S188453 SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LUIS OSCAR SANCHEZ,

Defendant and Appellant.

Case No. S_____

SUPREME COURT
FILED

NOV 29 2010

Frederick K. Ohlrich Clerk

Deputy

Fifth Appellate District, Case No. F057147

Tulare County Superior Court, Case Nos. PCF204260A, VCF166696A, and VCF180279
The Honorable Juliet L. Boccone, Judge

PETITION FOR REVIEW

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General
DAVID ANDREW ELDRIDGE
Deputy Attorney General
State Bar No. 172100
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-6291
Fax: (916) 324-2960
Email: David.Eldridge@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

STATUTES

COURT RULES

The People of the State of California hereby petition this Court to grant review to settle an important question of law, which is the subject of conflict in the decisions of the Courts of Appeal and this Court, whether a defendant's stated concern regarding counsel in an isolated context triggers a duty on the trial court sua sponte to require the defendant to prove current counsel should be discharged for all purposes.

ISSUE PRESENTED

At times, a just-convicted criminal defendant, who is currently represented, may ask the court to appoint a separate attorney to explore a motion to challenge that conviction, expressly or implicitly stating the basis for the motion would be a claim that current counsel has been ineffective. (E.g., *People v. Dickey* (2005) 35 Cal.4th 884, 920-921 (*Dickey*).)

Upon such a request, must the court invariably initiate a hearing for the defendant to attempt proof that current counsel should be discharged for all purposes? Or may the court, in its discretion, instead eliminate even the prospect of conflict as to that motion, by granting appointment of separate counsel for the limited purpose of the motion, and otherwise permitting the defendant to continue representation by original counsel?

INTRODUCTION

Not uncommonly, a just-convicted defendant (either by plea or trial), with prison sentence imminent, will personally want to explore whether the conviction may be set aside on a theory his current counsel is to blame for the fact he stands convicted. Personally or through counsel, the defendant may ask the court to appoint special counsel to investigate bringing a motion (to withdraw the guilty plea, or for a new trial) on that ground.

At times, instead of forcing the defendant to move for *discharge* of current counsel for all purposes, the court will grant the stated request for special appointment, with special counsel's duties limited to investigating

Also, in *People v. Mendez* (2008) 161 Cal.App.4th 1362 (*Mendez*), the Fifth Appellate District relied on *Eastman* to reverse when defendant Eastman, while represented by counsel, purported to personally make a new trial motion challenging counsel's effectiveness. While defendant Eastman had not moved to discharge counsel for all (or any) purposes, the Fifth Appellate District found that under *Eastman* the trial court sua sponte was required to conduct a hearing to determine whether current counsel should be discharged for all purposes. (*Id.* at pp. 1365-1368.)

The Third Appellate District has expressly disagreed with the Fifth Appellate District, finding *Eastman* and *Mendez* to be inconsistent with this Court's holding, in *Dickey*, that the trial court's obligation to investigate whether to discharge current counsel is triggered only if the defendant actually seeks to discharge current counsel, rather than merely complaining about what counsel may or may not have done. Thus, in the case of a defendant who filed a letter complaining about counsel's activities, but not stating a desire to discharge counsel, the Third Appellate District found defendant could not appeal on a theory the trial court should have sua sponte investigation whether to discharge counsel. (*People v. Richardson* (2009) 171 Cal.App.4th 479, 484-485.)

In this published case, the Fifth Appellate District re-affirmed *Eastman* and *Mendez*. Contrary to *Dickey* and *Richardson*, the Fifth Appellate District allows a defendant to appeal on the ground the trial court failed sua sponte to query whether current counsel should be removed for all purposes. In this case, where the only counsel-related request was for independent investigation whether to file a motion challenging current counsel's performance, the Fifth Appellate District again reversed (as in *Eastman* and *Mendez*), making the following absolute declaration:

RT 3.) The court asked if Dell'Anno would do that exploration, or if the court should appoint "conflict counsel" to represent appellant in that task. Dell'Anno said he believed that if an appointment were made under a theory of "conflict," the court had to proceed under *People v. Marsden*, and find appellant already had been denied effective assistance. Dell'Anno said his office would look into possible withdrawal as counsel. (*Ibid.*)

The court recognized no withdrawal motion pended (i.e., appellant was represented, and counsel filed no motion). Focusing on representation strictly, the court said Dell'Anno on December 9 was to "give [the court] an update as to whether counsel needs to be appointed or that you need to file a motion on his behalf as his representative." (Dec. 2, 2008 RT 3-4.)

