

GUILTY PLEA APPEALS
TYPES OF ERROR, LIMITATIONS ON REVIEW

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Guilty Plea Appeals – Types of Error, Limitations on Review

What Type of Error Exists?:

Error which goes to the validity of the plea?

Error which goes to the validity of the sentence?

Error which goes to the enforcement of the bargain?

I. Error Which Goes to the Validity of the Plea

A. The Plea Canvass

Advisement of Constitutional Rights to be Waived by the Plea

The waiver of a constitutional right must be knowing, voluntary and intelligently made. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [A waiver is “an intentional relinquishment or abandonment of a known right or privilege”].) Appellant must be canvassed at the plea hearing on his or her Boykin-Tahl rights, i.e., the right to a jury trial, confrontation and against self-incrimination, each of which is waived by the entry of a guilty or no contest plea. (See *Boykin v. Alabama* (1969) 392 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) A written waiver of rights form is also sufficient to advise appellant of the rights he or she is waiving through the entry of his/her plea. (See *People v. Castrillon* (1991) 227 Cal.App.3d 718, 722 [validly executed waiver form is a proper substitute for personally advising defendant of Boykin-Tahl rights.]) A defendant must also be advised as to the range of punishment (i.e., the maximum possible term) he or she faces under the statutes to which he/she is pleading. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.)

Validity of the Plea is Evaluated under the Totality of Circumstances

People v. Christian (2005) 125 Cal.App.4th 688 examined the validity of pleas where a defendant has not been advised of one or more of the rights she or he is waiving. In that case, the defendant was advised of his right to a jury trial, but not of his right to confront witnesses or against self-incrimination. *Christian* noted that *People v. Mosby* (2004) 33 Cal.4th 353 reaffirmed *Boykin/Tahl*'s requirement that a defendant must be expressly advised of the rights he/she is waiving by the entry of a plea. Where the defendant is not expressly told of those rights, however, the defendant can still be deemed to have entered a knowing and intelligent plea if the totality of the circumstances surrounding the admission supports such a conclusion. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1175.) *Christian* contains a good discussion of the factors the courts consider when determining whether the plea was in fact knowingly and intelligently entered. Those factors include a defendant's prior experience with the criminal justice system, whether any prior convictions were the result of guilty pleas (where presumably adequate advisements were given), any significant time gap between past and the current

conviction, and any other facts demonstrating the defendant's awareness and comprehension of his/her constitutional rights. (*Christian*, 125 Cal.App.4th at pp. 697-699.)

Direct vs. Collateral Consequences of the Plea

When a person enters a guilty plea, he or she must be advised of the direct consequences of the conviction. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 604.) The maximum range of punishment faced by a defendant by virtue of his/her plea is a direct consequence of the conviction. (*Bunnell*, 13 Cal.3d at p. 605; *People v. Sanchez* (1995) 12 Cal.4th 1, 30.) Probation ineligibility is also a direct consequence of the plea requiring an explicit advisement. (*People v. Moore* (1998) 69 Cal.App.4th 626, 630, *People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355.)

A collateral consequence is one which does not "inexorably follow" from a conviction of the offense involved in the plea. (*Crosby*, 3 Cal.App. 4th at p. 1355; *People v. Flores* (1974) 38 Cal.App.3d 484, 488.) The future use of a current conviction is not a direct consequence of the conviction, and therefore a person does not have to be advised of the possible future use of a conviction to support an enhancement in the event he or she commits a crime at a later date. (*People v. Gurule* (2002) 28 Cal.4th 557, 575; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457; *Crosby*, 3 Cal.App.4th at p. 1356.) Parole eligibility is also not a direct consequence of a conviction, and thus a defendant does not have to be advised of the mandatory parole terms at the time of his/her plea in order for the plea to be constitutionally valid. (See *People v. Barella* (1999) 20 Cal.4th 261; *Hill v. Lockhart* (1985) 474 U.S. 52, 55-56.) The limitation on credits for three strike offenses, whereby a defendant must serve 80% of the sentence, has been deemed a "collateral consequence" of a plea to a strike offense, and thus a defendant need not be advised of this limitation in order for the plea to be valid. (*People v. Barella* (1999) 20 Cal.4th 261.) At least one court had found that there is no need to inform a defendant of the amount of victim restitution to be imposed as a condition of probation in order for the plea to be valid. (*People v. Campbell* (1994) 21 Cal.App.4th 825, 829-830; see also *People v. Villalobos*, S176574, [decision pending: Did the imposition of a restitution fine and a parole revocation restitution fine violate defendant's plea agreement in light of the circumstance that he was told he might be required to pay restitution but no mention was made of restitution fines?]; *People v. Crandell* (2007) 40 Cal.4th 1301, 1309 [core question is whether restitution fine was actually negotiated and made part of plea agreement, or whether left to discretion of the court].)

