

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, |) Case No. S278262 |
| |) |
| Plaintiff and Respondent, |) Court of Appeal No. |
| |) C094949 |
| v. |) |
| |) Superior Court No. |
| ISHMAEL M. CARTER, |) 97-7081 |
| |) |
| Defendant and Appellant. |) |
| |) |
| _____ |) |

Appeal from the Superior Court of the State of California

In and For the County of Yolo

Honorable Daniel M. Wolk, Judge

APPELLANT’S OPENING BRIEF ON THE MERITS

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APPELLANT’S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

Did the trial court deprive defendant of effective assistance of counsel by failing to appoint substitute counsel to evaluate and potentially argue defendant’s pro. per. motion to dismiss after appointed counsel refused to consider the motion based on an asserted conflict in arguing her own ineffective assistance of counsel?

INTRODUCTION

The stakes for appellant Ishmael Carter in his trial for commitment to the State California Department of State Hospitals (“DSH”) as a sexually violent predator were high. A true finding to a Sexually Violent Predator (“SVP”) petition results in the defendant receiving an indeterminate term to DSH. (Welf. & Inst.

Code, §6604.) Appellant's trial in this case was most likely his one realistic chance at not spending most, if not the rest of his life, in custody.

The petition to commit appellant as a SVP was filed in May 2007. The trial occurred in 2021. Appellant, therefore, had been incarcerated at the DSH for almost 14 years without an adjudication of whether he should have been there at all. Appellant was represented by attorneys from the Yolo County Public Defender's Office from the inception of the case. Not surprisingly, one of appellant's complaints when his case came to trial was the inordinate delay of his trial. Appellant complained to the trial court about the delay. He requested appointment of new counsel in place of his deputy public defender and the filing of a motion to dismiss the petition based on denial of his right to a speedy trial. (Aug CT 6-8.) Appellant also filed a pro. per. motion to dismiss the petition based on denial of a speedy trial. (Aug. CT 9-13.) There was precedent for dismissal of a SVP petition based on denial of the defendant's right to a speedy trial. (*People v. Superior Court (Vasquez)* (2018) 27 Cal.App.5th 36, 41 [finding a 17-year delay of the SVP defendant's trial was prejudicial and dismissing the petition with prejudice].)

Appellant's defense attorney refused to file a speedy trial motion because it would implicate herself and her office in a claim of ineffective assistance of counsel. (RT 21.) The trial court refused to relieve appellant's attorney and told him he could pursue on his own the filing of a speedy trial motion. (RT 24-25.) The Court of Appeal affirmed this outcome in a two to one decision. (*People v. Carter* (2022) 86 Cal.App.5th 739, 746-760.) Justice Robie believed the judgment should be conditionally reversed and an attorney appointed to litigate a motion to dismiss based on denial of a speedy trial. (*Id.*, at pp. 761-774 (conc. and dis. opn., Robie J.)

The rulings of the trial court and the Court of Appeal meant that appellant

had a potentially meritorious motion to dismiss the petition with prejudice that was never litigated because: (1) his court appointed counsel refused to file it based on a conflict of interest; and (2) appellant lacked the skills as a lay person to file it. This result cannot be consistent with the guarantee of effective assistance of counsel for SVP defendants. (*People v. Otto* (2001) 26 Cal.4th 200, 210-211 [due process protections apply to SVP proceedings]; *People v. Orey* (2021) 63 Cal.App.5th 529, 568 [a SVP defendant's due process rights include the guarantee of effective assistance of counsel].)

The trial court erred by denying appellant's request for a new attorney. The trial court should have appointed an attorney not employed by the Public Defender's Office. Appellant's complaint that he was denied a speedy trial required testimony under oath from employees of the Public Defender's Office.

This Court should reverse the judgment because appellant was represented by an attorney hobbled with a disabling conflict of interest. Alternatively, at a minimum, a conditional reversal is necessary to uphold appellant's right to counsel.

STATEMENT OF THE CASE

A petition filed on May 29, 2007, alleged appellant was a sexually violent predator ("SVP") within the meaning of Welfare and Institutions Code section 6600. (See Petition Attached to Motion to Augment the Appellate Record.) Appellant waived his right to a jury trial on September 13, 2021. (1RT 75-78.) Trial testimony commenced on September 14, 2021. (1RT 95.) On September 27, 2021, the trial court found true the allegation in the petition and committed appellant to the State Department of Mental Health for an indeterminate term. (2RT 564-569; CT 160-161.) Approximately 14 years elapsed from the filing of the SVP petition to appellant's trial. On December 21, 2022, the Court of Appeal affirmed the judgment

of the Superior Court in a published opinion. (*People v. Carter, supra*, 86 Cal.App.5th at pp. 746-760.)

STATEMENT OF FACTS

A. The Prosecution Evidence.

Dale Arnold, a forensic psychologist employed with the Forensic Services Division of the Department of State Hospitals concluded appellant met the criteria to be a SVP. (1RT 114-114, 154-156.) .In 1998, appellant was convicted of committing a lewd act on a child in violation of section 288, subdivision (a), a qualifying offense under the Sexually Violent Predator Act (“SVPA”.) Arnold believed it was important that appellant had previously been convicted in Cincinnati in 1990 and 1991 for sex offenses involving a 14-year old child. (1RT 125-126)

Arnold diagnosed appellant with otherwise specified paraphilic disorder and anti-social personality disorder. (1RT 117-119, 121, 208-209.) The paraphilic disorder diagnosis was based on evidence that appellant was aroused by non-consenting or coerced sexual relations and also aroused by prepubescent children. Arnold did not diagnose appellant as a pedophile. (1RT 222-223.) Arnold believed appellant’s relationship with a 72- year old woman named Cindy Burdine was manipulative and for appellant’s personal gain. (1RT 143-144.) The relationship was consistent with appellant’s anti-social personality disorder. (1RT 143-144.)

