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### Your Responsibility When Using the Information Provided Below:

When we wrote this Informational Material we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. The laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in your institution law library.

## **Challenging a Conviction or Sentence After a Plea Bargain**

**Updated October 2013**

We received your letter asking us to help you challenge a criminal conviction or sentence resulting from a guilty or no contest plea. Unfortunately, we are not able to provide individual assistance or advice in criminal cases. This letter explains the general rules on when and how a defendant can challenge a conviction or sentence based on a guilty or no contest plea. We hope this information is helpful to you.

### **I. General Rules and Consequences of Challenging a Plea Bargain**

Criminal defendants can enter into plea bargains by which they give up the right to go to trial, and agree to be convicted. Sometimes a plea includes agreement that certain charges will be dropped or that the court will impose a particular sentence or a sentence within a specified range. Occasionally, defendants enter “open pleas” to all the charges against them, with no sentencing promises.

By agreeing to plead guilty or no contest, a defendant often can avoid the risk of being convicted of more serious crimes or receiving a longer sentence. Nonetheless, many defendants later regret entering a guilty plea and want to challenge their convictions and/or sentences. However, mere “buyer’s remorse” is not good grounds for undoing a plea bargain.

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There are special rules for challenging a conviction or sentence after a guilty or no contest plea. These rules limit the types of issues that defendants can raise and require special procedures for raising some issues. Generally, issues fall into four categories:

- issues that cannot be raised at all
- issues that can be raised on direct appeal without a certificate of probable cause
- issues that can be raised on direct appeal only with a certificate of probable cause
- issues that can be raised only in a state court petition for writ of habeas corpus.

Which category an issue falls into depends on the legal argument being made and on whether the facts supporting the argument are already in the court records. The following sections summarize the types of issues that fall into each category. Those sections also provide an overview of the procedures for each type of case.

But beware! Before you try to challenge your plea bargain, you should think very carefully about the possible benefits and risks of doing so. If you are claiming that your plea bargain was unlawful, and a court agrees with you, the remedy likely will be to allow you to undo or withdraw your plea.<sup>1</sup> Then your case will go back to the local superior court, where you will be in the same position that you were in before the plea was entered.<sup>2</sup> This means that you will probably be facing the same charges that were originally filed against you, including any charges that were dismissed in the plea bargain. The prosecutor might even file additional charges. When your case goes back to the superior court, the prosecutor does not have to offer you a better plea bargain or even the same plea bargain that you took before.<sup>3</sup> You could be facing a less favorable plea offer or a trial on the same evidence as when you decided to plead guilty. If you are convicted again, the judge does not have to give you a lesser sentence or the same sentence you received the first time; depending on the circumstances, you might receive a much longer sentence the second time around.<sup>4</sup> Thus, before trying to withdraw your plea, you should weigh your chances of ending up with a better outcome against the risk of a more serious conviction and a longer sentence.

If you are not claiming that your plea was invalid, your legal challenge most likely won't carry the same risks. For example, you might argue that the trial court mistakenly sentenced you

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<sup>1</sup> People v. Kaanehe (1977) 19 Cal.3d 1, 13-14. In very few cases where the parties cannot reasonably be returned to the status quo, a court might order "specific performance," meaning that the court would enforce the terms of the plea bargain as reasonably understood by the defendant at the time the bargain was entered. See Buckley v. Terhune (9th Cir. 2006) 441 F.3d 688, 699 (prisoner had already served most or all of term he thought he had bargained for); Brown v. Poole (9th Cir. 2003) 337 F.3d 1155, 1161 (similar).

<sup>2</sup> People v. Aragon (1992) 11 Cal.App.4th 749, 756-757.

<sup>3</sup> People v. Schuler (1977) 76 Cal.App.3d 324, 336.

