THE CONSEQUENCES OF THE FACTUAL BASIS FINDING IN A CONDITIONAL OR NEGOTIATED PLEA

INTRODUCTION

California Penal Code section 1192.5 requires the trial court, in negotiated or conditional pleas of guilty or no-contest, to find a factual basis for the plea. The factual basis, as defined by the plea, can have enormous consequences, sometimes on direct appeal, but more often in subsequent criminal prosecutions. For these reasons, as is more fully explained in this article, it is important that trial counsel confine the factual basis for the plea to the most minimal facts possible, and frame the plea as a stipulation, rather than an admission. It is equally important for appellate counsel, when drafting the statement of the case for the opening brief on the merits, or in an appeal which will be submitted as a *Wende*, to be sure to confine the statement of facts to the those facts stipulated as supplying the factual basis for the plea. In the trial court, and in the appellate court, defense counsel should avoid the enlargement of the record of conviction.

In two published decisions, the Third District Court of Appeal has afforded relief to appellants based on defects in the factual basis of the plea; accordingly, if the parties have identified no factual basis for the plea, or the stipulated factual basis is legally insufficient to support the plea, appellate counsel should consider whether that presents an issue to be raised on direct appeal.[1] Successfully arguing the trial court's failure to discharge this duty may afford the client an opportunity to withdraw his plea. Plea withdrawal is not likely to be granted on direct appeal, however, unless there is no factual basis to support a plea to the offense admitted, or the stipulated facts are not legally sufficient to support the conviction. In either case, this will have to affirmatively appear in the record on appeal; moreover, there will be substantive and procedural hurdles to be cleared in order to raise a defect in the factual basis on direct appeal. It is more likely that an insufficient factual basis, raised as an issue on direct appeal, will result in a remand to permit the parties to stipulate to an adequate factual basis, or, if that is not possible, to permit appellant to withdraw his or her plea.

THE SOURCE AND SCOPE OF THE TRIAL COURT'S DUTY TO FIND A FACTUAL BASIS

In California, there are two types of guilty or no contest pleas: (1) a negotiated or conditional plea, where the plea is conditioned upon receiving a particular

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[1] This issue could also be framed, on direct appeal, as one of legal impossibility. See

disposition; and (2) an open or unconditional plea. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1181.) The trial court's duty to ascertain the factual basis for a plea under Penal section 1192.5 only applies to the negotiated or conditional plea. *Hoffard* held that the trial court has no duty to inquire into the factual basis of a guilty plea when the defendant pleads guilty to the charged offenses unconditionally, as opposed to when the plea is entered pursuant to a plea agreement. (*People v. French* (2008) 43 Cal.4th 36, 50.)

But when a negotiated or conditional plea is entered, and the trial court accepts such a plea to a felony charge, Penal Code section 1192.5 requires the trial court to "cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea."

The purpose of imposing this statutory requirement is to prevent "the entry of a guilty plea by an innocent defendant." *Hoffard, supra*, 10 Cal.4th at p. 1183.) Theoretically, an innocent defendant could enter a guilty plea because '"the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged.' " (*People v. Tigner* (1982) 133 Cal.App.3d 430, 432-433; *People v. Watts* (1977) 67 Cal.App.3d 173, 178; see also *North Carolina v. Alford* (1970) 400 U.S. 25, 38, fn. 10; 3 ABA Standards for Criminal Justice, std. 14-1.6 (2d ed. 1980) p. 14.32.) That is precisely what the court found had occurred in *In re Rodden* (2010) 186 Cal.App.4th 24, discussed *infra*.

HOW THE FACTUAL BASIS SHOULD BE FOUND

In *Holmes, supra*, 32 Cal.4th 432, the California Supreme Court addressed for the first time what a trial court must do to comply with the statutory mandate of Penal Code section 1192.5. In *Holmes*, as part of a plea bargain, the defendant pleaded guilty to count one of the complaint. In addition to the charged offense, the complaint set out the names of the defendant and victim, date and location of the crime, and a brief description of the factual basis. In the plea colloquy, the trial judge asked the defendant "[d]id you do what it says you did in Count 1 on March 24th 2000, in Riverside County?" Defendant answered "yes." (*Id*. at p. 437.) The Court found the inquiry sufficient. It reasoned the complaint provided a "sufficiently precise factual account of the charged offense," and the trial court's questioning of the defendant was "adequate to establish that defendant was cognizant that his acts did constitute the offense with which he was charged, notwithstanding [his] letters to the court contesting his guilt." (*Id*. at p. 443.)

In so reasoning, the Court examined the statutory language and legislative history of Penal Code section 1192.5, as well as Court of Appeal cases construing this section, and concluded that in order for a trial court to accept a conditional plea, it must inquire of either the defendant or defense counsel regarding the factual basis for the plea. The Court set out guidelines to assist the trial court in complying with this duty to inquire.

For example, if the trial court inquires of the defendant, it may develop the factual basis on the record by questioning the defendant about the factual allegations included in the complaint or in the written plea agreement. The court may also ask the defendant to describe the conduct that gave rise to the charge. If the trial court inquires of defense counsel, it should request that counsel stipulate "to a particular document that provides a factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement." (*Holmes, supra*, 32 Cal.4th at p. 442.) Police reports are commonly identified as containing the factual basis for the plea, but the parties rarely make the document part of the record on appeal, which makes it difficult for appellate counsel and the reviewing court to review the documents; however, the probation report will often set forth portions of the police reports, and some appellate courts have chosen this avenue to avoid the problem.

