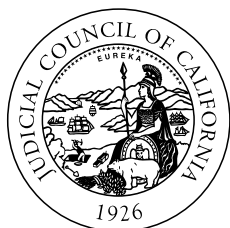


CALIFORNIA JUDGES BENCHGUIDES

Benchguide 91

FELONY ARRAIGNMENT AND PLEAS

[REVISED 2013]



ADMINISTRATIVE OFFICE
OF THE COURTS

JUDICIAL AND COURT OPERATIONS
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CENTER FOR JUDICIARY EDUCATION AND RESEARCH

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This benchguide provides an overview of the procedure for handling a felony arraignment. It includes a procedural checklist, a brief summary of the applicable law, plea scripts, and a felony plea form. For a discussion of misdemeanor arraignment procedures, see California Judges Benchguide 52: *Misdemeanor Arraignment* (Cal CJER).

II. [§91.2] PROCEDURAL CHECKLIST: ARRAIGNMENT HEARING

(1) *Call the case.* If the defendant is not present, issue a bench warrant for the defendant’s arrest. [Pen C §978.5](#). For discussion, see [§91.3](#).

(2) *Determine if an interpreter is needed.* For discussion, see [§91.4](#).

(3) *Ascertain whether the complaint is in the defendant’s true name, and, if not, ask the defendant or defense counsel to state the defendant’s true name.* Correct the record. [Pen C §989](#). For discussion, see [§91.4](#).

(4) *If the defendant appears with counsel, determine if formal arraignment is waived.* Generally, defense counsel will indicate representation of the defendant and waive a reading of the complaint and advisement of rights.

(5) *If the defendant appears without counsel, inform the defendant of the charges and his or her constitutional rights, including the right to counsel.* If the defendant desires the assistance of counsel, continue the case to allow the defendant to obtain private counsel or to speak with the public defender. For discussion, see §§91.5–91.6. If the defendant wishes to proceed in pro per, take a waiver under *Faretta v California* (1975) 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562. For discussion, see §§91.11–91.14.

(6) *When the defendant’s mental health is in question, determine if a Pen C §1368 competency inquiry or a 72-hour referral for evaluation and treatment under Pen C §4011.6 is appropriate.* For discussion, see §§91.17–91.18.

(7) *If the defendant is charged with a drug possession offense, inquire as to drug treatment eligibility either under Proposition 36 or deferred entry of judgment (Pen C §§1210–1210.1; Pen C §§1000–1000.4).* Under Proposition 36 when defendant is charged with personal use, possession for personal use, or transportation for personal use of a controlled substance, secure a time waiver from the defendant, refer the case to the probation department for a determination of defendant’s eligibility under Pen C §1210, and set a hearing date. Some courts take a plea of guilty from defendants who appear to qualify for Proposition 36 treatment in advance of an eligibility report, and condition that plea on a finding of eligibility. For discussion, see §91.19. For a conditional plea script, see §91.32. Under deferred entry of judgment, the defendant pleads guilty to the qualifying drug offense, entry of judgment is deferred while the defendant participates in a drug treatment program, and the charges are dismissed on successful completion of the program. For discussion, see Benchguide 62: *Deferred Entry of Judgment*, §§62.6–62.7 (Cal CJER).

(8) *Hear and decide any request for own-recognizance release or bail reduction.* See Cal Const art I, §12; Pen C §§1270.2, 1271, 1275. For discussion, see §§91.20–91.23.

(9) *Ask the defendant or defense counsel if the defendant is ready to plead.* Pen C §988. If the defendant is not ready to plead, continue the case for at least one day. Pen C §990. For discussion, see §91.24.

(10) *If the defendant pleads not guilty:*

- *Ask whether the defendant will waive the 10-court-day and 60-day time limits for the preliminary hearing.* If so, take a personal waiver. The defendant can, and frequently does, waive one limitation without waiving the other.
- *Set the case for preliminary examination.* [Pen C §859b](#). For discussion, see [§91.25](#).

(11) *If the defendant pleads guilty:*

- *Ask the defendant to execute a waiver-of-rights and plea form or take an oral waiver and plea.* For a script for use in taking a guilty or no-contest plea, see [§91.31](#). For a felony plea form, see [§91.33](#).
- *Set date for pronouncement of judgment within 20 judicial days and refer the case to the probation department for a presentence investigation and report.* For discussion, see [§91.25](#).

III. APPLICABLE LAW

A. Felony Arraignment Hearing

1. [\[§91.3\]](#) Presence of Defendant

A defendant charged with a felony must appear in person at the arraignment, when entering a plea, at the preliminary hearing, at proceedings at which evidence is received, and at sentencing. [Pen C §977\(b\)\(1\)](#). The court may compel the defendant's attendance at the arraignment as follows: (1) if the defendant is in custody, by directing the officer to bring the defendant before the court ([Pen C §978](#)); (2) if the defendant has been released on his or her own recognizance and fails to appear, by issuance of a bench warrant for the defendant's arrest ([Pen C §978.5](#)); or (3) if the defendant has been released on bail and does not appear, by issuance of a bench warrant for the defendant's arrest ([Pen C §979](#)).

Video arraignment. The court may permit the arraignment to be conducted by two-way electronic audio-video communication between the defendant and the courtroom in place of defendant's appearance in the courtroom. [Pen C §977\(c\)](#). A defendant who participates in a video arraignment must sign a written waiver of the right to appear. [Pen C §977\(c\)](#). If the defendant is represented by counsel, the attorney must be present with the defendant at the video arraignment, and may enter a plea during the arraignment. [Pen C §977\(c\)](#). The court may accept a guilty or no-contest plea from a defendant who is not physically present in the courtroom if the parties so stipulate. [Pen C §977\(c\)](#).

2. [§91.4] Informing Defendant of Charges

When the defendant's case is called, the court will read the accusatory pleading to the defendant and deliver to him or her a copy of the accusatory pleading and a copy of the endorsements, if any, including a list of witnesses. [Pen C §988](#). Normally, the court summarizes the complaint and, after appointing defense counsel, obtains from counsel a waiver of the full reading.

The defendant must be informed that if the name in the accusatory pleading is not the defendant's true name, the defendant must state his or her true name, or the name in the pleading will be used to proceed against him or her. If the defendant provides another name, entry of the correction must be made in the court minutes, and the subsequent proceedings may be taken in that name, referring also to the other name. [Pen C §989](#).

If the defendant is unable to understand English, the court must continue the defendant's case until an interpreter can be appointed. [Cal Const art I, §14](#) (defendant unable to understand English has right to interpreter throughout criminal proceedings); *People v Carreon* (1984) 151 CA3d 559, 567, 198 CR 843 (court must appoint interpreter on showing of need). See [Standards of Judicial Administration §2.10](#), which outlines the procedures for determining the need for a court interpreter.

3. [§91.5] Advisement of Rights

The court must advise defendants of their constitutional rights before arraignment and plea. *In re Johnson* (1965) 62 C2d 325, 330, 42 CR 228.

