Substitution of Defense Counsel—The California Controversy

In a criminal case, the trial judge has the responsibility of determining when the defendant's motion to substitute counsel should be granted. This comment proposes a workable procedure which the trial judge may use when ruling on such a motion.

INTRODUCTION

Indigent criminal defendants who become dissatisfied with their appointed counsel may make a motion to substitute.[1] Generally, the right to substitution exists whenever defendants demonstrate that they have not been afforded "effective representation."[2] Defining what constitutes effective representation has been the subject of many commentaries.[3] One area that de-

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[1] A motion is not necessary to substitute *private* counsel retained by the defendant. *See* CAL. CIV. PROC. CODE § 284 (West Cum. Supp. 1980). This section is applicable to both criminal and civil cases. Mandell v. Superior Court for Los Angeles County, 67 Cal. App. 3d 1, 136 Cal. Rptr. 354 (2d Dist. 1977). *See* note 14 and accompanying text *infra*.

[2] *See* note 12 *infra*.

[3] Commentators have advocated a variety of ways to determine ineffective counsel. *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 32 (1973) (Meeting a minimal list of specific duties should determine if counsel is effective.); Bines, *Remedying Ineffective Representation in Criminal Cases: Departure from Habeas Corpus*, 59 VA. L. REV. 927, 936-37 (1973) (The exercise of the customary skill and knowledge which normally prevails at the time and place.); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1078-81 (1973) (The test of effective counsel should be whether counsel exhibited the "normal and customary degree of skill possessed by attorneys who are *fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar.*" (emphasis in original)); Comment, *The Right to Competent Defense Counsel: Emergence of a Sixth Amendment Standard of Review on Appeal and the Persistence of the "Sham and Farce" Rule in California*, 15 SANTA CLARA L. REV. 355, 370 (1975) ("Reasonably competent" assistance of counsel should be required.). *See also* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233

serves closer attention, however, is the *procedure* used by trial judges in California to determine whether defendants have received effective representation.

In California, the procedure for allowing defendants to demonstrate their counsel's inefficacy has been controversial since its announcement by the California Supreme Court in *People v. Marsden.*[4] *Marsden* gave defendants the right to state specific examples of their attorney's inadequate representation.[5] California courts presently disagree, however, on the extent of the *Marsden* ruling. The controversy centers on whether the trial judge must make an inquiry of defense counsel.[6]

This comment proposes a procedure of inquiry of both defendant and *defense counsel* that is fair to all parties concerned, and efficient in its use of judicial resources. First, the comment reviews indigent defendants' constitutional right to effective counsel. Second, it examines the trial judge's responsibility when ruling on a motion to substitute counsel. Third, it assesses a procedural standard requiring the trial judge to inquire into the state of mind of the court-appointed attorney. The comment concludes that failure of the trial court to make such an inquiry constitutes error, and a reviewing court should remand for further inquiry of defense counsel.

I. The Right to Effective Counsel

The sixth amendment to the United States Constitution guarantees counsel for criminal defendants.[7] It grants criminal de-

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(1979); Gard, *Ineffective Assistance of Counsel—Standards and Remedies,* 41 Mo. L. Rev. 483 (1976); Comment, *A Standard for the Effective Assistance of Counsel,* 14 Wake Forest L. Rev. 175 (1978).

For a review of all these standards, *see* Note, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 13 Colum. J.L. & Soc. Prob. 1 (1977). For a discussion of the tests California courts use, *see* note 27 and accompanying text *infra.*

[4] 2 Cal. 2d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970).

No discernible standard existed prior to this decision. The trial judge had wide discretion in ruling on a motion to substitute counsel. *See, e.g.,* People v. Foust, 267 Cal. App. 2d 222, 228, 72 Cal. Rptr. 675, 679 (2d Dist. 1968); People v. Mitchell, 185 Cal. App. 2d 507, 512, 8 Cal. Rptr. 319, 323 (1st Dist. 1960).

[5] *See* notes 30-35 and accompanying text *infra.*

[6] *See* notes 37 and 41 *infra.*

[7] U.S. Const. amend. VI provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

fendants the right to court-appointed counsel if they are unable to secure private representation.[8] The states must honor the right to court-appointed counsel under the due process clause of the fourteenth amendment.[9] In addition, California has a specific provision in its constitution[10] recognizing the fundamental right of a defendant in criminal cases to the assistance of counsel.[11]

Defendants' right to *effective* assistance of counsel is inherent in the constitutional requirement that the states provide counsel to indigent criminal defendants.[12] While attorneys are not required to be guarantors of results, they are required to act as diligent, conscientious advocates.[13] If defendants feel they are

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[8] Gideon v. Wainwright, 372 U.S. 335 (1963). *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (right to counsel in misdemeanor cases); United States v. Wade, 388 U.S. 218, 226 (1967) (extending right to counsel at lineup).

