In the Supreme Court of the State of California

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

Fifth Appellate District, Case No. F057147

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
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

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ISSUES PRESENTED

The substantive issue in this case is whether a criminal defendant has a substantial right to have a trial court reject his post-conviction request for a hybrid form of representation. The procedural issue in this case arises because the conviction was founded on defendant's guilty plea, so that his right to appeal certain issues is subject to judicial screening. This Court's order granting review stated the issues as follows:

> (1) When a defendant indicates after conviction the intention to move to withdraw a plea on the ground of ineffective assistance of counsel, is the trial court obligated to conduct a hearing on the issue whether to discharge counsel for all purposes and appoint new counsel (*People v. Marsden* (1970) 2 Cal.3d 118)?
>
> (2) Was defendant required to obtain a certificate of probable cause (Pen. Code, § 1237.5) in order to raise this issue on appeal?

INTRODUCTION

A times, a just-convicted defendant may persuade a trial court to appoint additional, special counsel for the limited purpose of exploring the prospect of moving to set aside the conviction on a theory the conviction resulted from ineffective assistance of counsel. If special counsel makes no motion, or if a motion is made but denied, special counsel's duties end, and proceedings continue with defendant represented by original counsel. (E.g., *People v. Dickey* (2005) 35 Cal.4th 884, 920-921 (*Dickey*).) While a defendant has no right to such additional counsel, the court's allowance thereof may shorten delay and disruption.

Substantively, for the reasons in the Argument, a court violates no cognizable duty by allowing a defendant such additional counsel, in lieu of forcing the defendant to prove current counsel should be discharged.

Procedurally, as stated in the Argument, even assuming a lack of jurisprudence in the Court of Appeal's election to order issuance of the certificate of probable cause necessary to reach the counsel issue, that court

had subject matter jurisdiction to make the order. This Court accordingly faces no bar to reaching the merits of the representation issue.

STATEMENT OF THE CASE

After March 26, 2007 grants of probation in cases VCF180279 and VCF166696 (CT 279-289), defendant on October 28, 2008, appeared in court in a third case, number PCF204260, with his counsel deputy public defender Nathan Leedy. (CT 295-296.) In light of an indicated sentence of 32 months (CT 296), but expressly against attorney Leedy's advice (CT 300), defendant on that date entered guilty pleas and admissions to felony marijuana cultivation (Health & Saf. Code, § 11358) with a prior strike (Pen. Code, § 1170.12), and misdemeanor contributing to delinquency of a minor (Pen. Code, § 272, subd. (a)(1)) and giving false information to a police officer (Pen. Code, § 148.9, subd. (a)). (CT 296-303.)

On December 2, 2008, the time set for sentencing, defendant appeared with deputy public defender Tony Dell'Anno, who said defendant wanted his office to "explore" whether his plea could be withdrawn. (Dec. 2, 2008 RT 3.) The court asked if Dell'Anno would do that exploration, or if the court should appoint "conflict counsel" to represent defendant 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 defendant 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., defendant 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, defendant 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 defendant objected to that procedure, or said another procedure was desired. (*Ibid.*)

The court asked if defendant waived time for sentencing. Defendant did not address the issue of representation; 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.

(*Ibid.*) The court set December 30 to hear any plea-withdrawal motion. The court told defendant to consult with "conflict counsel" and receive "advice" from such counsel regarding "that." (*Id.*, p. 4.)

On December 30, 2008, defendant appeared with both Leedy and "conflict counsel" Wes Hamilton. (Dec. 30, 2008 RT 3.) Hamilton said that while defendant personally wanted to withdraw his plea, Hamilton was not filing such a motion as defendant's representative. Hamilton found no basis for a motion. (*Ibid.*) With defendant's counsel declining to file a motion, the court stated, "In light of that we will do the sentencing," and, "All right he is on for sentencing and so it goes back to you [attorney Leedy] representing him." (*Ibid.*) Again, there was complete acquiescence on the question of representation. (*Ibid.*)

On January 2, 2009, defendant appeared for sentencing with attorney Leedy. As required (Pen. Code, § 1200), the court asked if there was "legal

cause" why sentence should not be pronounced. (CT 338.) Leedy had no "legal cause"—i.e., Leedy did not intend to file a plea withdrawal motion to occasion a new trial. (See Pen. Code, § 1201.) But Leedy volunteered that defendant was unhappy the motion would not be filed. (CT 338.) With no motion pending, the court did not engage the issue, but noted defendant's legal representative had declined the motion in his professional judgment. (CT 338.) Defendant was sentenced. (CT 339-344.)