Factual Basis for the Plea

Penal Code section 1192.5 requires that before the court accepts a plea of guilty or nolo contendere as part of a plea bargain, it must conduct an inquiry to "satisfy itself . . . that there is a factual basis for the plea." In *People v. Holmes* (2004) 32 Cal.4th 432, the Supreme Court stated that in order to comply with section 1192.5, the trial must inquire as to the factual basis of the plea for "conditional" pleas, pleas conditioned on the receipt of a particular disposition. If the court inquires of the defendant, it may develop the factual basis by having the defendant describe the conduct that gave rise to the charge(s), or question him about the factual basis described in the complaint or in a written plea agreement. If the court inquires of trial counsel, it should ask counsel to stipulate that a factual basis is contained in a particular document like the complaint,

police report, preliminary hearing transcript, probation report or written plea agreement. But the Court explicitly stated that “a bare statement by the judge that a factual basis exists without the above inquiry is inadequate.” (Holmes, 32 Cal.4th at p.436.) In Holmes, the trial court’s inquiry of the defendant on the allegations of the complaint, i.e., “did you get a copy of the complaint and did you do what it says you did in Count 1 on such and such a date” was deemed sufficient to establish a factual basis for the plea.

A claim that no factual basis exists for the plea will be reviewed under an abuse of discretion standard. (Holmes, 32 Cal.4th at p. 443.) The reviewing court may examine the entire record, including the probation report or an agreement by counsel that the factual basis is reflected in a transcript of the preliminary hearing or police report, to determine whether a factual basis exists and thus the error can be deemed harmless. (Holmes, 32 Cal.4th at p. 443; People v. Mickens (1995) 38 Cal.App.4th 1557, 1565.)

B. The Notice of Appeal – Certificate of Probable Cause or Just Sentencing?

The Validity of a Plea Cannot Be Challenged on Appeal in the Absence of a Certificate of Probable Cause

Penal Code section 1237.5 states that “No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere ... 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.” (§ 1237.5.)

Where the notice of appeal states it is “from the judgment and sentence . . .”, that statement is sufficient to preserve an appellant’s right to challenge sentencing issues on appeal pursuant to California Rules of Court, rule 8.304(b). (People v. Lloyd (1998) 17 Cal.4th 658.) It is not sufficient, however, to attack the underlying validity of the plea. (See People v. Robinson (1988) 205 Cal.App.3d 280; People v. Hoffard (1995) 10 Cal.4th 1170; Penal Code section 1237.5.) To attack the underlying validity of a plea, an appellant must timely request, and the trial court must grant, a certificate of probable cause to believe a viable appeal issue exists. (People v. Mendez (1999) 19 Cal.4th 1084; People v. Aguilar (2003) 112 Cal.App.4th 111, 116 [failure to obtain timely CPC not cured by trial court’s grant of CPC “nunc pro tunc”].) Where no CPC was ever granted, the sentence and any other non-certificate grounds may be challenged, but the plea itself cannot be overturned via direct appeal. (Mendez, 19 Cal.4th at p. 1104.) The issuance of a CPC is jurisdictional, and thus there is no relief from default in filing an untimely CPC request. (In re Chavez (2003) 30 Cal.4th 643.)

