SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LUIS OSCAR SANCHEZ,** **Defendant and Appellant.**	Case No. S188453

Fifth Appellate District, Case No. F057147

Tulare County Superior Court, Case Nos. PCF204260A, VCF166696A, VCF180279

The Honorable Juliet L. Boccone, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

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I. THE ANSWER BRIEF DOES NOT SHOW THE TRIAL COURT WAS OBLIGED TO FOLLOW AN ALL-OR-NOTHING PROCEDURE REGARDING COUNSEL

A. The Answer Brief suggests the Opening Brief fails to address whether a court must sua sponte initiate an inquiry to remove present counsel for all purposes, if a defendant personally wants to withdraw a plea on the ground of ineffective assistance of counsel. (Answer Brief at 16.) Yet the Opening Brief answers that question. (Opening Brief at p. 5 ["in that context is the court instead limited to outright substitution of counsel for all purposes"?] & at p. 10 [the trial court had no duty sua sponte to inquire whether defendant wished to remove counsel for all purposes"].)

Further, the suggestion in the Answer Brief essentially overlooks that to ask whether a trial court must follow one course is indistinguishable from asking whether the court lacks discretion to follow alternative courses.[1] As stated in the Opening Brief (at pp. 4-10), the very fact a trial court has discretion in determining how to ensure a defendant has effective representation when the issue arises, and the fact no law or logic presents any compelling reason why that discretion should be eliminated in the particular context of a defendant's personal desire to make a motion to set aside a conviction (a motion which the defendant cannot personally make),

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[1] Cf. *People v. Crandell* (1988) 46 Cal.3d 833, 863 ["Our recognition of trial court discretion in ruling on a motion for advisory counsel necessarily implies the existence of discretion to deny as well as to grant. A discretion which can be exercised in one way only, or which is shackled by rigid rules regarding its exercise, is no discretion at all. ' "Judicial discretion is that power of decision exercised to the necessary end of awarding justice based upon reason and law but for which decision there is no special governing statute or rule. Discretion implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice." ').

lead to the conclusion the trial court is not rigidly shackled to an all-or-nothing procedure of replacing current counsel entirely, or not at all.

B. The Answer Brief asserts the record shows defendant "clearly" asked to discharged present counsel for all purposes, because the request was for appointment of "conflict" counsel, and that as a lay person he could not be held to what "semantics" he employed. (Answer Brief at 17-21.) Yet the Answer Brief overlooks that defendant, as a lay person, made no request for counsel at all. All that defendant *personally* sought to do was to move to withdraw his plea without the bother of waiting for an attorney to be appointed under any theory. (Dec. 9, 2008 RT 3.)

Nor did original counsel choose the term "conflict counsel." It was the *court* which picked the term, and in a manner indicating nothing other than that it was to describe an appointment for a task which could not be performed by the public defender because the public defender would have a conflict as to that task. Here, that implied a special purpose appointment to assist defendant in the form of investigating and deciding (as defendant's legal representative) whether to make a motion to set aside the conviction which had been entered pursuant to the plea. (Dec. 2, 2008 RT 3-4.)

When counsel appeared at the next hearing and the court recited, "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," counsel in no way indicated that was contrary to what the defense had requested. As counsel was a trained attorney who surely knew how to object and make clear the defense position (were that position in fact contrary to the court merely making a limited purpose appointment of counsel), it is not logical to resort to case language about the difficulties a lay person may have in making his wishes clear.

As in *People v. Dickey* (2005) 35 Cal.4th 884, 920-921, the only request made *clear* by the trial-level exchanges was that an attorney be

appointed handle the motion. As in *Dickey*, it is illogical to argue that clearly something more was desired, given that the request was made by counsel (and not by the lay defendant), and counsel surely could have and would have clarified if something more was desired.

C. The Answer Brief suggests the Opening Brief wrongly assumes *People v. Smith* (1993) 6 Cal.4th 684 is the basis for defendant's and the Court of Appeal's theory that a court must rigidly adhere to a procedure of removing counsel for all purposes (rather than having discretion to appoint special purpose counsel where appropriate). (Answer Brief at 22.)

