



The Certificate of Probable Cause

January 2023

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I. What is a certificate of probable cause?

A request for a certificate of probable cause is a statement under penalty of perjury prepared by the defendant or the trial attorney describing reasonable constitutional, jurisdictional, or other grounds going to the legality of a guilty or no contest plea or a probation violation admission and asking the trial court for an order certifying that there is one or more non-frivolous issues challenging the plea or admission. (Pen. Code, §1237.5; Cal. Rules of Court, rule 8.304 (b).) It is page two of the judicial council notice of appeal form, CR-120.

II. When is a certificate of probable cause required?

A certificate of probable cause is required in an appeal following a plea of guilt or nolo contendere, or an admission of a violation of probation, where the defendant wishes to challenge the validity of the plea or admission based on reasonable constitutional, jurisdictional, or other grounds. (Pen. Code, § 1237.5).

III. Why is a certificate of probable cause required?

A certificate of probable cause is required to prevent frivolous appeals challenging convictions following guilty and nolo contendere pleas. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1179.) “A guilty plea admits every element of the crime and constitutes a conviction.” (*Id.* at pp. 1177–1178.) Thus, “[b]y admitting guilt a defendant waives an appellate challenge to the sufficiency of the evidence of guilt.” (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1364.) The process of obtaining a certificate of probable cause promotes judicial economy and the time and money spent on preparing the record, the appointment of counsel and the time to decide the appeal. (*In re Chavez* (2003) 30 Cal.4th 643, 651.)

IV. What is the procedure for obtaining a certificate of probable cause?

The procedure for obtaining a certificate of probable cause is described in Penal Code section 1237.5 and California Rules of Court, rule 8.304(b). First, the defendant must file a written statement under penalty of perjury raising “reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings” that he or she wishes to assert on appeal. (Pen. Code, § 1237.5.) This statement must be filed in the superior court with the notice of appeal within 60 days of the judgment or order from

which the appellant wishes to appeal. (Cal. Rules of Court, rules 8.304(b)(1)(A), 8.308(a).) Following this, the trial court has 20 days to either issue a certificate of probable cause certifying any arguably meritorious issue or an order denying the certificate. (*People v. Holland* (1978) 23 Cal.3d 77, 84; Cal. Rules of Court, rule 8.304(b)(1)(B).)

Note that “trial counsel [not only] has the duty to respond to a timely request of his client to either file an appeal, instruct him how to file it, or to secure other counsel for him[, but also to] aid [the defendant] in obtaining a certificate of probable cause.” (Pen. Code, §1240.1.) A trial counsel who disregards instructions from a defendant to file a notice of appeal “acts in a professionally unreasonable manner.” (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 145 L.Ed.2d 985, 120 S.Ct. 1029; see *U.S. v. Sandoval-Lopez* (9th Cir. 2005) 409 F.3d 1193, 1197 [it is ineffective assistance of counsel for attorney to refuse to file a notice of appeal when the client tells attorney to do so, even if doing so would be contrary to the plea agreement and harmful to the client].) “If the defendant seeks to appeal after a guilty or no contest plea, trial counsel has the duty to assist the defendant in preparing and filing the required statement of grounds.” (*People v. Ribero* (1971) 4 Cal.3d 55, 66, superceded on a different point *In re Chavez* (2003) 30 Cal.4th 643, 656, 651.) Trial counsel has options other than alleging his or her own ineffectiveness. Counsel may either ““file the 1237.5 statement, instruct defendant how to file it, or secure other counsel for him’. [Citation.]” (*People v. Johnson* (2009) 47 Cal.4th 668, 684, n. 6.)

V. What happens if the request for a certificate of probable cause is not timely filed?

Generally, if the request for a certificate of probable cause is not filed within the required 60 days, the defendant has forfeited his or her ability to bring an appeal related to issues requiring a certificate of probable cause. (Cal. Rules of Court, rule 8.308(a).) There are two exceptions, both of which are based on an incarcerated criminal defendant’s good faith efforts to timely file a notice of appeal: reliance on the defendant’s trial counsel and reliance on prison officials.