Arnold concluded appellant was likely to commit a sexually violent offense if released from custody because of his diagnosed mental disorders. (1RT 154-156, 176-177.) Appellant scored a six on the Static 99R which is well above the average risk level. (1RT 158-161.) Appellant participated in sex offender treatment from 2011 to 2018. (1RT 183-185.) Appellant stopped participating in the sexual treatment program in 2018 after the hospital staff lost the flash drive containing

appellant's treatment material. (1RT 113-114.)

Dr. Douglas Korpi, a clinical therapist, also concluded that appellant qualified as an SVP. Korpi briefly spoke with appellant on December 16, 2020, and reviewed documents. (2RT 308-310, 335-336.) Appellant's conviction for a violation of section 288, subdivision (a), was a qualifying offense under the SVPA. (2RT 311-312.) Appellant was not currently participating in the sex offender treatment program which was a problem. Appellant's behavior in custody was polite and cooperative. (2RT 315-316, 326-327.)

Korpi diagnosed appellant with paraphilia with pedophilia and coercive features. Korpi did not diagnosis appellant as a pedophile. (2RT 316.) Korpi also diagnosed appellant with an anti-social personality disorder based on appellant's history of criminal behavior as a juvenile and adult. (2RT 322-323.) Korpi believed appellant's diagnoses predisposed him to the commission of sexually violent offenses if he were released from custody and there was a serious and well founded risk appellant would commit another sexual offense if released from custody. (2RT 326-327, 331-332.) Age significantly decreased the risk of reoffense. (2RT 361-362.)

B. The Defense Evidence.

Dr. Christopher Fisher, a clinical forensic psychologist in private practice, disagreed with the diagnoses of Arnold and Korp that appellant had a paraphilic disorder. The 1998 incident was the only pedophilic act in appellant's history. There was no evidene of current urges or fantasies. (2RT 405-406.) The anti-social personality disorder was a reasonable diagnosis for appellant part of the reason he committed the 1998 offense. (2RT 407-409.) However, that condition was in remission. (2RT 422-423.) Fisher concluded appellant did not have a diagnosable condition that made it likely he would engage in sexually violent predatory

behavior if released from custody. (2RT 429-430.) Appellant completed a majority of the sex offender treatment at his hospital and participated in the vast majority of the sex offender treatment program between 2011 and 2018. Appellant dropped out of treatment in 2018 when his flash drive was confiscated as part of a hospital wide search for child pornography. Appellant did not receive the thumb drive back for a year. The thumb drive contained appellant's treatment between 2011 and 2018. (2RT 395-397) Appellant did everything asked of him in therapy for seven years. He made a good faith effort to participate. The treatment program changed three times during appellant's stay at Coalinga. Appellant's notes reflected a lot of hard work. The loss of the flash drive was the final straw for appellant in terms of participating in treatment. (2RT 415-416.) Coalinga Hospital has suffered from staffing shortages and staff turnover. (2RT 417-418.)

Fisher scored appellant with a six on the Static 99R, which equated to a recidivism rate of 17.6 percent. (2RT 387-398.) Fisher believed appellant acquired the skills to avoid re-offending through his participation in sex offender treatment. (2RT 401-402.) Appellant had individual therapy at Coalinga Hospital which was rare and very beneficial. Appellant's treatment notes recorded that he gained empathy, understanding and insight to his behavior, and worked on anger management issues. (2RT 403.) Fisher did not see evidence appellant was preoccupied with sex while at Coalinga Hospital. (2RT 404-405.)

Sergio Sagasta, a behavior clinical specialist at Coalinga Hospital, testified that appellant participated in sex offender treatment and was cooperative with the staff members. (2RT 482-483.) Sagasta got to know appellant well during the 2013 and 2014 time period. Appellant was a positive influence on his peers. Sagasta never saw appellant in a confrontation with his peers or staff. Appellant decreased tensions when conflicts occurred. (2RT 482-483.)

Mary Bolin, a licensed clinical social worker at Coalinga Hospital, worked with appellant in her capacity as an interdisciplinary team and treatment plan coordinator. (2RT 488.) Appellant was upset and stopped treatment when his thumb drive with his treatment documents was lost. The treatment providers wanted appellant to start treatment all over. Appellant was not happy with that option. (2RT 489-490.) Facilitators also changed which disrupted appellant's treatment plan. (2RT 491-492.) Bolin noticed positive growth by appellant when she worked with him. Appellant learned how to control his behavior and accept responsibility. (2RT 493-494.) Appellant accepted that his conduct was wrong and was remorseful. (2RT 595-596.)

Cindy Burdine, appellant's fiancée, had known appellant for 16 to 20 years. Burdine was 72 years old. Much of Burdine's relationship with appellant had been through phone calls. They discussed the possibility of appellant living with her if he was released from custody. (2RT 503-505.)

