PLEA BARGAINS AND SENTENCING CONCERNS

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I. PLEA BARGAINS

"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, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 185-186.)

A. What is a Plea Bargain?

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; see also *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].)

The prosecutor is not obligated to make an offer. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 561.) "[T]here is no right to a plea offer." (*Missouri v. Frye* (2012) 566 U.S. 134, 143; *Lafler v. Cooper* (2012) 566 U.S. 156, 168.) The court has no duty to accept a plea bargain. (*Frye,* at p. 148.)

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.) A 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].) 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.)

An **indicated judgment,** often referred to as an **indicated sentence**, 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.) Although the defendant must admit all allegations in the charging document, the court can indicate it would dismiss some allegations under Penal Code section 1385. (*People v. Clancey* (2013) 56 Cal.4th 562, 579-583.) 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.)

B. What Are the Terms of the Plea Bargain?

"Although the analogy may not hold in all respects, plea bargains are essentially contracts." (*Puckett v. United States* (2009) 556 U.S. 129, 137.) "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.) "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.' " (*Ibid*., quoting *People v. Alvarez* (1982) 127 Cal.App.3d 629, 633.) "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." (*Shelton*, *supra*, 37 Cal.4th at p. 767; accord, *People v. Martin* (2010) 51 Cal.4th 75, 80.)

If there is any **ambiguity** in the terms, appellate courts "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)." (*Shelton*, *supra*, 37 Cal.4th at pp. 767-768; accord *People v. Segura* (2008) 44 Cal.4th 921, 930-931; *People v. Toscano* (2004) 124 Cal.App.4th 340, 344.)

Be aware, however, that **plea bargains are *like* contracts, but contract principles don't always control.** "Since plea bargains are enforced by courts on '*due process* grounds,' principles of contract law should not be imported wholesale into the plea bargaining process." (*Brown v. County of Los Angeles* (2014) 229 Cal.App.4th 320, 323; see, e.g., *People v. Mortera* (1993) 14 Cal.App.4th 861, 864 [a minor's plea is valid though could void a contract].)

C. Enforcing a Plea Bargain or Withdrawing a Plea.

1. When is a plea bargain enforceable?

Generally, the prosecution can withdraw a plea offer after defendant accepts it but before the entry of a plea. (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.) "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.)

The prosecution usually is not allowed to withdraw a plea offer after the defendant has detrimentally relied on it. "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.) 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, but it must allow the defendant to withdraw the plea if it refuses to sentence the defendant according to the agreement. (Pen. Code, § 1192.5; *People v. Cruz* (1988) 44 Cal.3d 1247, 1250-1253; *People v. Mora-Duran* (2020) 45 Cal.App.5th 589, 595-596; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1361-1362.)

"[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, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 185-186.) "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." [Citations.] 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 is the defendant's remedy for violation of the plea bargain?

When there is a violation of the plea bargain, the remedy could be: (1) withdrawal of the plea, (2) specific performance, or (3) substantial performance where deviate from the agreement but the punishment is not significantly greater than what was bargained for. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1362.)

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].)

No United States Supreme Court decision requires specific performance of a plea bargain. (*Kernan v. Cuero* (2017) 138 S.Ct. 4, 8 (per curiam).) The California Supreme Court has avoided specific performance when it would limit the discretion of the sentencing court. (*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861; see, e.g, *People v. Cruz* (1988) 44 Cal.3d 1247, 1250, fn. 2.)

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].)

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; accord, *K.R. v. Superior Court* (2017) 3 Cal.5th 295, 309, 312 [delinquency cases]; but see *In re Christian S.* (2017) 9 Cal.App.5th 510, 521 [different judge can conduct the victim restitution hearing in juvenile court]; *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 hearing. (*People v. Beaudrie* (1983) 147 Cal.App.3d 686, 693-694.)

3. Can the court increase the penalty at the time of sentencing?

The court 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 until 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])

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 increase 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.) There is not a valid *Cruz* waiver if the court imposes the condition after entering the plea. (*People v. Jensen* (1992) 4 Cal.App.4th 978, 982-983.)

In limited situations where the trial court changes the terms of the plea, the defendant can seek enforcement of the plea bargain on appeal. For example, if the court imposes a significant fine which was not disclosed before the plea and the defendant was not advised of the option to withdraw the plea, the defendant can seek enforcement of the plea bargain on appeal. (*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.)

Mandatory provisions must be imposed, even if the defendant was not advised of them and did not agree to them. (*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, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 185-186 [must impose statutory minimum restitution fine unless the court makes the proper findings]; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1414 [mandatory penalty assessments].)

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.)

4. What if the sentence agreed upon is unauthorized?

The defendant cannot withdraw the plea because he or she agreed to an illegal sentence as part of the bargain. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 153, fn. 5; *People v. Hester* (2000) 22 Cal.4th 290, 295 [Pen. Code, § 654 error]; *People v. Otterstein* (1987) 189 Cal.App.3d 1548, 1550-1552 [great bodily injury enhancement on a conviction for battery with serous bodily injury].) "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." (*Hester,* at p. 295; *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].)

5. Do plea bargains impliedly take into account changes in the law?

For years when the Legislature added more onerous consequences to convictions, courts were saying yes. (See, e.g., *Doe v. Harris* (2013) 57 Cal.4th 64, 70 [new law requiring sex registration for the crime the defendant had pled to years previously].) When new laws reduced the punishment for certain offenses, some courts balked. Nonetheless, the Supreme Court said in *Harris v. Superior Court* (2016) 1 Cal.5th 984 that a defendant can have a sentence reduced after the passage of Proposition 47, notwithstanding a plea bargain. (*Id.* at pp. 991-992.) The Court later retreated from the position and explained this was because the text of Proposition 47 expressly states it shall apply to past conviction, whether by plea or trial. (*People v. Stamps* (2020) 9 Cal.5th 685, 704.) Penal Code section 1016.8 was recently enacted to prevent the court or prosecutors from requiring defendants from waiving the benefit of future changes of the law as part of the plea bargain, but this does not mean that a plea bargain necessarily incorporates future changes in the law. (*Id.* at p. 705.) Generally, a change in the law "does not entitle defendants who negotiated stipulated sentences to whittle down the sentence but

otherwise leave the plea bargain intact." (*Id.* at pp. 706-707, internal quotation marks omitted.) If the court or the prosecution is not willing to agree to reduce the sentence, the defendant must decide whether to withdraw the plea. (*Id.* at p. 708.)

6. Appellate waivers and the prosecution's power to enforce the plea bargain.

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. 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; *People v. Mitchell* (2011) 197 Cal.App.4th 1009, 1013-1016; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662.)

Courts have been inconsistent in determining whether a waiver of appellate rights renders a claim non-cognizable. In *People v. Kennedy* (2012) 209 Cal.App.4th 385, 391, the Sixth District held one could challenge presentence credits when there was a waiver of appellate rights, which was described as a "general waiver." In *People v. Becerra* (2019) 32 Cal.App.5th 178, 189-190, the Sixth District held one could not challenge presentence credits, which it described as a "specific waiver," at least not without first obtaining a certificate of probable cause. Although the wording of the waiver was not published in the earlier opinion, the wording of both waivers were the same. (Also compare *People v. Espinoza* (2018) 22 Cal.App.5th 794, 798-803 [must have certificate of probable cause to challenge probation conditions after a waiver of the right to appeal] with *People v. Patton* (2019) 41 Cal.App.5th 934, 942-943 [need not obtain certificate of probable cause to challenge a probation condition despite the waiver of the right to appeal the stipulated sentence]; see also *People v. Castellanos* (2020) 51 Cal.App.5th 267, 273 [with a certificate of probable cause, can challenge the scope of an appellate waiver]; *People v. Wright* (2019) 31 Cal.App.5th 749, 756 [appellate waiver does not apply to a subsequent change in the law]; *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. Foster* (2002) 101 Cal.App.4th 247, 251 [when defendant waived right to appeal 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 can waive the filing of a civil rights suit. (*Newton v. Rumey* (1987) 480 U.S. 386, 397-398.) A defendant can waive *Brady* error. (*United States v. Ruiz* 2002) 536 U.S. 622, 633.)

A defendant cannot waive a claim of ineffective assistance of counsel. (*People v. Orozco* (2010) 180 Cal.App.4th 1279, 1285; see *Washington v. Lambert* (9th Cir. 2005) 422 F.3d 864, 871; *DeRoo v. United States* (8th Cir. 2000) 223 F.3d 919, 923-924.)

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.)

A 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 the total penalty was greater than statutory maximum]; *People v. Johnson* (1978) 82 Cal.App.3d 183, 188.) However, *Arnold* reaffirmed the earlier holding in *Johnson* that waiver of entitlement to custody credits under section 2900.5, like any waiver of rights by a criminal defendant, must "'be knowing and intelligent . . .'", (*id*., at p. 308, quoting *People v. Johnson*, *supra*, 28 Cal.4th at p. 1055), and that "the gravamen of whether such a waiver is knowing and intelligent is whether the defendant understood he was relinquishing or giving up custody credits to which he was otherwise entitled under section 2900.5. (*Arnold*, *supra*, at pp. 308-309, citing *People v. Burks* (1998) 66 Cal.App.4th 232, 237.)

7. In a multi-defendant case, can the prosecution withdraw from one defendant's plea bargain?

In certain circumstances, yes. 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 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.)

D. Grounds for Withdrawing a Plea.

The defendant must show the plea was involuntary or that it was not based on a knowing and intelligent waiver of the constitutional rights that come with a jury trial. For the latter, the defendant must show he or she: (1) was not told of the direct consequence (or was miadvised), (2) knew not of the consequences, 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. Improper advisements.

a. Constitutional rights.

The court must give "the necessary advisements whenever a defendant pleads guilty." (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) "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 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 can show he attempted to mitigate his actions. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 185.)

There must be a factual basis for the plea agreement. (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 is adequate for defense counsel to simply stipulate there is a factual basis for the plea**. (*People v. Palmer* (2013) 58 Cal.4th 110, 116-119.) 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.)

It may not be sufficient to only allege the lack of a factual basis as grounds to withdraw the plea. The Sixth District Court of Appeal has held that a defendant on appeal must also allege the plea was involuntary. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1363-1372.) If there is no plea bargain, a plea will not be reversed because there was no factual basis. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1182, 1184 [a factual basis is 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.) 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, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 185-186.)

"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.)

While the court must advise of direct consequences it generally need not do so for indirect (collateral) consequences. (*Brady v. United States* (1970) 397 U.S. 742, 748; *In re Moser* (1993) 6 Cal.4th 342, 351.)