[9] Escobedo v. Illinois, 378 U.S. 478, 487 (1964) (right of the accused in a criminal prosecution to assistance of counsel under the sixth amendment to the Constitution is made obligatory upon the states by the fourteenth amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel in criminal trials is incorporated within the fourteenth amendment).

[10] CAL. CONST. art. I, § 15, cl. 3 (formerly CAL. CONST. art. I, § 13) states, in pertinent part: "The defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defense. . . ."

[11] *See, e.g.*, People v. Williams, 174 Cal. App. 2d 364, 345 P.2d 47 (2d Dist. 1959); People v. Simpson, 31 Cal. App. 2d 267, 88 P.2d 175 (2d Dist. 1939).

[12] McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[e]ffective assistance" must be provided in criminal cases); Reece v. Georgia, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel in [a state prosecution for a capital crime] is a constitutional requirement of due process which no member of the Union may disregard."); Powell v. Alabama, 287 U.S. 45, 71 (1932) (effective aid is a federal constitutional imperative). *See also* Glasser v. United States, 315 U.S. 60, 76 (1942) (defendant is denied the right to effective assistance of counsel if the attorney simultaneously represents conflicting interests); Avery v. Alabama, 308 U.S. 444, 446 (1940) (constitutional guarantee of assistance of counsel is not satisfied by "mere formal appointment;" counsel must have the opportunity "to confer, to consult with the accused and to prepare his defense").

[13] *See* United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976); People v. Pope, 23 Cal. 3d 412, 424, 590 P.2d 859, 865, 152 Cal. Rptr. 732, 738 (1979) (a conviction may not be upheld if the defendant has been afforded representation of a lower quality than an attorney acting as a "diligent, conscientious advocate"); ABA CANONS OF PROFESSIONAL ETHICS No. 6 ("Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients.").

An attorney may be liable for malpractice for providing ineffective representation. *See, e.g.*, Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971) (elements for legal malpractice cause of action are duty,

not receiving "effective representation" by a court-appointed attorney, they may make a motion to substitute counsel.[14]

II. Motion to Substitute Counsel

A. Requirements

Defendants must make a timely motion at the pre-trial or trial stage if they wish to substitute counsel.[15] The motion must be made when a dispute arises between appointed counsel and defendants.[16] If defendants are aware of the attorney's shortcomings and do not make a motion to substitute at that time, then

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breach of that duty, proximate cause, and damages). This remedy, however, is inadequate because of the difficulty of establishing causation and damages. *See* Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 Harv. L. Rev. 633 (1980).

[14] Cal. Civ. Proc. Code § 284 (West Cum. Supp. 1980) provides:

> The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:
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> 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;
> 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

An indigent defendant has no absolute right to more than one appointed attorney. *See* note 25 *infra*.

[15] "If defendant felt his counsel did not adequately represent him he should have complained to the trial court and given the court an opportunity to correct the situation. In the absence of such complaint the acts of defendant's counsel are imputed to him." People v. Youders, 96 Cal. App. 2d 562, 569, 215 P.2d 743, 748 (1950). *See also* People v. Marsden, 2 Cal. 3d 118, 125, 465 P.2d 44, 51, 84 Cal. Rptr. 156, 160 (1970); People v. Monk, 56 Cal. 2d 288, 299, 363 P.2d 865, 870, 14 Cal. Rptr. 633, 645 (1961); People v. Prado, 190 Cal. App. 2d 374, 377, 12 Cal. Rptr. 141, 142 (2d Dist. 1961); People v. Hood, 141 Cal. App. 2d 585, 589, 297 P.2d 52, 56 (2d Dist. 1956).

A major concern over the discharge of the attorney is the delay it may cause in the proceedings. If the defendant's request comes late in the proceeding without good cause, the court may regard the action as dilatory and deny the request outright. *See* People v. Molina, 74 Cal. App. 3d 544, 141 Cal. Rptr. 533 (2d Dist. 1977) (request for substitution made on the second day of trial denied); People v. Glover, 270 Cal. App. 2d 255, 75 Cal. Rptr. 629 (1st Dist. 1969) (request for substitution made on the second day of trial denied because it was considered dilatory). *But see* People v. Munoz, 41 Cal. App. 2d 62, 115 Cal. Rptr. 726 (5th Dist. 1974) (appellate court reversed trial court's denial of substitution made on the first day of trial).

