



## SAN MATEO COUNTY LAW LIBRARY

### RESEARCH GUIDE #11

#### **MAKING MARSDEN AND/OR FARETTA MOTIONS**

This resource guide only provides guidance, and does not constitute legal advice. If you need legal advice you need to speak with an attorney. To find an attorney to assist you, you may contact the San Mateo County Lawyer Referral Service at (650) 369-4149.

#### **WHAT IS A MARSDEN MOTION?**

A *Marsden* motion is a criminal defense motion made by a Defendant in a criminal case to discharge his/her court appointed attorney (public defender or private defender panel attorney), and substitute new counsel. This is applicable only if the defendant's right to counsel would be substantially impaired by continuing with the original attorney. *People v. Marsden* (1970) 2 C3d 118, 123.

A defendant can make a *Marsden* motion by an oral motion before the trial judge; although a formal motion is not required, the defendant must clearly indicate that he/she wants a substitution of attorney.

#### **DO I QUALIFY TO MAKE A MARSDEN MOTION?**

You must currently have a court appointed attorney to qualify. *Marsden* motions do not apply to privately retained counsel. Retained counsel may be discharged at any time, with or without cause as long as the move was not made with the intent to delay. *People v. Lara* (2001) 86 CA 4<sup>th</sup> 139.

#### **CAN SOMEONE ELSE MAKE THE REQUEST FOR ME?**

No. The right to counsel is personal to the defendant, and the court is not required to conduct a *Marsden* hearing when a third party complains about the representation received by a defendant. *People v Martinez* (2009) 47 C4th 399, 418.

## **WHEN CAN I MAKE A MARSDEN MOTION?**

A *Marsden* motion may be made at any stage in the proceedings, including presentation of a motion for a new trial (*People v Meija* (2008) 159 CA4th 1081), or on a motion to withdraw a plea (*People v Sanchez* (2011) 53 CA4th 80)

## **HOW DO I MAKE A MARSDEN MOTION?**

Generally, the defendant initiates a request for a substitution of counsel by making an oral motion in open court. Although a formal motion is not required, the defendant must clearly indicate that he/she wants a different attorney. *People v Sanchez* (2011) 53 C4th 80, 89-90, 133 CR3d 56.

Once the defendant has made the motion, the court must hold a hearing to allow the defendant the opportunity to explain the grounds for the motion and to relate specific instances of his or her attorney's inadequate performance. After the defendant has stated his/her claims, the court will ask additional questions to determine the merits of defendant's motion. A full hearing is not required when the basis of the defendant's dissatisfaction with counsel is set forth in a letter or handwritten motion of sufficient detail. *People v Terrill* (1979) CA3d 291, 298, 159 CR 360.

## **WILL THERE BE A HEARING?**

The trial judge must conduct a hearing on a *Marsden* request and allow the defendant to state specific reasons for the requested dismissal of counsel. *People v Cole* (2004) 33 C4th 1158, 1190; *People v Fierro* (1991) 1 C4th 173, 204.

The court must question both the defendant and usually the current attorney in order to rule on the motion. A ruling cannot be based on the judge's personal confidence in the attorney, observations of the attorney's previous courtroom conduct, or ex parte communications with other participants. *People v Hill* (1983) 148 CA3RD 744, 753.

## **WILL THE DEPUTY DISTRICT ATTORNEY BE PRESENT AT THE MARSDEN HEARING?**

To protect confidentiality, the defense attorney should move to exclude the prosecuting attorney from the *Marsden* hearing, although the court is not required to, it should use its discretion as long as the request is timely *People v Madrid* (1985) 168 CA3d 14, 19. Under the California Rules of Court Section 8.328(b), which provides for a confidential transcript of the *Marsden* hearing, assumes that prosecutors are being excluded from Marsden hearings.

Under Penal Code Section 1054.6 neither defense counsel nor the prosecuting attorney is required to disclose any work product or privileged information to each other. The subject matter of a *Marsden* hearing would likely disclose such material which makes a prosecutor's exclusion at a Marsden hearing reasonable.