1. But mere examination reveals unreflective reliance on *Smith* was the basis of *People v. Eastman* (2007) 146 Cal.App.4th 688, 696; the Court of Appeal in fact said so. (Opening Brief at Ex. A ["Opinion"] at pp. 6-7.) And the Answer Brief relies on *Eastman* itself, and on a Fifth Appellate District case (*People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367) which directly relied on *Eastman*. (Answer Brief at pp. 22-25.) There is no logic in an assertion that reliance on *Smith* is not the basis of the theory advanced by the Court of Appeal below, and by the Answer Brief.

2. Too, the Answer Brief relies directly on the claimed "dictates" in *Smith* to urge this Court to validate the fact the Court of Appeal rewarded his appellate challenge to a procedure which the record shows he (through counsel) specifically requested in the trial court. (Answer Brief, p. 27.) It is not logical to disclaim reliance on *Smith* for the proposition that he can "complain that the court granted his request for an additional attorney" (Answer Brief, p. 22) rather than employing an all-or-nothing procedure.

3. Finally, to the extent the Answer Brief (at p. 23) likewise relies on *People v. Mejia* (2008) 159 Cal.App.4th 1081 for the proposition that a defendant's personal desire to move to set aside the conviction on ineffectiveness grounds is controlling, there is a different problem. The Fifth Appellate District in *Mejia* sought to retain that rule from the holding

in *People v. Stewart* (1985) 171 Cal.App.3d 388, 393. Thus, the Fifth Appellate District stated, in *Mejia*, that this rule in *Stewart* was not a ground affected by *Smith*. (*People v. Mejia*, *supra*, at p. 1086.) But in that *Mejia* was simply wrong. *Smith* held expressly that a defendant's personal desire to bring such a motion is not at all controlling, that it is solely up the defendant's legal representative whether to bring such a motion. (*People v. Smith*, *supra*, 6 Cal.4th at p. 696.) Thus, the Answer Brief's reliance on *Mejia* fails too.

D. The Answer Brief asserts the Opening Brief urges that "trial counsel merely needs to ask for the appointment of a second, separate attorney in order to receive one." (Answer Brief at 28.) Respondent leaves to this Court to determine whether that is a fair representation of what Respondent has argued. (See Opening Brief, p.7.) Moreover, as revealed by this Court's reasoning *Dickey*, what matters on appeal is not so much what might have been a better course in the abstract, but whether a defendant may be allowed to challenge an otherwise valid judgment by challenging the fact the trial court took the course which the defendant asked the court to take.

E. Finally, the Answer Brief implicitly asserts a trial judge has a duty, merely because a defendant personally would like to claim ineffectiveness, to *ensure* affirmatively that the defendant in fact had effective assistance, including aggressive inquiry into counsel's acts or omissions. (Answer Brief at 28-31.) To the contrary, that in no way amounts to respect for the strong *presumption* that trial counsel in fact was effective, which is compulsory upon courts. (See *Harrington v. Richter* (2011) 131 S.Ct. 770, 790 ["Although courts may not indulge 'post hoc rationalization' for counsel's decision making that contradicts the available evidence of counsel's actions, [citation], neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a

'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.' [Citation.]"].)

The mere fact a defendant has a constitutional right does not imply a court must affirmatively inquire whether the right was satisfied. A contrary rule would suggest that the court must inquire affirmatively of counsel when counsel (1) rejects a defendant's urging to move to suppress evidence on constitutional grounds, or (2) to utilize compulsory process to bring a particular witness to court, or even (3) to waive any procedural device whose existence implicates the Constitutions. Such a rule would be absurd, rather than protective of counsel's independence. The rule therefore is that, for all but a few matters, trial counsel's election to bring a motion, or not to bring a motion, is the end of the matter. (*In re Barnett* (2003) 31 Cal.4th 466, 472; accord *New York v. Hill* (2000) 528 U.S. 110, 114-115.)

