

APPEALING FROM A GUILTY PLEA
(Appellate Practice Manual, Chapter 2, § 2.18, et seq.)

Is the Notice of Appeal Valid/Operative? (See Pen. Code, § 1237; Cal. Rules of Ct., rule 8.304(b))

- Was the notice of appeal timely filed within the 60 day period? (If not, will need to file a *Benoit* habeas petition/motion.)
- Is the notice operative? (If the notice *only* challenges the validity of the plea and (1) no certificate of probable cause (hereafter "CPC") was requested, or (2) the CPC request was denied, then the notice is not operative.)
 - Within the 60 day period, can file an amended notice of appeal.
 - Outside the 60 day period, file a petition for writ of habeas corpus (*Benoit*) or motion to amend the notice of appeal. (Contact ADI staff attorney because each division has a different preference.)
- Is the appeal from a felony, and therefore properly before the Court of Appeal? (See *People v. Nickerson* (2005) 128 Cal.App.4th 33; Cal. Rules of Ct., rule 8.850.)

Adverse Consequences to Attacking the Validity of the Plea (Appellate Practice Manual, § 2.39)

Check the record for adverse consequences:

- All dismissed charges will be reinstated; appellant subject to the maximum punishment if later found guilty of all offenses.
- New counts/charges/enhancements can be alleged
 - Review the preliminary hearing/grand jury transcript;
 - Review the police report;
 - Review the probation report.
- New recidivist enhancements can be alleged
 - Review the probation report, or ask client about prior history.

- Dismissal of strike priors – verify the reasons for the dismissal are stated on the minute order
- Are the custody credits correct? Check actual and conduct credit calculation.

If you find an adverse consequence:

- Consult with trial counsel;
- Advise the client and obtain a written waiver.

Appeal Waivers – How to Get Around an Appeal Waiver

- Does the error raised in the appeal fall outside the scope of the appeal waiver? (Appeal waivers differ in each county.)
- Did the error occur *subsequent* to the appeal waiver? (*People v. Panizzon* (1996) 13 Cal.4th 68, 86 [a defendant cannot make a knowing, intelligent waiver of the right to appeal unforeseen or unknown future error]; *In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157 [a broad or general waiver will waive errors occurring *prior to but not subsequent* to the waiver]; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662.)
- Ineffective assistance of counsel – would likely be an attack on the plea, requiring a CPC.

What Constitutes Illegal Judicial Plea Bargaining v. Indicated Sentence

- The court may give an indicated sentence, but may not engage in plea bargaining. (*People v. Labora* (2010) 190 Cal.App.4th 907, 612 [illegal judicial plea bargaining]; *People v. Woosley* (2010) 184 Cal.App.4th 1136 [illegal judicial plea bargaining].)

THE CPC REQUIREMENT: It is Kind of a Big Deal

Procedures in appeals from GPs are more complicated and stricter than appeals from trials. The notice of appeal (“NOA”) must conform to California Rules of Court, rule 8.304(b) and Penal Code section 1237.5. This brings about the much ignored Certificate of Probable Cause (“CPC”) requirement.

- If a CPC is granted, *any* preserved and valid appellate issue can be raised.
- If the CPC was denied, the appeal will be circumscribed to non-certificate grounds.

There are basically three types of appeals after a guilty plea: (1) certificate appeals; (2) non-certificate appeals; (3) mixed certificate/non-certificate.

I. CERTIFICATE APPEALS: a CPC is required to initiate and proceed with an appeal that challenges the validity of the plea (directly or in substance). (*People v. Mendez* (1999) 19 Cal.4th 1084; *People v. Panizzon* (1996) 13 Cal.4th 68.)

- *It can be difficult to determine what is considered a challenge to the plea.*
 - o *Ask yourself*: what is being challenged? “[T]he 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.)
 - o One way to think about it: a CPC is needed whenever the defendant wants to attack a negotiated term of the plea (i.e., a stipulated sentence).
- Issues Requiring a CPC: issues requiring CPC can be substantial, procedural, or jurisdictional; the following list is meant as examples and may not be all-inclusive.
 - o Stipulated Sentences: If the defendant agreed to it as part of the plea, s/he cannot challenge it without a CPC. (*People v. Panizzon, supra*, 13 Cal.4th 68.) This includes stipulated credits.
 - o Unauthorized Sentences: once the defendant agrees to the sentence/lid, or even if there is no such agreement but count(s)/enhancement(s) were dismissed/reduced so that the remaining maximum exposure is less than what could have been had the defendant not entered the agreement, s/he cannot attack the sentence as unauthorized. This includes the imposition of a term otherwise subject to Penal Code section 654. (*People v. Cuevas* (2008) 44 Cal.4th 374; *People v. Shelton* (2006) 37 Cal.4th 759, 766; *People v. Hester* (2000) 22 Ca.4th 290.)

