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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC JERMAINE COLES, Defendant and Appellant.	A103183 (San Mateo County Super. Ct. No. SC53482)
In re ERIC JERMAINE COLES, On Habeas Corpus.	A106613

INTRODUCTION

A jury found Eric Coles guilty of arson and attempted arson. He raises a number of challenges to his conviction and sentence on appeal and in a related habeas corpus petition. We deny the petition and affirm the judgment.

BACKGROUND

In December 2002 Priscilla Rosales lived with various family members including her mother, Rene Jones, and her sister, Kristina. Defendant was Priscilla's boyfriend and lived in an abandoned car parked in the garage.

On the evening of December 3, 2002 Kristina had an altercation with the driver of an SUV. After the driver knocked Kristina to the ground, Priscilla urged defendant to "be a man" and "do something." Defendant was told the SUV had come from the garage of a large apartment building across the street from the residence. Later that night Jones saw defendant walking near the garage and standing at its doorway.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, only the Introduction, Background, section I.C. of Discussion, and Disposition of this opinion are certified for publication.

About 11:30 p.m. defendant came to the apartment asking for Priscilla. He looked odd and appeared to be drunk. As he stood at her door, Jones heard a loud gunshot or explosion. Alarms went off and people began leaving the building across the street. Jones later told the police that defendant said he had blown up a car. She also repeated defendant's statement to her daughter Priscilla.

About 10 minutes after the explosion Priscilla spoke with defendant, who told her he had "just lit up" a car. Priscilla told police about the admission but subsequently denied it, asking to withdraw her statement. At trial she claimed not to remember defendant's statement. Jones testified at trial that she had lied about defendant's admission, but that she was "almost positive" he had set the fire. Priscilla testified that defendant smokes, carries matches, and had borrowed her lighter that night.

A surveillance video in the garage captured someone loitering near both a Ford and a Mercedes SUV. The tape shows that after a glow developed on the far side of the Ford, the loiterer departed. The glow brightened and debris burst from the Ford. Jones identified defendant as the person on the tape.

Defendant was arrested and interviewed. He told police he did not remember anything, but that if he had set the fire it was "because of the drinking, to satisfy Priscilla, and to get back at that person." At the officer's suggestion defendant wrote a letter of apology stating "I really wasn't trying to hurt anyone. I'm sorry your car was damaged due to my actions. I would love to help with any damages."

The Ford sustained substantial damage. In addition, a paper towel had been rolled up and shoved into the fuel neck of the Mercedes. The towel had been ignited, but the flame had gone out before causing any damage. A fire inspector concluded the fire had been intentionally set.

Defendant testified that he had a history of alcohol and mental health problems and explained that he drinks to keep from hearing voices. He had been drinking the day of the fire. He remembered learning of the altercation and Priscilla telling him to "do something." Sometime thereafter he walked to a friend's house and returned to his car in

the garage at 1:30 or 2:00 o'clock in the morning. He did not remember setting the fire and did not believe he had done so.

The jury convicted defendant of arson and attempted arson. He waived his right to a jury trial on two prior conviction allegations, which the court found to be true. Defendant was sentenced to a total term of nine years and timely appealed.

DISCUSSION

I. The Appeal

A. Competency Hearing

Defendant argues the court erred in failing to suspend proceedings and order a competency evaluation. The argument fails in the absence of evidence that defendant was incompetent**.**

1. Legal Standards

A criminal defendant is incompetent to stand trial if he is unable to understand the nature of the proceedings or rationally assist in his defense due to mental disorder or disability. (Pen. Code, § 1367, subd. (a).)[1] A hearing is required if there is substantial evidence of incompetence. (*People v. Medina* (1990) 51 Cal.3d 870, 882.)

On appeal we apply a substantial evidence standard based on the record at the time the ruling was made, not by reference to subsequently produced evidence. (*People v. Welch* (1999) 20 Cal.4th 701, 739; *People v. Laudermilk* (1967) 67 Cal.2d 272, 283 fn. 10.)