ARGUMENT

I

Appellant's Right to Effective Assistance of Counsel under the Federal and State Due Process Clause, and Right to Counsel under Welfare and Institutions Code Section 6603, subdivision (a), Require: (1) Reversal of the Judgment Because the Trial Court Erroneously Denied Appellant's Request for Appointment of New Counsel, or alternatively; (2) a Conditional Reversal of the Judgment and Appointment of New Counsel to Determine Whether Appellant was Deprived of Effective Assistance of Counsel.

A. Summary of Proceedings in the Trial Court and Summary of Argument.

The SVP petition was filed on May 29, 2007. (See Aug. CT.) The case was continued numerous times. An attorney from the Public Defender's Office

appeared as counsel for appellant at each of these hearings. (CT 16-19, 25-26, 73, 76, 82-83, 95-98, 135-156.) On November 13, 2019, appellant filed a written request for a new attorney. The document was titled, “NOTICE OF MOTION FOR APPOINTMENT OF COUNSEL AND THE DISMISSAL OF ALLISON ZUVELA.” (Aug. CT 6.) The request complained about appellant’s current attorney not filing a motion to dismiss based on a speedy trial violation. (Aug. CT 6-8.)

Appellant also filed a pro. per. motion to dismiss for denial of a speedy trial. (Aug CT 9-13.) The speedy trial motion asserted, “this Court also had an obligation to act proactively to protect petitioner Carter’s right to a timely trial. The Court never exercised reasonable control over all the proceedings connected with this pending litigation.” (Aug CT 12.)

The trial court held a hearing on January 15, 2020, regarding appellant’s request for appointment of new counsel. (1RT 6-20.) Appellant’s attorney was Allison Zuvella of the Yolo County Public Defender’s Office. (RT 6.) Appellant complained, “[w]ell, I’ve been sitting here for 12 and a half years and there’s been multiple delays that was not at my request.” (1RT 6.) Appellant’s main complaint was “the constant delays, and my speedy trial is not being adhered to or things like that, but that’s the biggest complaint I’ve had, is the delays.” (1RT 8.) The defense attorney then outlined some of the case history. (1RT 9-11.)

The trial court first denied appellant’s motion to replace counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), finding Ms. Zuvella had been diligent and had communicated with appellant. The trial court then addressed appellant pro. per. motion for dismissal of the petition because of the delay of the trial. (RT 20.) The defense counsel stated, “he’s frustrated because the process has gone forward and he hasn’t had his trial, and so I would have to say that I am not living up to my ethical duties to pursue this for trial, and – in order to have

that—have that be granted.” (RT 20-21.) She stated *Vasquez*¹ was a speedy trial case which resulted in the dismissal with prejudice of the SVP petition because of a delay in prosecution and the failure of the defense counsel to demand a speedy trial. (RT 21.) The defense counsel continued, “[s]o in my mind, if the Court did not grant the *Marsden* motion, and that I have done what I need to do, I don’t think I can ethically pursue that. /P/ I’m not removing myself from the case.” RT 21.)

The trial court told appellant, “[b]ased on what Ms. Zuvela has said, you could still pursue this motion, but I don’t think she can represent you and advocate for it. So you would be representing yourself and I would give the DA an opportunity to respond.” (RT 21.) Appellant declined to represent himself. (RT 22.) The trial court told appellant his attorney could not pursue the motion because she would be alleging her own ineffectiveness. (RT 24-25.) Appellant could pursue the motion if he wanted by filing a declaration. (RT 25.) Appellant responded that he was not versed in the law and unable to represent himself. (1RT 25.) On appeal, appellant argued the judgment should be reversed. The Court of Appeal rejected that argument.

The trial court should have appointed new counsel for appellant who was not associated with the Yolo County Public Defender’s Office. Alternatively, the judgment must be conditionally reversed and the case remanded to the trial court to resolve whether appellant was denied effective assistance of counsel because a motion to dismiss for lack of a speedy trial was not filed. The trial court, in effect, required appellant to pursue this motion when that responsibility belonged to his defense counsel.

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¹ *People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th 36.

B. The Right of a SVP Defendant to Conflict Free Effective Assistance of Counsel.

Welfare and Institutions Code section 6603, subdivision (a), provides in part, “[a] person subject to this article is entitled . . . to the assistance of counsel.” A defendant in SVP proceedings has the right to due process of law (*People v. Otto, supra*, 26 Cal.4th at pp. 210-211) which includes the right to effective assistance of counsel. (*People v. Orey, supra*, 63 Cal.App.5th at p. 568; *People v. Hill* (2013) 219 Cal.App.4th 646, 652-653.)

To establish a claim for ineffective assistance of counsel, a petitioner must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Whether an attorney’s performance was deficient is determined by “reasonableness under prevailing professional norms.” (*Id.* at p. 688.) Prejudice means “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Id.* at p. 694.) Prejudice will be presumed, however, if the assistance of counsel is actually or constructively denied altogether. (*Id.* at 692; *United States v. Cronin* (1984) 466 U.S. 648, 659.)

The right to counsel includes the right to representation free of conflicts of interest that may compromise the attorney's loyalty to the client and impair counsel's efforts on the client's behalf. (*Wood v. Georgia* (1981) 450 U.S. 261, 272; *People v. Mai* (2013) 57 Cal.4th 986, 1009.) Conflicts of interest embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or his own interests. (*People v. Doolin* (2009) 45 Cal.4th 390, 417.) Prejudice is presumed when an attorney suffers from an actual conflict of interest. (*People v. Ng* (20220 12 Cal.5th 448, 530.) This presumption arises only if the defendant demonstrates

that counsel actively represented conflicting interests and that conflict affected the attorney's performance. (*Strickland v. Washington, supra*, 466 U.S. at p. 692.)

