ATTACK AND ENFORCEMENT OF PLEA BARGAINS

By: Jonathan Grossman

A. What is a Plea?

A guilty plea is "more than a confession which admits that the accused did various acts," it is a "stipulation that no proof by the prosecutor need be advanced." (*Boykin v. Alabama* (1969) 395 U.S. 238, 243, 242-243 & fn. 4.) "A guilty plea is the 'legal equivalent' of a 'verdict' [citation] and is 'tantamount' to a 'finding' [citations.]" (*People v. Statum* (2002) 28 Cal.4th 682, 688, fn. 2.) The same applies if the defendant plead no contest. (Pen. Code, § 1016, subd. 3.)

There are also slow pleas:

> "[T]he term 'slow plea' . . . is an agreed-upon disposition of a criminal case via any one of a number of contrived procedures which does not require the defendant to admit guilt but results in a finding of guilt on an anticipated charge and, usually, for a promised punishment." Perhaps the clearest example of a slow plea is a bargained-for submission on the transcript of a preliminary hearing in which the only evidence is the victim's credible testimony, and the defendant does not testify and counsel presents no evidence or argument on defendant's behalf. Such a submission is "tantamount to a plea of guilty" because "the guilt of the defendant [is] apparent on the basis of the evidence presented at the preliminary hearing and . . . conviction [is] a foregone conclusion if no defense [is] offered." [Citations.]
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> Submissions that are not considered slow pleas include those in which (1) the preliminary hearing involves substantial cross-examination of the prosecution witnesses and the presentation of defense evidence or (2) the facts revealed at the preliminary examination are essentially undisputed but counsel makes an argument to the court as to the legal significance to be accorded them. (*In re Mosley,* [(1970)] 1 Cal.3d [913] at pp. 924-925, fn. 9.)
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> A wide variety of submissions that fall between these extremes, however, present troublesome classification problems. . . . [¶] An appellate court, in determining whether a submission is a slow plea, must assess the circumstances of the entire proceeding. It is not enough for a reviewing court to simply count the number of witnesses who testified at the hearing following the submission. A submission that prospectively appeared to be a slow plea

> may turn out to be part of a full-blown trial if counsel contested the sufficiency of evidence for those counts or presented another potentially meritorious legal argument against conviction. Conversely, a submission that did not appear to be a slow plea because the defendant reserved the right to testify and call witnesses or to argue the sufficiency of the evidence (see *People v. Guerra* (1971) 21 Cal.App.3d 534, 538) may turn out to be a slow plea if the defense presented no evidence or argument contesting guilt. [¶] If it appears on the whole that the defendant advanced a substantial defense, the submission cannot be considered to be tantamount to a plea of guilty. Sometimes, a defendant's best defense is weak. He may make a tactical decision to concede guilt as to one or more of several counts as part of an overall defense strategy. A submission under these circumstances is not a slow plea, and the trial court is not constitutionally compelled by *Boykin* and *Tahl* to administer the guilty-plea safeguards to assure that the tactical decision is voluntary and intelligent. The advisements and waivers in such a case are required only as a matter of the judicial policies that underlie our decision in *Bunnell*.

(*People v. Wright* (1987) 43 Cal.3d 487, 496-497, citing *Boykin v. Alabama* (1969) 395 U.S. 238, *In re Tahl* (1969) 1 Cal.3d 122, 132, and *Bunnell v. Superior Court* (1975) 13 Cal.3d 592.)

Submission was tantamount to a guilty plea in:

Brookhart v. Janis (1966) 384 U.S. 1, 7-8, submitted on the transcripts with no intention of presenting witnesses, cross-examining witnesses or having the defendant testify.

People v. Tran (1984) 152 Cal.App.3d 680, 683, there was one witness, no cross-examination, no defense, no argument, and the record suggested a negotiated disposition.

In re Mosley (1970) 1 Cal.3d 913, 927, where "the defendant submits his case on a transcript of the preliminary hearing which under the circumstances can offer him no hope of acquittal, such submission is tantamount to a plea of guilty and must be accompanied by the constitutional and statutory safeguards which such a plea entails."

People v. Levey (1973) 8 Cal.3d 648, 651, "he understood the transcript contained only evidence pointing to his guilt and no evidence indicating his innocence, and that the court would in all likelihood find him guilty as charged." Also, the record suggested there was a negotiated disposition. At the preliminary hearing, he only asked general questions to the prosecution witnesses; no defense was presented.

See *People v. Leonard* (1996) 50 Cal.App.4th 878, 882, the court assumed a submission on the record was a "slow plea" when a suppression motion was litigated at the preliminary hearing which was renewed in a section 995 motion, and then the defendant submitted the matter on the preliminary hearing transcript.

People v. Little (2004) 115 Cal.App.4th 766, 776 when the defendant stipulated to

every element to the crime.

Submission was *not* tantamount to a guilty plea in:

Florida v. Nixon (2004) 543 U.S. 175, 188-189, defense counsel conceded guilt in a capital case when the prosecution was still required to present evidence, and the defendant subjected witnesses to cross-examination.

People v. Wright (1987) 43 Cal.3d 487, 497-499, submitted on the transcripts but reserved the right to present evidence, litigated suppression motion and a *Miranda* motion, at the preliminary hearing the defendant argued witnesses could not connect defendant to the crimes and presented five witnesses including the defendant, the defendant argued lack of malice; it was the best defense that could be presented.

People v. Sanchez (1995) 12 Cal.4th 1, 29, the defendant extensively cross-examined prosecution witnesses and called two of them at the preliminary examination, argued at trial to strike some portions of the testimony, and moved for an acquittal arguing insufficient evidence.

People v. Stone (1994) 27 Cal.App.4th 276, 282-283, defendant submitted on the grand jury testimony but argued to the judge there was insufficient evidence of mens rea and the prosecution witness was not credible, asked for assurances from the court that he not be prejudged, and was acquitted of some counts.

People v. Dakin (1988) 200 Cal.App.3d 1026, 1032, there was a vigorous cross-examination and argued the legal significance of the facts at the preliminary examination, moved to dismiss under Penal Code section 995.

When there is a slow plea which is tantamount to a guilty plea, the failure to advise of constitutional rights is reversible per se. (*People v. Levey* (1973) 8 Cal.3d 648, 654; *In re Mosley* (1970) 1 Cal.3d 913, 924-926; see *People v. Wright* (1987) 43 Cal.3d 487, 493-494; but see *People v. Calvert* (1993) 18 Cal.App.4th 1820, 1837-1838 [used test under *People v. Howard* (1992) 1 Cal.4th 1132, 1177 for prejudice; no reversal because record showed defendant understood his rights and voluntarily submitted on the transcripts].) When the submission is not tantamount to a plea of guilty, failure to advise the defendants of the rights being waived requires reversal only if there is prejudice; that is, it is more likely than not the defendant would not have submitted. (*People v. Sanchez* (1995) 12 Cal.4th 1, 30-31; *People v. Wright* (1987) 43 Cal.3d 487, 495.)

Article I, section 16 of the California Constitution requires an express waiver of the right to jury by the defendant and defendant's counsel. (*People v. Ernst* (1994) 8 Cal.4th 441, 444, 448.) A court trial resulting from no personal waiver of the right to jury is a structural error automatically requiring reversal. (*Id.*, at p. 449.) But this does not mean a plea of guilty is reversible per se without express waiver of the jury right because there the issue is whether the plea was voluntary. (*Id.* at pp. 445-446.)

B. What is a Plea Bargain?

"There are two types of guilty or no contest pleas in California: (1) a conditional plea, where the plea is conditioned upon receiving a particular disposition; and (2) an unconditional or open plea." (*People v. Holmes* (2004) 32 Cal.4th 432, 435.) A conditional plea occurs "[w]hen a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024; see, e.g, *People v. Williams* (1998) 17 Cal.4th 148, 156.)

Defendant can enter an open plea to every charge over the prosecution's objection. (*People v. Orin* (1975) 13 Cal.3d 937, 946-947; accord, *People v. Ernst* (1994) 8 Cal.4th 441, 447 [the prosecution cannot block the defendant from pleading by refusing to waive its right to jury trial].) An open plea is generally defined as a plea with no promises. (*People v. Williams* (1998) 17 Cal.4th 148, 156; *Liang v. Superior Court* (2002) 100 Cal.App.4th 1047, 1056.) When the defendant pleads "open," however, the court is permitted to give an indicated judgment. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296 *People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909, 915-916; *People v. Superior Court (Felman)* (1976) 59 Cal.App.3d 270.) An indicated judgment is the penalty the court announces it would give if defendant pleads guilty or is convicted under the same facts. (*People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909, 915-916; accord, *People v. Vergara* (1991) 230 Cal.App.3d 1564, 1567-1568.) Penal Code section 1192.7 does not prohibit the court from making an indicated judgment in cases involving serious felonies. (*Bryce v. Superior Court* (1988) 205 Cal.App.3d 671; see also *People v. Arauz* (1992) 5 Cal.4th 663.) If the defendant pleads after the court gives an indicated judgment, but the court does not follow its indicated judgment, the defendant can withdraw his plea. (*People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1271.)