Because the statute requires that only a prima facie factual basis for the charge be established, the trial court is not required to interrogate the defendant about possible defenses. The trial court is also not required to be convinced the defendant is guilty. (*Id*. at p. 441.) However, the Court reiterated that under either approach, a summary statement by the judge that a factual basis exists, absent inquiry or any attempt to develop the factual basis, is inadequate. (*Ibid*.)

The trial court has the discretion to decide how it will develop the factual basis. However if it chooses to develop the factual basis for the plea itself, it should do so on the record. The trial court's acceptance of a plea after an inquiry as to the factual basis will be reversed only for abuse of discretion. (*Id*. at p. 434.) And a finding of error under this standard will be deemed harmless where the contents of the record support a finding of a factual basis for the plea. (*Id*. at p. 443.)

The Court in *Holmes* did not decide whether reference to a criminal complaint will be sufficient to satisfy the factual basis requirement in a complex case; in fact, it noted several federal cases in which those courts had found reference to a criminal complaint to be insufficient to satisfy the factual basis requirement in related contexts. (*Id*. at p. 441-442, fn. 6.) The Court also declined to address whether defense counsel's stipulation to a factual basis, absent reference to a

particular supporting document, is adequate. (*Id*. at p. 442, fn. 8.) The Court approved of, but did not require, attaching a detailed and signed factual basis account to the plea agreement. (*Id*. at p. 442, fn. 7.)

Even if the trial court fails to make sure that the document on which the factual basis rests is included in the record on appeal, the error is still not prejudicial per se. Under this circumstance, the appellate court will have to review the record to determine whether the error is harmless. To make this determination, the appellate court must determine "whether the record contains sufficient information to ensure the defendant committed the acts to which the plea was entered." (*Ibid*.) This usually involves looking at the probation report, which, in turn, may summarize the police report, or other document on which the plea could have been based.

If the record does not contain sufficient information to permit the trial court to determine that the defendant committed the acts s/he is admitting, the appellate court will not be able to conduct an harmless error inquiry. Counsel may then need to settle the record, and/or seek a remand so that the document can be included in the record. This will ultimately provide the appellate court with an adequate record to review so that it can satisfy itself that there is a factual basis for the plea it has already accepted.

Despite language in *Tigner* that says the factual basis for the plea should be made "before" accepting a plea of guilty, at least one appellate court has found that a defendant can, by express or implied agreement, defer the factual inquiry to the sentencing hearing, as apparently is the practice in Ventura County. (*People v. Coulter* (2008) 163 Cal.App.4th 1117, 1122.) It will necessarily be more difficult to confine the facts providing the factual basis for the plea when the trial court is permitted to find the factual basis in this way. Under this approach, the contents of the probation report may more easily find their way into the factual basis determination.

WHERE AN INSUFFICIENT FACTUAL BASIS CLAIM HAS SUCCEEDED ON DIRECT APPEAL

The Third District Court of Appeal found the factual basis for a plea inadequate in *People v. Willard* (2007) 154 Cal.App.4th 1329 and remanded to permit the prosecution to establish a factual basis for the plea. If the prosecution was unable to do so, the appellate court ordered that Mr. Willard be given an opportunity to withdraw his plea. If the prosecution was able to do so, the trial court was directed to reenter the judgement, and to have a new abstract of judgment prepared and distributed.

In *Willard*, the factual basis for the plea was found inadequate because the stipulation to the factual basis identified no document containing factual allegations. Moreover, while the plea waiver form allowed the court to take facts from any source necessary to establish the factual basis, there were no such sources contained in the record. There was no probation report, preliminary hearing transcript, police reports, or presentence reports in the record on appeal. The court reasoned that unless the document is contained in the record, the requirements of section 1192.5 are not satisfied. The *Willard* court found the error was not harmless, and because conclusion was drawn based on the appellate court's interpretation of what the statute requires, appellate counsel was not required to settle the record

COGNIZABILITY CONSIDERATIONS ON DIRECT APPEAL: CERTIFICATES OF PROBABLE CAUSE, FORFEITURE, JUDICIAL ADMISSIONS AND ESTOPPEL

In evaluating defects in the factual basis for the plea as a potential issue on appeal, appellate counsel should be mindful of lurking cognizability issues. For example, in the unpublished decision of *In re Michael V., supra*, the Fifth District addressed the issue of whether the fact that a juvenile appellant did not move to withdraw his admission in the trial court precluded review of the factual basis for the plea on appeal. Both parties and the court agreed that where a juvenile files a timely notice of appeal, the court may review the record to determine if a factual basis for the plea exists. That is because the requirement for a certificate of probable cause, which is required under Penal Code section 1237.5 for appellant review of issues arising from a plea of guilty or no contest in an adult case, is inapplicable in juvenile cases. Similarly, the provisions of Penal Code section 1018, which provide that a motion to withdraw a plea of guilty or no contest in an adult case must be made prior to the entry of judgment, are inapplicable in juvenile cases.

In contrast, however, Justice Ardaiz, in his dissenting opinion, concluded any error was forfeited under *People v. Scott* (1994) 9 Cal.4th 331 because it was not brought to the trial court's attention. Therefore, he concluded any error in this regard must be raised by habeas.