An attorney has a conflict of interest when he must argue his own ineffectiveness. (*People v. Smith* (1993) 6 Cal.4th 684, 690.) An attorney cannot be expected to argue his own ineffectiveness. (*People v. Martinez* (1984) 36 Cal.3d 816, 826 [counsel who believes in good faith that he used due diligence cannot reasonably be expected to argue his own ineffectiveness; his client should not pay a penalty because of the attorney's unwillingness to assert his own incompetence].) An attorney cannot be expected to make an argument which threatens his or her professional reputation and livelihood. (*Christeson v. Roper* (2015) 574 U.S. 373, 377 (per curiam).) A significant conflict of interest exists when an attorney's interest in avoiding damage to his own reputation is at odds with his client's strongest argument. (*Maples v. Thomas* (2012) 565 U.S. 266, 286, n. 8.)

C. Appellant had a Potentially Meritorious Motion to Dismiss the SVP Petition with Prejudice under *People v. (Superior Court) Vasquez* .

In *People v. Superior Court (Vasquez)*, there was a 17- year delay between the filing of the SVP petition and the trial. Many of the continuance requests were made by the defense counsel. The defendant was represented by multiple attorneys from the Public Defender's Office during the 17 years. Several of the defense request for continuance were caused by the turnover in attorneys and the necessity for new counsel to prepare. The trial court granted a motion to dismiss the petition following an evidentiary hearing which established that much of the delay was because of the dysfunctional, underfunded public defender system. (*People v. Superior Court (Vasquez), supra*, 27 Cal.App.5th at pp. 62-63, 70-74,)

The prosecution filed a writ in the Court of Appeal. The Court stated, “while a substantial portion of the delay here resulted from the failure of individual appointed attorneys to move Vasquez's case forward, the extraordinary length of the delay resulted from a systemic breakdown in the public defender system, and must be attributed to the state. (*People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at p. 41, citing *Vermont v. Brillon* (2009) 556 U.S. 81, 85.) The Court concluded, “[t]his breakdown forced Vasquez to choose between having prepared counsel and a timely trial. Yet under our Constitution he had a right to both. We conclude the trial court did not err in finding that Vasquez's due process right to a timely trial was violated.” (*People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at p. 41.)

The Court affirmed the trial court’s order dismissing the petition after weighing the four factors in *Barker v. Wingo* (1972) 407 U.S. 514, for denial of the right to a speedy trial. (*People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at p. 41-74; see also *In re Butler* (2020) 55 Cal.App.4th 614, 638-629 [stating that a SVP detainee has a due process right to a time trial]; *People v. Litmon* (2008) 162 Cal.App.4th 383, 404-406 [vacating true finding to a SVP petition because of the delay of prosecution].)

D. The Judgment Should be Reversed Because the Trial Court Should Have Granted Appellant’s Request for Appointment of New Counsel.

1. Attorney Zuvela had a Disqualifying Conflict of Interest.

There was an approximately 14-year delay between the filing of the SVP petition and appellant’s trial. *People v. Superior Court (Vasquez)* found a slightly longer delay—17 years—sufficiently long to warrant dismissal with prejudice of the SVP petition when a substantial portion of the delay was attributable to the State. (*People v. Superior Court (Vasquez)*, *supra*, 27

Cal.App.5th at p. 41-74.)

The delay in appellant's case was sufficiently long that a *Vasquez* motion may have been meritorious. This Court does not have a record of the reasons for the delay because an evidentiary hearing was not held similar to the one held in *People v. Superior Court (Vasquez)*. Furthermore, this Court cannot grant relief based on a *Vasquez* violation because there was no motion filed in the Superior Court requesting that relief. The defense counsel believed she could not file a *Vasquez* motion because it would require her to argue her own ineffectiveness. (RT 20-21.) The trial court inexplicably left it to appellant to pursue this remedy. (RT 24.)

The purpose of a *Marsden* hearing is to determine whether court appointed counsel should be replaced. Court appointed counsel should be discharged upon a showing that counsel is not providing adequate representation, or counsel and the defendant have become embroiled in an irreconcilable conflict. (*People v. Panah* (2005) 35 Cal.4th 395, 431.) An attorney with a conflict of interest is unable to provide adequate representation because his loyalties are divided. (*People v. Mayfield* (1993) 5 Cal.4th 142, 206.) The trial court's ruling on a *Marsden* motion is reviewed for an abuse of discretion. (*Ibid.*)

The trial court stated at the commencement of the hearing that its purpose was to determine whether appellant's court appointed counsel needed to be replaced. (RT 6.) The trial court should have granted appellant's *Marsden* motion and replaced counsel. Counsel stated on the record that she was not pursuing a motion that appeared on its face to potentially have merit because she would have to argue her own incompetence. (1RT 20-21.) The trial court asked the defense attorney if she had discussed with appellant the filing of a speedy trial motion. (1RT 20.) She stated:

Ms. Zuvela: Yes. I mean, basically he's frustrated because the process has gone forward and he hasn't had his trial, and so I would have to say that I am not living up to my ethical duties to pursue this for trial, and — in order to have that—have that be granted.

So in essence, the first step was a *Marsden* hearing. I don't think I've breached my ethical duties and I think I've been trying to fight for [a] speedy trial.