- Cruel and Unusual Sentences: If a defendant agrees to a plea and the sentence imposed is within the plea – including the maximum – an appellate challenge to the sentence on the basis of cruel and unusual punishment requires a CPC. (*People v. Young* (2000) 77 Cal.App.4th 827, 829.)
 - Denial of Motion to Withdraw the Plea: An appellate argument that the motion was wrongly denied based on the merits, or that defendant did not receive the proper hearing/use of proper standards, all require a CPC. (Pen. Code, § 1018; *People v. Johnson* (2009) 47 Cal.4th 668, 681-683.)
 - Ineffective Assistance of Counsel (IAC): *People v. Stubbs* (1998) 61 Cal.App.4th 243, 245. [Note: If grounds exist, appellate counsel may want to consider filing a petition for writ of habeas corpus based on IAC.]
 - Claim that Plea Was Induced by Misrepresentation: *People v. DeVaughn* (1977) 18 Cal.3d 889, 896.
 - Defendant's Competence at Time of Plea: *People v. Lauder milk* (1967) 67 Cal.2d 272, 281, fn. 8.
 - Attacks on the Validity of the Proceedings: including challenges based upon jurisdictional errors and errors related to the legality of the proceedings (i.e., expired statute of limitations (*People v. Smith* (1985) 171 Cal.App.3d 997); multiple prosecutions (*People v. Turner* (1985) 171 Cal.App.3d 116, 128; *People v. Meyer* (1986) 183 Cal.App.3d 1150, 1158-1159.)
 - Appeal from Probation Revocation: whenever the defendant admitted the probation violation.
- **Amending a NOA to request a CPC**: If you find a CPC is required but was not requested, start by determining whether the 60 days statutory period for filing a NOA has run out.
- If still within the 60 days period: counsel should move to amend the NOA in the superior court.
 - If the statutory period has run out: counsel should request a correction in the Court of Appeal a la *Benoit/Flores-Ortega*. The California Supreme Court has not decided whether constructive filing principles apply to allow the filing of a late CPC; however, such request based on IAC is arguable because a defendant is entitled to effective assistance of counsel in seeking an appeal, and failure to seek a necessary CPC interferes with that right.

- **Obtaining a CPC via Writ of Mandate:** If the superior court improperly denies the CPC, counsel can file a petition for writ of mandate based on abuse of discretion asking the Court of Appeal to order the trial court to grant the CPC. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1179; *In re Brown* (1973) 9 Cal.3d 679, 683.) If the COA denies the writ, counsel may seek a petition for review in the Supreme Court *within 10 days* of the denial. (Cal. Rules of Court, rule 8.500(e); *Hagan v. Superior Court* (1962) 57 Cal.2d 767, 769-770.)

II. NON-CERTIFICATE APPEALS: challenges to the sentence (non-stipulated) or matters occurring after the plea that do not affect its validity as well as appeals from the denial of motion to suppress based upon a violation of the Fourth Amendment.