A trial court must grant a CPC request if not clearly frivolous. (See People v. Holland (1978) 23 Cal.3d 77 [abuse of discretion to deny certificate if request presents any issue not clearly frivolous or vexatious].) The only remedy for the denial of a certificate of probable cause

is to file a petition for writ of mandate in the Court of Appeal seeking review of the trial court's decision. (*In re Brown* (1973) 9 Cal.3d 679, 683; see also *Lara v. Superior Court* (1982) 133 Cal.App.3d 436, 438-439 ["We have concluded that the trial court erred in refusing to issue the certificate of probable cause. We issue writ of mandate."].) If a writ of mandate is denied, then appellant must proceed by habeas, since direct appeal is precluded by the absence of a CPC.

Challenges to an Agreed Sentence Require a Certificate of Probable Cause

Even when a defendant purports to challenge only the sentence imposed, a certificate of probable cause is required if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement. (*People v. Johnson* (2009) 47 Cal.4th 668, 678-679.) An attack upon an integral part of the plea agreement "is, in substance, a challenge to the validity of the plea...." (*People v. Panizzon* (1996) 13 Cal.4th 68, 73.)

A Penal Code section 654 challenge to the trial court's authority to impose a negotiated top or lid sentence is a challenge to the validity of the plea and thus requires a CPC. (*People v. Cuevas* (2008) 44 Cal.4th 374, 377 [certificate required for claim that the sentence imposed, which defendant was advised was the maximum possible sentence for the remaining charges after additional charges were dismissed pursuant to a plea agreement, violates the multiple punishment prohibition of § 654; challenge to negotiated plea where some charges dismissed, but sentence otherwise open to the court is an attack on validity of the plea and requires a CPC]; *People v. Shelton* (2006) 37 Cal.4th 759, 763 [certificate required for claim that the sentence imposed, whose length equaled the agreed-upon "lid," violates the multiple punishment prohibition of section 654]; see also *People v. Bobbitt* (2006) 138 Cal.App.4th 445, 448 [*Blakely* challenge to negotiated sentence requires CPC]; *People v. Panizzon* (1996) 13 Cal.4th 68, 73 [certificate required for claim that imposition of sentence to which defendant agreed pursuant to plea agreement constituted cruel and unusual punishment].)

Denial of Motions to Withdraw the Plea Require a Certificate of Probable Cause

A defendant who seeks to withdraw his guilty plea may do so before judgment has been entered upon a showing of good cause. (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1142; *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1616-1617; Pen. Code, § 1018.) "Good cause to withdraw a plea is shown if the defendant did not exercise free judgment in entering into the plea." (*In re Vargas, supra*, at p. 1142.) Good cause has also been defined as "mistake, ignorance or any other factor overcoming the exercise of free judgment." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) On review, the denial of a motion to withdraw the plea will be evaluated under an abuse of discretion standard of review. (*People v. Weaver* (2004) 118 Cal.App.4th 131, 145-146.)

Since such an issue seeks to overturn the plea, appellant must seek and obtain a CPC in order to raise the issue on direct appeal. (*People v. Johnson* (2009) 47 Cal.4th 668, 679.) Similarly, a CPC is required to raise a claim of IAC based on counsel's failure to assist the defendant in a motion to withdraw the plea. (*Johnson*, 47 Cal.4th at p. 681; see also *People v. Emery* (2006) 140 Cal.App.4th 560, 565 [CPC required to challenge denial of continuance to investigate grounds supporting motion to withdraw plea].) "Whether the appeal seeks a ruling by the appellate court that the guilty plea was invalid, or merely seeks an order for further

proceedings aimed at obtaining a ruling by the trial court that the plea was invalid, the primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest.” (*Johnson*, 47 Cal.4th p. 682.)

Consequences of Setting Aside a Plea

Cases on guilty pleas make clear that where a guilty plea is set aside by an appellant's appeal, all the charges are reinstated and the case can be fully prosecuted. Thus, appellant can receive any lawful maximum sentence. (*People v. Aragon* (1992) 11 Cal.App.4th 749; *People v. Kirkpatrick* (1972) 7 Cal.3d 480; *People v. Hill* (1974) 12 Cal.3d 731.) Further, the prosecution does not have to give appellant a similar plea bargain the second time around. (*People v. Schuler* (1977) 76 Cal.3d 324.)