2. Background

At the preliminary hearing defense counsel stated that, while defendant had a history of psychiatric problems and had been hospitalized after his arrest, counsel had observed nothing to suggest defendant was incompetent to stand trial. The prosecutor and the court offered to continue the preliminary hearing until defense counsel had received the medical records he had ordered, but counsel, unwilling to waive time,

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[1] All further statutory citations are to the Penal Code.

elected to proceed and revisit the question later, if necessary. No further evidence of incompetence was introduced.

The issue arose again at trial. Defense counsel told the court that he and defendant had repeatedly discussed whether defendant understood the nature of the proceedings, could make intelligent decisions and assist his attorney. The court asked the same questions and defendant responded affirmatively to each. Counsel told the court defendant had a history of hearing voices, but currently the voices were "not a problem." The court observed no indication that defendant's decision-making process was controlled by any "external phenomena like voices or auditory hallucinations." Again, defendant agreed. The court concluded that, "in the absence of any suggestion in the evidence or demeanor of defendant" that defendant was incompetent, there was no basis to suspend proceedings for a competency hearing.

3. Analysis

"Evidence that merely raises a suspicion 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." (*People v. Deere* (1985) 41 Cal.3d 353, 358, disapproved on another point in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9.) Defendant cites no evidence suggesting his mental problems impaired his ability to understand the proceedings and assist defense counsel at trial. The record shows defendant was coherent and cooperative in answering questions about his ability to understand proceedings, make sound decisions and assist with his defense. The court ruled correctly.

Defendant suggests for the first time in his reply brief that the court should have ordered a competency hearing after he testified at trial about his history of drinking and psychiatric problems. This subsequent testimony cannot support his claim that the court should have ordered a competency hearing before the trial began. (*People v. Welch, supra,* 20 Cal.4th at p. 739.) To the extent the argument is offered to show the court should have ordered such a hearing after his testimony, defendant has waived that point by failing to raise it in his opening brief. (See 9 Witkin, Cal. Procedure (4th ed.1997),

Appeal, § 616, pp. 647-648.) In any event, his testimony does not demonstrate such a hearing was called for.[2]

B. Instructional Error

Defendant contends that evidence of his intoxication at the time of the offense supported an instruction on the lesser included offense of unlawfully causing a fire. (§ 452; see generally *People v. Lopez* (1993) 13 Cal.App.4th 1840, 1846-1847.) He maintains the court had a sua sponte obligation to so instruct. We need not determine whether the evidence warranted the instruction because, even assuming such a duty, any error was harmless.

The critical difference between the two offenses is the mental state with which the act of burning is carried out. Arson requires a willful or malicious act. (§ 451.) Unlawfully causing a fire requires only recklessness. (*People v. Hooper* (1986) 181 Cal.App.3d 1174, 1181, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 198-199, fn. 7.) Defendant relies on the statutory proviso that a person who creates a risk of fire "but is unaware thereof solely by reason of voluntary intoxication . . . acts recklessly with respect thereto." (§ 450, subd. (f).)

Here, the evidence of a willful act was overwhelming. A fire inspector testified that the fire was intentionally set. There was evidence that defendant admitted setting it. A videotape showed him moving between the vehicles, the flames growing, and defendant watching the fire as he walked away. In addition to igniting the Ford, evidence supported a conclusion that defendant placed an improvised wick in the Mercedes' fuel neck and set it alight. He told the police that, if he had started the fire, it was "to satisfy Priscilla, and to get back at that person [who accosted her sister]." While there was evidence that defendant was intoxicated at the time, it is not reasonably probable that the jury would have found his intoxication rendered him unaware of the risk that his actions would cause a fire. (See *People v. Breverman* (1998) 19 Cal.4th 142, 177-178.)

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[2] We discuss this point in more depth in section II.A.1. of our discussion of the habeas petition, *post*.