On December 9, appellant appeared with deputy public defender Kimberly Barnett, who asked the court to appoint a "conflict attorney." (Dec. 9, 2008 RT 3.) The court recited that the reason for delay had been to allow the public defender's office to look into whether "conflict" counsel needed to be appointed with respect to "a motion to withdraw his plea." (*Ibid.*) Accepting Barnett's view of that necessity, the court stated, "I am going to appoint conflict counsel for the sole purpose of looking into the motion to withdraw his plea." (*Ibid.*) Neither Barnett nor appellant objected to that procedure, or said another procedure was desired. (*Ibid.*)

When the court then asked appellant if he waived time for sentencing, appellant did not address the issue of representation. Instead he sought to address the court on his own, as if representing himself, stating, "Well, actually I wanted to change the plea to not guilty." (Dec. 9, 2008 RT 3.) Again confining the issue to representation, the court stated,

> In order to do that, *they have to get a motion filed* to give you a good reason for that and in order to get a motion filed I have to appoint another attorney to figure out the reason why you want to withdraw your plea.

Nonetheless, the Fifth Appellate District disagreed, and in a published opinion reversed based on appellant's complaint about that form of representation, and remanded with for a hearing wherein appellant at most could obtain what he already had—evaluation by unconflicted counsel whether to make a withdrawal motion. (Ex. A, pp. 12-13.)

Respondent filed a Petition for Rehearing ("Rehg. Pet."), pointing out (1) the opinion conflated the issue of unconflicted representation with the issue of motions which an unconflicted representative could make; (2) the opinion failed to address the question of substantial rights of a defendant, instead focusing on the concept of "error"; (3) the opinion misstated respondent's representations; and (4) *Dickey* was not distinguishable and it governed the result to be reached in this case. (Rehg. Pet., pp. 1, 4-9.)

With only a few modifications, the Fifth Appellate District denied rehearing.

Respondent now seeks this Court's review.

REASONS FOR GRANTING THE PETITION

A. Summary of Reasons

Contrary to *Dickey* and *Richardson*, the Fifth Appellate District in this published case holds that a trial court must on its own commence an inquiry whether current counsel must be removed for all future purposes, based solely on the defendant's express complaint, or implied desire to complain about current counsel's pre-conviction representation. Rather than accepting the Legislature's power to restrict the scope of appellate review to claims as to which a criminal defendant can show he "objected" (Pen. Code, § 1259), and as to which he can demonstrate prejudice to his own substantial rights (Pen. Code, § 1258), the opinion below reversed, where the trial court granted appellant's request for modified representation to the extent he made his representation-based wishes known. The opinion

appealable unless expressly made so by statute.' "]; *Trede v. Superior Court of City and County of San Francisco* (1943) 21 Cal.2d 630, 634 ["There is no constitutional right to an appeal; the appellate procedure is entirely statutory and subject to complete legislative control."]; *People v. Callahan* (1997) 54 Cal.App.4th 1419, 1422 ["The Legislature has the power to change the procedure, limit the right, or even abolish the right to appeal altogether. [Citation.]"].)

The Legislature has exercised that power. In this State, appellate courts are statutorily compelled to ignore matters advanced by a defendant, whether or not "technical[ly]" they are "errors or defects" in some sense, unless and until the defendant shows the alleged error or defect affected his "substantial rights." (Pen. Code, § 1258.) The Legislature also has shown its meaning, as to when a thing affects the defendant's substantial rights—with but one enumerated exception,[1] on direct appeal a court's power to "review any question of law involved in any ... thing whatsoever said or done at the trial or prior to or after judgment" is conditioned upon whether such thing "was said or done *after objection* made in and considered by the lower court, ..." (Pen. Code, § 1259, emphasis added.)

The plain language of these statutory constraints is directly contrary to the notion that an appellate court's statutorily-granted power of appellate review includes the ability to consider an appellate complaint that a trial judge *granted* a criminal defendant's special-appointment request, such as here when the trial court granted appellant's request.

The record shows appellant, through counsel, asked the court to appoint an attorney to investigate (and possibly present) a motion to

---

[1] That exception is "any instruction given, refused, or modified." (Pen. Code, § 1259.) Even when that exception applies, appellate review is not mandatory, but rather the appellate court "*may*" elect such review. (*People v. Rundle* (2008) 43 Cal.4th 76, 151, original italics.)

Petition for Rehearing. Instead, the published opinion merely alludes vaguely to "statutory law" without identifying or discussing such law. (Slip opn., p. 9.) That refusal and avoidance warrants this Court's review.

In other contexts, this Court previously has admonished that appellate courts are not free to ignore the constraints the Legislature has placed upon appellate review.[2] Indeed, as to Penal Code section 1258 itself, in *People v. Watson* (1956) 46 Cal.2d 818, this Court separately noted historical failure of courts to give effect to that section's constraints (*id.* at p. 834), as part of this Court's discussion leading to the conclusion that under the California Constitution prejudice is required for reversal (*id.* at p. 836).