[16] *See* People v. Glover, 270 Cal. App. 2d 255, 75 Cal. Rptr. 629 (1st Dist. 1969).

defendants' motion may be denied as dilatory.[17] This requirement helps to prevent defendants from using the motion as a delaying tactic once the trial is well underway.[18]

If the motion to substitute is denied, defendants may seek post-conviction relief by an appeal or by a writ of habeas corpus.[19] However, these avenues are generally unsatisfactory because of heightened proof burdens on defendants and inefficient uses of judicial resources.[20]

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[17] *See* note 15 and accompanying text *supra*.

[18] *See* People v. Williams, 2 Cal. 3d 894, 471 P.2d 1008, 88 Cal. Rptr. 208 (1970) (to allow defendants to substitute counsel whenever they want would cause considerable delay and expense). *See also* People v. Marsden, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970); People v. Fitzgerald, 29 Cal. App. 3d 296, 105 Cal. Rptr. 458 (2d Dist. 1972); People v. Evans, 16 Cal. App. 3d 510, 94 Cal. Rptr. 80 (1st Dist. 1971); People v. Phillips, 270 Cal. App. 2d 381, 75 Cal. Rptr. 720 (2d Dist. 1969).

[19] A direct appeal is only successful in cases where the ineffectiveness of counsel is *clearly* evident in the record. The defendant has the burden of pointing to specifics in the record indicating that counsel was ineffective. People v. Pope, 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979). The denial of a motion to substitute is a non-appealable interlocutory order. *See* People v. Cortez, 13 Cal. App. 3d 317, 91 Cal. Rptr. 660 (1st Dist. 1970).

The existence of the writ of habeas corpus is recognized by both the federal and the state constitutions. U.S. CONST. art. I, § 9; CAL. CONST. art. I, § 11. The defendant may use the procedure to collaterally attack a conviction assertedly obtained in violation of a constitutional right. *See* In re Branch, 70 Cal. 2d 200, 449 P.2d 174, 74 Cal. Rptr. 238 (1969) (where the constitutional right to effective aid of counsel in the preparation and trial of a criminal case is denied, the question may be raised by a petition for habeas corpus); In re Winchester, 53 Cal. 2d 528, 531, 348 P.2d 904, 906, 2 Cal. Rptr. 296, 298 (1960) (habeas corpus is the proper remedy to use when a conviction is obtained in violation of a constitutional right).

Where the record does not clearly indicate counsel's ineffectiveness, the defendant should seek a writ of habeas corpus. A habeas corpus evidentiary hearing allows for a factual elicitation by which to test competency of counsel. People v. Frierson, 25 Cal. 3d 142, 161, 599 P.2d 587, 597, 158 Cal. Rptr. 281, 291 (1979) *citing* People v. Pope, 23 Cal. 2d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979).

Once the defendant demonstrates that the ineffectiveness of counsel affected the outcome of the case, the court may issue the writ and a new trial must take place. *See* Schwarzer, *supra* note 13, at 645.

[20] Notwithstanding the availability of collateral proceedings to determine effectiveness of counsel, inquiry of defendant's counsel by the trial court is more efficient. Such an inquiry avoids the necessity of a second trial and the potential of duplicative hearings and appeals. *See* People v. Pope, 23 Cal. 3d 412, 440, 590 P.2d 859, 876, 152 Cal. Rptr. 732, 749 (1979) (Mosk, J., dissenting).

The burden of establishing a claim of inadequate trial counsel in a motion to substitute falls on defendants.[21] Because they must offer proof that the inadequacy claimed is a "reality" and not merely a "speculative matter,"[22] defendants must be specific in alleging the inadequacy of counsel.[23] It is not enough to allege a general lack of confidence in their attorneys. There must be disagreement over the attorney's specific acts.[24]

An order to substitute counsel is solely within the discretion of the trial judge.[25] The trial judge's responsibility is to decide if defendants are being denied their constitutional right to effective representation.[26] Although California courts have used several tests to determine what constitutes effective representation,[27] the procedure for establishing ineffective counsel is

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[21] People v. Pope, 23 Cal. 3d 412, 425, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979).

[22] People v. Booker, 69 Cal. App. 3d 654, 668, 13 Cal. Rptr. 347, 360 (2d Dist. 1977).

[23] If a defendant does not offer reasons to support his declaration that he is dissatisfied with his appointed counsel, the trial judge does not have to interrupt the proceedings to make further inquiries of the defendant. People v. Culton, 92 Cal. App. 3d 113, 117, 154 Cal. Rptr. 672, 674 (1st Dist. 1979).

[24] *See, e.g.*, People v. Floyd, 1 Cal. 3d 694, 464 P.2d 64, 83 Cal. Rptr. 608 (1970) (defendant not entitled to substitution of appointed counsel based solely on his lack of confidence in the attorney as opposed to disagreement on trial tactics), *cert. denied*, 406 U.S. 972.

