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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN P. FIRESTONE-KELLY,

Defendant and Appellant.

B281436

(Los Angeles County  
Super. Ct. No. SA093600)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Laura F. Priver, Judge. Dismissed.

Edward Mahler, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Assistant  
Attorney General, Paul M. Roadarmel, Jr. and Tita Nguyen,  
Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

This case presents a challenging question: Where the parties agree there was a prejudicial error below, and the trial court acted in excess of its jurisdiction by entering judgment, must this court nonetheless dismiss the appeal because the defendant has not obtained a certificate of probable cause required by Penal Code section 1237.5?<sup>1</sup>

During pretrial proceedings, the trial court declared a doubt as to the competency of defendant John Firestone-Kelly, and suspended all proceedings under section 1368, subdivision (c). Once the trial court has declared a doubt as to a defendant's competency and suspended proceedings, the trial court is required to hold a competency hearing; this requirement may not be waived. Any further proceedings, other than a competency hearing, are in excess of the court's jurisdiction.

No competency hearing was held. Rather, at the next hearing, trial counsel purported to waive the requirements of section 1368, defendant pled no contest, and judgment was entered. Defendant, representing himself, later filed a notice of appeal and request for certificate of probable cause under section 1237.5; he did not mention the section 1368 error. The court denied defendant's request for a certificate of probable cause.

On appeal, the Attorney General concedes that the trial court erred by failing to hold a competency hearing, and that as a result the court acted in excess of its jurisdiction by proceeding with the conviction and sentencing. However, the Attorney General asserts that because the court retained fundamental jurisdiction, the conviction is voidable rather than void, and lack

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<sup>1</sup>All further statutory references are to the Penal Code unless otherwise indicated.

of a certificate of probable cause mandates dismissal. Defendant asserts that because it is clear that the court violated his due process rights by failing to hold a competency hearing, no certificate is required.

Thus, this case presents a conflict: On the one hand, “where . . . a full competence hearing is required but the trial court fails to hold one, the judgment must be reversed.” (*People v. Welch* (1999) 20 Cal.4th 701, 738.) On the other hand, section 1237.5 dictates that a challenge to the validity of a plea cannot be addressed without a certificate of probable cause, requiring the appeal to be dismissed. We find that section 1237.5, and the case law interpreting it, leave no room for exceptions to the certificate requirement. The appeal is therefore dismissed.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

At the preliminary hearing, Irma H.<sup>2</sup> testified that she was working at a women’s imaging center in June 2016. She saw defendant outside smoking a cigarette, and he walked into the building after a patient. Defendant was carrying a metal water container, and he went toward the water cooler; Irma asked if she could help him. Defendant started yelling, cursing, and threatening to kill Irma. Defendant’s “fists were clenched, his shoulders were drawn up,” and he had a “very evil,” “very scary” expression on his face. Irma pressed the panic button, which set off a silent alarm. Defendant told Irma he knew what she was doing, and said, “I know they’re gonna come here right now. I don’t care.” Then defendant left.

According to the probation report, “On August 8, 2016, an officer was advised the defendant was attempting to punch

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<sup>2</sup>We refer to the victim by her first name to protect her privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

several bystanders for no apparent reason. The officer turned and observed the defendant. The officer asked the defendant why he was swinging at people. The defendant stated he was shadow boxing, then stated he was only punching near someone.”

The Los Angeles County District Attorney (the People) filed an information charging defendant with felony criminal threats for the incident involving Irma (§ 422, subd. (a), count 1), and misdemeanor assault on a John Doe for the punching incident (§ 240, count 2). On September 7, 2016, defendant pled not guilty.

At a hearing on October 18, 2016, defendant requested new counsel, and the court held a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). The court denied defendant’s request. On the date set for trial, November 3, 2016, defendant again requested new counsel. The court held another *Marsden* hearing, and again denied defendant’s request.

Following the *Marsden* hearing, defense counsel expressed a doubt about defendant’s ability to assist counsel and his competence to stand trial pursuant to section 1368.<sup>3</sup> The court asked the prosecutor whether he had any information as to defendant’s mental health, and asked, “Was there something that happened during the course of this alleged crime that might suggest some mental health issues?” The prosecutor responded, “The People feel the crime itself was possibly under a delusional moment in time.” The court declared doubt, had defendant

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<sup>3</sup>Section 1368, discussed more fully below, allows the trial court or counsel to express on the record a doubt as to a defendant’s mental competence. Sections 1368 and 1369 require certain procedures to be followed once such a doubt has been expressed.

removed from the courtroom because he was interrupting the proceedings, and suspended the proceedings pursuant to section 1368. The court set a hearing on December 8, 2016 for further proceedings under section 1368 in a different courtroom, and stated, “Proceedings are suspended.”