A. Reliance on trial counsel

The defendant may be entitled to relief if his or her attorney failed to follow through on the defendant's timely request to file a notice of appeal. (*In re Benoit* (1973) 10 Cal.3d 72.) The defendant's reliance on trial counsel must be reasonable. (*In re Chavez* (2003) 30 Cal.4th 643, 658.) "[W]hen a notice of appeal in a criminal case is received by the trial court after the jurisdictional deadline to perfect the appeal, the appellate court may deem the notice of appeal to have been constructively filed in a timely manner if, prior to the deadline, the defendant expressly relied on his or her trial counsel to file it, but trial counsel neglected to do so." (*People v. Zarazua* (2009) 179 Cal.App.4th 1054, 1058.)

B. Reliance on prison officials

If the notice of appeal received by the superior court clerk was mailed from a correctional institution, the date of mailing or the date that it was handed to the custodial officials is determinative, even if the envelope was not received until after the time to appeal expired. (Cal. Rules of Court, rule 8.25(b)(5); *In re Jordan* (1992) 4 Cal.4th 116.) Additionally, the defendant may be entitled to relief if he or she relied upon representations made by prison officials, which caused the defendant to have a false sense of security. (*In re Benoit, supra*, 10 Cal.3d at p. 83.)

VI. What happens if the request for a certificate of probable cause is denied?

If a request for a certificate of probable cause is denied by the trial court, the appeal will be limited to issues that do not require a certificate of probable cause. (Cal. Rules of Court, rule 8.304(b)(3).) If, in fact, the defendant identified a non-frivolous issue in his or her request for a certificate of probable cause, the trial court's denial of the certificate of probable cause is an abuse of discretion. (*People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188.) However, the asserted abuse of discretion is not reviewable on appeal. (*Id.* at p. 1187.) The defendant's only recourse is to file a petition for a writ of mandate seeking review of the trial court's denial. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1180.)

VII. What claims of error are waived on appeal by a plea or admission?

When a defendant enters a guilty or no contest plea, or admits a violation of probation, he or she waives any and all claims of error arising prior to the plea, with the exception of search and seizure issues, or those that question the constitutionality, legality, or jurisdiction of the proceedings that resulted in the plea. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9.) Note that obtaining a certificate of probable cause does not reinstate issues waived as a result of the plea. (*People v. Turner* (1985) 171 Cal.App.3d 116, 124–125.)

What follows is a list of claims of error that are waived by a plea or admission. This list is not comprehensive, but representative. The common theme is that the following claims of error all impermissibly attempt to challenge the defendant's guilty status.

A. Claim: arrest was illegal

Following a plea, the claim that a defendant's arrest was illegal is waived on appeal. (*People v. Devaughn* (1977) 18 Cal.3d 889, 895.) This is because "a plea of guilty admits all matters essential to the conviction," and thus the particulars of the arrest are moot. (*Ibid.*)

B. Claim: confession was illegally obtained (*Miranda* violation)

Following a guilty plea, errors related to a trial court's failure to suppress a defendant's confession are not cognizable on appeal. (*People v. Devaughn* (1977) 18 Cal.3d 889, 893.) "Given the accused's guilty plea, an extrajudicial statement relating to [the defendant's] guilt of a charged crime does not, by reason of a claim that it was involuntarily or improperly induced, raise an issue on appeal based on 'constitutional, jurisdictional or other grounds going to the legality of the proceedings' resulting in the plea." (*Id.* at p. 896.) The guilty plea operates "to remove such issues from consideration as a plea of guilty admits all matters essential to the conviction." (*Id.* at p. 895.)

C. Claim: entrapment invalidated the admissibility of evidence

"An entrapment defense presumes guilt, but excuses the perpetrator's conduct as a matter of public policy, concluding overzealous law enforcement conduct which induces

the commission of a crime is a greater societal wrong.” (*People v. Bonwit* (1985) 173 Cal.App.3d 828, 832.) However, an affirmative defense is waived once a guilty plea is entered. (*Ibid.*) The guilty plea operates as an admission that the defendant was not entrapped. (*Ibid.*)