Defendants must be informed of the following rights:

- *To counsel*. The defendant has a right to be represented by an attorney at the arraignment. If the defendant is indigent and desires assistance of counsel, the court must appoint counsel to represent the defendant without charge. [Cal Const art I, §15](#); [Pen C §§859, 987\(a\)](#).
- *To a timely preliminary hearing and a speedy and public trial*. The defendant has a right to a preliminary hearing within 10 court days after the arraignment or entry of plea, whichever occurs later. [Pen C §859b](#). The defendant must be brought to trial within 60 days of an arraignment on an indictment or information. [Pen C §1382\(a\)\(2\)](#). Failure to meet these statutory time periods may result in dismissal of the case. The defendant may waive time for the hearing or trial, in which case the court may set a date beyond the prescribed limits. [Cal Const art I, §15](#); [Pen C §§859b, 1382\(a\)\(2\), \(c\), 686](#); *In re Smiley* (1967) 66 C2d 606, 629, 58 CR 579.

- *To a trial by jury.* Cal Const art I, §16; see *People v Garza* (1983) 142 CA3d 131, 133, 190 CR 824 (court is not required to advise defendant that trial jury is composed of 12 persons).
- *To process of the court.* The defendant has the right to compel attendance of witnesses on his or her behalf. Cal Const art I, §15; Pen C §686.
- *To confront and cross-examine witnesses.* The defendant has the right to confront and cross-examine witnesses who testify against the defendant. Cal Const art I, §15; Pen C §686.
- *To remain silent.* Defendants may not be compelled to take the witness stand and testify against themselves. Cal Const art I, §15; Evid C §§930, 940.
- *To release on reasonable bail.* An in-custody defendant has the right to be released on reasonable bail (unless this is a “no bail” situation; see §§91.20–91.21). Cal Const art I, §12; Pen C §1271; *In re Weiner* (1995) 32 CA4th 441, 444, 38 CR2d 172.

4. [§91.6] Appointment of Counsel

A defendant in a criminal case has a federal constitutional right to be represented by counsel at all critical stages of the prosecution. *People v Marshall* (1997) 15 C4th 1, 20, 61 CR2d 84. The Sixth Amendment right to counsel attaches at the time adversary judicial proceedings are initiated against a defendant, *e.g.*, when the defendant is indicted or arraigned. *People v Frye* (1998) 18 C4th 894, 987, 77 CR2d 25. The right to counsel is self-executing, *i.e.*, the defendant is not required to make a request for counsel in order to be entitled to legal representation. *People v Marshall, supra*, 15 C4th at 20. A defendant has a right to counsel unless and until the defendant affirmatively waives that right. 15 C4th at 20.

When a defendant appears at arraignment without counsel, the court must inform the defendant of his or her right to counsel before being arraigned and ask if the defendant desires the assistance of counsel. Cal Const art I, §§14–15; Pen C §§859, 987(a). In a capital case, the court must inform the defendant that he or she must be represented by counsel at all stages of the preliminary and trial proceedings, and that the representation is at his or her expense if he or she is able to employ counsel or at public expense if he or she is unable to employ counsel. Pen C §§859, 987(b).

If the defendant is able to employ counsel, the court must continue the case for a reasonable period to allow the defendant to obtain counsel. Pen C §§859, 987(b). If the defendant desires but cannot afford counsel, the court must appoint counsel to represent the defendant. Pen C §987(a),

(b); [Cal Const art I, §15](#). Many courts do not make a formal appointment, but rather continue the case for a short period and refer the defendant to the public defender's office.

The constitutional and statutory guaranties of the assistance of counsel are not violated by the appointment of an attorney other than the one the defendant has requested. It is not an abuse of discretion for the court to appoint an attorney other than that requested by the defendant when the attorney requested by the defendant has not previously represented the defendant in connection with the matter and has no particular familiarity with the case. See *People v Horton* (1995) 11 C4th 1068, 1098-1099, 47 CR2d 516. See also *Gressett v Superior Court* (2010) 185 CA4th 114, 124, 109 CR3d 919 (trial court has discretion not to appoint, as assigned counsel, a specific attorney requested by defendant when said counsel had represented defendant in proceedings until defendant ran out of money). The court's statutory discretion to appoint counsel is not restricted by any fixed policy. *Williams v Superior Court* (1996) 46 CA4th 320, 327, 53 CR2d 832. However, in accordance with [Govt C §27706](#) and [Pen C §987.2](#), the court must first utilize the services of the public defender in providing criminal defense services for indigent defendants, if the public defender is available to try the matter. 46 CA4th at 329.

➤ JUDICIAL TIPS:

- If the court appoints a private attorney through the conflicts panel of the local bar association, it should ensure that the attorney selected has been found qualified by the association to handle the particular type of felony case involved. In a capital case, the court may only appoint an attorney who meets the minimum qualifications as outlined in [Cal Rules of Ct 4.117](#).
- If the defendant is represented by an appointed attorney in a separate pending case, the court may wish to determine whether that attorney is available for appointment, so as to provide continuity of representation for the defendant.

a. [§91.7] Financial Eligibility Determination

In determining whether a defendant is unable to afford to employ counsel, the court may require the defendant to submit a financial statement or other financial information under penalty of perjury with the court. [Pen C §987\(c\)](#). The court may also order a defendant to appear before a designated county officer to inquire into the defendant's financial status. [Pen C §987\(c\)](#). The county officer who conducts the inquiry must provide the court with a written recommendation and the reasons in support of the recommendation. [Pen C §987\(c\)](#). Some courts provide

financial eligibility forms for defendants to complete and sign at the beginning of the arraignment proceedings, which may be reviewed as each case is called. In other courts, the public defender's office interviews the defendant and determines the defendant's eligibility for its services. The court's determination of the defendant's financial eligibility for appointed counsel must be made on the record. [Pen C §987\(c\)](#).

b. [§91.8] Notice of Potential Liability for Cost of Legal Services

After finding a defendant eligible for court-appointed counsel, the court must inform the defendant that he or she may be required to pay all or a portion of the cost of counsel on conclusion of the criminal proceedings if the defendant has the present ability to pay. [Pen C §987.8\(f\)](#). The notice must inform the defendant that such an order has the same force and effect as a judgment in a civil action, and is subject to enforcement against the defendant's property in the same manner as any other money judgment. [Pen C §987.8\(f\)](#). See *People v Smith* (2000) 81 CA4th 630, 637–639, 96 CR2d 856. This advisement usually appears on financial eligibility forms. The clerk must note on the docket that this admonition was made at the time of appointment. See *People v Amor* (1974) 12 C3d 20, 29, 114 CR 765.

c. [§91.9] Readiness of Counsel

The court must inquire whether assigned defense counsel (public defender or private counsel) will be ready to proceed with the preliminary hearing or trial within the prescribed statutory time limits. See [Pen C §987.05](#); *Williams v Superior Court* (1996) 46 CA4th 320, 329–330, 53 CR2d 832 (court obligated to appoint only those attorneys who will be ready for trial on given date). Counsel is allowed a reasonable time to become familiar with the case before representing to the court that he or she can be ready for trial. 46 CA4th at 330. Although the court may accept counsel's representation of availability, it may also allow the presentation of evidence in determining counsel's readiness to proceed. 46 CA4th at 331 (citing examples of factors court may consider).

d. [§91.10] Appointing Co-Counsel in Capital Case

In a capital case, the court may appoint an additional attorney as co-counsel on the written request of the first appointed attorney. [Pen C §987\(d\)](#). The court must appoint co-counsel when it is convinced by the reasons stated in the affidavit submitted by the first attorney that the appointment is necessary to provide the defendant with effective representation. [Pen C §987\(d\)](#). On the appointment of a second attorney, the court

must designate one attorney as lead counsel and the other attorney as associate counsel. [Cal Rules of Ct 4.117\(c\)](#). Both lead and associate counsel must meet the minimum qualifications to handle a capital case as outlined in [Cal Rules of Ct 4.117](#). The court must state on the record its reasons for denying appointment of co-counsel. [Pen C §987\(d\)](#). For a checklist of hearing a request for appointment of an additional attorney, see California Judges Benchguide 98: *Death Penalty Benchguide: Pretrial and Guilt Phase* §98.9 (Cal CJER).