But *Vasquez* is the case where he said he wanted a speedy trial and he didn't get the speedy trial and the case was dismissed and Mr. Vasquez was released from Coalinga State Hospital on those grounds because his lawyer didn't push for a trial in a timely manner and his lawyer did not meet their ethical duties.

So in my mind, if the Court did not grant the *Marsden* motion, and that I have done what I need to do, I don't think I can ethically pursue that.

(1RT 20-21.) The trial court then stated, “[b]ased on what Ms. Zuvela has said, you could still pursue this motion, but I don't think she can represent you and advocate for it. So you would be representing yourself and I would give the DA the opportunity to respond.” (1RT 21.)

The defense counsel's statement above established on its face a disabling conflict of interest requiring substitution of new counsel. The option not available to the trial court was the one it selected—allowing appellant to be represented by a conflict laden counsel which prevented her from filing a motion that could have resulted in dismissal of the petition with prejudice.

Conflicts of interest arise when an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client, a third person or his own interests. (*People v. Doolin, supra*, 45 Cal.4th at p. 417.) Attorney

Zuvela had a conflict of interest because her allegiance to appellant was impaired by her own interests and because of her status as an employee of the Public Defender's Office. Attorney Zuvela declined to file a motion that would have resulted in dismissal of the petition with prejudice because she did not want to accuse herself or her office of failing to competently represent appellant.

2. Attorney Zuvela's Conflict of Interest Disqualified the Entire Public Defender's Office.

The entire Public Defender's Office needed to be removed from the case . The conflict of interest that existed in this case was analogous to simultaneous representation of conflicting interest in which disqualification follows automatically. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 160.) Several cases have addressed removal of the entire Public Defender's Office in the context of successive representation by the same attorney of different defendants and the possible acquisition of confidential information. (E.g. *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, 1574-1581.) Those line of cases deal with a factually distinguishable situation from the instant case. Courts in the civil context have concluded that an entire law firm must be disqualified when an individual attorney in that firm must be disqualified based on a conflict of interest. (*People ex rel. Dept of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1139.) The same rule should apply when a deputy public defender must be removed because of a conflict of interest.

Litigation of appellant's speedy trial motion involved a claim that his deputy public defenders had not properly represented him. Employees from that office, including the deputy public defenders who represented appellant, will have to testify under oath at the hearing. Any deputy public defender would clearly having a disqualifying conflict of interest if required to argue that another deputy public

defender provided deficient representation. The trial court should have removed the entire Public Defender's Office from representing appellant.

E. The Opinion of the Court of Appeal.

1. The Majority Opinion Erroneously Analyzed Only Whether the Trial Court Acted within its Discretion by Denying Appellant's *Marsden* Motion.

The Court of Appeal's majority opinion reached several wrong conclusions. The Court viewed the issue solely as whether the trial court erred by failing to grant appellant's motion to replace his attorney under *People v. Marsden*. (*People v. Carter, supra*, 86 Cal.App.5th at p. 750.) The Court of Appeal was wrong when it concluded the trial court acted within its discretion when it denied appellant's request for a new attorney.

The Court initially concluded:

When defendant detailed some of the specific reasons for the delay, the trial court correctly perceived that the delay was not attributable to Zuvela but others, including the district attorney's office. To be sure, defendant was critical of Zuvela's predecessor, but to the extent defendant wanted a public defender who would push harder for trial, defendant got what he wanted in replacement of the prior attorney with Zuvela. In short, defendant presented the trial court with no grounds to grant a *Marsden* motion and the court did not abuse its discretion in denying it.

(*People v. Carter, supra*, 86 Cal.App.5th at p. 750.)

The above reasoning was flawed. It failed to recognize that Zuvela's status as an employee of the Public Defender's Office prevented her from alleging that her predecessors from her office had failed to provide competent representation of appellant. It also mischaracterized appellant's complaint. Appellant wanted his attorney to file a motion to dismiss based on denial of his right to a speedy trial.

A “speedy” trial after the original petition did not cure the complained-of-error.

The Court of Appeal then stated, “[w]e do not, however, endorse the trial court’s invitation to defendant to represent himself while the public defender’s office continued to represent him.” (*People v. Carter, supra*, 86 Cal.App.5th at p. 750.) However, the Court of Appeal’s opinion did exactly what it disclaimed it was doing. Its reasoning meant that appellant’s potentially meritorious speedy trial motion could have been litigated only by appellant because the Court of Appeal approved of appellant’s representation by an attorney who believed she could not file the motion because of a conflict of interest.

The Court of Appeal next reasoned, “[h]ere, the tactical decision was for defendant to complete sex offender treatment at Coalinga State Hospital before requesting trial, as reflected in the record.” (*People v. Carter, supra*, 86 Cal.App.5th at p. 752.) This conclusion was error because the Court of Appeal was litigating the merits of a speedy trial motion that was never heard. Appellant’s case was in the court system approximately 14 years. Perhaps the strategy was to wait 14 years for appellant to receive treatment to increase the likelihood of a better result at trial. It was unlikely the strategy was to wait 14 years for appellant to have his day in court. A full hearing is necessary in which all the relevant individuals, including appellant, testify under oath about the inordinate delay of appellant’s trial.