<sup>4</sup> People v. Aragon (1992) 11 Cal.App.4th 749, 759-760.

on a charge that was not part of your plea or imposed a sentence that was longer than you agreed to, or improperly imposed fines or other requirements that were not part of the plea agreement and not necessarily required by law. In such cases, the court of appeal could order the superior court to re-sentence you in accord with the plea agreement. Also, if the plea gave the superior court sentencing leeway, but the court made a calculation mistake or did not apply the sentencing factors properly, the court of appeal could modify the sentence or remand the case for re-sentencing.<sup>5</sup>

## II. Issues that Cannot Be Raised Following a Plea

Issues about whether you are guilty or innocent are “waived” by a guilty or no contest plea – this means that you cannot raise these arguments at all.<sup>6</sup>

Such issues usually concern whether the evidence the prosecution collected was reliable, admissible at trial, or enough to prove you were guilty of the charges. For example, after taking a plea bargain, you cannot argue that the evidence was insufficient to support the charges, that a police lineup was unfair, that police illegally coerced you to confess, that witnesses were not credible, or that the court was wrong in ruling that certain evidence would be admissible at trial (note: there is an exception for evidence obtained in an illegal search, discussed in section III, below).<sup>7</sup>

Other issues that cannot be raised following a guilty plea are claims about procedural matters that might have affected the fairness of the trial. These include denial of a defense motion to sever the trial of multiple charges or multiple defendants or denial of a motion for a continuance.<sup>8</sup>

If your plea includes agreement to a specified sentence or a specified maximum term, you waive your right to challenge that sentence the ground that it violates Penal Code section 654's prohibition on double punishment for the same act or course or conduct.<sup>9</sup>

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<sup>5</sup> See People v. Kaanehe (1977) 19 Cal.3d 1, 13-14.

<sup>6</sup> People v. Hoffard (1995) 10 Cal.4th 1170, 1177-1178.

<sup>7</sup> People v. Hunter (2002) 100 Cal.App.4th 37, 42; People v. Batista (1988) 201 Cal.App.3d 1288, 1291-1292 (insufficient evidence); People v. Devaughn (1977) 18 Cal.3d 889, 896 (illegal confession). .

<sup>8</sup> People v. Sanchez (1982) 131 Cal.App.3d 323, 335; People v. Kaanehe (1977) 19 Cal.3d 1, 8-9.

<sup>9</sup> Cal. Rules of Ct, rule 4.412(b); People v. Hester (2000) 22 Cal.4th 290, 295; People v. Jones (2013) 217 Cal.App.4th 735, 743.

### III. Issues that Can Be Raised on Direct Appeal Without a Certificate of Probable Cause

You can raise some types of issues after a guilty plea in a direct appeal without having to go through any special procedural hurdles. To figure out whether your issues fall into this category, you must consider the nature of the facts and law that are involved.

First, you can raise an issue on appeal only if all of the facts supporting the argument are already part of the court record. This means that the matter must have been discussed at a hearing that was documented by the court reporter or must have been discussed in written documents that were filed in the court. If all the facts you need to bring your issue are not on the record, you will have to raise your issue in a state court petition for writ of habeas corpus, as discussed in section V, below.

Second, the legal issue you are raising must be one of two types:

- a challenge to an illegal search or seizure about which your defense lawyer filed an unsuccessful motion to suppress,<sup>10</sup> or
- a challenge to an action by the court or prosecutor that was made after you entered the plea and that does not affect the plea itself. These issues usually involve sentencing. Note that if your defense attorney did not object when the sentence was imposed, you may have to include an argument that defense counsel provided ineffective assistance by failing to object.

Several types of issues are in this category. One type of issue arises if the court or prosecutor violated the plea bargain by failing to comply with some specific part of the agreement.<sup>11</sup> Another type of issue arises if the court imposed punishment that was significantly greater or different than what you were notified about in the plea negotiations and agreement. This might mean giving you fewer good

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<sup>10</sup> Pen. Code § 1538.5, subd. (m); People v. Kaanehe (1977) 19 Cal.3d 1, 7-8.

<sup>11</sup> Santobello v. New York (1971) U.S. 257, 261-262 (constitutional due process right to enforce terms of plea agreement); People v. Johnson (2009) 47 Cal.4th 668, 678-679, fn. 5; People v. Kaanehe (1977) 19 Cal.3d 1, 11-12 (prosecutor broke promise not to argue for a prison term); People v. Newton (1974) 42 Cal.App.3d 292, 297-299 (prosecutor broke promise to recommend CRC); see also People v. Mancheno (1982) 32 Cal.3d 855, 861-862 (judge broke promise to order diagnostic study prior to deciding whether to impose prison term); People v. Williams (2002) 83 Cal.App.4th 936, 943-944 (court violated defendant's reasonable expectation about how many credits he would receive); People v. Olea (1997) 59 Cal.App.4th 1289 (court violated defendant's reasonable expectation that no sex offender registration requirement would be imposed). Note: a defendant forfeits the right to challenge the sentence as exceeding the terms of the plea bargain if (a) the court advised the defendant per Pen. Code § 1192.5 of the right to withdraw the plea if the court withdraws approval of the terms before sentencing and (2) the defendant did not object when the sentence was entered. People v. Villalobos (2012) 54 Cal.4th 177, 182.