At the hearing on December 8, 2016, which was held before a different judge, the attorneys stated their appearances and the court asked, “We have a disposition?” The prosecutor said that defendant would plead to an amended count 3, “felony assault not a strike” under section 245, subdivision (a)(4), and he would serve a two-year sentence. The court said, “Stipulate to the court reinstating criminal proceedings?” Defense counsel replied, “Yes.” The People moved to amend the information, and the court granted the motion to add count 3. Defendant expressed that he understood his rights, and pled no contest. The court accepted the plea, sentenced defendant to two years in state prison, and imposed various fines and fees. The court asked defense counsel if she “waive[d] reading of the appellate rights at this stage of the proceedings.” Defense counsel answered yes.

On January 20, 2017, the court received a rambling, four-page handwritten letter from defendant requesting assistance in appealing from the plea and conviction. In the letter defendant acknowledged the felony and misdemeanor charges, stating that there was one case for assault and another for threats, and “both became confused as the same cases when transferring” from one court to another. Defendant wrote, “Please, will you see that an appeal is filed over the felony assault plea agreement and/or connect me with the proper judge or offices to have an appeal/revoke plea agreement done.” The court noted that it received the letter, and prepared a minute order stating in part,

“The court cannot give legal advice. If the defendant wants to appeal, the defendant must file the appropriate documents within the appropriate time frame.” On January 31, 2017, defendant, in pro per, filed a notice of appeal. Defendant also filed a request for a certificate of probable cause, which did not address the competency issue. The court denied the request.

### **DISCUSSION**

Defendant asserted in his opening brief that the trial court erred when, after the first court suspended proceedings under section 1368, the second court failed to conduct the required competency hearing and instead reinstated criminal proceedings. Defendant asserted that section 1237.5 barred a challenge to the validity of his plea, so he was challenging only his sentence. However, defendant’s briefs focused on the argument that the trial court violated his due process rights by accepting his plea and entering a judgment. The People, represented by the Attorney General, asserted that the appeal must be dismissed because defendant did not obtain a certificate of probable cause.

We requested further briefing from the parties as to whether the court’s failure to hold a competency hearing rendered the subsequent court proceedings void, and if so, whether a certificate of probable cause was required under the circumstances. Both parties submitted supplemental letter briefs.<sup>4</sup> In his supplemental briefing, the parties modified their

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<sup>4</sup> This court was very specific in defining the issues to be addressed in the parties’ supplemental briefing: whether the court acted in excess of its jurisdiction by taking defendant’s plea and entering judgment, and what effect that had on the requirement for a certificate of probable cause. For reasons unclear to the court, defense counsel’s initial supplemental letter brief instead argued that defendant was entitled to the assistance

arguments somewhat; defendant stated that he was in fact challenging the validity of his plea, and the Attorney General conceded that failure to hold a competency hearing was error, and that court's actions thereafter were in excess of its jurisdiction.

“[W]hen the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo.” (*In re Taylor* (2015) 60 Cal.4th 1019, 1035.) We find that because defendant is challenging the validity of his plea, but he failed to obtain a certificate of probable cause as required by section 1237.5, the appeal must be dismissed.

A. *The trial court was required to hold a competency hearing*

Our jurisprudence recognizes a “fundamental right not to stand trial while incompetent.” (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 369.) Thus, “[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” (*Drope v. Missouri* (1975) 420 U.S. 162, 171.) A finding that a defendant is competent to stand trial is also necessary before a defendant may be permitted to plead guilty. (*Godinez v. Moran* (1993) 509 U.S. 389, 400.) Thus, “[b]oth the due process clause of the Fourteenth Amendment to

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of counsel when preparing his notice of appeal. This was not an issue we requested to be briefed, and our specific request was not an invitation to assert new legal theories not addressed in the parties' briefs. Thus, we do not consider defendant's argument on this issue. (See *People v. Malik* (2017) 16 Cal.App.5th 587, 595 [issues not raised in the opening brief are forfeited].)

the United States Constitution and state law prohibit the state from trying or convicting a criminal defendant while he or she is mentally incompetent.” (*People v. Rogers* (2006) 39 Cal.4th 826, 846.)

