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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re

MIGUEL GARCIA,

On Habeas Corpus.

F065733

(Kings Super. Ct. No. 12W0122A)

**OPINION**

**THE COURT\***

Miguel Garcia, petitioner, in pro. per.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and John W. Powell, Deputy Attorneys General, for Respondent.

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Petitioner seeks leave to file a belated notice of appeal.

On March 20, 2012, petitioner pled no contest to voluntary manslaughter (Pen. Code § 192, subd. (a)). Petitioner claims that prior to sentencing he unsuccessfully moved to withdraw his plea. On May 30, 2012, petitioner was sentenced to 29 years in state prison.

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\*Before Hill, P.J., Levy, J., and Peña, Jr., J.

Petitioner asked his attorney to file a notice of appeal on his behalf. Despite counsel's agreement to file a notice of appeal, counsel failed to do so.

On July 15, 2012, petitioner signed a notice of appeal and a request for a certificate of probable cause. The court deemed the appeal inoperative on July 17, 2012. The court denied petitioner's request for a certificate of probable cause on July 24, 2012.

On September 18, 2012, petitioner filed the instant petition for writ of habeas corpus asking leave to file a belated appeal. On November 30, 2012, this court issued an order granting the Attorney General leave to file a response limited to the issue of whether petitioner should be granted leave to file a belated notice of appeal. On December 14, 2012, the Attorney General submitted an informal response informing this court that it "does not oppose petitioner's request to file a notice of appeal more than 60 days after sentencing."

A notice of appeal and a statement in support of a certificate of probable cause must be filed within 60 days of the date of the rendition of the judgment. (Pen. Code, § 1237.5 ; Cal. Rules of Court, rules 8.304, 8.308.) Although a criminal defendant has the burden of timely filing a notice of appeal, the burden may be delegated to trial counsel. (*In re Fountain* (1977) 74 Cal.App.3d 715, 719 .) "A criminal defendant seeking relief from his default in failing to file a timely notice of appeal is entitled to such relief, absent waiver or estoppel due to delay, if he made a timely request of his trial attorney to file a notice of appeal, thereby placing the attorney under a duty to file it, instruct the defendant how to file it, or secure other counsel for him [citation]; or if the attorney made a timely promise to file a notice of appeal, thereby invoking reasonable reliance on the part of the defendant [citation]." (*People v. Sanchez* (1969) 1 Cal.3d 496, 500.)

The trial court denied the timely filed Request for a Certificate of Probable Cause on July 24, 2012. Consequently no purpose would be served by granting petitioner leave to file a new request. (This court takes no position at this time on the merits of the

request for a Certificate of Probable Cause.) Petitioner is entitled to leave to file a belated notice of appeal limited to a challenge to his “sentence or other matters occurring after the plea that do not affect the validity of the plea” if he determines such ground for appeal is appropriate.

### **DISPOSITION**

Petitioner is granted leave to file a notice of appeal “based on the sentence or other matters occurring after the plea that do not affect the validity of the plea” on or before February 11, 2013, in Kings County Superior Court No. 11CM7083. Let a writ of habeas corpus issue directing the Kings County Superior Court, if the court receives the notice of appeal on or before February 11, 2013, to treat the notice of appeal as being timely filed, and to process the request and the appeal in accordance with the applicable rules of the California Rules of Court. This court takes no position at this time on whether the denial of petitioner’s Request for a Certificate of Probable Cause was appropriate.