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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.

CLEOTHA JONES,

Defendant and Appellant.

A101736

(Del Norte County
Super. Ct. No. CRPB-00-5043)

In re CLEOTHA JONES,

on Habeas Corpus.

A107889

Appellant Cleotha Jones was twice found incompetent to stand trial on a complaint charging him with multiple counts of threatening state officials or judges (Pen. Code, § 76)¹ and batteries and attempted batteries on correctional officers and other non-inmates (§§ 4501.5, 4501.1). After a certificate of mental competence was filed and criminal proceedings resumed, Jones’s attorney filed a motion to determine mental competence (§ 1368), arguing good cause existed because prison authorities had recently placed Jones on psychotropic medications. The trial court denied the motion and denied counsel’s request for appointment of a mental health expert to evaluate Jones’s competency. Two days later, over his attorney’s objections and without a preliminary hearing, Jones pleaded guilty to one count of threatening an official and not guilty by reason of insanity (NGI) to

¹ All statutory references are to the Penal Code.

one count of battery on a non-inmate, and he admitted two prior strike convictions. After a court trial on the NGI plea resulted in a finding of insanity, Jones was committed to a mental hospital for 25 years to life and, pursuant to the plea agreement, also sentenced to a consecutive term of 25 years to life in prison.

Jones obtained a certificate of probable cause and raises several claims in the consolidated appeal and petition for writ of habeas corpus. We conclude the conviction must be reversed, and Jones must be permitted to withdraw his pleas, because the trial court erred in denying Jones's request for a competency evaluation under section 1368.²

BACKGROUND

Shortly before the Del Norte County District Attorney filed the charges that gave rise to this appeal, Jones was serving three 25-year-to-life sentences in Pelican Bay State Prison (Pelican Bay) in another case. However, on November 30, 1999, the Fifth District Court of Appeal reversed this conviction. Noting that Jones's release from prison was imminent, on March 2, 2000 a deputy district attorney filed an arrest warrant and criminal complaint charging Jones with five counts of threatening state officials and a judge in 1999 and five counts of battery and attempted battery on correctional officers and other non-inmates at various times from 1998 to January 2000. The trial court ordered Jones confined at Pelican Bay after the Del Norte County Sheriff's Department declared it did not have appropriate facilities for housing a disruptive and violent inmate, such as Jones had proven in the past to be.

I. Prior Competency Proceedings

On March 23, 2000, defense counsel filed a section 1368 motion to determine Jones's competency. The court, Judge Frank S. Peterson, granted the motion, suspended proceedings, and appointed two mental health experts to evaluate Jones. Forensic and clinical psychologist Otto V. Vanoni interviewed Jones at Pelican Bay and found him to be in an "extremely agitated state" even though he had been medicated with psychotropic

² In light of our decision on this ground, we do not address Jones's remaining claims, nor do we discuss facts or proceedings that are irrelevant to the competency issue. Because we reverse the conviction, Jones' petition for a writ of habeas corpus is dismissed as moot.

drugs. Dr. Vanoni concluded Jones was not competent to stand trial. Psychiatrist Robert E. Soper filed a report that agreed with this conclusion, although Dr. Soper was not able to complete an interview with Jones due to Jones's disruptive outbursts and refusal to cooperate. On April 27, 2000, Judge Peterson found Jones presently incompetent and ordered him committed to a treatment facility.

After this order issued, Dr. Soper filed an addendum to his report. Having reviewed Jones's recent medical records and the opinions of prison psychiatrists that Jones was not delusional, Dr. Soper reversed his earlier opinion and concluded "the preponderance of the evidence now supports the view that there is premeditation in much of Mr. Jones's behavior."

On August 10, 2000, three months after he was committed there, Atascadero State Hospital (ASH) certified that Jones was presently competent. According to ASH's discharge summary, Jones was extremely agitated when admitted and displayed "a great deal of paranoia," though he exhibited "no active psychotic symptoms" such as hallucinations. During his hospital stay, however, Jones was well behaved and "showed no evidence" of a psychotic or mood disorder. The discharge diagnosis was antisocial personality disorder, "which could be characterized as severe," but no Axis I disorder. The ASH staff believed Jones was choosing not to cooperate with the criminal justice system and this behavior was not the result of a mental illness. ASH staff therefore concluded Jones was "competent to stand trial on no psychotropic medications."