"The following is a non-exclusive list of other *direct* consequences for which an advisement must be given under California's judicially declared rule of criminal procedure: the potential maximum sentence, including fines (*Bunnell*, *supra*, 13 Cal.3d at p. 605); minimum and maximum restitution fine (*Villalobos, supra*, 54 Cal.4th at p. 186); probation ineligibility (*People v. Caban* (1983) 148 Cal.App.3d 706, 711); registration requirements (*People v. McClellan* (1993) 6 Cal.4th 367, 376; *People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1485 [same]); maximum period of parole (*In re Moser* (1993) 6 Cal.4th 342, 352); mandatory revocation of driving privileges (*Corley v. Department of Motor Vehicles* (1990) 222 Cal.App.3d 72, 76). There are also statutory requirements that require advisements for consequences that could otherwise be considered collateral, e.g.: potential effect on immigration status (§ 1016.5 . . .); a no contest plea in a misdemeanor case may not be used against the defendant in a civil case. (§ 1016, subd. (3).)" (*Harris v. Superior Court* (2017) 13 Cal.App.5th 142, 149-150, fn. 4.)

"The following is a non-exclusive list of *collateral* consequences for which no advisement need be given prior to defendant entering a guilty or no contest plea: the conviction resulting from the plea may be used to enhance a sentence for a future conviction ([*People v.*] *Gurule* [(2002)] 28 Cal.4th [557] at pp. 634-635 [plea to murder could be used to support prior murder special circumstance in a future murder

prosecution]; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457 [plea to a serious felony or felony that qualifies for a prior prison term enhancement]); requirement that defendant participate in a sex offender management program as a condition of probation pursuant to section 1203.067, subdivision (b) ([*People v.*] *Dillard,* [(2017)] 8 Cal.App.5th [657] at pp. 666-667); possibility that a guilty plea might result in a revocation of probation and a prison sentence (*People v. Martinez* (1975) 46 Cal.App.3d 736, 745; *People v. Searcie* (1974) 37 Cal.App.3d 204, 211); that fewer conduct and work credits are available when a defendant pleads to a strike offense (*People v. Barella* (1999) 20 Cal.4th 261, 262 (*Barella*)); that conviction related to certain sex crimes could result in a finding that the defendant is a sexually violent predator (*[People v.] Moore,* [(1998)] 69 Cal.App.4th [626] at pp. 630-633)." (*Harris v. Superior Court* (2017) 13 Cal.App.5th 142, 150, fn. 5.)

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 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.)

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, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 185-186.)

A plea can be 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.

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; see *People v. Clancey* (2013) 56 Cal.3d 562, 574-576; 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 return to Iraq was void. (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 391-393.)

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.)

d. Lack of a knowing and intelligent waiver of rights.

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; 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].)

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.)

Case law examples of grounds to withdraw a plea:

i. **Due to 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 *People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1418 [domestic violence victim recanted]; *United States v. Ruiz* (2002) 536 U.S. 622, 633 [*Brady* error on impeachment evidence was waived by the plea].)

ii. **Due to the defendant's incompetency.** (*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 were grounds for withdrawing plea because he was under the influence of 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.)

iii. **The failure to provide an needed interpreter may be ground to withdraw a plea.** (See *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.)

Case law examples where a plea withdrawal was denied:

i. **A defendant cannot withdraw a 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.)

ii. **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].)

iii. **A 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].)

3. Notes on arguing prejudice.

The failure to give *Boykin-Tah*l advisements is reversible per se. "[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.)" (*Howard, supra,* 1 Cal.4th at p. 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.) Usually, only if there is no advisement will the court conclude the plea was involuntary; if there were a partial advisement, the court will often conclude the plea 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, a court will normally 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.)

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].)

For allegations of coerced pleas, 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.)

A trial court's increase of a defendant's sentence in violation of the plea bargain is also reversible per se. "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, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 185-186.)

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].)

Improper Immigration-Related Advisements: To show prejudice from failing to adequately explain immigration consequences, it must be demonstrated: (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; accord, *Lee v. United States* (2017) __ U.S. __ [137 S.Ct. 1958, 1966-1967] [it was not dispositive that the defendant would likely have been convicted at trial]; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 933.)

E. Attacking the Plea.

1. 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. (*Ibid*.)

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.)

2. On Appeal.

"[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.)

Sentencing errors following a section 1538.5 denial do not require a certificate of probable cause. 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; but see *People v. Lujano* (2014) 229 Cal.App.4th 175, 189-190 [if waive right to appeal when pled, can challenge search only with a certificate of probable cause]; *People v. Mashburn* (2013) 222 Cal.App.4th 937, 942-943 [same].)

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.)

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.)

"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.)

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.)

A certificate of probable cause permits a defendant to raise issues not raised in the application. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1176-1180; *People v. Sapienza* (2019) 39 Cal.App.5th 58, 65-66; *People v. Zandrino* (2002) 100 Cal.App.4th 74, 84, fn. 7.) However, "[o]btaining 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.*)

A certificate of probable cause is required to claim that the sentencing decision (range) was illegal, such as a Penal Code section 654 claim. (*People v. Cuevas* (2008) 44 Cal.4th 374, 379-384; *People v. Hester* (2000) 22 Cal.4th 290, 296.) By agreeing that the court can sentence the defendant up to the maximum term, he is barred under California Rules of Court, rule 4.412(b) from claiming a punishment should have been stayed under Penal Code section 654. (*People v. Jones* (2013) 217 Cal.App.4th 735, 743-746.)

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.)

A certificate of probable cause is a prerequisite to a claim of ineffective assistance of counsel for failure to assist a client in a motion to withdraw a plea. (*People v. Johnson* (2009) 47 Cal.4th 668, 678)

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.)

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, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 185-186.)

A certificate of probable cause is not required to argue the defendant should receive the benefit of a change in the law occurring after the plea. (*People v. Stamps* (2020) 9 Cal.5th 685, 698.)

No certificate of probable cause is required to challenge an admission when there is also a trial. (*People v. Maultsby* (2012) 53 Cal.4th 296, 299-300.)

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.)

Review of the denial of an application for certificate of probable cause is by petition for writ of mandate in the court of appeal. (*In re Brown* (1973) 9 Cal.3d 679, 683; *People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188.)

3. Statutory motion to vacate judgment [immigration consequences]

Penal Code section 1016.5 permits a motion to vacate judgment because the court failed to advise that a conviction could subject the defendant to deportation or prevent him or her from naturalization or re-entry. 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.)

Penal Code section 1473.7 permits withdrawal of the plea because the defendant was unaware of relevant immigration consequences from the conviction. It only applies if the defendant is no longer in custody or supervised release on the conviction. (*People v. DeJesus* (2019) 37 Cal.App.5th 1124, 1131-1132.) "Section 1473.7 contains three requirements. First, the moving party can no longer be imprisoned or restrained. (§ 1473.7, subd. (a).) Second, . . . prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere (§ 1473.7, subd. (a)(1)). . . . Third, any motion must be timely. . . . [T]he statute declares that a motion must be 'filed with reasonable diligence after the later of the following: [¶] (1) [t]he date the moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence is a basis for removal. [¶] (2) The date a removal order against the moving party, based on the existence of a conviction or sentence, becomes final.' (§ 1473.7, subd. (b)(1) & (2).)" (*People v. Perez* (2018) 19 Cal.App.5th 818, 826.)

Before 2019, the petitioner must show ineffective assistance of counsel by a preponderance of the evidence. A legislative amendment clarifying the statute, effective 2019, only requires the defendant not understand the immigration consequences due to counsel's advisements. (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1008-1009.) The only prejudice is that the defendant would not have pled. (*Id*. at p. 1011.) The statute no longer requires due diligence, so long as it is brought soon enough after certain immigration consequences occur. (*People v. Landaverde* (2018) 20 Cal.App.5th 287, 293.) The defendant is entitled to a hearing on the petition, to be present, and to be represented by counsel. (*People v. Rodriguez* (2019) 38 Cal.App.5th 971, 979-981.)

A motion to vacate 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.)

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.) 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,* at p. 59; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 933.) Consequently, a petition to attack a plea cannot be shown without at least an affidavit from the defendant.

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.)

F. Consequence of Withdrawing a Plea.

Restoration of the status quo ante: "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.)

Risk of a greater sentence: 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.)

No double-jeopardy: When a guilty plea is *properly* vacated, whether on the defendant's motion or otherwise, the double jeopardy prohibition does not prevent re-trial

on the offense charged. (See *People v. Clark* (1968) 264 Cal.App.2d 44, 47; *Liang v. Superior Court* (2002) 100 Cal.App.4th 1047, 1058.)

Reinstatement of dismissed counts: Counts that are dismissed pursuant to a plea bargain may be restored when a defendant withdraws his guilty plea or otherwise succeeds in attacking it. "[T]he ends of justice require that [when a defendant is permitted to withdraw a guilty plea] the *status quo ante* be restored by reviving the . . . dismissed counts." (*In re Sutherland* (1972) 6 Cal.3d 666, 672.)

Potential for more serious charges: Where a plea is successfully challenged, the potential for new charges or a more serious charge looms. Thus, in the following situations, careful counseling of the client is appropriate:

a. Certain priors that could have been alleged, but were not initially, could be added at any time (e.g., enumerated sex offenses, serious felonies, or strikes);

b. The defendant could have been charged with a more serious charge; especially in sex cases where he or she might be eligible for punishment under one strike law;

c. The defendant could have been charged with sex priors, creating a life case;

d. In sex cases, charges could be added for each act, especially if the defendant pled before the preliminary hearing.

II. PROBATION.

A. Purpose of Probation.

The California Legislature has declared that providing probation services "is an essential element in the administration of justice." (Pen. Code, § 1202.7, all statutory references in part II are to the Penal Code, unless indicated otherwise.) One of the primary goals of probation is, of course, "[t]he safety of the public." (*Ibid*.; accord *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) The Legislature has also declared that the primary considerations in the granting of probation shall be "the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the

needs of the defendant . . . .” (§ 1202.7; accord, *Carbajal, supra*, 10 Cal.4th at p. 1120.) It has also been stated that “[t]he declared purpose of a grant of probation is that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer. . . .” (*People v. Rojas* (1962) 57 Cal.2d 676, 682-683, internal quotations omitted; accord § 1203.1, subd. (j); Cal Rules of Ct., rule 4.410 (a).) “Probation is defined as an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted. [Citation.]” (*Rojas, supra*, 57 Cal.App.2d at p. 683, internal quotations omitted.) Being an act of grace and clemency, probation is not a matter of right. (*People v. Anderson* (2010) 50 Cal.App.4th 19, 32.)

B. Imposition of Sentence Suspended (ISS) & Execution of Sentence Suspended (ESS).

Probation is granted when the trial court suspends imposition or execution of a sentence and places a defendant on conditional and revocable release under the supervision of a probation officer. (§1203, subd. (a).) The court has the discretion to place a defendant on formal probation where he or she must report to the probation officer (§ 1202.8) or on informal or summary court probation, where the defendant is not required to report to a probation officer. (§ 1203b.) In most felony cases, the probation will be formal (§ 1202.8) and in almost all misdemeanor cases, the probation will be court probation (§ 1203b).

