

GUILTY PLEA APPEALS

Issues Waived, Issues Cognizable, and Procedural Problems

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FIRST DISTRICT APPELLATE PROJECT

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ISSUES WAIVED AND ISSUES REVIEWABLE FOLLOWING A GUILTY PLEA

INTRODUCTION

Most issues are waived by a guilty or nolo contendere plea. Thus, they are not cognizable in a post-plea appeal, even if the trial judge purports to authorize the appeal by issuing a certificate of probable cause.

However, some issues do remain cognizable. They fall into two broad categories: those which can be raised only if the trial judge executes a certificate of probable cause under Penal Code section 1237.5, and those which can be raised without a certificate under California Rules of Court, rule 31(d). Generally, the first category includes all issues which attack the validity of the plea. Part C, below, gives specific examples of issues in this category.

The second category includes issues “occurring after entry of the plea which do not challenge its validity” (rule 31(d)), that is, many but not all sentencing issues. It also includes search and seizure issues raised under section 1538.5(m), even though these issues, if successful, will result in the appellant being allowed to withdraw his plea. Part D, below, describes the scope of the issues included in these two categories. Part D also includes a discussion of the sometimes-difficult distinction between those sentencing issues which are really attacks on the plea, requiring a certificate, and those which are pure post-plea issues.

A. GENERAL CONSIDERATIONS: ISSUES WAIVED/PRESERVED

Penal Code section 1237.5 states that a defendant may only appeal “reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.”

The courts have attempted to summarize the scope of this phrase in various ways. Most recently, the California Supreme Court has held that:

When a defendant pleads guilty or no contest and is convicted without a trial, only limited issues are cognizable on appeal. A guilty plea admits every element of the charged offense and constitutes a conviction [citations], and consequently issues that concern the determination of guilt or innocence are not cognizable. [Citations.] Instead, appellate review is limited to issues that concern the 'jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea.'

In re Chavez (2003) 30 Cal.4th 643, 649.

Or, as the United States Supreme Court put it,

A counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent it quite validly removes the issue of factual guilt from the case.... A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.

Menna v. New York (1975) 423 U.S. 61, fn. 2

The courts have, naturally, had to approach the question of cognizability on a case by case basis. However, some cases have attempted to sum up the results:

By pleading guilty, a defendant admits the sufficiency of the evidence establishing the crime, and is therefore not entitled to a review on the merits. Issues which merely go to the guilt or innocence of a defendant are removed from consideration by entry of the plea. Thus, claims involving sufficiency of the evidence,

voluntariness of an extrajudicial statement, a trial court's refusal to disclose the identity of an informant, fairness of a pretrial lineup, and other such issues have been held not cognizable on appeal following a guilty plea.

People v. Meyer (1986) 183 Cal.App.3d 1150.

However, *Meyer* continued,

The following particular errors have been reviewed following a plea of guilty: insanity at the time of the plea; ineffective assistance of counsel; ineffective waiver of constitutional rights; erroneous denial of pretrial diversion right; failure of prosecution to seek restitution before filing criminal charges in a welfare fraud case; violation of the Interstate Agreement on Detainers which bars prosecution.

Id., at pp. 1157-1158, citations omitted.

Although section 1237.5 speaks of “constitutional” grounds, this does not mean that any constitutional error may be raised on appeal. The issue must still be one which goes to the jurisdiction of the court or the legality of the proceedings. Many of the noncognizable errors noted by *Meyers* are of constitutional dimension, yet are waived by a plea. Issues which survive the plea are generally those which concern either the validity of the plea itself, or which concern the right of the state to try a defendant notwithstanding his factual guilt. The only other surviving issues are those reserved by statute: post-plea issues, not attacking the validity of the plea (reserved by § 1237.5) and search and seizure issues (reserved by § 1538.5(m).)

It is important to understand that if an issue is waived by a plea, it is waived even if the trial court issues a certificate of probable cause or otherwise purports to allow the defendant to appeal it. “Obtaining a certificate of probable cause does not make

cognizable those issues which have been waived by a plea of guilty.” (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9; *In re John B.* (1989) 215 Cal.App.3d 477, 483.)

Where a plea of guilty or nolo contendere is induced by the judge's promise that the defendant may appeal an issue which is waived by a plea, the defendant may be entitled to have his plea set aside. But that is his sole remedy; the promise does not make the issue cognizable. (*People v. Burns* (1993) 20 Cal.App.4th 1266, 1274; see other cases at Part C. 6, p. 16.)

Finally, even where an appellant raises an issue on appeal from a plea and the Attorney General responds on the merits, the court will independently first determine whether the issues are cognizable.

B. ISSUES WAIVED BY A GUILTY PLEA

1. Claims of insufficient evidence.

People v. Turner (1985) 171 Cal.App.3d 116, 125: a plea “waives a trial and obviates the need for the prosecution to come forward with any evidence . . . [and thus] concedes that the prosecution possesses legally admissible evidence sufficient to prove defendant's guilt beyond a reasonable doubt.”

People v. Warburton (1970) 7 Cal.App.3d 815 [guilty plea admits every element of the crime charged]; *People v. Batista* (1988) 201 Cal.App.3d 1288, 1292-1292; *People v. Meals* (1975) 49 Cal.App.3d 702, 705-706 [where D pleads after grand jury or preliminary hearing, he cannot challenge the sufficiency of the evidence to return indictment or information].

People v. McGuire (1993) 14 Cal.App.4th 687, 697: A plea to two charges waives any claim that one is a lesser included offense of the other, and may not be the basis for a separate conviction: . (A similar point is made by *People v. Valenzuela* (1995) 40

Cal.App.4th 358, though it is not clear whether the claim is rejected because of the plea, or because of the failure to obtain a CPC.)

People v. Tuggle (1991) 232 Cal.App.3d 147, 154: A plea admits “all allegations and factors comprising the charge contained in the pleading.” (Disapproved on other grounds in *People v. Jenkins* (1995) 10 Cal.4th 234.) These “allegations and factors” include the date of the offense, where that is necessary to avoid an ex post facto prohibition against applying the statute: *People v. Palacios* (1997) 56 Cal.App.4th 252, 257-258. They include allegations pled conjunctively, e.g., a plea to “robbery by force and fear” is an admission of both means of committing robbery. (*Tuggle, supra*, followed by *People v. Mendias* (1993) 17 Cal.App.4th 195, 204.)

Note that a “slow plea” (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592), as distinguished from a guilty or nolo plea, does not waive a sufficiency argument. That is, a defendant may waive major constitutional rights, including the right to a jury and the right to present defense evidence, and may submit the case to the court on a preliminary hearing transcript – all without relieving the prosecution of its burden of proof, or relieving the court of the need to make a finding of guilt. *People v. Wright* (1987) 43 Cal.3d 487; *People v. Jackson* (1987) 192 Cal.App.3d 209, 217.)

2. Claim that D's conduct did not violate a statute

This claim is very closely related to the previous one. Whether it survives a guilty plea depends on whether there is any material dispute about the facts of the offense. Where there may be a dispute about the facts, or where the facts have not been established, a plea admits each element of the offense.

People v. Stanworth (1974) 11 Cal.3d 588
People v. Suite (1980) 101 Cal.App.3d 680.

(Closely related, and also barred, is a claim that D's conduct occurred on an earlier date than that pled, so as to create an ex post facto bar against prosecution under a new statute. *People v. Borland* (1996) 50 Cal.App.4th 124 held that “A plea of guilty or no contest to a felony offense that alleges a specific charging date is a judicial admission that the defendant committed the offense on the date alleged.”)

However, where the facts are undisputed, and where there is some record of them (e.g., a preliminary hearing transcript), and the statute to which the defendant pled did not prohibit his conduct, a sufficiency issue may survive a plea. (A CPC will be needed.) See Part C. 15, below at page 18.

