S105908

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN SAMUEL GHOBRIAL,

Defendant and Appellant.

Orange County
Sup. Ct. No. 98NF0906

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Orange

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TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

OTHER STATE CASES

TABLE OF AUTHORITIES

Page(s)

STATE STATUTES

TABLE OF AUTHORITIES

OTHER STATE STATUES

JURY INSTRUCTIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN SAMUEL GHOBRIAL, Defendant and Appellant.	)	No. S105908 (Orange County Sup. Ct. No. 98NF0906)

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INTRODUCTION

The Attorney General has struggled to preserve this conviction by ignoring pertinent facts, and dismissing all error as harmless. Respondent's efforts, however, cannot alter the fact that grievous error occurred, and the convictions and death judgment must be reversed.[1]

[1]Appellant has found it unnecessary to reply to all the arguments in the response since respondent raises very little that is not fully addressed in the opening brief, and appellant has only addressed respondent's contentions that require further discussion for the proper determination of the issues raised on appeal. Appellant specifically adopts the arguments presented in her opening brief on each and every issue, whether or not discussed individually below. Appellant intends no waiver of any issue by not expressly reiterating it herein.

I.

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED GHOBRIAL'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE DEATH VERDICT BY FAILING TO INITIATE COMPETENCY PROCEEDINGS SUA SPONTE

Psychotic disorders, which include schizophrenia and schizoaffective disorder,[2] "are significantly correlated with incompetence." (Jacobs, et al., *Competence-Related Abilities and Psychiatric Symptoms: An Analysis of the Underlying Structure and Correlates of the MACCAT-CA and the BPRS* (2008) 32 Law & Hum. Behav. 64, 65 (hereinafter *Competence-Related Abilities*).) As outlined in detail in the opening brief, the trial court had before it abundant evidence, which, when considered in the aggregate, was more than sufficient to raise a reasonable doubt that Ghobrial suffered from the symptoms of an intractable psychotic disorder that impaired his ability to rationally understand the proceedings, consult with counsel, and assist in the preparation of his defense against capital charges. (AOB 5-7, 30-45, 56-71.)

Respondent does not dispute the facts set forth in the opening brief. Indeed, respondent attempts to refute Ghobrial's claim by citing virtually the same evidence as that cited by Ghobrial in support of his claim (RB 23-48), thereby conceding its accuracy. Respondent nevertheless asserts that Ghobrial's claim fails for four reasons: (1) the evidence of Ghobrial's mental illness presented during trial did not amount to substantial evidence

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[2]The Diagnostic and Statistical Manual of Mental Disorders (DSM) applicable at the time of Ghobrial's trial, the DSM-IV-TR, includes schizoaffective disorder in the chapter entitled "Schizophrenia and Other Psychotic Disorders." (DSM-IV-TR (4th ed. text revision 2000), p. 297.)

of mental incompetency to stand trial; (2) no mental health expert gave an opinion that Ghobrial was incompetent; (3) Ghobrial's trial counsel never declared a doubt about his mental competency; and (4) the trial court's observations of Ghobrial did not provide any indication of mental incompetency. (RB 49, 57.) These arguments do not withstand scrutiny.

A. The Evidence Before the Trial Court Raised a Bona Fide Doubt as to Ghobrial's Competence to Stand Trial

The trial court heard evidence that two days after Ghobrial's arrest and admission to the Orange County Jail, jail psychiatrist Dr. Jasminka Depovic diagnosed him as suffering from a psychotic disorder not otherwise specified (NOS). (10 RT 2428-2430.) Thereafter, Ghobrial was examined at least once a month, and frequently much more often, by multiple members of the jail mental health staff. Over the course of the next three and a half years, while his diagnosis was changed from psychotic disorder NOS to the more specific schizoaffective disorder, Ghobrial never went a month without being plagued by at least one, and often more, of the following symptoms: auditory, visual, and olfactory hallucinations; delusional thought processes; labile affect; grossly disorganized behavior, including decompensation in grooming and self-care; suicidal ideation and delusional suicide attempts, including tying a string and sheet around his penis in the belief that he would stop breathing; other acts of self-mutilation; depression; blunted affect; and internal preoccupation. (See Attachment A.)