- Once a non-certificate ground starts the appeal, any other non-certificate issues can be raised on appeal [issues must still be preserved!], but certificate issues may not. (*People v. Jones* (1995) 10 Cal.4th 1102, 1112-1113.)
- **Issues Not Requiring a CPC:** (These issues still have to be preserved!)
 - o **Suppression Issues:** authorized by Penal Code section 1538.5, subdivision (m) (issue must stem from violations of the Fourth Amendment).
 - o **Sentencing Discretion Issues:** If there is no plea agreement AND no sentence agreement, no CPC is required to challenge the sentence. (*People v. Lloyd* (1998) 17 Cal.4th 658.)
 - “Lid” Sentences: absent contrary provisions in the plea agreement, a CPC is not required to challenge the court’s exercise of discretion to reach a sentence within the maximum. (*People v. Buttram* (2003) 30 Cal.4th 773; *People v. Cole* (2001) 88 Cal.App.4th 850.) [NOTE: in view of *Panizzon, Shelton, and Cuevas*, and because *Buttram* only covers discretionary calls, counsel should be hesitant to rely in *Buttram* to appeal from the sentence without a CPC; rather, counsel should attempt to secure a CPC whenever a sentencing issue seems meritorious.]
 - Other discretionary calls: Abuse of discretion in choosing base/upper term; denial of a *Romero* motion (*People v. Lloyd* (1998) 17 Cal.4th 658, 665); imposition of consecutive sentences.
 - o **Conditions of probation** (an order granting probation is considered a “judgment”): an improper condition or a court order changing/refusing to change a condition is appealable without a CPC. (*People v. Welch* (1993) 5

Cal.4th 228, 234-238; *People v. Romero* (1991) 235 Cal.App.3d 1423, 1425-1426; *In re Bine* (1957) 47 Cal.2d 814, 817.)

- Specific Performance: Issues arising when the prosecutor or court fails to comply with the terms of the plea agreement are not waived by a guilty plea, since by definition they were not contemplated when the agreement was made. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1220.)
- Refusal to Expunge: an order refusing to vacate the judgment under PC section 1016.5 b/c of **inadequate advice by the court** on immigration consequences.
- Credits: Adjustments/refusal to adjust presentence credits (must be raised in the superior court first if sole issue on appeal).
- Resentencing on remand or pursuant to 1170, subdivision (d).
- Restitution Orders
- Delinquency Cases: A minor who admits allegations of a juvenile court petition can appeal without a CPC. (*In re Joseph B.* (1983) 34 Cal.3d 952, 955.)

III. MIXED APPEALS: appellant marked the validity box (and requested a CPC!) as well as a non-certificate box. If a CPC is granted, any preserved and valid appellate issue can be raised. If the CPC was denied, the appeal will be circumscribed to non-certificate grounds.

APPENDIX [§2.122]
COMMON ISSUES WAIVED BY GUILTY PLEA [§2.123]

- Insufficiency of the evidence at the preliminary hearing or before a grand jury or lack of a factual basis for the plea. (*People v. Batista* (1988) 201 Cal.App.3d 1288, 1292; *People v. Pinon* (1979) 96 Cal.App.3d 904; *People v. Meals* (1975) 49 Cal.App.3d 702, 706-707.)
- Illegal arrest. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 895-896.)
- Discovery violations, such as failure to disclose the identity of an informant. (*People v. Castro* (1974) 42 Cal.App.3d 960, 963; see also *People v. Duval* (1990) 221 Cal.App.3d 1105, 1114; but contrast *People v. Hobbs* (1994) 7 Cal.4th 948, 955-957 [challenge to sealing of a search warrant affidavit appealable pursuant to Pen. Code, § 1538.5, subd. (m)].)
- Failure to hold hearing on mental competence before taking plea (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100; *People v. Hodges* (2009) 174 Cal.App.4th 1096, 1103-1104.)
- Refusal to grant a continuance. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 8-9.)
- Denial of motion to sever counts. (*People v. Haven* (1980) 107 Cal.App.3d 983, 985-986.)
- Denial of motion to sever defendants. (*People v. Sanchez* (1982) 131 Cal.App.3d 323, 335.)
- Challenge to pretrial lineup or an unduly suggestive pretrial identification. (*People v. Mink* (1985) 173 Cal.App.3d 766, 769-770; *People v. Stearns* (1973) 35 Cal.App.3d 304, 306.)
- Argument that alleged conduct does not violate statutory proscription. (*People v. Suite* (1980) 101 Cal.App.3d 680, 689 [contention that devices possessed were neither destructive nor explosive within meaning of a statute not appealable].)
- Invalid conviction used as part of a subsequent charge. (*People v. LaJocies* (1981) 119 Cal.App.3d 947, 957-958 [challenge on constitutional grounds to prior felony underlying current ex-felon in possession of a firearm not appealable following guilty plea to the latter].)