The Court of Appeal next reasoned, “[d]efendant's behavior reflects a belief held by many in the state hospital that creating a conflict with the assigned attorney might aid in dismissal of the case. By filing a *Marsden* motion with a motion to dismiss, defendant attempted to create a conflict of interest by disagreeing with the tactic that the record indicates he had previously assented to.” (*People v. Carter, supra*, 86 Cal.App.5th at p. 752.) This reasoning was

speculation. Furthermore, the notion that appellant was manufacturing a complaint about an almost 14 -year delay of his trial makes little sense.

The Court of Appeal finally concluded a conditional reversal for litigation of a speedy trial motion was not warranted. The Court relied on *People v. Sanchez* (2011) 53 Cal.4th 80, 90, which disapproved of the procedure of the trial court appointing counsel for the limited purpose of determining whether the defendant's appointed counsel was providing competent representation. *People v. Sanchez* will be discussed in more detail below. *People v. Sanchez* correctly recognized that the remedy when a defendant has a legitimate complaint about his attorney's representation was appointment of new counsel. (*People v. Sanchez, supra*, 53 Cal.4th at p. 90.)

The trial court should have granted appellant's *Marsden* motion, but it did not. The damage was already done once appellant's case reached the Court of Appeal. Appellant had been represented by an attorney with a disabling conflict of interest. A conditional reversal was a limited remedy to redress the trial court's erroneous denial of appellant's *Marsden* motion. The holding of *People v. Sanchez* did not limit the appellate remedy of a limited remand to the trial court to resolve appellant's speedy trial claim. However, a full reversal is the appropriate remedy for reasons discussed below. Alternatively, a conditional reversal is required.

2. The Court of Appeal's Dissenting Opinion Correctly Recognized that Appellant had been Denied Assistance of Counsel.

Justice Robie's dissenting opinion believed the majority opinion was wrong for several reasons. He rejected the majority view that appellant's motion to dismiss was the functional equivalent of a *Marsden* motion. "If a *Marsden* motion is granted, substituted counsel is appointed—the defendant is not left without

counsel. If a motion to dismiss is granted, the commitment petition is dismissed and the defendant no longer faces trial. In neither of those situations is the defendant left without the assistance of counsel.” (*People v. Carter, supra*, 86 Cal.App.5th at p. 770 (conc. and dis. opn., Robie J.)²

Justice Robie also rejected the argument that appellant’s attorney had made a tactical decision not to file a speedy trial motion. “Here, defendant was not complaining about his counsel's tactical decision in declining to file a motion to dismiss; Zuvella instead declined to represent defendant regarding the motion because she had “done what [she] need[ed] to do.” (*Id.* at p. 771 (conc. and dis. opn., Robie J.) Justice Robie noted that attorney Zuvella had stated that evaluating the merits of a speedy trial motion presented an inherent conflict of interest. (*Ibid.*, (conc. and dis. opn., Robie J.)

Finally, Justice Robie concluded the majority opinion was deciding the speedy trial motion that had never been filed. “No record was made as to the motion to dismiss because, as the trial court noted, the motion was never filed or argued, the motion was not supported by evidence, and the district attorney's office never filed a response. The majority attempts to decide the merits of the

² Justice Robie adopted a two-step process. The first inquiry was whether attorney Zuvella should have been disqualified under the *Marsden* standard. The next inquiry was whether error occurred under *People v. Wood, supra*, 450 U.S. 261, because a conflict of interest was brought to the trial court’s attention. (*People v. Carter, supra*, 86 Cal.App.5th at pp. 767-770 [conc. and dis. opn., Robie J.]) Appellant’s argument is a straightforward claim that the trial court erred under *People v. Marsden* by failing to remove attorney Zuvella because she had a disabling conflict of interest. There is no meaningful distinction between the analysis of Justice Robie and appellant. The trial court knew attorney Zuvella had a disqualifying conflict of interest and she should have been replaced with conflict free counsel. (*People v. Bonin* (1989) 47 Cal.3d 808, 834 [included in the right to the effective assistance of counsel is the right to conflict free counsel].)

motion to dismiss based on a record that does not provide an opportunity for meaningful review because defendant was denied his statutory right to counsel.” (*Id.* at p. 773 (conc. and dis. opn., Robie J.) Justice Robie concluded a conditional reversal and remand to the trial court was required so that appellant’s speedy trial claim could be investigated and litigated if appropriate. (*People v. Carter, supra*, 86 Cal.App.5th at pp. 773-774 (conc. & dis. opn., Robie J.)

F. The *Orey* Decision is Distinguishable from the Instant Case and also Incorrectly Decided.

The Court of Appeal relied on *People v. Orey, supra*, 63 Cal.App.5th 529, to conclude the trial court properly denied appellant’s *Marsden* motion. (*People v. Carter, supra*, 86 Cal.App.5th at p. 751-752.) *People v. Orey* was decided by the Fourth Appellate District, Division Three. There was an eight-year delay between the filing of the SVP petition and the first *Marsden* motion. The defendant objected to any substitute counsel who would not file a *Vasquez* motion. Two more *Marsden* hearings were held which did not result in appointment of new counsel.

The defendant argued on appeal that substitute counsel should have been appointed because: (1) his counsel had refused to file a *Vasquez* motion; (2) the Public Defender’s Office had a conflict of interest because the defendant had threatened to sue the office; and (3) his counsel had divulged confidential information. (*People v. Orey, supra*, 63 Cal.App.5th at p. 568.) The latter point is not relevant to appellant’s case.