On appeal, the People argued the sole issue was whether defendant's substantial rights were violated (Pen. Code, § 1258), an issue dependent on whether he objected to any claimed error in procedure (Pen. Code, § 1259). The People argued *Dickey* affirmed on indistinguishable facts, precluding relief. (Respondent's Brief in the Fifth Appellate District [RB], pp. 4-11.)

In a published opinion the Court of Appeal disagreed, reversing and remanding for defendant to seek what he had already received—exploration, by unconflicted counsel, whether to make a plea-withdrawal motion. (Ex. A, pp. 12-13.)

The People 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 the People'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.) The Court of Appeal denied rehearing.

ARGUMENT

I. A TRIAL COURT'S DISCRETIONARY POWER TO APPOINT COUNSEL IS NOT PRE-EMPTED BY *MARSDEN*

This Court has recognized a court's discretion to appoint counsel for a litigant, even when he has no actual right to such appointment. (*People v.*

Bigelow (1984) 37 Cal.3d 731, 742; see *People v. Lawley* (2002) 27 Cal.4th 102, 145; see also *People v. D'Arcy* (2010) 48 Cal.4th 257, 282 ["[N]one of the 'hybrid' forms of representation, whether labeled 'cocounsel,' 'advisory counsel,' or 'standby counsel,' is in any sense constitutionally guaranteed." (some internal quote marks omitted)].) That includes discretion to assess if additional counsel should be appointed to cure a discrete defect in current counsel's ability, or if it is instead necessary to substitute counsel altogether due to a pervasive defect with current counsel. (*People v. Lancaster* (2007) 41 Cal.4th 50, 72; cf. *People v. Weaver* (2001) 26 Cal.4th 876, 951 [duties may be divided between counsel, even in capital case].)

The question presented by this case is whether this judicial discretion is curtailed in some special manner (i.e., limited by something other than the judge's sound reason) when a convicted defendant requests additional counsel for the limited purpose of exploring a motion to set aside the current conviction on a theory current counsel was ineffective. assistance of counsel. That is to say, in that context is the court instead limited to outright substitution of counsel for all purposes, if the defendant can show current counsel may be compromised even as to a single task?

A. *Dickey* Supports the Trial Court's Action

This Court has already indicated the trial court is not so limited as to available options in that context. In *Dickey*, *supra*, this Court noted that after the guilt phase in defendant Dickey's capital trial, his current counsel asked the court to appoint an additional attorney for the limited purpose of a motion to set aside the convictions—via a new trial motion as to the guilt phase—on a theory of ineffectiveness of current counsel. (*Dickey*, *supra*, 35 Cal.4th at pp. 918-919, 920-921.) The trial court granted the request just as Dickey (through counsel) made it, i.e., the court appointed separate counsel to explore the motion. (*Id.* at p. 920.)

This Court rejected Dickey's appellate claim the trial court had a duty to explore the issue of representation beyond the scope of what was requested—specifically, to initiate sua sponte an inquiry whether Dickey would like to sever entirely his relationship with current counsel:

> 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, original emphasis.)

As in *Dickey*, the single purpose indicated by the defense here, in seeking judicial action with respect to counsel, was appointment of an additional attorney to provide representation in connection with a possible motion to set aside the conviction based on current counsel's alleged ineffectiveness. (See Dec. 9, 2008 RT 3.) The only difference between this case and *Dickey* is that in *Dickey* the desired attack on the conviction was a motion for new trial because the conviction followed a trial, while in this case the desired attack would have to be in the form of a motion to set aside a guilty plea because defendant here waived trial.

But that is no distinction at all. Once accepted, a guilty plea is itself a conviction, no less than a conviction reached by verdict after a trial. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300 [a guilty plea " ' "is itself a conviction; nothing more remains by to give judgment and determine punishment" ' "].) Thus, no matter whether a defendant files a "new trial" motion after a trial, or he files a plea-withdrawal motion because he waived trial, the substance of the motion is a request to set aside a *conviction*.

