

**CERTIFICATES OF PROBABLE CAUSE IN GUILTY PLEAS**  
by Cynthia Sorman, CCAP Staff Attorney

**I. Scope and Purpose of Requirement**

- **Procedural Requirements in Guilty Plea Appeals:** An appeal in a guilty plea case is procedurally governed by Penal Code section 1237.5 and is very different from an appeal following a court or jury trial. Most issues, such as guilt or innocence, in limine evidentiary rulings, and most procedural defects, are deemed waived by the defendant's plea. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9 [discussing availability of specific performance].) For these reasons appeals in guilty plea cases are quite restricted. One indication of the limits on such appeals is the requirement of a certificate of probable cause (CPC) when the defendant seeks to challenge the validity of the plea. (Pen. Code, § 1237.5.) A CPC is a document which is issued by the trial court certifying there is at least one non-frivolous basis for a challenge to the plea. (*People v. Ribero* (1971) 4 Cal.3d 55, 62.) It must be filed with the notice of appeal (Calif. Rules of Court, rule 8.308(a)) no later than 60 days after the judgment or order appealed from. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1099.) By signing the certificate, the trial court does not express a belief that a challenge to the plea is meritorious, but only that there is an honest difference of opinion whether the issue may have merit. (*People v. Ribero, supra*, 4 Cal.4th at p. 63, fn. 4.)
- **What is the Purpose of a CPC?** “The purpose for requiring a certificate of probable cause is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas. [Citations.] The objective is to promote judicial economy ‘by screening out wholly frivolous guilty [probation violation admissions and nolo contendere] plea appeals before time and money is spent preparing the record and the briefs for consideration by the reviewing court.’ [Citations.]” (*People v. Panizzon* (1996) 13 Cal.4th 68, 75-76, quoting *People v. Hoffard* (1995) 10 Cal.4th 1170, 1179; *People v. Holland* (1978) 23 Cal.3d 77, 84.) The CPC requirement also saves the appellate court from having to deal with frivolous matters by removing them from the available issues on appeal. (*People v. Mendez, supra*, 19 Cal.4th at p. 1095.)
- **No CPC is Required Where Defendant Does Not Challenge the Plea and/or a Penal Code sec. 1538.5 Issue is Preserved for the Appeal:** A certificate of probable cause is not required when the notice of appeal specifies that a Penal Code section 1538.5 issue has been preserved for appeal and/or the appeal is based on an issue that arose after the plea was entered and does not affect the plea's validity. The appeal is not perfected “unless the notice of appeal states that

it is based upon such grounds.” (Cal. Rules of Ct., rule 8.304(B); see also *People v. Panizzon*, *supra*, 13 Cal.4th at p. 75; *People v. Jones* (1995) 10 Cal.4th 1102, 1106-1107; *People v. Lloyd* (1998) 17 Cal.4th 658, 663-665 [statement may be express or implied].) An appeal from the denial of a motion to suppress is appealable without a certificate of probable cause. (Pen. Code, §§1237.5, 1538.5, subd. (m). See also *People v. West* (1970) 3 Cal.3d 595, 601.) But note, the suppression motion must be presented to the superior court to preserve it for appeal. (*People v. Richardson* (2007) 156 Cal.App.4th 574.) Issues such as improper or unconstitutional probation conditions (if properly preserved – see *People v. Welch* (1993) 5 Cal.4th 228, 234-238) and abuse of discretion at sentencing (*People v. Superior Court (Romero)* 1996) 13 Cal.4th 497) do not require a CPC unless the defendant has stipulated to a particular sentence (see *People v. Panizzon*, *supra*, 13 Cal.4th 68). A CPC is not required when the defendant enters an open plea to all charges without a cap and the defendant challenges the trial court’s exercise of discretion in setting the term. (*People v. Buttram* (2003) 30 Cal.4th 773.)