As Justice Ardaiz's reliance on forfeiture suggests, in a case where the appellant did not move to withdraw his plea in the trial court, appellate counsel should be prepared to address forfeiture. (See also *People v. Suite* (1980) 101 Cal.App.3d 680, 689 ["As appellant's guilty plea in effect admitted that the devices he possessed were explosive devices within the meaning of the statute, he cannot now raise that issue on appeal"].) Moreover, in an adult case, even if the

appellant moved to withdraw his plea in the trial court, the issue is not reviewable on appeal unless the appellant obtained a certificate of probable cause. (*People v. Ribero* (1971) 4 Cal.3d 55, 63.)

But even with a certificate of probable cause, other problems can arise:

> In dicta, the First District advised that with a certificate of probable cause, a claim that there was no factual basis in the record for the plea would have been cognizable on appeal. At the same time, however, the court recognized that even if appellant had timely appealed and secured a certificate of probable cause, he would have been estopped to complain on appeal that the trial court exceeded its jurisdiction by increasing his sentence pursuant to his plea agreement.

(*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1428, n. 11.)

A similar result was reached in *People v. Voit* (2011) 200 Cal.App.4th 1353, where the appellate court held that an appellant was estopped from arguing on appeal that the factual basis for the plea was insufficient, without first seeking to set aside his concession as mistaken. In *Voit*, appellant had entered a plea of no contest, but at the same time had admitted, as to each of the six counts of lewd and lascivious conduct involving use of force, violence, duress, menace, and fear of immediate and unlawful bodily injury, that each count involved substantial sexual conduct. His counsel had then stipulated that the preliminary examination transcript contained a factual basis for the pleas. Even though appellant had moved, in the trial court, to withdraw his plea, and had obtained a certificate of probable cause, the appellate court treated this portion of the no contest plea as a concession, and invoked estoppel to preclude its review of the claim. (*Id*. at pp. 1358-1359.)

The *Voit* court seems to have conflated no contest pleas and guilty pleas into admissions, citing the California Supreme Court's decision in *People v. Wallace* (2004) 33 Cal.4th 738, 749, in which it declared, citing Penal Code section 1016, subdivision (3), that a guilty plea and a no contest plea shall be the same for all purposes. (200 Cal.App.4th at p. 1364.) *Voit* then relies on the case law involving guilty pleas as applying equally to no contest pleas. But later in the opinion, the *Voit* court admitted, in a footnote, that the California Supreme Court had repudiated this claim in *French*, holding that "*Wallace* does not stand for the broad proposition . . . that a defendant's stipulation to a factual basis constitutes a binding admission for all purposes." (*Id*. at p. 1366, n. 10.)

Voit then acknowledged that an appellant can assert that his admission included a legal impossibility, such as where a defendant pleaded no contest to filing a forged instrument, when a death certificate does not qualify as an instrument. (*Id*. at p. 1365.) At the same time, however, the *Voit* court continued to appreciate no "material difference" between a no contest plea, which waives an appellate claim of insufficient evidence to support the plea, and a claim that a guilty plea or a no contest plea is not supported by a factual basis. (*Id*. at pp. 1365-1366.) In fact, this observation lead the *Voit* court to conclude that a plea of guilty or no contest forecloses and appellate challenge that the plea lacks a factual basis. (*Id*. at p. 1366.) To support this conclusion, the *Voit* court then relied on cases finding that the sufficiency of the factual basis was not cognizable on appeal from a plea of guilty and/or an admission of an enhancement or special allegation.

This finding by the *Voit* court reflects a fundamental misunderstanding of the factual basis requirement. To find a factual basis for a plea of guilty or no contest requires only a prima facie showing of a violation of the statute defining the criminal offense. (*People v. Holmes, supra,* 32 Cal.4th at p. 442.) In contrast, "[i]n assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738].)" (*People v. Story* (2009) 45 Cal.4th 1282, 1296.) It is clear that when a claim is made that the factual basis for the plea was insufficient, it is fundamentally different from an insufficiency of the evidence claim raised on direct appeal following a court or jury trial; accordingly, the appellate court must review the factual basis to determine whether it makes a prima facie showing of a violation of the criminal statute, and not whether a reasonable trier of fact could have found appellant guilty beyond a reasonable doubt.

Voit also relied on *People v. Borland* (1996) 50 Cal.App.4th 124, where the court treated a no contest plea and a stipulation to a factual basis as a judicial admission, and found appellant was estopped to challenge the charging date in the accusatory pleading. (*Id*. at 1367.)

The Third District, however, has found the issue to be cognizable on appeal, precisely because it does further constitutional interests.

THE RELATED DUE PROCESS CLAIM

Penal Code section 1192.5 is the sole source of the duty to find a factual basis for a plea. Absent special circumstances, there is no federal constitutional requirement for this factual basis inquiry. (See *Hoffard, supra*, 10 Cal.4th at p. 1182, fn. 11; see also *Rodriguez v. Ricketts* (9th Cir. 1985) 777 F.2d 5267, 528.) A special circumstance requiring a court, as a federal constitutional requirement, to find a factual basis for a plea might be found where the defendant protests and asserts his actual innocense at the taking of the plea. There, such a protest might impose on a state court the constitutional duty to make an inquiry and to determine if there is a factual basis for the plea. See *Banks v. McGougan* (5th Cir. 1983), 717 F.2d 186, 188 (citing *Willett v. Georgia* (5th Cir. 1979) 608 F.2d 538, 540).