California has codified this mandate in section 1367, which provides that a person cannot be tried while “mentally incompetent,” which is defined to mean that, “as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.” (§ 1367, subd. (a).) Section 1368 instructs the trial court that if “a doubt arises in the mind of the judge as to the mental competence of the defendant” the judge shall so state on the record, and “inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.” (§ 1368, subd. (a).) “If counsel informs the court that he or she believes the defendant is or may be mentally incompetent,” or upon its own motion, “the court shall order that the question of the defendant’s mental competence is to be determined in a hearing.” (§ 1368, subd. (b).) “[W]hen an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined.” (§ 1368, subd. (c).)

“Next, section 1369 sets forth the procedure for the court’s determination of the defendant’s mental competence. In essence, the court appoints a psychiatrist or licensed psychologist to examine the defendant . . . . (§ 1369, subd. (a).) The court then holds a hearing or ‘trial,’ at which the prosecution and defense offer evidence with respect to the defendant’s mental competence



and may make a closing argument. (§ 1369, subds. (b)-(f).) If tried by a jury, the defendant is presumed mentally competent unless, by unanimous verdict, the jury finds by a preponderance of the evidence that the defendant is mentally incompetent. (§ 1369, subd. (f).)” (*In re Taitano* (2017) 13 Cal.App.5th 233, 240.)

Here, the trial court did not follow the procedures required by sections 1368 and 1369. Although the first court declared a doubt as to defendant’s competence and suspended proceedings pursuant to section 1368, the second trial court never held a hearing as required by section 1369. This was a due process violation and constitutes reversible error. “[T]he failure to observe procedures adequate to protect a defendant’s right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.” (*Drope v. Missouri*, *supra*, 420 U.S. at p. 172; see also *Pate v. Robinson* (1966) 383 U.S. 375, 385.) As a result, “the failure of a trial court to employ procedures to protect against trial of an incompetent defendant deprives the defendant of his due process right to a fair trial and requires reversal of his conviction.” (*People v. Hale* (1988) 44 Cal.3d 531, 539 (*Hale*); see also *People v. Lightsey* (2012) 54 Cal.4th 668, 691 [“The failure to conduct a hearing” when required under section 1368 “is reversible error.”]; *People v. Blair* (2005) 36 Cal.4th 686, 711 [“Failure to declare a doubt and to conduct a competency hearing when there is substantial evidence of incompetence requires reversal of the judgment.”], overruled in part by *People v. Black* (2014) 58 Cal.4th 912, 919; *People v. Welch* (1999) 20 Cal.4th 701, 738 [“where . . . a full competence hearing is required but the trial court fails to hold one, the judgment must be reversed”]; *People v. Rogers*, *supra*, 39 Cal.4th

at p. 847 [“The failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence, however, requires reversal of the judgment of conviction.”]; *People v. Pennington* (1967) 66 Cal.2d 508, 521 [failure to hold a hearing as required by section 1368 denies a “substantial right” and is “per se prejudicial.”].)

The Supreme Court discussed these requirements in *Hale*, in which the defendant was charged with murder, robbery, and attempted robbery. (*Hale, supra*, 44 Cal.3d at p. 533.) The defendant exhibited bizarre behavior at several preliminary appearances in court, and the court “declared a doubt as to defendant’s present mental competency based on his conduct and demeanor in the courtroom.” (*Id.* at p. 535.) The court appointed two psychiatrists to examine the defendant, and set “a hearing ‘on the question of the defendant’s present mental competency.’” (*Id.* at p. 536.) The hearing was never held; after several continuances, the competency issue was not mentioned again and the case proceeded to trial. (*Id.* at pp. 536 and fn. 6, 538.)

The Supreme Court held that “the court’s failure to hold a competency hearing pursuant to section 1368 constituted a denial of due process.” (*Hale, supra*, 44 Cal.3d at p. 538.) The Court noted that “[o]nce the hearing is ordered, ‘*all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined.*’” (§ 1368, subd. (c), italics added.) . . . . Once the trial court ordered the hearing, as it reasonably did, it could not simply vacate the order, sub silentio.” (*Id.* at p. 540.) The Court also rejected the prosecution’s argument that the defendant’s mental condition had improved, stating, “Indeed, once a doubt has arisen as to the competence of the defendant to stand trial, the trial court has no