Doubtless, in both contexts, care should be exercised rather than the court reflexively electing to appoint counsel, else the defendant is granted the ability to manipulate the course of his representation. That of course did not happen here. Here, the court relied on the representation by current counsel (Dec. 9, 2008 RT 3), after having given current counsel time to investigate whether separate counsel was necessary to ensure unconflicted representation in with respect to a motion claiming ineffectiveness (Dec. 2, 2008 RT 3-4). The trial court properly could rely on the representations of counsel asserting a conflict. (See *Cuyler v. Sullivan* (1980) 446 U.S. 335, 346; *Holloway v. Arkansas* (1978) 435 U.S. 475, 485-486.) The trial court's election to appoint a different attorney with respect to the post-conviction motion therefore is unassailable. And, as *Dickey* makes plain, the court had no duty sua sponte to invite defendant to seek termination of current counsel's representation entirely.

B. Neither *Marsden* nor *Smith* Contradict the Trial Court's Action

Nothing in *People v. Marsden* even suggests a contrary conclusion. In that case this Court confronted a narrow defect, in that a defendant had asked midtrial for substitution of counsel, and the trial court denied the request without letting the defendant give reasons to justify his request. (*Id.*, 2 Cal.3d at p. 120 [issue was that "trial court denied his motion to substitute new counsel without giving him an opportunity to state the reasons for his request"].) This Court held "it was error to *deny* his motion without an opportunity for explanation." (*Id.* at p. 124, emphasis added.)

Thus *Marsden* involved a request to substitute counsel entirely, and the request was denied without opportunity to explain why it should be granted. In starkest contrast, this case involved a request for additional counsel only, and the trial court granted the request in the manner in which it was requested.

Nor, contrary to the opinion of the Court of Appeal, is *People v. Smith* (1993) 6 Cal.4th 684 (*Smith*) authority for a contrary proposition. In *Smith* this Court confronted a trial court's *denial* of a request for appointment of counsel. After noting *Marsden* had held "a defendant 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 held that substitution of counsel is to ensure future 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)]). This Court then broadly stated:

> 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:

> Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.

(*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66, citation and internal quotation marks omitted; accord *People v. Sapp* (2003) 31 Cal.4th 240, 262 [rejecting reliance on "dictum"].)[1] The issue in *Smith* was

> Under what circumstances *must* the trial court substitute new counsel in place of the first attorney for future representation, including investigation and, if appropriate, presenting a claim that the first attorney was ineffective?

(*Smith*, *supra*, 6 Cal.4th at p. 687, emphasis added.) In other words, the actual issue in *Smith* was whether in a given context a criminal defendant had a *right* to a requested change in his representation.

But the issue whether a defendant has a right to a thing (i.e., whether he may complain about being *denied* a thing he has requested) is quite distinct from the issue whether he may complain after his request for that thing was *granted*. This Court in *Smith* in no way conferred upon a defendant the right to complain when a trial court grants his request for a change in representation, with or without him having made the proper justification for his request.

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[1] See *Rowen v. Santa Clara Unified School District* (1981) 121 Cal.App.3d 231, 236 ("In any event, the question raised here was not discussed in that opinion. Moreover, the court's pronouncement in that case was gratuitous, . . ."); *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1041 ("Appellants' authority for the validity of their position is *Bostick v. Martin*, 247 Cal.App.2d 179 [], ... Although certain pronouncements, from an overall standpoint, sustain appellants' present argument we believe they should be considered in the context of the circumstances there presented.").

Thus, this Court's repeated admonitions against using language of an opinion out of context dictated the limits of *Smith*'s application. In *Smith*, 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.) Indeed, this Court in *Dickey* did not even cite to *Smith* when finding the trial court had no duty sua sponte to commence inquiry whether current counsel should be replaced for all purposes.

In sum, the trial court had no duty sua sponte to inquire whether defendant wished to remove current counsel for all purposes, when the only defense motion below was for appointment of separate counsel for an indicated purpose of assisting a motion to set aside the conviction. The contrary holding by the Court of Appeal should be reversed.

II. A REQUIRED CERTIFICATE OF PROBABLE CAUSE IS PRESENT

As to the second issue presented by this Court on review, the People respond to the issue raised explicitly, and the issue which appears implicit.