- **A CPC is Required When the Defendant Challenges the Trial Court’s Authority to Impose a Term Within the Plea Agreement:** If the plea agreement includes dismissal of counts or enhancements and a cap of less than the maximum term, the legal authority of the trial court to impose any sentence within the agreement cannot be challenged without a CPC. (*People v. Shelton* (2006) 37 Cal.4th 759 [where parties agree to a specified maximum term, a Pen. Code, §654 challenge to the plea’s validity requires a CPC]; *People v. Cuevas* (2008) 44 Cal.4th 374 [CPC required to challenge a sentence when the plea agreement includes a sentence less than the maximum exposure the defendant would otherwise face]; *People v. Panizzon* (1996) 13 Cal.4th 68 [agreement to a specified term precludes an argument that the term is cruel and unusual punishment].)
- See section VI below, **How Can You Tell When a CPC is Necessary?**

## II. The Validity of The Notice of Appeal

- **Carefully Check the Notice of Appeal:** One of the first things appointed appellate counsel should do with the transcript in a guilty plea appeal is to double check the notice of appeal for timeliness and compliance with rules 8.304(b) and 8.308(a). Where the only ground for the appeal after a guilty plea is a challenge to the validity of the plea and a CPC was denied, remedial action must be taken to perfect the appeal. What avenues are available to prevent dismissal of the appeal will be discussed further herein.

- There are basically three types of appeals after a guilty plea:
  1. **Certificate appeals:** These appeals challenge the validity of the plea either directly or in substance (for instance, by attacking a stipulated sentence) and require a CPC. Where no other ground for the appeal is asserted, these appeals must be accompanied by a CPC in order to be operative, i.e., to move forward. Otherwise, the Court of Appeal lacks jurisdiction over the case and the appeal will be dismissed.
  2. **Non-certificate appeals:** These appeals after a guilty plea challenge a sentence (non-stipulated) or matters occurring after the plea, which do not affect the validity of the plea. In addition, the denial of a Fourth Amendment motion to suppress evidence filed pursuant to section 1538.5 may be raised without a CPC. If the defendant has a valid notice of appeal on a non-certificate ground, any non-certificate issue which was preserved for appeal may be raised, even if it was not specified in the notice of appeal. (*People v. Jones* (1995) 10 Cal.4th 1102, 1112-1113.) For instance, if sentencing or matters occurring after the plea were specified as the ground for the appeal, the defendant may also raise the denial of a suppression motion under section 1538.5. (*Ibid.*)
  3. **Mixed certificate/non-certificate appeals:** In these cases the appellant marked the box challenging the sentence or matters occurring after the plea as well as the box challenging the validity of the plea. If the CPC is granted, there is no problem, as any issues which have foundation in the record, and which were preserved for appeal, may be raised. If the CPC is denied, the appeal continues nonetheless, although no issues challenging the validity of the plea may be raised in the appeal unless one is obtained. (*People v. Jones, supra*, 10 Cal.4th at pp. 1112-1113; *People v. Mendez, supra*, 19 Cal.4th at p. 1088.)
- **Initiating an Appeal Which Challenges the Plea:** A CPC is required to initiate an operable appeal if the validity of the plea is the only ground for the appeal after a plea of guilty or where the appellant seeks to challenge the validity of the plea. (Pen. Code, §1237.5; *People v. Mendez, supra*, 19 Cal.4th at p. 1104.) Determining what is considered a challenge to the plea can sometimes be difficult.
- **Non-certificate Issues can Proceed When the CPC is Denied if They are Listed as Grounds for the Appeal.** The failure to secure a CPC when required is generally fatal to an appeal based on the invalidity of the plea. (*People v.*

*Castelan* (1995) 32 Cal.App.4th 1185, 1188-1189.) However, rule 8.304(b) (re appeal after guilty plea and requirement of a CPC) "does not govern the cognizability of noncertificate issues, but, rather, determines only when a noncertificate appeal may proceed. Where . . . an appellant has in fact complied with rule [8.304(b)] in his notice of appeal, the rule does not restrict the cognizability on appeal of additional, unspecified noncertificate issues or categories of issues." (*People v. Jones, supra*, 10 Cal.4th 1102 [notice of appeal was as to denial of 1538.5 motion; appellate counsel raised a sentencing issue, which Court of Appeal refused to consider on the merits because notice of appeal did not specify it. Supreme Court held that predecessor to rule 8.304(b) does not require such specificity, and allowed the sentencing issue to proceed].)