C. Destruction of Investigatory Notes

The prosecutor called Priscilla and Jones as witnesses. When both denied having heard defendant's admissions, the investigating officers were called. Both officers testified they had taken notes of their witness interviews. Following departmental policy, they destroyed the notes after using them to prepare their reports. Defendant asserts the failure to preserve and turn over these raw notes violated the reciprocal discovery provisions of Proposition 115, the Crime Victims Justice Reform Act. (§§ 1054.1, 1054.3.) (See generally *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 364.)

A complete review of defendant's position requires some context. For over 40 years the courts of California and the United States have been discussing the obligation of government agents to retain their notes.

Killian v. United States (1961) 368 U.S. 231 (*Killian*) involved a perjury prosecution from the 1950's. Killian, a labor leader, had been convicted of committing perjury when he swore in an affidavit that he was not a member of, or affiliated with, the Communist Party. Two undercover FBI operatives testified that they had infiltrated the organization and seen Killian at party meetings in which he had actively participated. FBI agents had received oral reports from the operatives but did not keep their original notes. Killian sought a dismissal or new trial because the notes had been destroyed. The Supreme Court ultimately remanded the case for further factual findings. In doing so, the Court observed: "[A]lmost everything is evidence of something, but that does not mean nothing can ever safely be destroyed." (*Id.* at p. 242.)

People v. Angeles (1985) 172 Cal.App.3d 1203 (*Angeles*) contains an extensive discussion of the constitutional and statutory requirements relating to the preservation of investigatory notes and other evidence. In *Angeles,* Justice Eagleson traced the evolution of the rules beginning with *Killian, supra,* 368 U.S. 231 forward to *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*), and through the application of the Truth in Evidence provisions added to the California Constitution in 1982 by Proposition 8. Justice Eagleson adopted the analysis of *People v. Tierce* (1985) 165 Cal.App.3d 256, explaining the *Killian* test for evaluating the legal effect of note destruction. Under

Killian the court must make findings on three points: " '(1) whether the notes were made for the purpose of transferring the data, (2) whether the agent acted in good faith in destroying the notes, and (3) whether the agent acted in accordance with the normal procedure of the governmental unit in so destroying the notes. The [Supreme] court held the absence of at least one of those elements to be a necessary, but not a sufficient, condition for a new trial. In order to obtain that remedy, the defendant must also overcome the doctrine of harmless error and demonstrate that the particular destruction of evidence resulted in *actual harm* to the defense.' (Note, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine* (1975) 75 Colum.L.Rev. 1355, 1357, fns. omitted.)" (*People v. Tierce,* at p. 264.)

Justice Eagleson went on to explain the substantial burden a defendant must carry on appeal. "As we read *Killian* [,*supra,* 368 U.S. 231] . . . there is no deprivation of a federal due process right if destruction of the original notes complies with the tripartite test of *Killian*. Above and beyond that, with respect to the issue of 'constitutional materiality,' *Trombetta* places the burden on the defendant to show that the 'evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' (*California v. Trombetta, supra,* 467 U.S. at p. 489.)" (*Angeles, supra,* 172 Cal.App.3d at p. 1214.)

Under these standards defendant's challenge here fails. Officer Lisa Kleinheinz had interviewed Priscilla and witness Rosiceli Villarreal. She took notes on a small pad while doing so. Two or three hours later, she used the information from those "little jotted notes" to refresh her recollection when she wrote her report and summarized what witnesses had told her. It is standard procedure to destroy notes after preparing a written report. Officer Kleinheinz's report encompassed everything that was in her notes. Officer Tim Murphy spoke to Priscilla, took notes, and put the noted information in his report. Everything in the notes was included in his report. He confirmed that it is standard procedure to destroy notes after the completion of a report. The general custom and practice, as well as the particular procedures followed by these two officers was

inquired into during both direct and cross examination. The uncontradicted testimony establishes that the requirements of *Killian, supra,* 368 U.S. 231, *Angeles, supra,* 172 Cal.App.3d 1203 and their progeny were met.