The Ninth Circuit, interpreting California law, has noted that a defendant who *cannot* cooperate with his attorney because of disagreement is denied effective assistance. However, a defendant who *refuses* to cooperate with his attorney cannot claim such a defense. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).

[25] People v. Marsden, 2 Cal. 3d 118, 123, 465 P.2d 44, 47, 84 Cal. Rptr. 156, 159 (1970).

[26] People v. Gibson, 56 Cal. App. 3d 119, 133, 128 Cal. Rptr. 302, 310 (2d Dist. 1976) (trial court's constitutional responsibility is to inquire sufficiently into a defendant's complaints so that it may exercise its discretion on an intelligent basis).

[27] California courts have frequently stated that the trial must be reduced to a "farce" or "sham" by current counsel's representation of the accused. People v. Santos, 60 Cal. App. 3d 372, 380, 131 Cal. Rptr. 426, 431 (5th Dist. 1976); People v. Anderson, 43 Cal. App. 3d 94, 100, 117 Cal. Rptr. 507, 511 (3d Dist. 1974).

The California Supreme Court has noted that neither the sixth amendment nor article I, section 15 of the California Constitution is satisfied by "a standard which requires the trial to have been reduced to a farce or sham." People v. Pope, 23 Cal. 3d 412, 423, 590 P.2d 859, 865, 152 Cal. Rptr. 732, 738 (1979). The court did not overrule the "farce or sham" standard outright. It did, how-

unsettled.[28] California appellate courts continually attempt to provide trial judges with a procedure to use when faced with a motion to substitute counsel.[29] Unfortunately, the resulting guidance from the courts has not been very clear.

B. The Trial Judge's Expanded Responsibility

In the 1970 case of *People v. Marsden,*[30] the California Supreme Court attempted to clarify the scope of the trial judge's responsibility in ruling on a motion to substitute counsel. At trial, defendant Marsden claimed that he was not "being competently or adequately represented" by his appointed counsel and offered to cite specific examples.[31] The trial court denied his mo-

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ever, recommend an alternative standard requiring "reasonably competent representation." *Id.* at 424, 590 P.2d at 865, 152 Cal. Rptr. at 738.

Legal scholars have widely criticized the "farce or sham" standard. *See generally* Bazelon, *supra* note 3, at 28; Finer, *supra* note 3, at 1078-81; Note, *Ineffective Representation as a Basis of Relief from Conviction: Principles for Appellate Review,* 13 COLUM. J.L. & SOC. PROB. 1, 32, 37 (1977).

A growing number of federal and state courts have repudiated this standard outright. *See* United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc); People v. Garcia, 398 Mich. 250, 266, 247 N.W. 2d 547, 553 (1976).

See also Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977) ("[T]he farce standard today is little more than a metaphor indicating that the petitioner has a relatively heavy burden to prove ineffectiveness of counsel."); Beasley v. United States, 491 F.2d 687, 692 (6th Cir. 1974) ("The phrase 'farce and mockery' has no obvious intrinsic meaning. What may appear a 'farce' to one court may seem a humdrum proceeding to another.").

[28] *See* notes 37 and 41 and accompanying text *infra.*

[29] *See* People v. Maese, 105 Cal. App. 3d 710, 164 Cal. Rptr. 485 (5th Dist. 1980); People v. Blake, 105 Cal. App. 3d 619, 164 Cal. Rptr. 480 (1st Dist. 1980); *See also* People v. Marsden, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970).

[30] 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970).

[31] The problem relating to defendant and his counsel was raised in the judge's chambers. The next day, when the court denied defendant's motion for substitution of counsel, the following took place:

> THE DEFENDANT MARSDEN: Your Honor—
> THE COURT: (Interrupting) And so the Court—yes?
> THE DEFENDANT MARSDEN: Could I bring up some specific instances?
> THE COURT: I don't want you to say anything that might prejudice you before me as to the case, you see.
> THE DEFENDANT MARSDEN: I don't think it would.
> THE COURT: I don't want to take that chance.

tion to substitute counsel without giving him an opportunity to state the reasons for his request.[32]

The supreme court reversed the lower court, ruling that the trial judge cannot rely solely on courtroom observation of an attorney in deciding whether or not counsel was ineffective.[33] The trial judge must allow defendants to state reasons for claiming inadequate representation, even if the record does not reveal any incompetency.[34] The reasons given by defendants may include the statements or conduct of counsel outside the trial indicating ineffective representation.[35]

Following *Marsden*, a controversy has arisen in the California District Courts of Appeal concerning what constitutes a so-called "Marsden error."[36] Several courts have stated that a trial judge need only allow the accused to state reasons for any dissatisfaction with a court-appointed attorney.[37] The trial judge

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Id. at 122, 465 P.2d at 48, 84 Cal. Rptr. at 158.

