

**BOYKIN/TAHL CONSIDERATIONS WITH THE GUILTY PLEA CASE
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Although advisement of constitutional rights has long been an accepted practice in the guilty plea colloquy, trial courts, either through inadvertence or ignorance, still make occasional errors in this body of law. Therefore, when reviewing the transcripts of the taking of the plea in the guilty plea case, it is important to check to see that the record reflects a sufficient advisement.

A. Guilty plea must be intelligent and voluntary

When a criminal conviction results from a guilty plea, for the plea to be constitutionally valid, the record must demonstrate a defendant's intelligent and voluntary waiver of the three important federal constitutional rights of a jury trial, confrontation and freedom from compulsory self-incrimination. A defendant seeking to plead guilty is denied due process under the federal Constitution unless the plea is voluntary and knowing. (*Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274, 89 S.Ct. 1709].)

Advisement and waiver of these constitutional rights applies to the taking of an admission of a prior conviction for enhancement purposes, as well as the guilty or no contest plea to the substantive offense. (*In re Yurko* (1974) 10 Cal.3d 857.) But *Boykin/Tahl* requirements do not apply to probation revocation hearings. (*People v. Dale* (1973) 36 Cal.App.3d 191, 194-195; *People v. Garcia* (1977) 67 Cal.App.3d 134, 137.)

1. **Waiver must be established.** A waiver of the constitutional rights [i.e., jury trial, confrontation, remain silent] cannot be presumed from a silent record but must be actually established. (*Boykin v. Alabama, supra*, 395 U.S. 238 [23 L.Ed.2d 274, 89 S.Ct. 1709].)

2. **No set script required.** Although the judge accepting the plea is not required to follow a set script, there must be a reliable showing that the defendant was advised of the rights and waived them. (*In re Tahl* (1969) 1 Cal.3d 122, 130.)

3. **Judge may rely on a validly executed plea waiver form.** Rather than conducting an explicit in-court explanation of the constitutional rights, the judge can rely on a plea waiver form setting forth the rights. However, he must ascertain that the defendant has read and understands form and has discussed it with his attorney, and if this cannot be established, the judge must conduct further inquiry to verify that the *Boykin/Tahl* requirements have been met. (*In re Ibarra* (1983) 34 Cal.3d 277; *People v. Panizzon* (1996) 13 Cal. 4th 68, 83.)

B. Test to determine validity of guilty pleas

The relevant inquiry as to whether *Boykin/Tahl* requirements have been met is, whether “the record affirmatively shows that [the admission/guilty plea] is voluntary and intelligent under the totality of the circumstances.” (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) In *Howard*, the Court stated that the absence of an express waiver of the privilege against self-incrimination did not automatically result in a finding that the plea was not voluntary and intelligent. Because the court specifically informed defendant, who was represented by counsel, that he had a right to force the district attorney to prove the prior conviction in a trial and that, in such a trial, he would have the rights to a jury and to confront adverse witnesses, the record established that defendant knew he had a right not to admit the prior conviction and, thus, not to incriminate himself. (See also *People v. Mosby* (2004) 33 Cal.4th 353 [Having just undergone a jury trial at which he did not testify, defendant had exercised his right to remain silent, and through counsel confronted witnesses. In addition, the prior conviction was based on a plea of guilty, at which time he would have received the proper advisements. Thus, he was found to be aware of his rights.].)

C. Raising the error

1. **Certificate Probable Cause – required to raise issue.** Because a claim that appellant’s plea is not knowing and voluntary is an attack on the plea itself, appellant must obtain a certificate of probable cause before raising the issue on direct appeal. (Pen.

Code, sec. 1237.5.)

D. Remedy

If it is established that appellant's plea is not "intelligent and voluntary," appellant may withdraw his plea. However, it is important to advise him that this will not result in a dismissal of his case. Instead, he will merely be returned to his original position with his right to jury trial restored. If appellant has received a favorable result with a plea bargain, it may not be in his ultimate interest to pursue a *Boykin/Tahl* argument.