5. Taking *Faretta* Waiver of Right to Counsel

a. [§91.11] Right to Self-Representation

Under the [Sixth Amendment](#), a criminal defendant has a constitutional right of self-representation and may waive the right to counsel. *Faretta v California* (1975) 422 US 806, 819, 95 S Ct 2525, 45 L Ed 2d 562. The court must grant a defendant's request for self-representation if three conditions are met:

(1) The defendant must be mentally competent, and must make the request knowingly and intelligently, having been apprised by the court of the dangers of self-representation;

(2) The defendant must make the request unequivocally; and

(3) The defendant must make the request within a reasonable time before trial.

422 US at 835; *Godinez v Moran* (1993) 509 US 389, 399–400, 113 S Ct 2680, 125 L Ed 2d 321; *People v Jenkins* (2000) 22 C4th 900, 959, 95 CR2d 377; *People v Welch* (1999) 20 C4th 701, 729, 85 CR2d 203. A defendant who exercises the right to self-representation cannot later complain that the quality of his or her defense amounted to a denial of the effective assistance of counsel. *People v Garcia* (2000) 78 CA4th 1422, 1430, 93 CR2d 796.

➤ **JUDICIAL TIP:** Although [Pen C §§859 and 987\(b\)](#) appear to require the appointment of counsel in a capital case, a mentally competent defendant has an absolute right under *Faretta* to self-representation. *People v Bigelow* (1984) 37 C3d 731, 740–743, 209 CR 328. Under [Pen C §1018](#), however, the court may not receive a guilty plea to a capital offense from a defendant who appears without counsel. In addition, the court may not accept a guilty plea without defense counsel's consent. [Pen C §1018](#); *People v Alfaro* (2007) 41 C4th 1277, 1294–1304, 63 CR3d 433.

b. [§91.12] Assertion of Right to Self-Representation

The defendant must assert the right to self-representation in a timely and unequivocal manner. *People v Valdez* (2004) 32 C4th 73, 97–98, 8 CR3d 271; *People v Welch* (1999) 20 C4th 701, 729, 85 CR2d 203. A defendant's request is not unequivocal if it does not represent a genuine desire for self-representation, but is instead made out of anger, frustration or ambivalence, or to delay or disrupt the court proceedings. *People v Danks* (2004) 32 C4th 269, 295–296, 8 CR3d 767; *People v Marshall* (1997) 15 C4th 1, 23, 61 CR2d 84. In determining whether a request for self-representation is unequivocal, the court should consider not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other utterances in court. 15 C4th at 25. See *People v Scott* (2001) 91 CA4th 1197, 1203–1205, 111 CR2d 318 (request made immediately after denial of *Marsden* motion and motivated by defendant's desire to rid himself of appointed counsel); *People v Carlisle* (2001) 86 CA4th 1382, 1385–1390, 103 CR2d 919 (defendant's repeated requests made over four-month period to represent himself if he could not have other counsel assigned found unequivocal); *People v Barnett* (1998) 17 C4th 1044, 1087, 74 CR2d 121 (request deemed an equivocal, impulsive response to court's refusal to immediately hear *Marsden* motion).

The defendant must assert the right to self-representation within a reasonable time before the commencement of trial. *People v Jenkins* (2000) 22 C4th 900, 959, 95 CR2d 377; *People v Welch*, *supra*. If the motion is untimely, *i.e.*, not asserted within a reasonable time before trial, the defendant must justify the delay. *People v Horton* (1995) 11 C4th 1068, 1110, 47 CR2d 516. A motion made on the day preceding or the day of trial is generally considered untimely. *People v Rudd* (1998) 63 CA4th 620, 626, 73 CR2d 807; *People v Douglas* (1995) 36 CA4th 1681, 1688–1689, 43 CR2d 129.

A court has the discretion to grant or deny a motion that is not made a reasonable time before trial. *People v Jenkins*, *supra*. The court should consider the quality of counsel's representation of the defendant, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of the motion. *People v Mayfield* (1997) 14 C4th 668, 809–810, 60 CR2d 1. If a court grants a defendant's untimely motion, it must also grant a reasonable continuance, if necessary, so that the defendant may prepare for trial. *People v Douglas*, *supra*, 36 CA4th at 1689. However, if the court concludes that the defendant's motion is merely a tactic designed to delay the trial, the court has the discretion to deny the continuance and require the defendant to proceed to trial as scheduled either with his or her counsel or in pro per. 36 CA4th at 1689. See *People v Rogers* (1995) 37

CA4th 1053, 1055–1058, 44 CR2d 107 (court should have granted *Faretta* motion made just as opening statements were about to begin when defendant did not request a continuance, had a profound disagreement with his counsel about how case should proceed, and did not seek to delay or obstruct proceedings).

c. [§91.13] Competency To Waive Right to Counsel

In *Indiana v Edwards* (2008) 554 US 164, 128 S Ct 2379, 171 L Ed 2d 345, the United States Supreme Court held that a defendant who is competent to stand trial may not be competent to represent him or herself, and that state trial courts may deny that defendant the right to self-representation without violating the [Sixth and Fourteenth Amendments](#) to the United States Constitution. The Court considered the question of whether the Constitution permits a state to limit a defendant's right to self-representation by insisting on representation at trial when the defendant has been found sufficiently competent to stand trial. The Court ruled that even if a defendant has been found mentally competent to stand trial, a trial court may insist that the defendant be represented by counsel when the defendant suffers from severe mental illness to the point where he or she is not competent to conduct the trial proceedings alone. 554 US at 172–178. The Court stated that the nature of mental illness cautions against the use of a single mental competence standard for deciding both whether a defendant who is represented by counsel can proceed to trial and whether a defendant who goes to trial must be permitted to represent himself. 554 US at 174–177.

The Court distinguished *Godinez v Moran* (1993) 509 US 389, 399–400, 113 S Ct 2680, 125 L Ed 2d 321, which holds that the competency standard for standing trial is the same as that for waiving the right to counsel, on two grounds. First, *Godinez* involved a defendant waiving his right to counsel and pleading guilty. The defendant's ability to conduct a defense at trial was not at issue. Second, *Godinez* involved the issue of whether a state may *permit* a borderline-competent defendant to represent himself, not whether a state may *deny* such a defendant the right to represent himself or herself at trial. *Indiana v Edwards, supra*, 554 US at 171–173.

California has accepted the invitation in *Edwards* for state courts to set a higher standard for self-representation than for competency to stand trial. In *People v Johnson* (2012) 53 C4th 519, 525–531, 136 CR3d 54, the California Supreme Court expressly held that trial courts may deny self-representation in those cases where *Edwards* permits it.

If the court entertains any doubts about the defendant's competency, it must conduct an inquiry, usually by ordering a psychiatric evaluation.