This Court's correction is warranted here. The refusal of the opinion below to respect the constraint imposed by Penal Code section 1258 provides the only means by which the opinion can predicate a reversal. That is demonstrated by the fact the disposition below remands for a hearing, the best result of which can be (1) appointment of an attorney other than original counsel (2) to evaluate whether to bring a motion to withdraw a plea. Because the trial court already gave appellant precisely that, it necessarily follows that Penal Code section 1258 cannot have been

---

[2] See *People v. Alice* (2007) 41 Cal.4th 668, 679 (appellate court may not avoid the "plain" requirement of Government Code section 68081 that parties be allowed to address dispositive appellate issue "through supplemental briefing"); *People v. Visciotti* (1992) 2 Cal.4th 1, 53, fn. 19 ("Neither this court, nor defendant, can avoid the command of Evidence Code section 353, that 'A verdict ... shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [](a) There appears of record an objection to or a motion to exclude or to strike the evidence . ...' "); and see also *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 865 (even though habeas jurisdiction is conferred by California Constitution, courts still must adhere to legislative constraints by "abid[ing] by the procedures set forth in Penal Code sections 1473 through 1508").

has no absolute *right* to more than one appointed attorney." (*Smith*, *supra*, at p. 690, emphasis added, citation and internal quotation marks omitted.) This Court noted that substitution of counsel is strictly for the purpose of ensuring that in the future the defendant receives effective assistance. (*Id.* at p. 695 ["Whenever the motion is made, the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*." (original emphasis)].) Thereafter, the Court made the following broad pronouncement:

> We stress equally, however, that new counsel should not be appointed without a proper showing. A series of attorneys presenting groundless claims of incompetence at public expense, often causing delays to allow substitute counsel to become acquainted with the case, benefits no one. The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing. This lies within the exercise of the trial court's discretion, which will not be overturned on appeal absent a clear abuse of that discretion.
>
> We thus hold that substitute counsel should be appointed when, and only when, necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]. This is true *whenever* the motion for substitute counsel is made. There is no shifting standard for the trial court to apply, depending upon when the motion is made. . . .

(*Id.* at p. 696, original emphasis.)

Read literally, this broad language would indicate a trial court should deny a request for substitution of counsel unless the defendant himself makes a particular showing on the record. But this Court has admonished against attempting to apply broad language broadly:

the question was neither presented, nor considered, whether a criminal defendant could complain about the *grant* of his own request for additional counsel. It follows that *Smith* is not "authority for a proposition" as to that point. (*People v. Superior Court (Marks)*, *supra*, 1 Cal.4th at pp. 65-66.)

This Court demonstrated as much in *Dickey*, by not citing to *Smith* even once when confronting defendant Dickey's claim the trial court erred by granting his request to appoint special counsel for the limited purpose of exploring a new trial motion as to guilt—rather than initiating a hearing to determine if current counsel should be discharged completely. Defendant Dickey had expressed no desire to discharge his present counsel. Instead, he requested special-purpose appointment of additional counsel solely to explore the option of making a new trial motion based on present counsel's prior performance in the proceedings. (*Dickey*, *supra*, 35 Cal.4th at p. 918.) The request was granted just as made (*id.* at p. 920), and this Court flatly rejected the argument that something else was required:

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

(*Dickey*, *supra*, 35 Cal.4th at pp. 920-921, latter emphasis added.)

The Third Appellate District has noted this holding in *Dickey*, and has given it full effect. That is to say, just as in *Dickey*, the Third Appellate District holds a criminal defendant may not complain on appeal because the trial court did not sua sponte investigate whether to replace counsel for all

CONCLUSION

The Petition for Review should be granted.

Dated: November 29, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General

DAVID ANDREW ELDRIDGE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

SA2009309126
31139590.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **Petition for Review** uses a 13 point Times New Roman font and contains **5,078** words.

Dated: November 29, 2010

EDMUND G. BROWN JR.
Attorney General of California

DAVID ANDREW ELDRIDGE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

Exhibit A

Slip Opinion

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS OSCAR SANCHEZ, Defendant and Appellant.	F057147 (Super. Ct. Nos. PCF204260A, VCF166696A, and VCF180279) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Juliet L. Boccone, Judge.

Eleanor M. Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez, David Andrew Eldridge, and Jamie A. Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Appellant, Luis Oscar Sanchez, pled no contest to cultivation of marijuana (Health & Saf. Code, § 11358) and admitted allegations that he had a prior conviction within the meaning of the three strikes law (Pen. Code, § 667, subds. (b)-(i)). He also admitted that

he violated probation in two other cases. Sanchez was promised a stipulated term of 32 months in exchange for his pleas and admissions. On January 2, 2009, the court sentenced Sanchez to the agreed-upon term — a total of 32 months for all three cases.

On appeal, Sanchez contends the court erred in its failure to conduct a *Marsden*[1] hearing when he indicated his desire to withdraw his pleas and admissions based on incompetence of defense counsel. We will find merit to this contention and remand the matter for further proceedings.