[32] *Id.*

[33] People v. Marsden, 2 Cal. 3d 118, 124, 465 P.2d 44, 50, 84 Cal. Rptr. 156, 162 (1970).

[34] *Id. See also* People v. Chavez, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980); People v. Hidalgo, 22 Cal. 3d 826, 587 P.2d 230, 150 Cal. Rptr. 788 (1978); People v. Lewis, 20 Cal. 3d 496, 573 P.2d 40, 143 Cal. Rptr. 138 (1978).

[35] Matters outside the courtroom include (1) whether the defendant had a defense which was not presented; (2) whether trial counsel consulted sufficiently with the accused and adequately investigated the facts and the law; and (3) whether the omissions charged to trial counsel resulted from unwise choice of trial tactics and strategy. People v. Marsden, 2 Cal. 3d 118, 123, 465 P.2d 44, 48, 84 Cal. Rptr. 156, 160 (1970).

The duties described are not an exhaustive list of counsel's obligations. For example, trial tactics are generally within the discretion of the court-appointed counsel. However, constitutionally adequate legal assistance is denied if trial counsel makes a critical tactical decision that a "diligent" and "prudent" attorney in a criminal case would not make. People v. Pope, 23 Cal. 3d 412, 424, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979).

[36] *Compare* People v. Terrill, 98 Cal. App. 3d 291, 299, 159 Cal. Rptr. 360, 365 (2d Dist. 1979) (trial judge is not required to inquire into the attorney's state of mind), *with* People v. Munoz, 41 Cal. App. 3d 62, 66, 115 Cal. Rptr. 726, 728 (5th Dist. 1974) (trial judge must inquire into the attorney's state of mind regarding defendant's contentions).

[37] People v. Young, 118 Cal. App. 3d 959, 173 Cal. Rptr. 700 (1st Dist. 1981); People v. Penrod, 112 Cal. App. 3d 738, 169 Cal. Rptr. 533 (5th Dist. 1980); People v. Terrill, 98 Cal. App. 3d 291, 159 Cal. Rptr. 360 (2d Dist. 1979); People v. Culton, 92 Cal. App. 3d 113, 154 Cal. Rptr. 672 (1st Dist. 1979); People v. Wright, 72 Cal. App. 3d 328, 140 Cal. Rptr. 98 (2d Dist. 1977); People v. Huffman, 71 Cal. App. 3d 63, 139 Cal. Rptr. 264 (4th Dist. 1977); People v.

then rules on whether a substitution should take place, based upon the reasons advanced by the accused.

The second line of reasoning follows the standard articulated in *People v. Munoz*.[38] In *Munoz*, the defendant accused his attorney of not wanting to defend him and of having expressed a belief in the defendant's guilt.[39] Without making an inquiry of defense counsel, the trial court denied a motion to substitute counsel. The appellate court reversed, holding that the rationale of *People v. Marsden* mandated an inquiry of the court-appointed attorney.[40] The *Munoz* procedure thus requires the trial judge, after listening to defendant's reasons, to make a specific inquiry of counsel regarding the merits of defendant's contention.[41]

Gibson, 56 Cal. App. 3d 119, 128 Cal. Rptr. 302 (2d Dist. 1976).

[38] 41 Cal. App. 3d 62, 115 Cal. Rptr. 726 (5th Dist. 1974). *Munoz* was the first unanimous opinion. People v. Groce, 18 Cal. App. 3d 292, 95 Cal. Rptr. 688 (1st Dist. 1971), the first case to articulate this reasoning, was not a unanimous decision.

[39] People v. Munoz, 41 Cal. App. 3d 62, 64, 115 Cal. Rptr. 726, 727 (5th Dist. 1974).

[40] *Id.* at 66, 115 Cal. Rptr. at 72.

While the court in *Marsden* did not specifically hold that an inquiry of defense counsel must be made, the court's rationale suggests that imposing this requirement is appropriate. The *Marsden* court stated:

> A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom. . . . A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention is 'lacking in all the attributes of a judicial determination.'

People v. Marsden, 2 Cal. 3d 118, 123-24, 465 P.2d 44, 47-48, 84 Cal. Rptr. 156, 159-60 (1970).