A plea bargain is generally an agreement to limit the defendant's penalty in exchange for a guilty plea. (*People v. Cole* (2001) 88 Cal.App.4th 850, 858.) A plea bargain occurs when the defendant admits to a lesser charge, or pleads guilty to some charges in exchange for dismissal of other allegations; any plea bargain is subject to court approval. (*People v. Allan* (1996) 49 Cal.App.4th 1507.) When there is a plea bargain, the court can reject the agreement but it cannot change the terms of the agreement unless the parties agree. (*People v. Segura* (2008) 44 Cal.4th 921, 931; *People v. Superior Court (Gifford)* (1997) 53 Cal.App.4th 1333.)

A plea bargain requires the prosecution's consent. (*People v. Orin* (1975) 13 Cal.3d 937, 943; *People v. Superior Court (Himmelsbach)* (1986) 186 Cal.App.3d 524, 532; see also *People v. Turner* (2004) 34 Cal.4th 406, 417-419 [judge could not agree to no death

penalty in exchange for admitting special circumstances]; *Sanchez v. Superior Court* (2002) 102 Cal.App.4th 1266, 1269 [cannot plead to a lesser included offense without the prosecution's approval]; *People v. Allan* (1996) 49 Cal.App.4th 1507 [the court cannot dismiss charges over the prosecutor's objection in exchange for defendant's plea].)

C. Enforcing a Plea Bargain or Withdrawing a Plea

1. When is a plea bargain enforceable?

The prosecution can withdraw a plea offer after defendant accepts it but before the entry of a plea (unless there is detrimental reliance). (See, e.g., *People v. McClaurin* (2006) 137 Cal.App.4th 241, 249-250; *In re Kenneth H.* (2000) 80 Cal.App.4th 143, 148-149; *People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1353-1355; *People v. Anderson* (1982) 129 Cal.App.3d 491, 495; *People v. Dougherty* (1981) 123 Cal.App.3d 314, 319; *People v. Brown* (1986) 177 Cal.App.3d 537, 557, fn. 22 [cannot compel prosecutor to reinstate the offer]; see *People v. Brunner* (1973) 32 Cal.App.3d 908, 915.) "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here." (*Mabry v. Johnson* (1984) 467 U.S. 504, 507-508, fns. omitted.)

"A defendant relies upon a [prosecutor's] plea offer by taking some substantial step or accepting serious risk of an adverse result following acceptance of the plea offer. [Citation.] Detrimental reliance may be demonstrated where the defendant performed some part of the plea bargain." (*People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1353-1354; accord, *In re Kenneth H.* (2000) 80 Cal.App.4th 143, 148-149 [detrimental reliance when paid for and took a lie detector test].) The court can still reject the plea bargain even if the defendant detrimentally relied on the promise which now binds the prosecution. (See *In re Kenneth H.* (2000) 80 Cal.App.4th 143, 148.)

A court is not bound to a plea bargain until it sentences the defendant (see Pen. Code, § 1192.5; *People v. Cruz* (1988) 44 Cal.3d 1247, 1250-1253; *In re Jermaine B.* (1999) 59 Cal.App.4th 634) but it must allow the defendant to withdraw the plea if it refuses to sentence the defendant according to the agreement.

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, is that it can be said to be part of the inducement or consideration, such promises must be fulfilled." (*Santobello v. New York* (1971) 404 U.S. 257, 262.) "[T]he parties must

adhere to the terms of the plea bargain." (*People v. Walker* (1991) 54 Cal.3d 1013, 1020.)

"The Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea [citation], but that the requirements of due process attach also to implementation of the bargain itself. It necessarily follows that violation of the plea bargain by an officer of the state raises a constitutional right to some remedy." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860 [failure to order a CDC diagnostic study as promised was a breach of the agreement], relying on *Santobello v. New York* (1971) 404 U.S. 257, 262 [when the prosecution recommended the maximum one year term at the sentencing hearing after promising not to make a recommendation, there was a breach of the agreement]; accord, *People v. Quartermain* (1997) 16 Cal.4th 600, 620 [breach of the agreement made before trial for defendant to cooperate in the investigation that his statements could not be used against him violated due process]; *People v. Olea* (1977) 59 Cal.App.4th 1289 [the court requiring defendant to register as a sex offender after it was agreed he would plead to a charge that did not require registration was a violation of the agreement].) Once the court accepts a plea (and sentences the defendant), it cannot change the agreement. (*People v. Segura* (2008) 44 Cal.4th 921, 931.)

2. What are the terms of the plea bargain?

"In any given case, there may be a violation of the advisement requirement, of the plea bargain, or of both. Although these possible violations are related, *they must be analyzed separately*, for the nature of the rights involved and the consequences of a violation differ substantially." (*People v. Walker* (1991) 54 Cal.3d 1013, 1020.) "The first principle concerns the necessary advisements . . . . The defendant must be admonished of and waive his constitutional rights. [Citations.] In addition, . . . the defendant must be advised of the direct consequences of the plea." (*Id.* at pp. 1019-1020.) If the defendant can prove the court did not properly advise him or her of the constitutional rights and the direct consequences of the plea, and the defendant can show he or she would not have pled had there been a proper advisement, the remedy is to permit the defendant to withdraw the plea. (*Id.* at pp. 1020, 1022-1023.) "The second principle is that the parties must adhere to the terms of the plea bargain." (*Id.* at p. 1020.) This error occurs even if the defendant were properly advised of all direct consequences of the plea. (*Id.* at p. 1020.)

"Under *Santobello v. New York*, 404 U.S. 257, 261-62 . . . (1971), a criminal defendant has a due process right to enforce the terms of his plea agreement. *See also Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003) ('[The defendant's] due process rights conferred by the federal constitution allow [him] to enforce the terms of the plea agreement.'). . . . [T]he construction and interpretation of state court plea agreements 'and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness,

matters of state law.' *Ricketts v. Adamson*, 483 U.S. 1, 6 n.3, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987). In California, '[a] negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles,' *People v. Shelton*, 37 Cal. 4th 759, 767 . . . (2006), and 'according to the same rules as other contracts,' *People v. Toscano*, 124 Cal. App. 4th 340, 344 . . . (2004) (cited with approval in *Shelton* along with other California cases to same effect dating back to 1982). Thus, under *Adamson*, California courts are required to construe and interpret plea agreements in accordance with state contract law." (*Buckley v. Terhune* (9th Cir. 2006) 441 F.3d 688, 694 (en banc).)

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intentions of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) On the other hand, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisee understood it." (*Id.,* § 1649; *AIU* [*Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807,] 822.)' (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265.) 'The mutual intentions to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract the object, nature, and subject matter of the contract; and the subsequent conduct of the parties. (Civ. Code, §§ 1635-1656; Code Civ. Proc., §§ 1859-1861, 1864 . . . .)' [Citations.]." (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) "To resolve the ambiguity, we consider the circumstances under which this term of the plea agreement was made, and the matter to which it relates (Civ. Code, § 1647) to determine the sense in which the prosecutor and the court (the promisors) believed, at the time of making it, that the defendant (the promisee) understood it (*id.,* § 1649)." (*People v. Shelton* (2006) 37 Cal.4th 759, 767-768; accord *People v. Segura* (2008) 44 Cal.4th 921, 930-931; *People v. Toscano* (2004) 124 Cal.App.4th 340, 344.)

"The terms of a plea agreement must be placed on the record." (*In re Honesto* (2005) 130 Cal.App.4th 81, 92.) "A plea violation claim depends upon the actual terms of the agreement, not the subjective understanding of the defendant or the deficient advice of his attorney." (*In re Honesto* (2005) 130 Cal.App.4th 81, 92; *People v. Toscano* (2004) 124 Cal.App.4th 340, 344.)

3. What is the defendant's remedy for violation of the plea bargain?

"[A] plea bargain may be enforced through specific performance [citations] or the defendant may be permitted to withdraw her guilty plea [citations]." (*United States v. Franco-Lopez* (9th Cir. 2002) 312 F.3d 984, 989.)

The state supreme court has avoided specific performance when it would limit the discretion of the sentencing court. (See, e.g, *People v. Cruz* (1988) 44 Cal.3d 1247, 1250, fn. 2.) The court has stated:

> The goal in providing a remedy for breach of the bargain is to redress the harm caused by the violation without prejudicing either party or curtailing the normal sentencing discretion of the trial judge. The remedy chosen will vary depending on the circumstances of each case. Factors to be considered include who broke the bargain and whether the violation was deliberate or inadvertent, whether circumstances have changed between entry of the plea and the time of sentencing, and whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate. Due process does not compel that a particular remedy be applied in all cases. [Citation.]
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> The usual remedies for violation of a plea bargain are to allow defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain. *Courts find withdrawal of the plea to be the appropriate remedy when specifically enforcing the bargain would have limited the judge's sentencing discretion* in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing. Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances.
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> "Specific enforcement of a plea bargain agreement is actually a broad term covering several different types of relief. The remedy differs depending upon the nature of the breach and which party is seeking specific enforcement. When the breach is a refusal by the prosecutor to comply with the agreement, specific enforcement would consist of an order directing the prosecutor to fulfill the bargain. When the breach is a refusal by the court to sentence in accord with the agreed upon recommendation, specific enforcement would entail an order directing the judge to resentence the defendant in accord with the agreement. The People as well as a defendant may seek such specific enforcements. The effect is to limit the remedy to an order directing fulfillment of the bargain. In such instances, the defendant is not allowed to withdraw his guilty plea." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 13.)