FACTS

Introduction

On May 10, 2008, Lindsay police officers responded to a house to investigate a 911 hang-up call and were told by Sanchez that he dialed 911 accidentally. The officers searched the house to make sure no one there needed assistance. Detecting a strong odor of marijuana in one room, the officers looked in the room's closet and discovered four marijuana plants growing inside.

The Motion to Withdraw Plea

Sanchez entered his plea in this matter on October 28, 2008. On December 2, 2008, the date set for sentencing, Deputy Public Defender Tony Dell'Anno told the court that Sanchez wanted to withdraw his plea. The court then asked whether it needed to appoint conflict counsel. Dell'Anno replied with his understanding that, before conflict counsel was appointed, the court had to find that the public defender's office had not provided Sanchez competent representation. Dell'Anno further stated that, at that point, his office needed to "check out any issues for possible withdraw[a]l ourselves." The court agreed to give Dell'Anno time, stating:

---

1 *People v. Marsden* (1970) 2 Cal.3d 118.

"... I am going to give you till the 9th to let me know whether or not conflict counsel needs to be appointed and at that time you can give me an update as to whether counsel needs to be appointed or that you need to file a motion on his behalf as his representative."

At a hearing on December 9, 2008, a different public defender appeared and the following colloquy occurred:

"[DEFENSE COUNSEL]: Luis Sanchez. He is appearing in court and conflict counsel needs to be [ap]pointed.

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

On December 30, 2008, Sanchez appeared in court with Wes Hamilton, counsel appointed for that special purpose. Hamilton told the court that Sanchez was adamant about withdrawing his plea but Hamilton did not see a legal basis for doing so. The court then relieved Hamilton, reappointed the public defender's office to represent Sanchez, and continued the matter for sentencing.

At the sentencing hearing, on January 2, 2009, defense counsel announced that Sanchez still wanted to withdraw his plea. The court noted that special counsel had done "an evaluation on his case" and had found no basis for plea withdrawal. The court then sentenced Sanchez to a 32-month term in all three cases as provided in the plea agreement.

On February 26, 2009, Sanchez filed a timely appeal in all three cases.

DISCUSSION

Sanchez contends the public defender's statements to the trial court clearly indicated that the basis for Sanchez's motion to withdraw plea was defense counsel's alleged ineffectiveness. This, according to Sanchez, was sufficient to require the court to conduct a *Marsden* hearing and it erred by its failure to do so.

We will conclude that the trial court's duty to conduct a *Marsden* hearing was triggered by defense counsel's request for appointment of substitute counsel to investigate the filing of a motion to withdraw plea on Sanchez's behalf. We also will conclude that the court erred by appointing substitute counsel without a proper showing and by reappointing the public defender's office to represent Sanchez after substitute counsel announced his conclusion that there was no basis for filing a motion to withdraw plea on Sanchez's behalf. In drawing these conclusions, we will rely on this court's opinions in *People v. Eastman* (2007) 146 Cal.App.4th 688 (*Eastman*), *People v. Mejia* (2008) 159 Cal.App.4th 1081 (*Mejia*), and *People v. Mendez* (2008) 161 Cal.App.4th 1362 (*Mendez*).

We publish this opinion for the purpose of clarifying the proper procedure for trial courts to follow in the circumstances presented.[2] That procedure includes 1) making an adequate inquiry of the defendant and his or her defense counsel, to learn the general basis for the defendant's motion; 2) conducting a *Marsden* hearing, if the general basis for the motion is the alleged incompetence of defense counsel; 3) relieving defense counsel and appointing a new attorney for the defendant if, and only if, "a failure to replace the appointed attorney would substantially impair the [defendant's] right to assistance of counsel." (*People v. Smith* (1993) 6 Cal.4th 684, 696 (*Smith*).) The proper procedure does not include the appointment of "conflict" or "substitute" counsel to investigate or evaluate the defendant's new trial or plea withdrawal motion.

As we noted in *Eastman:*

---

2 Here, as in *Eastman,* the defendant made a motion to withdraw plea. (*Eastman, supra,* 146 Cal.App.4th at p. 691.) In *Mendez* and *Mejia*, the defendants made new trial motions. (*Mendez, supra,* 161 Cal.App.4th at p. 1365; *Mejia, supra,* 159 Cal.App.4th at p. 1084.)

> "*Marsden* and its progeny require that when a defendant complains about the adequacy of appointed counsel, the trial court permit the defendant to articulate his causes of dissatisfaction and, if any of them suggest ineffective assistance, to conduct an inquiry sufficient to ascertain whether counsel is in fact rendering effective assistance. [Citations.] If the defendant states facts sufficient to raise a question about counsel's effectiveness, the court must question counsel as necessary to ascertain their veracity. [Citations.]" (*Eastman, supra,* 146 Cal.App.4th at p. 695.)