The Court rejected the defendant’s first argument because the decision whether to file a *Vasquez* motion was a tactical decision. Disagreement between the defendant and his attorney about tactical decisions did not create an irreconcilable conflict. (*People v. Orey, supra*, 63 Cal.App.5th at pp. 568-569.) This reasoning was manifestly wrong. There rarely if ever could never be a

tactical reason for a defense attorney not to file a motion for dismissal of the case with prejudice if there is a reasonable basis for doing so. What tactical advantage could ever be obtained by not pursuing such relief? The granting of the motion would end the case.

People v. Orey should have analyzed the issue in terms of the ethical duty of an attorney to not file a motion he or she deems frivolous. The issue of whether the defendant in *People v. Orey* had a meritorious *Vasquez* motion had been discussed in multiple *Marsden* hearings. The defense attorney had concluded that remedy was not available. (*People v. Orey, supra*, 63 Cal.App.5th at pp. 564-567.) It is apparent from the description of the facts that the defense counsel did not file a *Vasquez* motion because of an attorney's ethical duty to not file a frivolous motion.

In appellant's case, the defense attorney never said the filing of a *Vasquez* motion would have been frivolous. There were discussions of the reasons for the delay. However, there was neither a hearing in which the reasons for the delay were explored with witnesses under oath nor multiple *Marsden* motions with lengthy and detailed explanations for the delay. The defense counsel's express reason for not filing a *Vasquez* motion was to avoid a conflict of interest. (1RT 20-21.) This was not a merit-based or tactical reason to refuse to file the motion.

People v. Orey concluded the defendant's threat to sue the Public Defender's Office did not warrant the granting of the *Marsden* motion because it was a manufactured threat designed to create a conflict of interest. (*People v. Orey, supra*, 63 Cal.App.5th at p. 570.) In this case, appellant never threatened to sue his attorney or the Public Defender's Office. Instead, it was clear appellant sincerely believed a *Vasquez* motion should have been filed, and the facts suggest the motion should have been filed given the 14 year delay between the filing of the

petition and the trial. The trial court's order denying appellant's *Marsden* motion cannot be affirmed on the basis appellant was manufacturing reasons for appointment of new counsel.

G. *People v. Sanchez* (2011) 53 Cal.4th 80, Does not Apply to the Instant Case.

The Court of Appeal relied on *People v. Sanchez* to conclude: (1) the trial court properly denied appellant's *Marsden* motion; and (2) its holding forbade a remand to determine whether a speedy trial motion should be filed. (*People v. Carter, supra*, 86 Cal.App.5th at pp. 753-754.) This reasoning was flawed because the holding of *People v. Sanchez* was limited to trial court proceedings.

In *People v. Sanchez*, the defendant pled guilty. The defendant at the sentencing hearing stated he wanted to explore withdrawing his guilty plea because his attorney had provided ineffective assistance of counsel. The trial court appointed conflict counsel for the sole purpose of determining whether a motion to withdraw the guilty plea should be filed. Conflict counsel reported to the trial court that there was no basis to withdraw the guilty plea. The defendant was then sentenced. (*People v. Sanchez, supra*, 53 Cal.4th at pp. 85-86.) The Court of Appeal held that: (1) the defendant's request for a substitute counsel to investigate whether a motion to withdraw the guilty plea should have been filed triggered the trial court's duty to hold a *Marsden* hearing; (2) the trial court erred by appointing substitute counsel and then reappointing the public defender's office to represent the defendant; (3) the proper procedure did not include appointment of conflict or substitute counsel; and (4) the case should be remanded to the trial court to hold a *Marsden* hearing. (*Id.* at p. 86.)

This Court reviewed the case law discussing the showing necessary to trigger the trial court's duty to conduct a *Marsden* hearing. (*People v. Sanchez, supra*, 53 Cal.4th at pp. 86-90.) This Court, in reliance on *People v. Smith* (1993)

6 Cal.4th 684, 695-696, “specifically disapprove[d] of the procedure adopted by the trial court in this case, namely, the appointment of substitute or ‘conflict’ attorney solely to evaluate whether a criminal defendant has a legal ground on which to move to withdraw the plea on the basis of the current counsel’s incompetence.” (*People v. Sanchez, supra*, 53 Cal.4th at p. 90.) The proper procedure is to appoint new counsel if the standards for substitution of counsel under *People v. Marsden* are satisfied. (*People v. Sanchez, supra*, 53 Cal.4th at pp. 89-91; see also *People v. Parker* (2022) 13 Cal.5th 1, 84-86 [finding no error under *People v. Sanchez* because the trial court ordered limited appointment of counsel to investigate whether a new trial motion should be filed based on ineffective assistance of counsel, but did not relieve the deputy public defender for all purposes] .)

Appellant is not arguing the trial court should have appointed counsel for the limited purpose of filing a speedy trial motion or investigate whether appellant’s counsel was providing effective assistance of counsel. Appellant’s argument is that the *Marsden* motion should have been granted because of the clear conflict of interest and a new attorney appointed who was not associated with the Yolo County Public Defender’s Office. Appellant argued in the Court of Appeal for a remand to the trial court with directions to appoint counsel to investigate, and file if appropriate, a speedy trial motion. This is a fundamentally different procedure than the procedure disapproved of in *People v. Sanchez* in which conflict counsel was appointed while the case was pending in the Superior Court. Appellant’s argument for a remand was an appellate remedy designed to address an erroneous denial of a *Marsden* motion in the trial court.