(*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861, emphasis added.)

Courts generally prefer the remedy of permitting the defendant to withdraw the plea. (See, e.g., *People v. Calloway* (1981) 29 Cal.3d 666, 671-673 [plea bargain for probation but defendant sentenced to prison, the remedy was withdrawal of the plea or admission of VOP because specific performance would limit the discretion of the sentencing court]; *People v. Johnson* (1974) 10 Cal.3d 868, 873 [plea bargain for probation but sentenced to prison after the court learned he lied about his identity and his true criminal record; the correct remedy was to permit withdrawal of the plea, not specifically require probation]; *People v. Kaanehe* (1977) 19 Cal.3d 1, 14-15 [plea bargain was that the prosecution would not argue at sentencing hearing but did so; the remedy was to resentence the defendant without the prosecution's arguments or permit him to withdraw his plea]; but see *People v. Arata* (2007) 151 Cal.App.4th 778, 786-788 [specific performance when expungement was a condition of the plea].)

Specific performance has been used when it does not diminish the court's sentencing power. (See, e.g., *People v. Cruz* (1988) 44 Cal.3d 1247, 1250 [requiring sentencing according to the plea bargain though the defendant failed to appear at the sentencing hearing or permit him to withdraw his plea]; *People v. Mancheno* (1982) 32 Cal.3d 855, 860-861 [promise of a CDC diagnostic study]; *People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757 [requiring the judge who accepted the plea to sentence the defendant].)

Specific performance has been used to enforce a minor provision of the plea bargain when the remedy of withdrawing the plea would be more onerous. (See, e.g., *People v. Walker* (1991) 54 Cal.3d 1013, 1026-1029 [the court imposed a restitution fine not part of the bargain].)

Federal courts have held that specific performance is required in California cases when the defendant has already performed. (See, e.g., *Buckley v. Terhune* (9th Cir. 2006) 441 F.3d 688, 698-699 (en banc) [paroled after 15 years for second degree murder when this was promised]; *Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155, 1161-1162 [enforced agreement that defendant can do half time in prison]; *Davis v. Woodford* (9th Cir. 2006) 446 F.3d 957, 961 [when defendant entered a plea bargain that several robberies would be one serious felony prior, there could be only one strike]; see also *People v. Arata* (2007) 151 Cal.App.4th 778, 786-788 [specific performance when expungement was a condition of the plea].) This is so, even if the sentence would be illegal: "This may be a problem for the state, but not for [the defendant]." (*Brown, supra,* at p. 1161.) "Under the circumstances of this case, it would be unjust to simply vacate the guilty plea, which theoretically would allow the state to reindict [defendant]. Since he has already performed his side of the plea bargain, fundamental fairness demands that the state be compelled to adhere to the agreement as well." (*United States ex rel. Ferris v. Finkbeiner* (7th Cir. 1977) 551 F.2d 185, 187, citing *Santobello v. New York* (1971) 404 U.S. 257; see *Cunningham v. Diesslin* (10th Cir.

1996) 92 F.3d 1054, 1059; *Nunes v. Muller* (9th Cir. 2003) 350 F.3d 1045, 1056.)

There can be implied terms of the plea bargain if a defendant would reasonably expect certain terms to be part of the plea agreement. For example, when a defendant pleads, there is an implied term that the same judge will sentence him or her, unless this is waived. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757 & fn. 5; see *In re Mark L.* (1983) 34 Cal.3d 171, 176-178 [delinquency case]; but see *People v. Dunn* (1986) 176 Cal.App.3d 572, 575 [judge retired]; *People v. Jackson* (1987) 193 Cal.App.3d 393, 402-403 [judge ill].) There can be a different judge on a violation of probation. (*People v. Beaudrie* (1983) 147 Cal.App.3d 686, 693-694.)

The court cannot increase the jail sentence if defendant fails to report to jail after a stay or fails to appear for sentencing, unless an increased in punishment is part of the plea bargain. (*People v. Cruz* (1988) 44 Cal.3d 1247, 1253; *People v. Gooch* (1995) 33 Cal.App.4th 1004; *People v. Jensen* (1992) 4 Cal.App.4th 978, 982-983 [*Cruz* waiver arrived at after the agreement was invalid]; *People v. Morris* (1979) 97 Cal.App.3d 358, 360-364.) The court, of course, can increase the penalty if it is part of the plea bargain. (*People v. Puente* (2008) 165 Cal.App.4th 1143, 1148 [can include waiver of presentence credits]; *People v. Vargas* (2007) 148 Cal.App.4th 644, 647-649 [waiver til a certain date for sentencing included the ability to increase punishment if the defendant committed a new crime at a later date]; *People v. Carr* (2006) 143 Cal.App.4th 786, 789-792 [the court was not required to provide formal written notice that the defendant's conduct permitted increased punishment under the agreement]; *People v. Masloski* (2001) 25 Cal.4th 1212, 1220; *People v. Vargas* (1990) 223 Cal.App.3d 1107, 1112.)

If the defendant was not advised of the option to withdraw the plea, the defendant can seek enforcement of the plea bargain on appeal if the court imposes a significant fine which was not disclosed before the plea. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024-1025, 1029 [but the court must impose the mandatory minimum restitution fine]; *People v. Clark* (1992) 7 Cal.App.4th 1041, 1050.) But when the court advises the defendant of a restitution fine without an express agreement of the amount, the court has full discretion in setting the amount. (*People v. Crandell* (2007) 40 Cal.4th 1301, 1309-1310; *People v. Sorenson* (2005) 125 Cal.App.4th 612, 619-620; *People v. Dickerson* (2004)124 Cal.App.4th 1374, 1384; *People v. Knox* (2004) 123 Cal.App.4th 1453, 1461.)

Mandatory provisions must be imposed, even if the defendant were not advised of them and did not agree to them as part of the bargain. (*People v. Collins* (2003) 111 Cal.App.4th 726, 730-734 [victim restitution]; *In re Moser* (1993) 6 Cal.4th 342, 353-354 [cannot enforce no parole]; *People v. McClellan* (1993) 6 Cal.4th 367, 377 [cannot enforce no sex registration when not part of the plea bargain]; *People v. Walker* (1991) 54 Cal.3d

1013, 1027-1028 [must imposed statutory minimum restitution fine unless the court makes the proper findings]; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1414 [mandatory penalty assessments]; *People v. Hove* (1999) 76 Cal.App.4th 1266 [victim restitution]; *People v. Rowland* (1997) 51 Cal.App.4th 1745, 1748-1749 [$143,500 in victim restitution when there was already a civil judgment against him for that amount]; *People v. Nystrom* (1992) 7 Cal.App.4th 1177, 1181 [$12, 866 in victim restitution]; contra *People v. Brown* (2007) 147 Cal.App.4th 1213, 1220-1224 [violated plea bargain when told would pay about $280 in victim restitution but assessed $34,000]; but see *Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155, 1161 [enforced agreement that defendant would do half time in prison].)

The defendant cannot withdraw the plea because he or she agreed to an illegal sentence as part of the bargain. (*People v. Hester* (2000) 22 Cal.4th 290 [Pen. Code, § 654 error]; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1427-1428 [court increased an unexecuted sentence when it reimposed probation]; *People v. Vera* (2004) 122 Cal.App.4th 970, 982-983 [prior serious felony conviction was dismissed as part of the plea bargain]; *People v. Jones* (1989) 210 Cal.App.3d 124, 136 [two serious felony priors based on same conviction]; *People v. Ellis* (1987) 195 Cal.App.3d 334, 342-347 [5 year prior for a non-serious felony]; *People v. Otterstein* (1987) 189 Cal.App.3d 1548, 1550-1552 [great bodily injury enhancement on a conviction for battery with serous bodily injury]; *People v. Webb* (1986) 186 Cal.App.3d 401, 411-412 [plea bargain included dismissing a serious felony].) " 'When, as here, the court has jurisdiction of the subject, a party who seeks or consents to action beyond the court's power, as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. [Citation.] Whether he shall be estopped depends on the importance of the irregularity not only to the parties but to the functioning of the courts and in some instances on other considerations of public policy. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when "To hold otherwise would permit the parties to trifle with the courts." ' (*In re Griffin* [(1967) 67 Cal.2d 343,] 347-348 . . . .)" (*People v. Beebe* (1989) 216 Cal.App.3d 927, 932-933 [court agreed to reduce a conviction for § 288 to child molest upon successful completion of probation without the prosecutor's approval]; accord, *People v. Flood* (2003) 108 Cal.App.4th 504, 508; but see *In re Williams* (2000) 83 Cal.App.4th 936, 945-946 [plea bargain void when the illegal sentence benefitted the defendant]; *People v. Ellis* (1987) 195 Cal.App.3d 334, 343, criticized on other points in *People v. Panizzon* (1996) 13 Cal.4th 68, 89, fn. 15 [cannot agree to a sentence when lack of fundamental jurisdiction]; *People v. Gilchrist* (1982) 133 Cal.App.3d 38, 44 [cannot extend the period of probation by stipulation]; *In re Bolley* (1982) 129 Cal.App.3d 555, 557 [same].)