> "*Marsden* imposes four requirements that the trial court here ignored. First, if 'defendant complains about the adequacy of appointed counsel,' the trial court has the duty to 'permit [him or her] to articulate his [or her] causes of dissatisfaction and, if any of them *suggest* ineffective assistance, to *conduct an inquiry* sufficient to ascertain whether counsel is in fact rendering effective assistance.' [Citations.] ... [¶] ... [¶] Second, if a 'defendant states facts sufficient to raise a question about counsel's effectiveness,' the trial court has a duty to '*question counsel as necessary* to ascertain their veracity.' [Citation.] ... [¶] Third, the trial court has the duty to '*make a record* sufficient to show the nature of [a defendant]'s grievances and the court's response to them.' [Citation.] ... [¶] Fourth, the trial court must '"allow the defendant to express any specific complaints about the attorney and *the attorney to respond accordingly.*"' [Citation.]" (*Mendez, supra,* 161 Cal.App.4th at pp. 1367-1368.)

In *Eastman,* the defendant entered into a plea agreement in which he pled no-contest to two counts of lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288, subd. (a)). At the time for sentencing, his defense attorney 1) informed the court that the defendant wanted to withdraw his plea, and 2) asked the court to appoint substitute counsel. Also, the defendant submitted to the court a letter (written by his mother) requesting that he receive an "adequate defense" and accusing his attorney of misconduct. (*Eastman, supra*, 146 Cal.App.4th at pp. 695-696.) The court appointed counsel "for the specific grounds of determining [the] motion to withdraw." (*Id.* at p. 691.) Subsequently, that attorney announced he would not be filing a motion to withdraw plea because his investigation did not disclose any grounds for such a motion. Original defense counsel then resumed his representation of the defendant during the sentencing hearing. (*Id.* at p. 693.)

In finding that the defendant's letter was sufficient to trigger the trial court's duty to conduct a *Marsden* hearing, this court stated,

> "Although Eastman did not expressly ask to have his attorney replaced, the letter did request that Eastman receive an 'adequate defense' and his complaints set forth an arguable case that a fundamental breakdown had occurred in the attorney-client relationship that required replacement of counsel. The court was obliged to make a record that this complaint had been adequately aired and considered. [Citation.]" (*Eastman, supra,* 146 Cal.App.4th at pp. 695-696.)

We also noted in *Eastman* that the practice of appointing a second attorney to represent a defendant for the purpose of exploring the defendant's motion to withdraw has been soundly criticized by the Supreme Court in *People v. Smith*, *supra*, 6 Cal.4th 684. (*Eastman*, *supra*, 146 Cal.App.4th at p. 698.)

In *Smith,* the Supreme Court explained the pitfalls of appointing counsel to investigate the defendant's complaints as happened here:

> "In *People v. Makabali* (1993) 14 Cal.App.4th 847 ... the trial court appointed second counsel to investigate a possible motion to withdraw a guilty plea on the basis of ineffective assistance of counsel. New counsel did not make the motion. On appeal, appointed appellate counsel, i.e., the *third* attorney, claimed (unsuccessfully) that the *second* was incompetent for not claiming the *first* was incompetent. The spectacle of a series of attorneys appointed at public expense whose sole job, or at least a major portion of whose job, is to claim the previous attorney was, or previous attorneys were, incompetent discredits the legal profession and judicial system, often with little benefit in protecting a defendant's legitimate interests. [¶] We note also that in *People v. Makabali* ... the original attorney was apparently not relieved of further representation of the defendant. He represented the defendant at sentencing, after the second attorney did not move to withdraw the plea. [Citation.] We are unaware of any authority supporting the appointment of simultaneous and independent, but potentially rival, attorneys to represent defendant. When a *Marsden* motion is granted, *new counsel is substituted for all purposes in place of the original attorney, who is then relieved of further representation.* If the *Marsden* motion is denied, at whatever stage of the proceeding, the defendant is not entitled to another attorney who would act in effect as a watchdog over the first. [¶] *We stress, therefore, that the trial court should*

> *appoint substitute counsel when a proper showing has been made at any stage.* A defendant is entitled to competent representation at all times, including presentation of a new trial motion or motion to withdraw a plea.... [W]hen a defendant satisfies the trial court that adequate grounds exist, substitute counsel should be appointed. Substitute counsel could then investigate a possible motion to withdraw the plea or a motion for new trial based upon alleged ineffective assistance of counsel. Whether, after such appointment, any particular motion should actually be made will, of course, be determined by the new attorney." (*Smith, supra*, 6 Cal.4th at pp. 695-696, italics added.)