One could also argue this requirement has grown out of constitutional considerations because in *Holmes*, the California Supreme Court cited two reasons the Legislature imposed the factual basis requirement:

> The original version of section 1192.5 would have "cause[d] an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, *and in the case of a guilty plea, that the defendant is pleading guilty because he is in fact guilty*." (Sen. Bill No. 621 (1970 Reg. Sess.) as introduced Mar. 16, 1970, italics added.) The final italicized clause was amended in committee to the present language of section 1192.5 before passage of the bill and signature by the Governor on September 15, 1970. (Stats. 1970, ch. 1123, § 3, pp. 1992–1993.)

(*People v. Holmes, supra*, 32 Cal.4th at 439.)

In finding the sufficiency of the factual basis to be cognizable on appeal, and citing to *Holmes*, the Third District has recognized that appellate review of the adequacy of the factual basis furthers constitutional considerations:

> Although not constitutionally required (*id*. at p. 1183), such an inquiry furthers constitutional considerations attending a guilty plea (*id*. at p. 1183, fn. 11), protects against the entry of a guilty plea by an innocent defendant, and makes a record in the event of appellate or collateral attacks on that plea. (*Id*. at p. 1183.) Given these significant policy considerations, a failure to make a sufficient inquiry, while not a constitutional or jurisdictional requirement, is one of the

> "other" grounds going to the legality of the proceedings in the trial court. Even though a defendant may in fact be guilty of the offense to which he pleads guilty, given the policy considerations underlying the intent behind section 1192.5, an adequate inquiry into the factual basis for the plea addresses broader issues such as the voluntariness of the plea and a knowing decision to plead guilty. A sufficient factual inquiry must be considered a necessary component of the legality of the proceedings. To decide otherwise would preclude review of the factual basis for a plea of guilty or no contest thereby frustrating the policies the statute is intended to advance. Thus, defendant's claim that the factual inquiry undertaken here was insufficient is, after issuance of a certificate of probable cause, cognizable on appeal.

(*People v. Marlin* (2004) 124 Cal.App.4th 559, 571.)

In *Santobello v. New York* (1971) 404 U.S. 257 [30 L.Ed.2d 427, 92 S.Ct. 495], the United States Supreme Court addressed the federal counter-part to Penal Code section 1192.5, Rule 11 of the Federal Rules of Criminal Procedure. Chief Justice Burger, writing for the majority, stressed the necessity for developing the factual basis for the plea on the record, noting heavy workloads may explain, but not excuse, failures to do so. In a concurring opinion, Justice Douglas commented, "However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145, to confront one's accusers, *Pointer v. Texas*, 380 U.S. 400, to present witnesses in one's defense, *Washington v. Texas*, 388 U.S. 14, to remain silent, *Malloy v. Hogan*, 378 U.S. 1, and to be convicted of proof beyond all reasonable doubt, *In re Winship*, 397 U.S. 358." (*Santobello, supra*, 404 U.S. at p. 265; see also *Boykin v. Alabama* (1969) 395 U.S. 238, 242-243 [23 L.Ed.2d 274, 89 S.Ct. 1709] ["a plea of guilty is more than an admission of conduct, it is a conviction"].)

Accordingly, one could argue that the California Legislature recognized the necessity for a factual basis for the plea as a policy it had embraced as arising out of the components of due process that prevent a defendant from entering a plea to an offense not supported by the evidence and that "helps [to] ensure that 'the constitutional standards of voluntariness and intelligence are met.'" (*People v. Holmes*, supra, 32 Cal.4th at p. 438, citing *Hoffard, supra,* 10 Cal.4th at p. 1182, fn. 11; *People v. Watts* (1977) 67 Cal.App.3d 173, 178, citing 1 Wright, Federal Practice and Procedure (1969) § 174, pp. 376-377.)

WHERE THE FACTUAL BASIS BECOMES A DUE PROCESS CONCERN

While the Fifth District's unpublished decision, *In re Michael V.*, F035974, found the juvenile court's failure to establish a sufficient factual basis for the appellant's admission to be an error of constitutional dimension and reversed the "true" finding, another California appellate court has found that Penal Code section 1192.5 is not expressly applicable to negotiated dispositions in juvenile court because there is no comparable provision in the Welfare and Institutions Code. (*In re Jermaine B.* (1999) 69 Cal.App.4th 634, 640.)

Although the court did not rely on a factual basis failure alone in *People v. Mitchell* (2011) 197 Cal.App.4th 1009, 1018, the court did rely on a related due process clause consideration to modify appellant's sentence where he was sentenced on an enhancement with which appellant was not charged, which appellant did not admit, and for which there was no factual basis:

> The due process clauses of the Fifth and Fourteenth Amendments require a defendant be given notice of the charges and enhancements against him. (*People v. Jones* (1990) 51 Cal.3d 294, 317 [270 Cal.Rptr. 611, 792 P.2d 643]; *People v. Hernandez* (1988) 46 Cal.3d 194, 208 [249 Cal.Rptr. 850, 757 P.2d 1013].) By sentencing defendant on an offense he did not commit, with which he was not charged, and which he did not admit, the court effectively imposed on him a waiver of his constitutional right to be given notice of the charges against him without informing him of that right or seeking an express waiver of it. In this circumstance, we conclude an appeal pursuant to a certificate of probable cause to rectify an error of this magnitude does not constitute trifling with the courts, and defendant is not estopped from seeking relief.