See *People v Welch* (1999) 20 C4th 701, 730, 85 CR2d 203 (court appointed psychiatrist under Evid C §730 to evaluate defendant on issue of whether he had mental capacity to waive constitutional right to counsel with a realization of the probable risks and consequences of his action). The court may not, however, consider the wisdom of the defendant's decision to undertake self-representation. *Godinez v Moran, supra*, 509 US at 399–400; *People v Welch, supra*, 20 C4th at 732–734 (court should not have denied defendant's *Faretta* motion based on its conclusion that defendant was not competent to present an *adequate* defense and that defendant must possess some minimal ability to represent himself). Nor may the court consider the defendant's level of education or particular work experience in order to invoke the right to self-representation. *People v Robinson* (1997) 56 CA4th 363, 372, 65 CR2d 406. The severity of the charges is also not an issue in determining whether self-representation is proper. 56 CA4th at 372.

d. [§91.14] Advising Defendant of Disadvantages of Self-Representation

The court must advise the defendant of the dangers and disadvantages of self-representation, *e.g.*, by asking whether the defendant understands the charges and the potential penal consequences, and by advising the defendant that he or she will be treated as any other attorney, can expect no special treatment or advice from the court during trial, and does not have a right to co-counsel or to advisory or standby counsel. See *People v Jenkins* (2000) 22 C4th 900, 959, 95 CR2d 377 (record must show that defendant knew what he or she was doing and that defendant's choice was made with eyes open); *People v Noriega* (1997) 59 CA4th 311, 319–322, 69 CR2d 127 (conviction reversed for court's failure to so advise defendant before granting motion for self-representation).

e. [§91.15] Defendant's Disruptive Behavior

A defendant's right to conduct his or her own defense is subject to the proviso that the defendant must abide by the rules of procedure and courtroom protocol. *People v Welch* (1999) 20 C4th 701, 734, 85 CR2d 203. The right of self-representation is not a license to abuse the dignity of the courtroom, but is a right that may be lost through deliberate, serious misconduct. *People v Marshall* (1997) 15 C4th 1, 20, 61 CR2d 84. See, *e.g.*, *People v Fitzpatrick* (1998) 66 CA4th 86, 92–93, 77 CR2d 634; *People v Rudd* (1998) 63 CA4th 620, 632–633, 73 CR2d 807.

The court's authority to terminate a defendant's right to self-representation is not limited to in-court misconduct. The court may terminate that right based on the defendant's out-of-court conduct that

seriously threatens the core integrity of the trial, *e.g.*, witness intimidation. *People v Carson* (2005) 35 C4th 1, 8–10, 23 CR3d 482.

A court may deny a motion for self-representation when the defendant's conduct before the motion gives the court a reasonable basis for concluding that the defendant's self-representation will create disruption. *People v Welch, supra*, 20 C4th at 734 (constantly disruptive defendant who represents himself and who, therefore, cannot be removed from trial proceedings as a sanction against disruption, would have capacity to bring trial to a standstill). The court must undertake the task of deciding whether the defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful, or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation. 20 C4th at 735. The court has a great deal of discretion when it comes to granting, as well as terminating, a defendant's right to self-representation. 20 C4th at 735 (citing examples of defendant's disruptive behavior that justified denying right to self-representation).

f. [§91.16] Appointment of Advisory Counsel

In a capital case involving complex legal and factual issues, a court may abuse its discretion by refusing the request of a pro per defendant for the appointment of advisory counsel. *People v Garcia* (2000) 78 CA4th 1422, 1428–1431, 93 CR2d 796 (no abuse of discretion in noncapital case). However, a defendant who elects self-representation does not have a constitutional right to advisory counsel or any other form of hybrid representation. 78 CA4th at 1430–1431 (court's right to appoint advisory counsel as part of its power to control proceedings does not give defendants right to have advisory counsel); *People v Moore* (2011) 51 C4th 1104, 127 CR3d 2 (self-representing defendant, even in capital case, has no constitutional right to appointment of co-counsel, but trial court retains discretion to make appointment).

For a comprehensive discussion of procedures for handling a defendant's request to proceed in pro per, see California Judges Benchguide 54: *Right to Counsel Issues* (Cal CJER).

6. Handling Mentally Ill Defendant

a. [§91.17] Competency Proceedings

When a defendant is called at arraignment and displays any behavior that suggests the defendant may be incompetent to stand trial, the court may want to order a hearing on the defendant's mental ability to participate in the criminal proceedings. Penal Code §1368 provides that if the judge or defense counsel believes that the defendant is mentally disordered and as a result may be incompetent to stand trial, the court may order a

competency hearing as outlined in [Pen C §1369](#), and suspend the proceedings. If the defendant is not represented by counsel, the court must appoint an attorney and declare a recess, if requested by the defendant or defense counsel, to allow counsel to confer with the defendant and to form an opinion as to whether the defendant is mentally competent. [Pen C §1368\(a\)](#).

If, after the completion of the hearing, the defendant is found competent, the criminal proceedings are reinstated. [Pen C §1370\(a\)\(1\)](#). If the defendant is found incompetent, the proceedings remain suspended and the defendant is sent to a state hospital or other treatment facility. [Pen C §1370\(a\)\(1\)](#).

See California Judges Benchguide 63: *Competence To Stand Trial* (Cal CJER) for a comprehensive discussion of court procedures under [Pen C §§1368–1370](#).

b. [§91.18] Treatment and Evaluation Under Pen C §4011.6

If the court has reason to believe an in-custody defendant may be mentally disordered and, as a result of the disorder, may be (1) a danger to others, or to himself or herself, or (2) unable to provide for his or her basic personal needs for food, clothing, or shelter, it may order that the defendant be referred for a 72-hour evaluation and treatment under [Pen C §4011.6](#), which initiates Lanterman-Petris-Short (LPS) procedures ([Welf & I C §§5000 et seq.](#)). [Penal Code §4011.6](#) provides that a defendant may be concurrently subject to criminal proceedings and the LPS Act. The time during which the defendant is detained in a mental health facility because of a [Pen C §4011.6](#) referral does *not* toll the [Pen C §1382](#) time requirements to bring the defendant to arraignment or trial, unless the person in charge of the facility specifically determines that arraignment or trial would be detrimental to the well-being of the defendant. [Pen C §4011.6](#). See *People v Vass* (1987) 196 CA3d Supp 13, 17–18, 242 CR 330 (letter from staff social worker containing treating physician’s conclusion that returning defendant to jail without medication would be detrimental to defendant’s well-being was inadequate to trigger tolling provision in [Pen C §4011.6](#)).

See California Judges Benchguide 63: *Competence To Stand Trial* (Cal CJER) for a discussion of court procedures under [Pen C §4011.6](#). See also California Judges Benchguide 120: *LPS Proceedings* (Cal CJER) for a procedural overview of the LPS Act.

7. [§91.19] Eligibility for Proposition 36 Drug Treatment

BULLETIN: Penal Code §§1210, 1210.1, and 3063.1 were amended by Stats 2006, ch 63 (SB 1137), effective July 12, 2006, to allow incarceration of offenders placed on Proposition 36 drug probation who relapse during treatment. In 2009, *Gardner v Schwarzenegger* (2009) 178 CA4th 1366, 1377, 101 CR3d 229, enjoined enforcement of the amendments, holding that the provisions of SB 1137, allowing incarceration for drug-related probation violations, were inconsistent with the purpose of Proposition 36.

Penal Code §§1210, 1210.1, and 3063.1 continue to reflect the SB 1137 amendments. Thus, the court should refer to the preamendment versions of those statutes.