In *Mejia,* a jury convicted the defendant of first degree murder and other offenses. At the sentencing hearing, defense counsel informed the court that the defendant wanted to move for a new trial "based in large part" on defense counsel's conduct and that he could not make the motion for the defendant. After the court stated that it needed some information before it conducted an in camera hearing, defense counsel replied that the defendant was unhappy with defense counsel's approach to his defense, his failure to make a motion to dismiss several counts, and his failure to present a defense of self-defense. After hearing from the prosecutor, the court denied the "motion for ... appointment of conflict attorney." (*Mejia, supra,* 159 Cal.App.4th at p. 1085.)

On appeal, this court held that, when defense counsel conveyed to the trial court the information that defendant wanted to file a motion for new trial on the basis of incompetence of counsel, it triggered the trial court's duty to conduct a *Marsden* hearing — a duty that the court did not discharge by making inquiries only of defense counsel. We rejected the respondent's contention that the trial court had no duty to conduct a *Marsden* hearing because the defendant did not make such a request. In so doing, we stated,

> "[Defendant's] counsel's representation to the trial court about Ismael's request 'to make a motion for a new trial based in large part on [his counsel's] conduct at the trial' was adequate to put the trial court here on notice of Ismael's request for a *Marsden* hearing. Our Supreme Court emphasizes: 'The semantics employed by a lay person in asserting a constitutional right should not be given undue weight in determining the

protection to be accorded that right.' [Citation.]" (*Mejia, supra,* 159 Cal.App.4th at p. 1086.)

In *Mendez*, a jury found the defendant guilty of battery with infliction of serious bodily injury on a fellow inmate (Pen. Code, § 243, subd. (d)), and the trial court found true five prior strike convictions (Pen. Code, § 667, subds. (b)-(i)). (*Mendez, supra,* 161 Cal.App.4th at p. 1364.) At the defendant's sentencing hearing, defense counsel informed the trial court that the defendant was making a new trial motion "based on incompetency of counsel." After allowing the defendant an opportunity to express some complaints about his representation, the court appointed substitute counsel stating, "All right. I'll appoint [new counsel] to represent Mr. Mendez for the sole purpose of investigating as to whether or not there appears to be a basis for a motion for new trial based on incompetency of counsel...." Substitute counsel, however, did not file a motion for new trial because, after reviewing the file, he concluded there was no basis for such a motion. The trial court then reassigned the case to the defendant's original counsel. (*Id.* at p. 1366.)

On appeal, we found that the court erred in its failure to hold a *Marsden* hearing. (*Mendez, supra,* 161 Cal.App.4th at pp. 1367-1368.) In so finding, we rejected the respondent's claim that the trial court did not have a duty to conduct a *Marsden* hearing because the defendant never indicated he wanted another attorney:

> "In *People v. Stewart* [(1985) 171 Cal.App.3d 388] (*Stewart*), ... defendant 'personally instructed his appointed trial counsel to file a motion for new trial on the basis of incompetence of counsel.' [Citation.] That was adequate to put the trial court on notice of defendant's request for a *Marsden* hearing. [Citation.] Here, Mendez informed his trial attorney that he was making a new trial motion 'based on competency of counsel.' That, too, was adequate to put the trial court on notice of his request for a *Marsden* hearing." (*Mendez, supra,* 161 Cal.App.4th at p. 1367, cf. *People v. Reed* (2010) 183 Cal.App.4th 1137, 1145-1146, contra, *People v. Richardson* (2009) 171 Cal.App.4th 479, 484-485.)

Here, the trial court appointed "conflict" counsel "for the sole purpose of looking into the motion to withdraw his plea." At the previous hearing, by telling the court that substitute counsel could be appointed only if the court found that the public defender had not provided competent representation, Sanchez's first public defender in effect told the court that the basis for the motion to withdraw plea would be ineffective assistance of counsel.[3] In accord with the cases cited above, we conclude that the court erred by not conducting a *Marsden* hearing.

Respondent does not discuss whether the trial court here had a duty to conduct a *Marsden* hearing. Instead, respondent cites statutory law and *People v. Dickey* (2005) 35 Cal.4th 884 (*Dickey*), to contend that Sanchez is precluded from complaining on appeal that the court gave him exactly what he asked for, the appointment of counsel to investigate whether to file a motion to withdraw plea. In a real sense, however, Sanchez did not get what he wanted. In *Dickey*, separate counsel actually filed a motion on behalf of the defendant. That did not happen here.

Moreover, respondent's analysis is superficial and misses the point. For example, respondent uses several pages of its opening brief to conclude that the "issue presented in [*People v.*] *Smith* [(1993) 6 Cal.4th 684] was whether a criminal defendant could complain about [the] *denial* of his own request for additional counsel." From this premise, respondent further concludes that *Smith* cannot be cited as support for the proposition that a defendant can "complain about the *grant* of his own request for additional counsel." Sanchez, however, did not cite to *Smith* in support of his appellate contentions. Further, the Supreme Court framed the main issue in *Smith* as follows: "Under what circumstances must the trial court substitute new counsel in place of the first

---

3 We presume that the trial court understood the motion to withdraw plea would be based on alleged incompetence of counsel. Otherwise, why would the court have appointed "conflict" counsel?

attorney for future representation, including investigating and, if appropriate, presenting a claim that the first attorney was ineffective?" (*Smith, supra,* 6 Cal.4th at p. 687.) It did not, as respondent suggests, purport to address whether the defendant could complain that his request for substitute counsel was granted.