In re Crumpton (1973) 9 Cal.3d 463

People v. Soriano (1992) 4 Cal.App.4th 781, 784-785 [where conduct charged and admitted does not violate a statute, D may challenge plea under section 1237.5.]

People v. Jerome (1984) 160 Cal.App.3d 1087.

People v. Wallace (2003) 109 Cal.App.4th 1699 [where D pg to § 422.7, which is a penalty provision and not a substantive offense, “we cannot affirm a conviction and sentence imposed for a crime that does not exist, notwithstanding defendant's consent.” Refusing to reduce the conviction to a misdemeanor, since the plea agreement was for a felony, the CA vacates the conviction.]

3. Claim that D was improperly convicted of multiple offenses:

People v. Valenzuela (1995) 40 Cal.App.4th 358 [D who pleads to two counts of vehicular manslaughter may not claim on appeal that he should have been charged with one count and one “multiple victims” enhancement.]

People v. McGuire (1993) 14 Cal.App.4th 687, 696, 697, fn. 11.

People v. Williams (1988) 201 Cal.App.3d 439 [fact-based claim that conduct amounted to one but not three counts of solicitation waived by plea.]

People v. Wilkerson (1992) 6 Cal.App.4th 1571, 1581 [D cannot claim, post-plea, that he should have been charged under § 288.5 and not other statutes.]

See also Part C.16, at page 18.

4. Sufficiency of evidence of an enhancement.

As a general rule, admissions of enhancements are treated like pleas to offenses; a defendant cannot admit an enhancement allegation (for gun use, drug weight, etc.) and then challenge the sufficiency of the evidence on appeal. (*People v. Westbrook* (1996) 43 Cal.App.4th 220, 223-224; *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785; *People v. Perry* (1984) 162 Cal.App.3d 1147, 1151.) D cannot admit a section 12022.6 enhancement (value of stolen items) and then challenge on appeal the court's finding, prerequisite to imposition of the enhancement, that several takings were pursuant to a common plan: *People v. Hughes* (1980) 112 Cal.App.3d 452, 460.

However, with admissions of enhancements based on prior convictions, particularly after the passage of the Three Strikes law, the question of cognizability has become more complicated. Some older cases held that an admission of a prior, in the current proceeding, waived the ability to challenge its legal sufficiency as an enhancement on appeal. (E.g., *People v. Bowie* (1992) 11 Cal.4th 1263, 1268.) But some decisions allowed a defendant to admit the fact of a prior conviction while reserving

a challenge to its legal sufficiency, either with a certificate of probable cause or via habeas corpus. (E.g., *People v. Ellis* (1987) 195 Cal.App.3d 334 drew a distinction between admission of the “experiential facts” which made a prior a serious felony, and the legal sufficiency of that prior. However, it then held that D's admission of the prior as part of a plea bargain estopped her from asserting a claim that the prior was insufficient. See also *People v. Sturns* (2000) 77 Cal.App.4th 1382, 1390-1391; *People v. Arwood* (1985) 165 Cal.App.3d 167.)

Where D admits an enhancement based on a prior which is not legally sufficient, counsel should always consider the possibility of a claim that the lawyer who counselled the plea was ineffective.

There is a distinct line of cases dealing with the effect of an admission *in a prior proceeding*, of an offense which is alleged as an enhancement in connection with a new charge. Older cases (e.g., *People v. Guerrero* (1993) 19 Cal.App.4th 401) held that the admission in the prior case served to establish the sufficiency of all elements charged against D, under any theory of the offense. Thus, in *Guerrero*, an admission in a federal bank robbery case was deemed an admission to a forcible bank robbery, a serious felony, rather than an admission to the non-serious form of federal bank robbery.

However, since *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262, it has been clear that a plea in a prior case establishes only the least adjudicated elements of that offense. If the offense could be committed alternatively in ways which qualify it as a “strike” in a current case, or in ways which do not qualify it as a strike, the plea alone does not prove that it is a strike. (See also *People v. Jones* (1999) 75 Cal.App.4th 616, 634-635; *People v. Cortez* (1999) 73 Cal.App.4th 276, 281-283; but see *People v. Mendias* (1993) 17 Cal.App.4th 195, 204 [admission to robbery charged as committed by “force and fear” admits both]; *People v. Hayes* (1992) 6 Cal.App.4th 616, 623[plea in prior case may admit acts charged in indictment, even if not elements of the offense].)

5. Claim that a confession was illegally obtained (unless D is seeking to suppress it on Fourth Amendment grounds; see Part D.1., below at p. 19.)

People v. DeVaughn (1977) 18 Cal.3d 889, 896

People v. Mattson (1990) 50 Cal.3d 826, 850-852

People v. Superior Court (Zolnay) (1975) 15 Cal.3d 729, 734-735.

People v. Whitfield (1996) 46 Cal.App.4th 947, 959-960.

6. Unduly suggestive pretrial identification or unfair lineup

People v. Hunter (2002) 100 Cal.App.4th 37, 42.
People v. Meyer (1986) 183 Cal.App.3d 1150, 1158
People v. Mink (1985) 173 Cal.App.3d 766, 770
People v. Stearns (1973) 35 Cal.App.3d 304, 306.

7. Denial of motion to disclose the identity of an informer

People v. Hobbs (1994) 7 Cal.4th 948, 957, fn. 1
People v. Hunter (2002) 100 Cal.App.4th 37
People v. Hollins (1993) 15 Cal.App.4th 567 [surveillance location]
People v. Duval (1990) 221 Cal.App.3d 1105, 1114
People v. Barkins (1978) 81 Cal.App.3d 30.

These cases hold that when information is sought on the grounds that it is material to guilt or innocence, any claim of error based on denial of discovery is waived by a plea. (See Part B. 9, below.) They are distinguishable from cases where disclosure is sought in litigating a motion to suppress under Penal Code section 1538.5. In such cases, where the discovery motion is “directed to the legality of the search” (*Hobbs, supra*, 7 Cal.4th at p. 956), its denial is cognizable in an appeal brought pursuant to section 1538.5(m) and rule 31(d). See Part D.1, below, at page 19.

Also distinguishable are issues based on denial of discovery, where the discovery sought does not go to guilt or innocence but to the legality of the prosecution. (See Part C.11, below at p. 17.)

8. Denial of motion to sever

People v. Sanchez (1982) 131 Cal.App.3d 323, 335
People v. Haven (1980) 107 Cal.App.3d 983.

9. Denial of motion for continuance

People v. Kaanehe (1977) 19 Cal.3d 1
People v. Vargas (1993) 13 Cal.App.4th 1653, 1656-60
People v. Lobaugh (1987) 188 Cal.App.3d 780.

10. Denial of Hitch or Mejia motion, seeking sanctions for suppression or destruction of material evidence, or deportation of witnesses:

People v. Avalos (1996) 47 Cal.App.4th 1569, 1576.

People v. McNabb (1991) 228 Cal.App.3d 462, 470-471.

People v. Lopez (1988) 198 Cal.App.3d 135

People v. Wakefield (1987) 194 Cal.App.3d 67

People v. Halstead (1985) 175 Cal.App.3d 772

People v. Bonwit (1985) 173 Cal.App.3d 828

People v. Galan (1985) 163 Cal.App.3d 786, 796.

But see: *People v. Aguilar* (1985) 165 Cal.App.3d 221: Where a claim of destruction of evidence is raised in the context of a section 1538.5 motion, it may be preserved for appeal. (See Part D.1.b, at p. 20.)

11. Entrapment

People v. Bonwit (1985) 173 Cal.App.3d 828 [plea not only admits guilt but admits that affirmative defenses do not exist].