Ghobrial also was prescribed anti-psychotic medication shortly after his arrival at the jail and continued on multiple anti-psychotics and anti-depressants of varying doses throughout his incarceration, including Haldol, Mellaril, Zyprexa, Seroquel, Depakote, Risperdal, Ativan, Prozac, and

Paxil. (See Attachment A.) Dr. Jose Flores-Lopez, a forensic psychiatrist (10 RT 2502) who, at the time of his testimony, was the chief psychiatrist at the Norco Prison (10 RT 2475), initially questioned whether Ghobrial might be malingering; in April 1999, however, he raised a doubt as to Ghobrial competence, noted that he "needed a competency assessment," and recommended that he be sent to a state mental hospital for evaluation. (10 RT 2492.) On December 17, 2001, Flores-Lopez testified before the jury that Ghobrial suffered from chronic schizoaffective disorder, "meaning that he was going to have it for the rest of his life." (10 RT 2498.)

Neuropsychological testing administered to Ghobrial by forensic neuropsychologist Dr. Ali Kalechstein in early 2001, showed both that Ghobrial put forth his best efforts and was not malingering, and, inter alia, that Ghobrial's executive functioning tested in the impaired range in three out of the four executive functioning tests, placing him in the 1st percentile, and borderline impaired in the fourth, which placed him in the 6th percentile. (10 RT 2525-2548.) Kalechstein testified that Ghobrial's test results were consistent with a psychotic illness, such as schizophrenia or schizoaffective disorder. (10 RT 2546.)

Respondent's general argument that "the evidence of Ghobrial's mental illness [and the administration of anti-psychotics and anti-depressants] presented during his trial did not include any substantial evidence of mental incompetency to stand trial" (RB 49) implies that *before a hearing is even warranted*, a defendant must present evidence that discloses a present inability because of mental illness to participate rationally in the proceedings. In fact, the only showing necessary to trigger a hearing is evidence raising a *reasonable doubt* as to the defendant's

competence.[3] At a competency hearing, a defendant must establish incompetence by a "preponderance of the evidence." (§ 1369, subd. (f).) Evidence that is substantial enough to raise a reasonable doubt as to a defendant's competence may not be sufficient to sustain a finding of incompetence by a preponderance of the evidence. To the extent that respondent, and this Court's opinions cited by respondent, equates the quantum of evidence necessary to trigger a competency hearing with the quantum of evidence necessary to prevail at such a hearing, respondent's argument violates the principles established in *Pate v. Robinson* (1966) 383 U.S. 375, and *Drope v. Missouri* (1975) 420 U.S. 162.

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[3]As discussed in the opening brief (AOB 52-54), it bears reemphasizing that when the trial court is deciding whether competency proceedings are warranted, the court is not deciding the ultimate issue, *i.e.* whether the defendant actually possesses the necessary cognitive, emotional, and communicative capabilities. Rather, the court simply is answering the threshold question of whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1021 ["Importantly, we are not deciding here whether defendant is, in fact, competent to stand trial, but whether there was evidence sufficient to raise a reasonable doubt as to defendant's competence to stand trial. We conclude there was"]; *Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666) [sole function of trial court in applying *Pate*'s substantial evidence test is to decide whether there is any evidence raising a reasonable doubt as to defendant's competence]; *Chavez v. United States* (9th Cir. 1981) 656 F.2d 512, 516 ["We review the record to see if the evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence"].)

1. The United States and California Supreme Courts Have Held That Evidence of Mental Illness Characterized by a History of "Pronounced Irrational Behavior" and Psychotic Symptoms is Sufficient to Warrant a Competency Hearing

The United States Supreme Court in *Pate v. Robinson*, *supra*, 383 U.S. 375, addressed a claim that the trial court's failure to hold a hearing pursuant to the Illinois statute requiring the judge to conduct a hearing when presented with evidence raising a bona fide doubt as to the defendant's competence to stand trial deprived the defendant of due process. The Supreme Court had no quarrel with the statutory procedures enacted by Illinois to ensure that prior to being put to trial a defendant meets the standards for competency articulated in *Dusky v. United States* (1960) 362 U.S. 402, that is, whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. (*Pate v. Robinson*, *supra*, 383 U.S. at p. 385.) The Supreme Court instead focused on the evidence before the trial court and concluded that the error lay in the trial and reviewing courts' failure to find the "uncontradicted testimony of [the petitioner's] history of pronounced irrational behavior" sufficient to warrant resort to the hearing into his competency. (*Id.* at pp. 385-386.) Although the Supreme Court's decision turned on the facts, the High Court did not identify with any specificity, other than reference to the petitioner's "history of pronounced irrational behavior," the nature and quantum of evidence mandating a hearing.