Generally, if the defendant violates probation, the court need not continue to follow the plea agreement. (*People v. Hopson* (1993) 13 Cal.App.4th 1; *People v. Martin* (1992) 3 Cal.App.4th 482, 487; *People v. Bookasta* (1982) 136 Cal.App.3d 296, 299-300; *People*

v. Jones (1982) 128 Cal.App.3d 253, 262; *People v. Allen* (1975) 46 Cal.App.3d 583, 590; *People v. Turner* (1975) 44 Cal.3d 583, 590.)

The court could not add a discretionary sex registration requirement when it was not part of the agreement. (*People v. Olea* (1997) 59 Cal.App.4th 1289.)

4. The prosecutor's power to enforce the plea bargain

The defendant generally cannot withdraw the plea or change the terms of the bargain to avoid immigration consequences. (*People v. Segura* (2008) 44 Cal.4th 921, 932-936; *People v. Paredes* (2008) 160 Cal.App.4th 496, 511-512; *People v. Superior Court (Gifford)* (1997) 53 Cal.App.4th 1337-1338; see *People v. Mendoza* (2009) 171 Cal.App.4th 1142, 1156-1157.)

The Prosecution can withdraw the plea when the defendant fails to cooperate with the investigation of the crime as promised. (*People v. Collins* (1996) 45 Cal.App.4th 849, 862-865.)

The prosecution can withdraw the defendant's plea when it was part of a packaged deal and the codefendant withdrew his plea. (*Liang v. Superior Court* (2002) 100 Cal.App.4th 1047, 1050.)

The prosecution can enforce the plea bargain. For example, when the defendant waives the right to appeal, the appeal can be dismissed. (*People v. Panizzon* (1996) 13 Cal.4th 68, 84-85; *People v. Aparacio* (1999) 74 Cal.App.4th 286; *People v. Nguyen* (1993) 13 Cal.App.4th 114.) But a waiver of appellate rights does not apply to " 'possible future error' [that] is outside the defendant's contemplation and knowledge at the time the waiver is made." (*Panizzon, supra,* 13 Cal.4th at p. 85; accord, *People v. Mumm* (2002) 98 Cal.App.4th 812, 815 [though defendant waived the right to appeal a prior conviction, this was before the court found it to be a strike]; *People v. Sherrick* (1993) 19 Cal.App.4th 657, 659; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662; see *In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157; but see *People v. Foster* (2002) 101 Cal.App.4th 247, 251 [when defendant waived right to appeal the future sentence, he waived objection to chemical castration order made at a subsequent hearing].)

A defendant can waive the right to file a federal petition for writ of habeas corpus. (*Whitmore v. Arkansas* (1990) 495 U.S. 149, 165; *Comer v. Stewart* (9th Cir. 2000) 215 F.3d 910, 917-918; *United States v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1074.)

A defendant cannot waive a claim of ineffective assistance of counsel. (*Washington*

v. Lambert (9th Cir. 2005) 422 F.3d 864, 871; *DeRoo v. United States* (8th Cir. 2000) 223 F.3d 919, 923-924; *Jones v. United States* (7th Cir. 1999) 167 F.3d 1142, 1145; *United States v. Cocerham* (10th Cir. 2001) 237 F.3d 1179, 1187; *United States v. Henderson* (5th Cir. 1995) 72 F.3d 463, 465; *United States v. Craig* (4th Cir. 1993) 985 F.2d 175, 178.)

The defendant cannot waive the claim he was incompetent when he pled. (*Pate v. Robinson* (1966) 383 U.S. 375, 384; see *People v. Shipman* (1965) 62 Cal.2d 226, 229.)

Defendant can waive the filing of a civil rights suit. (*Newton v. Rumey* (1987) 480 U.S. 386, 397-398.)

Defendant can waive *Brady* error. (*United States v. Ruiz* 2002) 536 U.S. 622, 633.)

Defendant can waive presentence credits. (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318 [including credits not yet earned]; *People v. Arnold* (2004) 33 Cal.4th 294, 304-309 [waiver assumed to apply to future violations of probation]; *People v. Johnson* (2002) 28 Cal.4th 1050, 1056-1057 [though total penalty is greater than statutory maximum]; *People v. Hilger* (2005) 131 Cal.App.4th 1528, 1531-1532 [at VOP]; *People v. Johnson* (1978) 82 Cal.App.3d 183, 188.)

D. Grounds for Withdrawing a Plea

The defendant must show he or she: (1) was not told of the direct consequence (or was misadvised), (2) knew not of the consequences (or otherwise involuntary), and (3) would not have pled if had known. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1178; *In re Alvernaz* (1992) 2 Cal.4th 924, 933-934; *People v. Soto* (1996) 46 Cal.App.4th 1596, 1606.)

1. Advisements

a. Constitutional rights

The court must give "the necessary advisements whenever a defendant plead guilty, whether or not the guilty plea is part of the plea bargain. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) In addition, and pertinent to this case, the defendant must be advised of the direct consequences of the plea. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.)" (*People v. Walker* (1991) 54 Cal.3d 1013, 1019-1020; *People v. Knox* (2004) 123 Cal.App.4th 1453, 1459.)

"Several federal constitutional rights are involved in a waiver that takes place when

a plea of guilty is entered in a state criminal trial. First the privilege against compulsory self-incrimination . . . . [Citation.] Second, is the right to trial by jury. [Citation.] Third, is the right to confront one's accusers. [Citation.]" (*Boykin v. Alabama* (1969) 395 U.S. 238, 243; *In re Tahl* (1969) 1 Cal.3d 122, 132.)

The required advisements and waivers apply not only to pleas of guilty or no contest to the charged crimes but also admissions of enhancements. (*In re Yurko* (1974) 10 Cal.3d 857, 863-864; accord, *People v. Mosby* (2004) 33 Cal.4th 353, 360.) The required advisements and waivers also apply to pleas of not guilty by reason of insanity unless the defendant also pleads not guilty. (*People v. Rizer* (1971) 5 Cal.3d 35, 36; *People v. McIntyre* (1989) 209 Cal.App.3d 548.)

As part of the Sixth Amendment right to notice, the defendant should be told of the "true nature of the charge against him" before the plea. (*Henderson v. Morgan* (1976) 426 U.S. 637, 647; *Smith v. O'Grady* (1941) 312 U.S. 329, 332-334; see *Marshall v. Lonberger* (1983) 459 U.S. 422, 436-437 [court saying defendant is pleading to the indictment was sufficient when defendant was represented by counsel]; *In re Ronald E.* (1977) 19 Cal.3d 315, 324-325 [sufficient defendant understood the nature of the allegation, though not necessarily every element].) The defendant cannot withdraw the plea because of a faulty indictment. (*Tollett v. Henderson* (1973) 411 U.S. 258, 267 [a challenge to the grand jury system could not be raised after a plea].) The plea bargain was void when the defendant admitted to an offense that did not exist. (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 79-81 [pled to conspiracy to commit attempted murder which is not a crime].)

The defendant should be advised by counsel of potential defenses. (*In re Williams* (1969) 1 Cal.3d 168, 177; *People v. Harvey* (1984) 151 Cal.App.3d 660, 668-671; but see *United States v. Broce* (1989) 488 U.S. 563, 573 [there is no requirement the defendant give an express a waiver of a specific defense].) The defendant trying to give his side of the story when he pled guilty does not necessarily mean he believed he was innocent; rather it shows he attempted to mitigate his actions. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 185.)

There must be a factual basis for a plea pursuant to a plea bargain. (Pen. Code, § 1192.5, subd. (c).) And "a bare bones statement by the judge that a factual basis exists without [an] inquiry is inadequate . . . . " (*People v. Holmes* (2004) 32 Cal.4th 432, 436.) The court must ask the defendant to describe his conduct or question the defendant about the facts in the complaint, or verify the facts in a plea agreement, or ask the attorney to stipulate to certain documents. (*Id.*, at p. 448.) A factual basis is less than a prima facie case. (*Id.*, at p. 441) It might be adequate for defense counsel to simply stipulate there is a factual basis for the plea. (See *id.*, at p. 438, fn. 8; see, e.g., *People v. McGuire* (1991) 1 Cal.App.4th 281.) A factual basis should be ascertained before the plea. (See *People v. Tigner*

(1982) 133 Cal.App.3d 430, 432.) But it can be ascertained at sentencing. (*People v. Coulter* (2008) 163 Cal.App.4th 1117, 1121-1123.) A plea will not be reversed because there was no factual basis when there was no plea bargain. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1182, 1184 [not required for an open plea].) An inconsistent prosecution theory of guilt concerning the codefendants is not a ground for withdrawing a plea. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 187.)

b. Direct consequences

The defendant must be aware of the direct consequences of the plea for there to be a knowing and intelligent waiver of the constitutional rights. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) But recently, courts have said that the advisement of direct consequences is not constitutionally compelled: "Unlike the admonition of constitutional rights, however, advisement as to the consequences of a plea is not constitutional mandated. Rather, the rule compelling such advisement is 'a judicially declared rule of criminal procedure.' (*People v. Wright* [(1987)] 43 Cal.3d [487,] 495, citing *In re Yurko* (1974) 10 Cal.3d 857, 864.)" (*People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023.)