If the defendant is charged with personal use, possession for personal use, or transportation for personal use of a controlled substance, he or she may qualify for drug treatment under the provisions of Proposition 36 (Pen C §§1210–1210.1). The court must grant probation as an alternative to incarceration to qualifying defendants convicted of “nonviolent drug possession offenses,” as defined in Pen C §1210(a). Pen C §1210.1(a). Courts must impose, as a condition of probation, completion of a drug treatment program not to exceed 12 months, with optional aftercare of up to six months. Pen C §§1210(b), 1210.1(c)(3). The court may also require that the defendant participate in vocational training, family counseling, literacy training, and/or community service. Pen C §1210.1(a). Qualifying defendants must consent to participate in a drug treatment program, must be amenable to treatment, and must not otherwise be excluded from participation under Pen C §1210.1(b). Trial courts that impose drug treatment are not otherwise limited in the type of probation conditions they may impose. Pen C §1210.1(a).

A determination of whether the defendant may be eligible for Proposition 36 sentencing may be initiated at arraignment on the suggestion of counsel, or on inquiry by the court. The prosecutor may formalize the process by filing with the complaint a statement of eligibility.

Penal Code §1210.1 does not outline presentence procedures to be followed by the courts when presented with a Proposition 36 case. Some courts may want to continue the case to allow the probation department to conduct an eligibility review, and to allow for a laboratory analysis of the substance possessed by the defendant or that was found in the defendant’s blood or urine. The court may also wish to assign a drug professional to conduct a preliminary treatment assessment. In the alternative, the court may ask the defendant to enter a conditional plea of guilty or no contest

before an eligibility review and treatment assessment. If the defendant is found ineligible for the drug treatment program or the laboratory analysis proves negative for the presence of a controlled substance, the defendant may be allowed to withdraw the plea. For a conditional plea script, see [§91.32](#).

8. Bail or Own-Recognizance Release

a. [§91.20] Noncapital Offenses

A defendant who is charged with a noncapital offense may be admitted to bail before conviction as a matter of right. [Pen C §1271](#). However, a court may deny bail to a defendant charged with a noncapital felony offense involving acts of violence on another person if the facts are evident or the presumption is great and the court finds, based on clear and convincing evidence, that there is a substantial likelihood that the defendant's release would result in great bodily harm to others. [Cal Const art I, §12\(b\)](#). Similarly, a court may deny bail to a defendant who is charged with a noncapital felony offense when the facts are evident or the presumption is great and the court finds, based on clear and convincing evidence, that the defendant has threatened another with great bodily harm and there is a substantial likelihood the defendant would carry out the threat if released. [Cal Const art I, §12\(c\)](#).

A defendant who has been charged with a noncapital offense may be released on his or her own recognizance in the court's discretion. [Cal Const art I, §12](#); [Pen C §1270](#); see [Pen C §§1318 et seq](#) for limitations on OR release. It may be granted by a court or magistrate who could release the defendant from custody on bail, unless the court makes a finding on the record in accordance with [Pen C §1275](#), that an OR release will compromise public safety or will not reasonably assure the defendant's appearance at subsequent proceedings. [Pen C §1270\(a\)](#). Public safety is the primary consideration.

For information the court must consider in setting bail or releasing a defendant on OR when charges involve domestic violence, see [Pen C §273.75\(a\)](#).

b. [§91.21] Capital Offenses

A defendant who has been charged with a capital offense may not be released on bail if the proof of the defendant's guilt is evident or the presumption of the defendant's guilt is great. [Cal Const art I, §12\(a\)](#); [Pen C §1270.5](#). The finding of the indictment does not add to the strength of the proof or the presumptions to be drawn from it. [Pen C §1270.5](#). A crime is a capital offense if the statute makes it potentially punishable by death, even if the prosecuting attorney has decided not to seek the death penalty.

Maniscalco v Superior Court (1993) 19 CA4th 60, 69, 23 CR2d 322; *In re Bright* (1993) 13 CA4th 1664, 1672, 17 CR2d 105. See *People v Superior Court (Kim)* (1993) 20 CA4th 936, 941, 25 CR2d 38 (minor charged with capital offense may be denied bail under Pen C §1270.5 even though minor is statutorily ineligible for death penalty).

c. [§91.22] Setting Bail Amount

In setting, reducing, or denying bail, the court must primarily consider public safety. The court should also consider the seriousness of the charged offense, the defendant's criminal record, and the probability the defendant will appear for hearings or trial. Cal Const art I, §12; Pen C §1275. See *In re Christie* (2001) 92 CA4th 1105, 112 CR2d 495 (trial court failed to articulate specific grounds for setting bail in excess of scheduled amount; statement of reasons must contain more than mere findings of ultimate fact or recitation of relevant criteria for release on bail). The issue of appropriate bail may be raised at various times throughout the proceedings. See Pen C §§1269b, 1269c, 1270.2, 1273, 1277, 1476, 1538.5(k). The defendant is entitled to an automatic review of the order fixing the amount of bail by the judge or magistrate who has jurisdiction of the offense. The review must be held within five days of the order. The defendant may waive this review. Pen C §1270.2.

d. [§91.23] Hearing When Defendant Charged With Designated Offenses

The court must conduct a hearing before a defendant charged with certain specified offenses may be released on bail in an amount that is either more or less than the amount contained in the bail schedule for that offense or may be released on his or her own recognizance. Pen C §1270.1(a). These offenses include serious felonies as defined in Pen C §1192.7(c), violent felonies as defined in Pen C §667.5(c), and violations of Pen C §§136.1 (if punished under Pen C §§136.1(c)), 243(e)(1), 262, 273.5, 273.6 (if threats or violence directed at protected party), 422 (if felony violation), and 646.9. Pen C §1270.1(a)(1)–(4). The prosecuting and defense attorneys must be given a two-court-day written notice and an opportunity to be heard on the matter. Pen C §1270.1(b). If the defendant does not have counsel, the court must appoint counsel for purposes of the hearing. Pen C §1270.1(b). The hearing must be held within the period prescribed in Pen C §825 for being brought before a magistrate (48 hours excluding Sunday and holidays). Pen C §1270.1(b). If a request for bail reduction or own-recognizance release is made at the hearing required under Pen C §825, the court must exercise its discretion to grant or deny

the request regardless of whether notice was given. *Dant v Superior Court* (1998) 61 CA4th 380, 390, 71 CR2d 546.

- **JUDICIAL TIP:** Case law does not address the situation when a request by the defendant for OR release or bail reduction or a request by prosecutor for a bail increase is made after the 48-hour time requirement of [Pen C §825](#) has expired. It appears that the best practice in these situations is to allow the requesting party to move forward with the bail or OR motion and require a two-day written notice of hearing from that party. The Court should comply with all other procedural requirements of [Pen C §1270.1](#) when hearing the bail motion.

At the hearing, the court must consider evidence of past court appearances by the defendant, the maximum potential sentence that may be imposed, and the danger that may be posed to other persons if the defendant is released. [Pen C §1270.1\(c\)](#). In determining whether to release the defendant on his or her own recognizance, the court must consider the potential danger to other persons, including threats the defendant has made and any past acts of violence. The court must also consider any evidence offered by the defendant regarding his or her ties to the community and ability to post bail. [Pen C §1270.1\(c\)](#). If the judge or magistrate sets bail in an amount that is either more or less than the amount contained in the bail schedule for the offense, the judge or magistrate must state the reasons for this decision and address the issue of any threats made against the victim or witness. These matters must be included in the record. [Pen C §1270.1\(d\)](#).