- In limine evidentiary rulings. (*People v. Shults* (1984) 151 Cal.App.3d 714, 719-720.)
- Double jeopardy claim. (*United States v. Broce* (1989) 488 U.S. 563, 565, 569 [guilty pleas to two indictments alleging two conspiracies precludes contention that only one conspiracy existed and that double jeopardy bars sentencing on second count]; see *Menna v. New York* (1975) 423 U.S. 61, 62, *Blackledge v. Perry* (1974) 417 U.S. 21, 30, and *People v. Plies* (1981) 121 Cal.App.3d 676, 681, disapproved on another ground in *People v. Crowson* (1983) 33 Cal.3d 623, 632, fn. 10 [claim of double jeopardy based on a prior conviction or acquittal of the same offense can be raised after guilty plea, because it challenges right of state to bring the proceeding at all].)
- Statute of limitations, if the issue is a question of fact, such as tolling, rather than a matter of law. (*People v. Padfield* (1982) 136 Cal.App.3d 218, 224-227 [guilty plea admitted the sufficiency of evidence that statute of limitations had been tolled]; cf. *People v. Chadd* (1981) 28 Cal.3d 739, 756 [if expiration of statute shown as matter of law on face of the pleading, issue can be raised on appeal after guilty plea].)
- Lack of a speedy trial. (*People v. Aguilar* (1998) 61 Cal.App.4th 615, 617, 619; see also *People v. Hayton* (1979) 95 Cal.App.3d 413, 419 [contention that preliminary hearing was continued beyond the statutory 10-day period without good cause also waived]; compare *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, 812 [speedy trial claim not waived by plea of guilty to misdemeanor complaint] with *People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1357-1360 [characterizing reasoning of *Avila* as “absurd” and refusing to apply it beyond its facts] and *People v. Stittsworth* (1990) 218 Cal.App.3d 837, 840-841 [*Avila* rule not applicable where original charges were felonies and became misdemeanors by virtue of the plea].)
- Denial of a change of venue/objection to territorial jurisdiction. (*People v. Krotter* (1984) 162 Cal.App.3d 643, 648.)⁵⁹
- Extradition issues. (*People v. Witherow* (1983) 142 Cal.App.3d 485, 490.)

⁵⁹“Territorial jurisdiction,” in the sense of “venue,” is a non-fundamental, waivable form of jurisdiction. (*People v. Klockman* (1997) 59 Cal.App.4th 621, 626-627.)

- Denial of a motion for dismissal or sanctions following the destruction of evidence. (*People v. McNabb* (1991) 228 Cal.App.3d 462, 470-471; *People v. Halstead* (1985) 175 Cal.App.3d 772, 781-782; *People v. Bonwit* (1985) 173 Cal.App.3d 828, 832; but compare *People v. Aguilar* (1985) 165 Cal.App.3d 221, 224 [denial of motion to suppress evidence related to a container of contraband where the container had been lost or destroyed is appealable pursuant to § 1538.5, subd. (m)], with *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1576 [concluding *Aguilar* is contrary to the weight of authority].)
- Failure to arraign defendant on sentence enhancement (*People v. Hodges* (2009) 174 Cal.App.4th 1096, 1103-1104.)
- Entrapment defenses. (*People v. Bonwit* (1985) 173 Cal.App.3d 828, 832.)
- Illegally obtained confessions, not the result of an unlawful search or seizure. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896; *In re John B.* (1989) 215 Cal.App.3d 477, 483 [motion to suppress confessions in juvenile court waived by admission].)
- Denial of a *Marsden* motion, at least when no contention is made that the plea was not intelligently and voluntarily made or that the advice from counsel concerning the plea was inappropriate. (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 786.)
- Cruel and unusual punishment arguments directed at sentences to which the defendant expressly or implicitly agreed in pleading guilty – at least if (a) the defendant fails to obtain a certificate of probable cause or (b) the defendant has explicitly waived the right to appeal at all. (*People v. Shelton* (2006) 37 Cal.4th 759, 771; *People v. Panizzon* (1996) 13 Cal.4th 68, 89; see also *People v. Foster* (2002) 101 Cal.App.4th 247, 250-252; *People v. Cole* (2001) 88 Cal.App.4th 850, 867-869; *People v. Young* (2000) 77 Cal.App.4th 827, 829, 832.) It is not wholly clear whether these arguments could be considered if the defendant does have a certificate of probable cause and has not waived an appeal.