The notes were made by the officers to assist them in the accurate preparation of their official reports. The notes were subsequently destroyed in accordance with departmental policy. The destruction was done in good faith, which the *Angeles* court described in this context as: "the absence of malice and absence of design to seek an unconscionable advantage over the defendant." (*Angeles, supra,* 172 Cal.App.3d at p. 1214.) The notes were destroyed before any charges were filed against defendant and no exculpatory value was apparent before their destruction.

Defendant notes that the 1990 enactment of Proposition 115 imposed a prosecutorial duty to disclose "relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . ." (§ 1054.1, subd. (f).) He goes on to argue that this enactment requires law enforcement officers to retain all investigatory notes. His position is not supported by applicable authority.

Nothing in the statutes expressly requires the preservation of interview notes before a criminal complaint has been filed. Section 1054.1 requires the prosecutor to disclose material or information only "if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies . . . ." This limitation, framed in the present tense, is inconsistent with defendant's view that the police must preserve investigatory notes before a complaint has been filed. Additionally, there is no support for such a requirement in the Proposition 115 ballot pamphlet. (See 81 Ops.Cal.Atty.Gen. 397, (1998).) Proposition 115 expressly precludes us from "broadening the scope of discovery beyond that provided in the chapter or other express statutory provisions, or as mandated by the federal constitution."

(*People v. Tillis* (1998) 18 Cal.4th 284, 294; § 1054, subd. (e)[3].) In the absence of an express statutory requirement or constitutional mandate that police retain their investigatory notes before a criminal complaint is filed, we will not create one.[4]

Thompson v. Superior Court (1997) 53 Cal.App.4th 480, on which defendant relies, does not hold to the contrary. There, defense counsel disclosed witness interview reports to the prosecution. The raw notes upon which the reports were based had been preserved but counsel refused to divulge them. The *Thompson* court held the notes were discoverable.[5] (*Id.* at pp. 485-487.) However, the court referred to settled law that notes need not be preserved before entry of a discovery order. (*Id.* at p. 485, fn. 3.)

D. Sentencing Error

The information alleged one prior strike conviction under section 1170.12, subdivision (c)(1), and one prior serious felony conviction within the meaning of section 667, subdivision (a)(1). The prosecution submitted two group exhibits, each comprised of multiple items. Exhibit No. 1 documented a 1995 strike conviction for robbery. Exhibit 2 consisted of records relating to a 1996 felony conviction for violating section 32. Exhibit 2 included a certification; Exhibit 1 did not.

The court commented that "on the back of the last page of the group of documents marked as No. 2, is a certification dated March 26th 2003, saying that the foregoing instruments are correct copies of the original filed in this office. It's a little bit ambiguous. Were all of these documents, Exhibit 1 and 2 received together?" The prosecutor responded that they were. She explained she had received the documents "not in two separate packets as you see them now. They were in one envelope with—for

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3 In relevant part, section 1054 states: "This chapter shall be interpreted to give effect to all of the following purposes . . . (e) To provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States."

4 Our analysis is consistent with the Attorney General's view that Proposition 115 did not change the rule as articulated in *In re Gary G.* (1981) 115 Cal.App.3d 629 and *People v. Dickerson* (1969) 270 Cal.App.2d 352. (81 Ops.Cal.Atty.Gen. 397 (1998).)

5 The notes did not involve attorney work product. (*Thompson v. Superior Court, supra,* 53 Cal.App.4th at p. 482.)

instance one of the transcripts stapled together, the plea form stapled together, each of the individual documents. I separated them into the two cases, having been mixed together, for the Court's convenience. . . . But they were all received together, and it is my position that that certification applies to all the documents in both People's 1 and 2." The prosecutor also noted defendant had admitted both prior convictions in his testimony at the guilt phase.

The court overruled defendant's objection that the certification was inadequate. "The Court will accept the certification, and the Court having read the transcripts that have been included as well as the probation report in the latter case, which makes specific reference to the former case, the Court has no doubt that these convictions—these proceedings occurred and the convictions were suffered by the defendant."

