant was committed in August 2008 he was in the grip of a severe psychosis manifested in paranoia and delusional thinking, that his symptoms were stabilized through treatment and medication and then progressed to the point where staff suspected malingering of trial competency, which staff confirmed in their minds following a period of close observation of defendant between July and October 2009. Some fifteen months later, at a hearing on January 7, 2011, the trial court faced the question whether it should declare doubt a second time regarding defendant's competency. In reaching its decision, the trial court stated Napa officials "did a global analysis of the defendant's behavior [and] found that his conduct outside the presence of the psychiatric evaluators was persuasively inconsistent with his presentation of psychiatric symptoms." The trial court concluded that the "global analysis" described in the October 2009 report "shows without question the defendant's ability to control his acts and his speech and *shows his present competence.*"

In reaching that conclusion, however, the trial court entirely discounted the new report by Dr. Delman based on an examination Delman conducted only a week or so before the January 2011 hearing. The clinical observations, opinions and conclusion stated in the Delman report contrast starkly with the Napa Hospital's October 2009 report. Delman stated defendant was unable to discuss the allegations against him and "could not coherently answer any question I asked him." Delman found defendant's demeanor to be "one of vehemence and unthinking, relentless paranoia" and his train of

thought “illogical, incoherent and relentlessly paranoid.” Defendant was in the grip of “psychotic, irrational delusions,” in which he “went raging on and on about a conspiracy against him” by the judges and attorneys in his case. Delman opined defendant “filters everything he hears through the delusions in which he so fiercely believes” and concluded he “is not capable of rationally cooperating with his attorney.”

The trial court declined to credit Delman’s report as substantial evidence of a “substantial change of circumstances” (*Medina, supra*, 11 Cal.4th 694, 734), on the grounds that Delman’s omission of the October 2009 report “substantially undermines the persuasive force of [Delman’s] opinion.” On this point, the trial court failed to recognize that although Delman did not review the October 2009 report, he considered defendant’s treatment history at Napa, as well as the issue of malingering that underpins the October 2009 report, in rendering his opinion that defendant was currently incompetent to assist counsel.

For example, Delman noted that upon his admission to Napa defendant was “floridly psychotic, agitated, unkempt, with pressured speech, hostile demanding, irritable, mistrustful, angry, anxious, with labile affect and a thought process that was loose, racing and disorganized.” Importantly, Delman found defendant’s current mental condition similar to the condition described upon his commitment in August 2008; specifically, Delman stated, “The version of [defendant] I saw was at the very bottom of his range of functioning, much like that described by NSH staff on admission in 2008. He was loud, constantly enraged, made ferocious eye contact, spoke so fast and with such pressured speech that the interpreter could not keep up with him.”

Furthermore, Delman noted that although the July 2009 report found defendant incompetent, “[i]t is clear . . . there is some feeling [defendant] might be malingering . . . . Nevertheless, they continue to medicate him with Risperdal, Celexa and valproic acid, drugs given to people who are psychotic and seriously depressed.” Also importantly, in regard to the issue of medication, Delman noted the October 2009 report recommends defendant should continue to take his prescribed medication to ensure continuity of care

after discharge, yet defendant “is not taking medication now, as the Jail Psychiatric Service will not force him to take it.”

Last, Delman directly addresses the core rationale for the October 2009 report’s recommendation of competency—that defendant was malingering. Delman specifically opined defendant was not malingering; noting that a psychotic “is not a person who sits in a corner babbling nonsense 24 hours a day,” stating, “the fact that [defendant] can be seen speaking to his attorney in what may appear to be a calm, controlled voice means nothing [because] he is probably just trying to convince the attorney of the truth of his delusions.” Contrary to the 2009 report, Delman opined that whereas defendant has “some superficial understanding of the nature and object of the proceedings against him, [] this knowledge exists in a psychotic mind, in which his delusions control his thinking,” rendering him incapable of rationally cooperating with his attorney. Delman opined defendant needs to be hospitalized and forcibly medicated to restore him again to competency.

In sum, based upon the entire record, including Delman’s December 2010 report, we conclude there is substantial evidence of a substantial deterioration or regression in defendant’s condition between the time of the prior finding of competency in October 2009 and trial. The strength of defendant’s delusional thinking, the anger, and the illogical and incoherent speech observed by Delman was not present in October 2009, and Delman opined defendant had regressed to a mental state closer to the one observed upon his admission to Napa State Hospital in August 2008. Although the court could properly consider the fact Delman did not read the October 2009 discharge report, the court was nevertheless required to evaluate the present facts and opinions presented by Delman for substantial evidence of changed circumstances. Because the trial court did not do so, it ignored substantial evidence of changed circumstances. (See *Kaplan, supra*, 149 Cal.App.4th at pp. 384-385 [in deciding whether changed circumstances warrant a second competency hearing, trial court does not weigh the evidence; rather, as in assessing the need for an initial competency hearing, trial court applies the substantial evidence standard of proof].) Thus, the trial court abused its discretion in declining to

order that the question of the defendant's mental competence should be determined in a hearing, as provided under section 1368.

**DISPOSITION**

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

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Jenkins, J.

We concur:

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McGuinness, P. J.

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Siggins, J.