conduct credits or ordering higher restitution fines than you expected.<sup>12</sup> A third type of issue occurs when you entered a plea that gave the court a range of sentencing options and the court then abused its discretion in choosing a particular sentence. For example, you might challenge denial of a “Romero” motion to strike a prior offense, a motion to reduce a felony to a misdemeanor following probation, or a request for less than the maximum sentence or for drug diversion.<sup>13</sup> You might also argue that probation conditions selected by the court were not lawful. Another type of error can occur when the court clerk makes a mistake in recording the sentence imposed by the court.<sup>14</sup> You may also be able to challenge a math error in the calculation of sentence credits.<sup>15</sup>

To bring a direct appeal, you must file a Notice of Appeal that says that the appeal is based on the denial of a motion to suppress evidence or on a ground arising after the plea that does not affect the plea’s validity.<sup>16</sup> The notice of appeal must be filed within 60 days of the judgment.<sup>17</sup> It is difficult to get permission from the court to file a late notice of appeal, but it may be possible if the prisoner’s attorney failed to follow through on a promise to file the notice or the prisoner tried diligently to file the notice in a timely manner.<sup>18</sup> A free manual on filing a

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<sup>12</sup> Where the plea negotiations do not address statutorily mandated requirements like restitution fines or parole terms, imposition of those penalties at sentencing may violate your right to be advised of the direct consequences of your plea, but does not actually violate the terms of the plea bargain. People v. Villalobos (2012) 54 Cal.4th 177,185-186 (restitution fine of more than minimum amount); People v. Crandell (2007) 40 Cal.4th 1301, 1308 (restitution fine); In re Moser (1993) 6 Cal.4th 342, 357 (length of parole term); People v. McClellan (1993) 6 Cal.4th 367, 379-380 (sex offender requirement).

Later changes in the law that affect the impact of a plea do not violate the plea agreement. Doe v. Harris (2013) 57 Cal.4th 64 (sex offender registration changes affecting privacy); People v. Gipson (2004) 117 Cal.App.4th 1065, 1068-1070 (new recidivist laws such that the plea conviction has more onerous effect when defendant later convicted of new crimes).

<sup>13</sup> People v. Buttram (2003) 30 Cal.4th 773, 777 (imposition of maximum term and denial of diversion); People v. Lloyd (1998) 17 Cal.4th 658 (denial of motion to strike priors); People v. Myers (2009) 170 Cal.App.4th 512, 515-516 (denial of motion to reduce felony to misdemeanor).

<sup>14</sup> People v. Mitchell (2001) 26 Cal.4th 181.

<sup>15</sup> People v. Huff (1990) 223 Cal.App.3d 1100, 1106. Note that credit calculation issues usually must be first raised in a letter and/or motion in the sentencing court. Pen. Code § 1237.1; People v. Clavel (2002) 103 Cal.App.4th 516.

<sup>16</sup> Cal. Rules of Ct, rule 8.304(b)(4).

<sup>17</sup> Cal. Rules of Ct, rule 8.308(a). If you are in prison or jail, and the envelope shows that the notice was mailed or delivered to prison or jail officials for mailing within the 60 day time period, then the notice is considered to be timely. Cal. Rules of Ct, rule 8.25(b)(5); In re Jordan (1992) 4 Cal.4th 116.

<sup>18</sup> People v. Chavez (2003) 30 Cal.4th 643, 657; In re Benoit (1973) 10 Cal.3d 72; People v. Lyons (2009) 178 Cal.App.4th 1355.

notice of appeal is available by writing to the Prison Law Office or at [www.prisonlaw.com](http://www.prisonlaw.com) on the Resources page. After you file a timely notice of appeal, the court of appeal will appoint an attorney to represent you at state expense if you do not have money to pay for an lawyer.

#### IV. Issues Which Can Be Raised on Direct Appeal Only With a Certificate of Probable Cause

There are many issues that can be raised in a direct appeal following a guilty or no contest plea only if the superior court agrees to issue a Certificate of Probable Cause. The first part of this section describes the types of factual and legal issues that fall into this category. The second part of this section describes the procedures for getting a Certificate of Probable Cause.