12. Denial of Penal Code section 995 motion, except where the motion seeks review of a magistrate's denial of a suppression motion:

People v. Truman (1992) 6 Cal.App.4th 1816, 1821

People v. Batista (1988) 201 Cal.App.3d 1288

People v. Tillery (1989) 211 Cal.App.3d 1569, 1581

People v. Woodford (1986) 176 Cal.App.3d 944

People v. Galan (1985) 163 Cal.App.3d 796

People v. Lilienthal (1978) 22 Cal.3d 891, 897

People v. Waters (1975) 52 Cal.App.3d 323.

13. Claim that the defendant was found guilty of an offense not charged nor included within a charged offense. (Such a claim is based on lack of notice, which goes to the ability to defend the charge; it is thus waived by an admission of guilt.)

People v. West (1970) 3 Cal.3d 595.

14. Issues Concerning Admissibility of Evidence

People v. Whitfield (1996) 46 Cal.App.4th 947, 959

People v. Soriano (1992) 4 Cal.App.4th 781, 784

People v. McNab (1991) 228 Cal.App.3d 462, 470

People v. Parrott (1986) 179 Cal.App.3d 1119.

This includes rulings on the admissibility of confessions, so long as the motion to suppress the confession is not made on Fourth Amendment grounds. (See Part D.1, below at p. 19.)

People v. DeVaughn (1977) 18 Cal.3d 889

In re John B. (1989) 215 Cal.App.3d 477, 483-484 [same rule for minors]

15. Claim that the Statute of Limitations Has Passed

Such claims may be cognizable where the accusatory pleading on its face shows expiration, and does not allege facts showing tolling.

People v. Superior Court (Jennings) (1986) 183 Cal.App.3d 636

People v. Smith (1985) 171 Cal.App.3d 997, 1001-1002 [suggests that a claim that information on its face shows prosecution to be time-barred would be cognizable with a CPC.]

People v. Padfield (1982) 136 Cal.App.3d 218, 226-227 [“When the pleading is facially sufficient, the issue of the statute of limitations is solely an evidentiary one. The sufficiency of the evidence introduced on this issue does not raise a question of jurisdiction in the fundamental sense.”]

But see *In re Demillo* (1975) 14 Cal.3d 598, 601 [D allowed to raise claim that prosecution was time-barred in petition for habeas corpus.]

People v. Zamora (1976) 18 Cal.3d 538, 547; *People v. McGee* (1934) 1 Cal.2d 611 [D allowed to raise claim where time bar appears on face of accusatory pleading.] *McGee's* holding that the statute of limitations goes to fundamental jurisdiction was overruled by *Cowan v. Superior Court* (1996) 14 Cal.4th 367, which held that D may affirmatively waive a claim that the prosecution is time-barred as part of a plea agreement. However, it is possible that *McGee* may still be cited where there is no affirmative waiver.

16. Issues Involving Speedy Trial and Other Time Limitations

People v. Hernandez (1992) 6 Cal.App.4th 1355, 1358 [law on this point is “settled”, with the exception of *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807 [misdemeanor D's speedy trial claim survives plea].]

People v. Egbert (1997) 59 Cal.App.4th 503, 512-513 [citing *Hernandez* and disavowing *Avila*.]

People v. Stittsworth (1990) 218 Cal.App.3d 837

People v. Perez (1985) 172 Cal.App.3d 806 [px held in violation of ten-day rule]

People v. Draughon (1980) 105 Cal.App.3d 471

People v. Lee (1980) 100 Cal.App.3d 715

People v. Hayton (1979) 95 Cal.App.3d 413

But see *People v. Glover* (1974) 40 Cal.App.3d 1006 [D allowed to raise a constitutional speedy trial claim, which if meritorious would result in dismissal, where he was promised as a condition of his plea that he could raise this issue.]

Also see *People v. Young* (1991) 228 Cal.App.3d 171 [reviews claim that trial court lacked jurisdiction under §1203.2a to revoke probation, following admission of probation violation.]

Also see *People v. Broughton* (2003) 107 Cal.App.4th 307, fn. 5, reviewing without a CPC a claim that the trial court should have granted a motion to dismiss under section 1381.5, the speedy trial statute for state prisoners serving time in a federal institution.

Claims based on violation of the Interstate Detainers Act have been held to be cognizable:

People v. Gutierrez (1994) 30 Cal.App.4th 105, 108 [“The denial of a motion to dismiss under section 1389 may be reviewed despite a subsequent guilty plea, because the defendant's objection goes to the legality of the proceedings notwithstanding defendant's actual guilt.”] *Gutierrez* also holds, without citation, that claims based on section 1381 (speedy trial demands by state prisoners) are cognizable after a plea. (30 Cal.App.4th at p. 108.)

People v. Brooks (1987) 189 Cal.App.3d 866 [IAD claim litigated before plea not waived by plea.]

People v. Zetsche (1987) 188 Cal.App.3d 917, fn. 2 [“Since the grounds urged for reversal do not challenge defendant's guilt but instead raise issues which would preclude

the state from prosecuting him despite his guilt, defendant may raise those issues with a certificate of probable cause.]

See Part C.9, below, at page 17.

17. Claim that Trial Court Should Have Dismissed under Section 1385

People v. Lopez (1988) 198 Cal.App.3d 135, 140-141. (But see *People v. Cole* (2001) 88 Cal.App.4th 850867-869; *People v. Buttram* (2003) 30 Cal.4th 773, discussed below at Part D. 2, p. 21.)

18. Double Jeopardy Claims

At least those claims which do not appear on the face of the record but which require a factual determination will be waived by a plea.

United States v. Broce (1989) 488 U.S. 563, 573-574

But see: *Menna v. New York* (1975) 423 U.S. 61:

“A counselled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.” (*Id.*, at p. 63, fn. 2.)

See also: *Blackledge v. Perry* (1973) 417 U.S. 21; *People v. Bas* (1987) 194 Cal.App.3d 878; *People v. Turner* (1985) 171 Cal.App.3d 116, 128 [“It is his right not to be haled into court at all that defendant asserts, not his innocence.”]

18. Territorial Jurisdiction and Venue

People v. Tabucchi (1976) 64 Cal.App.3d 133, 141-142, cited with approval by *People v. Simon* (2001) 25 Cal.4th 1082, 1101.

People v. Krotter (1984) 162 Cal.App.3d 643, 648-649 [claim that court erred in denial motion for change of venue waived.]

People v. Witherow (1983) 142 Cal.App.3d 485 [claim that extradition procedures not followed waived by plea.]

19. Claim That a Statutorily Authorized Sentence is Cruel and Unusual

Where a factual record is necessary to consider a claim that a sentence is disproportionate and therefore cruel and unusual, the claim is waived by a plea.

People v. Lloyd (1998) 17 Cal.4th 658, 666 [distinguishing non-fact bound question whether trial court understood the scope of its discretion];

People v. Hunt (1985) 174 Cal.App.3d 95, 107-108.

People v. Sabados (1984) 160 Cal.App.3d 691. [ambiguous as to whether claim is waived, or simply requires a CPC. See Part C. 14.]

Where the sentence is part of a plea bargain, see *People v. Panizzon* (1996) 13 Cal.4th 68.

C. ISSUES REVIEWABLE AFTER A PLEA, WITH A CPC.

1. Denial of right to counsel.

People v. Holland (1978) 23 Cal.3d 77.

2. Denial of right to waive counsel and represent self.

People v. Robinson (1997) 56 Cal.App.4th 363, rev. den. However, a claim of Marsden error may not be cognizable, even with a CPC, unless there is also a claim of ineffective assistance of counsel. (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 786; *People v. Gonzalez* (1993) 13 Cal.App.4th 707, 716.)