(*People v. Mitchell*, 197 Cal.App.4th at p.1018.)

The *Mitchell* approach demonstrates how a factual basis deficit can evolve into a due process deprivation when it is coupled with prejudice: the failure to charge or admit the enhancement for which sentence was imposed.

DIRECT AND COLLATERAL CONSEQUENCES OF THE FACTUAL BASIS

Under *Hoffard* a no contest plea constitutes an admission to all the elements of the charged offenses to which a defendant has pleaded. (*People v. Hoffard, supra,* 10 Cal.4th at p. 1177.) It does not, however, constitute an admission to

any aggravating circumstance. (*People v. French, supra*, 43 Cal.4th at p. 49.) This is because a defendant who agrees to plead guilty or no contest, and who agrees to a sentence to be imposed within a specified maximum, "reasonably expects to have the opportunity to litigate any matters related to the trial court's choice of sentence—including the existence of aggravating and mitigating circumstances—at the sentencing hearing." (*Ibid*.)

The Ninth Circuit, in a recent unpublished decision, found sentencing error under *Apprendi v. New Jersey* (2000) 530 U.S. 466, based on the factual basis for a plea. (*United States v. Hunt* (9th Cir. 2011) 2011 U.S.App. LEXIS 18216.) The court first noted that: (1) the government has the burden to seek an explicit admission of any unlawful conduct it seeks to attribute to a defendant, (2) drug quantity and type are not formal elements of the offense of attempting to possess a controlled substance with the intent to distribute under 21 U.S.C. section 841, and (3) a defendant can plead guilty without admitting the type of drug. The court the pointed out that the factual basis for Mr. Hunt's plea included no admissions as to the weight or type of controlled substance he attempted to posses. Consequently, in increasing Mr. Hunt's sentence from one year to 20 years based on a fact (Mr. Hunt's possession of cocaine) that he never admitted and that the government never proved beyond a reasonable doubt to a jury, was error.

The court then recognized that *Apprendi* errors are reviewed under the harmless error standard set forth in *Neder v. United States* (1999) 527 U.S. 1, and found this error was not harmless. Recognizing under *Neder* that the error is harmless only where the record contains "overwhelming and uncontroverted evidence supporting an element of the crime," the court found *Apprendi* error could not be harmless if the defendant contested the omitted element and raised evidence sufficient to support a contrary findings, citing *Neder*, 527 U.S. at p. 19. Even though in *Neder* the Supreme Court did not expressly define what quantum of evidence is necessary to support a contrary finding, the Ninth Circuit found Hunt's denial of his intent met that standard. When the district court took Mr. Hunt's plea, it asked him whether he attempted to possess cocaine, whether he knew the package contained cocaine or some illegal drugs, and whether he did so with the intent to distribute. Mr. Hunt admitted the elements of the offense, but added that he did not receive the package and open it; accordingly he had no specific knowledge of what it contained, other than it did contain a controlled substance, or how much it weighed. The circumstantial evidence surrounding the offense did not convince the court, beyond a reasonable doubt, that the jury would have found Mr. Hunt intended to receive cocaine.

A second way the factual basis of a plea may become an issue in a pending

appeal is where the plea is used to enhance a sentence for a subsequent offense. This is the more prevalent context in which an appellate issue might arise, and highlights the importance of stating the factual basis for the plea, rather than letting the court rely on any document in the file, the probation report, or statements made by the prosecutor, to provide the basis for the factual basis for the plea.

For this purpose, the courts treat guilty pleas and *Alford* pleas differently. For example, in *People v. Sample* (2011) 200 Cal.App.4th 1253, the appellate court relied on the prosecutor's comments, made immediately before the court accepted the guilty plea, as the factual basis for the plea and as part of the record of conviction. Over appellant's hearsay objection, the appellate court treated appellant's silence in response to the prosecutor's statements as an adoptive admission because appellant pleaded guilty and because defense counsel explicitly agreed with it. In contrast, in *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1112, 1121, the court concluded the prosecution's factual recital was not admissible as an adoptive admission because appellant had entered an *Alford* plea, and under those circumstances, would not normally be expected to respond to the prosecution's factual recital.

The genesis of this issue can be found in *Shepard v. United States* (2005) 544 U.S. 13, where the high court approved the use of the factual basis of a plea to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense. (*Id*. at p. 26.) Based on *Shepard*, a California court could rely on the factual basis as part of the judicial record of the conviction to show, for example, that a plea to a Penal Code section 245, subdivision (a)(1), offense, assault with a deadly weapon or by any means of force likely to produce great bodily injury, qualifies as a serious felony under Penal Code section 1192.7, subdivision (a)(31), assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245.

Moreover, if trial counsel takes proper care, s/he can prevent the factual basis from being construed as an admission by appellant. If there is no admission in the factual basis for the plea,[2] then its use will not satisfy the requirements of the

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[2] *North Carolina v. Alford, supra,* 400 U.S. at pp. 37-38, was decided long before *Cunningham*, and there the U.S. Supreme Court had held that the distinction between a no-contest plea and a plea of guilty was of no constitutional significance with respect to the imposition of punishment, and that both types of pleas could be referred to as "*Alford* pleas."