You can only use a direct appeal to raise issues if all of the facts necessary to the issue are already part of the record in the case. This means that the matter was discussed at a hearing in the superior court or in written documents that were filed in the superior court. For example, your or your attorney might have raised the issue by making an objection during the sentencing hearing or by making a motion to withdraw the plea. If all the facts you need to bring your issue are not already in the court record, then you will have to raise your issue in a state court petition for writ of habeas corpus, as discussed in section V, below.

If you get a certificate of probable cause, you can argue that your plea agreement was not lawfully made and that you should be allowed to withdraw your plea.<sup>19</sup> There are many issues that fall into this category. Some of the most common arguments are as follows:

- your plea was not knowingly and voluntarily made because when you entered your plea, you did not understand what your constitutional trial rights were and that you were giving up those rights. You do not need to show that you would not have taken the plea if you had understood what rights you were waiving.<sup>20</sup>

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<sup>19</sup> People v. Mendez (1999) 19 Cal.4th 1084, 1088.

<sup>20</sup> These rights are the right to a jury trial, the right to confront and cross-examine the state's witnesses, the right to present evidence, and the privilege against self-incrimination. See In re Tahl (1969) 1 Cal.3d 122, 132; Boykin v. Alabama (1969) 395 U.S. 238, 242-243; In re Yurko (1974) 10 Cal.3d 857. Most judges explain these rights to defendants in court, but some use a written form. Use of a written form is legal as long as you understood what you were signing. People v. Castrillon (1991) 227 Cal.App.3d 718, 722.

Even if you were not advised of your constitutional rights before you entered your plea, a court may still find that you understood the rights you were giving up. People v. Allen (1999) 21 Cal.4th 424, 439, fn. 4; People v. Howard (1992) 1 Cal.4th 1132, 1175. The court can look at whether you had prior experience in the criminal justice system, whether you had ever previously entered guilty pleas, and how long it had been since those pleas. People v. Christian (2005) 125 Cal.App.4th 688, 697-699.

- your plea was not knowingly and voluntarily made because you did not understand the “direct consequences” of your plea. When you enter a guilty or no contest plea, the court must advise you of the direct consequences.<sup>21</sup> One direct consequence is the maximum length of the prison or jail term. Other direct consequences of a pleas are probation ineligibility, direct restitution, restitution fines and other fees, parole term, and any sex offender registration requirement.<sup>22</sup> To be allowed to withdraw your plea, you must show that the lack of advisement was prejudicial because if is “reasonably probable” that you would not have entered a plea if you knew about the consequences.<sup>23</sup> A claim that the court failed to advise you of a consequence may have been waived if you or your attorney did not object at sentencing.<sup>24</sup>
- your plea was not knowingly and voluntarily made because the court did not advise you of immigration/deportation consequences of your plea if you are not a citizen of the United States. You must show that the error was prejudicial, meaning that it is “reasonably probable” that if you had been fully advised, you would not have entered that plea (and would have either gone to trial or tried to negotiate a plea with less severe immigration consequences).<sup>25</sup>
- your plea was not voluntary because you entered your plea based on false or misleading information or unfair pressure, and not of your own free will. In order to show that you plea is invalid because you did not enter it voluntarily, you must prove by clear and convincing evidence that some mistake, inadvertence,

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<sup>21</sup> Bunnell v. Superior Court (1975) 13 Cal.3d 592, 605. There are some consequences of pleas that courts have decided are “indirect” or “collateral” A court’s failure to advise a defendant of an indirect consequence will not make the plea invalid. People v. Gurule (2002) 28 Cal.4th 557, 633-634 (possible use of the conviction to increase the penalty for future crime); People v. Barella (1999) 20 Cal.4th 261, 263, 272 (limitation on prison credit earning eligibility; standards for and date of life parole eligibility).

<sup>22</sup> People v. Crandell (2007) 40 Cal.4th 1301, 1308 (restitution fine); In re Moser (1993) 6 Cal.4th 342, 357 (length of parole term); People v. McClellan (1993) 6 Cal.4th 367, 379-380 (sex offender requirement); People v. Moore (1998) 69 Cal.App.4th 626, 630 (ineligibility for probation); In re Moser (1993) 6 Cal.4th 342, 345 (parole term); People v. McClellan (1993) 6 Cal.4th 367, 370 (sex offender registration) and People v. Zaidi (2007) 147 Cal.App.4th 1470, 1481 (sex offender registration).