For a comprehensive discussion of bail and OR procedures, see California Judges Benchguide 55: *Bail and Own-Recognizance Release* (Cal CJER).

9. [§91.24] Receiving Defendant's Plea

Following the reading of the accusatory pleading and the appointment of counsel, the court must ask the defendant if the defendant pleads guilty or not guilty to the accusatory pleading. [Pen C §988](#). See [Pen C §1016](#) (possible pleas). When the defendant is not ready to enter a plea, the court must continue the matter for at least one day. [Pen C §990](#). If the defendant refuses to answer, the court must enter a plea of not guilty. [Pen C §1024](#). Any plea must be entered by the defendant himself or herself in open court. [Pen C §1018](#).

No-contest plea. A plea of no contest has the same legal effect as a plea of guilty and is subject to the court's approval. Before accepting a plea of no contest, the court should advise the defendant that a plea of no contest shall be considered the same as a plea of guilty and that the

defendant will be sentenced as if he or she pleaded guilty. [Pen C §1016\(3\)](#) (court “shall ascertain” whether defendant understands nature of no-contest plea). A no-contest plea may not be used against the defendant as an admission in any civil suit based on the same act. [Pen C §1016\(3\)](#). A defendant who pleads no contest must be advised of and waive the same constitutional rights as a defendant who pleads guilty.

Plea on prior conviction. If the defendant pleads guilty or not guilty and the complaint charges a prior conviction, the court must ask the defendant whether he or she admits or denies the previous conviction. The response must be entered in the minutes. The defendant’s refusal to answer is equivalent to a denial. [Pen C §1025\(a\)](#). If the defendant admits the prior conviction and pleads not guilty to the current charges, the prior conviction cannot be read to the jury or alluded to during trial except as otherwise provided by law. [Pen C §1025\(e\)](#).

10. [§91.25] Setting Dates for Subsequent Proceedings

At arraignment, the court, unless it orders otherwise for good cause, must set dates for trial, a readiness conference, and a hearing on all pretrial motions. It must also specify the dates for filing and service of these motions and responses. [Cal Rules of Ct 4.100\(1\)](#).

The court must set the case for the next court hearing, depending on the defendant’s plea. If the defendant pleads not guilty, the court must set the case for a preliminary examination, unless it permits waiver by agreement of the defense and prosecution. See [Pen C §§738, 859b](#) (time limitations), [860](#) (waiver). The preliminary examination must be held at least two but not more than ten court days after the defendant’s arraignment or plea, whichever is later. See [Pen C §§859b, 871.6](#) (consequences of setting beyond [Pen C §859b](#) time limits); *In re Samano* (1995) [31 CA4th 984, 990, 37 CR2d 491](#) (if prosecuting attorney is unable to timely proceed but shows good cause, court may set preliminary examination beyond ten-day limit, but defendant must be released on own recognizance). If the defendant pleads not guilty and the preliminary examination is waived, with both the court’s and prosecution’s agreement, the court must make an order holding the defendant to answer. The prosecuting attorney must then file an information within 15 days. [Pen C §860](#).

If the defendant pleads guilty or no contest to a noncapital felony, the court must appoint a time for pronouncing judgment within 20 judicial days of the plea. [Pen C §§859a\(b\), 1191](#). The court must refer the case to the probation department if the defendant is eligible for probation. [Pen C §§859a\(b\), 1191](#). The court must also set bail. See [§§91.20–91.23](#).

If the defendant pleads guilty or no contest to a misdemeanor, judgment and sentencing must not be less than six hours or more than five

days after the plea, unless the defendant waives this time limitation or probation is being considered. See [Pen C §1449](#). Courts frequently impose a misdemeanor sentence immediately on acceptance of the plea, after obtaining the defendant’s waiver of the [Pen C §1449](#) time limits.

B. Taking Plea of Guilty or No Contest

1. [§91.26] Advisement and Waiver of Rights

A defendant’s guilty or no-contest plea is valid only if it is voluntarily and knowingly made. *Boykin v Alabama* (1969) 395 US 238, 242, 89 S Ct 1709, 23 L Ed 2d 274. Before accepting the plea or an admission of charged enhancements, the trial court must expressly advise the defendant and obtain his or her waiver of the constitutional rights to trial by jury, to confront and cross-examine witnesses, and against self-incrimination. The record must show explicit advisements and waivers of these constitutional rights. 395 US at 243; *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577; see *People v Howard* (1992) 1 C4th 1132, 1178–1179, 5 CR2d 268.

There is no specific formula for advising a defendant of his or her constitutional rights. *People v Wharton* (1991) 53 C3d 522, 582, 280 CR 631. All that is required is that the record must show by direct evidence, in light of the totality of circumstances, that the defendant was fully aware of these rights. *People v Murillo* (1995) 39 CA4th 1298, 1304, 46 CR2d 403. However, it is best for the court to ensure that there is an adequate record for appeal and to protect the validity of a defendant’s guilty plea by making its advisements, defendant’s understanding of his or her rights, and waivers as complete and explicit as possible. 39 CA4th at 1304.

A court may rely on a defendant’s validly executed waiver form as a proper substitute for a personal admonition. *People v Panizzon* (1996) 13 C4th 68, 83, 51 CR2d 851. If the court, in questioning the defendant and defense counsel, has reason to believe the defendant does not fully comprehend his or her rights, the court must conduct further inquiry of the defendant to ensure a knowing and intelligent waiver of the defendant’s rights. 13 C4th at 83. Otherwise, the court need only determine whether the defendant has read and understood the contents of the form, and discussed them with defense counsel. 13 C4th at 83.

A mere evidentiary admission by the defendant does not implicate the *Boykin-Tahl* requirements. *People v Gaul-Alexander* (1995) 32 CA4th 735, 746, 38 CR2d 176. When the defendant pleads not guilty and stipulates to one or more, but not all, of the evidentiary facts necessary for a conviction of the charged offense, the concerns that prompt the requirements of advice and waiver are not present. 32 CA4th at 746. The advisements and waivers are required, however, when the defendant submits a “slow plea,” *i.e.*, an agreed-on disposition of the case that does

not require the defendant to admit guilt but results in a finding of guilt. 32 CA4th at 747–750. See *People v Adams* (1993) 6 C4th 570, 576, 24 CR2d 831 (*Boykin-Tahl* requirements apply when defendant agrees to submit case on record of preliminary hearing).

2. [§91.27] Advisement of Direct Consequences of Plea

The record must demonstrate that the defendant understands the nature of the charges and the direct consequences of his or her plea or admission. *People v Walker* (1991) 54 C3d 1013, 1022, 1 CR2d 902, overruled on other grounds in 54 C4th at 177, 183. This requirement extends only to the primary and direct penal consequences of the imminent conviction. It is not constitutionally required, but is merely a judicially declared rule of criminal procedure. *People v Barella* (1999) 20 C4th 261, 266, 84 CR2d 248.