The courts refusing to extend *Marsden* have stated a variety of reasons for not doing so. *See, e.g.*, People v. Terrill, 98 Cal. App. 3d 291, 299, 159 Cal. Rptr. 360, 365 (2d Dist. 1979) ("We do not find in *Marsden* or in any subsequent Supreme Court decisions on this subject a requirement that the court make inquiry of *counsel* when a motion for substitution has been lodged."); People v. Huffman, 71 Cal. App. 3d 63, 80, 139 Cal. Rptr. 264, 274 (4th Dist. 1977) ("The purpose of *Marsden* was to assure the defendant a fair trial—not to make a pretty record for the appellate court."); People v. Gibson, 56 Cal. App. 3d 119, 134, 128 Cal. Rptr. 302, 314 (2d Dist. 1976) (inquiry of defendant adequately protects the constitutional right of effective representation).

[41] *See, e.g.*, People v. Minor, 104 Cal. App. 3d 194, 198, 163 Cal. Rptr. 501,

III. A Criminal Procedure Standard—Specific Inquiry of Defense Counsel

The procedural inquiry required by *People v. Munoz*[42] should be used by all trial courts. Such an inquiry achieves several desirable objectives. First, it enables the trial judge to make a more enlightened decision. An explanation by counsel eliminates the trial judge's need to speculate at the attorney's reasons for the

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503 (1st Dist. 1980) (reasons for substitution of counsel related only by appointed counsel; failure to inquire of defendant is reversible error); People v. Cruz, 83 Cal. App. 3d 308, 317, 147 Cal. Rptr. 740, 745 (2d Dist. 1978) (even though a *Marsden* inquiry was made, it was reversible error not to ask public defender to respond to defendant's charge that there was conflict of interest). The *Munoz* court has recently clarified its original opinion. *See* People v. Penrod, 112 Cal. App. 3d 738, 747, 169 Cal. Rptr. 533, 538 (5th Dist. 1980) ("Inquiry into the attorney's state of mind is required only in those situations in which a satisfactory explanation for counsel's conduct or attitude toward his client is necessary in order to determine whether counsel can provide adequate representation.").

[42] 41 Cal. App. 3d 62, 115 Cal. Rptr. 726 (5th Dist. 1974). *See* notes 38-41 and accompanying text *supra*.

A failure to make an inquiry of defense counsel should be considered a *Marsden* error. If the trial record does not clearly show any inadequacy on the part of trial counsel, the case should be remanded for a hearing to make the necessary inquiry of counsel. An appellate court, reviewing a criminal conviction, is not limited to affirmance, reversal, or modification of the judgment. The court, "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." Cal. Penal Code § 1260 (West Cum. Supp. 1980).

In People v. Vanbuskirk, 61 Cal. App. 3d 395, 132 Cal. Rptr. 30 (1976), the Court stated:

> [w]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate postjudgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand. *Id.* at 405, 132 Cal. Rtr. at 36.

See People v. Minor, 104 Cal. App. 3d 194, 163 Cal. Rptr. 501 (1st Dist. 1980) (employing the suggested remand procedure). The California Supreme Court needs to clarify the extent of the *Marsden* ruling, and should mandate that trial judges made an inquiry of defense counsel. If an inquiry is not made, then a reviewing court should remand the case to the trial court.

The court in People v. Pope, 23 Cal. 3d 412, 426, 590 P.2d 859, 867, 152 Cal. Rptr. 732, 740 (1979), noted that a habeas corpus proceeding would be the appropriate means to challenge a claim of ineffective assistance. This suggestion was met with a strong dissent. *See* note 20 *supra*.

alleged ineffective conduct.[43] This is particularly true when the judge is considering conduct outside the courtroom.

A second advantage of the *Munoz* standard is that a record of defense counsel's explanation facilitates a more informed appellate review. On defendant's appeal from a criminal conviction, an appellate court will not consider any alleged ineffectiveness of trial counsel based upon matters not contained in the record.[44] It is therefore important to have as complete a record as possible.[45]

People v. Lindsey[46] illustrates how an attorney's explanation can aid appellate review. In *Lindsey,* the defendant requested a substitution of counsel because of counsel's failure to call a particular witness.[47] In response, the public defender explained that she had interviewed the potential witness. Based on the interview, she determined that the witness might be detrimental to the case because the witness would not testify as defendant expected.[48] Defense counsel's explanation enlightened both the trial judge and the reviewing court by demonstrating, first, that counsel *had* interviewed defendant's witness and, second, the

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[43] People v. Pope, 23 Cal. 3d 412, 426, 590 P.2d 859, 867, 152 Cal. Rptr. 732, 740 (1979) ("Having afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competency.").

The trial judge should not rely on the attorney's comments as the sole basis for determining the validity of the defendant's motion. Rather, the inquiry should be merely one factor in determining the adequacy of representation. Other factors that California courts have traditionally considered, such as courtroom observation and defendant's reasons, should also be weighed.