When probation is granted, the sentencing court has the option of either imposing a prison term and staying its execution during the term of probation or suspending the imposition of sentence. (§§ 1203, subd. (a); 1203.1, subd. (a).) When the sentencing court suspends imposition of sentence, no formal judgment has been entered and the probationer is simply made subject to the terms and conditions of probation for the probationary term selected by the court. (*People v. Howard* (1997) 16 Cal.4th 1081, 1087.) In such situations, the judgment is only final for the limited purpose of allowing the defendant to appeal. (*Ibid*.) Conversely, where the sentencing court has imposed sentence but suspended its execution, the court actually selects a term of imprisonment (lower, middle, or upper term) but suspends the execution of the sentence for the duration

of the term of probation. (See e.g., *People v. Taylor* (2007) 157 Cal.App.4th 433, 437.) As discussed further below, the distinction between these two types of sentencing choices becomes one of significant import if and when a defendant's probation is subsequently revoked.

C. The Maximum Probation Period.

The maximum probationary term for felonies is set out in section 1203.1, subdivision (a) and, with certain exceptions, provides that the probation term shall not exceed five years or the maximum potential prison term. (§ 1203.1, subd. (a).) For misdemeanors, with certain exceptions, the maximum period is three years or the maximum potential period of incarceration in the county jail. (§ 1203a.) However, the trial court retains jurisdiction to "at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." (§ 1203.3, subd. (a); accord 1203.2, subd. (b)(1).) If a willful violation of probation has been alleged and sustained, this power includes extending the probationary period. (§§ 1203.2, subd. (e); 1203.3.) The court cannot modify or revoke probation after it has expired. (*People v. Leiva* (2013) 56 Cal.4th 498, 516-518.)

D. The Grant or Denial of Probation.

The decision whether to grant or deny probation is left to the discretion of the sentencing court. (§ 1203, subd. (b)(3); rules 4.4113(a); 4.433(a)(2).) Case law describes this discretion as broad (*Carbajal, supr*a, 10 Cal.4th at p. 1120) and an order denying probation will not be reversed on appeal absent a clear abuse of discretion. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.) On review, the trial court will be presumed to have acted "to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary. . . ." (*Ibid*.) The propriety of an order denying probation will be deemed forfeited on appeal absent an objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

As with the decision to grant or deny probation in the first place, the court also has broad discretion to set the conditions of probation (*People v. Birkett* (1999) 21 Cal.4th 226, 235; accord *Carbajal, supra*, 10 Cal.4th at pp. 1120-1121; § 1203.1, subd. (j).) The probation conditions may include the imposition of a term of incarceration in the county jail, generally limited to one year. (§§ 19.2, 1203.1, subd. (j).) An appellate challenge to a

condition of probation must also be preserved by objection in the trial court unless the claim consists of a facial constitutional challenge involving a pure question of law. (*In re Sheena K.* (2007) 40 Cal.4th 875, 881-882, 888-889.)

E. Probation Conditions.

Generally, there are four attacks that can be made on a probation condition: (1) it is unreasonable, (2) it is vague because it does not provide the defendant fair warning of what is prohibited, and (3) it is vague because the terms are susceptible to various interpretations by law enforcement, and (4) it is overbroad. Each is a separate claim of error and must by analyzed differently. The latter three claims are based on due process. A challenge to a probation condition as unreasonable requires an objection. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) A claim that a condition is unconstitutionally vague or overbroad based on undisputed facts can be raised on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 885-887.)

1. Unreasonable conditions.

A probation condition is unreasonable if "it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted, internal quotation marks omitted.) The court has broader discretion in formulating probation conditions for juveniles. (*In re D.G.* (2010) 187 Cal.App.4th 47, 52-53.) Appellate courts were often saying that just about any condition is reasonably related to future criminality. The Supreme Court recently stepped in, stating the condition is not reasonable unless there is a nexus to the offender's criminal activity. (*In re Ricardo P.* (2019) 7 Cal.5th 1113, 1127.) *Ricardo P.* placed limits on when the court could order the probationer be subject to warrantless searches of electronic devices. It also limited the scope of the search when such a condition might be appropriate.

2. Vague for lacking fair warning.

The Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution guarantee no person shall be deprived of life, liberty, or property without due process of law; statutes are vague if they fail to give the defendant fair notice of what was required or fails to give law enforcement fair

instructions as to what is proscribed. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

"A restriction is unconstitutionally vague if it is not sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated. [Citation.] A restriction failing this test does not give adequate notice – fair warning – of the conduct proscribed." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153, internal quotation marks omitted.) Many conditions have been vague in that the defendant might lack knowledge as to what is prohibited. A condition need not expressly state the defendant must not "knowingly" or "willfully" do what is prohibited because this is an implied term of probation. (*People v. Hall* (2017) 2 Cal.5th 494, 503.) But a condition can be vague if the defendant lacks knowledge of what qualifies as a forbidden zone of activity. For example, a condition to stay away from someone "suspected" to be a gang member was too vague. (*People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.) Instead, the condition can be modified to stay away from known gang members or who have been identified to the probationer as gang members.

3. Vague for promoting arbitrary enforcement.

Furthermore, " ' " a law that is 'void for vagueness' . . . 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' " ' " (*In re H.C.* (2009) 175 Cal.App.4th 1067, 1070; *In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) These conditions are unconstitutionally vague because it is subject to the arbitrary beliefs of the probation officer of the day as to what is prohibited. (See, e.g., *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1352-1353 [not possess pornography];

People v. O'Neil (2008) 165 Cal.App.4th 1351, 1357 [condition to stay away from anyone the probation officer designates was vague and overbroad because it did not require knowledge or give the probation officer guidance from whom to restrict].)

4. Overbreadth.

Due process also requires a clear order that is not overly broad when a condition infringes on a constitutional right. (*People v. Harrisson* (2005) 134 Cal.App.5th 637, 641-642; see also *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 612.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally

overbroad." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Under this doctrine, " ' "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." ' [Citations.]" (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.) " 'A law's overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.' [Citation.]" (*Ibid.*; *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175.) "A restriction is unconstitutionally overbroad, on the other hand, if it (1) impinge[s] on constitutional rights, and (2) is not tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights – bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153, internal quotation marks omitted; see, e.g, *In re Carlos C.* (2018) 19 Cal.App.5th 997, 1001-1004 [not possess depictions of partial or complete nudity was overbroad].) However, orders to stay away from certain areas valid. (*People v. Moran* (2016) 1 Cal.5th 398, 402-405 [all Home Depot stores and their parking lots].)

F. Violation, Revocation and Reinstatement.

1. Initiation of the revocation process.

As noted above, a trial court has authority to modify, revoke or terminate probation at any time during the probationary period. (§§ 1203.2, subd. (b)(1); 1203.3, subd. (a).) The revocation process is generally divided into two components: the summary revocation and a subsequent formal revocation hearing where a final decision is made whether to reinstate, permanently revoke or terminate probation.

Under section 1203.2, subdivision (a), the court has authority to summarily revoke a defendant's probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her [probation], has become abandoned to improper associates or a vicious life, or has subsequently

committed other offenses, regardless whether he or she has been prosecuted for such offenses." (§ 1203.2, subd. (a).) The revocation procedure may be commenced at any time during the probationary period either by the court on its own motion, or a motion of the probationer, the probation officer, or the district attorney. (§ 1203.2, subd. (b).) If the probation department intends to revoke probation and the defendant is not in custody, it has the option of sending a letter giving notice of the violation and specifying a time and place for a pre-revocation hearing. (Levenson, California Criminal Procedure (2007-2008 ed.) § 25.30, p. 1114.) Alternatively, a probationer may be arrested and brought before the court at any time during the probationary period "if the probation officer or a peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional sentence." (§ 1203.2, subd. (a).)

A summary revocation can be ordered without formal hearing and is a legal mechanism by which the running of the probationary period is tolled. (§ 1203.2, subd. (a).)

2. Formal revocation hearing.

a. Defendant admits a violation.

A formal revocation hearing may not be necessary if a defendant waives his rights and stipulates to the alleged violation. As is true of a guilty plea, the probationer personally holds the right to admit a probation violation. (*People v. Robles* (2007) 147 Cal.App.4th 1286, 1290.) The probationer must be advised of his rights, and his waiver must be knowing and intelligent. Notably, however, the due process advisals are not nearly as stringent as those required in taking a standard criminal guilty plea. (See, e.g., *People v. Garcia* (1977) 67 Cal.App.3d 134, 136.) As a practical matter, a probationer frequently stipulates to the alleged violation, usually because the probationer is often reinstated on the existing probationary term, sometimes with an associated county jail term.

b. Timeliness, notice and due process requirements

A decision revoking probation is reviewed under the substantial evidence standard. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681) and great deference is given to the trial court's decision. (*People v. Pinon* (1973) 35 Cal.App.3d 120, 123.) The discretion of the court to revoke probation is "analogous to its power to grant probation,

and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action. [Citation.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

While there are no time limits in which a probation revocation hearing must be held, it should be done as "promptly as convenient after arrest while information is fresh and sources are available." (See *Morrissey v. Brewer* (1972) 408 U.S. 471, 485 [parole revocation case, the reasoning of which has been applied to probation revocation cases].) A probationer's due process rights are implicated by an alleged revocation of probation. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786; *People v. Self* (1992) 233 Cal.App.3d 414, 419; *People v. Ruiz* (1975) 53 Cal.App.3d 715, 718-719.) A "final revocation of probation must be preceded by a hearing . . . . The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. [Citations.]" (*Black v. Romano* (1985) 471 U.S. 606, 611-612; *People v. Vickers* (1972) 8 Cal.3d 451, 458; *People v. Mosley* (1988) 198 Cal.App.3d 1167, 1173.) Pursuant to section 1203.2, subdivision (b), a party alleging a revocation must ensure that the other parties to the proceeding – including the probation department, the prosecutor, the defendant, and the court – receive the notice.

The probationer should have sufficient time to investigate the validity of the allegations. (*Mosley, supra,* 198 Cal.App.3d at p. 1174.) If the alleged violation is based on a new criminal case, the notice of revocation should specify the violation. (*In re Moss* (1985) 175 Cal.App.3d 913, 929.) A revocation hearing may occur simultaneously with the preliminary hearing on the new charge, though the defendant should be notified of this. (Ibid.)

c. Contested hearings

A defendant does not have the right to a jury trial, but only a hearing before a judge. (§ 1203.2, subd. (b).) The prosecution need not prove the violation by proof beyond a reasonable doubt, but only by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441.) On appeal, the appellate court will only determine whether the finding was supported by substantial evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The prosecution must prove that a violation of probation is willful, or else it has not met its burden. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983.)