The court must advise of direct consequences but not indirect (collateral) consequences. (*Brady v. United States* (1970) 397 U.S. 742, 748; *In re Moser* (1993) 6 Cal.4th 342, 351.)

"A consequence is 'direct' where it presents 'a definite, immediate and largely automatic effect' on the defendant's range of punishment." (*People v. Moore* (1998) 69 Cal.App.4th 626, 630; *United States v. Kikuyama* (9th Cir. 1997) 109 F.3d 536, 537.) "A consequence is considered 'collateral' if it 'does not "inexorably follow"from a conviction of the offense involved in the plea.' " (*People v. Moore* (1998) 69 Cal.App.4th 626, 630.)

Direct consequences include:

The penalty for the crimes. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; see *United States v. Barrios-Gutierrez* (9th Cir. 2001) 255 F.3d 1024, 1027 [maximum potential punishment].)

Terms of the plea bargain. (*Santobello v. New York* (1971) 404 U.S. 257, 261-262.)

Potential civil commitment due to the conviction? (See *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605 [dictum]; contra *People v. Renfro* (2004) 125 Cal.App.4th 223, 231 [potential MDO commitment]; *People v. Ibanez* (1999) 76 Cal.App.4th 537 [potential SVP commitment]; *People v. Moore* (1998) 69 Cal.App.4th 626, 632-633 [potential SVP commitment].)

Fines and penalty assessments. (*People v. Sorenson* (2005) 125 Cal.App.4th 612, 620.)

Parole. (*In re Moser* (1993) 6 Cal.4th 342, 351-352; but see *United States v. Timmreck* (1979) 441 U.S. 782, 783-784 [failure to advise the defendant of special parole conditions did not require withdrawal of plea].)

Probation ineligibility. (*People v. Spears* (1984) 153 Cal.App.3d 79, 86-87; *People v. Cabran* (1983) 148 Cal.App.3d 706, 711.)

Restitution fines. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022.)

Sex registration (at least in California). (*People v. McClellan* (1993) 6 Cal.4th 367, 376; *People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1481 [must advise that sex registration is for life]; see *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; but see *People v. Ansell* (2000) 25 Cal.4th 868, 872-873 [sex registration is not punishment].)

When a defendant pleads not guilty by reason of insanity, the court should advise that regardless of the maximum sentence, the defendant can be committed for life. (*People v. Minor* (1991) 227 Cal.App.3d 37, 41; *People v. McIntyre* (1989) 209 Cal.App.3d 538, 558; *People v. Lompboy* (1981) 116 Cal.App.3d 67, 68, 70; *In re Vanley* (1974) 41 Cal.App.3d 846, 856-859.)

Immigration consequences are an indirect consequences. (*Spencer v. Kemma* (1998) 523 U.S. 1, 8-9, 12; *United States v. Fry* (9th Cir. 2003) 322 F.3d 1198, 1200.) But Penal Code section 1016.5 requires the *court* to advise the defendant. (*People v. Superior Court (Zamudio)* (2001) 23 Cal.4th 183, 192, 199-200, 209; *People v. Totari* (2002) 28 Cal.4th 876, 834; but see *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173-174 [substantial compliance is sufficient; no (prejudicial) misadvisement when the defendant was correctly advised on a different occasion]; *People v. Dubon* (2001) 90 Cal.App.4th 944, 951-952.) There might not be a requirement that trial counsel advise the defendant of immigration consequence, though counsel can be ineffective for an affirmative misadvisement. (*People v. Kim* (2009) 45 Cal.4th 1078; see *People v. Chen* (2008) 159 Cal.App.4th 1283, 1288; *People v. Soriano* (19687) 194 Cal.App.3d 1470, 1474.)

Indirect consequences include:

Conduct credits limits. (*People v. Barela* (1999) 20 Cal.4th 261, 272; *People v. Reed* (1998) 62 Cal.App.4th 693, 601-602.)

Disqualification from jury service (See *People v. Ansell* (2000) 25 Cal.4th 868, 872-873 [dictum].)

Driver's license suspension. (*People v. Dakin* (1988) 200 Cal.App.3d 1026, 1033.)

Firearms ban. (See *People v. Ansell* (2000) 25 Cal.4th 868, 872-873 [dictum].)

Impeachable as a witness. (See *People v. Ansell* (2000) 25 Cal.4th 868, 872-873 [dictum].)

Prioribility. (*People v. Gurule* (2002) 28 Cal.4th 557, 634; see *People v. Treadway* (2008) 163 Cal.App.4th 689, 698 [prior valid though it is almost ten years old and defendant

was told when pled it would be a prior for only seven years]; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457.)

Professional license disqualification. (See *People v. Ansell* (2000) 25 Cal.4th 868, 872-873 [dictum].)

The conviction could be a basis for a violation of probation in another case. (*People v. Martinez* (1975) 46 Cal.App.3d 736, 745; *People v. Searcie* (1974) 37 Cal.App.3d 204, 211.)

2. Involuntariness

" ' "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes)." ' " (*Mabry v. Johnson* (1984) 467 U.S. 504, 508-509, quoting *Brady v. United States* (1970) 397 U.S. 742, 755.) Pleas can also be invalid if the defendant was not aware of nature of the charges or defense or of the rights he or she was waiving.

a. Threats or coercion

A plea is involuntary when the defendant pleads due to coercion to provide leniency for a codefendant in packaged deal. (*In re Ibarra* (1983) 34 Cal.3d 277, 281-290; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 126-127 [plea coerced when judge was active in forming a packaged deal and a codefendant threatened to attack defendant]; but see *Liang v. Superior Court* (2002) 100 Cal.App.4th 1047, 1055 [package deals generally are valid].)

A plea is not coerced because the defendant was afraid of a greater penalty or desired not going to trial. (*Brady v. United States* (1970) 397 U.S. 742, 750-751 [pled to avoid the death penalty].) The court said:

> [T]he defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged. [¶] The issue we deal with is inherent in the criminal law and its

> administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages – the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

(*Id.* at p. 751-752; see *Womack v. Del Papa* (9th Cir. 2007) 497 F.3d 998, 1002-1004 [pled because attorney said it was the best chance to avoid a life term, though failed].)

The law distinguishes between involuntary pleas from those that are made reluctantly or unwillingly. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208-1209.) The plea is not coerced because counsel pressured the defendant to accept the plea bargain. (*People v. Hunt* (1985) 174 Cal.App.3d 94, 103-104; see also *Huricks, supra,* at pp. 1208-1209 [pressure by family]; *Weaver v. Palmateer* (9th Cir. 2006) 455 F.3d 958, 972 [attorney's "negative attitude" and failure to do line-up motion or analyze fingerprints].) "Assuming [defendant] was reluctant or 'unwilling' to change his plea, such state of mind is not synonymous with an involuntary act. Lawyers and other professional men often persuade clients to act upon advice which is unwillingly or reluctantly accepted. And the fact that such advice is unwillingly or reluctantly acted upon is not a ' . . . factor overreaching defendant's free and clear judgment' . . . . " (*People v. Urfer* (1979) 94 Cal.App.3d 887, 892, fn. omitted.) "The fact that he may have been persuaded, or was reluctant, to accept the plea is not sufficient to warrant the plea being withdrawn." (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919; see *Doe v. Woodford* (9th Cir. 2007) 508 F.3d 563, 569-572 [two hours to consider plea the day of trial was not involuntary when the offer had been available for months].)

A defendant cannot withdraw the plea because of "buyer's remorse." (*In re Brown* (1973) 9 Cal.3d 679, 686; *People v. Knight* (1987) 194 Cal.App.3d 337, 344.) "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's

case or the likely penalties attached to alternative courses of action." (*Brady v. United States* (1970) 397 U.S. 742, 757.) A "plea's validity may not be collaterally attacked merely because the defendant made what turned out, in retrospect, to be a poor deal. See *Brady,* 397 U.S., at 757; *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). Rather, the shortcomings of the deal . . . cast doubt on the validity of his plea only if they show either that he made the unfavorable plea on the constitutionally defective advice of counsel, see *Tollett v. Henderson,* 411 U.S. 258, 267 (1973), or that he could not have understood the terms of the plea bargain . . . . " (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 186.)

b. Misrepresentations

If the defendant can prove the court did not properly advise him or her of the constitutional rights and the direct consequences of the plea, and the defendant can show he or she would not have pled had there been a proper advisement, the remedy is to permit the defendant to withdraw the plea. (*People v. Walker* (1991) 54 Cal.3d 1013, 1020, 1022-1023.)

