SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	) Supreme Court No.) S188453)
	) Court of Appeal No.
v.	) F057147)
LUIS OSCAR SANCHEZ, Defendant and Appellant.	) Superior Court Nos.) PCF204260A) VCF166696A) VCF180279

Fifth Appellate District
Tulare County Superior Court, Honorable Juliet L. Boccone, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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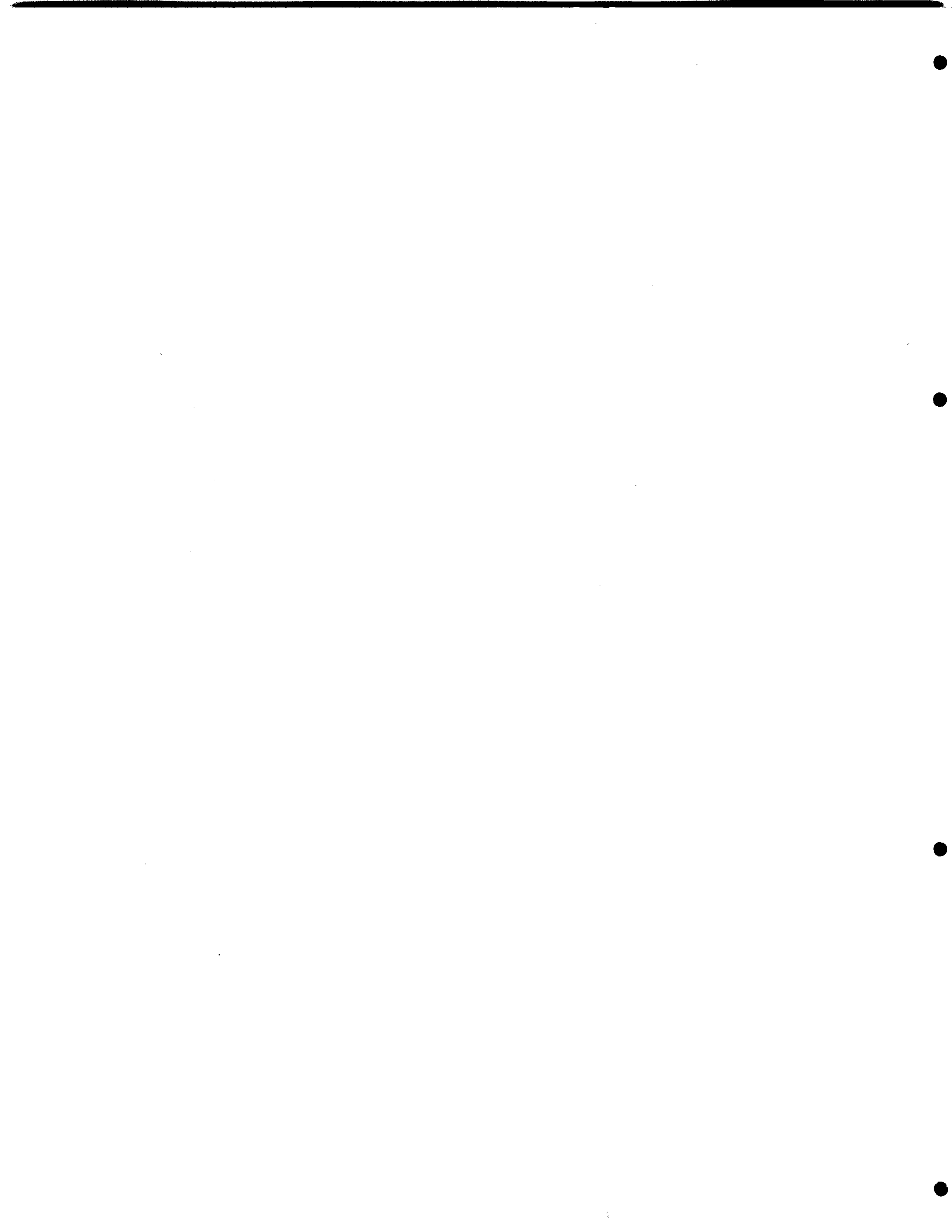

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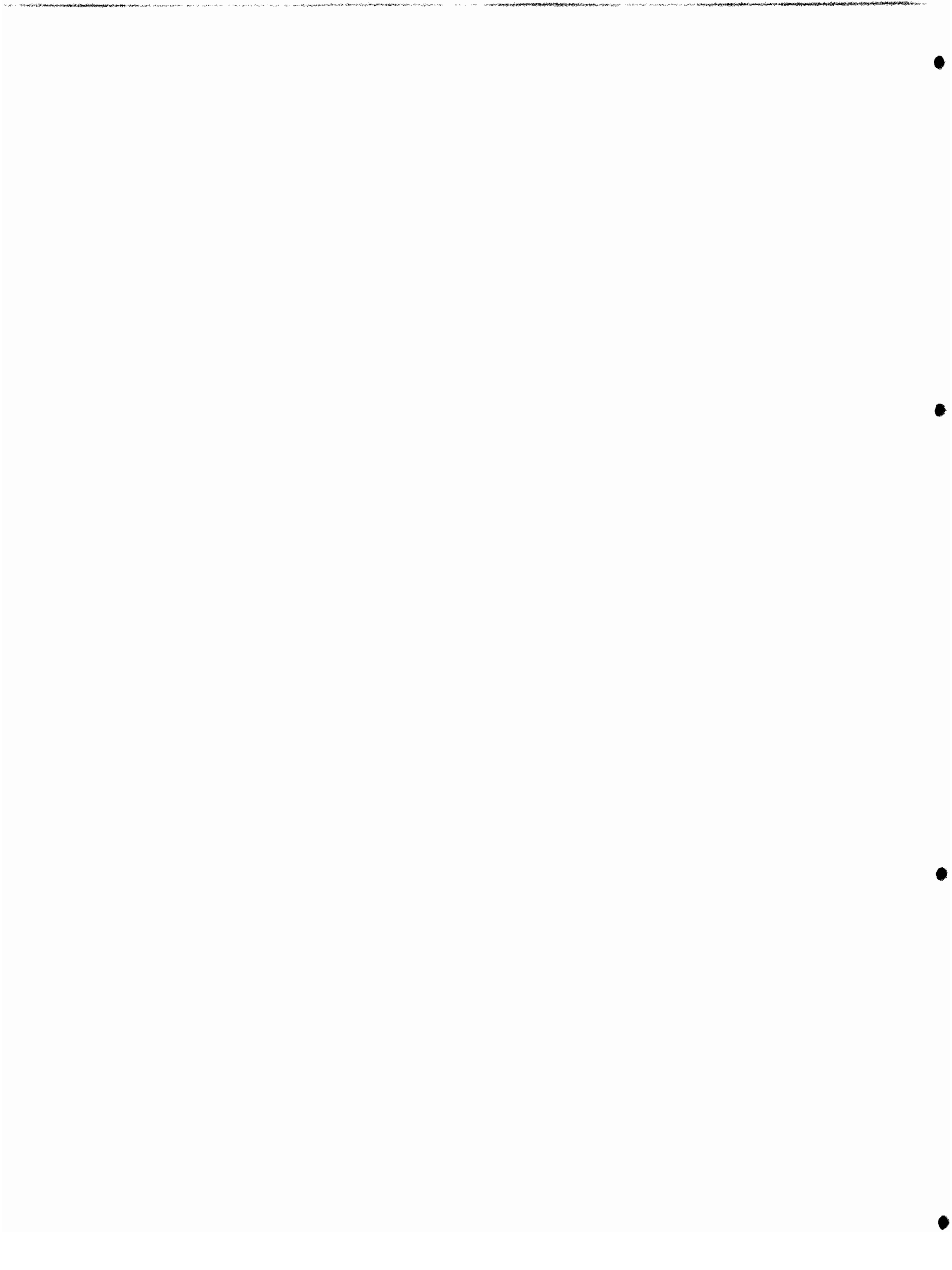

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	) Supreme Court No.) **S188453**)
	) Court of Appeal No.
v.	) F057147)
LUIS OSCAR SANCHEZ, Defendant and Appellant.	) Superior Court Nos.) PCF204260A) VCF166696A) VCF180279

Fifth Appellate District
Tulare County Superior Court, Honorable Juliet L. Boccone, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

ISSUES PRESENTED

1. When a defendant indicates after conviction the intention to move to withdraw a plea on the ground of ineffective assistance of counsel, is the trial court obligated to conduct a hearing on the issue whether to discharge counsel for all purposes and appoint new counsel (*People v. Marsden* (1970) 2 Cal.3d 118)?

2. Was defendant required to obtain a certificate of probable cause (Pen. Code, § 1237.5) in order to raise this issue on appeal?

RESPONDENT'S CONTENTIONS

I. A trial court's discretionary power to appoint counsel is not pre-empted by *Marsden*.

II. A required certificate of probable cause is present.

APPELLANT'S CONTENTIONS

I. When a defendant indicates after conviction he wishes to withdraw a plea based on ineffective assistance of counsel, the Sixth and Fourteenth Amendments to the United States Constitution dictate that the trial court must hold a hearing to determine whether to relieve counsel for all purposes and appoint new counsel.

II. This court should dismiss review as to whether a certificate of probable cause is required to reach the merits of the first issue, because the question is moot in the instant case; in the alternative, if a certificate is required, it was granted, and the appellate court was authorized to direct the lower court to grant it.