Defendant contends there was insufficient evidence to sustain the finding on the robbery prior because the documents submitted with Exhibit 1 lacked certification and the prosecutor's statement that the certification submitted with Exhibit 2 encompassed both exhibits was not evidence. The approach here was slipshod and might have proven fatally defective. However, in light of properly admitted evidence supporting the true finding, reversal is not in order. As the court observed, the probation report included in Exhibit 2 set forth defendant's earlier robbery conviction. Moreover, defendant admitted that conviction when he testified during the guilt phase. This evidence amply supports a finding that the conviction had been proven. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; see also *People v. Tenner* (1993) 6 Cal.4th 559, 567 [prior may be proven without section 969b packet].)

II. The Petition For Writ of Habeas Corpus

In a related habeas petition ordered consolidated with the appeal, defendant asserts his trial counsel was constitutionally deficient for failing to (1) investigate and present expert evidence of incompetency; (2) mitigate and rebut prosecution evidence; and (3) persuade the court he needed treatment rather than incarceration. He also claims he was denied due process because he was legally incompetent. None of these assertions support habeas corpus relief.

A. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a petitioner "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

1. Failure To Request Competency Assessment

In terms of the failure to obtain a psychiatric evaluation, this record does not support a conclusion that counsel's investigation fell below constitutionally required standards. Counsel told the court he had ordered defendant's medical records and had repeatedly discussed with defendant whether he understood the nature of the proceedings. He obtained and provided the probation officer with a number of documents relating to defendant's mental health history. There is no indication that this documentation was in any way incomplete. "Counsel may make reasonable and informed decisions about how far to pursue particular lines of investigation. Strategic choices based upon reasonable investigation are not incompetent simply because the investigation was less than exhaustive." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1252.)

At trial defendant testified coherently. He consistently maintained he had a history of hearing voices, that he had been drinking heavily, that he did not remember setting the fire, and that he was not responsible for doing so. He also testified that he had not heard any "voices" during the trial or during the immediately preceding weeks. Nothing in his testimony demonstrates he was unable either to understand the legal

proceedings or participate meaningfully in his defense. Without some indication that his client's abilities were presently impaired, trial counsel was not ineffective for failing to obtain a psychiatric evaluation. "Trial counsel is not required to make futile objections, advance meritless arguments or undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel." (*People v. Jones* (1979) 96 Cal.App.3d 820, 827.)

2. Failure To Present Evidence About Alcoholic Blackouts

When initially questioned by the investigating officers, defendant said he did not remember anything about the traffic altercation or the fire. On the stand, however, he was able to recall a fair amount of detail about events that night. The prosecutor then argued to the jury that they could consider his initial statement as proof of consciousness of guilt. "Now, the reason that that's important and that that's relevant in this case is because remember what the defendant told Sergeant MacKriss and that is I have absolutely no memory of either of these two incidents. And Sergeant MacKriss began to explain it to him. He said oh I may have done it for this reason or I may have done it for that reason but he never admitted that he actually had any memory. He specifically told Sergeant MacKriss he did not recall either the incident with Kristina being slapped or anything to do with the fire. But you saw him on the stand. And he suddenly has a very vivid memory, detail after detail, timing, where he went, what he was wearing, who he was talking to, what movie they were watching. He can tell you all kinds of details when he's on the stand today."

Defendant now asserts his attorney was ineffective in failing to investigate and present psychological testimony to defuse the prosecutor's suggestion that he had lied to the investigating officer. In support he relies on a declaration in which psychologist Rahn Minagawa attests that alcoholics experiencing blackouts are unable to remember what happened during the blackout but will later accept what others tell them and repeat

that information as though it were a recalled memory.[6] Armed with such evidence, defendant asserts, his attorney would have been able to demonstrate defendant did not act willfully and the information defendant gave during testimony probably came from others.

Assuming arguendo that trial counsel performed deficiently in failing to obtain and present such testimony, defendant has failed to establish prejudice. The evidence of guilt was substantial. On the other hand, the only evidence that defendant was experiencing an alcoholic blackout that night was from his own testimony. The officer who interviewed him the next morning testified that he did not appear to be under the influence of alcohol or experiencing alcohol withdrawal.[7] Viewing the record as a whole, defendant cannot show a reasonable likelihood that the jury would have reached a different verdict had trial counsel offered evidence attributing his divergent stories to an alcoholic blackout.