A plea is coerced because of an illusory promise. (*People v. Collins* (2001) 26 Cal.4th 297, 309; *People v. Lamb* (1999) 76 Cal.App.4th 664; *People v. Hollins* (1993) 15 Cal.App.4th 567, 571-575; *People v. Bowie* (1992) 11 Cal.App.4th 1263; *People v. Truman* (1992) 6 Cal.App.4th 1816, 1820-1821.)

c. Improper plea agreements

Admission to the delinquency petition was erroneously compelled when the minor did so in order to be placed on informal probation because an admission was not statutorily required for the program. (*Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 792.)

A plea was invalid when the judge actively negotiated the plea bargain to the extent that the defendant believed he could not receive a fair trial. (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146-148; but see *People v. Dixon* (2007) 153 Cal.App.4th 985, 993 [promise of the court to consider an early plea as a factor in mitigation was not coercive since defendant did not plead until later].)

A plea bargain requiring defendant to go to Iraq was void. (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 391-393.)

d. Lack of a knowing and intelligent waiver of rights

A court can rely heavily on the defendant's statements when he entered the plea that

he understood and the trial court's findings that the defendant's plea was made knowingly and voluntarily. (*Blackledge v. Allison* (1977) 431 U.S. 63, 74.)

Defendant was allowed to withdraw his plea because of late discovery which materially changed the outlook of the case. (*In re Miranda* (2008) 43 Cal.4th 541, 575-582 [prosecution withheld *Brady* material that another person confessed to the murder and was heard by three people; that the evidence was also consistent with guilt did not change the fact that counsel might have advised defendant not to plead guilty]; *People v. Ramirez* (2006) 141 Cal.4th 1501, 1506-1508; *People v. Dena* (1972) 25 Cal.App.3d 1001, 1009; but see *United States v. Ruiz* (2002) 536 U.S. 622, 633 [*Brady* error on impeachment evidence was waived by the plea].)

Defendant shall be allowed to withdraw the plea because he or she was incompetent. (*Godinez v. Moran* (1993) 509 U.S. 389; *People v. Shipman* (1965) 62 Cal.2d 226, 229; *People v. Welch* (1964) 61 Cal.2d 786; see *United States v. Howard* (9th Cir. 2004) 381 F.3d 873, 877-881 [there are grounds for withdrawing plea because he was under the influence of Percodan (oxycotin)]; but see *People v. Ravaux* (2006) 142 Cal.App.4th 914, 917-919 [insufficient evidence defendant suffered from mental problems when he appeared to understand when he pled]; *Sasser v. United States* (9th Cir. 1972) 452 F.2d 1104, 1106 [unsupported assertions of the effects of Lithium was insufficient].) The defendant cannot withdraw the plea because the case should have been in juvenile court. (*People v. Mortera* (1993) 14 Cal.App.4th 861.)

Defendant was allowed to withdraw the plea because he or she was not provided an interpreter when one was needed. (*People v. Aguillar* (1984) 35 Cal.3d 785; *People v. Duarte* (1984) 161 Cal.App.3d 438; see *United States v. Bailon-Santana* (9th Cir. 2005) 429 F.3d 1258, 1260-162.) But a court may properly determine the defendant did not require an interpreter when he appeared to be responding to English appropriately. (*Gonzalez v. United States* (9th Cir. 1994) 33 F.3d 1047, 1051.)

The defendant cannot withdraw the plea because of an assertion of factual innocence. (*North Carolina v. Alford* (1970) 400 U.S. 25; *People v. West* (1970) 3 Cal.3d 595; *People v. Watts* (1988) 67 Cal.App.3d 173.)

A defendant cannot withdraw the plea because of a change in the law. (*Brady v. United States* (1970) 397 U.S. 742, 745, 757 [pled guilty only to avoid the death penalty and then the death penalty was ruled unconstitutional]; *Bousley v. United States* (1998) 523 U.S. 614, 619; *United States v. Cardenas* (9th Cir. 2005) 405 F.3d 1046, 1048 [*Apprendi* error]; *United Stats v. Johnson* (9th Cir. 1995) 67 F.3d 200, 202-203.)

The defendant cannot withdraw the plea because of displeasure over court rulings. (*McMann v. Richardson* (1970) 397 U.S. 759, 770 [fear of certain evidence being introduced at trial]; *People v. Panah* (2005) 35 Cal.4th 395, 437 [in limine rulings]; *United States v. Hernandez* (9th Cir. 2000) 203 F.3d 614 [denied *Faretta* motion]; *Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261 [same].)

3. Prejudice

Once the defendant shows prejudice in that he would not have pled, a coerced plea is reversible per se. (*People v. Collins* (2001) 26 Cal.4th 297, 312.) Further, "[a] violation of the plea bargain is not subject to harmless error analysis. A court may not impose punishment significantly greater than that bargained for by finding the defendant would have agreed to the greater punishment had it been made a part of the plea offer." (*People v. Walker* (1991) 54 Cal.3d 1013, 1026.)

Prejudice from the court's failure to make an adequate inquiry as to whether there was a factual basis for a plea when there was a plea bargain was harmless when there is substantial evidence in the record of a factual basis. (*People v. Holmes* (2004) 32 Cal.4th 432, 443; cf. *People v. Willard* (2007) 154 Cal.App.4th 1329, 1335 [reverse when no factual basis in the record, though counsel stipulated to one when it was not specified which documents they relied on].)

"[B]ecause the effectiveness of a waiver of federal constitutional rights is governed by federal standards [citation], we adopt the federal test in place of the rule that the absence of express admonitions and waivers requires reversal regardless of prejudice." (*People v. Howard* (1992) 1 Cal.4th 1132, 1178.) "[T]he high court has never read *Boykin* as requiring explicit admonitions on each of the three constitutional rights [jury trial, self-incrimination, confrontation]. Instead, the court has said that the standard for determining the validity of a guilty plea 'was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' (*North Carolina v. Alford*, *supra*, 400 U.S. at p. 31, citing *Boykin, supra,* 395 U.S. at p. 242; see also *Brady v. United States, supra,* 397 U.S. at pp. 747-748.) 'The new element added in *Boykin*' was not a requirement of explicit admonitions and waivers but rather 'the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.' (*Brady v. United States, supra,* 397 U.S. at pp. 747-748, fn. 4.)" (*People v. Howard* (1992) 1 Cal.4th 1132, 1177.)

"[A] defendant (even on direct appeal) is entitled to relief based upon a trial court's misadvisement only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial

court given a proper advisement." (*In re Moser* (1993) 6 Cal.4th 342, 352; *People v. McClellan* (1993) 6 Cal.4th 367, 378-381.)

If the transcript on appeal does not show a complete *Boykin-Tahl* advisement and waiver, the reviewing court must examine the entire record to determine if the waiver was intelligent and voluntary in light to the totality of the circumstances. (*People v. Mosby* (2004) 33 Cal.4th 353, 361.) Only if there is no advisement, normally will conclude it was involuntary; if there were a partial advisement, normally will conclude it was voluntary. (*Id.*, at pp. 361-365.)

> Truly silent record cases are those that show no express advisement and waiver of the *Boykin-Tahl* rights before a defendant's admission of a prior conviction. (*People v. Stills* (1994) 29 Cal.App.4th 1766, 1769-1771 [without any rights advisements or waivers the defendant was asked if he admitted the priors]; see also *People v. Campbell* (1999) 76 Cal.App.4th 305, 309-310 [after conviction by jury on the substantive offense, the defendant, who received no admonishments and gave no waivers, admitted each of four alleged priors]; *People v. Moore* (1992) 8 Cal.App.4th 411 [after conviction by jury on the substantive offense, the defendant, who received no admonishments and gave no waivers, admitted a prior conviction of assault with a deadly weapon and a prior prison term].) [¶] Although the record was not entirely silent in *People v. Johnson* (1993) 15 Cal.App.4th 169, it was so nearly silent as to be indistinguishable from the three cases just cited. . . . The court made a fleeting reference to ' "whether or not you want a jury trial," ' and without waiting for a response, the court then [took defendant's admissions].

(*Id.* at pp. 361-362.) If there is an incomplete advisement and waiver on the right to a trial on the prior at the end of a jury trial, normally will conclude any admission was voluntary. (*Id.* at pp. 364-365; cf. *People v. Christian* (2005) 125 Cal.App.4th 688, 697 [plea and admission not valid when the court told the defendant of right to jury trial but not to confront witnesses or self incrimination after a preliminary hearing].)