In *Drope v. Missouri*, *supra*, 420 U.S. 162, the Supreme Court's next opinion addressing whether the trial court heard evidence sufficient to

conclude that the defendant was entitled to a competency hearing, the Court acknowledged the *Pate* Court's disinclination to "prescribe a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure." (*Id.* at p. 172.) In *Drope*, as in *Pate*, the Court recognized the constitutional adequacy of the state's statutory procedures to determine competence, but focused on the lower courts' determination that the evidence presented failed to establish "reasonable cause to believe that the accused ha[d] a mental disease or defect excluding fitness to proceed." (*Drope v. Missouri*, *supra*, 420 U.S. at p. 173.) The Court again concluded that the lower courts erred in finding the facts relevant to the petitioner's competency inadequate to warrant a hearing, but once more declined to set strict standards for the quantum or type of evidence a defendant must present before being entitled to a competency hearing. Stated the Court: "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." (*Id.* at p. 180.)

In *People v. Aparicio* (1952) 38 Cal.2d 565 – an opinion presaging *Dusky v. United States* by eight years and anticipating the decisions in *Pate v. Robinson* and *Drope v. Missouri* – this Court found that the trial court erred in failing to inquire into the defendant's sanity pursuant to Penal Code section 1368[4] where one psychiatrist who had examined the defendant testified that "the defendant was suffering from delusions of persecution

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[4]The *Aparicio* Court refers to "sanity" to stand trial rather than competency in keeping with language of section 1368 applicable in 1952. (*People v. Aparicio*, *supra*, 38 Cal.2d at p. 567, quoting section 1368.)

and hallucinations; another stated that he was 'paranoid and delusional'; while a third described him as possibly psychotic from a psychiatric point of view even though he was not legally insane."[5] (*People v. Aparicio*, *supra*, 38 Cal.2d at p. 569.) As with *Pate v. Robinson* and *Drope v. Missouri*, notably absent from the evidence before the trial court was any evidence specifically stating that the defendant could not understand the nature and purpose of the proceedings or assist in his own defense in a rational manner. Nevertheless, this Court concluded that the evidence presented, which the Court characterized as "a continuous course of irrational conduct" – necessitated a hearing. (*People v. Aparicio*, *supra*, 38 Cal.2d at p. 570.)

The holdings of *People v. Aparicio*, *Pate v. Robinson*, and *Drope v. Missouri* establish that when a defendant presents evidence raising a reasonable doubt as to his ability to rationally understand the proceedings, communicate with counsel, and assist in his own defense, he is entitled to a hearing, but that the evidence itself need not include documentary or testimonial commenting specifically on the defendant's competence. The evidence sufficient to raise a reasonable doubt as to a defendant's incompetence need not be couched in the terms of incompetence.

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[5]*People v. Aparicio* is cited as authority in *People v. Koontz* for the proposition that "[w]hen there exists substantial evidence of the accused's incompetency, a trial court must declare a doubt and hold a hearing pursuant to section 1368 even absent a request by either party." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1064, citing *Aparicio*, *supra*, 38 Cal.2d at p. 568.)

2. Respondent Erroneously Conflates the Evidentiary Showing Warranting a Hearing With the Evidentiary Showing Required at the Hearing to Establish a Defendant's Incompetence

Respondent's claim that Ghobrial must present evidence to the trial court specifically stating that he currently is incapable of rationally understanding the proceedings, communicate with counsel, and assist in his own defense prior to being afforded a hearing to determine exactly whether he possess those very capabilities is an unconstitutional reading of *Pate v. Robinson*, *supra*, 383 U.S. 375, and *Drope v. Missouri*, *supra*, 420 U.S. 162. (See also *People v. Aparicio*, *supra*, 38 Cal.2d at p. 570 [evidence presenting continuous course of irrational conduct requires competency hearing].) As noted above, respondent contests neither the credibility of the evidence presented to the trial court nor the severity of Ghobrial's symptoms; respondent's disagreement is with the inferences to be drawn therefrom. (See *Drope v. Missouri*, *supra*, 420 U.S. at pp. 174-175 [no dispute as to the evidence possibly relevant to petitioner's mental condition; rather, dispute concerns inferences to be drawn and whether the failure to make further inquiry into petitioner's competence denied petitioner a fair trial].) In fact, respondent fails to make *any* inferences from the evidence before the trial court, and simply asserts repeatedly that Ghobrial has failed to present "substantial evidence of incompetence" because the court heard no testimony specifically finding that Ghobrial was incompetent. (RB 51, 53-55.)