3. Failure To Support Request For CALJIC No. 3.32

Trial counsel requested CALJIC No. 3.32 directing the jury to consider whether a mental disease or defect prevented defendant from forming the specific intent for attempted arson.[8] The trial court ruled the evidence did not support the instruction. Relying on Dr. Minagawa's post-trial declaration,[9] defendant contends that at the time of the incident his "paranoia substantially increased, as did the force and power of the auditory hallucinations. The auditory hallucinations were associated with impulsive

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6 We previously deferred ruling on appellate counsel's request for investigative fees for Dr. Minagawa's services. Despite counsel's failure to obtain preapproval, we find the expenditure of $1,100 to have been appropriate and approve the reimbursement request.

7 Defendant testified that in withdrawal he was subject to fever and tremors.

8 CALJIC No. 3.32 instructs: "You have received evidence regarding a [mental disease] [mental defect] [or] [mental disorder] of the defendant . . . at the time of the commission of the crime charged . . . . You should consider this evidence solely for the purpose of determining whether the defendant . . . actually formed [the required specific intent,] . . . which is an element of the crime . . . ."

9 In relevant part, Dr. Minagawa attested that in December 2002 petitioner "reported that he frequently heard voices (for a few minutes at a time) several times a week, often associated with impulsive thoughts, which he tried to control."

thoughts. These transient, impulsive thoughts, combined with his alcohol abuse did not allow defendant to form the specific intent required for him to be convicted of attempted arson." He urges that proper investigation and presentation of psychiatric testimony to support a CALJIC No. 3.32 instruction would likely have produced an acquittal.

Defendant's claim fails. He testified he was *not* hearing voices at the time of the offense. In the face of that testimony, defendant offers no credible reason why the jury would have been persuaded by expert testimony that a mental condition he was *not* experiencing at the time could have impaired his ability to form the specific intent required. Dr. Minagawa's later-formed opinion is undermined by defendant's own evidence. We discuss Dr. Minagawa's information about the case at greater length in Section II.B. below.

4. Sentencing Error

Defendant asserts counsel was ineffective because he did not secure a psychological evaluation before sentencing. Such an expert would have reported that defendant suffered from significant psychiatric disorders; that he did not understand the seriousness of his conduct; and that his criminality was probably "the result of his mental illness and marginal mental functioning." Defendant concedes, however, that counsel provided the probation department with documentation of his mental health history. The probation report informed the court that defendant had attempted suicide in 1992 and 1998; that he suffered from bipolar disease and had medication prescribed for him; that he had admitted himself to San Mateo County General Hospital because he was hearing voices; that he had been on antidepressants and under psychiatric care after his suicide attempts; that he had stopped taking his medications and failed to continue with therapy. At sentencing defense counsel argued that defendant had significant psychological problems.

Defendant has not shown what counsel actually did provide to the probation department. Thus, it is impossible to conclude these records were inadequate. Even were we to assume some inadequacy, however, it is not reasonably probable, on this record, that a psychiatric evaluation would have changed the court's sentencing decision. The

court knew that defendant had significant psychiatric problems. The court's comments at sentencing made clear its overriding concern that defendant posed a significant risk to others and that this risk outweighed any mitigating factors, including his mental illness and self-medication with alcohol. Nothing in the record or in the evidence presented on habeas indicates that a psychiatric evaluation would have changed this judgment. Nor has defendant provided this court with legal support for his apparent claim that counsel must request a psychiatric expert whenever mental health issues may be relevant at sentencing. The only case he cites for this broad proposition is *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307. To the extent that it is relevant, *Corenevsky* holds only that the constitutional right to counsel includes also a right to ancillary services necessary in the preparation of a defense, including investigative expenses. (*Id.* at pp. 319-320.) Absent an affirmative showing of prejudice, no basis appears for an order to show cause.