A consequence is “direct” if it has a definite, immediate, and largely automatic effect on the range of the defendant’s punishment. *People v Moore* (1998) 69 CA4th 626, 630, 81 CR2d 658. A consequence is “collateral” if it does not inexorably follow from a conviction of the offense involved in the plea, *e.g.*, the possibility of enhanced punishment in the event of a future conviction, the possibility of probation revocation in another case, or limitations on the ability to earn conduct and work credits while in prison. 69 CA4th at 630–633 (court was not required to advise defendant that he might eventually be subject to additional confinement under *Sexually Violent Predator Act* (Welf & I C §§6600 *et seq.*), because any such confinement was collateral, not direct or penal, consequence of plea); *People v Aguire* (2011) 199 CA4th 525, 528–529, 131 CR3d 785 (court was not required to advise defendant that his plea might be used against him in federal proceedings, as that was collateral consequence of plea).

The court must advise the defendant of the following direct consequences of conviction:

(1) *Permissible range of punishment provided by statute, including fine, penalty assessments, and state surcharge.* *Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302. For a chart summarizing felony sentencing terms, see CJER Felony Sentencing Handbook (Cal CJER).

(2) *Restitution to crime victim for economic losses incurred as a result of the charged offense.* Pen C §1202.4(a); *People v Rowland* (1997) 51 CA4th 1745, 1752–1753, 60 CR2d 351. See California Judges Benchguide 83: *Restitution* (Cal CJER).

(3) *Restitution fine (minimum \$280 to maximum \$1000).* Note: The minimum fine increases to \$300 in 2014. Pen C §1202.4(b); *People v*

Villalobos (2012) 54 C4th 177, 186, 141 CR3d 491. See California Judges Benchguide 83: *Restitution* (Cal CJER). The court must order the fine unless there are clear and compelling reasons for not doing so. Pen C §1202.4(c).

(4) *Imposition of probation revocation restitution fine.* If the defendant's sentence includes a period of probation, the court must impose an additional probation revocation fine in the same amount as that imposed under Pen C §1202.4(b). Pen C §1202.44. The fine applies to both defendants who are placed on probation after the court has suspended imposition of sentence and to defendants who are placed on probation after the court has suspended execution of sentence. *People v Taylor* (2007) 157 CA4th 433, 436–439, 68 CR3d 682. This additional fine must be suspended unless the defendant's probation is revoked. Pen C §1202.44; see California Judges Benchguide 83: *Restitution* (Cal CJER).

(5) *Imposition of parole revocation restitution fine.* Additionally, if the defendant's sentence includes a period of parole, the court must impose an additional parole revocation restitution fine in the same amount as that imposed under Pen C §1202.4(b). Pen C §1202.45(a). This additional fine must be suspended unless the defendant's parole is revoked. Pen C §§1202.45(c), 3060.1; see California Judges Benchguide 83: *Restitution* (Cal CJER).

(6) *Imposition of postrelease community supervision revocation and mandatory supervision revocation restitution fines.* When a defendant is convicted of a crime and is subject to either postrelease community supervision under Pen C §3451 or mandatory supervision under Pen C §1170(h)(5)(B), the court must impose an additional postrelease community supervision revocation restitution fine or mandatory supervision revocation restitution fine in the same amount as that imposed under Pen C §1202.4(b). Pen C §1202.45(b). These fines must be suspended unless the postrelease community supervision or mandatory supervision is revoked. Pen C §1202.45(c); see California Judges Benchguide 83: *Restitution* (Cal CJER).

(7) *Probation ineligibility.* *People v Caban* (1983) 148 CA3d 706, 711, 196 CR 177 (probation consideration precluded by Pen C §1203.06(a)(1)(B) for conviction on plea that included admission of gun use in commission of robbery; court's failure to advise defendant regarding probation consequences of admission was prejudicial error).

(8) *Maximum parole period following completion of prison term.* *In re Carabes* (1983) 144 CA3d 927, 932, 193 CR 65 (parole period is direct penal consequence); see *People v McMillion* (1992) 2 CA4th 1363, 1367, 3 CR2d 821 (defendant was not properly informed of parole period). See

[Pen C §§3000, 3000.1](#). The court is not required, however, to advise the defendant of a limit on the availability of good-time or work-time credits, because parole eligibility is not a direct consequence of the conviction. *People v Barella, supra*, 20 C4th at 265–270 (court did not err in failing to advise three-strikes defendant that he would not be eligible for parole until he had served four-fifths of his sentence).

(9) *Registration requirements, if any. Bunnell v Superior Court, supra*, 13 C3d at 605. See [Pen C §§186.30](#) (gang-related crime offenders), [290](#) (sex offenders), [457.1](#) (specified arson offenders); [Health & S C §11590](#) (specified narcotics offenders). When advising of the sex registration requirement under [Pen C §290](#), the court must state that such registration is a lifetime obligation. *People v Zaidi (2007) 147 CA4th 1470, 1481–1486, 55 CR3d 566*.

(10) *Revocation or suspension of driving privilege. People v Dakin (1988) 200 CA3d 1026, 1033, 248 CR 206*.

(11) *If defendant is not a United States citizen, potential effect on his or her immigration status. Pen C §1016.5*. The court must advise the defendant that if he or she is not a citizen, a conviction *may* or, with certain offenses, *will* result in deportation, exclusion from admission to the United States, or denial of naturalization. [Pen C §1016.5\(a\)](#); see also *Padilla v Kentucky (2010) 559 US 356, 130 S Ct 1473, 1483, 176 L Ed 2d 284*; see also Judicial Council form CR-101 (Plea Form, With Explanations and Waiver of Rights—Felony). The court is required to warn the defendant of each of these three possible immigration consequences before the defendant enters a plea. *People v Gontiz (1997) 58 CA4th 1309, 1316–1319, 68 CR2d 786*, disapproved on other grounds in 23 C4th 183, 197–198 (guilty plea vacated based on court’s failure to warn defendant of possibility of exclusion). Although [Pen C §1016.5](#) does not apply to United States citizens, the court must give the required advisement to all defendants and may not inquire about the defendant’s legal status. See [Pen C §1016.5\(d\)](#); *People v Aguilera (1984) 162 CA3d 128, 133, 208 CR 418* (discussion of advisement, waiver, and withdrawal of plea issues under [Pen C §1016.5](#)). A court is not required to give a [Pen C §1016.5](#) advisement when a defendant submits a “slow plea” in which the defendant submits his or her case on stipulated facts. *People v Limones (1991) 233 CA3d 338, 345, 284 CR 418* ([Pen C §1016.5](#) only applicable to guilty and no-contest pleas).

- **JUDICIAL TIP:** Defense counsel is constitutionally required to advise a noncitizen defendant of the immigration consequences of a guilty or no contest plea. *Padilla v Kentucky (2010) 559 US 356, 130 S Ct 1473, 1483, 176 L Ed 2d 284*. [Penal Code §1016.5](#)

requires the court to administer the following advisement on the record to the defendant: “If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged *may* have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” However, in *Padilla*, the United States Supreme Court said, regarding the duty of defense counsel, that “[w]hen the law is not succinct and straightforward, . . . a criminal defense attorney need do no more than advise a noncitizen that pending criminal charges may carry a risk of adverse immigration consequences. *But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.*” 130 S Ct at 1473, 1483. Trial judges should be aware of the distinction and should guard against deficient advice when taking a plea. If the court does not ensure that proper advice is given, the plea may be defective.

(12) *If the defendant is a youthful offender (under age 21 when apprehended), possible commitment to the California Department of Corrections and Rehabilitation (CDCR) Division of Juvenile Justice.* [Welf & IC §§1731.5, 1766](#).