STATEMENT OF THE CASE

Proceedings in the Trial Court

On May 28, 2008, the Tulare County District Attorney charged appellant Luis Oscar Sanchez in a felony complaint filed May 28, 2008 with cultivation of marijuana (Health & Saf. Code, § 11358) and alleged appellant had suffered one prior strike (Pen. Code,[1] § 667, subds. (b)-(i)), a first degree burglary (§ 459; case no. VCF166696). (2 CT 353-354.) On June 19, 2008, the probation officer filed a request for revocation of probation in case number VCF166696A, and, on October 22, 2008, appellant was arraigned on the violation of probation. (1 CT[2] 146, 2 CT 291.) No request for revocation of probation was filed in case number VCF180279, and, on October 22, 2008, appellant was arraigned on the violation of probation, with the minute order indicating "basis of VOP: filing of case PCF204260A." (2 CT 291.)

On October 28, 2008, appellant, represented by Tulare County Deputy Public Defender Nathan Leedy, pled guilty to cultivation of marijuana (Health & Saf. Code, § 11358) and admitted allegations that he had one strike, a first degree burglary in case number VCF166696A. (2 CT 296-302.) He also admitted he had violated probation in case numbers

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

[2]"CT" stands for the clerk's transcript. "RT" stands for the reporter's transcript. "Aug. RT" with the date of the hearing stands for the augmented reporter's transcript.

VCF166696A and VCF180279. (2 CT 302.) The court gave an indicated sentence of 32 months in state prison. (2 CT 296.)

On the date set for sentencing, December 2, 2008, Deputy Public Defender Tony Dell'Anno appeared and told the court "Mr. Sanchez wishes to have the Public Defender explore having his plea withdrawn" and the following ensued:

> THE COURT: Is this something that you can do or do I need to appoint conflict counsel?
>
> MR. DELL'ANNO: My understanding is that we -- conflict cannot be appointed until a Marsdens [sic] were held where the Court would find that we did not give competent advice before conflict. [¶] I believe at this point we need to check out any issues for possible withdrawal ourselves.
>
> THE COURT: Okay. So you are going to look into this and then -- this had been going on for awhile here?
>
> MR. DELL'ANNO: Yes.
>
> THE COURT: What I am going to do is I am going to give you till the 9th to let me know whether or not conflict counsel needs to be appointed and at that time you can give me an update as to whether counsel needs to be appointed or that you need to file a motion on his behalf as his representative. (Aug. RT 12/2/2008 pp. 3-4.)

On December 9, 2008, Deputy Public Defender Kimberly Barnett told the court that "conflict attorney needs to be [ap]pointed" and the following ensued:

> THE COURT: We had discussed you were looking into conflict needing to be appointed if you wanted to do a motion to withdraw his plea. [¶] Your assessment is that it's necessary, so what I am going to do is I am going to appoint

> conflict counsel for the sole purpose of looking into the motion to withdraw his plea. [¶] You want to continue to waive time for your sentencing; is that correct?
>
> THE DEFENDANT: Well, actually I wanted to change the plea to not guilty.
>
> THE COURT: In order to do that they have to get a motion filed to give you a good reason for that and in order to get a motion filed I have to appoint another attorney to figure out the reason why you want to withdraw your plea.
>
> . . . .
>
> [¶] . . . I have appointed conflict counsel and they will contact you. When they contact you you give them all the reasons why you think you should be able to withdraw your plea. They will give you some advice about that. (Aug. RT 12/9/2008 pp. 3-4.)

On December 30, 2008, Wes Hamilton, conflict counsel, appeared for appellant, told the court that he had reviewed appellant's file and talked to him, and the following ensued:

> MR. HAMILTON: He is adamant he wants to withdraw the plea but I don't have a legal basis. I looked at the felony plea.
>
> THE COURT: Okay.
>
> MR. HAMILTON: He wants a trial on his case.
>
> THE COURT: In light of that we will do the sentencing. You have reviewed the file and you have reviewed the criteria. You talked to him and you do not find a legal basis to withdraw his plea?
>
> MR. HAMILTON: No, I don't.
>
> THE COURT: All right he is on for sentencing so it goes back to you representing him.
>
> [DEPUTY PUBLIC DEFENDER NATHAN] LEEDY: I know I represented him at the time of the plea but I don't

have the file or the probation report. (Aug. RT 12/30/2008 p. 3.)

At sentencing, on January 2, 2009, Deputy Public Defender Nathan Leedy told the court that appellant "is still in the position that he would like to withdraw his plea." (2 CT 403.) The court stated that conflict counsel "did an evaluation on his case and talked to him. He did not find that there was any basis or any grounds for plea withdrawal." (2 CT 403.)

The court sentenced appellant to 32 months in state prison (lower term doubled under the strikes law) as to the marijuana cultivation conviction in case number PCF204260A. (2 CT 400-401, 404[3].) The court revoked probation and sentenced appellant to the concurrent sentences in case numbers VCF180279 and VCF166696A. (2 CT 400-401, 406-407.)

On January 14, 2009, defense counsel prepared a notice of appeal, indicating a challenge to the validity of the plea or admission and sought a certificate, stating "Defendant Luis Oscar Sanchez challenges the refusal of his court-appointed attorney to bring a motion to withdraw his plea and admissions of the alleged violations of probation." (2 CT 411-412.) No other grounds were stated. On February 6, 2009, the superior court denied the request for a certificate. (2 CT 412.) On February 26, 2010, the superior court filed the notice of appeal. (2 CT 411.)

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[3]There are multiple copies of some documents in the clerk's transcripts due to the multiple cases. Appellant refers to the abstract and sentencing transcripts found in the section for case PCF204260A.

Proceedings in the Court of Appeal

On appeal, appellant argued that his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process of law were violated when the court failed to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. (Appellant's Opening Brief ("AOB") 7-14.) Both parties acknowledged in their statements of case that the certificate had been denied. (AOB 5; Respondent's Brief ("RB") 3.) Neither party raised or briefed the issue of whether a certificate was needed.

On May 17, 2010, following the completion of briefing, the Court of Appeal sent a letter to the parties, noting this court's holding in *People v. Johnson* (2009) 47 Cal.4th 668 ("*Johnson*") that a certificate is required under section 1237.5 where an appeal seeks "an order for further proceedings aimed at obtaining a ruling by the trial court that the plea was invalid . . .", asking whether that comported with appellant's contention on appeal, and directing the parties to brief the issue of "Is appellant's claim that the court erred by its failure to hold a *Marsden* hearing cognizable on appeal in light of *Johnson* and appellant's failure to obtain a certificate of probable cause?"

On June 4, 2010, appellant filed a letter brief, asking the Court of Appeal to treat the appeal as a petition for writ of mandate or a petition for writ of habeas corpus and hear the case on the merits to avoid the trial

court's insulating itself from review by not following established procedures and then denying a certificate. (App. Supp. Ltr. Bf. dated 5/29/2010 p. 2.) Appellant argued the purpose of section 1237.5 was to prevent the expense of record preparation and appointment of counsel in frivolous appeals, but, in the instant case, the record had already been prepared and counsel appointed. (*Ibid.*) Further, counsel had not been appointed in the instant case until seven months after appellant had requested a certificate (six months after the certificate had been denied), noting a timely mandate writ petition can challenge the failure of a court to issue a certificate but "a six month time lag most likely would not be viewed as timely." (*Id.* at p. 1.)

On June 9, 2010, the Attorney General filed its letter brief, arguing that a certificate was required because appellant was seeking an order for further proceedings aimed at obtaining a ruling by the trial court to invalidate his plea under *Johnson*, *supra*, 47 Cal.4th at p. 682 and asking that the court not consider the issue on appeal. (Resp. Supp. Ltr. Bf. dated 6/04/2010, pp. 1-2.)

On July 2, 2010, the Court of Appeal granted the Attorney General leave to file an informal letter brief addressing whether the court should reverse the superior court's denial of appellant's request for a certificate and whether the court should direct the superior court to grant the request.

On July 14, 2010, the Attorney General filed an informal response, arguing that the court lacked authority to reverse the trial court's denial of appellant's request for a certificate because appellant failed to file a timely petition for writ of mandate, that the court should not construe appellant's brief as a petition for mandate because a brief cannot substitute for a writ petition, and that, even if deemed a writ petition, it was not filed within 60 days of the court's denial of the certificate. (Resp Supp. Ltr. Bf. dated 07/12/2010 pp. 1-2.)

On July 28, 2010, the Court of Appeal on its own motion directed the superior court to vacate its denial of the request for a certificate and enter a new order granting the request. Respondent did not seek this court's review of that order.

On August 3, 2010, the superior court granted the certificate. (Supp. CT [certificate of probable cause] p. 2.)

STATEMENT OF FACTS

PCF204260A

On May 10, 2008, police investigated a 9-1-1 hang-up call at appellant's house in Lindsay. Appellant told them he had dialed 9-1-1 by mistake. Police searched the house to ensure no one needed help. When they detected a strong odor of marijuana, police looked in the closet and found four marijuana plants. (2 CT 371.)

VCF166696A, VCF180279

The cultivation of marijuana count was the basis for the admission of probation violations in case numbers VCF166696A and VCF180279. (1 CT 146, 2 CT 291.)

ARGUMENTS

I.

WHEN A DEFENDANT INDICATES AFTER CONVICTION HE WISHES TO WITHDRAW A PLEA BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL, THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DICTATE THAT THE TRIAL COURT MUST HOLD A HEARING TO DETERMINE WHETHER TO RELIEVE COUNSEL FOR ALL PURPOSES AND APPOINT NEW COUNSEL.