H. Remedy.

The trial court erred by failing to appoint a new attorney for appellant. The

next issue is which of two remedies should be ordered: (1) a complete reversal of the judgment; or (2) a conditional reversal of the judgment and a remand to the trial court with directions to appoint new counsel to represent appellant to file a *Vasquez* motion if appropriate. A full reversal is required in the instant case.

1. The Judgment Must be Reversed in Full.

The judgment must be reversed in full for two reasons. First, appellant's *Marsden* motion should have been granted which would have disqualified the entire Yolo County Public Defender's Office. Appellant was represented at trial by attorney Monica Brushia of the Yolo County Public Defender's Office. (1RT 71; CT 86.) Appellant should not have proceeded to trial with an attorney from the Yolo County Public Defender's Office representing him because that entire office was disqualified from representing him based on attorney Zuvela's asserted conflict of interest. The granting of a *Marsden* motion means substitute counsel must be appointed for all purposes. (*People v. Sanchez, supra*, 53 Cal.4th at p. 84.)

This Court cannot affirm a judgment when appellant was represented by an attorney who should not have represented him at trial. *People v. Marsden* concluded reversal of the judgment was required when the trial court failed to conduct a hearing to determine whether the defendant's counsel should be discharged. (*People v. Marsden, supra*, 2 Cal.3d at p. 126.)

Reversal of the judgment in full is also the appropriate remedy when a *Marsden* motion was wrongfully denied. The fact that appellant's complaint about his attorney's performance was based on a single, discreet failure is not relevant. The judgment cannot be affirmed if appellant was represented by a deputy public defender when the entire Public Defender's Office should have been removed from the case.

People v. Mai (2013) 57 Cal.4th 986, 1009-1010, stated that a conflict of

interest requires reversal only when the defendant can demonstrate that: (1) counsel labored under an actual conflict of interest that adversely affected counsel's performance; and (2) absent counsel's deficiencies arising from the conflict it is reasonably probable the result of the proceeding would have been different. It is clear that attorney Zuvela labored under an actual conflict of interest which impaired her performance because she refused to file a potentially meritorious motion to dismiss the petition with prejudice. The second standard was met because the delay was presumptively prejudicial. (*People v. Carter, supra*, 86 Cal.App.5th at p. 770 (conc. & dis. opn., Robie, J.)

Some courts have ordered a limited remand to the trial court when the trial court failed to conduct a *Marsden* hearing. These courts permit reinstatement of the judgment if the defendant cannot show that his attorney should have been discharged. (E.g. *People v. Minor* (1980) 104 Cal.App.3d 194, 199; *People v. Hall* (1983) 35 Cal.3d 161, 170.) These cases do not apply. The trial court in the instant case held a *Marsden* hearing. The information disclosed during that hearing established that appellant's attorney, and the Yolo County Public Defender's Office, should have been removed from the case.

The judgment must be reversed in full for the additional reason that prejudice is presumed when an attorney suffers from an actual conflict of interest. (*People v. Ng, supra*, 12 Cal.5th at p. 530.) This presumption arises only if the defendant demonstrates that counsel actively represented conflicting interests and that conflict affected the attorney's performance. (*Strickland v. Washington, supra*, 466 U.S. at p. 692.) Here, attorney Zuvala had an active conflict of interest—her own self interest and her loyalty to her office—which prevented her from filing a potentially dispositive motion. The presumption of prejudice which applied to attorney Zuvela's representation of appellant extended

to the entire Yolo County Public Defender's Office. Prejudice must therefore be presumed and the judgment reversed in full.

2. The Alternative Remedy is a Conditional Reversal.

This Court should reverse the judgment in full for the reasons above, and not order a conditional reversal and remand to the trial court in which the speedy trial motion can be investigated and litigated if appropriate. There is precedent for a conditional reversal of the judgment and a limited remand to conduct a *Marsden* hearing when the trial court erroneously failed to hold that hearing. (*People v. Hall, supra*, 35 Cal.3d at p. 170.) The remedy does not apply because appellant's complaint is not the trial court's failure to hold a *Marsden* hearing, but the trial court's erroneous denial of his *Marsden* motion.

CONCLUSION

The trial court erred by denying appellant's *Marsden* motion. The Court of Appeal reached a result that cannot legally be defended. The judgment must be reversed.

Dated: May 17, 2023

/S/ John L. Staley

DECLARATION REGARDING WORD COUNT

I declare under penalty of perjury this Opening Brief contains 8,563 words.
Executed on , in San Diego, California.

/S/ John L. Staley

PROOF OF SERVICE
(People v. Carter, Appeal No. S278262)

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action; My business address is John L. Staley, Attorney, 12463 Rancho Bernardo Road, No. 372, San Diego, CA 92128-2143. On , I served the foregoing document described as: **APPELLANT'S OPENING BRIEF ON THE MERITS** on all parties to this action as follows:

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/S/ John L. Staley

had to remedy this problem. It could have appointed a new attorney for appellant for all purposes or possibly appointed counsel solely to file a *Vasquez* motion if appropriate. (*People v. Smith* (1993) 6 Cal.4th 684, 695-696 [permitting appointment of new counsel to pursue a motion for a new trial upon a proper showing]; *People v. Sanchez* (2011) 53 Cal.4th 80, 89-90 [stating substitute counsel should be appointed at any stage of the case upon a proper showing].)

STATE OF CALIFORNIA
Supreme Court of California

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