A "defendant's prior experience with the criminal justice system [i]s relevant to the question of whether he knowingly waived constitutional rights . . . . " (*Park v. Riley* (1992) 506 U.S. 20, 37 [it is permissible for states to presume the plea was valid]; *Marshall v. Lonberger* (1983) 459 U.S. 422, 437; but see *People v. Campbell* (1999) 76 Cal.App.4th 305, 310 ["If this experience were sufficient to constitute a voluntary and intelligent waiver of constitutional rights, courts should rarely be required to give *Boykin-Tahl* admonitions."].)

In determining whether the defendant would have not pled guilty if properly advised, the defendant should present independent corroboration. The court can consider whether the attorney accurately communicated the offer and the recommendation and the advice, the difference between the plea bargain and the exposure or likely penalty from trial, and whether defendant engaged in any negotiation. (*In re Alveraz* (1992) 2 Cal.4th 924, 938 [habeas petition]; *People v. Howard* (1992) 1 Cal.4th 1132, 1178-1180; see *In re Resendiz* (2001) 25 Cal.4th 230, 253 (lead opn. opn.) [Pen. Code, § 1016.5 motion to vacate].)

Prejudice from failing to adequately explain immigration consequences: (1) the defendant was misadvised about naturalization, exclusion, or deportation; (2) there is a real possibility of immigration consequences; and (3) but for the misadvisement, the defendant would not have pled guilty (as defendant did not previously know of the consequences). (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192, 199-200, 209; *People v. Totari* (2002) 28 Cal.4th 876, 884; see *People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1245-1246 [the issue is not whether the defendant would have won a jury trial]; *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174 [no prejudice when court substantially complied with Pen. Code, § 1016.5 and defendant correctly advised on a separate occasion].)

In a claim of ineffective assistance of counsel causing the defendant to plead guilty, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Hill v. Lockhart* (1985) 474 U.S. 52, 59; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 933.)

E. Attacking a Plea

1. Appeal

A slow plea preserves issues as if there was a true court trial. (*Brunnell v. Superior Court* (1975) 13 Cal.3d 592, 603-604; *People v. Martin* (1973) 9 Cal.3d 687, 693-695 [including insufficient evidence].)

If the defendant does not obtain a certificate of probable cause following a plea of guilty or no contest, the notice of appeal must state that the defendant challenges the sentence or search motion and does not challenge the validity of the plea. (*People v. Lloyd* (1998) 17 Cal.4th 658, 664-665.) A notice of appeal that challenges only a search motion was sufficient in making sentencing claims cognizable on appeal. (*People v. Jones* (1995) 10 Cal.4th 1102, 1105-1107, disapproved on other grounds in *In re Chavez* (2003) 30 Cal.4th 643, 656-657.) The notice of appeal is defective when it purports to appeal from the judgment after the defendant pled. (*People v. Navarro* (2008) 161 Cal.App.4th 1100, 1104-

1105; see *People v. Mendez* (1999) 19 Cal.4th 1084, 1096.) There is no operative appeal when the appellant states only he or she wishes to attack the plea but there is no certificate of probable cause. (*People v. McEwan* (2007) 147 Cal.App.4th 173, 175-176, 178.)

"[S]ection 1237.5 provides that a defendant may not take an appeal from a judgment of conviction entered on a plea of guilty or nolo contendere unless he has filed in the superior court a statement of certificate grounds, which go to the legality of the proceedings, including the validity of his plea, and has obtained from the superior court a certificate of probable cause for the appeal." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095.) There is an exception to this rule. "The defendant may take an appeal without a statement of certificate grounds or a certificate of probable cause if he does so solely on noncertificate grounds, which go to postplea matters not challenging his plea's validity and/or matters involving a search or seizure whose lawfulness was contested pursuant to section 1538.5." (*Id.* at p. 1096.)

The defendant needs a certificate of probable cause when the appeal "in substance . . . challenges the validity of the plea." (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.) "In determining whether section 1237.5 applies in a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: 'the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.' (*People v. Ribero* (1971) 4 Cal.3d 55, 63.) Hence, the critical inquiry is whether a challenge to the sentence is in substance a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5." (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.)

Review the denial of an application for certificate of probable cause by petition for writ of mandate in the court of appeal. (*In re Brown* (1973) 9 Cal.3d 679, 683; see *People v. Holland* (1978) 23 Cal.3d 77, 84, fn. 6; *People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188; *Lara v. Superior Court* (1982) 133 Cal.App.3d 436; *People v. Nigro* (1974) 39 Cal.App.3d 506, 511; *People v. Warburton* (1970) 7 Cal.App.3d 815, 820, fn. 2.)

A certificate of probable cause permits defendant to raise issues not raised in the application. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1176-1180; *People v. Zandrino* (2002) 100 Cal.App.4th 74, 84, fn. 7.)

"Obtaining a certificate of probable cause does not make cognizable those issues which have been waived by a plea of guilty." (*People v. Meyer* (1986) 183 Cal.App.3d 1150, 1157.) "[O]nly 'constitutional, jurisdictional, or other grounds going to the legality of the proceedings,' survive a guilty plea." (*Ibid.*)

There is no need for a certificate of probable cause when the defendant "assert[s] only that errors occurred in the . . . adversary hearings conducted by the trial court for the purposes of determining the degree of the crime and the penalty to be imposed." (*People v. Ward* (1967) 66 Cal.2d 571, 574.) Thus, "a certificate of probable cause is not required to challenge the exercise of individualized sentencing discretion within an agreed maximum sentence. Such an agreement, by its nature, contemplates that the court will choose from among a range of permissible sentences within the maximum, and abuse of discretionary sentencing authority will be reviewed on appeal, as they would otherwise be. Accordingly, such appellate claims do not constitute an attack on the validity of the plea, for which a certificate of probable cause is necessary." (*People v. Buttram* (2003) 30 Cal.4th 773, 790-791.)

However, the defendant could not challenge without a certificate of probable cause that the sentencing decision was illegal, such as a Penal Code section 654 claim. (*People v. Cuevas* (2008) 44 Cal.4th 374, 379-384; *People v. Shelton* (2006) 37 Cal.4th 759, 769-770; *People v. Hester* (2000) 22 Cal.4th 290, 296; *People v. Young* (2000) 77 Cal.App.4th 827 [cruel and unusual punishment].)

The failure of the trial court to comply with the plea bargain can be attacked on appeal without a certificate of probable cause, because the court's actions are events occurring after the entry of the plea and does not attack the validity of the plea bargain appellant wished to enforce. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 7-8; see, e.g. *People v. Walker* (1991) 54 Cal.3d 1013, 1028.)

Conditions of probation generally can be attacked on appeal without a certificate of probable cause. (See, e.g., *People v. Narron* (1987) 192 Cal.App.2d 724, 730-731.)

An appeal from the denial of a motion to withdraw plea requires a certificate of probable cause. (*People v. Ribero* (1971) 4 Cal.3d 55, 62-63.)

Is a certificate of probable cause a prerequisite to a claim of ineffective assistance of counsel for failure to assist a client in a motion to withdraw a plea? (See *People v. Johnson* [nonpub. opn.] review granted Nov. 19, 2008, S166894.) There is currently a split of authority. (Compare *People v. Earp* (2008) 160 Cal.App.4th 1223, 1228; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1220; *People v. Osorio* (1987) 194 Cal.App.3d 183, 186-187 [no certificate required] with *People v. Caraval* (2007) 157 Cal.App.4th 1483, 1487 [certificate required]; *People v. Emery* (2006) 140 Cal.App.4th 560, 564-566 [refusal to give continuance to permit a motion to withdraw plea required a certificate of probable cause].)

"A certificate of probable cause cannot render reviewable a claim that is otherwise

not cognizable on appeal from a guilty plea." (*People v. Collins* (2004) 115 Cal.App.4th 137, 149.) "A guilty plea thus concedes that the prosecution possesses legally admissible evidence sufficient to prove defendant's guilt beyond a reasonable doubt. Accordingly, a plea of guilty waives any right to raise questions regarding evidence, including sufficiency or admissibility, and this is true whether or not the subsequent claim of evidentiary error is founded on constitutional violations. . . . By pleading guilty a defendant '[waives] any right to question how evidence had been obtained just as fully and effectively as he [waives] any right to have his conviction reviewed on the merits.' [Citation, brackets added].)" (*People v. Turner* (1985) 171 Cal.App.3d 116, 125-126.) [Note, however, a defendant can still challenge the denial of a suppression motion if there is a proper notice of appeal. (Pen. Code, § 1538.5, subd. (m).)] "A guilty plea also waives any irregularity in the proceedings which would not preclude a conviction. [Citation.] Thus irregularities which could be cured, or which would not preclude subsequent proceedings to establish guilt, are waived and may not be asserted on appeal after a guilty plea. . . . In short, a guilty plea 'admits all matters essential to the conviction.' [Citation.]" (*Id.* at p. 126.) Thus, "even if the defendant obtains a certificate of probable cause he will be precluded from raising issues which were waived by his guilty plea." (*Id.* at p. 125.)

2. Motion to withdraw plea

Penal Code section 1018 states a trial court may grant a defendant's application to withdraw his or her plea of guilty or no contest "before judgment [or within six months afterward if on probation] for a good cause shown" based on mistake or ignorance. "Mistake, ignorance, or any other factor overcoming the exercise of free judgment is good cause for withdrawing a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.)