D. Claim: pretrial identification or lineup was unfair

Following a plea, a challenge to the denial of a motion to suppress a witness’s identification of the defendant in a lineup based on claims that the lineup was unfair is waived on appeal. (*People v. Stearns* (1973) 35 Cal.App.3d 304, 306.) Whether or not the lineup was unfair becomes immaterial after a plea, as the plea admits the elements of the offense charged. (*Ibid.*) Note that a challenge to a denial of a motion to suppress identification testimony is not a motion pursuant to Penal Code section 1538.5, subdivision (m), as this code section only applies to motions to suppress evidence obtained following a search and seizure. (*Ibid.*)

E. Claim: denial of motion to disclose identity of an informant was error

“An order denying a motion to disclose the identity of an informant is not subject to review on appeal after the defendant has entered a plea of guilty.” (*People v. Castro* (1974) 42 Cal.App.3d 960, 963.) “This is so because the purpose of the motion relates solely to the defendant’s guilt or innocence, an issue which is removed by the guilty plea.” (*Ibid.*) A “[d]efendant cannot admit [the charged offense] by pleading guilty and then question the judgment on the ground some witness he was not permitted to discover might possibly have testified otherwise.” (*Ibid.*) “The two positions are inconsistent.” (*Ibid.*)

F. Claim: in limine evidentiary ruling was error

A trial court’s denial of a defendant’s motion in limine to admit certain evidence is foreclosed from appellate review by a defendant’s plea. (*People v. Shults* (1984) 151 Cal.App.3d 714, 716.) This is because a plea admits the elements of the charged offense, eliminating the need for any determination of whether an in limine evidentiary ruling was erroneous. (*Id.* at p. 719.) The defendant’s guilt or innocence is no longer in question. (*Ibid.*)

G. Claim: evidence was insufficient

A contention on appeal that there was insufficient evidence to support a particular charged offense “is not cognizable on appeal, with or without a certificate of probable cause.” (*People v. Thurman* (2007) 157 Cal.App.4th 36, 43.) A guilty plea “concedes that the prosecution possesses legally admissible evidence sufficient to prove defendant’s guilt beyond a reasonable doubt.” [Citation.]” (*Ibid.*) Accordingly, “a guilty plea waives any right to raise questions regarding the evidence, including its sufficiency or admissibility.” [Citation.]” (*Ibid.*)

VIII. What issues can be raised on appeal following a guilty plea?

Issues that can be raised on appeal following a plea fall into one of two categories: (1) those that require a certificate of probable cause, and (2) those that do not. More specifically, a certificate of probable cause is required to raise issues challenging the legality of the plea proceedings based on reasonable constitutional, jurisdictional, or other grounds. (Pen. Code, § 1237.5.) A certificate of probable cause is not required for challenges to sentencing not part of the plea agreement, search and seizure issues raised under Penal Code section 1538.5, subdivision (m), or other post-plea issues. (*People v. Williams* (2007) 156 Cal.App.4th 898, 910.)

If a certificate of probable cause is obtained on one issue, all otherwise cognizable claims may be raised on appeal. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1174.) “Nothing in [Penal Code] section 1237.5 indicates the defendant must specify, and the trial court certify as non-frivolous, each issue to be raised on appeal.” (*Ibid.*) “The specification of a single proper ground for appeal allows any and all cognizable issues to be raised.” (*People v. Jones* (1995) 10 Cal.4th 1102, 1105.) Note that obtaining a certificate of probable cause does not reinstate issues waived as a result of the defendant’s plea (i.e., issues related to defendant’s guilt or innocence). (*People v. Turner* (1985) 171 Cal.App.3d 116, 124–125.) If a defendant wishes to challenge the enforceability of the waiver, the defendant must seek a certificate of probable cause specifically as to that effect. (*People v. Codinha* (2021) 71 Cal.App.5th 1047, 1078–1079.)

A. Issues that can be raised with a certificate of probable cause

If a defendant has obtained a certificate of probable cause following a plea or a violation of probation admission, he or she may raise issues broadly categorized as those challenging the legality of the plea proceedings. (Pen. Code, § 1237.5.) The following list is not comprehensive, but representative. The common theme of arguable issues listed below is that each involves a matter of constitutional magnitude, such as due process or violation of an enumerated right.