<sup>23</sup> In re Moser (1993) 6 Cal.4th 342, 352-353; People v. McClellan (1993) 6 Cal.4th 367, 378.

<sup>24</sup> People v. Villalobos (2012) 54 Cal.4th 177, 181-182.

<sup>25</sup> Penal Code § 1016.5; People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183, 210. It is not necessary to show that you would likely have obtained a more favorable outcome by not taking the plea. People v. Martinez (2013) 57 Cal.4th 555, 559.

ignorance or other factor seriously impaired your understanding or judgment.<sup>26</sup> Pleas have been found involuntary in the following circumstances: the defendant was induced to enter a guilty plea because the court or attorneys made a factual or legal misrepresentation as to the right to appeal; the defense attorney failed to advise the defendant of crucial favorable evidence that was produced, or all of the elements of the charge to which he is admitting; 3) the defendant lacked the mental capacity to make an informed and voluntary decision about whether to plead guilty; 4) the court promised the defendant a benefit it could not actually give.<sup>27</sup> A court will not set aside a plea merely because a defendant hoped he or she would get a lesser sentence than that which was imposed.<sup>28</sup> However, if a defendant's plea was truly involuntary, your conviction must be reversed without any requirement that you show that you would not have taken the plea if you had not been misinformed.<sup>29</sup>

- the court acted in excess of its jurisdiction by allowing admission to a legally impossible crime.<sup>30</sup>
- your attorney failed to provide effective assistance during the plea proceedings or a motion to withdraw the plea. You must show that you would not have pled guilty or no contest if you had received competent legal advice.<sup>31</sup>

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<sup>26</sup> People v. Superior Court (Giron) (1974) 11 Cal.3d 793, 797.

<sup>27</sup> People v. Coleman (1977) 72 Cal.App.3d 287, 292 (misinformation about right to appeal); People v. Bonwit (1985) 173 Cal.App.3d 828, 833 (judge promised to issue Certificate of Probable Cause on issue that was not appealable); People v. Harvey (1984) 151 Cal.App.3d 660 (attorney failed to advise about favorable evidence); Henderson v. Morgan (1976) 426 U.S. 637 (attorney failed to advise about nature of the charges); People v. Gallantier (1941) 47 Cal.App.2d 148, 150 (defendant mentally incompetent); People v. Collins (2000) 26 Cal.4th 297, 306 (judge misled defendant that he would receive "some benefit" for waiving his right to trial).

<sup>28</sup> People v. Superior Court (Smith) (1978) 82 Cal.App.3d 909, 915.

<sup>29</sup> People v. Collins (2000) 26 Cal.4th 297, 310.

<sup>30</sup> People v. Soriano (1992) 4 Cal.App.4th 781, 784 (court had no power to allow defendant to enter plea to attempting to file a forged "instrument," where the document was by law not an instrument); but see People v. Ellis (1987) 195 Cal.App.3d 334, 342-343 (although defendant incorrectly agreed as part of the plea that prior conviction was a serious felony, he was not allowed to undo the plea because of other benefits he obtained); People v. Miller (2012) 202 Cal.App.4th 1450, 1452, 1458 (although it was error to allow defendant to plead guilty and be sentenced for a felony when the charge was only a misdemeanor, defendant was not allowed to vacate plea or get modification because of other benefits he received).

<sup>31</sup> See Hill v. Lockhart (1985) 474 U.S. 52 (claim that lawyer misadvised on how long defendant would have to serve before eligible for parole); Padilla v. Kentucky (2010) 559 U.S. \_\_\_, 130 S.Ct. 1473 (claim that lawyer misadvised defendant on immigration consequences); People v. Nocelotl (2012) 211 Cal.App.4th 206 (claim that



- the court failed to ascertain a factual basis for the plea. Penal Code section 1192.5 requires that before the court accepts a guilty or no contest plea bargain, it must satisfy itself that there is a factual basis for the plea.<sup>32</sup> The court can have the defendant describe the conduct or question him about the facts. More commonly, the court asks defense counsel to stipulate that there is factual basis as set forth in the complaint, police report, preliminary hearing transcript, probation report or written plea agreement. A bare statement by the judge that a factual basis exists without any other evidence is not enough.<sup>33</sup>
- the court selected an unauthorized sentence or abused its discretion in selecting the sentence, if you agreed to a set term or certain range of possible terms, and the sentence was no more than what you agreed to.<sup>34</sup>

To raise one of these issues, you must file both a Notice of Appeal and an application for a Certificate of Probable Cause in the superior court within 60 days of the judgment.<sup>35</sup> A free

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counsel gave erroneous advice on what reports would be relevant to sentencing); People v. Johnson (2009) 47 Cal.4th 668, 679, 681 (claim of ineffective assistance in motion to withdraw plea).