Respondent also mischaracterizes the holding of *Dickey*, *supra*, 35 Cal.4th 884. That was a death penalty case where, following the guilt phase of the trial, defense counsel requested the appointment of separate counsel to assist the defendant in making a motion for a new trial based on several grounds including counsel's ineffectiveness during the guilt phase. In making the request, defense counsel clearly framed the matter as a request for separate counsel, not substitute counsel. He also made it clear that the idea for the request came from him, not the defendant, and that the genesis for the request was a disagreement over "'trial tactic decisions that were made on witnesses who were called and not called and the way some things were presented.'" (*Id.* at p. 918.) Defense counsel further told the court that what he sought was "not really a pure *Marsden* hearing[.]" (*Id.* at p. 918, fn. 12.) After some discussion, the defendant acquiesced in the court's decision to appoint separate counsel after the penalty phase to review the case and determine whether there were any grounds for a motion for new trial. (*Id.* at pp. 919-920.) After the penalty phase, the trial court did appoint separate counsel, who did file a motion for a new trial alleging that defense counsel was ineffective during the guilt phase and that the court erred in not conducting a *Marsden* hearing following the guilt phase. (*Dickey,* at p. 920.) The trial court denied the motion finding, as to the defendant's *Marsden* claim, that the defendant had not asked for a *Marsden* hearing. (*Dickey,* at p. 920.)

On appeal, the defendant claimed that he had sought to make a *Marsden* motion for the appointment of different counsel to represent him in the penalty phase and that the trial court erred by its failure to hold a *Marsden* hearing and by declining to rule on his

motion until the penalty phase was concluded. In rejecting these contentions, the Supreme Court stated,

> "We conclude the court did not commit *Marsden* error. '"Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.'" [Citations.]' [Citation.] *Defendant did not clearly indicate he wanted substitute counsel appointed for the penalty phase*. To the extent he made his wishes known, he wanted to use counsel's assertedly incompetent performance in the guilt phase as one of the bases of a motion for new trial, and he wanted to have separate counsel appointed to represent him in the preparation of such a motion. As his expressed wishes were honored, he has no grounds for complaint now." (*Dickey, supra,* 35 Cal.4th at pp. 920-921, italics added.)

The issue in *Dickey* was not, as respondent contends, simply whether the defendant could complain about receiving the separate counsel he requested to assist him in presenting a motion for new trial. Instead, the issue was whether the defendant's communications and those of his defense counsel triggered the trial court's duty to conduct a *Marsden* hearing at the end of the guilt phase of the trial and, if appropriate, to appoint substitute counsel to represent the defendant for the remainder of the trial. As noted above, the Supreme Court concluded that the statements of defense counsel and the defendant did not trigger the trial court's duty to conduct a *Marsden* hearing because the defendant did not clearly indicate he wanted substitute counsel appointed for the penalty phase.

Dickey is distinguishable from the instant case because here defense counsel on behalf of Sanchez made an unambiguous request for the appointment of "conflict" counsel. Moreover, in *Dickey*, defense counsel told the trial court that the request for separate counsel originated with him and that he was not seeking a "pure" *Marsden* hearing. Further, the defendant's conduct in *Dickey* was inconsistent with a desire to discharge his original counsel because he did not ask for new counsel to represent him in the penalty phase of the trial and he acquiesced to the continued representation by his

original counsel during this phase. For all these reasons, we reject respondent's contention that the court did not commit *Marsden* error because Sanchez received exactly what he asked for.

Thus, we conclude that, when a defendant announces his or her desire to make a motion for new trial or a motion to withdraw plea on the ground of ineffective assistance of counsel, the court should conduct a *Marsden* hearing to explore the reasons underlying the request. This is true even where the defendant or defense counsel requests the appointment of another attorney to explore the viability of the motion.[4] If the court is not sure whether the basis of the defendant's motion is alleged attorney incompetence, the court should inquire of counsel or the defendant, just as it would in any circumstance in which it appears a *Marsden* hearing might be required. Substitute counsel should be appointed only if the defendant makes a showing that his right to counsel has been substantially impaired. Once appointed, substitute counsel remains the attorney of record for all purposes.