The requirement to file the motion within six months after placed on probation is jurisdictional. (*People v. Miranda* (2004) 123 Cal.App.4th 1124, 1133.)

Generally, the defendant must testify to show prejudice or that his or her will was overborne. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1174-1180; *People v. Randle* (1992) 8 Cal.App.4th 1023, 1035.)

Courts are allowed not to credit an affidavit from the criminal defendant unless independent corroboration exists. (*In re Resendiz* (2001) 25 Cal.4th 230, 253 (lead opn.).) "[A] defendant's self-serving statement – after trial, conviction and sentence – that with competent advice he or she would have accepted a proffered plea bargain is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an

unchecked flow of easily fabricated claims." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.) "The court may also take into account the defendant's credibility and his interest in the outcome of the proceedings." (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 918.)

The court may rely on its own observations in deciding whether to permit the plea to be withdrawn. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 918.)

Penal Code section 1018 does not apply to the prosecution attempting to withdraw defendant's plea. (*Liang v. Superior Court* (2002) 100 Cal.App.4th 1047, 1057.)

Penal Code section 1018 does not expressly apply to the withdrawal of an admission in juvenile court, but the broad principles underling Penal Code section 1018 are applicable to juvenile court proceedings. (*In re Francis W.* (1974) 42 Cal.App.3d 892, 903; *In re M.G.S.* (1968) 267 Cal.App.2d 329, 339; see *In re Jermaine B.* (1999) 69 Cal.App.4th 634, 640.) Also, Welfare and Institutions Code section 775 gives the juvenile court authority to change, modify, or set aside any order it has previously made with respect to the minor. (*In re Francis W.* (1974) 42 Cal.App.3d 892, 897; see *In re Kazuo G.* (1994) 22 Cal.App.4th 1, 6.)

3. Statutory motion to vacate judgment

Penal Code section 1016.5 motion to vacate judgment because the court failed to advise of immigration consequences. The defendant must show: (1) the defendant was misadvised about naturalization, exclusion, or deportation by the court (2) there is a real possibility of immigration consequences; and (3) but for the misadvisement, would not have pled guilty (as defendant did not previously know of the consequences). (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192, 199-200, 209; *People v. Totari* (2002) 28 Cal.4th 876, 884; see *In re Resendiz* (2001) 25 Cal.4th 230, 253 (lead opn. opn.).) Further, the defendant must show due diligence in that the motion was filed immediately upon learning of immigration consequences. (See *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 203-204; *id.* at pp. 204-207 [there may also exist a defenses of laches]; *People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1209.) A "habeas corpus petitioner, like a petitioner who mounts a collateral attack by petition for writ of *coram nobis*," must allege facts showing diligence. (*In re Clark* (1993) 5 Cal.4th 750, 779.) The petition must set forth with specificity when the "petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." (*In re Robbins* (1998) 18 Cal.4th 770, 780; accord *People v. Kim* (2009) 45 Cal.4th 1078.)

It is filed in the court where convicted. (*People v. Allheim* (1975) 45 Cal.App.3d Supp. 1.) It is appealable as an order after judgment. (*People v. Totari* (2002) 28 Cal.4th

876, 887.)

A nonstatutory motion to vacate a judgment is considered the equivalent of a petition for writ of error coram nobis. (See *People v. Miranda* (2004) 123 Cal.App.4th 1124, 1132, fn. 6.)

4. Petition for writ of habeas corpus

A claim the defendant's plea was involuntary needs to allege the defendant was misadvised or otherwise had his will overborne and that he would not have entered the plea. (*Hill v. Lockhart* (1985) 474 U.S. 52, 59; *In re Resendiz* (2001) 25 Cal.4th 230, 251-253 (lead opn.); *In re Moser* (1993) 6 Cal.4th 342, 345; *In re Tahl* (1969) 1 Cal.3d 122, 132.) Consequently, a petition to attack a plea cannot be shown without at least an affidavit from the defendant.

In a claim of ineffective assistance of counsel causing the defendant to plead guilty, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Hill v. Lockhart* (1985) 474 U.S. 52, 59; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 933.)

Generally, a habeas petition must allege: (1) the identity of the petitioner and the location of his custody; (2) the court order which led to the petitioner's restraint; (3) *an illegal restraint on the petitioner's liberty*; (4) why the petition is being filed in the appellate court; (5) *there is no plain, speedy, and adequate remedy at law*; (6) the legal claim for relief and the factual predicate; (7) no previous petition had been filed, or why a successive or why delay is justified. The petition must also include a prayer for relief and a verification. A petition should contain points and authorities and exhibits. (Pen. Code, § 1474; see *People v. Romero* (1994) 8 Cal.4th 728, 737; *In re Lawler* (1979) 23 Cal.3d 190, 194.)

The defendant must be in custody on a state order. A defendant who is no longer on probation or parole but is in federal custody because of immigration problems is not able to file a habeas corpus petition to challenge a California conviction. (*People v. Villa* (2009) 45 Cal.4th 1063.)

5. Petition for writ of error coram nobis?

"The writ of [error] *coram nobis* is granted only when three requirements are met. (1) Petitioner must 'show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would

have prevented rendition of the judgment.' [Citation.] (2) Petitioner must also show that the 'newly discovered evidence . . . [does not go] to the merits of the issue tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.' [Citations.] . . . (3) Petitioner 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of the writ. . . . ' " (*People v. Shipman* (1965) 62 Cal.2d 226, 230; *People v. Kim* (2009) 45 Cal.4th 1078.)

Misadvice from counsel is not a ground for relief. (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 983; accord, *People v. Miranda* (2004) 123 Cal.App.4th 1124, 1132, fn. 6; *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174; *People v. Ibanez* (1999) 76 Cal.App.4th 537, 544-54; *People v. Sorano* (1987) 194 Cal.App.3d 1470, 1477; *People v. Gatewood* (1960) 182 Cal.App.2d 724, 728; *People v. Sharp* (1958) 157 Cal.App.2d 205, 207.)

"It has often been held that the motion or writ is not available where a defendant voluntarily and with knowledge of the facts pleaded guilty or admitted alleged prior convictions because of ignorance or mistake *as to the legal effects* of those facts." (*People v. Banks* (1959) 56 Cal.2d 370, 378.) Since an immigrant normally knows he or she is an immigrant when entering a plea, the writ cannot be granted when the defendant was unaware that the legal effect of the plea would be deportation. (*People v. Kim* (2009) 45 Cal.4th 1078.)

The writ is available only when other remedies (new trial motion, habeas corpus, appeal, etc.) were never available for the claim. (*People v. Blalock* (1960) 53 Cal.2d 798, 801; *People v. Martinez* (1948) 88 Cal.App.2d 767, 774.) Thus, it cannot be raised when the court failed to advise of immigration consequences. (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1526, 1529-1531.)

The writ can be used when the plea would be void; for example, when a defendant who was insane at the time of the offense, but did not present a defense because he was insane at the time of the plea. (*People v. Shipman* (1965) 62 Cal.2d 226, 229; *People v. Welch* (1964) 61 Cal.2d 786 [on error coram vobis].) The writ can be used because of fraud or mistake induced by official representation by the court or prosecutor. (*People v. Chaklader* (1994) 24 Cal.App.4th 407, 409; accord, *People v. Wadkins* (1965) 63 Cal.2d 110, 113 [prosecutor or court not keep the plea bargain]; but see *In re Nunez* (1965) 62 Cal.2d 234, 236 [plea induced by trial counsel's promise of diversion which the prosecutor refused to do].)

F. Consequence of Withdrawing a Plea

"Familiar and basic principles of law reinforced by simple justice require that when an accused withdraws his guilty plea the *status quo ante* must be restored. When a plea agreement has been rescinded the parties are placed by the law in the position each had before the contract was entered into." (*People v. Superior Court (Garcia)* (1982) 131 Cal.App.3d 256, 258.)

When withdrawing a plea: "A party who rightfully rescinds a contract is entitled to 'complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction . . . .' (Civ. Code, § 1692.) 'It is the purpose of recission "to restore both parties to their former position as far as possible" [citation] and "to bring about substantial justice by adjusting the equities between the parties' despite the fact that "the status quo cannot be exactly reproduced." [Citations.]' (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 316, quoting *Bank of America N.T. & S.A. v. Greenbach* (1950) 98 Cal.App.2d 220, 238 and *Lobdell v. Miller* (1952) 114 Cal.App.2d 328, 344.) This entitlement to restitution once a contract is rescinded as much a contract right as is the entitlement to specific performance or damages once a contract is breached. Thus, in the context of a criminal plea bargain, it is equally protected by due process. [Citation.]" (*People v. Scheller* (2006) 136 Cal.App.4th 1143, 1151-1152.)

If the defendant withdraws the plea and is subsequently convicted, the court can impose a greater sentence. *People v. Serrato* (1973) 9 Cal.3d 753, 765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.)