1. Denial of right to counsel of defendant's choice

In *People v. Holland* (1978) 23 Cal.3d 77, the defendant appealed following a guilty plea. (*Id.* at p. 81.) The defendant's issue was that he was denied "his constitutional right to counsel when the state unlawfully prevented him from using his savings to retain private counsel." (*Ibid.*) Such an "alleged constitutional defect in the proceedings is cognizable after a plea of guilty." (*Id.* at p. 85.) The defendant's judgment was reversed because "the trial court failed to intervene to permit appellant to exercise his constitutional right to counsel." (*Id.* at p. 89.)

2. Denial of right to waive counsel and represent self

In *People v. Robinson* (1997) 56 Cal.App.4th 363, after the trial court denied the defendant's motion to represent himself, the defendant entered a plea. (*Id.* at p. 368.) Later, the defendant obtained a certificate of probable cause, allowing him to raise his *Faretta* issue on appeal. (*Id.* at pp. 368, 370.) "The right to self-representation is grounded in the Sixth Amendment's right to counsel." (*People v. Robinson* (1997) 56 Cal.App.4th 363, 369, citing *Faretta v. California* (1975) 422 U.S. 806, 819.) The denial of the right to counsel is not waived by a plea. (*Id.* at p. 366, 369.)

3. Ineffective assistance of counsel at, or advising on, the plea

A defendant suffers a constitutional violation whether the ineffective assistance of counsel resulted in the defendant rejecting a plea agreement and proceeding to trial, or waiving trial and accepting a plea agreement. (*In re Alvernaz* (1992) 2 Cal.4th 924, 934–935, 936.) As such, either scenario falls within the category of permissible issues that may be raised on appeal following a plea. (Pen. Code, § 1237.5, subd. (a) ["reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings"].)

To raise this issue on appeal, a defendant must obtain a certificate of probable cause. (*People v. McCary* (1985) 166 Cal.App.3d 1, 7, fn. 2.)

4. Voluntariness of the plea

A claim that a plea was improperly induced goes to the legality of the proceedings that resulted in the plea, and thus can be raised on appeal with a certificate of probable cause. (*People v. Devaughn* (1977) 18 Cal.3d 889, 895–896.) Improper inducement can be the result of either undue pressure or duress, or (2) fraud:

- Undue Pressure or Duress: *People v. Weaver* (2004) 118 Cal.App.4th 131, 137, 149, 150 [defendant contended that he entered his plea under duress that resulted from the pressure from his attorneys and the trial court, the trial court’s over-involvement in plea negotiations, and the court’s apparent bias against him; the reviewing court agreed stating that “when the trial court abandons its judicial role and thrusts itself to the center of the negotiation process and makes repeated comments that suggest a less-than-neutral attitude about the case or the defendant, then great pressure exists for the defendant to accede to the court’s wishes”].
- Fraud: *People v. Butterfield* (1940) 37 Cal.App.2d 140, 142–144, 147 [fraud induced a plea from defendant where his cell-mate, working with district attorney and sheriff, secured defendant’s confession on the promise of punishment no higher than manslaughter, where the cellmate was not authorized to make such a promise, and where defendant was sentenced on first degree murder; “the fraud and undue influence which it appears that [the cell mate] exercised to induce the [defendant] to plead guilty is not justifiable, for it wrongfully deprived [the defendant] of [his] right of trial by jury”].

5. Failure to advise of rights and/or consequences

a. Rights

An appeal following a guilty plea, where constitutional rights were not “knowingly, intelligently, properly or competently waived,” involves issues that go to the legality of the plea. (*People v. Navarro* (1966) 243 Cal.App.2d 755, 758.) A certificate of probable cause is required for a defendant to assert on appeal that he or she was not

properly advised of his or her constitutional rights prior to entering a plea. (See *Lara v. Superior Court* (1982) 133 Cal.App.3d 436.)