3. Voluntariness of plea; court's failure to advise of rights/consequences.

Despite some ambiguity in earlier case law, most cases held or assumed that a CPC was required. (See *People v. Robinson* (1988) 205 Cal.App.3d 29; *People v. Turner*

(1985) 171 Cal.App.3d 116, 128, fn. 8; *People v. Gloria* (1980) 108 Cal.App.3d 50, 52; but see *People v. Caban* (1983) 148 Cal.App.3d 706, 708; *People v. Casarez* (1981) 124 Cal.App.3d 641, 644, overruled on other grounds by *People v. Wright* (1987) 43 Cal.3d 487.)

However, after *People v. Panizzon* (1996) 13 Cal.4th 68, 74-76 and *People v. Mendez* (1999) 19 Cal.4th 1084, 1093-1094, it is clear that these types of claims require a CPC.

See also:

People v. Gonzalez, supra, 13 Cal.App.4th at pp. 715-716 [guilty plea waives argument on appeal that extrajudicial statements could not be used to establish the factual basis for plea];

People v. Zamora (1991) 230 Cal.App.3d 1627, 1632-1634 [claim that there was no factual basis for plea held not cognizable without CPC.]

People v. Breckenridge (1992) 5 Cal.App.4th 1096.

People v. Truman (1992) 6 Cal.App.4th 1816, 1823-1824 [reviews claim that trial court failed to advise of dangers of self representation, w/out discussion of CPC requirement.]

People v. Manriquez (1993) 18 Cal.App.4th 1167 [claim that D was “confused” when he entered plea cognizable only with CPC.]

Cf. *People v. Barella* (1999) 20 Cal.4th 261, 271 [with CPC, reviews claim that trial court failed to advise of parole eligibility before accepting plea.]

Regarding admissions of enhancements:

People v. Hoffard (95) 10 Cal.4th 1170: CPC required for claim that there was no factual basis for D's admission of a “substantial sexual conduct” allegation.

However, where the current offense and allegations are contested, the voluntariness of an admission of a prior conviction may apparently be appealed without a CPC:

People v. Van Buren (2001) 93 Cal.App.4th 875.

People v. Campbell (1999) 76 Cal.App.4th 305.

People v. Garcia (1996) 45 Cal.App.4th 1242.

4. Denial of Motion to Withdraw Plea

A motion to withdraw a plea on pre-plea grounds (involuntariness, inadequate advisements, etc.) is a challenge to the plea itself, rather than a post-plea issue. Thus, it requires a CPC.

In re Chavez (2003) 30 Cal.4th 643, 651.

People v. Breckinridge (1992) 5 Cal.App.4th 1096 [CPC needed to challenge admission of prior conviction used to enhance sentence.]

In re Brown (1973) 9 Cal.3d 679, 683 [cannot file habeas where appellate review is available with a CPC, but court has denied request for one.]

People v. Ribero (1971) 4 Cal.3d 55, 62-64.

People v. Castelan (1995) 32 Cal.App.4th 1185.

People v. Manriquez (1993) 18 Cal.App.4th 1167.

People v. Patterson (1984) 151 Cal.App.3d 252, 255.

Similarly, a claim that the defendant should be allowed to withdraw his plea because the terms of a plea bargain will not or cannot be kept, and the trial court has not given Penal Code section 1192.5 advisements, may require a CPC, at least if withdrawal of plea is the remedy sought:

People v. Preciado (1978) 78 Cal.App.3d 144, 147-148.

Cf. *People v. McClellan* (1993) 6 Cal.4th 367, fn. 5 [D's claims that trial court failed to honor plea bargain or, alternatively, to advise of consequences of plea, reviewed with CPC.]

5. Ineffective assistance of counsel at, or advising on, the plea:

People v. Ribero (1971) 4 Cal.3d 55, 63.

People v. Everett (1986) 186 Cal.App.3d 274.

People v. McCary (1985) 166 Cal.App.3d 1.

People v. Roper (1983) 144 Cal.App.3d 1033

In re Chavez (2003) 30 Cal.4th 643, 651: “A defendant who challenges the validity of such a plea on the ground that trial counsel rendered ineffective assistance in advice regarding the plea may not circumvent the requirements of section 1237.5 by seeking a writ of habeas corpus.”

This statement may be overbroad; a defendant who needs to present information outside the record to substantiate his claim may (in fact, must) proceed by way of habeas corpus:

People v. Johnson (1995) 36 Cal.App.4th 1351

People v. Cotton (1991) 230 Cal.App.3d 1072.

(But see *People v. Guzman* (1991) 226 Cal.App.3d 1060, rejecting habeas alternative because “no new information is presented by way of habeas that is not already contained in the appeal record”)

(For claims of ineffective assistance in failing to file a timely notice of appeal, or to perfect an appeal requiring a CPC, see Part E, Practice Tips, below.)

6. Claim that Plea Was Induced by Misrepresentation

People v. Panizzon (1996) 13 Cal.4th 68, 76
People v. DeVaughn (1977) 18 Cal.3d 889
In re Brown (1973) 9 Cal.3d 679

This principle applies to cases where the trial judge, as an inducement to plead, promises to allow the defendant to appeal an issue which is, in fact, not appealable.

People v. Burns (1993) 20 Cal.App.4th 1266, 1274
People v. Hollins (1993) 15 Cal.App.4th 567, 571-574
People v. Bowie (1992) 11 Cal.App.4th 1263, 1266-1267
People v. Truman (1992) 6 Cal.App.4th 1816, 1820.
People v. Bonwit (1985) 173 Cal.App.3d 828.
People v. Haven (1980) 107 Cal.App.3d 983, 986.
People v. Crown (1971) 18 Cal.App.3d 1052.

7. Challenge to a sentence which was determined by a plea bargain.

This is, in reality, a challenge to the plea itself, and thus requires a CPC. The cases in this area are discussed at Part D. 2, page 21. See also Part C. 12, page 17, discussing cases where D has admitted an enhancement as part of a plea bargain.

8. Claim that defendant was incompetent at time of plea.

This category includes claims that the trial court failed to hold a hearing under Penal Code section 1368, where there was substantial evidence of the defendant's incompetence.

People v. Panizzon (1996) 13 Cal.4th 68, 76.
People v. Lauder milk (1967) 67 Cal.2d 272.

9. Violation of Interstate Agreement on Detainers, which bars prosecution.

People v. Garner (1990) 224 Cal.App.3d 1363 [considers issue after plea, without discussion of CPC]

People v. Cella (1981) 114 Cal.App.3d 905, fn. 5.
People v. Reyes (1979) 98 Cal.App.3d 524.

See also Part B. 16, above, page 11.

10. Erroneous denial of pretrial diversion or deferred entry of judgment.

People v. Sturiale (2000) 82 Cal.App.4th 1308.
People v. McAlister (1990) 225 Cal.App.3d 941, 944.
People v. Hayes (1985) 163 Cal.App.3d 371, 373.

People v. Flores (1987) 196 Cal.App.3d 475, 482.
People v. Williamson (1982) 137 Cal.App.3d 419.
People v. Padfield (1982) 136 Cal.App.3d 218.

11. Denial of Murgia motion

People v. Moore (2003) 105 Cal.App.4th 94: A discovery motion seeking evidence of discriminatory prosecution is unlike a motion seeking evidence relevant to guilt or innocence. If a violation of equal protection in prosecution is uncovered, it would “mandate dismissal regardless of a defendant's guilt.” (105 Cal.App.4th at p. 100.) Thus, unlike discovery issues which are waived by a plea (see, e.g., *People v. Hunter* (2002) 100 Cal.App.4th 37), this category of discovery issue may be raised with a CPC.

12. Imposition of enhancement based on prior conviction, where D has admitted the prior conviction.

Where D admits a prior conviction, but challenges its sufficiency to support a sentence enhancement, this may be treated as a challenge to the plea (requiring a CPC) rather than as a sentencing issue (no CPC required). See Part B.4, above, page 6.