- **Make Sure to Determine Exactly What is Being Challenged on Appeal.** Be cautious; even if the notice of appeal states that the appeal is from the sentence only, if the appeal *in substance* attacks the validity of the plea, a CPC is required to raise the issue. (*Lloyd, supra*, 17 Cal.4th 658, 665-666, citing *Panizzon, supra*, 13 Cal.4th at p. 76.) "It does so if the sentence was part of a plea bargain." (*Ibid.*, citing *Panizzon* at p. 79.) "It does not if it was not [], especially so if the claim or claims in question were 'reserved as part of the plea agreement.'" (*Ibid.*, citing *Panizzon* at p. 76, and 78, fn. 8.) However, with respect to the appeal, it remains viable because the box listing as a ground for the appeal the sentence also states "or other matters occurring after the plea."
- **When a CPC Issues, all Other Preserved Issues May be Raised.** Once a CPC is granted the appellant may raise any issue on appeal which was preserved and not waived by the plea; the appeal is not restricted to the matters mentioned in the declaration in support of the CPC. (*People v. Hoffard, supra*, 10 Cal.4th at p. 1174.)

### III. Amending the Notice of Appeal to Obtain a CPC

- **Appellate Counsel's Duty to Perfect the Appeal:** What if appellant needs a CPC to raise a valid issue on appeal, yet no CPC was requested in the trial court? Appellate counsel has a duty to perfect the appeal to protect appellant's right to have his case heard on the merits. What action is necessary depends on the number of days that have passed since the judgment or order appealed.
- **Correcting the Notice of Appeal Before the 60-Day Clock Runs:** The appellant has only 60 days to file his statement of reasons in support of a CPC. (Cal. Rules of Ct., rule 8.308(a).) The trial court has 20 days after that time to either issue or deny the CPC. (Cal. Rules of Ct., rule 8.304(b)(2).) After the

60-day jurisdictional period, the trial court loses jurisdiction to accept the notice of appeal. (See *In re Chavez* (2003) 30 Cal.4th 643, 652-653.) If the notice of appeal is timely but defective because a CPC should have been requested, but was not, the appellant may move to amend the notice of appeal to add a valid ground for the appeal in the superior court within 60 days from the judgment or order appealed.

- **Seeking to Correct a Defective Notice of Appeal After the Statutory Period has Lapsed:** After the 60-day period has lapsed, correction requests must be directed to the Court of Appeal. Depending on the circumstances, the options are to file a motion to amend the notice of appeal or a motion for constructive notice of appeal (Third District) or a petition for writ of habeas corpus to establish a late appeal (Fifth District preference). The petition option requires appointed counsel to file a motion to seek to expand his/her appointment to include the authority to assist appellant to file a writ petition. If the only ground listed for the appeal was a challenge to the validity of the plea and the CPC is denied a motion may be made to amend the notice of appeal to add a non-certificate ground for the appeal. The application must reflect that appellant intended to appeal on that ground. (*People v. McEwan* (2007) 147 Cal.App.4th 173, 178-179.)

#### IV. Filing a Petition For Writ of Mandate Where a CPC was Improperly Denied

- **Seeking an Order from the Court of Appeal:** What happens when the appeal is validly pending based on a valid non-certificate ground, but the trial court improperly denied appellant's request for a CPC? If there are valid grounds for issuing the CPC, appellate counsel may file a petition for writ of mandate asking the Court of Appeal to order the trial court to grant the CPC. (*People v. Hoffard, supra*, 10 Cal.4th 1170 ; *In re Brown* (1973) 9 Cal.3d 679 , 683.) Such a petition is based on an assertion the trial court abused its discretion by denying the CPC. (Pen. Code, §1237.5 [trial court required to certify any arguably meritorious appeal]; *People v. Holland, supra*, 23 Cal.3d at p. 84 [abuse of discretion standard applied].) NOTE: *In the Third and Fifth Districts appointed counsel must seek to expand his or her appointment before filing a petition for writ of mandate.*
- **Review in the California Supreme Court:** When the Court of Appeal denies the relief requested in a petition for writ of mandate the appropriate course is to file a *petition for review* in the Supreme Court. (*Hagan v. Superior Court* (1962) 57 Cal.2d 767, 769-770.) The deadline for filing is very short – within 10 days of denial of the writ of mandate. Under the finality rule set forth in rule 8.500(e), a decision of the Court of Appeal denying a writ within its original jurisdiction without issuance of an alternative writ or OSC becomes final as to the Court of

Appeal immediately. Pursuant to rule 8.500(e), a petition for review must be filed within 10 days after the Court of Appeal decision becomes final as to that court.