The making of a motion to set aside the conviction is not among the exceptions. (*People v. Smith*, *supra*, 6 Cal.4th at 696.) True, if there is substantial question whether a defendant *has* unconflicted representative to investigate and bring any given motion, the trial judge must resolve that matter. But here there can be no question that defendant was represented by an unconflicted attorney to look into whether to bring a motion alleging original counsel was effective. Thus, unless and until the defendant's legal representative chose in his professional judgment to bring a motion alleging the conviction should be set aside, based on specific allegations the conviction resulted from a denial of the effective assistance of counsel, [2]

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[2] Any such motion to set aside a conviction "must, of course, be part of a fully adversarial proceeding." (*People v. Smith*, *supra*, 6 Cal.4th at p. 694, fn. 2.) Logically, counsel might decline to bring an ineffectiveness claim by new trial motion if (1) the claim, if any, is one which properly should be brought by habeas rather than the summary proceeding of a new

(continued...)

that properly was the end of the issue. There was no cause (or propriety) for the court to engage in advisory procedure—i.e., for the court to sua sponte investigate just to make sure for itself there would have been no merit to a motion *which was never brought* by counsel. (Cf. *People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912 [judicial function does not include the making of advisory opinions].)

II. THE ANSWER BRIEF DOES NOT ARGUE FOR THIS COURT NOT TO DECIDE THE REPRESENTATION ISSUE

A. While curiously suggesting that Respondent raised the certificate issue rather than this Court, the Answer Brief agrees with the Opening Brief that this Court faces no jurisdictional barrier to deciding the representation issue. (Answer Brief at 32-52.) And the Opening Brief (at pp. 13-14) specifically declined to ask this Court to resolve any non-jurisdictional issue related to the certificate.

B. Respondent thus merely addresses the Answer Brief's casual suggestion that the mere existence of a right to one judicial determination (e.g., the trial court's judicial determination whether to issue a certificate) automatically implies a constitutional right to have a higher court review that determination. (See Answer Brief at p. 47.) Such suggestion is virtually indistinguishable from the notion that there is any constitutional right to appeal—which has long been rejected. (See *People v. Mazurette* (2001) 24 Cal.4th 789, 792; *Trede v. Superior Court of City and County of San Francisco* (1943) 21 Cal.2d 630, 634.)

(...continued)
trial motion—e. g., an ineffectiveness claim based not on matters seen by the court, but instead matters out of court, requiring an evidentiary hearing (see *People v. Cornwell* (2005) 37 Cal.4th 50, 100-102)—or (2) counsel has a basis to conclude the claim simply has a poor chance of success (*Knowles v. Mirzayance* (2009) 129 S.Ct. 1411, 1422).

Nor is it appropriate to invoke cases discussing requirements for a first appeal as of right, when speaking of the Court of Appeal's role as to the certificate. As to the issue whether a certificate should issue, the first review as of right is made by the trial judge. And unlike an appellate court whose first view of a case is from spare documents after the trial (cf. *Halbert v. Michigan* (2005) 545 U.S. 605), a trial judge is privy to the trial-level proceedings and need not rely on counsel at all to determine the narrow legal question whether there is even a single certificate issue presented by the record. In contrast, *further* review (on mandamus) of that same narrow legal question (whether by the Court of Appeal, or even this Court) is only supplemental review.

No other discussion appears material.

CONCLUSION

Accordingly, for the reasons in the Opening Brief and this Reply Brief, the People respectfully ask this Court to reverse the Court of Appeal's decision which reversed the conviction and remanded, and for this Court on the merits to affirm the judgment of conviction.

Dated: May 16, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Reply Brief on the Merits** uses a 13 point Times New Roman font and contains **2,217** words.

Dated: May 16, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Sanchez** Case No.: **S188453**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 18, 2011, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 18, 2011, at Sacramento, California.

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