A. A Certificate of Probable Cause Was Required

As noted in the Statement, defendant's conviction resulted from a plea of guilty. To raise any issue "going to the validity of [his] plea," he had to obtain a certificate of probable cause. (*People v. Buttram* (2003) 30 Cal.4th 773, 781.) This Court's second stated issue implicitly asks, at least, if the issue here goes to the validity of the plea.

It does. A challenge as to how a court proceeded with respect to a trial-level effort designed to invalidate the plea is necessarily a challenge going to the validity of the plea. Whether the challenge is direct or indirect does not matter. (*People v. Johnson* (2009) 47 Cal.4th 668, 678-679; 680-682.) Defendant's trial court-level request for appointment of counsel was

to obtain assistance in challenging the plea. His appellate claim, attacking how the trial court rulings affected that effort, and seeking another trial court opportunity to attack the plea—is therefore necessarily a claim going to the validity of the plea. (*People v. Johnson*, *supra*, at pp. 680-682.) A certificate of probable cause therefore was required.

B. The Court of Appeal Had Subject Matter Jurisdiction to Direct Issuance of a Certificate of Probable Cause

The foregoing discussion addresses the second issue raised by this Court, to the extent a question is explicitly posed. However, given this Court's unusual step of raising its own question, and given that lack of Court of Appeal jurisdiction is distinctly enumerated as a ground for review (Cal. Rules of Court, rule 8.500(b)(2)), it appears this Court contemplates briefing on the question whether, for reasons related to the certificate requirement, the Court of Appeal lacked subject matter jurisdiction to reach the merits of the counsel issue. (See *id.*, rule 8.516(a)(1) [briefing to be limited to issues granted review, and sub-issues "fairly included" therein].) For the reasons which follow, it appears the Court of Appeal did not lack subject matter jurisdiction, irrespective of any questions regarding that court's exercise of discretion within the scope of that jurisdiction.

1. Trial Court-Level Requirements

The trial court-level actions needed to seek a certificate of probable cause are prescribed by statute and court rule. (Pen. Code, § 1237.5; Cal. Rules of Court, rule 8.308(a).) These constraints are strictly enforced; courts lack inherent authority to make an allowance not itself in the statute or rule. (*People v. Johnson*, *supra*, 47 Cal.4th at pp. 681-682; *People v. Mendez* (1999) 19 Cal.4th 1084, 1093-1094, 1098, 1099.) It is not disputed defendant complied with the constraints. He timely sought a certificate from the trial court (Pen. Code, § 1237.5, subd. (a); Cal. Rules of Court, rule 8.308(a)), but the trial court denied the certificate. (CT 411-412.)

2. Remedy for Trial-Level Denial

Neither statute nor court rule appears to contemplate that there will be a remedy for a trial court's refusal to issue a certificate of probable cause. Thus, unsurprisingly, no statute or court rule appears to govern the time or manner of such a remedy.

Instead, the fact and manner of a remedy seems to have originated in an appellate case in 1970, when a Court of Appeal stated in a footnote, without reasoning or citation to authority, that mandamus lay to review a trial court's denial of a certificate of probable cause. (*People v. Warburton* (1970) 7 Cal.App.3d 815, 820, fn. 2.) This Court soon agreed, citing that case, but adding the remedy of mandamus lay upon "a timely application therefor." (*In re Brown* (1973) 9 Cal.3d 679, 683.) It yet appears, 38 years later, the sole foundation for the fact of such remedy, and its procedural steps, is judicial rule. (*People v. Johnson*, *supra*, 47 Cal.4th at p. 676 [citing only *In re Brown*, *supra*, as to the remedy of mandamus].)

Absent legislation imposing a specific deadline for the filing of an extraordinary writ, courts generally enforce as a deadline the "60-day period applicable to appeals." (*Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 499, citing *Reynolds v. Superior Court* (1883) 64 Cal. 372, 373; *People v. Superior Court (Brent)* (1992) 2 Cal.App.4th 675, 682.) Yet it remains a general truism that "[w]rit proceedings are not appeals." (*People v. Superior Court (Brent)*, *supra*, 2 Cal.App.4th at p. 682.) And as stated, for four decades the Judicial Council and Legislature have left the fact and terms of this remedy to the courts. Thus, discretionary judicial rule (and not, e.g., statutory divestiture of jurisdiction) is all that would preclude relief on an untimely mandamus petition challenging a trial court's denial of a certificate of probable cause.