jurisdiction to proceed with the case against the defendant without first determining his competence in a section 1368 hearing, and the matter cannot be waived by defendant or his counsel.” (*Id.* at p. 541; see also *Medina v. California* (1992) 505 U.S. 437, 450 [“it is impossible to say whether a defendant whose competence is in doubt has made a knowing and intelligent waiver of his right to a competency hearing”].) The *Hale* Court added, “as pointed out in *Pate, supra*, 383 U.S. at page 384, 86 S.Ct. at page 841, ‘it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently “waive” his right to have the court determine his capacity to stand trial.’” (*Hale, supra*, 44 Cal.3d at p. 541.) The Court reversed the defendant’s conviction: “The sub silentio disposition of the section 1368 proceedings without a full competency hearing rendered the subsequent trial proceedings void because the court had been divested of jurisdiction to proceed pending express determination of the competency issue.” (*Ibid.*)

Shortly after *Hale* was decided, the Supreme Court held in *People v. Marks* (1988) 45 Cal.3d 1335 (*Marks I*), “We reverse the entire judgment because the trial court failed to conduct a competency hearing pursuant to sections 1368 and 1369 after specifically stating a doubt as to defendant’s competency to stand trial and ordering a hearing to determine his competency.” (*Marks, supra*, 45 Cal.3d at p. 1337.) The Court said, “We reiterate our recent unanimous holding in *People v. Hale*[, *supra*,] 44 Cal.3d 531, [244 Cal.Rptr. 114, 749 P.2d 769] that, once a trial court has ordered a competency hearing pursuant to section 1368, the court lacks jurisdiction to conduct further proceedings on the criminal charge or charges against the defendant until the court has determined whether he is competent. This determination is

mandated by the federal constitutional requirement of due process and by unambiguous California statutes.” (*Ibid.*)

The defendant in *Marks I* was charged with murder and related charges. (*Marks I, supra*, 45 Cal.3d at p. 1338.) After defense counsel expressed a doubt as to the defendant’s competence at a pretrial hearing, the trial court said, “All right. Based upon [defense counsel’s] statement in court, at this time *the Court does express a doubt as to Mr. Marks’ mental capacity to stand trial. And I now order the question of his mental competence to be determined in a special hearing* which will be held pursuant to Sections 1368.1 and 1369 of the Penal Code.” (*Ibid.*, italics added by Supreme Court.) On the date scheduled for the competency hearing, defense counsel represented that “all 1368 matters have been resolved” because the psychiatrists who examined the defendant opined that the defendant was able to cooperate with counsel; no hearing was held. (*Id.* at p. 1339.) The court said, “All right,” and the issue of competency was not raised again. (*Ibid.*) Following a jury trial, defendant was convicted of murder and conspiracy to commit murder. (*Ibid.*)

The Supreme Court ordered that the conviction must be reversed. “The trial court stated a doubt as to defendant’s mental competency and pursuant to section 1368 ordered a hearing to determine whether he was competent to stand trial. The hearing was never held. . . . Under the clear language of section 1368, the trial court had no jurisdiction to proceed on the charges against defendant until the court determined whether defendant was competent to stand trial. . . . That the hearing was not held is dispositive.” (*Marks I, supra*, 45 Cal.3d at p. 1340.)

The Court noted defense counsel’s statement that section 1368 issues had been “resolved,” and said that the trial court may

have interpreted this as a waiver of the right to have the competency issue determined. The Court said, “As we emphasized in *Hale*, however, ‘ . . . the matter is jurisdictional, and cannot be waived by counsel. [Citations.] Moreover . . . “it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial.” [Citation.] This principle is well established and understood.” (*Marks I, supra*, 45 Cal.3d at p. 1340.) The Court said that once the trial court stated that a competency hearing was required, “We hold . . . that the constitutional right to due process, section 1369, and our holding in *Hale, supra*, 44 Cal.3d 531, require, at a minimum, that the trial court expressly and unmistakably state on the record, either orally or in writing, its determination as to whether the defendant is mentally competent to stand trial.” (*Id.* at p. 1343.)