The weight accorded the attorney's explanation can only be determined in light of the circumstances of each case. Trial judges must exercise discretion in making the final determination. However, application of the *Munoz* procedural standard will help inform that decision.

[44] People v. Pope, 23 Cal. 3d 412, 426 n.16, 590 P.2d 859, 867 n.16, 152 Cal. Rptr. 732, 740 n.16 (1979) (a habeas corpus proceeding would be the appropriate means to supplement the trial record). In United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), the court suggested that the trial judge may request the attorney to submit an affidavit in response to the defendant's allegations.

[45] This not only helps defendant, but is fairer to defense counsel. What seems to be inadequate counsel may actually be good lawyering. Without an explanation, effective counsel may be dismissed. *See* People v. Pope, 23 Cal. 3d 412, 426, 590 P.2d 859, 867, 152 Cal. Rptr. 732, 740 (1979).

[46] 84 Cal. App. 3d 851, 149 Cal. Rptr. 47 (2d Dist. 1978).

[47] *Id.* at 857, 149 Cal. Rptr. at 51.

[48] *Id.*

reason why the witness was not being called.[49]

A third advantage of the *Munoz* standard is that it improves the attorney-client relationship. A working attorney-client relationship requires open and free communication.[50] Such communication cannot exist if the attorney and client are embroiled in irreconcilable conflicts. Trial judges taking the necessary time to conduct an inquiry will help to ease any dissatisfaction, distrust, or concern defendants may have regarding their counsel.[51] Judges can thus seek to ensure that defendants are not forced to accept the representation of attorneys with whom they cannot cooperate.[52]

Some courts have criticized the *Munoz* standard. These courts have rejected *Munoz* on two grounds. First, the complementary privileges of the fifth amendment and the attorney-client relationship bar direct inquiry. Second, the standard gives the prosecution an unfair benefit in defense counsel's explanation.[53] A close examination of these criticisms, however, reveals their weaknesses.

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[49] If defense counsel does not offer an explanation, the appellate court must speculate as to counsel's motive for not calling the witness. For example, the trial court in People v. Maese, 105 Cal. App. 3d 710, 164 Cal. Rptr. 485 (5th Dist. 1980), denied a motion to substitute counsel without an inquiry of the court-appointed attorney. Defendant Maese requested a substitution of counsel because, among other things, counsel failed to call his mother as a witness. Speculating as to defense counsel's reason for such failure, the court of appeal stated: "[I]t is quite probable that counsel chose not to call appellant's mother because the testimony would open the door to rebuttal evidence on appellant's character." *Id.* at 724, 164 Cal. Rptr. at 492-93. Inquiry by the trial judge into counsel's actions would have enabled the reviewing court to determine on the basis of a record if the trial judge had abused his discretion in denying the motion for substitution of counsel.

[50] *See* People v. Cruz, 83 Cal. App. 3d 308, 318, 147 Cal. Rptr. 740, 746 (2d Dist. 1978); People v. Munoz, 41 Cal. App. 3d 62, 66, 115 Cal. Rptr. 726, 728 (5th Dist. 1974) ("It is basic that the attorney-client relationship contemplates trust and mutual cooperation particularly when the attorney is defending the client's liberty.").

[51] *See* Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).

[52] *See* United States v. Jones, 512 F.2d 347, 349-50 (9th Cir. 1975); Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970) (to require the defendant to undergo a trial with an attorney with whom he has a conflict is to deprive him of adequate counsel).

[53] *See* People v. Terrill, 98 Cal. App. 3d 291, 300, 159 Cal. Rptr. 360, 366 (2d Dist. 1979); People v. Huffman, 71 Cal. App. 3d 63, 139 Cal. Rptr. 264 (4th Dist. 1977).

The fifth amendment attorney-client argument has never been explained fully by the courts.[54] One basis for the argument is that requiring attorneys to respond to an inquiry would force counsel into self-incrimination. Because response to the inquiry would not result in any criminal sanctions,[55] this threat is harmless. Attorneys would not be required to state that they were "wrong" or gave "ineffective" assistance;[56] they would merely present the reasons for their acts.[57]

Another possible basis for the argument is that requiring attorneys to explain their conduct may reveal privileged information or evidence adverse to the defendant.[58] This parallels the second ground for the rejection of *Munoz*—that inquiring of defendants' counsel results in an unfair benefit to the prosecu-

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[54] The argument was first made by Justice Draper in his dissenting opinion in People v. Groce, 18 Cal. App. 3d 292, 297, 95 Cal. Rptr. 688, 691 (1st Dist. 1971). Justice Draper asserted that ". . . the complementary privileges of the Fifth Amendment and the attorney-client relationship would bar direct inquiry by the court of either defendant or counsel as to the truth of the facts underlying defendant's complaints." Since then, the courts rejecting *Munoz* have done so by adhering to Justice Draper's dissent. *E.g.*, People v. Terrill, 98 Cal. App. 3d 291, 300, 159 Cal. Rptr. 360, 366 (2d Dist. 1979); People v. Huffman, 71 Cal. App. 3d 63, 70, 139 Cal. Rptr. 264, 268 (4th Dist. 1977).