People v. Arwood (1985) 165 Cal.App.3d 167 [D needs CPC to challenge 5-year enhancement under § 667 after admitting prior ADW. Since D admitted the prior as part of a plea bargain, the case would probably now be analyzed under *People v. Panizzon* (1996) 13 Cal.4th 68 and *People v. Buttram* (2003) 30 Cal.4th 773.

People v. Sturns (2000) 77 Cal.App.4th 1382 [argument that an admitted prior conviction, pled as a strike, did not qualify as a strike was a challenge to the plea bargain and required a CPC.]

Contra: *People v. Loera* (1984) 159 Cal.App.3d 992 held that D did not need a CPC to argue that the section 12022.6 enhancement which he admitted was inapplicable to an underlying offense of receiving stolen property; issue treated as a sentencing issue.

13. Jeopardy-barred prosecution

See cases under Part B.18, page 12.

See also *People v. Cuevas* (1996) 51 Cal.App.4th 620 [claim of impermissible successive prosecution reviewed with CPC.]

14. Claim that punishment for a crime is cruel & unusual.

See Part B. 19, above, page 13.

People v. Cole (2001) 88 Cal.App.4th 850 and *People v. Young* (2000) 77 Cal.App.4th 827 both hold that a constitutional attack on a sentence contemplated by a plea agreement is an attack on the plea agreement, and thus requires a CPC.

People v. Zamora (1991) 230 Cal.App.3d 1627, 1634 also holds that a CPC is required.

15. Claim that the information on its face fails to state an offense.

People v. Soriano (1992) 4 Cal.App.4th 781 [Claim that death certificate is not a forge-able instrument within meaning of statute]

People v. Jerome (1984) 160 Cal.App.3d 1087 [Information charged D with sex offense on minor under 14, and also alleged that victim was 15.]

People v. Bean (1989) 213 Cal.App.3d 639 [w/ CPC, reviews claim that “attempted petty theft with a prior” is not a crime.]

People v. Calderon (1991) 232 Cal.App.3d 930 [w/CPC, reviews applicable of transferred intent doctrine to attempted murder.]

16. Claim that D cannot be convicted of both charges to which he has pled.

Depending on the circumstances, this claim may be waived altogether by a plea (see Part B.3 at p 6), or may require a CPC

People v. Jones (1995) 33 Cal.App.4th 1087

People v. Valenzuela (1993) 14 Cal.App.4th 837.

17. Collateral Estoppel

People v. O'Daniel (1987) 198 Cal.App.3d 715

People v. Meyer (1986) 183 Cal.App.3d 1150, 1159.

(continuing applicability of rule noted in *In re Chavez* (2003) 30 Cal.4th 643, fn. 2.)

But see *People v. Shults* (1984) 151 Cal.App.3d 714 [claim waived by plea where trial court refused to admit evidence of previous hearing which was a necessary basis for collateral estoppel claim; there was no support in the record for the claim.]

D. ISSUES REVIEWABLE WITHOUT A CPC:

1. Search and seizure issues litigated under section 1538.5, and appealed under section 1538.5(m).

Section 1538.5(m) allows defendants to appeal the denial of a suppression motion after a guilty plea, and California Rules of Court, rule 31(d), exempts such appeals from the CPC requirement. (*People v. Jones* (1995) 4 Cal.4th 1102, 1106; *People v. Panizzon* (1996) 13 Cal.4th 68, 75.)

a. Procedural requirements for appealability under section 1538.5(m)

While section 1538.5(m) requires only that the suppression motion have been made at some stage of the proceedings below, the Supreme Court held in *People v. Lilienthal* (1978) 22 Cal.3d 891 that the motion must have been made in superior court. (See also *People v. Hinds* (2003) 108 Cal.App.3d 897; *People v. Terrell* (1999) 69 Cal.App.4th 1246.) If made earlier, in municipal court, the motion must be renewed in superior court, either under section 1538.5 or section 995. (*People v. Galindo* (1991) 229 Cal.App.3d 1529, 1534; *People v. Kain* (89) 212 Cal.App.3d 816 [*Lilienthal* rule applies even if superior court acts as a reviewing court.]

The *Lilienthal* rule has been affirmed even after court unification. (*People v. Hoffman* (2001) 88 Cal.App.4th 1; *People v. Hart* (1999) 74 Cal.App.4th 479.) Thus, normally the motion must be made after the case has been filed in superior court – and before a plea is entered. (*People v. Parrott* (1986) 179 Cal.App.3d 1119, 1124.) In cases where the defendant enters a plea in municipal court, and the case is certified for sentencing under section 859a, the appealability of a municipal court ruling on a motion to suppress may depend on whether judgment was imposed in municipal court (*People v. Callahan* (1997) 54 Cal.App.4th 1419 [muni ct. motion appealable where motion, plea, and sentencing all took place before same muni ct. judge]) or in superior court (*People v. Burns* (1993) 20 Cal.App.4th 1266 [issue waived if judgment imposed in superior court, without renewal there of motion to suppress].)

Where D wins the motion in municipal court and P overturns the ruling in superior court under section 871.5, it may be necessary for D to renew the motion in subsequent proceedings – if new evidence is taken following the section 871.5 reinstatement. (*People v. Dossman* (1991) 235 Cal.App.3d 1433.)

Where the motion is made or renewed in superior court, but the superior court declines to hear it in the merits, that ruling may be reviewable: *People v. Gonzales* (1991) 233 Cal.App.3d 1428.

b. Substantive limits on review under section 1538.5(m)

Sometimes there is a fine line between discovery issues which are not cognizable following a plea (see Part B. 7, p. 8 and Part C.11, p. 17), and discovery issues which pertain to litigating a motion to suppress, and which therefore remain cognizable.

A motion to unseal a search warrant may be reviewable under section 1538.5(m); this situation is distinguishable from motions to disclose informers who are material to guilt or innocence. *People v. Hobbs* (1994) 7 Cal.4th 948. (Compare *People v. Hunter* (2002) 100

Cal.App.4th 37 [motion to discover informer, not accompanied by motion to suppress evidence, not cognizable after plea.]

People v. Workman (1989) 209 Cal.App.3d 687, 693-694: D may appeal magistrate's failure to give collateral estoppel effect to earlier suppression ruling, under section 1538.5(m) [no CPC required] rather than under section 1237.5 [CPC required.] The opinion accordingly distinguishes *People v. Meyer* (1986) 183 Cal.App.3d 1150 (see Part C.17, p. 19.). “While appellant's contentions do not involve the searches and seizures themselves, they question the proper procedure for relitigation of search and seizure issues”

But see *People v. Cella* (1981) 114 Cal.App.3d 905: trial court's refusal to hold second 1538.5 hearing after remand cognizable on appeal under section 1237.5. (Why not under § 1538.5(m)?)

People v. Whitfield (1996) 46 Cal.App.4th 947, 958: Since section 1538.5 may not be used to suppress statements which are the product of Fifth or Sixth Amendment violations, motions to suppress such statements on those grounds are not cognizable on appeal under section 1538.5(m).

People v. Wakefield (1987) 194 Cal.App.3d 67, 69: Motion to suppress evidence on grounds of *Hitch* (*People v. Hitch* (1974) 12 Cal.3d 641) violation (a due process claim, rather than a Fourth Amendment claim) not cognizable under section 1538.5(m). The issue relates to guilt or innocence, and thus is waived by the plea. (Same: *People v. Ahern* (1984) 157 Cal.App.3d 27.) Contra: *People v. Aguilar* (1985) 165 Cal.App.3d 221 did review a *Hitch* claim made in the context of a section 1538.5 motion to suppress: “Where a defendant seeks to suppress tangible fruits of a *Hitch* violation, ... section 1538.5(m) preserves the *Hitch* issue for appellate review.” However, *Aguilar* was disapproved, as a minority view, in *People v. Avalos* (1996) 47 Cal.App.4th 1569.