Jones was returned to Pelican Bay on August 18, 2000, and he promptly challenged the competency certification. Jones acted out violently in the courtroom, and his attorney averred Jones had apparently "suffered a relapse of his mental problems by being placed back at Pelican Bay State Prison." At Jones's request, the court appointed Dr. Vanoni and psychologist D. Rose Marie Reynolds to evaluate Jones's competency. Dr. Vanoni examined Jones for approximately four hours at Pelican Bay and remarked upon Jones's extreme anger and "obvious paranoia." Although Jones would not cooperate sufficiently for Vanoni to administer objective malingering tests, Vanoni believed "the sustained, relentless fury in his behavior nullifie[d] any major malingering." In addition, the fact that

Jones's aggression had apparently not wavered for any significant period of time, despite medications, was a factor that ruled out "major malingering." But Vanoni noted, "Of course, this does not mean that Mr. Jones does not malingering in certain vectors of his behavior; he [ha]s a major personality disorder." Based on several psychological tests, he diagnosed Jones with probable delusional paranoid disorder and generalized anxiety disorder (Axis I) and paranoid and antisocial personality disorders (Axis II). Dr. Vanoni also believed it is possible Jones has an organic brain dysfunction.

Dr. Reynolds reached a different conclusion. Jones was at times agitated and rageful when she interviewed him but still capable of listening to her questions and concentrating on the interview. There was no evidence Jones suffered from hallucinations or delusions, and he gave the impression he was very knowledgeable about the legal system. Reynolds diagnosed Jones with antisocial personality disorder with borderline features and concluded he was not suffering from any mental illness that would impair his ability to participate rationally in his defense. She believed his refusal to cooperate with his attorney was deliberate and not due to psychosis.

Based on Dr. Vanoni's report and the court's own observations, on November 22, 2000 Judge Peterson again found Jones not competent to stand trial. After a brief commitment in the California Medical Facility in Vacaville, Jones was returned to ASH. On March 13, 2001, ASH staff submitted a periodic evaluation, which remarked that Jones appeared "very pleased with himself" for having acted in a manner that caused his return to ASH. The ASH psychiatrists placed Jones on no medications and diagnosed no Axis I mental disorder; nevertheless, the report concluded, "It is the opinion of the treatment team . . . that Mr. Jones may manifest a mental illness or defect in some respect that may interfere with him in his ability to cooperate with an attorney in the preparation of a defense."

II. 2001 Competency Proceedings and Plea

For administrative reasons, Jones was transferred to Patton State Hospital (Patton) at the end of February 2001. Less than one month later, in a report dated March 22, 2001, Patton certified Jones's return to competency. The certificate requested a hearing in the

matter, however, noting “A speedy trial is important for maintenance of trial competency.” Patton psychiatrists concurred in the Axis II diagnosis of antisocial personality disorder but no Axis I mental disorder, and Jones continued to receive no psychotropic medications. Patton staff found Jones “friendly, calm, amiable, high-functioning” and without symptoms of mental illness. They concluded his outrageous courtroom behaviors were a product of his severe Axis II personality disorder but were volitional, and not the result of any psychotic illness.

Clinical and forensic psychologist O. S. Glover, who had previously been appointed to assist the defense, examined Jones in Patton on April 20, 2001. He repeated the Axis II antisocial personality disorder diagnosis and also diagnosed Jones with Axis I disorders of paranoid schizophrenia (in partial remission), panic disorder and PCP disorder based on Jones’s history of substance abuse. Given Jones’s reported history of a severe childhood head injury, Dr. Glover also thought it possible Jones suffered from organic brain syndrome.³ Glover blamed conditions in the Security Housing Unit (SHU) at Pelican Bay for exacerbating Jones’s psychopathology, and he predicted that if Jones were removed from a hospital setting he would “again suffer clinical symptoms that would make it highly improbable that he could effectively cooperate in his defense. Nevertheless, in May 2001 Jones was returned to Pelican Bay, and in early June he was again placed in the SHU.

Relying on Dr. Glover’s report, Jones’s attorney challenged the restoration of competency. (§ 1372.) Judge Peterson recused himself from further proceedings, and a section 1372 hearing was conducted on June 4, 2001 by Judge Harold Neville. Judge Neville concluded Jones had not met his burden of proof in controverting the competency certification and therefore found Jones competent to stand trial.

A month later, on July 16, 2001, defense counsel filed another motion to determine Jones’s mental competence. (§ 1368.) Counsel declared that during a protracted visit with Jones at Pelican Bay he learned a prison psychiatrist had placed Jones on psychotropic

³ Dr. Soper also previously diagnosed a substance abuse disorder by history and a possible organic mental disorder secondary to head trauma.

medications. Nevertheless, Jones appeared highly agitated and suicidal, and counsel did not believe Jones was capable of assisting in the defense of his case. Counsel declared on information and belief that Jones had suffered a relapse of mental illness as a result of having been placed in Pelican Bay. At the July 30, 2001 hearing on this motion, which was conducted before a third judge (Hon. John R. Morrison), Jones's attorney explained he was not necessarily requesting another competency hearing. Rather, the motion sought appointment of a mental health expert to examine Jones and give an opinion as to whether he was currently competent to stand trial. Although defense counsel argued he could never produce evidence of Jones's incompetence sufficient to rebut the opinions of psychiatrists at Patton absent another examination, the court denied the motion.