A defendant may also be able to overturn a conviction where a plea bargain offer lapsed or was rejected due to ineffective assistance of counsel, with the result that the defendant later entered into a less favorable plea agreement or went to trial and was convicted. The defendant must show that (1) there is a reasonable probability that he would have accepted the plea offer if he had not received incompetent advice from his attorney; (2) the prosecutor would not have withdrawn the offer before the judgment become final, and (3) the trial court would have accepted the agreement. Missouri v. Frye (2012) \_\_\_ U.S. \_\_\_ [132 S.Ct.1399]; Lafler v. Cooper (2012) \_\_\_ U.S. \_\_\_ [1132 S.Ct. 1376].

<sup>32</sup> Pen. Code § 1192.5. The statutory requirement of a factual basis for the plea does not apply to “open pleas” where there is no benefit promised to the defendant. People v. Hoffard (1995) 10 Cal.4th 1170, 1181.

<sup>33</sup> People v. Holmes (2004) 32 Cal.4th 432, 436. A court may review only whether the procedure for taking the plea was correctly followed, since the question of whether there is actually sufficient evidence for the charge is forfeited by entry of a guilty plea. See discussion in People v. Voit (2011) 200 Cal.App.4th 1353, 1363-1372, but see language to the contrary in People v. Marlin (2004) 124 Cal.App.4th 559, 571.

<sup>34</sup> People v. Cuevas (2008) 44 Cal.4th 374, 376; People v. Panizzon (1996) 13 Cal.4th 68, 73; People v. Crandell (2007) 40 Cal.4th 1301, 1309. You do not need a certificate of probable cause if you entered an “open” plea without any promised benefit or if the plea bargain expressly states that the length of the sentence will be litigated in a separate proceeding. See People v. Buttram (2003) 30 Cal.4th 773, 786-787 (allowing challenge to denial of motion to strike prior conviction without a certificate of probable cause).

<sup>35</sup> Cal. Rules of Ct., rules 8.304(b)(1) and 8.308(a). It is difficult to get permission to file a late request for a certificate of probable cause, but it may be possible in some circumstances. People v. Chavez (2003) 30 Cal.4th 643, 657; In re Benoit (1973) 10 Cal.3d 72; People v. Lyons (2009) 178 Cal.App.4th 1355.

manual on filing a notice of appeal and certificate of probable cause is available by writing to the Prison Law Office or at [www.prisonlaw.com](http://www.prisonlaw.com) on the Resources page.

The standard for deciding whether to issue a Certificate of Probable Cause is quite favorable to defendants. If the application “presents any cognizable issue for appeal which is not clearly frivolous and vexatious,” then the superior court should grant the request.<sup>36</sup> If the superior court refuses to issue a certificate of probable cause (by either denying the request or failing to act on the request within 20 days), you can challenge that refusal by filing a petition for writ of mandate in the court of appeal.<sup>37</sup>

If the court allows your appeal to go forward, the court of appeal will appoint an attorney to represent you at state expense if you do not have money to pay for an lawyer.

## **V. Issues that Can Be Raised in a State Petition for Writ of Habeas Corpus.**

The legal issues that can be raised in a state court petition for writ of habeas corpus include all of the types of claims described in Sections II-IV, above. There are two circumstances in which you will have to file a state court petition for writ of habeas corpus rather than raise your issues in a direct appeal.<sup>38</sup>

First, you will be able to raise your issues only by a habeas petition if the time for filing your Notice of Appeal and/or the request for a Certificate of Probable Cause has passed and you are denied permission to file late. You will have to explain in your habeas petition why you did not raise the issue in an appeal.<sup>39</sup>

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<sup>36</sup> People v. Hoffard (1995) 10 Cal.4th 1170, 1178-1179. If the court issues a certificate of probable cause, you can raise any issue on appeal, not just the issue that was the basis for issuance of the certificate. People v. Hoffard (1995) 10 Cal.4th 1170, 1179-1180.