A. Introduction, Proceedings Below, And Standard Of Review.

The Court of Appeal concluded that defense counsel's request for appointment of "conflict" counsel to investigate the filing of a motion to withdraw appellant's plea triggered the trial court's duty to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 ("*Marsden*"). (Typed opn., p. 4.) The court further concluded that the trial court erred by appointing separate counsel in the absence of a proper showing and by reappointing the public defender's office after separate counsel announced his opinion that there was no basis for filing the motion to withdraw the plea. (*Ibid.*) The court reversed the judgment and remanded the matter for a *Marsden* hearing, a determination whether failure to replace appointed counsel would substantially impair appellant's right to assistance of counsel, and appointment of new counsel for all purposes if such impairment was shown. (Order modifying opn., p. 2.) The Court of Appeal's reasoning and result were correct, the opinion comports with the

values of *Marsden*, and the procedure both promotes judicial economy and accords defendants the constitutional protections of the Sixth and Fourteenth Amendments. The opinion should be affirmed by this court.

Respondent disagrees, arguing that *People v. Dickey* (2005) 35 Cal.4th 884 ("*Dickey*") supports its position and that neither *Marsden* nor *People v. Smith* (1993) 6 Cal.4th 684 contradict its position. Respondent, however, tries to change the question presented, fails to discuss the key issue in this case -- whether the trial court had a duty to conduct a *Marsden* hearing -- fails to analyze the opinion, ignores the case law underpinning the opinion, and avoids the implications of its own position on judicial economy and a defendant's Sixth Amendment rights.

The proceedings related to the *Marsden* issue are set forth verbatim in the Statement of the Case, *ante*. In a more abbreviated form, the following occurred. At sentencing, a Deputy Public Defender told the court that appellant wanted the Public Defender's Office to explore having his plea withdrawn and the court asked if "this is something that you can do or do I need to appoint conflict counsel?" (Aug. RT 12/2/2008 p. 3.) Counsel responded that "conflict cannot be appointed until a Marsdens [sic] were held where the Court would find that we did not give competent advice before conflict" and that the office needed "to check out any issues for possible withdrawal ourselves" at this point. (*Ibid.*) The court told counsel to let it know "whether or not conflict counsel needs to be appointed" or

whether the office could file the motion. (*Id.* at pp. 3-4.) At the next hearing, another Deputy Public Defender told the court that "conflict attorney needs to be [ap]pointed." (Aug. RT 12/09/2008 p. 3.) The court appointed conflict counsel for the sole purpose of "looking into the motion to withdraw his plea" and "figur[ing] out the reason" appellant wanted to withdraw his plea. (Aug. RT 12/09/2008 p. 3.) At the next hearing, conflict counsel advised the court appellant wanted to withdraw the plea but stated counsel had found no legal basis. (Aug. RT 12/30/2008 p. 3.) At the same hearing, the case was returned to the Public Defender (*ibid.*), and, at sentencing, a Deputy Public Defender reiterated that appellant still wanted to withdraw his plea (2 CT 403).

The question of whether a trial court is obligated to conduct a *Marsden* hearing when a defendant indicates he wants to move to withdraw his plea on ineffective assistance of counsel grounds is a pure question of law subject to independent review by this court. (*People v. Cromer* (2001) 24 Cal.4th 889, 894, fn. 1.) The trial court made no factual findings, but merely deferred to the Deputy Public Defender's request that conflict counsel be appointed. To the degree that this court finds, however, that there is a mixed fact-law question, any mixed question of law and fact is also entitled to independent review because the question affects constitutional rights. (*Id.* at p. 901.)

B. *Marsden* And Its Progeny.

A defendant has a right to the effective assistance of counsel for his defense. (U.S. Const., 6th, 14th Amends.; *Strickland v. Washington* (1984) 466 U.S. 668, 684 [104 S.Ct. 2052, 80 L.Ed.2d 674]; Cal. Const., Art. I, § 15) and, if indigent, the right to appointment of counsel at government expense when his physical liberty is at stake (U.S. Const., 6th, 14th Amends; *Lassiter v. Dept. of Social Services* (1981) 452 U.S. 18, 25-27 [101 S.Ct. 2153, 68 L.Ed.2d 640]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 343-345 [83 S.Ct. 792, 9 L.Ed.2d 299]; Cal. Const., Art. I, § 15; § 987.)

The decision whether to discharge one appointed attorney and substitute another is solely within the discretion of the trial court. (*Marsden*, *supra*, 2 Cal.3d at p. 123.) A "defendant has no absolute right to more than one appointed attorney." (*Ibid.*)

"The trial court is not obliged to initiate a *Marsden* inquiry sua sponte. [Citation.] The court's duty to conduct the inquiry arises 'only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.' [Citations.]" (*People v. Lara* (2001) 86 Cal.App.4th 139, 150-151.) "[A] trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel." (*People v. Lucky*

(1988) 45 Cal.3d 259, 281.) No formal legal motion is required, but the defendant must provide "at least some clear indication . . . that he wants a substitute attorney." (*Id.* at p. 281, fn. 8.)

If a defendant requests a change of attorneys, a trial court cannot "intelligently deal with a defendant's request for substitution of attorneys unless [the court] is cognizant of the grounds which prompted the request." (*Marsden*, *supra*, 2 Cal.3d at p. 123.) A court which does not listen to the reasons for which a defendant has requested a substitution of attorneys and permit the defendant to enumerate specific examples of counsel's performance abuses it discretion. (*Ibid.*)

C. Respondent's Brief Alters The Question Presented, Fails To Discuss The Key Issue, Does Not Analyze The Opinion, Ignores Case Law Supporting The Opinion's Reasoning And Refuting Respondent's Position, And Overlooks Policy Reasons Contradicting That Position.

Respondent first attempts to re-cast the question presented. Respondent mistakenly suggests that the issue turns on the scope of trial court's discretion to appoint counsel, arguing that "a trial court's discretionary power to appoint counsel is not pre-empted by *Marsden*." (Respondent's Opening Brief on the Merits ("RBOM") 4.) Respondent posits the court's discretionary power is open-ended, permitting appointment of substitute counsel to cure a discrete defect in current counsel's ability or to replace counsel entirely. (RBOM 4-5.) Respondent erroneously states the question presented here as "whether this judicial

discretion is curtailed in some special manner (i.e., limited by something other than the judge's sound reasons) when a convicted defendant requests additional counsel for the limited purpose of exploring a motion to set aside the current conviction on a theory current counsel was ineffective." (RBOM 5.) However, that is not the question presented, which is whether, "[w]hen a defendant indicates after conviction the intention to move to withdraw a plea on the ground of ineffective assistance of counsel, is the trial court obligated to conduct a hearing on the issue whether to discharge counsel for all purposes and appoint new counsel (*People v. Marsden* (1970) 2 Cal.3d 118)." Thus, the question does not turn on the scope of a court's discretion and whether *Marsden* restricts that discretion, but on the appropriate procedure when a defendant seeks to withdraw a plea based on ineffective assistance of counsel.

The initial cases cited by respondent shed no light on the actual issue. (RBOM 4-5, citing *People v. D'Arcy* (2010) 48 Cal.4th 257, 282; *People v. Lancaster* (2007) 41 Cal.4th 50, 72; *People v. Lawley* (2002) 27 Cal.4th 102, 145; *People v. Weaver* (2001) 26 Cal.4th 876, 951; *People v. Bigelow* (1984) 37 Cal.3d 731, 742.) In *People v. D'Arcy*, *supra*, 48 Cal.4th 257, this court examined whether a trial court had erred by accepting co-counsel's waiver of the defendant's statutory right to a jury trial at his competency hearing, where the representation was hybrid, with defendant permitted to act as his own attorney for limited purposes. (*Id.* at

pp. 282-283.) In *People v. Lancaster*, *supra*, 41 Cal.4th 50, this court found that the trial court had not erred when it appointed a new attorney to replace counsel entirely, rather than appoint a second counsel, where the first attorney was unable to prepare for trial because of conflicting obligations. (*Id.* at pp. 72-73.) In *People v. Lawley*, *supra*, 27 Cal.4th 102, this court concluded the trial court had not erred when it found advisory counsel, who had previously represented a prosecution witness, did not have a conflict requiring waiver. (*Id.* at pp. 145-146.) In *People v. Weaver*, *supra*, 26 Cal.4th 876, this court held there was no error by trial counsel where the defendant had adequately waived the presence of lead counsel due to illness. (*Id.* at pp. 950-951.) In *People v. Bigelow*, *supra*, 37 Cal.3d 731, this court determined that the trial court had entirely failed to exercise its discretion to appoint advisory counsel under the mistaken belief that California law did not permit advisory counsel. (*Id.* at pp. 741-743.) These cases have nothing to do with what a trial court should do about appointment of counsel when faced with a defendant's expressed intention to withdraw his plea based on ineffective assistance.

Respondent next contends that *Dickey, supra,* 35 Cal.4th 884 supports its position. (RBOM 5-6.) However, *Dickey* stands for the proposition that expressions of retrospective dissatisfaction with trial counsel's representation, *without any indication of the desire for new representation*, fail to trigger the obligation to hold a *Marsden* hearing.