The next day, July 31, 2001, Jones's attorney filed a motion to withdraw as counsel, declaring there had been an irreparable breakdown in the attorney-client relationship such that continued effective representation was not possible. Then, on August 1, 2001, Jones signed a declaration waiving his rights in connection with a guilty plea. Pursuant to the plea agreement, Jones pleaded guilty to one count of threatening a state official and admitted two prior felony strike convictions, with an agreed sentence of 25 years to life imprisonment "consecutive to any other sentence" and Jones's promise to "waive appellate rights." All remaining charges would be dismissed except one count of battery on a non-inmate, to which Jones would plead not guilty by reason of insanity (NGI). On the form, defense counsel specifically indicated he did not concur in the plea.

A change of plea hearing was held the same day, August 1, 2001, before Judge Morrison. When the court asked Jones if he was currently taking any psychotropic medications, Jones responded, "Yes, Your Honor, a lot of them, sir." Jones said he had taken 60 milligrams of Paxil, "for anxiety and panic attack," and 600 milligrams of Gabapentin, "for brain damage," and said he felt the effects of these drugs "all the time." When asked if he would nevertheless be able to make an intelligent decision about the plea, Jones responded that he was "real high." He said, "I'm like floating, you know, I'm drugged." The court then asked Jones whether feeling "high" would interfere with his ability to make a "good decision" regarding the plea. Jones answered, "Well—I feel—I

feel that—I mean I can—you know. I can—I can—can say, yes. You know.” After the prosecutor and the court expressed concern over proceeding given Jones’s statements, Jones interrupted and launched into a long soliloquy in which he complained about his treatment at Pelican Bay and asserted he was placed on medication because he is mentally ill. Jones also told the court he wanted to enter the plea so he could obtain mental health treatment.⁴ Jones then agreed with the court’s assessment that the drugs helped him to be calm enough to enter a knowing and intelligent plea.

Jones entered pleas in accordance with the agreement and waived his right to a jury trial on the charge to which he pleaded NGI. However, Jones’s attorney remained doubtful that Jones was competent to enter the plea and said he did not believe Jones understood all the consequences of the plea. Counsel related Jones’s belief that there is a conspiracy against him and that his attorney is part of the conspiracy. Nevertheless, the court accepted Jones’s pleas and decided it would “not act on” defense counsel’s motion to withdraw “at this time.” After Jones entered his NGI plea to the battery charge, the trial court relied on Dr. Glover’s report to find that Jones was legally insane at the time of this October 1998 offense. Specifically, the court quoted Dr. Glover’s conclusion that Jones’s incarceration for 10 years in the Pelican Bay SHU “resulted in an exacerbation of the very psychopathology that is currently the object of legal scrutiny” and “likely produced the type of psychopathology that Mr. Jones evidenced in 1998 [and] 1999.”

In accordance with the plea agreement, Jones was sentenced to two consecutive terms of 25 years to life and remanded to the Department of Mental Health. The abstract of judgment further states that, in the event his sanity is restored, Jones will be transferred to the Department of Corrections to serve the remainder of both sentences in prison. On March 20, 2003, this court granted Jones’s motion to file a late notice of appeal, and on November 24, 2003, the trial court granted Jones’s application for a certificate of probable

⁴ Jones said: “The only reason I want to take this deal, like I told [defense counsel], [is] because, hey, man, I’m mentally ill. I’m suffering over there. Nobody don’t care, you know.”

cause. Jones later filed a related petition for writ of habeas corpus, which we ordered consolidated with the appeal.

DISCUSSION

“A defendant who, as a result of mental disorder or developmental disability, is ‘unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner,’ is incompetent to stand trial. (§ 1367.) When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. [Citation.] Evidence is ‘substantial’ if it raises a reasonable doubt about the defendant’s competence to stand trial. [Citation.] The court’s duty to conduct a competency hearing arises when such evidence is presented at any time ‘prior to judgment.’ [Citations.]” (*People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153; see also *People v. Frye* (1998) 18 Cal.4th 894, 951-952.)

Because it has long been settled that conviction of an accused person while he is legally incompetent violates due process (*Pate v. Robinson* (1966) 383 U.S. 375, 377), “[t]he consequence of the court’s failure to order such a hearing in the face of such substantial evidence is severe: ‘Under section 1368 of the Penal Code the trial court has no power to proceed with the trial once a doubt arises as to the sanity of the defendant. In trying defendant without first determining at a hearing his competence to stand trial, the court both denie[s] to defendant a substantial right [citations] and pronounce[s] judgment on him without jurisdiction to do so. In such cases the error is *per se* prejudicial.’ ([*People v. Pennington* [(1967)] 66 Cal.2d [508,] 521.)” (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1021.)