True, the case law regarding such discretion is clear that an untimely filed writ "*should*" be denied absent "extraordinary circumstances."

(*Popelka, Allard, McCowan & Jones v. Superior Court*, *supra*, 107 Cal.App.3d at p. 499, emphasis added; *Reynolds v. Superior Court*, supra, 64 Cal. at p. 373.) Too, this rule does not require prejudice to the opposing party. (*Popelka*, *supra*, 107 Cal.App.3d at p. 499; *Scott v. Municipal Court* (1974) 40 Cal.App.3d 995, 997.) Further, it is near certain that a late-in-the-day order construing an appellate brief as a substitute for a timely mandamus petition, would be clear abuse of judicial discretion. (*People v. Drake* (1977) 19 Cal.3d 749, 758; *People v. Godfrey* (1978) 81 Cal.App.3d 896, 903-904.) That is, a mere desire to *avoid* an otherwise plain bar of untimeliness rarely, if ever, could amount to extraordinary circumstances.

Still, this Court has noted that even when a statute requires there be extraordinary circumstances to support a judicial act, the absence of such extraordinary circumstances does not mean the court's action was beyond its subject matter jurisdiction. Rather, it simply means the aggrieved party may seek relief from such action in a higher court, subject to the condition the aggrieved party timely objected in the lower court. (*People v. Tillman* (2000) 22 Cal.4th 300, 301, 303.) And here there is no statute at all.

There is no dispute defendant did not petition for mandamus within 60 days after the trial court denied the certificate of probable cause. But it was within the Court of Appeal's subject matter jurisdiction to overlook that procedural defect. The Court of Appeal exercised discretion and reversed the trial court's denial. (F057147 docket, July 28, 2010 order.) By that order, a certificate of probable cause issued (F057147 docket, Aug. 11, 2010 entry), and the Court of Appeal thereby acquired jurisdiction to address the representation issue before this Court.

Despite objection to the July 28, 2010 order in the Court of Appeal, the People as the aggrieved party respectfully will not ask this Court to engage in case-specific examination as would be needed to review that

order.[2] Rather, even if one may question the exercise of discretion to acquire subject matter jurisdiction, there is no question but that subject matter jurisdiction was acquired. Thus, the appeal is operative as to certificate issues. And given such subject matter—or "fundamental" (*In re Harris* (1993) 5 Cal.4th 813, 836)—jurisdiction in that court, it follows that this Court may review of the merits of the representation issue.

For these reasons, as to the second issue presented on review, a certificate of probable cause was required for the Court of Appeal to reach the issue whether the trial court erred as to defendant's representation. But a certificate has issued, and the People as aggrieved party do not ask this Court to correct any error in its issuance (and defendant is estopped from doing so). The People respectfully ask this Court to review the merits of the representation issue.

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[2] (Cf. *Greenlaw v. United States* (2008) 554 U.S. 237, 243-244 ["In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.... [A]s a general rule, '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.' "]; accord *Douglas v. Jacquez* (9th Cir. 2010) 626 F.3d 501, 504; and see *New York v. Hill* (2000) 528 U.S. 110, 117 [noting, in another timeliness context, "In general, '[i]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation.' "].)

CONCLUSION

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

Dated: March 8, 2011

Respectfully submitted,

KAMALA D. HARRIS
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

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Opening Brief on the Merits** uses a 13 point Times New Roman font and contains **4,624** words.

Dated: March 8, 2011

KAMALA D. HARRIS
Attorney General of California

DAVID ANDREW ELDRIDGE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

EXHIBIT

A

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:

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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:*

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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

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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

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[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

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]

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[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, J.

WE CONCUR:

HILL, J. ACTING, P.J.

KANE, J.

DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On March 8, 2011, I served the attached **RESPONDENT'S OPENING BRIEF ON MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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

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

Clerk of the Court
Tulare County Superior Court
County Civic Center
221 South Mooney Boulevard, Room 124
Visalia, CA 93291

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

Fifth Appellate District
Court of Appeal of the State of California
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 March 8, 2011, at Sacramento, California.

_____
Declarant

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