**V. May the Court of Appeal Grant Relief From the Failure to Timely File a Statement of Reasons in Support of a CPC request?**

- **The *Benoit* Doctrine:** When applicable, the doctrine of constructive filing allows an untimely filed notice of appeal to be deemed timely if the defendant has relied upon the promise of trial counsel to file the notice on defendant's behalf. (*In re Benoit* (1973) 10 Cal.3d 72, 86-87.) The doctrine protects defendants who have been "lulled into a false sense of security" by trial counsel's promise. (*Id.* at p. 87.) In addition, appointed counsel in the trial court has a statutory duty to "execute and file" a timely notice of appeal where "arguably meritorious grounds exist for reversal or modification of the judgment." (Pen. Code, §1240.1, subd. (b).) But what about guilty plea appeals where a CPC is required to raise an appellate issue? Is the *Benoit* doctrine available to obtain a late CPC in such cases? As will be discussed, this issue has not been expressly decided by the California Supreme Court.
- **Can the Court of Appeal Grant Relief from Default Where the Defendant Fails to Timely File a Request for CPC?** In *People v. Mendez, supra*, 19 Cal.4th 1084, the Supreme Court found that a defendant must comply with section 1237.5 and rule 31(d) (now rule 8.308(a)), including meeting the filing deadlines, or the appeal is not operable. (*People v. Mendez, supra*, 19 Cal.4th at p. 1104.) The court in *Mendez* found the statutory period for filing a notice of appeal to be jurisdictional. The court did not decide whether a Court of Appeal has the power to grant relief from default upon a showing of good cause.
- ***In re Chavez* Decided the Question Left Unanswered in *Mendez*.** The Supreme Court adversely determined the relief from default question left opening in *Mendez* in the case of *In re Chavez, supra*, 30 Cal.4th 643. Mr. Chavez failed to file a notice of appeal and statement of reasonable grounds in support of a request for CPC within the 60-day limit. A petition for writ of habeas corpus was filed by appellate counsel, asking for constructive filing of the appeal. The Court of Appeal granted relief, but not on the theory of constructive filing. Instead it granted relief from default under then rule 45(e) (now rule 8.60(d)) for good cause, and noted that "the Supreme Court [in *Mendez*] never considered the issue of relief from default under rule 45(e)." Rule 8.60(d) allows the Court of Appeal to grant relief from default for failure to timely comply with the rules, although it expressly excludes such relief when the failure is to timely file a notice of appeal.

The *Chavez* court held the Court of Appeal does *not* have authority under then rule 45(e) (now rule 8.60(d)) to grant relief from default in such a case for good cause, because the 60-day rule applies to the statement of reasonable grounds in support of a CPC and this requirement is **jurisdictional**. The *Chavez* court did not decide whether a *Benoit* (constructive filing) request could be applied to allow the filing of a late CPC request.

- **What About A Habeas Petition to File a Late CPC Request?** In *Chavez* the court referred to *In re Brown* (1973) 9 Cal.3d 679, 682-683, finding that the need for a CPC cannot be circumvented by a habeas petition where the defendant seeks to raise a certificate issue on appeal. In *Brown* the court stated that a habeas petition will not lie where the remedy of appeal exists. (*In re Brown, supra*, 9 Cal.3d at pp. 682-683.) The *Chavez* court therefore left open the question whether a writ petition based on ineffective assistance of counsel could be filed where trial defense counsel failed to file a timely statement of reasons in support of a CPC. Given a defendant's right to effective assistance of counsel it seems arguable that the constructive filing doctrine should be applied where trial counsel failed to timely file reasons in support of a CPC. (See *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477 [regarding trial counsel's duty to advise a defendant about appealing and to perfect an appeal at defendant's request].)