See also Part.B.5, page 7, for when motions to suppress confessions are/are not reviewable after a plea.

2. Sentencing issues.

Rule 31(d) says that no CPC is required where the appeal “is based solely upon grounds ... occurring after entry of the plea which do not challenge its validity.” As a general rule, this exception encompasses sentencing issues. (*People v. Jones* (1995) 4 Cal.4th 1102, 1106; *People v. Lloyd* (1998) 17 Cal.4th 658; *People v. Panizzon* (1996) 13 Cal.4th 68, 76, 79, fn. 9; *People v. Ramos* (1996) 50 Cal.App.4th 810, fn. 2 [credits].)

a. Sentence imposed pursuant to plea agreement

However, there is a major exception to this general rule. Where the sentence is imposed pursuant to a plea agreement, a challenge to the sentence may be deemed a challenge to the plea

agreement – and therefore, as an attempt to set aside the plea, which requires a CPC. For example, in *Panizzon, supra*, the defendant pled in exchange for an agreed sentence of life with parole plus twelve years, and then sought to argue on appeal that his sentence was disproportionate to those received by his co-defendants. The Supreme Court held that this argument was “*in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. *People v. McNight* (1985) 171 Cal.App.3d 620, 624.” (*Panizzon, supra*, 13 Cal.4th at p. 76. See also *People v. Enlow* (1998) 64 Cal.App.4th 850, 853-854.)

(Beyond the scope of this memo is the problem of what substantive challenges may be raised to an agreed upon sentence, after the procedural requirements are met. As the Supreme Court recently held in *People v. Hester* (2000) 22 Cal.4th 290, 295: “Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction.” *Hester* accordingly refused to consider a claim that a sentence violated § 654, when the sentence was the result of a plea bargain. See also Calif. Rules of Court, rule 4.412(b), which specifically addresses § 654 claims following plea bargains. As the Supreme Court later held in *People v. Buttram* (2003) 30 Cal.4th 773, 782, this rule is simply a codification, in the context of § 654 claims, of the “long-standing rule that 'defendants are estopped from complaining of sentences to which they agreed.'”)

b. Sentence imposed pursuant to plea agreement for a “lid”, but leaving discretion to trial court to sentence under that lid

What happens when the plea bargain is not for a specified sentence, but for a maximum? May the defendant argue that a sentence within that maximum is erroneous? Generally, he may. In *Buttram, supra*, the court resolved a split of authority as to whether any objection could be raised to a sentence which did not exceed an agreed-upon lid. Rejecting an argument that an attack on a maximum sentence was an attack on the plea agreement, and therefore required a CPC, the court held:

Unless it specifies otherwise, a plea agreement providing for a maximum sentence inherently reserves the parties' right to a sentencing proceeding in which (1) ... they may litigate the appropriate individualized sentence choice within the constraints of the bargain and the court's lawful discretion, and (2) appellate challenges otherwise available against the court's exercise of that discretion are retained. (30 Cal.4th at p. 777.)

Such an agreement, *Buttram* held, “necessarily contemplates further adversary proceedings ... in which the court must exercise its discretion to determine the appropriate sentence within the constraints of the bargain.... This exercise of discretion is not made standardless and unreviewable simply because its exercise is confined to a specified range by the terms of a plea bargain that included no express waiver of appeal.... When the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence

that was 'part of the plea bargain.' ... Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself.” (30 Cal.4th at pp. 785-786.)

(Note again that the court was speaking only to the procedural requirements for appellate review, and not to the availability of substantive challenges. As it said, “Such a claim [that a sentence within the agreed-upon maximum was an abuse of discretion] may rarely have merit, but it does not attack the validity of the plea.” 30 Cal.4th at p. 777.)

c. Claims of post-plea breach of bargain

A claim that a sentence constitutes a post-plea breach of a bargain is cognizable without a certificate: *People v. Kaanehe* (1977) 19 Cal.3d 1, 8; *People v. Delles* (1968) 69 Cal.2d 906; *People v. Preciado* (1978) 78 Cal.App.3d 144 [D can claim violation of agreement that a certain judge would sentence him]. In *People v. Scott* (1984) 150 Cal.App.3d 910, D was allowed to claim, without a CPC, that the court acted unlawfully when it increased his sentence after his return from CRC. Even though the bargain contemplated such an increase, it exceeded the court's jurisdiction. (Is *Scott* valid after *Hester*? If it is, this is because the *Scott* court lacked *fundamental* jurisdiction to increase an already-imposed sentence.)

In *People v. Cooke* (2003) – Cal.App.4th — [CA3, 8/18/03], the court allowed D to raise an argument concerning the proper interpretation of his credits waiver; he was in effect claiming a violation of his bargain rather than attempting to repudiate it.

d. Claim that sentence is cruel and unusual

People v. Buttram (2003) 30 Cal.4th 773, discussed above in section (b), distinguished claims that an agreed-upon maximum constituted cruel and unusual punishment. It expressly refused to decide whether such claims were in effect attacks on the legality of a plea agreement, requiring a CPC. It cited *People v. Young* (2000) 77 Cal.App.4th 827, in which D, a third strike offender, pled in return for a maximum sentence of 25-life. D then tried to argue on appeal that this sentence was cruel and unusual. “The *Young* court reasoned that 'by arguing that the maximum sentence is unconstitutional, [the defendant] is arguing that part of his plea bargain is illegal and is thus attacking the validity of the plea.'” (Quoted at 30 Cal.4th at p. 790.) See also *People v. Foster* (2002) 101 Cal.App.4th 247, rev. den.

3. Other post-plea errors, cognizable without a CPC:

a. Trial court's failure to exercise sentencing discretion

Buttram approved the court's earlier holding in *People v. Lloyd* (1998) 17 Cal.4th 658, in which D pled without a bargain to a third strike offense. The trial court (acting before the decision in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) stated it had no discretion to strike

prior convictions. The claim that it did have such discretion was cognizable without a CPC.

b. Error in determining degree of offense

Where D pleads to an offense which is divided into degrees, but leaves it to the trial court to determine the degree, that determination is appealable without a CPC: *People v. Ward* (1967) 66 Cal.2d 571. (This holding of *Ward* was implicitly approved by *Panizzon*, 13 Cal.4th at p. 79, and expressly approved by *Buttram*, 30 Cal.4th at p. 784.)

c. Claim that court lost jurisdiction to impose sentence for failure to comply with section 1203.2a

People v. Rogers (1967) 252 Cal.App.2d 1015, 1020.

People v. Young (1991) 228 Cal.App.3d 171, 179 suggests (w/out analysis) that a CPC would be required to review a claim that the court lost jurisdiction under section 1203.2a, following an admission of probation violation. It nonetheless proceeds to treat the appeal as a petition for habeas corpus, to avoid an IAC claim. (The latter reasoning is no longer arguable; see Part E.2, below at p. 26.)

In re Hoddinott (1996) 12 Cal.4th 992 reviewed a section 1203.2a which followed a plea to the underlying offense on a petition for habeas corpus. It noted that the failure to comply with section 1203.2a deprived the sentencing court of personal jurisdiction over defendant, and that the sentence could therefore be attacked in a habeas petition.

d. Claim that trial counsel failed to represent D in a motion to withdraw his plea

This is distinguished from a claim that the motion to withdraw should have been granted: “The relief requested does not require that we pass on the validity of the guilty plea.” *People v. Osorio* (1987) 194 Cal.App.3d 183, 187 (CA5); *People v. Makabali* (1993) 14 Cal.App.4th 847, 851 (CA1/3.)

4. Juvenile appeals do not require a CPC

In re Joseph B. (1983) 34 Cal.3d 952; *In re Antwon R.* (2001) 87 Cal.App.4th 348, 351.