The Supreme Court revisited the issue three years later in *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56 (*Marks II*). There, following remand from *Marks I*, the defendant was found competent and the prosecution reinstated all charges. (*Id.* at p. 62.) Defendant asserted his right against double jeopardy. (*Id.* at p. 63.) The prosecution argued that once the trial court in *Marks I* declared a doubt as to the defendant’s competence, the trial court lacked jurisdiction to conduct any proceedings except the competency hearing, so all other proceedings were a nullity and jeopardy never attached. (*Ibid.*)

In the Supreme Court, “[t]he People contend[ed] double jeopardy is not implicated because the trial court’s failure to observe the mandate of section 1368 divested it of fundamental, i.e., subject matter, jurisdiction.” (*Marks II, supra*, 1 Cal.4th at p. 63.) The defendant argued that “[t]he jurisdictional concept

involved . . . is not lack of jurisdiction of the cause but excess of jurisdiction” and “the trial court retained subject matter jurisdiction even if it lacked discretion to act other than in compliance with section 1368.” (*Id.* at p. 64.) The Court held, “[W]e conclude that the failure to comply with the mandate of section 1368 does not effect a fundamental loss of jurisdiction, i.e., ‘an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. [Citation.]’ [Citation.] Rather, the trial court suffers an inability ‘to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.’ [Citations.] Thus, while the court retains jurisdiction over the cause, it acts in excess of that authority in failing to hold a competency hearing.” (*Id.* at p. 66; see also *People v. Webb* (1986) 186 Cal.App.3d 401, 411-412 [“The erroneous acceptance of a plea bargain is . . . an act in excess of jurisdiction and . . . is not void for want of fundamental jurisdiction.”]; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1426 [“[W]hen a court has jurisdiction of the subject matter and the parties, actions in substantial disregard of constitutional or statutory limitations, or that deny fundamental rights or defenses, are acts in excess of jurisdiction.”].)

The Court discussed the statutory, constitutional, and common law bases for the requirement of a competency hearing. It noted that the “principle underlying both the statutory scheme and the constitutional mandate is of ancient derivation and deeply rooted in our sense of basic fairness: “[T]here may be circumstances lying in [the defendant’s] private knowledge, which would prove his innocence, of which he can have no advantage, because not known to the persons who shall take

upon them his defence.”” [Citations.] While section 1367 et seq. ‘implements [this] fundamental canon’ [citation], judicial construction enforces it by compelling reversal in the event of any compromise.” (*Marks II, supra*, 1 Cal.4th at p. 69.) The Court continued, “The trial court acts ‘without jurisdiction’ because its authority is constitutionally and statutorily restricted to holding a competency hearing before proceeding with any other matters. When the court fails to discharge this obligation, the resultant denial of due process is ‘so fundamental and persuasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case. [Citations.]” (*Id.* at p. 70.) “We therefore conclude that the trial court does not lose subject matter jurisdiction when it fails to hold a competency hearing, but rather acts in excess of jurisdiction by depriving the defendant of a fair trial. [Citation.] Although the judgment may be a nullity, for double jeopardy purposes the proceedings are not.” (*Id.* at pp. 70-71.) The Court added in a footnote, “[T]he naked power conferred by subject matter jurisdiction cannot sanction a violation of rights. In concluding that the trial court retains fundamental authority over the cause, in no respect do we endorse, condone, or excuse a failure to comply with the express mandate of section 1368.” (*Id.* at p. 71 fn. 11.)

Here, defendant argued that the trial court erred and acted in excess of its jurisdiction by accepting defendant’s plea and entering judgment after failing to hold a competency hearing. In its supplemental briefing, the Attorney General concedes that that this was error and “subsequent proceedings were conducted in excess of the trial court’s jurisdiction.” The Attorney General asserts, however, that “[e]ven assuming the judgment is arguably void or a nullity, appellant may not appeal his bargained-for

sentence without a certificate of probable cause.” We therefore turn to those requirements.

B. *Certificate of probable cause requirements*

Section 1237.5 states, “No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.”

“California Rules of Court, rule 8.304 establishes an exception to section 1237.5. A defendant who has entered a plea of no contest need not obtain a certificate of probable cause ‘if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under . . . section 1538.5; or [¶] (B) Grounds that arose after entry of the plea [that] do not affect the plea’s validity.’ (Cal. Rules of Court, rule 8.304(b)(4); see *id.*, rule 8.304(b)(1).) If a notice of appeal identifies either of these circumstances as the basis for the appeal, ‘the reviewing court will not consider any issue affecting the validity of the plea’ unless the defendant obtains a certificate of probable cause. (*Id.*, rule 8.304(b)(5); see *id.*, rule 8.304(b)(1).)” (*People v. Espinoza* (2018) 22 Cal.App.5th 794, 799.) Neither exception is relevant here.