B. Competency

Defendant maintains that, apart from his ineffective assistance claim, he was denied due process of law because he was incompetent. He cite for this proposition authority from the Ninth Circuit Court of Appeals: " 'In a habeas proceeding, a petitioner is entitled to an evidentiary hearing on the issue of competency to stand trial if he presents sufficient facts to create a real and substantial doubt as to his competency, even if those facts were not presented to the trial court.' [Citation.] A 'good faith' or 'substantial doubt' exists 'when there is substantial evidence of incompetence.' [Citation.] 'Even if the evidence before the trial judge was insufficient to raise a good faith doubt with respect to [a defendant's] competency, he would still be entitled to [a hearing] if it now appears that he was in fact incompetent.' " (*Deere v. Woodford* (9th Cir. 2003) 339 F.3d 1084, 1086 (*Deere*), brackets in original.)

To meet his burden, defendant relies heavily on Dr. Minagawa's attestation that defendant was incompetent at the time of the preliminary hearing, trial and sentencing. Dr. Minagawa based his opinion on a review of various documents, statements and transcripts related to defendant's case and a four-hour interview conducted some six months after defendant's conviction and over a year after the crimes. He opines that

defendant's extensive psychiatric history, his statements about having heard voices before trial, and his history of placement in special education classes indicated "he needed a comprehensive psychological evaluation to *determine* his competency. . . ." (Emphasis added.)

This evidence fails to raise a reasonable doubt as to defendant's competence to stand trial. Defendant relies on *Deere, supra*, 339 F.3d at p. 1084, in which the Ninth Circuit found psychiatric testimony submitted on a habeas petition sufficient to compel the district court to hold a competency hearing. First, we note that this case is not binding precedent. Even if it were applicable, it would not assist defendant. In *Deere*, the court gave credence to the declaration of an expert who had examined the defendant *within several days* of his guilty plea. However, it expressed a different view of another psychiatrist's evaluation conducted several years after the fact. The court noted: "Belated opinions of mental health experts are of dubious probative value and therefore, disfavored. [Citation.] 'We disfavor retrospective determinations of incompetence, and give considerable weight to the lack of contemporaneous evidence of a petitioner's incompetence to stand trial.' " (*Id.* at p. 1086, internal brackets and parentheses omitted.) Dr. Minagawa's opinion suffers the same debility highlighted in *Deere*.

In addition to its post hoc nature, Dr. Minagawa's declaration is speculative and internally inconsistent. He cites defendant's testimony that he heard threatening "voices" four or five times while in jail before trial. This testimony, he posits, is "clear evidence" of psychotic processes that "[call] into question his ability to sustain his attention in Court, or to have trust in his own attorney." Yet, while fully crediting this particular testimony, Dr. Minagawa simply dismisses defendant's further statement that he never heard voices during the court proceedings. This latter statement, he says, "does not appear to be credible given the nature of his psychiatric condition." Indeed, Dr. Minagawa opines that "Mr. Coles was unable to follow the proceedings in Court due to his efforts to ignore or shut out the voices *he was hearing during the trial*." Nowhere does the doctor explain why defendant would truthfully report suffering auditory hallucinations before trial but inaccurately report not experiencing them during court.

Dr. Minagawa relies heavily on the fact that defendant initially declined to testify but changed his mind after conferring with counsel. Dr. Minagawa deduces that defendant either did not understand the proceedings or could not rationally assist in his defense. That assumption is but one of various possible reasons for his change of mind, including the likelihood that an understandable reluctance to expose himself to cross-examination gave way in the face of his counsel's advice. In sum, the evidence does not satisfy the standard of raising a " 'real and substantial doubt' " (*Deere, supra,* 339 F.3d at p. 1086) as to defendant's competency to stand trial.

DISPOSITION

The judgment is affirmed. The petition for habeas corpus is denied.

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Corrigan, Acting P.J.

We concur:

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Parrilli, J.

_____
Pollak, J.

Trial Court:	San Mateo County Superior Court
Trial Judge:	Hon. John W. Runde
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