At a hearing on a probation violation, several different evidentiary rules are notable. Hearsay evidence is ordinarily not admissible, unless good cause exists for its admission. (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1202 [good cause exists if declarant unavailable or declarant's presence at hearing would require great difficulty or pose risk of harm].) Reliable documentary evidence not supported by live testimony is generally admissible (*People v. Maki* (1985) 39 Cal.3d 707, 716), though various courts have come to differing interpretations of this rule (see, e.g., *People v. Brown* (1989) 215 Cal.App.3d 452, 454; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1065-1067; *People v. Abrams* (2007) 158 Cal.App.4th 396, 398). Section 1111, requiring that testimony of accomplices be corroborated, has no application in revocation proceedings. (*People v. McGavock* (1999) 69 Cal.App.4th 332, 339-340.) An acquittal on a criminal charge that also serves as the basis for the probation violation does not bar revocation on the same facts. (*In re Coughlin* (1976) 16 Cal.3d 52, 56.) A conviction on the charge can serve as the basis for the revocation without relitigating the facts, though the defendant must be given the opportunity to provide contradictory evidence. (*People v. Sturgeon* (1975) 53 Cal.App.3d 711, 713.) A defendant's testimony at a revocation hearing cannot later be used in the prosecution's case-in-chief at a related criminal trial, though it can be used to impeach the defendant, should he testify at the trial. (*People v. Weaver* (1985) 39 Cal.3d 654, 660.)

4. Sentencing.

If a court revokes probation, the nature of the sentence will depend on whether the imposition of sentence had been previously suspended (hereinafter "ISS probation"), or whether execution of the sentence had been suspended (hereinafter "ESS probation"). (*Howard, supra*, 16 Cal.4th at p. 1092.) When a defendant has been on ISS probation, the revocation judge may choose to sentence the defendant to the low-, mid-, or upper-term based on circumstances that existed at the time probation was originally granted. (Rule 4.435.) If a court previously reinstated probation, and later revoked it, at least one appellate court has ruled that the trial court can then consider events between the initial grant of probation and the reinstatement. (*People v. Harris* (1990) 226 Cal.App.3d 141, 145.) Additionally, events occurring after the original grant of probation may be considered in determining whether to reinstate a defendant on probation or whether to impose a state prison or county jail term. (*People v. White* (1982) 133 Cal.App.3d 677, 680-682.) The trial court must provide reasons on the record for choosing imprisonment

as opposed to probation, and for choosing a particular term of imprisonment. (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1080-1081.)

If a defendant has previously been on ESS probation, the exact sentence previously suspended must be imposed if a defendant is not reinstated on probation. (Rule 4.435(b)(2); *Howard, supra*, 16 Cal.4th at p. 1092.) Under section 1170, subdivision (d)(1), however, a court may recall a sentence under section 1170(d)(1) within 120 days of its execution, and impose any lawful sentence which is not greater than the ESS sentence. (*Ibid*.) And with a violation of ESS probation, a court retains discretion to reinstate a defendant on probation, as opposed to imposing a prison or county jail term. (*People v. Medina* (2001) 89 Cal.App.4th 318, 322-323.)

G. Modification and Extension of Probation.

A court may modify probation at any time before the probationary term expires. (§§ 1203.1-1203.3.) A probationer has fewer due process rights when probation is modified than when probation is revoked. (*People v. Minor* (2010) 189 Cal.App.4th 1, 6.) A probationer is entitled only to notice of the intended modification and an opportunity to be heard. (*Ibid*.) Pursuant to section 1203.3, subdivision (b)(1), a defendant is entitled to two days notice on a request to modify or extend probation.

Trial courts have the authority to modify the terms of probation or extend it up to the maximum term so long as a change in circumstances is shown; no violation of probation must be alleged or proven. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095; see also *In re Clark* (1959) 51 Cal.2d 838, 840 ["[a]n order modifying the terms of probation based upon the same facts as the original order granting probation is in excess of the jurisdiction of the court"]; *People v. Medeiros* (1994) 25 Cal.App.4th 1260, 1264.) A trial court must provide reasons on the record justifying the modification. (§ 1203.3, subd. (b)(1)(A).) Section 1203.3 provides for several limitations about how a court may modify the terms and conditions of probation.

There are two different types of extensions – extensions of probation up to the maximum term, and extensions of probation past the maximum term. Only the former is governed by the traditional rules regarding probation modifications. If appellate counsel receives a case in which the extension of probation is at issue, counsel should first determine whether probation has been extended up to or past the maximum term. This is

vital because each type of extension is subject to different statutes and case law. Both types will be examined in turn.

III. SENTENCING ISSUES

The courts have recognized the determinate sentencing law (DSL) is "a legislative monstrosity which is bewildering in its complexity." (*People v. Begnald* (1991) 205 Cal.App.3d 1548, 1551.) "As a sentencing judge wends his way through the labyrintine procedures of section 1170 of the Penal Code, he wonders, as he utters some of its more esoteric incantations, if perchance the Legislature had not exhumed some long departed Byzantine scholar to create its seemingly endless and convoluted complexities. Indeed, in some ways it resembles the best offerings of those who author bureaucratic memoranda, income tax forms, insurance contracts or instructions for the assembly of packaged toys." (*Community Release Board v. Superior Court* (1979) 91 Cal.App.3d 814, 815, fn. 1.)

Yet "a defense attorney who fails to adequately understand the applicable sentencing alternatives, promote the proper application, or pursue the most advantageous disposition for his client may be found incompetent." (*People v. Scott* (1994) 9 Cal.4th 331, 351.) A defendant must make a specific objection to the court's exercise of discretion in sentencing. (*Id*. at pp. 353-354.) Thus, there must be an objection to conditions of probation, factors the court finds in aggravation or (does not find) in mitigation, reasons for (not) granting probation, whether extraordinary reasons exist for granting probation, for imposing the upper term, for imposing a consecutive sentence, the reasons given for imposing a consecutive sentence, for not stating reasons in sentencing, for double counting factors in sentencing, for the amount of setting a fine above a statutory minimum, for the amount of victim restitution, and so on. (*Ibid.*) It may be insufficient to simply ask the court not to impose an upper or middle term without stating why certain factors in mitigation should be found true or why certain facts in aggravation should not be found true. Further, the sentencing issue will be waived on appeal without pressing the court to state its reasons.

A. Determinate Sentencing Law (DSL).

One can understand how to construct a determinate sentence in four steps.

First, choose the **principal term**. The principal term is longest term under the DSL scheme. It is includes a base term and specific enhancements. (Pen. Code, § 1170.1, subd.

(a), sen. 2.) Most crimes carry a **base term** that includes a **lower term, a middle term,** and an **upper term**. (Pen. Code, § 1170, subd. (b).)

A **specific enhancement** is a conduct enhancement that is specific to the crime (not the person), such as weapons use, infliction of great bodily injury, etc. (Cal. Rules of Court, rule 4.405(c); see Pen. Code, § 1170.11.) Generally, there is no limit on enhancements to the principal term, but there can be only one weapons enhancement and only one GBI enhancement for any charge. (Pen. Code, §§ 1170.1, subds. (f) & (g), 12022.53, subd. (f).)

Second, a **subordinate term** is any determinate term running consecutively to the principal term. Generally, a person can be sentenced on only one determinate sentence, and separate cases (even from different courts) must be run concurrently or follow the rules for imposing subordinate terms. (Pen. Code, §§ 669, subd. (b), 1170.1, subd. (a), sen. 1; Cal. Rules of Court, rule 4.452.)

Usually the court has the discretion to run terms concurrently or consecutively (Pen. Code, § 669, subd. (a), sen. 1), and if the court does not specify, then the term is presumed to be concurrent (*id.*, par. 2). Exceptions: Escape from custody must be run consecutively (Pen. Code, §§ 1370.5, 4530, 4532). When there is an OR/bail enhancement, the two cases must be run consecutively (Pen. Code, § 12022.1, subd. (e)). In a strikes case, a conviction not arising from the same occasion or set of operative facts must run consecutive (Pen. Code, §§ 667, subd. (c)(6), 1170.12, subd. (a)(6)). With enumerated sex offenses involving separate victims or separate occasions, the conviction must be run consecutive (Pen. Code, § 667, subd. (d)).

Most subordinate terms must be one-third the middle term. (Pen. Code, § 1170.1, subd. (a), sen. 3.) Exceptions: Full middle term consecutive for kidnapping multiple victims (Pen. Code, § 1170.1, subd. (b)), or violations of Penal Code sections 136.1, 137, 139, subdivision (b), and 653f. (Pen. Code, §§ 1170.13, 1170.15.) Full upper term consecutive for voluntary manslaughter (Pen. Code, § 1170.16), or escape (*ante*) is permitted.

When the punishment for a subordinate term is one-third the middle term and a specific enhancement is added to the punishment, the court usually can only impose one-third the punishment for the enhancement. (Pen. Code, § 1170.1, subd. (a), sen. 3.) Full

enhancements may be added to each kidnapping conviction (Pen. Code, § 1170.1, subd. (b)) and for enumerated sex offenses (Pen. Code, § 1170.1, subd. (h)). A full weapons and GBI enhancement may be added for violations of Penal Code sections 136.1, 137, and 653f (Pen. Code, § 1170.15).

A defendant cannot be punished twice for committing two offenses for the same act or with the same objective. (Pen. Code, § 654; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) A concurrent sentence is punishment. (*People v. Deloza* (1998) 18 Cal.4th 585, 594.) Multiple punishments is permissible for multiple victims of crimes of violence. (*Neal v. State of California* (1960) 55 Cal.2d 11, 20-21.) The Supreme Court has warned against "pars[ing] the objectives too finely." (*People v. Britt* (2004) 32 Cal.4th 944, 953.) Yet, the Supreme Court has approved doing just that, especially when sex offenses are involved. (*People v. Hicks* (1993) 6 Cal.4th 784, 787; *People v. Harrison* (1989) 48 Cal.3d 321, 325, 335-336.) When section 654 applies, the court must stay the lighter sentence. (*People v. Kramer* (2002) 29 Cal.4th 720, 723.) When a punishment is stayed, the fine for the offense cannot be imposed. (*People v. Le* (2006) 136 Cal.App.4th 925, 934.) The failure to object on Penal Code section 654 grounds after a jury trial does not forfeit the claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) Section 654 is not an issue when imposition of sentence is suspended. (*People v. Wittig* (1984) 158 Cal.App.3d 124, 137.)

Third, calculate the **aggregate term** by adding the principal term with the subordinate terms and any **general enhancements** (or status enhancements, usually priors) (Cal. Rules of Court, rule 4.405(c)) and any OR/bail enhancement. (Pen. Code, § 1170.1, subd. (a), sen. 1.)

The same conviction cannot be used as both a prison prior and a serious felony prior [Proposition 8 prior] (*People v. Jones* (1994) 5 Cal.4th 1142, 1152) or a violent felony prior (Pen. Code, § 667.5, subd. (b)).