## VI. How Can You Tell When a CPC is Necessary?

- **What is being challenged governs the inquiry:** In determining whether the defendant must seek and obtain a probable cause certificate, "... the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." (*People v. Ribero, supra*, 4 Cal.3d at p. 63.) The formal CPC requirements of Penal Code section 1237.5 do not apply where the defendant is not challenging the validity of his plea but is alleging error in the sentencing proceedings following entry of the plea (unless there is a stipulated sentence - *People v. Panizzon, supra*, 13 Cal.4th at p. 79).
- **Pleas Involving A Sentencing Lid:** On July 10, 2008, the California Supreme Court decided *People v. Cuevas* (2008) 44 Cal.4th 374. In tandem with *People v. Shelton* (2006) 37 Cal.4th 759 and *People v. Panizzon* (1996) 13 Cal.4th 68, it is now clear that a certificate of probable cause is required in order to challenge on appeal the legality of the sentence imposed in a plea bargained case if either (a) there is an agreement that a specific sentence will be imposed (*Panizzon*), or (b) there is an agreement that the sentence will not exceed a certain term (i.e., a "lid" that sets a range of sentences that can be imposed) (*Shelton*), or (c) some counts or enhancements have been dismissed or reduced so that the remaining maximum

exposure is less than what could have been imposed had the defendant been convicted as charged and sentenced to the maximum, even if the plea bargain does not limit the sentence to anything less than the potential maximum allowed for the charges of which the defendant has been convicted (*Cuevas*). The need for a certificate of probable cause is obviated only if the plea bargain specifically preserves the defendant's right to claim that the sentence is illegal or unauthorized.

- **A Penal Code sec. 654 Issue May Require a CPC in a Guilty Plea Appeal:** As mentioned above with respect to “lid” pleas, a Penal Code section 654 issue may require a CPC where the defendant is in substance challenging the trial court’s authority to impose the second term. Generally we have come to understand that a section 654 error results in an unauthorized sentence which can be corrected at any time. However, in the context of a guilty plea appeal a challenge to the trial court’s *authority* to impose the lid, such as alleging the court has no jurisdiction to impose a sentence because Penal Code section 654 prohibits double punishment, is considered an attack on the plea. Thus a CPC is required to raise the issue. (*People v. Shelton* (2006) 37 Cal.4th 759, 766.) In *Shelton* the court held that an appellate challenge to the trial court’s *authority* to impose the maximum term provided for in the plea required a CPC because it is in substance an attack on the plea. (*Id.* at pp. 766-767.)
- **Unauthorized Sentences:** Challenging an unauthorized sentence is generally allowed at any time. However, this could be different where the appellant accepted the unauthorized sentence as part of his plea. In *People v. Hester* (2000) 22 Cal.4th 290, 295, the court found a defendant forfeits the right to challenge an unauthorized sentence by agreeing to the term as part of his plea. In such instances the trial court may have acted in *excess of its jurisdiction* but did not lack *fundamental jurisdiction*. The rationale behind this policy is that the appellant received the benefit of his bargain and should not be allowed to try and better his situation through the review process. (*Id.* at p. 295.)
- **Illegal Sentences:** No CPC is needed where the issue is that the trial court exceeded its jurisdiction by sentencing contrary to statute. (*People v. Saunders* (1991) 232 Cal.App.3d 1592, 1594-1595 [the court erred in ordering registration under Pen. Code, § 290, although language of statute did not encompass the elements of offense of which he was convicted].) Unless the defendant agreed to accept the illegal sentence as part of a plea bargain.
- **A Cruel and Unusual Punishment Issue** was held to require a CPC in *People v. Panizzon, supra*, 13 Cal.4th 68, where it was made against a stipulated prison term. *Panizzon* is generally cited for the proposition that an attack on a stipulated

sentence is considered a challenge to the plea and therefore requires a CPC. (*Id.* at p. 78; see also *People v. Young* (2000) 77 Cal.App.4th 827, 829 [where plea provided for lid of 25 years to life with an opportunity to seek dismissal of priors, an appellate challenge to the 25 year to life sentence on the basis of cruel and unusual punishment was a challenge to the plea and required a CPC].)