Those are not the facts here, where there was a clear request for "conflict" counsel. In *Dickey*, the defendant contended on appeal that the trial court erred because it did not conduct a *Marsden* hearing, claiming that he had sought, at the conclusion of the guilt phase, to make a motion for the appointment of new counsel to assist him in the penalty phase, and because the court did not rule on the motion until the penalty phase was concluded. (*Id.* at p. 918.) In making the request, defense counsel framed the issue as a request for separate counsel, not substitute counsel, making it clear that the idea for the request came from him, not from the defendant, and the impetus for the request was disagreement with the defendant about "trial tactic decisions that were made on witnesses who were called and not called and the way some things were presented." (*Id.* at p. 918, fn. 12.) Defense counsel told the court that what he sought was "not really a pure *Marsden* hearing." (*Ibid.*) The defendant acquiesced in the decision to appoint separate counsel after the penalty phase was over to review the case and determine whether there were any grounds for a new trial motion. (*Id.* at pp. 919-920.) Separate counsel was appointed for preparation of the new trial motion after the penalty phase, and she claimed that the court had erred in failing to conduct a *Marsden* hearing following the guilt phase, a contention the trial court denied because there had been no request for a *Marsden* hearing. (*Id.* at p. 920.)

This court found no *Marsden* error because the *"[d]efendant did not clearly indicate he wanted substitute counsel appointed for the penalty phase*." (*Dickey, supra,* 35 Cal.4th at p. 920, emphasis added.) As this court explained:

> We conclude the court did not commit *Marsden* error. Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.' [Citations]. Defendant did not clearly indicate he wanted substitute counsel appointed for the penalty phase. To the extent he made his wishes known, he wanted to use counsel's assertedly incompetent performance in the guilt phase as one of the bases of a motion for new trial, and he wanted to have separate counsel appointed to represent him in the preparation of such a motion. As his expressed wishes were honored, he has no grounds for complaint now. (*Id.* at pp. 920-921.)

The issue in *Dickey*, as the Court of Appeal observed in its opinion, was not, as respondent asserted, whether the defendant could complain about receiving the separate counsel he had requested to assist him in presenting a new trial motion. (Typed opn., p. 11.) Rather, as the appellate court explained, the issue was "whether the defendant's communications and those of his defense counsel triggered the trial court's duty to conduct a *Marsden* hearing at the end of the guilt phase and, if appropriate, to substitute counsel to represent the defendant for the remainder of the trial." (Typed opn., p. 11.) This court had concluded, however, that the statements of defense counsel and the statements of the defendant in *Dickey* did not trigger the duty to conduct a *Marsden* hearing because the

defendant did not clearly indicate he wanted substitute counsel for the penalty phase. (35 Cal.4th at pp. 920-921.)

Respondent claims the instant case is just like *Dickey*, with the only difference being that *Dickey* involved a trial whereas this case involves a motion to withdraw a guilty plea, so that, like the defendant in *Dickey*, appellant was entitled only to the appointment of separate counsel. (RBOM 6.) Respondent is wrong, as there were significant differences between what was requested here and in *Dickey*. In the present case, defense counsel made an unambiguous request for the appointment of "conflict" counsel, whereas, in *Dickey*, the attorney asked for the appointment of separate counsel and told the court he was not seeking a "pure" *Marsden* hearing. In *Dickey*, contrary to the defendant's assertion on appeal, he had never asked for a new counsel to represent him during the penalty phase and even acquiesced to the continued representation. Here, appellant, through counsel, reiterated at every appearance that he wanted to file a motion to withdraw his plea, on the basis there was a "conflict," i.e., ineffective assistance of counsel.

In another oversimplification, respondent argues this case is not *Marsden*, contending that *Marsden* involved a "request to substitute counsel entirely," and a hearing there was denied without any opportunity to explain why it should be granted. (RBOM 7.) The opinion, and appellant, have never asserted this case is somehow *Marsden* all over again.

Rather, as explained earlier, under *Marsden* and its progeny, a trial court has a duty to exercise its discretion as to whether it should substitute another attorney when the defendant "asserts directly or by implication" that his attorney's performance has denied him his constitutional right to effective representation (*People v. Lara*, *supra*, 86 Cal.App.4th at p. 151), when the defendant "in some manner moves to discharge his current counsel" (*People v. Lucky*, *supra*, 45 Cal.3d at p. 281), and when the defendant has provided "some clear indication" "he wants a substitute attorney" (*id.* at p. 281, fn. 8). As this court has stated, the "semantics employed by a lay person in asserting a constitutional right should not be given undue weight in determining the protection to be accorded that right." (*Marsden*, *supra*, 2 Cal.3d at p. 124.) Through counsel, appellant indicated that he wanted to withdraw his plea, his attorney indicated that the court could only appoint "conflict" counsel after a *Marsden* hearing and if the court found the public defender's office had not provided competent representation, the attorney indicated his office would determine whether they could file the motion (i.e., whether the motion was to be based on ineffective assistance or not) and, at the next hearing, the attorney asked for "conflict" counsel to be appointed, meaning the office had determined they could not file the motion because its basis would be ineffective assistance of counsel. The trial court's duty to conduct a *Marsden* hearing was triggered.

Respondent cites *Smith*, *supra*, 6 Cal.4th 684 for the proposition that a defendant has no "right to complain when a trial court grants his request for a change in representation." (RBOM 9.) As the opinion noted, "respondent's analysis is superficial and misses the point" in arguing that *Smith* cannot be relied upon to support the proposition that appellant cannot complain that the court granted his request for an additional attorney. (Typed opn., p. 9.) As the opinion indicates, appellant never relied upon *Smith* for that proposition (typed opn., p. 9), nor does appellant do so now.

Respondent fails to analyze the Court of Appeal's opinion and does not even mention the cases upon which it relies, *People v. Eastman* (2007) 146 Cal.App.4th 688 ("*Eastman*"), *People v. Mendez* (2008) 161 Cal.App.4th 1362 ("*Mendez*"), and *People v. Mejia* (2008) 159 Cal.App.4th 1081 ("*Mejia*"), or their reasoning. In *Eastman*, *supra*, 146 Cal.App.4th 688, the defendant pled guilty but, at sentencing, his attorney told the court that the defendant wanted to withdraw his plea and asked the court to appoint substitute counsel, and the defendant's mother submitted a letter to the court requesting an "adequate defense" and accusing his attorney of misconduct. (*Id.* at pp. 695-696.) The trial court appointed a second attorney "for the specific grounds of determining [the] motion to withdraw," and the attorney appointed solely for that purpose later announced he would not be filing such a motion because he had found no grounds, after which the first defense attorney resumed his representation.

(*Id.* at pp. 691, 693.) The appellate court found the trial court's duty to conduct a *Marsden* hearing had been triggered because, even though the defendant had not expressly asked to have his attorney replaced, his complaints "set forth an arguable case that a fundamental breakdown had occurred in the attorney-client relationship that required replacement of counsel." (*Id.* at pp. 695-696.)

Similarly, in *Mejia*, *supra*, 159 Cal.App.4th 1081, although the Attorney General argued there that "no *Marsden* hearing was ever requested for either [defendant] nor is there anything in the record to suggest the trial court should have divined such an intent," the court concluded the record showed that the defendant "instructed his counsel to move for a new trial largely on the basis of his counsel's performance at trial and that his counsel so informed the trial court." (*Id.* at p. 1086.) The court reasoned "[t]hat was adequate to put the trial court on notice of defendant's request for a *Marsden* hearing." (*Ibid.*)

Likewise, in *Mendez*, *supra*, the Attorney General argued that the defendant made a new trial motion "'based on competency of counsel' but emphasizes that he never indicated 'he wanted another attorney' and on that basis argues that the trial court had no duty to conduct a *Marsden* hearing.'" (*Id.* at p. 1366-1367.) The appellate court reasoned that the defendant notified his trial attorney that he was making a new trial motion based on

competency of counsel, which was adequate to put the trial court on notice of his request for a *Marsden* hearing. (*Id.* at p. 1367.)

Finally, in *People v. Stewart* (1985) 171 Cal.App.3d 388 ("*Stewart*"), disapproved on another ground in *Smith*, *supra*, 6 Cal.4th at p. 696, the defendant "personally instructed his appointed trial counsel to file a motion for new trial on the basis of incompetence of counsel," which was adequate to put the trial court on notice of his request for a *Marsden* hearing. (*Stewart*, *supra*, 171 Cal.App.3d at pp. 393, 396-397.)

Here, as in *Eastman*, *Mendez*, *Mejia*, and *Stewart*, appellant's request for a "conflict" attorney to determine whether ineffective assistance of counsel provided a basis for a motion to withdraw the plea was sufficient to put the trial court on notice of the necessity for a *Marsden* hearing.

Nor does respondent comment on *People v. Richardson* (2009) 171 Cal.App.4th 479 ("*Richardson*"), the only published case disagreeing with *Eastman*, *Mendez*, and *Mejia*. In *Richardson*, the defendant argued *Marsden* error on appeal, after he had submitted a post-conviction letter detailing the inadequacy of his representation at trial and seeking a new trial motion, and the court had appointed separate counsel to investigate whether there were grounds for a new trial. (*Id.* at p. 485.) However, in contrast to the defendants in *Eastman*, *Mendez*, and *Mejia*, the defendant in *Richardson* had made requests of trial counsel which were "utterly inconsistent with a request for substitute counsel," contradicting any

request to substitute counsel. (17 Cal.App.4th at p. 485.) More significantly, like the procedure advocated by respondent, application of the *Richardson* procedure to cases where the desire for substitute counsel is clearly indicated does not comply with *Marsden*, is a waste of judicial resources, and does not protect a defendant's constitutional right to counsel.