Fourth, Calculate the penalty for escape and crimes committed in prison separately and add it to the total sentence. (Pen. Code, § 1170.1, subd. (c).) Calculate the penalty for enumerated sex offenses separately, as it may be added to the total DSL sentence. (Pen. Code, § 667.6, subds. (c) & (d).) Add the determinate sentence to all other sentences under other schemes. (Pen. Code, § 669, subd. (a), sen. 3; Cal. Rules of Court, rule 4.451(a).)

An enumerated sex offenses is a conviction for any crime listed in Penal Code section 667.6, subdivision (c), first sentence. The court may impose a concurrent sentence or run a full lower/middle/upper term consecutive along with full terms for conduct enhancements. (Pen. Code, §§ 667.6, subd. (c); 1170.1, subd. (h).) A consecutive sentence is mandatory "if the crimes involve separate victims or involve the same victim on separate occasions." (Pen. Code, § 667.6, subd. (d); *People v. Jones* (1988) 46 Cal.3d 585, 595-596, 600.) A separate occasion exists if the defendant had a "reasonable opportunity to reflect upon [his or her] actions and nonetheless resumed sexually assaultive behavior." (Pen. Code, § 667.6, subd. (d), par 2.)

Generally speaking, the total determinate term can be imposed consecutively or concurrently with indeterminate terms. (Pen. Code, § 669; *People v. Quintanilla* (2009) 170 Cal.App.4th 406, 411.)

B. Strike or stay an allegation.

Generally, the court can stay or strike an offense or the punishment for the offense. It may strike an enhancement or the punishment for the enhancement. (Pen. Code, § 1385.) There are some statutory prohibitions against striking or staying certain allegations. (See, e.g, Pen. Code, §§ 667.61, subd. (g); 1385.1.)

Striking the punishment is not the same as striking the offense or enhancement. "A stay is a temporary suspension of a procedure in a case until the happening of a defined contingency. [¶] In contrast, a striking is an unconditional deletion of the legal efficacy of the stricken allegation or fact for purposes of a specific proceeding. It is tantamount to a dismissal." (*People v. Carrillo* (2001) 87 Cal.App.4th 1416, 1421, fn. omitted.) For example, if an offense would be a violent felony because of a great bodily injury enhancement, limits on presentence credits would apply if the punishment for the enhancement is imposed but would not apply if the enhancement is stricken. (*In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443-1446.) The court must impose or strike an enhancement or its punishment; it cannot stay an enhancement. (*People v. Perez* (2011) 195 Cal.App.4th 801, 805.)

Under Penal Code section 1385, there must be an allegation in the charging document to strike. (*In re Varnell* (2003) 30 Cal.4th 1132, 1134, 1139.) The court cannot use section 1385 to eliminate an uncharged consequence of the offense. (*Id*. at pp. 1134-

1135; *People v. Thomas* (2005) 35 Cal.4th 635, 644.)

C. Presentence credits.

1. Actual credit.

A defendant is entitled to presentence credits. (Pen. Code, § 2990.5.) Counsel should careful examine the award of presentence credits. There is often a calculation error. The defendant receives credit for every day in custody, including the day of arrest and the day of sentencing. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469.) An issue concerning actual or conduct presentence credits cannot be argued in the Court of Appeal without first rasing it in the superior court, unless other issues are being raised on appeal. (Pen. Code, § 1237.1; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1176-1177; *People v. Acosta* (1996) 48 Cal.App.4th 411, 420.)

2. Multiple cases.

"Although the statutory language in section 2900.5 'may appear to have meaning which is self-evident, the appellate courts have had considerable difficulty in applying the words to novel facts.' (*People v. Adrian* (1987) 191 Cal.App.3d 868, 874.) 'Probably the only sure consensus among the appellate courts is a recognition that section 2900.5, subdivision (b), is "difficult to interpret and apply." [Citation.] As we have noted, in what is surely an understatement, '[c]redit determination is not a simple matter." '(*Id.* at pp. 874-875.)" (*In re Marquez* (2003) 30 Cal.4th 14, 19.)

The problem arises when the defendant is in custody for more than one case. The defendant is entitled to presentence credits in a certain case if it can be shown he or she would not be in custody "but for" the case. The defendant's burden to prove "but for" causation is not met simply by demonstrating that the conduct for which he seeks credit was "a" basis for the restraint. The defendant is only entitled to dual credits if he is able to show that he "could have been free during any period of presentence custody but for the same conduct that led to the instant conviction and sentence." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1195.)

The general rule is that the defendant cannot receive presentence credits for a case if he or she is in custody on another case. For example, there are no presentence credit for the time there is a hold in a case while the defendant is in custody on another case. (*In re*

Joyner (1989) 48 Cal.3d 487, 492.) And if the defendant is serving an adjudicated sentence while waiting to adjudicate another case, he or she cannot receive presentence credits in the second case, even if he or she receives a concurrent sentence. (*In re Rojas* (1979) 23 Cal.3d 152, 155-156.) However, the defendant does receive credit for the case if the other case is dismissed or reversed. (*People v. Marquez* (2003) 30 Cal.4th 14, 20-21.)

There is no credit for two cases when there is a consecutive sentence, even if this leads to dead time. (*People v. Santa Ana* (2016) 247 Cal.App.4th 1123, 1135-1143; *People v. Adrian* (1987) 191 Cal.App.3d 868, 876-877; see *Bruner, supra,* 9 Cal.4th at p. 1192, fn. 9 ["when consecutive terms are imposed for multiple offenses in a single proceeding, only one of the terms shall receive credit for presentence custody, . . . "].)

There is an exception to the general rule. If the defendant is given two concurrent sentences *at the same time*, dual presentence credits can be awarded. (*People v. Jacobs* (2013) 220 Cal.App.4th 67, 81; see *Bruner, supra,* 9 Cal.4th at p. 1192, fn. 9.) There is an exception to the exception. The defendant does not receive dual credits if there is a violation of probation based on conduct that is different, at least in part, from the new offense.

If the defendant is sentence on a violation of probation and receives concurrent time, he or she receives dual credit only if the violation is based on the same conduct as the new offense. (*People v. Williams* (1992) 10 Cal.App.4th 827, 832-834 [new crime and VOP based on the new crime and not obeying all laws which was the new crime]; *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1485 [presentence credits when VOP was based solely on the new crime]; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 394 [when the technical violations are dismissed, the defendant is entitled to dual credit]; but see *People v. Stump* (2009) 173 Cal.App.4th 1264, 1273 [no presentence credits for DUI conviction when parole violation was for DUI and the technical violations of consuming alcohol and driving a car because DUI is behavior in addition to consuming alcohol].)

Similarly, a defendant cannot receive presentence credits for a new crime when he or she suffers a parole revocation based on other conduct. (*Bruner, supra,* 9 Cal.4th at p. 1191.)

3. Conduct credit.

Generally, a defendant is entitled to a day of conduct credit for every day of actual credit in custody after October 2011 until the date of sentencing. (Pen. Code, § 4019.) However, presentence conduct credits is limited to 15 percent if the defendant is sentenced on a violent felony. (Pen. Code, § 2933.1; *In re Pope* (2010) 50 Cal.4th 777, 784-786 [even if the punishment for the violent felony is stayed under Pen. Code, § 654]; *In re Reeves* (2005) 35 Cal.4th 765, 773 [Pen. Code, § 2933.1 applies to the entire sentences, even for consecutive terms that are not violent felonies].) And there are no presentence conduct credits for murder after 1996 (Pen. Code, § 2933.2; *People v. Calles* (2012) 209 Cal.App.4th 1200, 1226) or a one strike offense committed after 2006 (Pen. Code, § 667.61, subd. (j); *People v. Adams* (2018) 28 Cal.App.5th 170, 181-182).

4. Resentencing.

Calculating presentence credits for a prisoner who has been resentenced is complicated. This is because "an appellate remand solely for correction of a sentence already in progress does not remove a prisoner from the Director's custody or restore the prisoner to presentence status is contemplated by section 4019. Clearly defendant is not entitled to section 4019 credit for this time in a state penitentiary. Nor could he earn them during the time he was physically housed in *county jail* to permit his participation in the remand proceedings." (*People v. Buckhalter* (2001) 26 Cal.4th 30, 33-34; *In re Martinez* (2003) 30 Cal.4th 29, 31; *People v. Meyers* (1999) 69 Cal.App.4th 305, 311.) No additional presentence credits after the initial sentencing hearing if the court recalls the sentence pursuant to section 1170. (*People v. Johnson* (2003) 32 Cal.4th 260, 267-268.)

The Supreme Court has broken down the time in custody into four phases. "Phase I is the period from the initial arrest to the initial sentencing. . . . Phase II is the period from the initial sentencing to the reversal. . . . Phase III is the period from the reversal to the second sentencing. . . , and phase IV is the period after the second and final sentencing." (*In re Martinez* (2003) 30 Cal.4th 29, 32.) If the conviction is reversed, defendant receives presentence credits for Phase I (before initial sentencing) and Phase III time (after reversal and before second sentencing hearing) but not Phase II time (after initial sentencing hearing and before reversal). (*Id.*, at pp. 32-36; *People v. Donan* (2004) 117 Cal.App.4th 784, 792 [must administratively pursue credit for phase II].) Thus, the court calculates presentence credits for all of the time before the first sentencing hearing and

for the time at the jail after remand or reversal of the sentence until the sentencing date. (*People v. Saibu* (2011) 191 Cal.App.4th 1005, 1012-1013.)

D. Fines and Fees.

Once cannot raise on appeal only issues concerning fines, fees, or presentence credits without first rasing it in the superior court (Pen. Code, §§ 1237.1, 1237.2.) One case, however, holds that the superior court is without jurisdiction to correct fines and fees if other issues are raised on appeal. (*People v. Jenkins* (2019) 40 Cal.App.5th 30, 38, review granted on other grounds Nov. 26, 2019, S258729.).An exception to this holding would be an unauthorized sentence.