b. Direct consequences

A defendant must be advised of the direct consequences of a guilty or nolo contendere plea. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) Direct consequences include the range of punishment (*ibid.*), imposition of a restitution fine and restitution to the victim (*People v. Walker* (1991) 54 Cal.3d 1013, 1030), ineligibility for probation (*People v. Caban* (1983) 148 Cal.App.3d 706, 711), a mandatory parole term (*In re Moser* (1993) 6 Cal.4th 342, 351–352), the maximum parole term (*In re Carabes* (1983) 144 Cal.App.3d 927, 932), the requirement to register as a sex offender (*People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1481), the revocation or suspension of driving privileges (*People v. Dakin* (1988) 200 Cal.App.3d 1026, 1033). A certificate of probable cause is required for a defendant to assert on appeal that he or she was not properly advised of direct consequences prior to the entry of a plea. (See *People v. Searcie* (1974) 37 Cal.App.3d 204.)

c. Collateral consequences

Although a defendant must be advised of direct consequences prior to the entry of a guilty or nolo contendere plea, there is no such requirement for collateral consequences. (*People v. Crosby* (1992) 3 Cal.App.4th 1352, 1354–1355.) A consequence is collateral if it does not inevitably follow from the plea. (*In re Carabes, supra*, 144 Cal.App.3d 927, 931.) Examples of collateral consequences include limitations on the ability to earn good time or work time credits (*People v. Barella* (1999) 20 Cal.4th 261, 271), the possibility the conviction could be used in the future to enhance punishment (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457), the possibility that a conviction can serve to revoke an existing probationary grant (*People v. Martinez* (1975) 46 Cal.App.3d 736, 745), conditions of probation (*People v. Dillard* (2017) 8 Cal.App.5th 657, 666).

6. Denial of motion to withdraw the plea

A defendant who wishes to challenge on appeal the denial of a motion to withdraw his or her plea must obtain a certificate of probable cause. (*In re Chavez* (2003) 30 Cal.4th 643, 650–651.) A defendant cannot avoid the certificate of probable cause requirement by arguing that a challenge to the denial of the motion to withdraw is a

challenge to a proceeding subsequent to the entry of the plea. (*People v. Ribero* (1971) 4 Cal.3d 55, 63–64.) “[T]he determinative factor [is] the substance of the error being challenged, not the time at which the hearing was conducted.” (*Id.* at p. 63.) A challenge to the denial of a motion to withdraw a plea goes to the validity of the plea, and thus requires a certificate of probable cause. (*Id.* at pp. 63–64.)

7. Plea was induced by misrepresentations

A certificate of probable cause is required where a defendant wishes to assert on appeal that the plea agreement that he or she entered into was induced by misrepresentations. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.)

Examples of misrepresentations include:

- *People v. Hollins* (1993) 15 Cal.App.4th 567, 569, 571–574: Trial court incorrectly informed defendant that his plea would not affect his right to appeal the denial of his motion to compel disclosure of the confidential location where a witness had observed the events in question.
- *People v. Devaughn* (1977) 18 Cal.3d 889, 893: Guilty pleas were improperly induced where the trial court issued certificates of probable cause that purported to preserve for appeal issues raised by the defendants related to their pre-plea motions to suppress, but which did not.
- *People v. Coleman* (1977) 72 Cal.App.3d 287, 292: Trial court erroneously agreed to issue a certificate of probable cause to preserve defendant’s right to appeal the denial of his motion to disclose the informant’s identity, despite the guilty plea foreclosing his ability to do this.
- *People v. Bowie* (1992) 11 Cal.App.4th 1263, 1267, 1268: Defendant’s admission of a prior federal bank robbery conviction that resulted in a sentencing enhancement was improperly induced by the trial court’s incorrect advice that the defendant would be able to appeal whether the bank robbery conviction constituted a serious felony under section 667, subdivision (a).
- *People v. Truman* (1992) 6 Cal.App.4th 1816, 1820–1821: Defendant’s guilty plea was improperly induced by misrepresentation that he could appeal the denial of his

Penal Code section 995 motion; his guilty plea precluded him from raising this issue on appeal.

- *People v. Haven* (1980) 107 Cal.App.3d 983, 985, 986: Defendant was improperly induced to enter no contest plea on the understanding that the trial court would sign a certificate of probable cause to preserve her right to argue on appeal that it was error for the trial court to deny her motion to sever where this issue was not cognizable on appeal following a plea.