## **WILL I HAVE AN ATTORNEY TO HELP ME MAKE THE MOTION?**

The court is not required to appoint independent counsel to assist the defendant in making the *Marsden* motion, however the court has discretion to appoint counsel. *People v Hines* (1997) 15 C4th 997, 1024-1025, 64 CR2d 594.

## **DOES THE COURT HAVE TO GRANT MY MOTION?**

No. The trial court does have discretion to deny a *Marsden* motion “in the absence of a sufficient showing that a defendant’s right to counsel would otherwise be substantially impaired.” *People v Walker* (1976) 18 C3d 232, 238. The defendant has the burden of proving substantial impairment (*People v Young* (1981) 118 CA3d 959) by demonstrating that counsel is inadequate (*People v Marsden* (1970) 2 C3d 118). If the defendant fails to specify reasons for the substitution of counsel, the court may properly deny the request.

## **WHAT ARE SOME TYPICAL REASONS FOR A TRIAL JUDGE TO DENY A MARSDEN MOTION?**

- Defendant did not think that counsel had the client’s best interest at heart (*People v Silva* (1988) 45 C3d 604);
- Counsel would not make certain motions the defendant wanted brought (*People v Silva* (1988) 45 C3d 604)
- Defendant did not relate well with defense counsel (*People v Berryman* (1993) 6 C4th 1048, overruled on other grounds in *People v Hill* (1998) 17 C4th 800, 823 n1)

Note: When the trial court denies a *Marsden* motion in error, and the defendant subsequently asks to represent himself or herself (*Faretta* Motion), the *Marsden* error will taint the defendant’s waiver of the right to be represented by counsel, even though the court admonitions otherwise satisfy the *Faretta* requirements (see *Faretta v California* (1975) 422 US 806, 95 S Ct 2525). – Additional information on *Faretta* Motions are also included in this guide.

## **WHAT IS A FARETTA MOTION?**

A *Faretta* Motion is a motion that a criminal defendant makes to represent themselves in a criminal prosecution. In legal terms this is known as *propria persona*, or in short *pro per*.

## **DO I QUALIFY TO MAKE A FARETTA MOTION?**

A defendant has the right, under the Sixth and Fourteenth Amendments to the United States Constitution, to waive counsel and represent herself or himself. *Faretta v California* (1975) 422 US 806, 95 S Ct 2525. As with other waivers of constitutional rights, the waiver of counsel must be a knowing, intelligent, and voluntary when it is made.

A criminal defendant may choose to make a *Faretta* motion on their own behalf, however the judicial officer has discretion to either grant or deny the motion. The judge will question the defendant to determine whether he/she is mentally competent to waive the right to counsel,

and that the defendant is making the waiver of counsel knowingly and intelligently, and is aware of the dangers of self- representation. However, the Sixth Amendment does not require the trial court to advise the defendant of specific dangers that may flow from the self-representation (*Iowa v Tovar* (2004) 541 US 77, 88, 124 S Ct 1379), nor is a trial court obligated to advise the defendant about the privilege against compelled self- incrimination *People v Barnum* (2003) 29 C4th 1210. If you are unsure of the potential dangers associated with self –representation, you should contact an attorney.

The right of self- representation is applicable to both the guilt, and the penalty phases of the trial. However, a defendant who has waived counsel and chooses to represent themselves cannot later appeal the decision on the grounds of ineffective assistance of counsel. (See - *Faretta v California, supra.*)

#### **WHEN CAN I MAKE A FARETTA MOTION?**

A defendant’s request to represent himself or herself must be made in a timely fashion. *People v Rivers* (1993) 20 CA4th 1040

#### **WHAT IF I LATER DECIDE THAT I WANT AN ATTORNEY?**

When a defendant who has chosen to represent himself or herself chooses to terminate self- representation and makes a request for an attorney, the court should ordinarily appoint counsel (or permit the defendant to retain counsel) and grant a continuance to allow adequate time for a new attorney to prepare the defense.