Thus, before raising any issues which can result in setting aside the guilty plea, appellant must be informed of this consequence and asked if he wants to go ahead with setting aside the plea. (Note that this is not a problem where the issue on appeal is a search and seizure, since the remedy if the court on appeal suppresses the evidence is to remand the case to give the defendant a chance to decide whether he wants to withdraw his plea or not. [*People v. Ruggles* (1985) 39 Cal.3d 1.] However, for any issue which would result in setting aside the plea, appellant should be informed of the consequences before going ahead with the appeal. This includes search and seizure issues.)

II. Errors Going to the Validity of the Sentence

A. Sentencing Errors Are Clearly Subject to Review on Direct Appeal with the Filing of a Valid Notice of Appeal pursuant to California Rules of Court, Rule 8.304(b).

8.304(b) Appeal after plea of guilty or nolo contendere or after admission of probation violation

(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court-with the notice of appeal required by (a)-the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause.

(2) ...

(3) ...

(4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on:

(A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or

(B) Grounds that arose after entry of the plea and do not affect the plea's validity.

(5) ...

Panizzon: “Notwithstanding the broad language of section 1237.5, it is settled that two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. [Citation.]”

B. Clerical Errors Can be Corrected at Any Time

The court has the authority to correct clerical errors in the abstract of judgment at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181.) Where there is a conflict between the clerk’s transcript and the reporter’s transcript, that part of the record will prevail which, because of its origin and nature, is entitled to greater credence. (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Smith* (1983) 33 Cal.App.3d 596, 599; *People v. Stevens* (2001) 92 Cal.App.4th 11, 13, fn. 1; *People v. Harris* (1999) 72 Cal.App.4th 711, 718, fn. 4.) A conflict between the judgment of conviction as orally pronounced by the court and that recorded in the minutes of the proceedings or abstract of judgment is presumed to be a clerical error in the clerk’s transcript. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-187; *People v. Chambers* (2002) 104 Cal.App.4th 1047, 1050; see also Pen. Code, § 1207 [recording of the judgment in clerk’s minutes generally a clerical rather than judicial duty]; *People v. Price* (2004) 120 Cal.App.4th 224, 242.) The court has the authority to correct clerical errors in the abstract of judgment at any time. (*People v. Mitchell, supra*, 26 Cal.4th at p. 185.) The record of the oral pronouncement of the court controls over the clerk’s minute order. (*People v. Farrell, supra*, 28 Cal.4th at 384, fn. 2.)

C. Errors in the Calculation of Credits Can be Corrected at Any Time (Pro and Con)

An erroneous award of presentence custody credits is an act in excess of jurisdiction, and therefore may be corrected by the sentencing court whenever brought to its attention. (*People v. Jack* (1989) 213 Cal.App.3d 913, 917; *Wilson v. Superior Court* (1980) 108 Cal.App.3d 816, 818-819.) Incorrect credit determinations, whether accruing to the defendant’s favor or improperly denying credits to which appellant is entitled, constitute an unauthorized sentence and therefore can be corrected at any time. (*People v. Huff* (1990) 223 Cal.App.3d 1100, 1106.)

Errors in the calculation of credits must be challenged in the trial court by noticed motion in order not to waive the issue on appeal. (Pen. Code, § 1237.1; *People v. Fares* (1993) 16 Cal.App.4th 954.) While in the past an informal letter to the sentencing judge was sufficient as an attempt to resolve this issue, that is no longer the case. Pursuant to *People v. Clavel* (2002) 103 Cal.App.4th 516, counsel must file a noticed motion with the trial court seeking to resolve a disputed credits issue in order to properly preserve the issue for appellate review. If the issue was thoroughly litigated at sentencing or in a post-sentencing trial court hearing, then it is not necessary to seek further resolution of the issue in that court. *People v. Acosta* (1996) 48 Cal.App.4th 411, 427, states that a credits issue may be raised for the first time on appeal so long as it is not the only issue on appeal. Thus, unless the credits issue is raised along with other errors on appeal, the defendant risks having his appeal dismissed if he or she has not first attempted to remedy those errors in the trial court. An informal letter to the trial court judge is often sufficient to remedy the problem. If such informal efforts are not successful, then a formal noticed motion will be necessary under *Clavel*.