The basis of the opinion in the case sub judice (and of *Eastman*, *Mejia*, and *Mendez*) is three-fold, vindicating the values underlying *Marsden*, ensuring judicial economy, and protecting a defendant's Sixth Amendment rights. First, the opinion comports with the principles expressed in *Marsden* by providing a procedure that avoids the court's abrogation of its obligation and its delegation of those decisions to appointed counsel. "[T]he court cannot abandon its own constitutional and statutory obligations to make the ultimate determination itself based upon the relevant facts and law of which the court is made aware by some legally sanctioned procedure." (*Eastman*, *supra*, 146 Cal.App.4th at p. 697.) The Court of Appeal criticized both defense counsel and the trial court in the present case for reliance on specially appointed counsel "to do the court's job of evaluating the defendant's assertions of incompetence of counsel and deciding the defendant's new trial or plea withdrawal motion." (Typed opn., p. 12, fn. 4.) In the procedure used by the trial court here, and advocated by respondent, there was no exercise of judicial discretion.. When defense counsel first mentioned appellant wanted to withdraw his

plea, the court here asked counsel if counsel could file the motion or whether conflict counsel was needed, telling counsel to "let me know whether or not conflict counsel needs to be appointed" (Aug. RT 12/02/2008 p. 3). At the next hearing, counsel stated conflict counsel needed to be appointed, and the court appointed conflict counsel. (Aug. RT 12/09/20078 p. 3.) A defendant making a *Marsden* motion must show "good cause for replacing appointed counsel." (*People v. Ortiz* (1990) 51 Cal.3d 975, 986.) Free substitution as a matter of right presents "an undesirable opportunity to 'delay trials and otherwise embarrass effective prosecution' of crime [Citation.]" (*ibid.*), but that is exactly what happened here. Defense counsel asked for appointment of a conflict attorney, and a conflict attorney was appointed as a matter of right, without any showing of good cause. A trial court cannot "intelligently deal with a defendant's request for substitution of attorneys unless [the court] is cognizant of the grounds which prompted the request" and it is an abuse of discretion not to listen to such reasons. (*Marsden*, *supra*, 2 Cal.3d at p. 123.) In fact, it is an abuse of discretion to appoint substitute counsel for all purposes where, following a *Marsden* hearing, there has been no showing that current counsel does not or cannot adequately represent the defendant. (*Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1023.) Appellant never received any exercise of the court's discretion, because the court delegated to counsel an evaluation of his own effectiveness as well as the decision

whether conflict counsel was required and delegated to the separate attorney an evaluation of whether the first attorney was ineffective.

Second, the opinion provides a procedure which is economically sound and which follows this court's dictates in *Smith*, *supra*, 6 Cal.4th 684. As this court stated, "[t]he spectacle of a series of attorneys appointed at public expense whose sole job, or at least a major portion of whose job, is to claim the previous attorney was, or previous attorneys were, incompetent discredits the legal profession and judicial system, often with little benefit in protecting a defendant's legitimate interests." (*Id.* at p. 695.) This court specifically denounced "the appointment of simultaneous and independent, but potentially rival attorneys to represent [a] defendant." (*Ibid.*) If a *Marsden* motion is granted, new counsel should be substituted in for all purposes in place of the first attorney who is relieved of further representation. (*Ibid.*) If the *Marsden* motion is denied, "the defendant is not entitled to another attorney who would act in effect as a watchdog over the first." (*Ibid.*) Under the *Eastman* procedure, the trial court screens the need to appoint any attorney at all by holding a *Marsden* hearing to determine whether a failure to replace the appointed attorney would substantially impair the defendant's right to effective assistance of counsel. While an expression of dissatisfaction triggers a hearing, it does not compel a finding of inadequate representation unless the defendant shows that failure to replace counsel would substantially impair his right to assistance

of counsel. (*People v. Welch* (1999) 20 Cal.4th 701, 728.) If the court does find substantial impairment, the first attorney is relieved, and a second substituted, effectuating appellant's right to effective assistance of counsel. On appeal, the record contains the basis for the *Marsden* motion, streamlining appellate review. Under respondent's procedure, trial counsel merely needs to ask for the appointment of a second, separate attorney in order to receive one. Separate counsel may frequently be appointed under respondent's procedure where no such need for any substitution would be found under the *Eastman* procedure. Even respondent appears to recognize the perils of its position, suggesting that "care should be exercised rather than the court reflexively electing to appoint counsel." (RBOM 7.)

Third, the opinion ensures a defendant's constitutional right to effective assistance of counsel. A defendant is entitled to competent representation at all times, including when he seeks to withdraw his plea. (*Smith*, *supra*, 6 Cal.4th at p. 965.) Under respondent's procedure, the court adopts the first attorney's conclusion about his effectiveness and then adopts the second attorney's conclusion about the first attorney's effectiveness, entirely insulating the first attorney's performance from a proper evaluation by the trial court. Further, respondent's procedure thwarts any appellate adjudication of a defendant's constitutional right to counsel, because the record is silent as to basis of the defendant's complaint about counsel's performance.

D. <u>The Matter Must Be Remanded With Directions To Hold A *Marsden* Hearing.</u>

Reversal and remand is required. *Marsden* error is reviewed under the prejudice standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Marsden*, *supra*, 2 Cal.3d at p. 126.) The test is not whether it can be ascertained that the defendant had a meritorious claim. Rather, "[b]ecause the defendant might have catalogued acts and events beyond the observations of the trial judge to establish the incompetence of counsel, the trial judge's denial of the motion without giving defendant an opportunity to do so denied him a fair trial." (*Marsden*, *supra*, 2 Cal.3d at p. 126.) Here, there were at least three demonstrable errors related to the taking of the plea as to which appellant might have claimed ineffective assistance of counsel, had he been heard by the court. First, at the beginning of the hearing, defense counsel indicated that his client wanted to plead "no contest." (2 CT 296.) Defense counsel then stood by silently while appellant entered a plea of "guilty." (2 CT 301; see also 2 CT 358 [minute order showing plea of guilty].) Second, in the felony complaint in case number PCF204260A, the prosecution pled that appellant had suffered a strike, i.e., a conviction of residential burglary in case number VCF166696A. (2 CT 353.) In case number VCF166696A, appellant was initially charged with attempted residential burglary (§ 664/459), but the information was amended to vandalism (§ 594, subd.

(b)(1)) at the plea, and appellant pled guilty to felony vandalism and admitted a gang-benefit enhancement (§ 186.22, subd. (b)(1)(B)). (1 CT 113, 145; Aug. RT 2/5/2007 pp. 6-7.) Defense counsel stood by silently in the instant proceeding while appellant admitted he had "suffered a prior conviction pursuant to Penal Code Section 1170.12(a) through (d) and 667(b) through (i) by committing or being convicted of a violation of *Penal Code Section 459, first degree*, in February of 2007, Case 166696." (2 CT 301, emphasis added.) Vandalism with a gang-benefit enhancement (the offense to which appellant had actually pled guilty) may constitute a serious felony and thus a strike. (*People v. Briceno* (2004) 34 Cal.4th 451, 464 [any felony with gang-benefit enhancement constitutes serious felony under § 1192.7].) However, defense counsel permitted his client to admit as a strike an offense of which he was never convicted, residential burglary.

Third, a petition to revoke probation was filed in case number VCF166696A (1 CT 146, 2 CT 291), but no such written petition is found in the clerk's transcript or superior court file for case number VCF180279. (But see 2 CT 291 [arraignment on VOP in 180279; minute order indicates "basis of VOP: filing of case PCF204260A"].) Due process of law (U.S. Const., 14th Amend; *Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 33 L.Ed.2d 484]) requires procedural safeguards for probation revocation proceedings, which includes written notice of the claimed violations under section 1903.2, subdivision (b) and *In re Moss* (1985) 175

Cal.App.3d 913, 929-930 [minimum due process requirements of *People v. Vickers* (1972) 8 Cal.3d 451, 458 not satisfied when no notice of motion to revoke probation filed].)

E. Conclusion.

The opinion of the Court of Appeal is well-reasoned, effectuates the principles underlying *Marsden*, protects a defendant's Sixth Amendment right to the effective assistance of counsel, and establishes a judicially economical procedure. This court should affirm the decision of the Court of Appeal and remand the matter to the trial court with directions to hold a *Marsden* hearing.

II.

THIS COURT SHOULD DISMISS REVIEW AS TO WHETHER A CERTIFICATE OF PROBABLE CAUSE IS REQUIRED TO REACH THE MERITS OF THE FIRST ISSUE, BECAUSE THE QUESTION IS MOOT IN THE INSTANT CASE; IN THE ALTERNATIVE, IF A CERTIFICATE IS REQUIRED, IT WAS GRANTED, AND THE APPELLATE COURT WAS AUTHORIZED TO DIRECT THE LOWER COURT TO GRANT IT.

A. Introduction, Proceedings Below, And Standard Of Review.

Respondent maintains a certificate of probable cause ("certificate") was required to reach the *Marsden* issue on appeal. (RBOM 10-11, citing *Johnson*, *supra*, 47 Cal.4th at pp. 678-682.) However, respondent agrees that appellant timely complied with the requirements of section 1237.5 (RBOM 11), that the lower court issued a valid certificate (RBOM 13), that the appellate court had authority to order the lower court to issue the certificate (RBOM 13-14), and that the appellate court had jurisdiction to reach the merits of the *Marsden* issue once the certificate had issued (RBOM 13-14). Respondent explicitly asks this court not to review the merits of the certificate issue. (RBOM 13-14.) Based on the procedural posture of this case, respondent fails to present this court with a justiciable controversy.