1. Penalty assessments.

The Legislature has added a host of new penalty assessments that makes it more difficult to determine if the court imposed the correct fine. It is important to calculate the correct penalty assessment in order to determine if there is an issue on appeal or a potential adverse consequence. Penalty assessments are mandatory and can be adjusted by the appellate court if the superior court failed to impose the correct amount. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157; *People v. Taylor* (2004) 118 Cal.App.4th 454, 457.) The penalty assessments described below are added to most fines, but they are not added to victim restitution, restitution fines, court security and facility fees, or most administrative fees such as probation fees, criminal justice administrative (booking) fees, cite and release fees, collection fees, or attorney fees. (See *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1257; *People v. Allen* (2001) 88 Cal.App.4th 986, 992-993; *People v. Martinez* (1999) 73 Cal.App.4th 265.)

a. Since 1995, a state penalty assessment of $10 (Pen. Code, § 1464, subd. (a)) and a county penalty assessment of up to $7 has been added to each fine of $10 or portion thereof (Gov. Code, § 76000, subd. (a)). Thus, penalty assessments of $170 would be added to a $100 fine. Each county transferred part of the county penalty assessment to constructing new courthouses. The amount each county transfers is listed in subdivision (e) of Government Code section 76000.

b. Effective September 30, 2002, a state surcharge of 20 percent is added as a penalty assessment. (Pen. Code, § 1465.7.) Like most penalty assessments, the surcharge is considered to be punishment, and the ex post facto clause prohibits applying the

surcharge to crimes committed before September 30, 2002. (*People v. High* (2004) 119 Cal.App.4th 1192, 1197.)

c. Starting January 1, 2003, a county surcharge of up to $5 can be assessed on every $10 of a fine or portion thereof. (Gov. Code, § 70372, subd. (a).) The exact assessment used to depend on the amount set by the county board of supervisors. (Gov. Code, § 70375.) One can refer to the Uniform Bail and Penalty Schedules for the correct amount of surcharge in each county. Alternatively, the amount can be calculated by taking the amount not transferred to county courthouse funding under Government Code section 76000, subdivision (e) and subtracting the amount from $5. (*McCoy, supra*, 156 Cal.App.4th at pp. 1252-1254.) The court in *McCoy* used a case from Los Angeles as an example. LA transfers $5 of the $7 under section 76000. Thus, the assessment under section 70732 is: $5 - ($7 - $5) = $3. (*Id*. at p. 1256.) This formula does not work if the county decides to transfer a different amount under Government Code section 70372, subdivision (b)(2); Santa Cruz was one such county. The correct assessment under section 70732 for Monterey and San Benito Counties was $3 for every $10 of a fine or portion thereof; in Santa Clara County, it was $3.50; and in Santa Cruz County it had been $5 through 2007 and then became $3. An amendment to the statute, effective January 1, 2009, made this amount $5 in all cases. Since the county surcharge is similar to the state surcharge, it is subject to the same ex post facto limitations. (*High, supra*, 119 Cal.App.4th at p. 1199.)

d. On November 3, 2004, the voters approved the practice of DNA testing all people who are arrested. To pay for the tests, a penalty assessment of $1 is added to every $10 of a fine or portion thereof. (Gov. Code, § 76104.6, subd. (a).) Imposition of the DNA penalty assessment to a crime occurring before the statute became effective violates the ex post facto clause. (*People v. Batman* (2008) 159 Cal.App.4th 587, 590-591.)

e. Not to be outdone, the Legislature approved a DOJ forensic lab fee of $1 for every fine of $10 or portion thereof, effective July 12, 2006. (Gov. Code, § 76104.7.) This increased to $3 for every fine of $10 or portion thereof, effective June 10, 2010. It increased again to $4, effective June 27, 2012.

f. Starting in 2007, a county may impose an "Emergency Medical Services" Fund penalty assessment of $2 for every $10 or portion thereof of a fine. (Gov. Code, § 76000.5.)

g. Effective August 13, 2003, a court operations assessment (formerly called a court security fee) of $20 was added. (Pen. Code, § 1465.8.) The amount increased to $30 on July 28, 2009. This amount increased to $40 on October 19, 2010. The fee is assessed for each conviction. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) It applies to any case, regardless of when the crime was committed. (*People v. Alford* (2008) 42 Cal.4th 749, 754-755.) The amount that applies is the amount in effect when the "conviction" occurred, which is when there is a guilty or no contest plea or a guilty verdict. (See *People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.) It cannot be assessed in juvenile cases. (*Edgar v. Superior Court* (2004) 120 Cal.App.4th 1306, 1309.)

h. Effective January 1, 2009, a court facilities fee of $30 was added. (Gov. Code, § 70373.) The wording of the statute suggests it applies per conviction, not per case. The fee also applies to misdemeanors. A fee of $35 is added for each infraction. Again, what matters is when the "conviction" occurred, not when the crime was committed.

i. Penal Code section 1463.27 was enacted which allows counties to assess an additional $250 for every fine, penalty, or forfeiture imposed for violating Penal Code section 273.5 or 243, subdivision (e)(1).

j. Starting in 2011, there is a $4 penalty assessment for every conviction for a violation of the Vehicle Code or a local ordinance adopted pursuant to the Vehicle Code, except for parking offenses. (Gov. Code, § 76000.10, subd. (c)(1).)

k. Under subdivision (b) of section 1202.4, the court must impose a restitution fine when the defendant is convicted. Starting August 3, 1995, the court must impose a parole revocation restitution fine of the same amount when the defendant is sentenced to prison; this fine is stayed unless the defendant violates parole. (Pen. Code, § 1202.45.) Effective August 16, 2004, the court must also impose a probation revocation restitution fine of the same amount when the defendant is placed on probation, and the fine is stayed unless the defendant violates probation.

(Pen. Code, § 1202.44.) The ex post facto clause prohibits imposing the parole revocation and probation revocation restitution fine for a crime committed before the effective date of the statute, regardless of when the revocation occurs. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 678.) The restitution fine must be not less than $200 and not more than $10,000 ($100-$1000 for misdemeanor convictions). The minimum restitution fine increased to $240 (or $120 for misdemeanor convictions) in 2012, $280 (or $140) in 2013, and $300 (or $150) in 2014.

l. There are additional penalty assessments for convictions for driving under the influence. (See, e.g., Pen. Code, § 1463.14, subd. (b) [$50 per conviction]; Veh. Code, §§ 23645 [$50], 23649 [$100].)

m. **Sample Calculation for Penalty Assessments**: A $100 fine for a felony conviction in Santa Clara County for a felony committed on or after January 1, 2014, resulting in probation, would require additional penalty assessments amounting to $310, plus $70 in court security and court facility fees, not to mention restitution fines of at least $900 and victim restitution. Ironically, efforts by the state to balance the budget on the backs of criminal defendants have been thwarted by the tough-on-crime movement. Proposition 9, passed in November 2008, requires all money collected from defendants to go first to victim restitution. (Prop. 9, § 4.1, amending Cal. Const., art. I, § 28, subd. (b)(13)(C).) Given the meager wages paid in prison, the state treasury might never see the fines levied on defendants who are ordered to pay even modest amounts of victim restitution.

2. Victim restitution.

Restitution can include, for example, moving expenses, the victim's attorney fees, lost wages or profits for attending court, adding a security system, clean-up costs, and so on. It can be argued in some cases that a restitution order violates due process, the right to a jury trial, or constitutes an excessive fine. The ideal case is when the restitution award exceeds the maximum fine permissible for the case (usually $10,000 per felony) and the loss consists of something other than medical bills or property that was damaged or taken.

The purpose of restitution is to make the victim whole. "Victims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California." (Cal. Const., art. I, § 28, subd. (b)(13);

see also *People v. Birkett* (1999) 21 Cal.4th 226, 246.) The amount of restitution may include "the actual cost of repairing the property when repair is possible." (Pen. Code, § 1203.4, subd. (f)(3)(A).) "[T]he restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct . . . . " (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 995.) At the same time, the purpose of the statutory scheme is not to provide the victim with a windfall. (*Id.* at pp. 995-996.)

Neither the voters nor the Legislature has established a procedure for determining the amount of restitution. The courts of appeal have developed a court-made procedure where the victim only needs to present a prima facie evidence of a loss; the defendant then has the burden of proving to a judge the amount should be different. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542-1543; see also *People v. Goulart* (1990) 224 Cal.App.3d 71, 82-83; *People v. Prosser* (2007) 157 Cal.App.4th 682, 690-692.)

The Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . " Similar wording can be found in the state constitution. (Cal. Const., art. I, §§ 7, 15.)

Reliability of the information considered by the court is key issue in determining whether its sentencing decisions comply with due process. (*United States v. Tucker* (1972) 404 U.S. 443, 447.) The unsworn statement by the victim was not evidence. (*In re Heather H.* (1988) 200 Cal.App.3d 91, 95.) Virtually no other judicial proceeding permits permanently depriving a person of property without proof by at least a preponderance of the evidence. In a civil suit, the plaintiff has the burden of proving to a jury both a cause of action and the amount of damage. (*Canavin v. Pac. Southwest Airlines* (1983) 148 Cal.App.3d 512, 531.)

Even in an administrative proceeding concerning victim restitution, the victim has the burden of proof by a preponderance of evidence to establish the amount of the loss with declarations under oath and corroborating documentation. (Gov. Code, §§ 13952, subds. (b) & (c), 13954, 13959, subd. (c); Cal. Code Regs., tit. 2, §§ 649.7, 649.11; see, e.g., *Webster, supra,* 197 Cal.App.3d at pp. 38-39.) The administrative procedure established by the Legislature reflects a balance between a relatively easy and timely method of compensating victims for their loss while assuring that their claims are properly scrutinized. Not only does the minimal scrutiny ensure the integrity of the

system, but it also ensures that limited resources would reach as many needy victims as possible. It demonstrates that a greater amount of protection can be afforded to the one given the responsibility to compensate victims without imposing an undue burden on the victims. At a minimum, the procedures for ordering money from a criminal defendant should reflect the same amount of scrutiny and fairness the government requires in providing restitution out of the public fisc to crime victims.

A restitution order might also violate the right to a jury trial. Under the Sixth and Fourteenth Amendments, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; see also Cal. Const., art. I, § 16.) It might be argued that the punishment for any crime in California includes a potentially unlimited amount of restitution. But this reasoning was rejected in *Apprendi* itself. New Jersey argued that any felony was subject to a hate crime enhancement. The Court said that because the fact of it being a hate crime needed to be proved before the punishment could be imposed, this fact needed to be determined by a jury. (*Apprendi,* at pp. 492-494; see *Hester v. United States* (2019) __ U.S. __ [139 S.Ct. 509, 510] (dis. opn of Gorsuch, J. from the denial of petn. for cert. ["We've used the term 'statutory maximum' to refer to the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted. [Citation.] In that sense, the statutory maximum for restitution is usually *zero*, because a court can't award *any* restitution without finding additional facts about the victim's loss." (emphasis in original)].)

Some courts have argued that restitution is not punishment. (See, e.g., *People v. Panagan* (2013) 213 Cal.App.4th 574, 585.) But restitution awards are considered to be part of a defendant's punishment. (See, e.g., *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123-1124 [the amount of restitution can be greater than one's civil liability]; *People v. Richards* (1976) 17 Cal.3d 614 [its purpose is rehabilitation]; *People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1132-1133 [because the state's interest in rehabilitation is different from the private civil interests, a civil pay-out did not end the victim restitution claim]; *Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 443-446 ["A victim's right to sue a defendant for tortious conduct amounting to a crime and the state's right to impose a restitution order on a criminally convicted defendant are independent of one another."]; *People v. Rugamas* (2001) 93 Cal.App.4th 518, 523 [because restitution is to

rehabilitate the offender, the court can order restitution for losses not authorized by statute as a condition of probation].) "Restitution hearings held pursuant to section 1202.4 are sentencing hearings and are thus hearing which are a significant part of a criminal prosecution." (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1386.)