“When a competency hearing has already been held and the defendant has been found competent to stand trial, however, a trial court need not suspend proceedings to conduct a second competency hearing unless it ‘is presented with a substantial change of circumstances or with new evidence’ casting a serious doubt on the validity of that finding. [Citations.]” (*People v. Jones, supra*, 53 Cal.3d at p. 1153; see also *People v. Lawley* (2002) 27 Cal.4th 102, 136; *People v. Medina* (1995) 11 Cal.4th 694, 734.) Although normally a trial court’s personal observations or beliefs about a defendant’s competency

are irrelevant, such that the court must hold a section 1368 hearing regardless of such beliefs if the defendant presents substantial evidence of incompetence (see *People v. Pennington, supra*, 66 Cal.2d at pp. 518-519; *People v. Castro* (2000) 78 Cal.App.4th 1402, 1415), “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.” (*People v. Jones, supra*, 53 Cal.3d at p. 1153.)⁵

In this case, a competency hearing pursuant to section 1368 was first held by Judge Peterson in April 2000. After Judge Peterson found Jones incompetent and committed him to ASH, Jones was not found legally competent to stand trial until June 4, 2001, when Judge Neville—new to the case—rejected his challenge to Patton’s competency certification. Thus, Jones was first adjudged competent at a section 1372 restoration hearing. Because he was previously found competent, Jones had to show there had been a substantial change of circumstances or present new evidence to obtain another competency hearing. (See *People v. Jones, supra*, 53 Cal.3d at p. 1153.) This standard is not insurmountable, however. Even after a court finds a defendant competent at a restoration hearing, “the court has ‘a continuing duty to monitor for substantial evidence’ of defendant incompetence. [Citations.]” (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1485.) If at any time after the restoration hearing “ ‘a doubt [arose] in the mind of the judge as to the mental competence of the defendant’ (§ 1368, subd. (a)) the judge had a duty to initiate mental competency proceedings.” (*People v. Mixon, supra*, 225 Cal.App.3d at p. 1485.)

⁵ However, our Supreme Court has noted such observations are particularly relevant when the defendant has actively participated in the trial and the trial court has had an opportunity to observe, and converse with, defendant throughout the trial and other proceedings. (*People v. Jones, supra*, 53 Cal.3d at p. 1153.) Here, because Judge Morrison was new to the case and Jones was not present in court when the section 1368 motion was argued, the trial court denied defense counsel’s motion to determine mental competency having *never* observed Jones in court. Judge Morrison’s first opportunity to observe Jones came at the change of plea hearing, which occurred two days *after* the hearing under section 1368.

Considering the trial court's continuing duty to monitor the case for substantial evidence of incompetence (*People v. Mixon, supra*, 225 Cal.App.3d at p. 1485), the new evidence a defendant presents to show a substantial change of circumstances requiring a second competency hearing must be sufficient to raise a "serious doubt" as to the defendant's continued competency. (See *People v. Jones, supra*, 53 Cal.3d at p. 1153 [the evidence must "cast serious doubt on" the validity of an earlier finding of competence]; see also *People v. Medina, supra*, 11 Cal.4th at p. 734 ["substantial evidence of a change in circumstances" necessitates a new hearing].) Jones's motion for appointment of a mental health expert to assess competency relied on evidence that: (1) Jones had been placed in Pelican Bay nearly two months earlier; (2) Jones appeared highly agitated and suicidal when his attorney visited him in the prison; (3) although he had been prescribed no psychotropic medications during his previous months of commitment in mental hospitals, Jones had now been placed on such medications by the prison's psychiatrist; and (4) a report from the last mental health expert who examined Jones indicated that he decompensates and exhibits clinical symptoms of mental illness when placed in a prison setting.

Setting aside whether this new evidence was sufficient to rebut the court's earlier finding of competence, it is clear from the record that the trial court did not assess the evidence in accordance with the proper legal standard. Rather than considering whether the new evidence was sufficient to raise a serious, or a reasonable, doubt as to Jones's competence, the trial court essentially reweighed the evidence another judge had previously considered at the restoration hearing and likewise concluded Jones had not proven he was incompetent by a preponderance of the evidence. Thus, the court stated: "There's obviously a difference of opinion here, but it would seem like the great weight of the evidence at this point is that he is, indeed, competent." Relying on past reports, the court found there had been a consistent pattern of Jones acting out while in prison and concluded his current behavior was just manifestation of this pattern. The court speculated that psychotropic medications may have been prescribed to ease Jones's discomfort or mental anguish, "But it does appear that, based on information in front of us, that he [has]

not, by a preponderance of the evidence shown, that even risen [*sic*] to enough evidence to show that he's entitled to a further hearing on this matter. [¶] On the other side, the great weight of the evidence is that he's acting out. . . . [¶] So the great weight of the evidence is that he's not even produced enough in order to be entitled to a hearing on that matter. . . .”