- **Challenging the Denial of a Motion to Withdraw the Plea Requires a CPC:** Where a motion to withdraw the plea is filed and denied, a certificate of probable cause is required to argue on appeal that the motion was *wrongly denied*. (*People v. Ribero* (1971) 4 Cal.3d 55.) Nor does an allegation of ineffective assistance of counsel in presenting the motion avoid CPC requirements. (*People v. Johnson* (2009) 47 Cal.4th 668, 683.) If the trial court wrongfully refuses to issue a certificate, the defendant may seek a writ of mandate from the appellate court. (*In re Brown* (1973) 9 Cal.3d 679, 683.)
- **When the Defendant Seeks Specific Performance of the Plea, is a CPC Required?** Generally issues arising out of an allegation that either the court or the prosecution has failed to comply with the terms of the plea is not waived by a guilty plea and do not require a CPC. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1220.) Specific performance is disfavored, but may be appropriate when it will implement the reasonable expectations of the parties without binding the court to an unreasonable disposition. (*People v. Mancheno* (1982) 32 Cal.3d 855, 861; *People v. Brown, supra*, 147 Cal.App.4th at pp. 1220-1225 [where defendant complains on appeal that the trial court failed to give effect to her plea no CPC was required to raise the issue on appeal. The challenged victim restitution caused an increase in the punishment contemplated by the plea in violation of section 1192.5. Because the Cal. Const., art I, § 28, subd. (b) requires full victim restitution, defendant must be allowed to withdraw her plea].)
- **Allegations of Ineffective Assistance of Counsel Generally Require a CPC:** Where a defendant on appeal contends his guilty plea must be set aside or withdrawn because of ineffective assistance of counsel, the defendant must first obtain a certificate of probable cause in order to make his appeal on those issues operative. (*People v. Stubbs* (1998) 61 Cal.App.4th 243, 245.) Where there is no foundation in the record to support the argument on appeal, and there are legitimate grounds to assert the issue, the remedy is to file a petition for writ of habeas corpus alleging ineffective assistance of counsel.

*NOTE: Remember that in the Third and Fifth Districts, appointed counsel on appeal must seek to expand his/her appointment in order to file a petition for writ of habeas corpus. Such a course should be discussed with the assigned CCAP buddy before being undertaken.*

- **Denial of a *Romero* Motion Generally Does Not Require a CPC:** In *People v. Lloyd, supra*, 17 Cal.4th 658 the defendant pled nolo contendere to a charge of second degree robbery (Pen. Code, §§211/212.5) with a weapons use enhancement (Pen. Code, §12022, subd.(b)) and allegations of several strike priors (Pen. Code, §667, subds. (b) - (i)). Defendant pled to the sheet with no sentencing promises. (*Id.* at p. 661.) The trial court stated it had no discretion to strike any of the strike priors and imposed a life sentence under the three strikes law. Defendant appealed, arguing the court did have discretion to strike a strike. While the appeal was pending, the *Romero* case was decided. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) However on respondent's motion the Court of Appeal in *Lloyd* dismissed the appeal for lack of a CPC. The Supreme Court reversed, finding no CPC was required to challenge the denial of the *Romero* motion because the court's exercise of authority did not affect the validity of the plea. (*People v. Lloyd, supra*, at 17 Cal.4th p. 665.)
- **Raising the Issue of Defendant's Incompetence at the Time of the Plea** Requires a CPC. (See e.g., *People v. Laudermilk* (1967) 67 Cal.2d 272, 281, fn. 8 [but holding CPC requirement not retroactive to defendant].)

## VII. What Types of Issues Do Not Require A CPC?

- **Challenging the Trial Court's Exercise of Sentencing Discretion.** When a plea provides for a maximum sentence and the appellant does not forfeit challenges to the term actually imposed, a CPC is not required to raise an issue regarding the sentencing because this is not a challenge to the validity of the plea. (*People v. Buttram, supra*, 30 Cal.4th 773; rule 8.304(b); Pen. Code, §1237.5.)
- **Raising the Denial of a Fourth Amendment Motion to Suppress Evidence.** The denial of a Penal Code section 1538.5 motion (where appellant did not waive his right to seek review of the trial court's holding as part of his plea) may be raised without a CPC. (Pen. Code, §§1538.5, subd. (m), 1237.5; rule 8.304(b).)
- **Issues Regarding Matters Occurring After the Plea.** The sentence or matters occurring after the plea may be raised where there is no stipulated sentence and the issue is otherwise preserved for appeal. (Pen. Code, §1237.5; rule 8.3094(b); *People v. Scott* (1994) 9 Cal.4th 331, 353.)