The requirements of section 1237.5 must be strictly applied; “[t]he Supreme Court has disapproved the practice of applying the rule loosely in order to reach issues whose consideration would otherwise be precluded.” (*People v. Cole*



(2001) 88 Cal.App.4th 850, 860.) Thus, “the Court of Appeal generally may not proceed to the merits of the appeal, but must order dismissal thereof, unless the defendant has filed a statement of certificate grounds as an intended notice of appeal, and has obtained a certificate of probable cause.” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1099 (*Mendez*).)

“The purpose for requiring a certificate of probable cause is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas. [Citations.] The objective is to promote judicial economy. . . .” (*People v. Panizzon* (1996) 13 Cal.4th 68, 75.) “A guilty plea admits every element of the charged offense and constitutes a conviction [citations], and consequently issues that concern the determination of guilt or innocence are not cognizable. [Citations.] Instead, appellate review is limited to issues that concern the ‘jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea.’” (*In re Chavez* (2003) 30 Cal.4th 643, 649.)

The Attorney General compares this case to *Mendez, supra*, 19 Cal.4th 1084, arguing that the Supreme Court in that case made clear that appellate challenges regarding a defendant’s competence in the trial court require a certificate of probable cause. In *Mendez*, the trial court questioned the defendant’s mental competence twice, and both times had him committed to a mental hospital for evaluation and treatment. After each commitment and treatment, the hospital’s medical director determined that the defendant was competent, and the trial court held that the defendant had recovered mental competence and reinstated the criminal proceedings. (*Id.* at pp. 1089-1090.) After the second reinstatement, the defendant pled guilty pursuant to a

plea deal. (*Id.* at pp. 1090-1091.) The defendant filed a notice of appeal, but did not indicate that he intended to appeal any grounds requiring a certificate of probable cause, and the court did not issue a certificate of probable cause. (*Id.* at p. 1091.) Later, citing issues with the court’s proceedings relating to his mental competence, the defendant sought and received a certificate of probable cause, but it was obtained outside the timeframe allowed by statute and court rules. (*Id.* at pp. 1091-1092.) The Court of Appeal dismissed the defendant’s appeal for failure to obtain a timely certificate of probable cause, and the defendant challenged that finding in the Supreme Court.

The Supreme Court framed the question as follows: “In order to obtain review of certificate issues, must a defendant who has pleaded guilty or nolo contendere to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon, have complied with section 1237.5 and rule 31(d), first paragraph, *fully, and, specifically, in a timely fashion?*”<sup>5</sup> (*Mendez, supra*, 19 Cal.4th at p. 1093.) The Court

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<sup>5</sup>At the time *Mendez* was decided, the first paragraph of California Rules of Court, rule 31(d) stated, “If a judgment of conviction is entered upon a plea of guilty or nolo contendere [in the superior court], the defendant shall, within 60 days after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5. . . ; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate.” (*Mendez, supra*, 19 Cal.4th at p. 1088 fn. 2.) Similar provisions are now in California Rules of Court, rule 8.304(b).

noted that the defendant's challenges regarding his "mental incompetence issues are indeed certificate issues, inasmuch as they are questions going to the legality of the proceedings, and, specifically, the validity of his guilty plea." (*Id.* at p. 1100.) The Court held that "section 1237.5 and rule 31(d), first paragraph, should be applied in a strict manner. In enacting section 1237.5, the Legislature . . . established a mechanism that did not invite consideration of the peculiar facts of the individual appeal." (*Id.* at p. 1098.) Because the defendant did not obtain a timely certificate of probable cause in compliance with the applicable rules, the Supreme Court held that the appeal challenging any competence issues in the trial court must be dismissed.

The Attorney General correctly points out that California authority universally holds that in the absence of a certificate of probable cause, the validity of a guilty or no contest plea cannot be challenged. "[S]ection 1237.5 does not allow the reviewing court to hear the merits of issues going to the validity of the plea unless the defendant has obtained a certificate of probable cause, or has sought and obtained relief from default in the reviewing court." (*People v. Panizzon*, *supra*, 13 Cal.4th 68, 75; see also *People v. Shelton* (2006) 37 Cal.4th 759, 766 [a "challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself" and thus requires a certificate of probable cause.].) Moreover, "[c]laims regarding the illegality of the judgment, whether on jurisdictional or other grounds, are precisely the types of claims which are covered by section 1237.5 and require a certificate of probable cause." (*People v. Jones* (1995) 33 Cal.App.4th 1087, 1092.) Here, by asserting that the trial court did not have the authority to enter judgment against defendant because it failed to hold a

competency hearing, defendant is challenging the legality of the judgment, which typically requires a certificate of probable cause.