Appellant asks this court to dismiss the certificate issue as moot. In the alternative, while appellant agrees arguendo that a certificate may have been necessary for the appellate court to reach the *Marsden* issue under the

circumstances of this case, but there was a valid certificate, which the appellate court had the authority to direct the lower court to grant, and thus the appellate court could validly decide the *Marsden* issue on the merits.

As set forth in detail in the Statement of the Case, *ante*, appellant timely requested a certificate, and the superior court denied it. Both parties acknowledged that a certificate had been requested and denied (AOB 5; RB 3), but neither party raised the issue of whether a certificate was necessary, and, after briefing was completed and following this court's decision in *Johnson*, the Court of Appeal asked the parties to address whether a certificate was required. After that briefing, the court asked respondent to address whether the court should order the superior court to grant the certificate and, following such briefing, ordered the superior court to grant the certificate, which the superior court did. Respondent did not seek this court's review of the Court of Appeal's order.

The question of whether a certificate is required under the procedural posture of this case is a pure question of law subject to independent review by this court. (*People v. Cromer, supra,* 24 Cal.4th at p. 894.)

This court should dismiss the certificate issue as moot or, in the alternative, find that there was a valid certificate, that the Court of Appeal had the authority to direct the lower court to grant it, and that the appellate court appropriately reached the merits of the *Marsden* issue.

B. This Court Should Dismiss The Issue Of Whether A Certificate Of Probable Cause Was Necessary As Moot.

This court granted review as to the *Marsden* issue in Argument I, *ante*, and, on its own motion, added a second issue, whether a defendant is required to obtain a certificate to obtain review of the *Marsden* issue. This court should dismiss review of the second question presented because the matter is moot. There is no case or controversy before this court. The trial court granted a certificate (Supp. CT [certificate of probable cause] p. 2), as both appellant and respondent agree. (RBOM 10-11.) Appellant has a certificate, so it is a moot question whether or not one was required.

Respondent also concedes that the appellate court had the authority to reverse the lower court's denial of the certificate and order the lower court to issue the certificate (RBOM 11), a conclusion with which appellant agrees. Indeed, respondent specifically asks this court *not* to review the validity of the appellate court's order or the certificate. (RBOM 13-14.) Consequently, it is a moot question in this case whether the order to grant the certificate was authorized or whether a defendant is required to obtain a certificate to raise the *Marsden* issue.

"A judicial tribunal ordinarily may consider and determine only an existing controversy, and not a moot question or abstract proposition." (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 452-453 ("*Wilson*").) A case is moot when "the question addressed

was at one time a live issue in the case," but is no longer live "because of events occurring after the judicial process was initiated." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 120; *Wilson*, *supra*, 112 Cal.App.2d at p. 453.) In such cases, any ruling can have no practical effect and cannot provide the parties with effective relief. (*People v. Rish* (2008) 163 Cal.App.4th 1370, 1380-1382.) When events render a cause moot, the court should generally dismiss the cause. (*Wilson, supra,* 191 Cal.App.4th at p. 1571; *Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1183.) This court's ruling will have no effect on either party, and this court should dismiss the question as moot.

Even if an issue is moot in a particular case, this court may nonetheless retain discretion to decide an issue, where there is an important public interest that will continue to recur yet evade review. (*Calif. State Personnel Bd. v. Calif. State Employees Association* (2005) 36 Cal.4th 758, 763, fn. 1; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1181; *People v. Cheek* (2001) 25 Cal.4th 894, 897.) In *People v. Cheek*, this court reached an issue under the Sexually Violent Predator Act, even though the defendant's two-year civil commitment had expired, because the issue was likely to recur yet evade appellate review because all such commitments were brief, and the issue involved a matter of public interest. (*Id.* at pp. 897-898.) In contrast, while the certificate issue here may be of public interest, it is not one that would otherwise elude resolution. Future

appellate review will certainly be sought, either by defendants whose appeals are dismissed for lack of a certificate or by respondent, when such appeals proceed without a certificate. As respondent has noted, the adversary system works best when the parties have a stake in the litigation. (RBOM 14, fn. 2.) This court's resolution of the moot certificate issue will not be binding on or otherwise impact the parties to the litigation, and the issue does not repeatedly evade review. This court should dismiss the second question presented.

C. A Certificate Is Required When The Defendant Seeks A *Marsden* Hearing In Order To Withdraw His Plea Based On Ineffective Assistance Of Counsel.

Section 1237.5 and rules 8.304(b) and 308(a), California Rules of Court,[4] set forth the requirements for appeals following guilty pleas and the associated procedures. Section 1237.5 provides that no appeal shall be taken upon a plea of guilty except where the defendant has filed a written statement "showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings (subd. (a)) and the court has filed a certificate of probable (subd. (b)). Rule 8.304(b)(4)(A), (B) exempt from the requirement appeals from section 1538.5 motions and "[g]rounds that arose after entry of the plea and do not affect the plea's validity."

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[4]All further rule references are to the California Rules of Court.

After appellant's opening brief was filed, this court decided *Johnson*, *supra*, 47 Cal.4th 668, holding that, under section 1237.5, appellate review of the defendant's claim that the trial court abused its discretion in denying his motion to withdraw his plea required a certificate. (*Id.* at pp. 681-682.) The determinative factor, this court reasoned, is "'the substance of the error being challenged, not the time at which the hearing was conducted.'" (*Johnson, supra*, 47 Cal.4th at p. 681, quoting *People v. Ribero* (1971) 4 Cal.3d 55, 63 ("*Ribero*").) A certificate is required for alleged defects in the proceedings conducted on a motion to withdraw a guilty plea, even when those proceedings occur following the taking of the plea. (*Johnson, supra*, 47 Cal.4th at p. 682.) "Whether the appeal seeks a ruling by the appellate court that the guilty plea was invalid, or merely seeks an order for further proceedings aimed at obtaining a ruling from the trial court that the plea was invalid, the primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest." (*Ibid.*)

Members of this court have complained that the judicial treatment of section 1237.5 makes the "'validity of the plea' issue so complicated" (*People v. Buttram* (2003) 30 Cal.4th 773, 794 (conc. opn. of Baxter, J.), with one former justice calling the judicial patchwork underlying the probable cause requirement "incomprehensible, cumbersome, and inefficient" (*People v. Mendez* (1999) 19 Cal.4th 1084, 1105 (conc. opn. of

Brown, J.); see also *People v. Lloyd* (1998) 17 Cal.4th 658, 667 (dis. opn. of Brown, J.).) Unfortunately, the issue of whether a trial court's denial of a post-plea *Marsden* hearing seeks an order for further proceedings aimed at obtaining a ruling that the plea was invalid certainly adds to the labyrinth of certificate law. Denial of a *Marsden* hearing, by definition, means that the defendant's complaints were not aired on the record. Therefore, it would generally be impossible to know whether the defendant is seeking a ruling ultimately intended to invalidate his plea (requiring a certificate) or merely one where he sought only to replace counsel for sentencing (not requiring a certificate) -- or both (requiring a certificate for one aspect and not the other). While some clue to the defendant's intentions might be present on the record, it cannot be assumed that all the complaints a defendant might have wanted to air if given a chance are contained in a request, letter or statement to the court that triggered the need for a *Marsden* hearing or in a triggering request by trial counsel, generally made obliquely as to specific complaints to protect the attorney-client relationship. Here, for example, appellant's counsel indicated appellant wanted to withdraw his plea based on ineffective assistance of counsel, but it is also possible that the attorney-client relationship had broken down to the point where ineffective representation was likely to occur at sentencing. Without hearing from a defendant the content of his *Marsden* motion, the need for a certificate cannot be readily ascertained. If this court follows

Johnson, the certificate requirement for denials of post-plea *Marsden* hearings will be split into two threads (one requiring a certificate and one not), furthering complicating section 1237.5 requirements.

However, under the circumstances of the instant case, a certificate was arguably required. Appellant argued on appeal that the trial court erred when it failed to conduct a *Marsden* hearing and to determine whether a new attorney should be appointed for all purposes, instead erroneously appointing a separate attorney to represent him solely to evaluate whether a motion to set aside his plea should be filed. (AOB 7, 14.) Thus, on appeal, appellant sought an order for a *Marsden* hearing, at which he would present his concerns and, if the court found the failure to replace his appointed attorney would substantially impair his right to assistance of counsel, appoint new counsel for all purposes, including evaluation of whether a motion to set aside his plea should be filed. The issue on appeal was aimed, ultimately, at invalidating the plea. Therefore, a certificate was required.

D. <u>There Is A Valid Certificate, The Appellate Court Had Authority To Order The Lower Court To Grant The Certificate, And The Appellate Court Had Jurisdiction To Decide The Issue On Appeal.</u>

1. Respondent and appellant agree there was a valid certificate.

Respondent concedes the Court of Appeal had jurisdiction to decide this case after the lower court granted the certificate on August 3, 2010. (RBOM 13.) Appellant agrees. The filing of a valid notice of appeal vests

jurisdiction in the appellate court and divests the trial court of jurisdiction until issuance of the remittitur. (*People v. Perez* (1979) 23 Cal.3d 545, 554; *Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 8-10.)