From these comments, it appears the trial court required Jones to prove his incompetence by a preponderance of evidence before it would even appoint a psychiatrist or psychologist to evaluate his competency. It is difficult to imagine how a defendant could ever obtain a second competency hearing under such a standard. Although the trial court's decision regarding whether to hold a second competency hearing is normally entitled to great deference, because an appellate court is in no position to appraise the defendant's conduct (see *People v. Danielson* (1992) 3 Cal.4th 691, 727), such deference is inappropriate when the record demonstrates the trial court applied the wrong legal standard in making this determination.

Moreover, this error is reversible because, at least as of the time of the change of plea hearing, the court was presented with substantial evidence of Jones's present incompetence. (See *People v. Pennington*, *supra*, 66 Cal.2d at p. 521; *People v. Castro*, *supra*, 78 Cal.App.4th at p. 1416.) In addition to counsel's declaration that Jones appeared delusional and suicidal (see *People v. Howard* (1992) 1 Cal.4th 1132, 1164 [counsel's opinion alone is not enough to require a hearing if the court has not declared a doubt as to the defendant's competency, but it is “undoubtedly relevant”]), Jones had a history of exhibiting symptoms of mental illness when housed in the Pelican Bay SHU, and the most recent psychological assessment by Dr. Glover warned that Jones would not be able to cooperate in his defense if removed from a hospital setting. Although the trial court dismissed Jones's behavior in Pelican Bay as mere “acting out,” evidence that the Pelican Bay staff psychiatrist had recently placed Jones on two psychotropic medications, when no such medications had been prescribed during either of Jones's hospital stays, could not be so easily disregarded. The administration of these new drugs, which Jones reported rendered him “real high” and “drugged” at the change of plea hearing, was a significant change of circumstances that, coupled with Jones's history and the most recent

psychologist's opinion regarding decompensation, cast a serious doubt on Jones's continued competency. (See *People v. Jones, supra*, 53 Cal.3d at p. 1153.) "[O]nce a doubt has arisen as to the competence of the defendant to stand trial, the trial court has no jurisdiction to proceed with the case against the defendant without first determining his competence in a section 1368 hearing. . . . [Citations.]" (*People v. Hale* (1988) 44 Cal.3d 531, 541.)⁶

Our conclusion is buttressed by the fact that the trial court rejected Dr. Glover's opinions regarding Jones's competency but then, just two days later, relied on the same report from Glover as sufficient proof to find Jones was legally insane when he committed an October 1998 battery. Indeed, at the change of plea hearing, the court quoted a portion of Glover's report describing how incarceration in the Pelican Bay SHU had exacerbated the psychopathology Jones exhibited in 1998 and 1999 and " "that he presents currently." " The court then remarked, "there is a basis here for finding that Dr. Glover did determine [Jones] was not competent and meets the definition of not guilty by reason of insanity at the time he's alleged to have committed this matter," and it found Jones legally insane based on Glover's report alone. When a court relies on a mental health expert's report as a sufficient basis for accepting a plea of NGI, it abuses its discretion by ignoring conclusions in the same report that the defendant is presently incompetent. (See *People v. Merkouris* (1956) 46 Cal.2d 540, 553 [doubt as to a defendant's sanity appeared as a matter of law when the court observed after reading one expert's report that it might be compelled to accept an NGI plea].⁷

⁶ Indeed, at the change of plea hearing, the trial court made some statements suggesting it did have some doubt about Jones's competency at the prior hearing. In remarking on how "well-reasoned and . . . competent" Jones's decision to enter the plea appeared to be, the court stated, "If I were to look only at the file, I'd have some question. And I did previously have a question in that regards [*sic*]."

⁷ Although we conclude the trial court applied the wrong standard in deciding whether to order a competency hearing, and that this error requires reversal, we of course express no opinion on how the question of Jones's competency should ultimately be decided.

Finally, cases upholding a trial court's decision not to order a new competency hearing are distinguishable. In *People v. Jones* (1997) 15 Cal.4th 119, 147-151, the defendant's sleepiness from medication was not a new circumstance, since the jury had previously rejected a claim that the administration of these drugs rendered the defendant incompetent. (See also *People v. Danielson, supra*, 3 Cal.4th at pp. 726-727 [despite the defendant's high drug doses, there was no substantial evidence his abilities to understand the proceedings and cooperate with counsel were impaired].) Other cases involve mere continuations of the same behaviors that were addressed in past competency proceedings (e.g., *People v. Lawley, supra*, 27 Cal.4th at pp. 136-138; *People v. Medina, supra*, 11 Cal.4th at p. 734) or bare assertions by counsel without supporting facts (e.g., *People v. Howard, supra*, 1 Cal.4th at pp. 1163-1164; *People v. Jones, supra*, 53 Cal.3d at p. 1153.)

DISPOSITION

The judgment is reversed. On remand, Jones shall be permitted to withdraw his pleas and admissions.

McGuiness, P.J.

I concur:

Corrigan, J.

POLLAK, J., Concurring.