Sixth Amendment, and the prosecution will not be able to use it to enhance a subsequent sentence without violating *Cunningham v. California* (2007) 549 U.S.

> The issue in *Hudson v. United States*, 272 U.S. 451 (1926), was whether a federal court has power to impose a prison sentence after accepting a plea of nolo contendere, a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty. The Court held that a trial court does have such power, and, except for the cases which were rejected in *Hudson*, the federal courts have uniformly followed this rule, even in cases involving moral turpitude. *Bruce v. United States, supra,* at 343 n. 20, 379 F.2d, at 120 n. 20 (dictum). See, e. g., *Lott v. United States*, 367 U.S. 421 (1961) (fraudulent evasion of income tax); *Sullivan v. United States*, 348 U.S. 170 (1954) (*ibid*.); *Farnsworth v. Zerbst*, 98 F.2d 541 (CA5 1938) (espionage); *Pharr v. United States*, 48 F.2d 767 (CA6 1931) (misapplication of bank funds); *United States v. Bagliore*, 182 F.Supp. 714 (EDNY 1960) (receiving stolen property). Implicit in the nolo contendere cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence. [footnotes omitted]

(*Ibid*.)

In reliance on *Alford*, a least one California court, has found, post *Cunningham*, that the absence of that admission has no effect on the use of the resulting conviction as evidence in other criminal actions:

> In *In re Alvernaz* (1992) 2 Cal.4th 924, 932 [8 Cal.Rptr.2d 713, 830 P.2d 747], the court characterized a *West* plea as "a plea of nolo contendere, not admitting a factual basis for the plea."[footnote omitted] Such a plea, also referred to as an *Alford* plea, based on *North Carolina v. Alford* (1970) 400 U.S. 25, 37–38 [27 L.Ed.2d 162, 91 S.Ct. 160], allows a defendant to plead guilty in order to take advantage of a plea bargain while still asserting his or her innocence. The absence of an admission of guilt has no effect on the use of the resulting conviction as evidence in other criminal actions. (See *People v. Chagolla* (1984) 151 Cal.App.3d 1045 [199 Cal.Rptr. 181]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1373–1375 [65 Cal.Rptr.2d 145, 939 P.2d 259].)

(*People v. Rauen* (2011) 201 Cal.App.4th 421, 424.)

The *Rauen* court, however, does not seem to have considered this ramification of its decision.

270 [166 L.Ed.2d 856, 127 S.Ct. 856 or *Blakely v. Washington* (2004) 542 U.S. 296 [59 L.Ed.2d 403, 124 S.Ct. 2531]:

> As noted earlier, when asked by the trial court whether she believed there was a sufficient factual basis for the no contest pleas, defense counsel stated, "I believe the People have witnesses lined up for this trial that will support what the D.A. read in terms of the factual basis, and that's what they'll testify to." Indeed, counsel was careful to state that she agreed that witnesses would testify to the facts as recited by the prosecutor; she did not stipulate that the prosecutor's statements were correct. Under the circumstances of this case, defense counsel's stipulation to the factual basis cannot reasonably be construed as an admission by defendant sufficient to satisfy the Sixth Amendment requirements established in *Cunningham, supra*, 549 U.S. 270 [127 S. Ct. 856].

(*People v. French* (2008) 43 Cal.4th 36, 51.)

In reaching this conclusion, the *French* court distinguished and limited its earlier decision in *People v. Wallace* (2004) 33 Cal.4th 738, 749–750:

> We explained: "In light of defendant's express stipulation as to the factual basis of his plea and his acknowledgment that his offenses constituted strikes, the trial court was not free to look beyond defendant's no contest plea … nor could the trial court properly give dispositive weight to the magistrate's evaluation of the evidence at some earlier period in the prior proceeding." (*Id*. at p. 750.) We did not hold that such a stipulation would be dispositive in all circumstances, and indeed explicitly declined to decide whether a trial court could strike a prior-conviction allegation "based upon proof of factual innocence of the prior offense, and if so, what types of evidence the court may consider for this purpose." (*Wallace, supra*, 33 Cal.4th at p. 754, fn. 3.) Wallace does not stand for the broad proposition asserted by the Attorney General; namely, that a defendant's stipulation to a factual basis constitutes a binding admission for all purposes.

(*People v. French, supra,* 43 Cal.4th at p. 52.)

A third way the factual basis for the plea can be used is as the basis for a foreign prior. In *Bacon*, the California Supreme Court evaluated the congruence of an

Arizona prior with a California offense. The court began by looking to the factual basis for the plea:

> In the Arizona plea proceeding, defense counsel and the prosecutor had agreed that the grand jury transcript provided a factual basis for the plea, and the trial court had both the prosecutor and defense counsel summarize the contents of those transcripts.

(*People v. Bacon* (2010) 50 Cal.4th 1082, 1116.)

The Court then concluded that the uncontested facts and circumstances contained in the grand jury transcript enabled it to find that the California offense would be punishable as first degree felony murder in California.

> We now conclude that we may properly consider at least the uncontested facts and circumstances of the offense in the record, which here establish that the robbery and killing occurred during the course of a continuous transaction, and which therefore establish that this crime "would be punishable" as first degree felony murder in California. [footnote omitted] (§ 190.2, subd. (a)(2).)