C. *The due process error is not cognizable on appeal due to the lack of a certificate of probable cause*

The difficulty with this case is that on the one hand, the parties agree on the existence of a clear due process error that is “per se reversible,” but on the other hand, section 1237.5 does not allow defendant to challenge it because the court denied his request for a certificate of probable cause. We hold that section 1237.5 and the case law interpreting it do not allow for exceptions to the requirement that a defendant must obtain a certificate of probable cause.

The Attorney General asserts that although the trial court’s actions were in excess of its jurisdiction, the court did not lack *fundamental* jurisdiction, and as a result the judgment is voidable, but not void. Because the judgment is voidable, the Attorney General argues, the lack of a certificate of probable cause bars the appeal. Indeed, “[t]he erroneous acceptance of a plea bargain is only an act in excess of jurisdiction and hence is not void for want of fundamental jurisdiction.” (*People v. Webb, supra*, 186 Cal.App.3d at pp. 411-412.)

A certificate of probable cause is required when a defendant pleads guilty and thereafter challenges the “constitutional, jurisdictional, or other grounds going to the legality of the proceedings.” (§ 1237.5, subd. (a).) “[T]he critical inquiry is whether a challenge to the sentence is in substance a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.” (*People v. Panizzon, supra*, 13 Cal.4th at p. 76.) Here, defendant contends his conviction was unconstitutional and the proceedings did not comply with

sections 1368 and 1369. These are bases that fall squarely under the requirements of section 1237.5. Moreover, competence issues are encompassed within the requirements of section 1237.5 and require a certificate of probable cause. (See *Mendez, supra*, 19 Cal.4th at p. 1104; *People v. Hodges* (2009) 174 Cal.App.4th 1096, 1105 [“defendant’s mental competency argument is barred for lack of certificate of probable cause”].)

“[T]he decision to plead guilty is undeniably a profound one,” and before accepting a guilty or no contest plea, “a trial court must satisfy itself that the waiver of [the defendant’s] constitutional rights is knowing and voluntary.” (*Godinez v. Moran, supra*, 509 U.S. at pp. 398, 400.) At the time of the plea, the court had never made a determination that defendant was competent to proceed, despite its previous declaration of doubt and suspension of the proceedings.<sup>6</sup> We question whether a defendant who pled guilty under such circumstances should be bound by that choice, even in the absence of a certificate of probable cause.

Nonetheless, we find that Supreme Court precedent mandates that section 1237.5 “should be applied in a strict manner.” (*Mendez, supra*, 19 Cal.4th at p. 1098.) “The provision lays down a ‘condition precedent’ to the taking of an appeal within its scope. [Citation.] It is a general ‘legislative command’

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<sup>6</sup>Our Supreme Court has called this a “true *Pate* error”—“a procedural constitutional due process violation of the type in which the trial court has failed to hold a hearing despite sufficient triggering evidence showing the defendant might be mentally incompetent”—and contrasted it with “fundamentally different” violations in which the competency hearing was held, but may have been deficient. (*People v. Lightsey, supra*, 54 Cal.4th at p. 703.)

to defendants. [Citation.] It is not an authorization for ‘ad hoc dispensations’ from such a command by courts.” (*Ibid.*)

Considering a case on the merits despite the lack of a certificate is “squarely contrary’ to [the] terms” of section 1237.5. (*Ibid.*)

Thus, the Supreme Court has “strongly criticized the practice in some appellate decisions of reaching the merits of the appeal, notwithstanding the defendant’s noncompliance with section 1237.5’s certificate requirements.” (*People v. Zuniga* (2014) 225 Cal.App.4th 1178, 1183.) As a result, even cases in which a plea lacks a factual basis will be upheld. In *Zuniga*, for example, the defendant pled no contest to an offense involving active participation in a criminal street gang. On appeal, he asserted that there was no factual support for the plea because there was no evidence to show he committed the underlying offense with another gang member. The Court of Appeal dismissed the appeal for lack of a certificate of probable cause, holding that “defendant’s challenge to the factual basis for the no contest plea ‘is properly viewed as a challenge to the validity of the plea itself.’ [Citation.] Since defendant failed to obtain a certificate of probable cause in compliance with section 1237.5, his challenge is barred.” (*Id.* at p. 1187.)