#### **TO DOWNLOAD THE TEMPLATES SHOWN BELOW:**

From a computer with an internet connection, go to <http://www.smclawlibrary.org/ResearchGuides/MarsdenRequest.docx> and <http://www.smclawlibrary.org/ResearchGuides/PropOrderMarsden.docx>. When you click these links, it should open the Motion and the Proposed Order as Word Documents.

1 Name, Address and Telephone Number

2 \_\_\_\_\_  
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4 \_\_\_\_\_  
5 \_\_\_\_\_

6  Attorney for Defendant  Self-Represented Defendant

7  
8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF \_\_\_\_\_

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10  
11 The People of the State of California, )  
12 )  
13 Plaintiff, )  
14 vs. )  
15 \_\_\_\_\_ )  
16 Defendant )  
17 \_\_\_\_\_ )

Case No. \_\_\_\_\_

MARSDEN REQUEST

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

Submitted Ex Parte

18  
19 To the District Attorney and to the Honorable \_\_\_\_\_, Judge:

20 *Insert Name of the Hearing/Trial Judge Assigned*

21 PLEASE TAKE NOTICE that on \_\_\_\_\_, 2014 at the hour of \_\_\_\_\_

22 a.m./p.m., or as soon thereafter as the matter may be heard  in Courtroom \_\_\_\_ of the above entitled  
23 court **or**  in the courtroom posted on the date of the Hearing, the Defendant in this case will request  
24 an *in camera* hearing to assert his or her grounds for a substitution of attorney.

25 THE MOTION WILL BE MADE on one or more of the grounds calling for substitution of the  
26 Defendant's appointed counsel expressed in *People v. Marsden (1970) 2 Cal. 3d 118*.

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I

Statement of Facts

To safeguard the privilege against self-incrimination, as guaranteed by the United States Constitution and the Constitution of the State of California, Defendant requests an *in camera* hearing, or, in the alternative, a hearing in the courtroom with the District Attorney or his or her representative excused, to submit his or her reasons for wanting new defense counsel appointed.

II

Relief Requested

Based on the foregoing, the Defendant respectfully requests the appointment of new defense counsel.

Dated: \_\_\_\_\_

Respectfully Submitted,

\_\_\_\_\_  
*(Signature of Defendant)*

\_\_\_\_\_  
*(Printed name of Defendant)*

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1 Name, Address and Telephone Number

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6  Attorney for Defendant  Self-Represented Defendant

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF \_\_\_\_\_

11 The People of the State of California, )  
12 )  
13 vs. )  
14 )  
15 Defendant. )  
16 )  
17 )

Case No. \_\_\_\_\_

Insert your Case Number

**PROPOSED ORDER ON MOTION  
FOR APPOINTMENT OF NEW  
DEFENSE COUNSEL**

Judge to add:

ADOPTED BY THE COURT

\_\_\_\_\_, \_\_\_\_', \_\_\_\_.  
Month Day Year

18 The motion of \_\_\_\_\_ for an order appointing

Defendant's Name

19 New defense counsel and discharging present counsel in the within proceedings came on regularly for a  
20 hearing by the court on \_\_\_\_\_, \_\_\_\_', \_\_\_\_.

Month Day Year

21 **The People** • present • not present • not required. [LEAVE ALL BOXES BLANK FOR THE JUDGE]

22 **The Defendant** • present with counsel. • present without counsel. • not present.

23 **On proof made to the satisfaction of the court** that the motion ought to be • granted or • denied,

24 **IT IS ORDERED** that the motion be, and hereby is, \_\_\_\_\_.

25 is appointed as the Defendant's new attorney, effective immediately.

26 Dated \_\_\_\_\_, \_\_\_\_', \_\_\_\_

[Month] [Date] [Year]

28 \_\_\_\_\_  
Judge of the Superior Court