The conclusion that a state restitution award is inherently part of a criminal punishment was the underlying principle in *Kelly v. Robinson* (1986) 479 U.S. 36, which held that although civil debts can be discharged in bankruptcy, restitution awards cannot be. (*Id.* at p. 47). California has agreed that a defendant's bankruptcy and the discharge of a civil debt does not affect the court's ability to impose and enforce criminal restitution. (*People v. Moser* (1996) 50 Cal.App.4th 130, 133-134; see also *People v. Dalvito* (1997) 56 Cal.App.4th 557, 560-562 [the amount of restitution is not decreased when the debt from the stolen property is discharged in bankruptcy court].) An uncollected civil judgment normally extinguishes in ten years (Code Civ. Proc, § 683.020), but "[a]ny portion of a restitution order that remains unsatisfied . . . shall continue to be enforceable . . . until the obligation is satisfied." (Pen. Code, § 1202.4, subd. (m).)

A person cannot be imprisoned for failing to pay a civil debt. (Cal. Const., art. I, § 10.) A failure to pay civil debts imposed in criminal cases, such as the imposition of attorney fees or probation fees, cannot be used to revoke probation or converted into imprisonment or involuntary community service. (*People v. Faatiliga* (1992) 10 Cal.App.4th 1276, 1280, overruled on a related point in *People v. Flores* (2003) 30 Cal.4th 1059, 1068; *People v. Hill* (2002) 103 Cal.App.4th 889, 892-894.) Failure to pay restitution, however, is grounds for revoking or extending probation. (See *Giordano, supra,* 42 Cal.4th at p. 663, fn. 7; *People v. Cookson* (1992) 54 Cal.3d 1091, 1096-1100.)

Even if restitution were civil, appellant had a constitutional right to a jury trial to determine the amount of the loss. The California's Constitution guarantees the right to a jury trial in civil cases. (Art. I, § 16, ¶ 1.) Because the amount of damages is an issue of fact, the amount of damages, not just the cause of action, must be tried by a jury. (Code Civ. Proc, §§ 590, 592; see *Canavin v. Pac. Southwest Airlines* (1983) 148 Cal.App.3d 512, 531.) Whether appellant had a right to a jury trial on the amount of restitution depended on whether it was an action "at law" or "in equity." (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8; *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 299-300 [the right to a jury trial in a drug forfeiture action].)

The amount of a loss from a transgression, such theft (conversion) and battery, are common law torts that require the right to a jury trial.

3. *Dueñas.*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157, the court held that the imposition of fines and fees on a defendant who cannot afford to pay them violates due process. (*Id.* at p. 1164.) A different, well-reasoned case better explained the basis of the decision and offered that it might also violate the excessive fines clause and equal protection clause. (*People v. Cowan* (2020) 46 Cal.App.5th 32, 44-45, 46-48, review granted June 17, 2020, S261952; see also *id*. at pp. 52-64 (conc. opn. of Streeter, J.).) Many courts have disagreed. This issue is pending in the California Supreme Court along with whether the defendant has the burden of showing the inability to pay. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.)

E. Sentencing Reform.

Propelled by budget constraints, increasing awareness of draconian sentences, and federal oversight of the state prisons due to overcrowding, there has been a series of laws enacted over the last ten years reducing punishments and in some cases permitting vacating or reducing convictions.

1. Realignment Act.

The Realignment Act, effective October 1, 2011, permitted serving many "prison" sentences in county jail. The court may also impose the maximum punishment while suspending a portion of the sentence on supervised release. (Pen. Code, § 1170, subd. (h).)

2. Proposition 47.

Proposition 47, effective November 4, 2014, permits reducing a felony conviction for simple possession of drugs and theft-related offenses. Much of the litigation has concerned what qualifies as a theft-related offense.

Proposition 47 created the new offense of shoplifting, and prohibited convicting a defendant of theft or commercial burglary when the amount taken is not more than $950. Shoplifting requires the intent to steal before entering the business. (See *People v. Lopez* (2020) 9 Cal.5th 254, 273-274.) Shoplifting includes entering a store or bank to commit

fraud or theft by false pretenses. (*People v. Gonzales* (2017) 2 Cal.5th 858, 868-875.) Shoplifting does not include entering a room that is not open to the public and taking something. (*People v. Colbert* (2019) 6 Cal.5th 596, 604.) Shoplifting does not include entering another's school locker to take something. (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1114.) It does not include entering a storage unit to take something. (*People v. Roth* (2017) 17 Cal.App.5th 694, 703; *People v. Stylz* (2016) 2 Cal.App.5th 530, 533-535.)

Vehicle Code section 10851 prohibits (a) taking a motor vehicle with the intent to permanently deprive the owner, (b) taking a motor vehicle with the intent to temporarily deprive the owner, and (c) driving a motor vehicle without permission. Proposition 47 applies to (a) taking a motor vehicle with the intent to permanently deprive the owner if the vehicle is worth no more than $950 (*People v. Page* (2017) 3 Cal.5th 1175, 1181–1183) and (b) taking a motor vehicle with the intent to temporarily deprive the owner if the vehicle is worth no more than $950 (*People v. Bullard* (2020) 9 Cal.5th 94, 109), but not (c) driving a motor vehicle without permission (*People v. Lara* (2019) 6 Cal.5th 1128, 1137).

Proposition 47 applies to forgery of a check, bond, bank bill, note, cashier's check, traveler's check, or money order (Pen. Code, § 473, subd. (b)); but it does not apply to any other item. (*People v. Martinez* (2016) 5 Cal.App.5th 234, 241 [does not apply to a forged receipt]; *People v. Bloomfield* (2017) 13 Cal.App.5th 647, 652 [doe not apply to fraudulent use of credit card under Pen. Code, § 484f, subd. (a)].) "[S]ection 473(b) does not apply 'to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.' " (*People v. Guerrero* (2020) 9 Cal.5th 244, 248.)

Proposition 47 applies to theft of a debit or credit card (Pen. Code, § 484e, subd. (d)). (*People v. Romanowski* (2017) 2 Cal.5th 903, 910.) In determining whether it is a felony, the court must determine the fair market value of the information in the black market. (*Id*. at p. 912.) The same rule applies to receiving a stolen debit card. (*Caretto v. Superior Court* (2018) 28 Cal.App.5th 909, 918.) The fair marker value can be the amount of money in the bank account to which the debit card can access. (*Id*. at p. 918.)

The *Romanowski* formulation of value applies to theft of access card information (Pen. Code, § 484e, subd. (d)). (*People v. Liu* (2019) 8 Cal.5th 253, 258-261.) The value of the goods taken from the access card information is not necessarily the minimal value. (*Id*. at p. 261.) However, Proposition 47 does not apply to possession of identifying

information (Pen. Code, § 530.5, subd, (a)). (*People v. Jimenez* (2020) 9 Cal.5th 53, 64-65 [cashing two stolen checks is not shoplifting].)

In determining the value stolen property, the issue is the market value of the property that was taken, accounting for any appreciation or depreciation. "In determining the market value of the property obtained for the purposes of [evaluating a theft], the reasonable and fair market value shall be the test." (Pen. Code, § 484; *People v. Lizarraga* (1954) 122 Cal.App.2d 436, 438.) "Put another way, 'fair market value' means the highest price obtainable in the market place rather than the lowest price or the average price." (*People v. Pena* (1977) 68 Cal.App.3d 100, 104.) The question, however, is not what the value of replacing the stolen property or the amount of victim restitution, but the value of the "property taken." (Pen. Code, § 490.2, subd. (a); *People v. Simpson* (1938) 26 Cal.2d 223, 2288-229; accord, *People v. Cook* (1965) 233 Cal.App.2d 435, 438 [because "the test is what it would bring in the open market, not its special value to the owner, nor its replacement cost," the value of merchandise stolen from a store is the retail value, not the wholesale value].)

Proposition 47 includes possession of counterfeit money. (*People v. Mutter* (2016) 1 Cal.App.5th 429, 436; *People v. Maynarich* (2016) 247 Cal.App.4th 77, 80-81.) The value is the amount of the total counterfeit currency. (*People v. Aguirre* (2018) 21 Cal.App.5th 429, 434-435.) It does not apply to forging a prescription (Health & Saf. Code, § 11368). (*People v. Gollardo* (2017) 17 Cal.App.5th 547, 557-558.)

Proposition 47 applies to embezzlement (Pen. Code, § 503). (*People v. Warmington* (2017) 16 Cal.App.5th 333, 337-338 [and remand with directions to grant the petition when the record clearly shows the amount was less than $950].)

Proposition 47 applies to receiving stolen property. (Pen. Code, § 496.) But it does not apply to receiving a stolen motor vehicle (Pen. Code, § 496d). (*People v. Orozco* (2020) 9 Cal.5th 111, 121-122.)

Proposition 47 does not apply to theft from an elder (Pen. Code, § 368, subd. (d)). (*People v. Soto* (2018) 23 Cal.App.5th 813, 819-824; *People v. Bush* (2016) 245 Cal.App.4th 992, 1001-1005.)

A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the petition a statement of

personally known facts necessary to eligibility. (*Page, supra,* 3 Cal.5th at p. 1188.) The defendant is entitled to relief, even if there has been a plea bargain. (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 991-992.) At resentencing, the court can restructure the sentence with another case. (*People v. Buycks* (2018) 5 Cal.5th 857, 893; *In re Guiomar* (2016) 5 Cal.App.5th 265, 273-275.)

The effect of reducing a conviction to a misdemeanor means the conviction can no longer apply as a prior conviction. If a defendant has a new conviction that was not final when Proposition 47 was enacted where the sentence was enhanced by a prior conviction that was later reduced to a misdemeanor, the defendant can be resentenced on the newer case. (*Buycks, supra,* 5 Cal.5th at p. 876.) A conviction for the gang crime (Pen. Code, § 186.22, subd. (a)) that is dependent upon a conviction that was reduced to a misdemeanor is no longer valid. (*People v. Valenzuela* (2019) 7 Cal.5th 415, 427.)

3. Proposition 57.

Proposition addressed prison overcrowding by permitting early parole for nonviolent prisoners and by reducing the number of juveniles who could be tried as adults. (See *Brown v. Superior Court* (2016) 63 Cal.4th 335, 339; *In re McGhee* (2019) 34 Cal.App.5th 902, 906.)

