

**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.<sup>2</sup> 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:

<sup>2</sup> 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:

<sup>4</sup> 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.<sup>5</sup>

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<sup>5</sup> 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 facie 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.

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DAWSON, J.

WE CONCUR:

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HILL, J.

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KANE, J.