(*People v. Bacon, supra,* 50 Cal.4th at 1118.)

The *Bacon* court explicitly did not reach the issue of whether or how contested circumstances of a foreign conviction should be considered under section 190.2, subdivision (a)(2). (*People v. Bacon*, 50 Cal.4th at p.1118, n. 11.)

Allowing an unstated factual basis for a plea can also have civil consequences, and at least one court has recognized that one way to limit liability in a subsequent civil action is to identify and limit the factual basis for the plea:

> Had Yount wanted to maximize his ability to challenge the officers' conduct in a subsequent civil action, he could have sought to identify and limit the basis for his plea to violating Penal Code section 148, subdivision (a)(1). (See *Truong v. Orange County Sheriff's Dept.* (2005) 129 Cal.App.4th 1423, 1426 [29 Cal.Rptr.3d 450].) There was, however, no duty on the part of the court or the prosecution in the criminal proceeding to identify or limit the factual basis for Yount's plea to violating Penal Code section 148, subdivision (a)(1), a misdemeanor. (*In re Gross, supra,* 33 Cal.3d at p. 567.)

> Indeed, Yount obtained substantial benefit from his general plea. By declining to limit the scope of his no contest plea, Yount is protected against a new prosecution for resisting these officers by the double jeopardy clause. (U.S. Const., 5th Amend.; see *State v. Newman* (1992) 63 Wn.App. 841, 851 [822 P.2d 308, 313].) It would be anomalous to construe Yount's criminal conviction broadly for criminal law purposes so as to shield him from a new prosecution arising from these events but then, once he had obtained the benefits of his no contest plea, to turn around and construe the criminal conviction narrowly so as to permit him to prosecute a section 1983 claim arising out of the same transaction.

(*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 897.)

A fourth effect of how the factual basis for a plea is defined has to do with its use in a motion to withdraw the plea, and whether the probation report can be treated as part of the record of conviction. Here, it is important to recognize the difference between reliance on probation report for purposes of conducting a harmless error analysis, and reliance on a probation report as part of the record of conviction.

> We expressly declined to decide in *Reed* whether an excerpt from a probation officer's report is part of the record of conviction, stating: "Whether the probation officer's report also falls within the more narrow definition of record of conviction presents a closer question." (*People v. Reed, supra,* 13 Cal.4th 217, 230.) We declined to reach that question because we concluded that the excerpt from the probation officer's report in that case was multiple hearsay that did not fall within a recognized exception to the hearsay rule. (*Ibid*.)
>
> The Court of Appeal in *People v. Monreal* (1997) 52 Cal.App.4th 670 [60 Cal.Rptr.2d 737] reached the issue we left open in *Reed* and held that a probation officer's report is part of the record of a prior conviction, and a defendant's admission reflected in such a report may be considered in determining the nature of a prior conviction. We disagree, however, with the holding in *Monreal*.

(*People v. Trujillo*, 40 Cal.4th 165, 177-178.)

In rejecting the *Monreal* holding, the California Supreme Court recognized that in the case before it, the probation report was not part of the record of conviction.

We reach a different conclusion than the court in *Monreal*, but for reasons not considered in that decision; we conclude that a defendant's statements, made after a defendant's plea of guilty has been accepted, that appear in a probation officer's report prepared after the guilty plea has been accepted are not part of the record of the prior conviction, because such statements do not "reflect[] the facts of the offense for which the defendant was convicted." (*People v. Reed, supra,* 13 Cal.4th at p. 223.) We recognized in *People v. McGee* (2006) 38 Cal.4th 682, 691 [42 Cal.Rptr.3d 899, 133 P.3d 1054], that in determining whether a prior conviction is for a serious felony " 'the nature of the conviction is at issue.' " We explained that "the relevant inquiry in deciding whether a particular prior conviction qualifies as a serious felony for California sentencing purposes is limited to an examination of the record of the prior criminal proceeding to determine the nature or basis of the crime of which the defendant was convicted." (*Ibid*., italics added.)

A statement by the defendant recounted in a postconviction probation officer's report does not necessarily reflect the nature of the crime of which the defendant was convicted. In the present case, for example, the prosecution did not attempt to prove that defendant used a knife and, instead, entered into a plea bargain in which it dismissed the allegation that defendant used a deadly or dangerous weapon and committed an assault with a deadly weapon. The prosecution could not have compelled defendant to testify, and thus could not have used defendant's subsequent admission that he stabbed the victim to convict him. Once the court accepted his plea, defendant could admit to the probation officer having stabbed the victim without fear of prosecution, because he was clothed with the protection of the double jeopardy clause from successive prosecution for the same offense. (*Texas v. Cobb* (2001) 532 U.S. 162, 173 [149 L.Ed.2d 321, 121 S.Ct. 1335].) Defendant's admission recounted in the probation officer's report, therefore, does not describe the nature of the crime of which he was convicted and cannot be used to prove that the prior conviction was for a serious felony.