[55] The attorney might, however, be subject to legal malpractice claims and disciplinary action for violation of ethical considerations. *See* note 13 and accompanying text *supra*.

[56] Note, however, that attorneys may find it strategically wise to make that argument on appeal: "There are enough scattered decisions involving lawyers attempting to use their own incompetence as a basis for relief. . . to indicate that the criminal bar is well aware that a complete discharge of counsel's duty to his client demands such argument from time to time." Kaus and Mallen, *The Misguiding Hand of Counsel—Reflections on Criminal Malpractice*, 21 U.C.L.A. L. Rev. 1191, 1198 (1974).

[57] *See* notes 46-48 *supra*.

[58] The attorney-client privilege statute states, in part: ". . . the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer. . . ." Cal. Evid. Code § 954 (West 1966).

The California Evidence Code recognizes an exception to the lawyer-client privilege "as to communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." Cal. Evid. Code § 958 (West 1966). Thus, if defendants allege incompetence of counsel, attorneys must be able to defend their professional reputation even if by doing so they disclose otherwise privileged information. *See* People v. Pope, 23 Cal. 2d 412, 440, 590 P.2d 859, 876, 152 Cal. Rptr. 732, 749 (1979) (Mosk, J., dissenting).

tion.[59] These concerns are easily countered. First, many inquiries of counsel would not require revealing evidence incriminating the defendant.[60] Where the attorney's response would potentially violate a privilege or provide the prosecutor with evidence adverse to a defendant, the court could hold the inquiry outside the prosecutor's and jury's presence.[61] Any prejudice resulting from the judge's hearing the adverse evidence is outweighed by the possibility of removing inadequate counsel.[62]

CONCLUSION

The procedure that California trial judges must use when defendants make a motion to substitute court-appointed counsel is unsettled. The California Supreme Court sought to provide guidance in this area by requiring trial judges to inquire into defendant's reasons for requesting a substitution.[63] The result has been a split among the appellate courts concerning the trial judge's responsibility. The most compelling position was adopted in *People v. Munoz*.[64] *Munoz* requires the trial judge to listen to the defendant's reasons, and then to make an inquiry of defense counsel.

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[59] *See* People v. Terrill, 98 Cal. App. 3d 291, 300, 159 Cal. Rptr. 360, 365 (2d Dist. 1979); People v. Huffman, 71 Cal. App. 3d 63, 139 Cal. Rptr. 264 (4th Dist. 1977).

[60] *See* note 48 *supra*.

[61] The suggestion that the attorney would be able to reveal privileged information if the defendant alleges inadequate counsel is not discussed in the holding of any case. The argument was made in a dissenting opinion discussing the evils of habeas corpus proceedings. *See* note 58 *supra*. However, under the *Munoz* standard, attorneys would not have to divulge privileged information. For example, attorneys can merely state they did not call a particular witness because of information previously received from the defendant. This informs the trial judge that the witness was considered but rejected due to information confidentially received. The danger that the response creates an inference that the witness is adverse to the defense is solved by holding a hearing ouside the presence of the prosecutor and the jury. *See* People v. Lindsey, 84 Cal. App. 3d 851, 149 Cal. Rptr. 47 (2d Dist. 1978).

[62] In People v. Marsden, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970), the court stated, "[J]udges hear numerous motions and argument in chambers . . . without permitting such proceedings to jaundice their views on ultimate conclusions." Any remote prejudicial effect is ". . . outweighed by the importance of replacing an incompetent attorney." *Id.* at 125, 465 P.2d at 50, 84 Cal. Rptr. at 161.

[63] *See* notes 33-35 *supra*.

[64] 41 Cal. App. 3d 62, 115 Cal. Rptr. 726 (5th Dist. 1974).

Clarification by the California Supreme Court is necessary to reconcile the conflicting results reached by the appellate courts. Clarification would also provide explicit guidelines to trial judges for the procedure to use when ruling on a motion for substitution of counsel. Accordingly, when the issue next arises, the court should endorse the procedure followed in *Munoz*. In so doing, the court would facilitate protection of the fundamental constitutional right to effective representation.

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