However, juveniles are subject to the same limitations as adults as to which issues are waived by a plea. *Joseph B.* means only that an issue which remains cognizable may be raised without a CPC: *In re John B.* (1989) 215 Cal.App.3d 477.

5. Appeals following pleas of not guilty by reason of insanity

People v. Wagoner (1979) 89 Cal.App.3d 605.

E. PRACTICE TIPS REGARDING NOTICE OF APPEAL and CPC.

1. Statutory Requirements

For appeals which require a CPC, Penal Code section 1237.5 says that:

No appeal shall be taken by a defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.

Under rule 31(d), first paragraph, the defendant's statement must be filed within 60 days, as an “intended notice of appeal.” The trial court must grant or deny the certificate within 20 days after the intended notice of appeal is filed. The appeal is not operable unless the trial court does grant the certificate.

a. Timeliness: As with any other appeal, the notice of appeal – with the defendant's statement of reasonable grounds, if a CPC is sought – must be filed within 60 days after rendition of judgment. (Rule 31(a); *In re Chavez* (2003) 30 Cal.4th 643 [time limits jurisdictional; no relief for good cause available under rule 45(e).] See also *In re Jordan* (1992) 4 Cal.4th 116, approved in *Chavez*, regarding timeliness of pro. per. filings by prison inmates under the “prison delivery rule.” *Chavez* also left open the possibility that a late notice of appeal could be accepted under the “constructive filing” doctrine of *In re Benoit* (1973) 10 Cal.3d 72, if the defendant relied on a promise from trial counsel to file. (30 Cal.4th at pp. 657-658. *People v. Sturns* (2000) 77 Cal.App.4th 1382, 1386 held that the constructive filing doctrine required not only reliance but some diligence on the part of the defendant.)

b. Content of notice of appeal: For appeals which do not require a certificate, rule 31(d)'s second paragraph states the required content of a notice of appeal. The notice must specify at least the general category of issue to be raised. “The provisions of section 1237.5 ... are inapplicable, *but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.*” (Rule 31(d).)

In the past, Courts of Appeal were sometimes lax about enforcing these threshold requirements for perfecting an appeal. More recently, the Supreme Court has demanded strict compliance. **One of the first things appellate counsel must check, when reviewing a superior court record in a guilty plea appeal, is whether the notice of appeal is adequate to let the Court of Appeal consider the issues s/he wants to raise.** If the notice is inadequate, and the 60 day period of rule 31(a) or (d) has not expired, counsel should file an amended notice, or (if necessary) a defendant's request for a CPC.

If the 60 day period has expired, counsel should consult a FDAP attorney as to whether any relief may be available.

If the request for CPC has been timely filed but denied, counsel must consider whether to file a petition for writ of mandamus seeking review of the trial court's denial. (See Part E.2, below.)

2. Practice issues: where a CPC is required for the issues to be appealed.

Standard for granting the CPC: The request must be made within 60 days after imposition of judgment (rule 31(d)), in the form of an “intended notice of appeal.” In theory, the trial court must grant a CPC so long as the defendant identifies an issue which is not frivolous or vexatious. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1178; *People v. Holland* (1978) 23 Cal.3d 77, 84.)

Effect of trial court's denial: Denial of the CPC, where the defendant has identified a nonfrivolous issue, is an abuse of discretion. D can seek a writ of mandamus in the Court of Appeal to compel the trial court to issue the CPC. (*People v. Hoffard, supra*, 10 Cal.4th at 1180; *In re Brown* (1973) 9 Cal.3d 679; *People v. Cole* (2001) 88 Cal.App.4th 850, fn. 3; *People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188; *Lara v. Superior Court* (1982) 133 Cal.App.3d 436.

But if mandamus is not sought, or if it is denied, the Court of Appeal must dismiss an appeal purporting to raise a CPC issue but lacking a CPC. The Supreme Court has made clear that “section 1237.5 and rule 31(d), first paragraph, should be applied in a strict manner.” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098.) *Mendez* and the cases discussed therein make clear that the courts will no longer listen to arguments that judicial economy would be served by hearing a noncomplying appeal, because the record has already been prepared, or because it would have been an abuse of discretion to deny a CPC. (See, e.g., *People v. Cole* (2001) 88 Cal.App.4th 850, fn. 3; *People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188.)

Effect of failure to file request within 60 days: It is trial counsel's duty to prepare and file, upon the client's request, an adequate notice of appeal and, where needed, request for CPC. (Pen. Code, § 1240.1; *People v. Ribero* (1971) 4 Cal.3d 55, 65.) The United States Supreme Court has held that the duties of effective counsel, under *Strickland v. Washington* (1984) 466 U.S. 668, include consulting with the client about whether to file an appeal, if (1) a rational defendant might want to file; or (2) this defendant has shown an interest in filing. Where trial counsel fails to

consult, and (presumably) to take the steps to secure an appeal for his client, the client may claim ineffective assistance of counsel. The prejudice prong of *Strickland* may be met by showing “a reasonable probability that but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.” (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 484.) “[E]vidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination.” (*Id.*, at p. 485. See also *Evitts v. Lucey* (1985) 469 U.S. 387 [D entitled to new appeal when counsel's failure to comply with local court rules led to dismissal of new appeal].)

Under California law, there is no relief from a failure timely to file a request for a CPC, unless either the “prison delivery rule” or the constructive filing rule applies. (See *In re Chavez* (2003) 30 Cal.4th 643, discussed above at pages 25-26.) If you have a case requiring a CPC and the 60 day deadline has passed, consult your FDAP buddy for possible habeas remedies.

Effect of successful application for a CPC: If the application for a CPC *is* timely filed, and if the certificate is granted, the appeal is not limited to the specified issues. The Court of Appeal must address on the merits *any* CPC issues presented to it. In *People v. Hoffard* (1995) 10 Cal.4th 1170, 1174, 1177-1178, the Supreme Court explained that a CPC certifies the appeal, but not particular issues. Once the CPC is granted, the appeal is operative as to any cognizable issue:

“Nothing in section 1237.5 indicates the defendant must specify, and the trial court certify as nonfrivolous, each issue to be raised on appeal.... Section 1237.5 does not expressly limit the issues that may be raised on appeal once a certificate of probable cause has been obtained.... Section 1237.5 does not restrict the scope of inquiry into a cognizable error once a certificate has been issued.”

2. Where only rule 31(d) compliance is required:

Again, the trend is toward requiring strict compliance with the provision of rule 31(d) that “the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.” In *People v. Jones* (1995) 10 Cal.4th 1102, 1108, the Court held that “where a criminal defendant has not complied with rule 31(d) ... by stating noncertificate grounds in the notice of appeal, the appeal is not 'operative'. No record should be prepared and no briefing undertaken for such an inoperative appeal, which is subject to dismissal on respondent's or the court's own motion.”

However, compliance with this requirement is not difficult. A notice of appeal must be liberally construed in favor of its sufficiency (rule 31(b)), and a notice which purported to appeal from the “sentence” and which referred to Rule 31(d) was held sufficient to allow a non-CPC appeal to proceed. (*People v. Lloyd* (1998) 17 Cal.4th 658, 665.)

Where the notice of appeal does not appear sufficient, even under the liberal standards of

Lloyd, appellate counsel should seek leave to file an amended notice of appeal. *People v. Jones, supra*, 10 Cal.4th at 1108, fn. 4 expressly contemplates that leave should be granted upon a proper motion. Sample motions are available from FDAP.

Once an adequate notice is filed, the appeal is operative as to all noncertificate issues. In *People v. Jones, supra*, 10 Cal.4th at 1105, the Court held that “when, as here, an appellant has in fact complied with rule 31(d) in his notice of appeal, the rule does not restrict the cognizability on appeal of additional, unspecified noncertificate issues or categories of issues.”