2. Respondent and appellant agree the Court of Appeal had the authority to order the lower court to grant the certificate and jurisdiction to decide the *Marsden* issue on appeal.

Respondent concedes that "it was within the Court of Appeal's subject matter jurisdiction to overlook that procedural defect [appellant's not filing a mandate petition]," that the Court of Appeal "exercised discretion" to reverse the denial of the certificate, and, once the certificate issued, "the Court of Appeal thereby acquired jurisdiction to address the representation issue before this Court." (RBOM 13.) Respondent is correct that the Court of Appeal had the authority to order the lower court to grant the certificate and possessed jurisdiction to decide the *Marsden* issue on appeal.

The Court of Appeal had appellate jurisdiction because the case was within the original jurisdiction of the superior court (see Cal. Const., art. VI, § 11, subd. (a)). The fact that there was no certificate and no other non-certificate ground indicated on the notice of appeal may have made the notice of appeal inoperative, but did not deprive the Court of Appeal of fundamental jurisdiction, i.e., the court had the authority to act and the power to hear and determine the case. (*Abelleira v. District Court of App., Third Dist.* (1941) 17 Cal.2d 280, 288 ("*Abelleira*"); *Harrington v.*

Superior Court (1924) 194 Cal. 185, 188.) It was within the Court of Appeal's fundamental jurisdiction, or inherent authority, to direct the lower court to grant the certificate, which made the appeal operative and the issue cognizable on the merits.

"The filing of a statement of reasonable grounds *initiates* an appeal following a plea of guilty or no contest." (*In re Chavez* (2003) 30 Cal.4th 643, 653, fn. 4, emphasis added ("*Chavez*").) "The filing by the trial court of the certificate of probable cause acts to make the appeal *operative*." (*Ibid.*, emphasis original, citing *People v. Lloyd* (1998) 17 Cal.4th 658, 663 and *People v. Panizzon* (1996) 13 Cal.4th 68, 75.) "Operative" means the appeal will go forward, i.e., a record will be prepared, counsel for an indigent defendant appointed, briefing will be produced, and the issues on appeal will be considered and decided. (*People v. Mendez*, *supra*, 19 Cal.4th at p. 1095; see also *People v. Jones* (1995) 10 Cal.4th 1102, 1106-1108, dictum on another point disapproved in *Chavez*, *supra*, 30 Cal.4th at p. 656; *People v. Holland* (1978) 23 Cal.3d 77, 84.) In an inoperative appeal, no record is prepared, no counsel is appointed, and no briefing is prepared; an inoperative appeal is subject to dismissal on respondent's or the court's own motion. (*People v. Jones*, *supra*, 10 Cal.4th at p. 1108.) "[T]he defendant may not obtain *review of certificate issues* unless he has complied with section 1237.5 and [former] rule 31(d), first paragraph [now rule 8.304(b)]." (*People v. Mendez*, *supra*, 19 Cal.4th at p. 1097, emphasis

added; see *id.* at pp. 1089, 1093, emphasis added [addressing question of whether defendant must fully, specifically, and timely comply with § 1237.5 "[i]n order to *obtain review* of certificate issues"].) "Only when it has been adjudged that probable cause of appeal exists and the certificate has issued, either because the trial court has affirmatively responded to a defendant's declaration of probable cause or because a proper court has reviewed a trial court's denial and mandated the issuance of the certificate, may *appellate review of the trial court proceedings on the merits* be had." (*In re Brown* (1973) 9 Cal.3d 679, 683 ("*Brown*") disapproved on another ground in *People v. Mendez*, *supra*, 19 Cal.4th at p. 1098.) Thus, the appeal was initiated when appellant timely sought a certificate (see *People v. Mendez*, *supra*, 19 Cal.4th at p. 1088); jurisdiction was vested in the Court of Appeal, which possessed authority to direct the trial court to issue a certificate and, once the certificate had issued, the court could review any certificate issues.

The Court of Appeal clearly had fundamental jurisdiction over the cause so, even if this court were to deem the issuance of the certificate as a prerequisite to the power of the appellate court to act, the appellate court's order to the trial court to grant the certificate was, at most, an act in excess of its jurisdiction. An act is in excess of a court's jurisdiction when the court has no power "to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural

prerequisites." (*Abelleira, supra*, 17 Cal.2d at pp. 289-290.) An act in excess of jurisdiction is not void, but voidable (*Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 727), and respondent has not sought to invalidate the court's order. Further, the remedy for an act in excess of a court's jurisdiction is a petition for writ of prohibition or certiorari (*Abelleira, supra*, 17 Cal.2d at p. 291), and respondent did not timely seek such review from this court following the appellate court's order.

Further, while a Court of Appeal is not authorized to grant relief from default from a failure to file a *timely* request for a certificate (*Chavez, supra*, 30 Cal.4th at p. 659), it is accepted that a Court of Appeal can correct a trial court's abuse of discretion in not granting a certificate where the appeal is not clearly frivolous and vexatious or involves an honest difference of opinion (*Brown*, *supra*, 9 Cal.3d at p. 683 & 683, fn. 5, citing *Ribero*, *supra*, 4 Cal.3d at p. 63, fn. 4). A petition for writ of mandate has been viewed as the routine remedy for a lower court's denial of a certificate. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1180; *Brown, supra,* 9 Cal.3d at p. 683 ["Where a certificate of probable cause has been denied on the merits the remedy is to seek review of the propriety of the denial. On timely application therefor, the writ of mandate lies"]; *Lara v. Superior Court* (1982) 133 Cal.App.3d 436, 440-442; *People v. Warburton* (1970) 7 Cal.App.3d 815, 820, fn. 2 ("*Warburton*").) However, as respondent has noted, there is no statute or rule of court providing mandate

as the exclusive remedy or indeed as any remedy at all. (RBOM 12.) Rather, as respondent has also noted, the suggested remedy of mandate first appeared in 1970 in a footnote of an appellate opinion, without analysis. (RBOM 12, citing *Warburton*, *supra*, 7 Cal.App.3d at p. 820, fn. 2, citing *People v. Ward* (1967) 66 Cal.2d 571 ("*Ward*") [certificates "should be granted routinely" and "[i]f the superior court should refuse improperly, relief by mandate would be available"].) However, *Ward* does not support the proposition for which *Warburton* cites it. In *Ward*, the court dismissed respondent's request to dismiss the appeal for lack of a certificate, reasoning that no certificate was needed under section 1237.5 where the defendant was challenging errors subsequent to the guilty plea, i.e., adversary proceedings to determine the degree of the crime and the penalty. (*Ward*, *supra*, 66 Cal.2d at pp. 574, 576-577.) Later cases merely cite *Warburton* for the proposition that a mandate petition could be filed, without further analysis or discussion. (See, e.g., *Brown*, *supra*, 9 Cal.3d at p. 683.) The origin of mandate as the proper remedy for denial of a certificate is not supported by statute, case law, or reasoning, and the issue of whether a mandate writ is the sole remedy has never been addressed.

There are good reasons why a mandate petition should not be the exclusive remedy, as it is expensive and impedes access to justice. First, the cost of the writ process defeats the very purpose of section 1237.5, which is judicial economy based on weeding out frivolous appeals. Some

appellate districts, including the Third and Fifth Districts, require appellate counsel to seek an expansion of appointment before filing a mandate petition, an additional cost on top of the subsequent petition. (<http:www.capcentral.org/procedures/expand_appt.asp> [as of Apr. 28, 2011; see also 1 Appeals and Writs in Criminal Cases (3d ed. 2010) Right to Counsel on Appeal, § 2.29, p. 78 [noting Third/Fifth District requirements that counsel submit application to expand appointment for habeas writ].)

Second, use of the writ process for this purpose is cumbersome, which denies some defendants an appeal. When asked to file an appeal, trial counsel has the duty to do so or tell his client how to do so (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 480 [120 S.Ct. 1029, 145 L.Ed.2d 985] [noting constitutional dimension of duty to consult with defendant about appeal]; *People v. Acosta* (1969) 71 Cal.2d 683, 687), and "[t]rial counsel has the duty to assist the defendant in preparing and filing the required statement of grounds" for the certificate (*Johnson*, *supra*, 47 Cal.4th at p. 684, fn. 6, citing *Ribero*, *supra*, 4 Cal.3d at p. 66). There is no case establishing trial counsel's duty to file a mandate petition (or inform the defendant of his options) if the certificate is denied, but at least one court has found ineffective assistance of counsel for failing to do so (*People v. Bautista* (2005) 129 Cal.App.4th 1431, 1435), and another court has found the certificate requirement passes constitutional muster because indigent

defendants are entitled to trial counsel's assistance in filing a certificate and perfecting an appeal, without directly holding that trial counsel's duty encompasses the filing of a mandate petition or advice on how to do it (*People v. Hodges* (2009) 174 Cal.App.4th 1096, 1112). Rule 8.304(b)(2) requires the trial court to notify the defendant of its denial of a certificate, but the more customary practice, as found in former rule 31(d), seems to be a notification of the attorneys, as the superior court did here (2 CT 413). Appellate counsel is generally not appointed for many months, usually after record preparation, and, in this case, counsel was not appointed until six months after the certificate was denied (App. Supp. Ltr. Bf. dated 05/29/2008 p. 1). Any notification of denial of a certificate may not timely reach the defendant, even if the rule 8.304(b) is complied with, because a defendant may be in physical transition from jail to probation or from one prison to another following processing and classification, with access to the law library or a defendant's own legal paperwork frequently limited during that time. There is nothing on the Judicial Council's approved form CR-120, "Notice of Appeal -- Felony (Defendant)" to notify the defendant of the mandate remedy (2 CT 411-412), nor does the superior court's notice of mailing provide the remedy (2 CT 413). As noted earlier, members of this court have complained that, even for lawyers, the judicial treatment of section 1237.5 makes the "'validity of the plea' issue so complicated" (*People v. Buttram, supra,* 30 Cal.4th at p. 794 (conc. opn. of Baxter, J.),