8. Alleged conduct did not violate statute as charged

If a defendant pleads guilty to conduct that does not violate the statute as charged, resulting in a legally impossible admission of guilt, a challenge to the validity of the plea is cognizable on appeal, so long as the defendant meets Penal Code section 1237.5 requirements. (*People v. Soriano* (1992) 4 Cal.App.4th 781, 783.) Specifically, the defendant must obtain a certificate of probable cause. (*People v. Ellis* (1987) 195 Cal.App.3d 334, 338, disapproved of on unrelated grounds in *People v. Guzman* (1991) 226 Cal.App.3d 1060.) “[T]he law has a strong interest in insuring that a defendant is convicted and punished only if he has done an act proscribed by a criminal statute.” (*Id.* at p. 345.)

9. Defendant was incompetent at time of the plea

“A claim that the trial court accepted a guilty plea from a defendant . . . without having conducted a hearing on his present sanity despite substantial evidence raising a doubt of his sanity is an allegation of fundamental error.” (*People v. Laudermilk* (1967) 67 Cal.2d 272, 282.) “The error goes to the legality of the proceedings because ‘conviction of an accused person while he is legally incompetent violates due process.’ [Citation.]” (*Ibid.*) Challenges to a defendant’s mental competence at the time the defendant entered his or her plea may be raised on appeal if the defendant has obtained a certificate of probable cause. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100.)

10. Trial court erred when it denied pretrial diversion

“Since a factually guilty but otherwise eligible defendant is entitled to be diverted, his plea of guilty cannot be deemed a waiver of his asserted but denied right to diversion.” (*People v. Padfield* (1982) 136 Cal.App.3d 218, 228.) “[T]he wrongful denial

of pretrial diversion constitutes ‘other grounds going to the legality of the proceedings’ (Pen. Code, § 1237.5), and may be raised on appeal by a certificate of probable cause after a plea.” (*Ibid.*)

More recent cases have found that the denial of pretrial diversion can be raised without a certificate of probable cause because these appeals do not challenge the validity of the plea. (*People v. Hill* (2021) 59 Cal.App.5th 1190 [denial of Pen. Code § 1001.36 mental health diversion can be raised on appeal without a certificate of probable cause]; *People v. Pack-Ramirez* (2020) 56 Cal.App.5th 851, 856 [denial of Pen. Code § 1001.83 primary caregiver diversion can be raised without a certificate of probable cause.]

11. Challenges to sentence to which defendant agreed as part of plea

The Penal Code section 1237.5 certificate of probable cause requirement does not apply to post-plea challenges such as sentencing. (*People v. Ward* (1967) 66 Cal.2d 571, 574.) However, this exception does not apply to sentencing challenges where the sentence was part of the plea agreement. (*People v. Johnson* (2009) 47 Cal.4th 668, 678.) A certificate of probable cause is required where the parties have agreed that the court will impose a specific, agreed-upon sentence. (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 55-56.) However, a certificate of probable cause is not required to challenge the sentence when the parties agreed that the court may impose any sentence at or below an agreed-upon maximum because the agreement, by its nature, contemplates that the court will choose from a range of permissible sentences. (*Ibid.*) A challenge to the legal validity of the maximum sentence itself does require a certificate of probable cause. (*People v. Cuevas* (2008) 44 Cal.4th 374, 377.) The guiding principle is whether the challenge is to the validity of the plea itself. (*People v. Panizzon* (1996) 13 Cal.4th 68, 74.)

B. Issues that do not require a certificate of probable cause on appeal:

1. Sentencing issues

If the sentence was not part of the plea agreement, but rather was left to the discretion of the trial court, and any required objection was made during the trial court proceedings, there are a number of sentencing-related errors that may be raised on appeal. Some examples are discussed below:

a. Error in determining degree of offense

In *People v. Ward* (1967) 66 Cal.2d 571, the defendant pled guilty to murder, but the degree of the offense was not specified as part of the plea agreement. (*People v. Ward* (1967) 66 Cal.2d 571, 572.) Ultimately, the trial court determined the murder was of the first degree. (*Ibid.*) The defendant brought an appeal challenging, in part, the trial court's finding of degree. (*Ibid.*) However, the defendant did not timely file a request for a certificate of probable cause. (*Ibid.*) The California Supreme Court held that the certificate requirement did not apply where a defendant claimed errors related to the hearings where the degree of the crime was determined, which did not challenge the validity of the plea itself. (*Id.* at p. 574.)