Timeliness: No relief from default for failure to file a timely notice of appeal is available under Rule 45. (*In re Chavez* (2003) 30 Cal.4th 643.) See discussion of the prison delivery rule and the constructive filing doctrine above, under Part E.2.

F. APPEAL WAIVERS

Occasionally, as part of a plea agreement, a prosecutor or trial judge will demand a waiver of appeal from a defendant. Because the waiver is not always communicated to the court clerk before a notice of appeal is filed and a record prepared, you may receive appointments, and even get a transcript, only to find that the appellant has apparently waived his or her right to appeal. In such cases, your threshold issue (if you are to find one) will likely be the validity of the waiver, and/or its scope.

Obtaining an appeal waiver as part of a bargain is a generally acceptable practice. (*People v. Panizzon* (1996) 13 Cal.4th 68, 79-80: “Just as a defendant may affirmatively waive constitutional rights ... as a consequence of a negotiated plea agreement, so also may a defendant waive the right to appeal as part of the agreement.”) In fact, at least one reviewing court has encouraged the practice. (*People v. Olson* (1989) 216 Cal.App.3d 601.) However, like any other waiver, an appeal waiver must be express, intelligent, and voluntary. (*Panizzon* at p. 80.) It must be made under circumstances which are not “inherently coercive”, beyond the coercion inherent in any plea bargain situation. (*People v. Nguyen* (1993) 13 Cal.App.4th 114, fn. 3.)

Sometimes, appeal waivers are addressed to specific issues, typically rulings on suppression motions. (*People v. Kelly* (1994) 22 Cal.App.4th 533; *People v. Castrillon* (1991) 227 Cal.App.3d 718, 722-723; *People v. Charles* (1985) 171 Cal.App.3d 552, 558-560.) Other appeal waivers are expressed in general terms, leaving it to the courts to decide whether all or only some issues are included in their scope. (*Panizzon*, at p. 85.)

Validity and Voluntariness of Waiver

“To be enforceable, a defendant's waiver of the right to appeal must be knowing, intelligent, and voluntary. [Citation.] Waivers may be manifested either orally or in writing. [Citation.] The

voluntariness of a waiver is a question of law which appellate courts review de novo. [Citation.] (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.)

“The burden is on the party claiming the existence of a waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver. The right of appeal should not be considered waived or abandoned except where the record clearly establishes it.” (*People v. Rosso* (1994) 30 Cal.App.4th 1001, 1006.)

In practice, this is not always such a high burden for the prosecution. Appeal waivers have been upheld where a trial court simply mentioned the right to appeal, along with the list of rights necessarily waived by a plea (jury trial, etc.) to a defendant, who agreed generally to waive all mentioned rights. (*People v. Berkowitz* (1995) 34 Cal.App.4th 671; *People v. Foster* (2002) 101 Cal.App.4th 247, 250 [“Foster's waiver of the right to appeal is enforceable even though the court did not specifically admonish Foster that he would be giving up his appellate rights.”])

Defendant's initials on a change of plea form, even without oral advisements, may be sufficient to establish that a waiver was intelligent and voluntary, at least where the waiver is part of a plea bargain. (*People v. Kelly* (1994) 22 Cal.App.4th 533, but see *People v. Nguyen* (1993) 13 Cal.App.4th 114, fn. 3, accepting “plea form” waiver but advising trial courts to include oral advisement of fact and scope of waiver.) Conversely, where the court orally mentions a right to appeal during a plea colloquy, the plea is operative as an appeal waiver, even if this right is not specifically waived. (*People v. Berkowitz* (1995) 34 Cal.App.4th 671. *Berkowitz* also rejects an argument that the court was required to tell D what issues he might have appealed had he not waived them.) But see *People v. Rosso, supra*, 30 Cal.App.4th at pp. 1005-1007, holding that lack of advisement makes the waiver invalid. “While there was a purported waiver, there was no advisement, and we cannot say Rosso's waiver was knowing and intelligent.”

Even a pro. per. defendant can make a voluntary and intelligent waiver. (*People v. Vargas* (1993) 13 Cal.App.4th 1653 [Uncounselled D's *express* oral and written waiver, after advisements and in the context of a plea agreement, voluntary and intelligent].) So may a minor: *In re Uriah R.* (1999) 70 Cal.App.4th 1152.

However, most courts (though sometimes in dictum) have expressed the view that the voluntariness of a waiver depends on whether it is part of a plea bargain. That is, the waiver is not “intelligent” if the defendant is not getting something in return. As the court held in *People v. Nguyen* (1993) 13 Cal.App.4th 114, fn. 4, “a waiver which was not part of some quid pro quo could hardly be characterized as 'intelligent'.” See also *Vargas, supra*, 13 Cal.App.4th at p. 1658, upholding a waiver because “the benefits of a plea agreement would be eliminated if courts disallowed the waiver of the right of appeal to which the parties have agreed.” The presence of a plea agreement, of which the waiver was a part, was a factor contributing to the voluntariness findings in *People v. Rosso, supra*, 30 Cal.App.4th at p.1006; *People v. Kelly, supra*, 22 Cal.App.4th at p. 536; *People v. Berkowitz, supra*, 34 Cal.App.4th at p. 677.

Scope of the Waiver

Even a voluntary and intelligent waiver may be found not to encompass errors occurring after it is made. “To properly define the reach of such a waiver, we must be mindful of the context in which it normally will be made: a plea or sentence bargain. [Fn. omitted.] Courts have traditionally viewed such bargains using the paradigm of contract law.[Citations.]”(*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120.) Thus, courts should look first to the language of the agreement, and then should seek to carry out the parties' reasonable expectations. For example, where D was not specifically admonished that his waiver included a motion to suppress, but suppression was his only possible appellate issue, it must have been within his contemplation at the time of the waiver. (*People v. Berkowitz* (1995) 34 Cal.App.4th 671, 677.)

Typically, errors occurring *after* an appeal waiver is made are held to be outside its scope. They cannot be found to have been within the defendant's contemplation, at the time he agreed to the waiver. (*People v. Mumm* (2002) 98 Cal.App.4th 812 [trial court's determination that prior was a “strike”, made after appeal waiver]; *In re Uriah R.* (1999) 70 Cal.App.4th 1152 [juvenile disposition issues]; *People v. Sherrick* (1993) 19 Cal.App.4th 657, 659 [trial court's mistake as to scope of sentencing discretion]; *People v. Vargas, supra*, 13 Cal.App.4th at 1662 [post-waiver credits calculation]; both *Sherrick* and *Vargas* are cited in *Panizzon, supra*, 13 Cal.4th at p. 85.) Among other post-waiver errors, “the defendant always retains the right to complain the sentence was in excess of the bargain.” (*Nguyen, supra*, 13 Cal.App.4th at p. 121.)

On the other hand, *Panizzon* distinguished complaints about a sentence which was the one he bargained for. (13 Cal.4th at pp. 85-86; see also *Nguyen, supra*, 13 Cal.App.4th at p. 122.) Such complaints *are* waived – including complaints about the computations by which the sentence was calculated. (*Nguyen, supra*, 13 Cal.App.4th at pp. 121-124.) (Regarding plea bargains for a “lid” – for a maximum sentence, below which the court is free to exercise discretion, see discussion of *Buttram*, at Part D.2.b, page 22. *Buttram* calls into question *People v. Foster* (2002) 101 Cal.App.4th 247, 251, which barred D from complaining about a component of a sentence of which he was notified as a possible consequence of the plea. The component “cannot fairly be characterized as falling outside of [D's] contemplation and knowledge when the waiver was made.”)

There may be some issues which can never be waived, such as lack of fundamental jurisdiction. (*Uriah R., supra*, 70 Cal.App.4th at p. 1157-1158; *Nguyen, supra*, 13 Cal.App.4th at p. 121.)