D. Penal Code section 654 Claims are Waived by a Plea Bargain

California Rules of Court, rule 4.412, subdivision (b) states that an agreement to a specified sentence abandons any claim an appellant may have under section 654:

“By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record.”

A 654 challenge to the trial court's authority to impose a negotiated top or lid sentence is a challenge to the validity of the plea and thus requires a CPC. (*People v. Shelton* (2006) 37 Cal.4th 759, 766; see also *People v. Bobbitt* (2006) 138 Cal.App.4th 445, 448 [*Blakely* challenge to negotiated sentence requires CPC]; *People v. Cuevas* (2008) 44 Cal.4th 374, 377 [certificate required for claim that the sentence imposed, which defendant was advised was the maximum possible sentence for the remaining charges after additional charges were dismissed pursuant to a plea agreement, violates the multiple punishment prohibition of § 654; challenge to negotiated plea where some charges dismissed, but sentence otherwise open to the court is an attack on validity of the plea and requires a CPC].)

E. The Failure to Object Waives Most Sentencing Errors

Any error regarding the failure to state reasons to support a sentencing choice must be objected to at the time of sentencing in order to be raised on appeal. In *People v. Scott* (1994) 9 Cal.4th 331, 356, the Supreme Court held “that complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” Failure to object waives all claims involving a trial court's failure to support its discretionary sentencing choices with adequate reasons. (*Id.*) The court upheld a defendant's right to challenge unauthorized sentences, such as claims of dual punishment under Penal Code section 654, regardless of whether an objection on that ground was made below. (*Id.* at 354, fn. 17; *People v. Hester* (2000) 22 Cal.4th 290, 295)

An unauthorized sentences may be corrected at any time, and a failure to object to such a sentence does not waive an attack on the sentence on appeal. (See *In re Birdwell* (1996) 50 Cal.App.4th 926, 931; *People v. Breazall* (2002) 104 Cal.App.4th 298, 304; *People v. Andrade* (2002) 100 Cal.App.4th 351, 354.) A related exception to the waiver rule is that it is not generally applied when the error involves a pure question of law, which can be resolved on appeal without reference to a record developed below. (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

III. Error Which Goes to the Enforcement of the Bargain

A. The Trial Court Can Reject a Plea Agreement at any Time Prior to Sentencing

Approval of the trial court is an essential element of a plea bargain. (*People v. Alvernaz* (1992) 2 Cal.4th 924, 941; *People v. Smith* (1975) 53 Cal.App.3d 655; *People v. Cardoza* (1984) 161 Cal.App.3d 40.) The trial judge retains power before the judgment is final to withdraw its approval of a plea bargain and vacate a guilty or nolo plea sua sponte. (Penal Code § 1192.5;

People v. Thornton (2006) 137 Cal.App.4th 241 [trial court has option to disapprove of agreement reached by defendant and prosecution; *People v. Akins* (2005) 128 Cal.App.4th 1376 [court retains authority not to sentence in accordance with terms of plea where subsequently learns of facts that render agreed sentence inappropriate]; *People v. Superior Court (Gifford)* (1997) 53 Cal.App.4th 1333 [court has broad discretion to withdraw prior approval of negotiated plea where court decides bargain not in the best interest of society]; *People v. Thomas* (1994) 25 Cal.App.4th 921.) The failure to advise a defendant at the time of his plea that the acceptance of the agreement is conditional does not entitle a defendant to specific enforcement of the bargain. (*People v. King* (1981) 123 Cal.App.3d 406.) If a plea agreement is unacceptable to the trial court, the remedy is to reject it. (*People v. Cunningham* (1996) 49 Cal.App.4th 1044.)

B. A Defendant is Estopped from Attacking an Unauthorized But Agreed-Upon Term

Defendants waive any right to challenge an unauthorized sentence when they specifically bargain for an agreed-upon term. (*People v. Hester* (2000) 22 Cal.4th 290, 295.) The Court stated: “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. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.”