Most litigation concerns two areas. First, what is a nonviolent offender? A third strike offender without the current felony being violent or serious qualifies for early parole under Prop. 57. (*In re Edwards* (2018) 26 Cal.App.5th 1181, 1192; see *In re Arroyo* (2019) 37 Cal.App.5th 727, 730.) Several courts have said that being a sex offender does not automatically disqualify a prisoner for early parole. (*In re Chavez* (2020) 51 Cal.App.5th 748, 756; *Alliance for Constitutional Sex Laws v. Cal. Dept. of Corr. and Rehab.* (2020) 45 Cal.App.5th 225; *In re Schuster* (2019) 42 Cal.App.5th 943, 955.) Thus, being a third strike offender with prior sex offenses could qualify for early parole, but this issue is on review. (*In re Gadlin* (2019) 31 Cal.App.5th 784, 789, review granted May 15, 2019.)

The second area of litigation concerns Senate Bill No. 1391 (2017–2018 Reg. Sess.) (SB 1391), which increased the minimum age of a juvenile transferred to adult court from 14 to 16 years. (Stats. 2018, ch. 1012.) Most courts have held S.B. 1391 is constitutional and does not conflict with Proposition 57. (See, e.g., *People v. Superior*

Court (Alexander C.) (2019) 34 Cal.App.5th 994, 999-1004; *Narith S. v. Superior Court* (2019) 42 Cal.App.5th 1131, 1140-1142; *People v. Superior Court (S.L.)* (2019) 40 Cal.App.5th 114, 120-123, review granted Nov. 26, 2019, S258432.) One court disagreed, and the issue is on review. (See *O.G. v. Superior Court* (2019) 40 Cal.App.5th 626, 630, review granted Nov. 26, 2019, S259011.)

4. Proposition 64.

Proposition 64 (Gen. Elec. Nov. 8, 2016) legalized possession of relatively small amounts of marijuana, decreased the punishment for other marijuana-related offenses, and permitted commercial sales of recreational marijuana. Under newly enacted Health and Safety Code section 11361.8, certain people who have marijuana-related convictions can petition the court to reduce the offense. The prosecution must show ineligibility by clear and convincing evidence. (*People v. Banda* (2018) 26 Cal.App.5th 349, 355.)

Much of the litigation concerns which marijuana-related offenses qualify. One court has held that Proposition 64 applies to accessory to commit a marijuana offense (Pen. Code, § 32). (*People v. Boatwright* (2019) 36 Cal.App.5th 848, 855-857.) But another had held that conspiracy to sell marijuana under Penal Code section 182 can still be a felony. (*People v. Medina* (2018) 24 Cal.App.5th 61, 66.) Proposition 47 applies to possession of marijuana for sale with a gang enhancement. (*People v. Jessup* (2020) 49 Cal.App.5th 83, 89.)

Whether Proposition 64 decriminalized the possession of up to 28.5 grams of marijuana by adults 21 years of age or older who are in state prison is on review. (See *People v. Raybon* (2019) 36 Cal.App.5th 111, review granted Aug. 21, 2019, S256978.)

5. Firearms enhancement [Senate Bill No. 620].

For decades, the rule was “use a gun, go to prison.” Billboards went up in urban neighborhoods in the 1980's to advertise this. To ensure the enhancement was not stricken, thus making an offender eligible for probation, the Legislature stated the court may not strike a firearms enhancement under Penal Code section 1385. This was undone in 2017 with Senate Bill. No. 620 (2017-2018 Reg. Sess.), effective January 1, 2018. (See *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679.) However, probation is still prohibited, even if the enhancement is stricken. (*People v. Centeno* (2019) 38 Cal.App.5th 572, 577-578.)

An open question is whether the court on remand can reduce the enhancement to a lesser one. (*People v. Tirado* (2019) 38 Cal.App.5th 637, 643-644, review granted Nov. 13, 2019, S257658.)

6. Prior serious felony conviction [Senate Bill No. 1393].

Similarly, the Legislature had prohibited the courts from striking a five year enhancement for committing a serious felony with a prior serious felony conviction. This was undone around the same time the Legislature permitted striking a firearms enhancement. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.); Stats. 2018, ch. 1013, §§ 1, 2, effective January 1, 2019.)

7. Prior drug trafficking conviction.

Perhaps one of the most draconian enhancements was the drug trafficking prior, which added three years for an offender convicted of selling or transporting drugs or possession of drugs for sale with a prior conviction for one of the offenses. This enhancement disproportionately affected people of color who were convicted of possession for sale, even if the amount was very small, or simply for being in a car with drugs. The Legislature eliminated the prior unless it involved drug sales through a minor. (Sen. Bill No. 180 (2017-2018 Reg. Sess.), effective January1, 2018, amending Health and Safety Code section 11370.2.)

8. Prior prison commitment [Senate Bill No. 136].

Senate Bill No. 136 (2019-2020 Reg. Sess.), amending Pen. Code, § 667.5, subd. (b) (Stats. 2019, ch. 590, § 1, effective Jan. 1, 2020) eliminated a one year enhancement for most offenders who had previously been committed to prison.

9. Mental health diversion.

Assembly Bill No. 1810 (2017-2018 Reg. Sess.) added Penal Code sections 1001.35 and 1001.36. (Stats. 2018, ch. 34, § 24, effective June 27, 2018, amended by Sen. Bill No. 215 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1005, § 1, effective Jan. 1, 2019). This provision applies retroactively to convictions not yet final. (*People v. Frahs* (2020) 9 Cal.5th 618, 630-631.) The defendant would be entitled to a limited remand for a pretrial diversion hearing. (*Id*. at p. 637.) This provision does not apply to juveniles. (*In re J.M.* (2019) 35 Cal.App.5th 999, 1008.)

Penal Code section 1170.91 has also been amended to permit veterans who acquired mental health problems while in the military to petition to modify their sentence.

10. Retroactivity.

It is presumed that changes in the law do not apply retroactively. (Pen. Code, § 3.) An exception to the rule is that when the Legislature reduces the punishment for an offense, it is presumed the courts shall apply the reduction in all cases it is constitutionally permitted unless the Legislature has indicated otherwise. (*In re Estrada* (1965) 63 Cal.2d 740, 745-747.) Three questions have arisen. Did the Legislature indicate a new law should be applied retroactively? To what cases can it be applied retroactively? And what is the effect of permitting a court to change a sentence?

a. Is the new law retroactive?

Generally speaking, the Supreme Court has held in recent cases that the Legislature (or the electorate) has intended sentencing reform to apply retroactively (See, e.g., *People v. Frahs* (2020) 9 Cal.5th 618, 630-631 [mental health diversion]; *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308-310 [Prop. 57]; *People v. Petri* (2020) 78 Cal.App.5th 82, 93-94 [S.B. 136]; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679 [S.B. 620]; *People v. Millan* (2018) 20 Cal.App.5th 450, 455-456 [S.B. 180]), unless there is a process for convicts to petition to modify the sentence. In the latter situation, the petition method is the only way to modify a sentence (*People v. DeHoyos* (2018) 4 Cal.5th 594, 603 [Prop. 47]; *People v. Rascon* (2017) 10 Cal.App.5th 388, 392-39 [Prop. 64].)

b. Does it apply to the defendant?

Traditionally, it has been said that the *Estrada* doctrine applies to all convictions not yet "final." And a conviction is final when the time for seeking an appeal or a petition for writ of certiorari in the United States Supreme Court has expired. (*People v. Buycks* (2018) 5 Cal.5th 857, 876.)

A defendant with a final conviction is not entitled to relief. (*People v. Alexander* (2020) 45 Cal.App.5th 341, 344; *People v. Hernandez* (2019) 34 Cal.App.5th 323, 326; *People v. Johnson* (2019) 32 Cal.App.5th 938, 941-942; *People v. Fuimaono* (2019) 32 Cal.App.5th 132, 135.) The court correcting a clerical error in the abstract of judgment

after a letter from CDCR did not make a final judgment no longer final. (*People v. Humphrey* (2020) 44 Cal.App.5th 371, 379-380.)

Is a conviction "final" if the defendants is on probation or mandatory supervision? Recently, the Supreme Court decided that a defendant on probation with imposition of sentence suspended is entitled to the retroactive application of a new law. (*People v. McKenzie* (2020) 9 Cal.5th 40, 43 [drug trafficking prior].) Some courts have then held that defendants on probation with execution of sentence suspended (*People v. Contreraz* (2020) 53 Cal.App.5th 965, 971 [firearms enhancement]) and on mandatory supervision are qualify (*People v. Conaster* (2020) 53 Cal.App.5th 1223, 1229; *People v. Martinez* (Aug. 31, 2020, B303086) __ Cal.App.5th __ [2020 Cal.App. Lexis 831] [prison prior]). The issue is on review. (*People v. Shelton* [nonpub. opn.], review granted Aug. 12, 2020, S26297.)

c. Timing.

The Legislative session ends on August 31. The governor then has 30 days to sign or veto the bill. The new law normally goes into effect on January 1. (Cal. Const., art. IV, § 8, subd. (c).) If an appellate attorney is aware of a new law that would benefit the client is going into effect the following January, it is best to raise the issue now in the opening brief or a supplemental brief. By the time the court decides the case, the new law will be in effect. (See also *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [opinion issued early November requiring remand, though the new law did not go into effect until the following January].) If a decision is issued when it is discovered there is a new law that would benefit the client, the matter should be raised in a petition for rehearing. (See, e.g., *People v. Wright* (1990) 52 Cal.3d 367, 382-383, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) If this is unsuccessful or it is too late to file a rehearing petition, a petition for review should be filed. If the Supreme Court denies review more than 90 days before January 1, a petition for certiorari can be filed in the United States Supreme Court if a federal issue had been raised on appeal.

d. What happens on remand?

When a new law applies retroactively to a case on appeal, the defendant is generally entitled to a remand for the court to consider the new law. (*People v. Frahs* (2020) 9 Cal.5th 618, 637.) A remand is not necessary if the record shows it would be

futile. (*People v. Flores* (2020) 9 Cal.5th 371, 431-432; see *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109-1110.)

The defendant on remand is entitled to be present and with counsel (*People v. Cutting* (2019) 42 Cal.App.5th 344, 347-348; *People v. Rocha* (2019) 32 Cal.App.5th 352, 357-359.) A court with new discretion to strike an enhancement often decides not to. Unless one can show from the record an abuse of discretion, this decision will be upheld. (*People v. Pearson* (2019) 38 Cal.App.5th 112, 116-117.) When the court does decide to modify the sentence, it can choose to restructure the entire sentence. (*People v. Buycks* (2018) 5 Cal.5th 857, 893.)

Even when there is no discretion but to modify a sentence, if the defendant had entered into a plea bargain, the court and the prosecution must approve of modifying the sentence. Otherwise, they can undo the entire plea bargain. (*People v. Stamps* (2020) 9 Cal.5th 685, 705-709 [prior serious felony conviction]; *People v. Martinez* (Aug. 31, 2020, B303086) __ Cal.App.5th __ [2020 Cal.App. Lexis 831] [prison prior]; *People v. Barton* (2020) 52 Cal.App.5th 1145, 1154-1159 [drug trafficking prior].)