I agree that defendant must be permitted to withdraw his guilty plea to the charge of threatening a state official in violation of Penal Code¹ section 76, but rely on a different ground in reaching this conclusion.

Before accepting defendant's conditional plea, the trial court failed adequately to determine that there is a factual basis for his plea, as required by section 1192.5. (See *People v. Holmes* (2004) 32 Cal.4th 432, 443 (*Holmes*).) The third paragraph of section 1192.5 provides in part that before accepting a conditional plea, "The court shall . . . cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea." This requirement applies only when the court accepts a conditional, or negotiated, plea of guilty or no contest, which is one that "specifies 'the punishment' to be imposed or 'the exercise by the court . . . of other powers legally available to it.'" (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1181.) "The purpose of the requirement is to protect against the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged. [Citation.] Inquiry into the factual basis for the plea ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead. 'In addition, these inquiries provide a more adequate record of the conviction process; this record minimizes the chances of a defendant successfully challenging his conviction later [citation], and also aids correctional agencies in the performance of their functions. Finally, increased knowledge about the circumstances of the defendant's offense provides the court with a better assessment of defendant's competency, his willingness to plead guilty, and his understanding of the charges against him.'" (*People v. Watts* (1977) 67 Cal.App.3d 173, 178.)

¹ All statutory references are to the Penal Code unless otherwise indicated.

Defendant pled guilty to one count of violating section 76. Subdivision (a) of that section makes it a crime to “knowingly and willingly threaten[] the life of, or threaten[] serious bodily harm to, any elected public official . . . with the specific intent that the statement is to be taken as a threat, *and the apparent ability to carry out that threat by any means . . .*” (Italics added.) Subdivision (c)(1) of section 76 provides a non-exclusive definition of the phrase “apparent ability to carry out” the threat when the defendant is incarcerated. “ ‘Apparent ability to carry out that threat’ includes the ability to fulfill the threat at some future date when the person making the threat is an incarcerated prisoner *with a stated release date.*” (*Ibid.*, italics added.)² “[T]he statute requires the defendant to have the specific intent that the statement be taken as a threat and also to have the apparent ability to carry it out, requirements which convey a sense of immediacy and the reality of potential danger and sufficiently proscribe only true threats, meaning threats which ‘convincingly express an intention of being carried out.’ ” (*People v. Gudger* (1994) 29 Cal.App.4th 310, 320.) Moreover, to constitute a violation of the statute, the target of the threat must reasonably have been placed in fear for his safety. (See *People v. Andrews* (1999) 75 Cal.App.4th 1173, 1178.)

There was no preliminary hearing in this case and the parties waived preparation of a report by the probation department. The only description of the offense to which Jones pleaded guilty is contained in the complaint and in the district attorney’s arrest warrant affidavit. The affidavit states that “on August 23, 1999, the defendant sent a letter to the Del Norte County District Attorney’s Office threatening the lives of District Attorney Robert Drossel, as well as Superior Court Judge Robert Weir.” At the plea hearing, the court asked, “And to the offense set forth that on or about the 23rd day of August of 1999, that you did commit a violation of section 76(a) of the Penal Code, a

² Likewise, CALJIC No. 7.40 defines the phrase for a jury as follows: “ ‘Apparent ability to carry out that threat’ includes but is not limited to the ability to fulfill the threat at some future date when the person making the threat is an incarcerated prisoner with a stated release date.”

felony, in that you did willfully and unlawfully on or about that day threaten the life and threaten serious, bodily harm to District Attorney Robert Drossel with the intent that statement be taken as a threat with the apparent ability to carry out that threat, to that charge, sir, what is your plea?” Jones replied, “Guilty, Your Honor.” After the court finished taking Jones’s plea on the strike allegations and the assault count, the judge asked, “Could we have a stipulation of the factual basis for entry of his plea?” The prosecutor answered, “So stipulated,” and defense counsel stated, “Stipulation, yes, Your Honor.”

However, on August 23, 1999, the date on which defendant was alleged to have threatened the district attorney, Jones was incarcerated in Pelican Bay prison, serving a term of 75 years to life on a 1997 conviction, also for threatening a public official. As the district attorney noted in the declaration filed with the original complaint, the current charges were not brought against Jones until March 2000 because prior to the Fifth Appellate District’s reversal of that conviction, it was anticipated that Jones would remain incarcerated for the length of that sentence. The Fifth District did not file its opinion reversing the conviction until November 30, 1999. Therefore, from the only facts contained in the record, it appears that Jones had no apparent ability to carry out the threat when he was alleged to have made it. Since he had no “stated release date,” the circumstances did not come within the scope of section 76, subdivision (c)(1). Moreover, so far as the record indicates, the charge suffered from the same fatal defect that caused the reversal of Jones’s 1997 conviction (*People v. Jones* (Nov. 30, 1999, F029266) [nonpub. opn.]), that is, there was no indication that the target of the threat reasonably feared for his safety.