b. Error determining pre-sentence custody credits

In *People v. Mendez* (1999) 19 Cal.4th 1084, the California Supreme Court established that a "miscalculation of pre-sentence custody credits issue is a non-certificate issue, inasmuch as it is, on its very face, a post-plea question not challenging [the] guilty plea's validity." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100.) Accordingly, no certificate of probable cause is required to challenge the trial court's calculation of pre-sentence custody credits in a plea case. (*Ibid.*)

People v. Mendez provides a cautionary tale about challenging the calculation of custody credits on appeal. In that case, the defendant did not secure a certificate of probable cause, as was required, for the certificate issues he was also raising on appeal. (*People v. Mendez, supra*, 19 Cal.4th 1084, 1101.) As a result, those issues were waived on appeal, leaving the custody credit issue the only validly raised post-plea issue. (*Id.* at pp. 1100–1101.) However, because Penal Code section 1237.5 required credit issues be raised first in the trial court and appellant had failed to do so, the California Supreme Court upheld the appellate court's decision to dismiss the appeal. (*Id.* at pp. 1100–1101.)

c. Trial court failed to exercise its sentencing discretion

A trial court's failure to exercise its sentencing discretion, for example in response to a *Romero* motion, can be raised on appeal following a plea absent a certificate of probable cause because such a challenge does not attack the validity of the plea. (*People v. Lloyd* (1998) 17 Cal.4th 658, 665, 666.)

d. Trial court failed to carry out terms of the plea agreement

“When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties and the court must abide by the terms of the agreement.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024 overruled on unrelated grounds by *People v. Villalobos* (2012) 54 Cal.4th 177.) “Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant . . . cannot be sentenced on the plea to a punishment more severe than that specified in the plea.” (Pen. Code, § 1192.5.) No certificate of probable cause is required to challenge a trial court’s failure to honor the terms of a plea agreement. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1220.)

e. Challenge to probation conditions

Orders made after the grant of probation are appealable without a certificate of probable cause. (Pen. Code § 1237(b).) An order denying a defendant's motion to modify the conditions of probation is appealable as an order after judgment. (*People v. Romero* (1991) 235 Cal.App.3d 1423, 1425-1426.) However, if a defendant waives the right to appeal as part of a plea, they must obtain a certificate of probable cause to challenge probation conditions. (*People v. Espinoza* (2018) 22 Cal.App.5th 794.)

2. Search & seizure issues

Where a defendant has entered a guilty plea, Penal Code section 1538.5, subdivision (m), allows a defendant to challenge on the denial of a motion to suppress search and seizure evidence without first obtaining a certificate of probable cause. (See also Cal. Rules of Court, rule 8.304(b)(4)(A).) This exception to the certificate of probable cause requirement only applies to Fourth Amendment search and seizure issues, not motions to suppress confessions or admissions in violation of a defendant’s Fifth or Sixth Amendment rights. (*People v. Whitfield* (1996) 46 Cal.App.4th 947, 958.)

3. Immigration consequences

The trial court is statutorily required to advise the defendant of the immigration consequences of a conviction following a guilty plea. (Pen. Code § 1016.5.) A certificate of probable cause is not required to appeal a trial court’s order denying a motion to vacate a conviction under section 1016.5 (*People v. Arriaga* (2014) 58 Cal.4th 950 [failure to

advise of immigration consequences of plea)]; or section 1473.7 (*People v. Vivar* (2021) 11 Cal.5th 510, 523 [that defendant was unaware of the immigration consequences of conviction or sentence]).

4. Post plea changes to the law

A certificate of probable cause is not required to raise the claim on appeal that a subsequent change in the law applies retroactively to the defendant. (*People v. Stamps* (2020) 9 Cal.5th 685.) The claim does not constitute an attack on the validity of the plea because it does not challenge that the plea was defective when it was made. (*Ibid.*) However, in cases where the retroactive legislative changes grant the trial court additional discretion in sentencing and the trial court exercises that discretion, the remainder of the plea bargain will not stand. (*Ibid.*) When the ameliorative change does not rely upon the trial court's exercise of discretion, then the prosecution may not rescind the remainder of the plea agreement. (*People v. Flores* (2022) 77 Cal.App.5th 420.) [Note: This issue is under review in *People v. Prudholme*, S271057.]