<sup>37</sup> People v. Holland (1978) 23 Cal.3d 77, 84. On request, the Prison Law Office can provide free information on petitions for writ of mandate.

<sup>38</sup> You can bring a petition for writ of habeas corpus only if you are in custody, meaning in prison or jail or on parole, probation or some other form of supervised release. Sometimes people who are out of custody can challenge or enforce a prior plea by filing a motion to vacate (sometimes called a petition for writ of error coram nobis). See Pen. Code § 1016.5 (authorizing motion to vacate a conviction for failure to advise of immigration consequences); Pen. Code § 1473.6 (relief where material prosecution evidence discovered to be false); People v. Collins (1996) 45 Cal.App.4th 849, 863; People v. Shipman (1965) 62 Cal.2d 226, 230; People v. Goodrum (1991) 228 Cal.App.3d 397, 400-401; People v. Soriano (1987) 194 Cal.App.3d 1470, 1474; People v. Ibanez (1999) 76 Cal.App.4th 537, 544-545; People v. McElwee (2005) 128 Cal.App.4th 1348, 1351.

<sup>39</sup> In re Serrano (1995) 10 Cal.4th 447; In re Walker (1974) 10 Cal.3d 764; In re Ronald E. (1977) 19 Cal.3d 315.

Second, you will have to raise your issue in a state habeas petition if your argument depends on any facts that were not presented to the superior court judge either during a hearing that was reported by the court reporter or in written documents filed with the court. For example, you may need to file a habeas petition if you did not understand what sentence you could receive, and your trial counsel failed to object at sentencing or failed to make a motion that you be allowed to withdraw your plea. In such circumstances, the superior court record probably won't fully show that you did not actually understand the terms of the plea and that you would not have accepted the plea if you had understood them.

When you file your habeas petition, you should attach any documents you can get to show the full facts important to the issue. For example, you might need to write a declaration or get a declaration or file notes from your defense attorney about your discussions. You might also need to include a declaration in which you state that you did not actually know about your legal rights or the consequences of your plea, and that you would not have taken the plea if you had correct information. All declarations should be signed and include a statement that the person making the declarations swears "under penalty of perjury under the laws of the State of California that the information is true and correct."

There is no set deadline for filing a petition for writ of habeas corpus, but you should not delay any longer than necessary. If you do not file within a reasonable period of time, the court may deny your petition as being untimely.<sup>40</sup> Usually, you should file your petition in the superior court in which you entered your plea and were sentenced, but you may be able to file your petition in the court of appeal if you have a direct appeal pending from the same case. There is a standard form that you can use to file a petition for writ of habeas corpus. If you cannot afford an attorney to represent you, you should also file a "Declaration of Indigency and Request for Appointment of Counsel." Sample forms and information for filing a state habeas petition are available for free from the Prison Law Office and at [www.prisonlaw.com](http://www.prisonlaw.com) on the Resources page.

If the court issues an order to show cause after you file your petition, it must appoint an attorney to represent you in the rest of the proceedings, if you have requested an attorney and shown that you are not able to afford to hire one.

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<sup>40</sup> See In re Harris (1993) 5 Cal.4th 813; In re Clark (1993) 5 Cal.4th 750; In re Swain (1949) 34 Cal.2d 300; In re Moss (1985) 175 Cal.App.3d 913. Be aware that the time frame in which you file your state habeas petition may affect whether you later will be able to raise the issues in a federal court habeas petition.

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After you have challenged your plea convictions and sentences through the highest level of state court review (the California Supreme Court), then you may be able to raise your issues in a petition for writ of habeas corpus filed in federal court. Federal habeas proceedings are complicated and are beyond the scope of this letter. However, you can get more information by requesting the Federal Habeas Corpus letter from the Prison Law Office or downloading that letter on the Resources page at [prisonlaw.com](http://prisonlaw.com).

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In addition to the Prison Law Office packets discussed in this letter, there are other resources to help you prepare an appeal or habeas petition. The best is a book called Appeals and Writs in Criminal Cases, published and updated periodically by the Continuing Education of the Bar (C.E.B.) in Oakland, CA. Another helpful book is California Criminal Law and Procedure, also published by C.E.B. The California State Prisoners Handbook (4<sup>th</sup> ed. 2008 and periodic supplements), which can be ordered from the Prison Law Office, also has information on state and federal habeas petitions. Some or all of these resources, along with the necessary court forms, should be in the prison or jail law library.