Given these obvious questions as to how defendant could possibly have violated section 76, counsel’s conclusory stipulation was not sufficient to satisfy the court’s obligation to determine the existence of a factual basis for the plea. In *Watts*, although finding grand jury testimony included in the record sufficient to establish a factual basis,

the court found insufficient defense counsel's statement to the court that " 'We have discussed the elements of the charges against him and the possible defenses to those charges, and I have advised him of the law as it relates to the facts of his case. I have advised him of the legal consequences of a guilty plea to this charge and that the possible punishment for this offense is five years to life.' " (*People v. Watts, supra*, 67 Cal.App.3d at p. 180.) The court concluded that "[i]n order to effect the purpose underlying the factual basis requirement of Penal Code section 1192.5, the trial judge should develop the factual basis on the record, for example, by having the accused describe the conduct that gave rise to the charge, or by making specific reference to those portions of the grand jury transcript or preliminary hearing transcript which provide a factual basis for the plea, or by eliciting information from the defense attorney or the district attorney." (*People v. Watts, supra*, at pp. 179-180; see also *Holmes, supra*, 32 Cal.4th at p. 441, fn. 8 ["A closer question is raised when counsel stipulates to a factual basis for the plea under section 1192.5, absent reference to a particular document that provides an adequate factual basis. (*People v. McGuire* (1991) 1 Cal.App.4th 281, 286 (dis. opn. of Poche', J.) ['Such a stipulation reveals no more of a factual basis supporting the plea than the plea itself.'])] While we have no occasion to decide whether *McGuire* is correct, we agree . . . that the better approach under section 1192.5 is for a stipulation by counsel to a factual basis to be accompanied by reference to a police report [citation], reference to the probation report or preliminary hearing transcript [citation], or to reference grand jury testimony [citation]".)

In *Holmes, supra*, 32 Cal.4th at page 436, the Supreme Court pointed out that "in order for a court to accept a conditional plea, it must garner information regarding the factual basis for the plea from either defendant or defense counsel to comply with section 1192.5. If the trial court inquires of the defendant regarding the factual basis, the court may develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge [citation], or

question the defendant regarding the factual basis described in the complaint or written plea agreement. [Citations.] If the trial court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. [Citation.] Under either approach, a bare statement by the judge that a factual basis exists, without the above inquiry, is inadequate.”

The defendant in *Holmes* was charged with assault with the intent to commit rape and with sexual battery. The complaint listed “the charged offenses, name of the defendant and victim, date and location of the charged offenses, and briefly describe[d] the factual basis for the charged offenses.” (*Holmes, supra*, 32 Cal.4th at p. 436.) The first count stated that “ ‘The above named defendant(s) committed a violation of Penal Code section 220, a felony, in that on or about March 24, 2000, in the County of Riverside, State of California, he did willfully and unlawfully assault Sandra R., with the intent to commit rape.’ ” (*Holmes, supra*, at p. 436.) The second count stated that the defendant “ ‘did willfully and unlawfully direct and indirectly touch an intimate part of another person, to wit: Sandra R., for the purpose of sexual arousal, sexual gratification, and sexual abuse, against the will of said person.’ ” (*Ibid.*) At the plea hearing, the court asked, “ ‘Did you do what it says you did in Count 1 on March 24th, 2000 in Riverside County?’ ” The defendant replied, “ ‘Yes, ma’am.’ ” (*Id.* at p. 437.) The court held that this was adequate to establish a factual basis for the plea. (*Ibid.*)

Although in *Holmes* the court found that reference to the complaint provided a sufficient factual basis for accepting the plea, the court suggested that reference to the complaint may be insufficient in some circumstances. (*Holmes, supra*, 32 Cal.4th at p. 440, fn. 6 [“We do not decide whether reference to a criminal complaint will be sufficient in a complex case”].) The federal cases cited in *Holmes* to illustrate its qualification are instructive. In *United States v. Montoya-Camacho* (5th Cir. 1981) 644

F.2d 480, 486, the court stated, as quoted in *Holmes, supra*, at page 441, “ ‘The indictment may be used for [the purpose of determining a defendant’s understanding of the nature of the charges and establishing a factual basis] if it is factually precise and sufficiently specific to show “the accused’s conduct on the occasion involved was within the ambit of that defined as criminal.” ’ ”