## VIII. What Can a CPC Not Do?

- **A CPC Will Not Make an Arguable Issue Out of a Non-appealable Matter.** A CPC cannot render an otherwise nonappealable issue cognizable on appeal. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896 [*Miranda* issue].) In other words, if the trial court mistakenly issues a CPC, but the issue appellant seeks to raise was waived by the plea, the granting of the CPC does not expand the grounds on which the appeal may be taken. The CPC requirement relates only to the procedure in perfecting an appeal after a guilty plea.
- **There Must be Foundation in the Record for the Issue.** A CPC will not support a challenge to the plea where there is no factual foundation for the issue in the record. For instance, where the defendant in his declaration in support of a CPC cites illegality of the plea, this illegality must appear on the face of the record. A foundation to challenge the plea may be established during a motion to withdraw the plea under Penal Code section 1018. A CPC is not a substitute for a petition for writ of habeas corpus or *coram nobis*, where such is needed because the appellate record lacks foundation for the argument.
- **The Issue Must be Preserved for Appeal.** A CPC does not open all issues to review, especially where the issues were not preserved for appeal. For instance, trial counsel must have preserved certain issues below to enable appellant to raise the matter on appeal, such as make objections to discretionary sentencing choices. (See e.g., *People v. Scott, supra*, 9 Cal.4th at p. 353 [trial counsel must object to trial court's statement of reasons in support of discretionary sentencing choice to raise issue on appeal]; *People v. Welch* (1993) 5 Cal.4th 228, 234-238 [objection required to court's exercise of discretion in imposing probation conditions to raise an abuse of discretion argument on appeal].)

**IX. Where the Defendant Admits Priors or a Substantive Count in the Context of a Jury Trial, is a CPC Required to Raise an Appellate Issue as to the Admitted Prior or Count?**

- What if defendant's case is tried by jury but at some point in the proceedings the defendant admits a prior, an enhancement or one of the substantive counts? Is a CPC required to raise an issue on appeal regarding the matter admitted? In *People v. Perry* (1984) 162 Cal.App.3d 1147, 1151 and *People v. Williams* (1980) 103 Cal.App.3d 507, 512, the reviewing courts held that section 1237.5 encompasses admissions of enhancements, and a CPC is required to challenge an admission to these enhancements. But both of those cases involved pleas to the *substantive offenses*. Whether a defendant is required to obtain a certificate of probable cause to raise on appeal a claim that his admissions regarding *prior* conviction allegations were not knowingly and intelligently made, even though he

was convicted by jury of the underlying offense is an issue presently pending before the California Supreme Court as of this update. (*People v. Maultsby*, unpublished opn., rev. granted 6/30/10, (S182042/C060532); see also *People v. Fulton* (2009) 179 Cal.App.4th 1230.)

#### **X. Is a CPC Required in Juvenile Delinquency Cases?**

- No. A minor who admits allegations of a juvenile court petition need not secure a certificate of probable cause to obtain appellate review. (*In re Joseph B.* (1983) 34 Cal.3d 952, 955; Welf. & Inst. Code, §§ 700, 702.5; Cal. Rules of Court, rule 8.400.)

#### **XI. Appellate Counsel's Duty to Warn of Potential Adverse Consequences Resulting From the Successful Challenge to a Plea**

- A successful challenge to a plea not only removes the “bad” parts of the plea, but the entire plea, including any benefits appellant received as part of the agreement. All charges, enhancements and prior allegations against appellant may be reinstated and appellant may end up with a far greater sentence than initially received. (See *People v. Collins* (1978) 21 Cal.3d 208, 214-215.) Appellants may not understand that their circumstances could get worse after overturning a plea. This is especially true where a prior strike was dismissed, causing the defendant to receive a two-strike rather than a three-strike sentence. It is appellate counsel's duty to ascertain these downside risks and to warn appellant prior to mounting a challenge to the plea.
- If there are potential adverse consequences to challenging a plea and the defendant nonetheless wants to do so, it is advisable to obtain a written waiver from the client acknowledging their understanding of the risks and waiver of same.