A provision of a plea bargain that requires a defendant to generally waive any benefits of future ameliorative changes in the law is void as against public policy. (Pen. Code § 1016.8.) Plea agreements are deemed to incorporate the power of the state to amend the law or enact additional laws and a plea agreement will not insulate the parties from changes in the law that apply to them. (*Doe v. Harris* (2013) 57 Cal.4th 64.)

A certificate of probable cause is not required to raise the issue of whether an appellate claim falls within the scope of an appellate waiver. (*People v. Becerra* (2109) 32 Cal.App.5th 178.)

5. Juvenile appeals

A certificate of probable cause is not required in juvenile appeals. (*In re Joseph B.* (1983) 34 Cal.3d 952, 959.) However, in an appeal following a juvenile's admission, the juvenile does not have free rein to assert any error. (*In re John B.* (1989) 215 Cal.App.3d 477, 483.) Rather, Penal Code section 1237.5 requires that a juvenile's appeal be "limited to reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings resulting in the plea." (*Ibid.*)

6. Resentencing

When the legislature has established a resentencing process that allows the trial court to modify a sentence after the plea agreement, an appeal from the modified sentence does not require a certificate of probable cause. (*People v. Arias* (2020) 52 Cal.App.5th 213, 218-219.)

7. Slow pleas

A certificate of probable cause is not required for slow pleas. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 603–604.) This is because a slow plea is not a true plea - although the outcome is a foregone conclusion, the defendant does not admit guilt. (*People v. Wright* (1987) 43 Cal.3d 487, 496.)

8. Admit enhancements but proceed to trial on substantive counts

A certificate of probable cause is not required where a defendant admits a prior or an enhancement, but proceeds to trial on the substantive count(s). (*People v. Maultsby* (2012) 53 Cal.4th 296, 304, 305.) Similarly, where a defendant pleads on the substantive count(s) but has a bench or jury trial on any alleged priors or enhancements, the trial can “be reviewed without a certificate of probable cause because it would be contested.” (*People v. Perry* (1984) 162 Cal.App.3d 1147, 1151, fn. 3.)

9. Denial of post plea, presentencing *Marsden*

A post-plea *Marsden* motion does not implicate the validity of the plea and may be reviewed on appeal without obtaining a certificate of probable cause. (*People v. Vera* (2004) 122 Cal.App.4th 970, 978.)

IX. Certificate of Probable Cause Decision Tree

A. Is defendant appealing following a plea or admission of probation violation?

1. No:

A certificate of probable cause does not play a role in the appeal.

2. Yes:
A certificate of probable cause may be required, depending on the claim of error. (Continue to “B” below.)

B. If the appeal follows a plea or admission, what is defendant challenging?

1. A claim of error occurring prior to entry of plea/admission:
With the exception of a challenge to a motion to suppress (Pen. Code, § 1538.5, subd. (m)), all claims of error occurring prior to the entry of the plea are waived by the plea and may not be raised on appeal.
2. A claim of error occurring after entry of plea/admission:
No certificate of probable cause is required to raise a claim of error occurring after the entry of the plea, so long as the asserted error does not challenge the validity of the plea.
3. A claim of error related to legality of plea proceedings:
A certificate of probable cause is required to raise any claim of error that challenges the legality of the plea proceedings.

C. What is the procedure for obtaining a certificate of probable cause?

1. Timeliness:
A request for a certificate of probable cause should be made at time the notice of appeal is filed, and must be made within 60 days of judgment. By the time the appeal reaches appellate counsel, a defect related to timeliness is typically not curable.
2. Denial:
A denial of a request for a certificate of probable cause is properly challenged via a writ of mandate, not on direct appeal.
3. Curing Defects:
Appellate counsel is limited in what can be done to cure a defective notice of appeal based on a failure to request or secure a certificate

of probable cause. Depending on the particulars of the case, it may be possible to petition the court of appeal to construe the notice of appeal to include issues not related to the validity of the plea (i.e. post- plea or motion to suppress issues).