C. Both Parties Must Adhere to the Bargain

“The reciprocal nature of a plea bargain agreement mandates that either party to the agreement be entitled to enforce the agreement in a situation where the party is deprived of the benefit of the bargain.” (*People v. Collins* (1996) 45 Cal.App.4th 849, 863; see also *People v. Mancheno* (1982) 32 Cal.3d 855, 860 [either defendant or the People may seek specific performance of a plea bargain agreement].) Neither party may “retain the favorable aspects of his negotiated disposition and at the same time jettison its unfavorable aspects.” (*People v. Velasquez* (1999) 69 Cal.App.4th 503, 507.)

The punishment may not significantly exceed that which the parties agreed upon. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.) For instance, an award of victim restitution in amount greatly exceeded that specified in plea agreement violates that agreement, resulting in the opportunity to withdraw plea. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1224-1226.)

D. The Terms of a Plea Bargain are Evaluated under Contract Law

A criminal defendant has a due process right to enforce the terms of his plea agreement. (*Santobello v. New York* (1971) 404 U.S. 257, 261-262.) In California, “a negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles,” (*People v. Shelton* (2006) 37 Cal.4th 759, 767), and “according to the same rules as other contracts.” (*People v. Toscano* (2004) 124 Cal.App.4th 340, 344.)

E. The Parties Cannot Bargain Away Certain Things

Victim Restitution Cannot be Bargained Away

Penal Code section 1202.4; *People v. Giordano* (2007) 42 Cal.4th 644, 653-654 [victims

entitled to victim restitution]; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1224-1226; *People v. Rowland* (1997) 51 Cal.App.4th 1745, 1751-1752 [plea deal which specifically calls for no victim restitution is invalid].)

F. Enforcement of the Bargain – Appeal, Coram Nobis, Habeas?

Where seeking enforcement of a plea agreement via an appeal, no certificate of probable cause is required. “On the other hand, if a defendant claims on appeal that the sentence imposed violated a plea agreement, no certificate of probable cause is required even though the result of a successful appeal could be the withdrawal of the defendant's plea. When the appeal is based upon violation of the plea agreement at sentencing, it is based upon alleged improprieties in the sentencing proceedings, and not upon any alleged invalidity of the guilty plea at the time it was entered.” (*People v. Johnson* (2009) 47 Cal.4th 668, 678-679, fn. 5.) The court will look to the substance of the claim to determine whether the claimed error constitutes an attack on the underlying validity of the plea, requiring a CPC, or whether it is an attempt to enforce the plea agreement. (*People v. Panizzon* (1996) 13 Cal.4th 68, 75-76; *People v. Johnson* (2009) 47 Cal.4th 668)

A defendant can enforce the terms of a plea bargain by bringing a motion to vacate the judgment or a writ of error coram nobis. (*People v. Collins* (1996) 45 Cal.App.4th 849, 863.) Where the terms of the bargain are not adequately shown on the record, or where the time for filing a notice of appeal has expired, a defendant can seek to enforce the terms of the bargain through habeas or coram nobis procedures.

IV. Some Errors Are Waived by a Guilty Plea, Irrespective of the Issuance of a Certificate of Probable Cause

“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; *People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1361.) Even if the trial court grants a certificate of probable cause, certain issues are waived by a guilty plea and cannot be raised on direct appeal.

A. Issues Waived by a Guilty Plea

Issues Going to Guilt or Innocence

A guilty plea admits every element of the charged offense and constitutes a conviction. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1177-1178; *People v. Laudermilk* (1967) 67 Cal.2d 272, 281.) Issues that concern the determination of guilt or innocence are not cognizable on appeal. (*Hoffard* at p. 1178; *People v. Hunter* (2002) 100 Cal.App.4th 37, 42; *People v. Ribero* (1971) 4 Cal.3d 55, 63.)

See FDAP Manual, Guilty Plea Appeals, Issues Waived and Issues Cognizable, last updated September, 2003, for additional law concerning issues that survive a plea.