In *United States v. Dayton* (5th Cir. 1979) 604 F.2d 931, 941, the defendant pleaded guilty to two charges that on two separate dates he “ ‘did unlawfully, knowingly and intentionally possess with intent to distribute’ ” approximately 600 and 1000 pounds of marijuana, respectively. An en banc panel held that in fulfilling the court’s responsibility to inform the defendant of the nature of the charges and determine that he understands them, it could provide no mechanical rule but only some general observations. “For simple charges such as those in this case, a reading of the indictment, followed by an opportunity given the defendant to ask questions about it, will usually suffice. Charges of a more complex nature, incorporating esoteric terms or concepts unfamiliar to the lay mind, may require more explication. In the case of charges of extreme complexity, an explanation of the elements of the offense like that given the jury in its instructions may be required; this, of course, is the outer limit, for if an instruction informs a jury of the nature of the charge sufficiently for it to convict the defendant of it, surely it informs the defendant sufficiently for him to convict himself.” (*Id.* at p. 938.) As to determining whether there is a factual basis for the charge, “Here again, no mechanical rules can be stated, and the more complex or doubtful the situation . . . , the more searching will be the inquiry dictated by a sound judgment and discretion.” (*Ibid.*)

United States v. Van Buren (6th Cir. 1986) 804 F.2d 888, also cited in *Holmes*, provides an example in which the defendant’s mere acknowledgement that he violated a statute expressed in legalistic terms was insufficient to establish a factual basis. There the defendant was charged with use of a telephone to further a conspiracy. The prosecutor explained that the defendant intended to plead guilty to “unlawfully using a

communication facility” and made reference to the indictment and code section with which he was charged. When asked to state what he had done, “[t]he defendant replied that he made a phone call and asked Clay to sell a gram or two of cocaine.” (*Id.* at p. 891.) The elements of conspiracy were never discussed nor explained to the defendant. The appellate court held that while the district court had established that the defendant used the telephone to purchase cocaine, “[o]ne must know of the conspiracy to commit the crime of conspiracy or to facilitate the conspiracy. The District Court did not establish by means of an inquiry directed to defendant a factual basis for the crime with which defendant was charged.” (*Id.* at p. 892.) The factual basis was lacking because “[t]he charge of utilizing a communication facility to further a conspiracy or in the commission of a conspiracy is a complex charge that a lay person would not easily understand. To fully understand the charge against him, defendant must have understood what it meant to be a member of a conspiracy and to act in furtherance of that conspiracy.” (*Ibid.*)

Here, the elements of the offense to which defendant pleaded were not so straightforward that even a defendant whose competence was unquestioned could necessarily be expected to understand them. When taking defendant’s plea, the trial court made no reference to any document describing the particulars of the offense. The only description of the offense mentioned at the hearing was the court’s inquiry of Jones whether he committed the offense as it was described in the complaint from which the court read. Although the complaint read to defendant included the statutory element “with the apparent ability to carry out that threat,” no reference was made to the definition of that phrase in subdivision (c)(1) of section 76, nor was mention made of any facts explaining how Jones might have had the apparent ability to carry out his threat. Nor did the court inquire or receive any information indicating whether the subject of defendant’s threat took the threat seriously or feared for his safety because of it.

The need for the trial court to have gone further in ascertaining that a factual basis existed was particularly compelling here, where the defendant's mental competence was at best questionable. Jones's history of mental instability was an additional factor that should have caused the trial court to make further inquiry into the factual basis for the crime to which he was pleading, rather than accepting the bare stipulation of counsel. (See, e.g., *Godinez v. Moran* (1993) 509 U.S. 389, 400 ["A finding that a defendant is competent to stand trial . . . is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary"]; *Brady v. United States* (1970) 397 U.S. 742, 758 [It is expected "that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and *that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged*" (italics added)].)

The Attorney General suggests that any error in accepting Jones's plea was harmless. "A finding of error under [the abuse of discretion] standard will qualify as harmless where the contents of the record support a finding of a factual basis for the conditional plea." (*Holmes, supra*, 32 Cal.4th at p. 443.) But as pointed out above, the record here does not support a finding that a factual basis exists for the offense to which Jones pled guilty. To the contrary, because of Jones's long-term imprisonment without a stated release date, the record indicates that without more he did not have the apparent means of carrying out his threat and that, in truth, there is no factual basis for his guilty plea.

I do not suggest that in every case the trial court must engage in an extensive colloquy and examine every conceivable defense before accepting a conditional guilty plea. As *Holmes* makes clear, where the charge is one that is easily understood, the

defendant's acknowledgement that he committed the offense as described in the charging document may be adequate to establish a factual basis for the plea. However, this was not such a case. While the court might reasonably have accepted defendant's acknowledgement that he sent a threatening letter to the district attorney, the court was obligated to determine that there is a factual basis for each of the elements of the offense. On the face of what was before the court, this was at a minimum highly dubious. Thus, the court was required to conduct a more extensive inquiry to ensure that defendant understood the elements of the offense and that there was a factual basis for his guilty plea, particularly in view of defendant's doubtful mental status.

The court's failure to have made such an inquiry affects the legality of the proceedings within the meaning of section 1237.5, subdivision (a). Since defendant obtained a certificate of probable cause, he is entitled to the reversal of the judgment on appeal and the opportunity to withdraw his guilty plea. (*People v. Marlin* (2004) 124 Cal.App.4th 559, 571.)

Pollak, J.