Respondent states that "evidence of mental illness alone is insufficient to raise a doubt as to Ghobrial's competency" (RB 51) – an uncontroversial proposition (see AOB 57). Respondent relies on *People v.*

Young, where the court found that a psychologist's testimony about defendant's mental condition is insufficient "*when he did not relate his finding in terms of defendant's competency to stand trial.*" (RB 51, citing *People v. Young* (2005) 34 Cal.4th 1149, 1218, italics added.) Respondent also relies on *People v. Welch*, where the Court explained that more is necessary than that defendant is psychopathic "*with little reference to defendant's ability to assist in his own defense.*" (RB 51, citing *People v. Welch* (1999) 20 Cal.4th 701, 742, italics added.) Similarly, respondent asserts that "there was no testimony that any of the prescribed medications *interfered with his ability to understand the proceedings or to assist with his defense.*" (RB 52, citing *People v. Danielson* (1992) 3 Cal.4th 691, 726-728, italics added.) Respondent also asserts that "[e]vidence that merely raises a suspicion[6] that the defendant lacks present sanity or competence *but does not disclose a present inability because of mental illness to participate rationally in the trial* is not deemed 'substantial' evidence requiring a competence hearing." (RB 51, citing *People v. Deere* (1985) 41 Cal.3d 353, 358, italics added.)

Respondent's reasoning erroneously conflates the evidentiary showing necessitating a hearing to determine a defendant's competence to stand trial with the evidentiary showing required at the hearing to establish the defendant's incompetence. As demonstrated above, respondent's

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[6]Roget's International Thesaurus identifies "doubt" as a synonym of "suspicion." (Roget's International Thesaurus, (6th ed. 2001) p. 680.) Thus, this Court's assertion can be read as: "Evidence that merely raises a [doubt] that the defendant lacks present . . . competence . . . is not deemed 'substantial' evidence requiring a competence hearing." Such a reading violates the the holdings of *Dusky, supra,* 362 U.S. at p. 402, and its progeny.

position eviscerates the protections guaranteed to potentially incompetent defendants established in *Pate v. Robinson*, *supra*, 383 U.S. 375, *Drope v. Missouri*, *supra*, 420 U.S. 162, and *People v. Aparicio*, *supra*, 38 Cal.2d at p. 570.

3. A Court Must Hold a Competency Hearing When a Defendant Presents Evidence That His Mental Illness Precludes Him From Accurately Perceiving, Interpreting, and/or Responding to the World Around Him

The evidence sufficient to raise a reasonable doubt as to a defendant's competence to stand trial makes clear that "competence" is not a diagnostic category with a checklist of symptoms or behaviors that, when present, manifest incompetence and when absent, demonstrate competence. Each case is unique (*United States v. Jones* (3rd Cir. 2003) 336 F.3d 245, 256-57, citations omitted [court must examine the unique circumstances of the case]), and the defendant's functional abilities must be considered in the context of the particular case or proceedings. (See Sadock & Sadock, eds., Kaplan & Sadock's Comprehensive Textbook of Psychiatry (8th ed. 2005) Vol. II, p. 3983 [an individual who is incompetent to stand trial in a complicated tax fraud case may not be incompetent to stand trial on a simple misdemeanor charge].) A trial court must consider all relevant evidence in the aggregate, but also recognize "that even one of the [relevant] factors standing alone may, in some circumstances, be sufficient." (*Ibid.*)

"[T]he crucial component of the inquiry [into a defendant's competence to stand trial] is the defendant's possession of a 'reasonable degree of rational understanding.' In other words, the focus of the *Dusky* formulation is on a particular level of mental functioning." (*Godinez v.*