even “incomprehensible, cumbersome, and inefficient” (*People v. Mendez*, *supra*, 19 Cal.4th at p. 1105 (conc. opn. of Brown, J.). Reliance on a mandate petition as the proper or sole remedy for a certificate denial is replete with practical problems. If a mandate petition is the sole remedy for denial of a certificate, the procedure may consequently violate due process and equal protection (U.S. Const., 14th Amend.) under *Halbert v. Michigan* (2005) 545 U.S. 605, 610 [125 S.Ct. 2582, 162 L.Ed.2d 552] and *Douglas v. California* (1963) 372 U.S. 353, 355 [83 S.Ct. 814, 9 L.Ed.2d 811], because neither trial counsel nor appellate counsel has a duty under California law to file a mandate petition to perfect an appeal where a certificate has been denied. (See *People v. Hodges, supra,* 174 Cal.App.4th at p. 1105 [rejecting claim that certificate requirement violates federal due process and equal protection guarantees because defendant receives assistance of trial counsel in *filing* certificate].)

So now to the court’s actions here. As established earlier, the appellate court had fundamental jurisdiction. Although a mandate petition has generally been viewed as the proper remedy, there is no statute requiring its use, and there is no decisional law saying it is the exclusive or only available path. There is no statutory or case law prohibiting the procedure used by the Court of Appeal in directing the lower court to grant the certificate without a mandate petition being filed and without issuing an alternative or peremptory writ. Here, the appellate court asked the parties

for briefing on whether a certificate was necessary; appellant's response, in part, was to ask the court to construe his appellate brief and supplemental briefing as a mandate petition. (App. Supp. Ltr. Bf. dated May 29, 2010, p. 2.) While the court never formally stated it was treating the matter as a mandate petition, it appeared to do so, and other courts have similarly treated other filings as mandate petitions (see, e.g., *Brown*, *supra*, 9 Cal.3d at pp. 383-384 [treating habeas writ petition as mandate petition]). Also, the court followed procedures akin to mandate, procedures that served the same purposes and accomplished the same objectives of mandate, without prejudice to any party.

In a writ proceeding, a court may issue a peremptory writ -- one giving ultimate relief -- in the first instance without prior issuance of an alternative writ or order to show cause in mandate proceedings, where the filings adequately address the issues, no factual dispute exists, and any additional briefing is unnecessary to the disposition of the petition. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178; rule 8.487(a)(4).) This court has strongly approved the practice of routinely requesting informal opposition prior to issuance of an alternative writ, reasoning that unnecessary formal responses are eliminated and opposition is encouraged, reducing litigation costs and conserving judicial resources, while still assuring respondent has had a full opportunity to oppose the final proposed disposition. (*Palma v. U.S. Industrial Fasteners, Inc, supra,* 36

Cal.3d at p. 180.) The process here paralleled that process; both parties aired their positions, the court notified respondent of its proposed disposition, and respondent provided an informal response, all of which gave due notice and a full opportunity to be heard. No party was disadvantaged. Respondent did not contend below, nor does respondent contend now, that the procedure used, in lieu of a mandate petition and writ, prejudiced respondent in any way.

There is no statutory period in which a petition for mandate must be filed. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 163 ("*Peterson*").) Respondent has conceded that the 60-day time limit conventionally associated with mandate petitions is not jurisdictional, while nonetheless citing *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496 ("*Popelka*") for the proposition that courts generally apply and enforce the 60-day deadline applicable to appeals as a deadline for the filing of writ petitions. (RBOM 12-13; see also *Reynolds v. Superior Court* (1883) 64 Cal. 372, 373 [refusal to hear petition for certiorari filed one year after challenged order where no "extraordinary circumstances" existed].) However, *Popelka* was overruled sub silento in *Peterson, supra,* 31 Cal.3d at p. 163, and the 60-day discretionary time limit is replaced by a traditional laches test. (*Peterson, supra,* 31 Cal.3d at p. 163; *Wagner v. Superior Court* (1993) 12 Cal.App.4th 1314, 1317 [laches, not absolute deadline, applies to writ petition].) "Laches requires

an unreasonable delay in filing the petition plus prejudice to real party." (*Peterson, supra,* 31 Cal.3d at p. 163; *Wagner v. Superior Court*, *supra*, 12 Cal.App.4th at p. 1317 [accord].) The burden as to laches is on the opposing party, which must show it should bar the claims. (*Conti v. Board of Civil Serv. Comm'rs* (1969) 1 Cal.3d 351, 361.) Respondent has not argued, here or below, that it suffered any prejudice based on the delay.

The discretionary 60-day period sometimes relied upon has never been a jurisdictional limit for writ review. (*People v. Superior Court (Duran)* (1978) 84 Cal.App.3d 480, 489.) Courts have always had discretion to hear a writ petition, even after the 60-day period. (*People v. Superior Court (Lopez)* (2005) 125 Cal.App.4th 1558, 1562 [court heard late People's petition, despite no reason for delay, where no claim of prejudice]; *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 356 [court exercised discretion to hear writ petition beyond 60 days]; *People v. Superior Court (Clements)* (1988) 200 Cal.App.3d 491, 496 [court heard late challenge by People to forfeiture release order where no prejudice found].)

Any delay would have been reasonable here, in light of changes in the certificate requirements set forth in *Johnson*, *supra*, 47 Cal.4th 668, which explicitly overruled *People v. Osorio* (1987) 194 Cal.App.3d 183 ("*Osorio*"), and, implicitly, *People v. Vera* (2004) 122 Cal.App.4th 970 ("*Vera*"). Before *Johnson,* the Fifth District Court of Appeal, in which this

case arose, had explicitly held in *Osorio* that no certificate was required where an appeal attacked the failure of counsel to file a motion to withdraw a guilty plea, reasoning that there was no ruling upon the validity of the guilty plea, only a question as to events occurring after the plea. (*Osorio*, *supra*, 194 Cal.App.3d at p. 187.) Further, in *Vera*, *supra*, 122 Cal.App.4th 970, another appellate court, relying upon *Osorio*, held that a challenge to the denial of a post-plea *Marsden* motion does not implicate the validity of the plea and thus no certificate is required. (*Id.* at p. 978.) Courts are bound by and must follow the decisions of higher courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 457.) When the appeal was filed, no certificate had been required in the Fifth District under these circumstances for over 22 years, and the parties would have reasonably relied upon the Fifth District's guidance in *Osorio*, as well as the on-point decision regarding post-plea *Marsden* motions in *Vera*. Indeed, respondent was aware of the denial of the certificate (RB 3), but was unconcerned about its absence until the appellate court requested briefing on the matter.

Finally, the appellate court's decision was sound. Section 1237.5 requires a trial court to certify any arguably meritorious appeal. A trial court abuses its discretion by denying a certificate when the request presents an appellate issue that is not clearly frivolous and vexatious or where the issue involves a honest difference of opinion. (*Ribero*, *supra*, 4 Cal.3d at p. 63.) Respondent has not contended here, or below, that the

appeal was clearly frivolous. Rather, whether the court should have granted appellant a *Marsden* hearing is subject to genuine dispute. The trial court abused its discretion because it should have granted the certificate in the first instance. The Court of Appeal simply rectified the lower court's error.

E. <u>Conclusion.</u>

The issue was to whether a certificate of probable cause was required is moot, because, as both respondent and appellant agree, a valid certificate was granted. Respondent and appellant also agree that a certificate was required under the circumstances of this case, that the appellate court had the authority to order the lower court to grant the certificate, and that the appellate court had jurisdiction to decide the *Marsden* issue on its merits.

CONCLUSION

For the reasons given herein, this court should affirm the decision of the Court of Appeal reversing the judgment and remanding with directions to hold a hearing on appellant's *Marsden* motion.

Date: May 9, 2011 Respectfully submitted,

/s/

Diane Nichols
Attorney for Defendant and Appellant

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), I hereby certify the number of words in Appellant's Answer Brief on the Merits is 12,256, based on the calculation of the computer program used to prepare this brief. The applicable word-count limit is 14,000.

Dated: May 9, 2011 /s/

Diane Nichols

DECLARATION OF SERVICE

PEOPLE OF
THE STATE OF CALIFORNIA
v. **LUIS OSCAR SANCHEZ**

SUPREME COURT NO. **S188453**
COURT OF APPEAL NO. **F057147**

The undersigned declares: I am an attorney duly licensed to practice in the State of California and am not a party to the subject cause. My business address is P.O. Box 2194, Grass Valley, California 95945-2194. I served the attached **APPELLANT'S ANSWER BRIEF ON THE MERITS** by placing a true and correct copy thereof in a separate envelope for each addressee named hereafter, addressed as follows:

Court of Appeal
Fifth Appellate District
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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Grass Valley, California on May 9, 2011.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Grass Valley, California on May 9, 2011.

/s/

Diane Nichols