DISPOSITION

The judgment is reversed and the matter is remanded with the following directions: (1) the court shall hold a hearing on Sanchez's *Marsden* motion concerning his representation by the public defender's office; (2) if Sanchez makes a prima facie showing of ineffective assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may

---

[4] Defense counsel, like the trial courts, should abandon their reliance on counsel specially appointed to do the trial court's job of evaluating the defendant's assertions of incompetence of counsel and deciding the defendant's new trial or plea withdrawal motion. (See *Eastman, supra,* 146 Cal.App.4th at p. 697 ["the court cannot abandon its own constitutional and statutory obligations to make the ultimate determination itself based upon the relevant facts and law of which the court is made aware by some legally sanctioned procedure"].)

make; and (3) if newly appointed counsel does not make any motions, any motions made are denied, or Sanchez's *Marsden* motion is denied, the court shall reinstate the judgment.

DAWSON, Acting P.J.

WE CONCUR:

HILL, J.

KANE, J.

Exhibit B

Modification Order

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS OSCAR SANCHEZ, Defendant and Appellant.	F057147 (Super. Ct. Nos. PCF204260A, VCF166696A, and VCF180279) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on October 19, 2010, and reported in the Official Reports (189 Cal.App.4th 374), be modified in the following particulars:

1. On page 4, delete the second full paragraph and replace it with the following:

> We publish this opinion for the purpose of clarifying the proper procedure for trial courts to follow in the circumstances presented.[2] That procedure includes: 1) making an adequate inquiry of the defendant and his or her defense counsel, to learn the general basis for the defendant's proposed motion; 2) conducting a *Marsden* hearing, if the general basis for that motion is the alleged incompetence of defense counsel; 3) relieving defense counsel and appointing a new attorney for the defendant if, and only if, "a failure to replace the appointed attorney would substantially impair the [defendant's] right to assistance of counsel." (*People v. Smith* (1993) 6 Cal.4th 684, 696 (*Smith*).) The proper procedure does not include the appointment of "conflict" or "substitute" counsel to investigate or evaluate the defendant's proposed new trial or plea withdrawal motion.

2. On page 4, delete footnote 2 and replace it with the following:

[2] Here, as in *Eastman,* the defendant wanted to make a motion to withdraw plea. (*Eastman, supra,* 146 Cal.App.4th at p. 691.) In *Mendez* and *Mejia*, the defendants wanted to make new trial motions. (*Mendez, supra,* 161 Cal.App.4th at p. 1365; *Mejia, supra,* 159 Cal.App.4th at p. 1084.)

3. On page 12, delete footnote 4 and replace it with the following:

[4] Defense counsel, like the trial courts, should abandon their reliance on counsel specially appointed to do the trial court's job of evaluating the defendant's assertions of incompetence of counsel and deciding the defendant's proposed new trial or plea withdrawal motion. (See *Eastman, supra,* 146 Cal.App.4th at p. 697 ["the court cannot abandon its own constitutional and statutory obligations to make the ultimate determination itself based upon the relevant facts and law of which the court is made aware by some legally sanctioned procedure"].)

4. On pages 12-13, delete the section entitled "**DISPOSITION**" and replace it with the following:

DISPOSITION

The judgment is reversed and the matter is remanded with the following directions: (1) the court shall hold a hearing on Sanchez's *Marsden* motion concerning his representation by the public defender's office; (2) if the court finds that Sanchez has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make; and (3) if newly appointed counsel makes no motions, any motions made are denied, or Sanchez's *Marsden* motion is denied, the court shall reinstate the judgment.[5]

---

[5] Copying the dispositional language used in *Eastman, supra,* 146 Cal.App.4th at page 699, our original opinion in this matter stated that if, in the *Marsden* hearing, the defendant made a "prima facia showing of ineffective assistance of counsel," the trial court shall appoint a new attorney. This was clearly wrong, both here and in *Eastman.* The correct test is whether the defendant has shown that a "failure to replace the appointed attorney would substantially impair the [defendant's] right to the assistance of counsel." (*Smith, supra,* 146 Cal.App.4th at p. 695.) We have modified our original opinion to state the rule correctly.

Except for the modifications set forth, the opinion previously filed remains unchanged. There is no change in the judgment.

The petition for rehearing filed by appellant is denied.

Dawson
DAWSON, J.

WE CONCUR:

Hill
HILL, J. ACTING, P.J.

Kane
KANE, J.

DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On November 29, 2010, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Eleanor M. Kraft
Attorney at Law
P.O. Box 60698
Palo Alto, CA 94306
(Representing appellant Sanchez)
(2 copies)

CCAP
Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

Clerk of the Superior Court
Tulare County
221 S. Mooney Boulevard, Room 124
Visalia, CA 93291

The Honorable Phillip Cline
District Attorney
Tulare County District Attorney's Office
221 South Mooney Blvd., Suite 224
Visalia, CA 93291

Court of Appeal of the State of California
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 29, 2010, at Sacramento, California.

_____
Declarant

SA2009309126
31148459.doc