We agree with the concurring and dissenting justices that information that comes to the court's attention after it has accepted a plea of guilty may be considered by the trial court in deciding such matters as whether to withdraw its prior approval of the plea (*People*

> *v. Johnson* (1974) 10 Cal.3d 868, 873 [112 Cal.Rptr. 556, 519 P.2d 604]) and, of course, in determining the appropriate sentence. But we disagree with the concurring and dissenting justices' leap in logic that this means that defendant's admission to his probation officer in the prior case that he stabbed the victim, made after the trial court had accepted his guilty plea pursuant to a plea bargain dismissing all allegations that he had stabbed the victim, "reflect[s] the facts of the offense for which the defendant was convicted." (*People v. Reed, supra*, 13 Cal.4th 217, 223.)

(*People v. Trujillo* (2006) 40 Cal.4th 165, 179-180.)

In the context of a plea withdrawal issue, Justice Baxter, in his concurring and dissenting opinion, cited with approval several of the judicial rules relating to the use of the factual basis for the plea, such as finding a probation report read by the court after the plea was entered. Justice Baxter found the probation report could still serve as the factual basis for the plea, without distinguishing between its use in conducting a harmless error analysis, and its use as part of the record of conviction:

> In this regard, evidence concerning the offense at issue, whether contained in a probation officer's report or otherwise presented to the trial court by the time of the sentencing hearing, may be highly relevant to whether the defendant's plea may stand as a valid conviction. For instance, it has been held that a trial court's reading of a probation officer's report after the entry of a defendant's negotiated plea of guilty contributed to a sufficient factual basis for the plea and supported the trial court's denial of the defendant's motion to withdraw his plea. (*People v. Watts* (1977) 67 Cal.App.3d 173, 181–182 [136 Cal.Rptr. 496] [also finding grand jury transcripts provided a sufficient factual basis].) In a similar vein, when trial counsel stipulates to a factual basis for a negotiated plea, but appellate counsel claims the plea lacks an adequate factual basis, the appellate court may review the probation report to see if it establishes a factual basis for the plea. (*People v. Mickens* (1995) 38 Cal.App.4th 1557, 1564–1565 [45 Cal.Rptr.2d 633].) Because a court may rely on facts disclosed in a probation officer's report for the critical purpose of validating the defendant's plea and resulting conviction, it follows that a court should be able to rely on the defendant's uncontradicted admission of facts in such a report for the additional purpose of determining the nature or basis of the pleaded

offense.

(*People v. Trujillo* (2006) 40 Cal.4th 165, 185 (dissenting and concurring opinion of Baxter, J.)

A fifth ramification of a failure to include and limit the factual basis for the plea is that it can be viewed as a ground on which to find a waiver of appeal was not knowing and intelligent:

> In January 2010, this court issued a peremptory writ of mandate directing the superior court to vacate its order denying petitioner's request for a certificate of probable cause and to issue a new and different order granting the certificate. (*Rodden v. Superior Court, supra,* C062804.) In ordering the issuance of a peremptory writ of mandate, this court held that, to the extent there was no factual basis for the plea of guilty to the crime of failing to register as a sex offender, petitioner's waiver of the right to appeal was not knowing and intelligent. (*Ibid*.)

(*In re Rodden, supra,* 186 Cal.App.4th at p. 31.)

In a habeas action, the *Rodden* court also found the lack of a factual basis for the plea to be grounds for ordering plea withdrawal:

> In this habeas corpus proceeding, we address whether California's sex offender registration requirement may be imposed on the basis of facts gleaned from a probation report prepared after a guilty plea was entered in Kentucky state court.

(*In re Rodden, supra*, 186 Cal.App.4th at p. 28.)

In *Rodden*, the petitioner had entered a plea to failing to register as a sex offender in California, based on the trial court's mistake of law finding her Kentucky violation was equivalent to California's Penal Code section 266j, which is a mandatory registrable offense under section 290, subdivision (c). The *Rodden* court found petitioner's plea had been induced by the trial court's erroneous ruling, and it was undisputed that had petitioner known she could not be convicted, she would not have entered a plea.

> Such a guilty plea cannot stand. Our Supreme Court has stated that

> "[i]t would be unconscionable to hold a defendant bound by a plea made under such significant and excusable misapprehension of the law." (*In re Crumpton* (1973) 9 Cal.3d 463, 468 [106 Cal.Rptr. 770, 507 P.2d 74].) Accordingly, habeas corpus relief is warranted. [footnote omitted]

(*In re Rodden, supra,* 186 Cal.App.4th at pp. 40-41.)

CONCLUSION

On direct appeal, the lack of a factual basis for the plea issue is best presented in a case where the defendant entered a conditional plea, the trial court made no inquiry into the factual basis for the plea, defendant obtained a certificate of probable cause after he unsuccessfully moved to withdraw his plea in the trial court, and there is nothing in the record which the appellate court might review to conclude the error in accepting the plea without a factual basis was harmless. In this limited situation, the appellate court should remand to permit the parties to stipulate to a factual basis, unless the record on appeal affirmatively demonstrates that there is no legally sufficient factual basis for the plea, in which case the appellate court should direct the trial court to allow appellant to withdraw his or her plea. Because the oral plea is usually supplemented by a written plea form, counsel should be sure to review the written plea form in evaluating this issue.

In a *Shepard* situation, counsel should review the record of the prior conviction obtained by plea to see if the defendant or counsel made an admission to a fact, as part of the factual basis for the plea, that would permit the prior to be used as a strike. If not, counsel can then argue, under *French*, that this means of proving the prior as qualifying as a strike violates the Sixth Amendment.