Similarly, in *People v. Jerome* (1984) 160 Cal.App.3d 1087, the defendant challenged his guilty plea to “oral copulation with another person who is under 14 years of age,” asserting that the crime was legally impossible because the victim was 15 years old. (*Id.* at p. 1092-1093.) The Court of Appeal held that a certificate of probable cause was required nonetheless: “Since it was legally impossible to commit the charged crime against the overaged victim, the trial court acted in excess of its jurisdiction when it imposed sentence for that crime. [Citations.] But

notwithstanding that error, defendant cannot raise this jurisdictional issue on appeal because he did not request or procure a certificate of probable cause.” (*Id.* at p. 1094.) The court nonetheless addressed the defendant’s challenges by considering the appeal as a writ of habeas corpus and modifying the judgment (*id.* at pp. 1095, 1099), but the Supreme Court later criticized such practices in *Mendez*. (See *Mendez, supra*, 19 Cal.4th at p 1098 and fn. 9.)

Section 1237.5 applies following a guilty or no contest plea, which “admits every element of the crime and constitutes a conviction.” (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1177.) Appeals challenging guilty and no contest pleas are generally barred because “defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.” (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

However, the reasoning behind section 1237.5 and these estoppel principles assumes that a defendant was competent to bargain for a sentence. A no contest plea must be “voluntary and intelligent under the totality of the circumstances.” (*People v. Howard* (1992) 1 Cal.4th 1132, 1178.) Thus, before accepting a guilty or no contest plea, “a trial court must satisfy itself that the waiver of [the defendant’s] constitutional rights is knowing and voluntary.” (*Godinez v. Moran, supra*, 509 U.S. at p. 400.) When a defendant’s competence has been questioned to the extent that the trial court has suspended proceedings, however, “it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently” waive his rights. (*Pate v. Robinson, supra*, 383 U.S. at p. 384.) A defendant is not competent if he or she lacks the capacity to understand the

nature and object of the proceedings, to consult with counsel, and to assist in preparing a defense. (*Drope v. Missouri, supra*, 420 U.S. at p. 171.)

Defendant compares this case to *People v. Oglesby* (2008) 158 Cal.App.4th 818 (*Oglesby*), saying that *Oglesby* “considered the exact question presented in this appeal” and determined that no certificate of probable cause was needed. However, *Oglesby* is not on point. There, pursuant to defense counsel’s request, the court suspended pretrial proceedings to allow for a determination of defendant’s competence under section 1368. The court concluded the defendant was competent and reinstated the proceedings. (*Id.* at p. 822.) The defendant pled guilty, and during the sentencing his counsel questioned whether defendant was competent. The court found that he was.

On appeal, the defendant challenged only “the sentencing procedure. He argue[d] the court should have suspended sentencing to inquire into his competence, but did not.” (*Oglesby, supra*, 158 Cal.App.4th at p. 824.) The Attorney General asserted that the defendant was required to have a certificate of probable cause under section 1237.5. The court rejected this contention: “[B]ecause [the defendant’s] appeal uniquely challenges only postplea sentencing procedures and not the plea, we conclude a certificate of probable cause was not necessary.” (*Id.* at p. 828.) The court specifically recognized that the issue before the court “does not necessarily implicate the validity of the guilty plea.” (*Id.* at p. 827.)

*Oglesby* does not address the question at issue in this case. Although in his opening brief defendant asserted that he was challenging the sentence rather than pre-plea proceedings, that characterization was not accurate and defendant has since



conceded that he is challenging the validity of the plea. Because defendant asserts that the trial court did not have the authority to sentence him because the court's actions were in excess of its jurisdiction, defendant has challenged not his sentence, but the authority of the court to sentence him. A "challenge to the trial court's sentencing authority is in substance a challenge to the validity of the negotiated plea. Therefore, defendant's failure to secure a certificate of probable cause bars consideration of this challenge and requires dismissal of his appeal." (*People v. Shelton, supra*, 37 Cal.4th at p. 771.)

Defendant has challenged the court's authority to accept his no contest plea and enter a conviction. Although the parties agree that the court erred by failing to hold a competency hearing, defendant's challenges require a certificate of probable cause. Because defendant did not obtain one, section 1237.5 requires that the appeal be dismissed.

#### **DISPOSITION**

The appeal is dismissed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.