(13) *If the defendant is a narcotics addict, or potential addict, possible commitment to the California Rehabilitation Center for treatment.* See [Welf & IC §3051](#). *Bunnell v Superior Court, supra*, 13 C3d at 605.

The court must also advise a defendant, before taking a guilty plea under a plea bargain, that the trial court may choose to sentence the defendant other than in conformity with the bargain, but that the defendant will be permitted to withdraw the guilty plea in such an event. [Pen C §1192.5](#); *People v Johnson* (1974) 10 C3d 868, 872, 112 CR 556 (trial court must permit defendant to withdraw plea on remand).

A defendant who pleads guilty to a felony before being held to answer on a “wobbler” offense charged in a complaint need not be advised that the magistrate loses the power under [Pen C §17\(b\)\(5\)](#) to reduce the offense to a misdemeanor at or before the preliminary hearing. *People v Kunkel* (1985) 176 CA3d 46, 54, 221 CR 359.

➤ **JUDICIAL TIP:** When a defendant receives a sentence of “state prison—execution of sentence suspended” the court is not required to advise him or her that the felony may not be reduced to a misdemeanor after he or she finishes with probation, even though the offense is a “wobbler.” *People v Wood* (1998) 62 CA4th 1262, 1270, 73 CR2d 308. However, the court may wish to

do so. Many defendants are surprised when they return to court to have their case expunged as a misdemeanor, and the case cannot be expunged. This inhibits future job prospects.

3. [§91.28] Factual Basis

Before accepting a negotiated plea of guilty or no contest in a felony case, the court must determine that there is a factual basis for the plea. [Pen C §1192.5](#); *People v Holmes* (2004) 32 C4th 432, 438–442, 9 CR3d 678. The factual basis required by [Pen C §1192.5](#) does not require more than establishing a prima facie factual basis for the charge. The court need not interrogate the defendant about possible defenses to the charge, nor does it have to be convinced of the defendant’s guilt. 32 C4th at 441.

In order to comply with [Pen C §1192.5](#), the court must garner information regarding the factual basis either from the defendant or defense counsel. 32 C4th at 442. If the court decides to question defendant regarding the factual basis, the judge may develop the factual basis for the plea on the record by having the defendant describe the conduct that gave rise to the charge, or questioning the defendant regarding the detailed factual basis described in the complaint or written plea agreement. If the court questions defense counsel regarding the factual basis, counsel may stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea form. 32 C4th at 442. The practice of many courts is to ask the prosecutor to recite a brief statement of facts, which should include all the elements of the crime, including a reference to the police report, then ask defense counsel to agree to the facts as stated by the district attorney and as contained in the police report. Trial counsel’s bare stipulation that there is a factual basis, without reference to any documents in the record containing factual allegations, is insufficient to establish an adequate factual basis for the defendant’s plea. *People v Willard* (2007) 154 CA4th 1329, 1333–1335, 65 CR3d 488 (court held that *Holmes, supra*, makes clear that there must be some reference to a factual source to support the essential elements of the crime).

➡ JUDICIAL TIPS:

- Although *People v Holmes, supra*, allows the factual basis to be established from reference to the police report alone, the better practice is to have the record reflect an affirmative statement made in the presence of the defendant and agreed to by counsel. Such a discussion on the record may help the court rule on a subsequent motion to withdraw the plea based on a lack of understanding of the charges.

- Although the factual basis requirement of [Pen C §1192.5](#) applies only to negotiated pleas, courts should inquire as to the existence of a factual basis for all guilty and no-contest pleas. By doing so, the court ensures the voluntariness of the plea, protects against the entry of a plea by an innocent defendant, and makes a record against appellate or collateral attacks on the plea. See *People v Hoffard* (1995) 10 C4th 1170, 1183–1184, 43 CR2d 827 (approving of this practice followed by many courts, but declining to impose a duty on courts to do so).

4. [§91.29] Additional Waivers

Arbuckle waiver. When a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge. If the sentence is to be imposed by another judge, the court should ask the defendant or defense counsel to enter an *Arbuckle* waiver at the time of plea. If the defendant's case is assigned to a different judge for sentencing and an *Arbuckle* waiver was not given, the defendant may withdraw the guilty plea. *People v Arbuckle* (1978) 22 C3d 749, 756–757, 150 CR 778.

The *Arbuckle* rule does not apply when the judge's unavailability arises from circumstances clearly beyond the power of the court, such as the judge's resignation, retirement, illness, or death. *People v Jackson* (1987) 193 CA3d 393, 403, 238 CR 327 (illness); *People v Dunn* (1986) 176 CA3d 572, 575, 222 CR 273 (retirement); *People v Watson* (1982) 129 CA3d 5, 7, 180 CR 759 (death). However, when the judge becomes unavailable for reasons beyond the court's power, a defendant is not entitled to withdraw the plea unless there is evidence that the exercise of individualized judicial discretion is a material element of the plea agreement. *People v McIntosh* (2009) 177 CA4th 534, 545, 98 CR3d 901.

Harvey waiver. Also implicit in a plea bargain is the understanding that the defendant will not suffer any adverse sentencing consequences by reasons of facts underlying, and solely pertaining to any dismissed counts or cases that are not transactionally related to the crime(s) for which the defendant is being sentenced. If the court will be considering such counts or cases for the purposes of determining restitution or punishment, the court should secure the defendant's consent to do so (*Harvey* waiver). *People v Harvey* (1979) 25 C3d 754, 757–759, 159 CR 696; *People v Beck* (1993) 17 CA4th 209, 215, 21 CR2d 250. A waiver is not required if the dismissed counts are transactionally related. *People v Harvey, supra*, 25 C3d at 758; *People v Bradford* (1995) 38 CA4th 1733, 1737–1739, 45 CR2d 757. See also *People v Beagle* (2004) 125 CA4th 415, 420–421, 22 CR3d 757; *People v Martin* (2010) 51 C4th 75, 77, 119 CR3d 99 (court

may not impose a probation condition based on dismissed charges absent *Harvey* waiver).

Cruz waiver. Penal Code §1192.5 allows a defendant the right to withdraw his or her plea if the court withdraws its approval of the plea and imposes a harsher sentence on the defendant's failure to appear for sentencing. Pen C §1192.5. However, as part of the plea agreement, the court may ask the defendant to waive his or her right to withdraw a plea under Pen C §1192.5. This is called a "*Cruz* waiver." *People v Cruz* (1988) 44 C3d 1247, 1254 n5, 246 CR 1; *People v Masloski* (2001) 25 C4th 1212, 1216–1223, 108 CR2d 484.

5. [§91.30] Inquiry for "Package Deal"

In a package deal, the prosecutor offers the defendant an opportunity to plead guilty to a lesser charge and receive a lesser sentence, contingent on a guilty plea by all codefendants. The trial court has a duty to conduct an inquiry into the totality of the circumstances to determine whether, in fact, a package-deal plea has been unduly coerced or freely and voluntarily given. *In re Ibarra* (1983) 34 C3d 277, 287, 193 CR 538.

The court's examination of the circumstances must at least consider (34 C3d at 288):

(1) *Whether the inducement for the plea is proper*. The court should be satisfied that the prosecution has not misrepresented facts to the defendant and that the substance of the inducement is within the proper scope of the prosecutor's business. The prosecutor must also have a reasonable and good-faith case against the third parties to whom leniency is promised.

(2) *The factual basis for the guilty plea*. A plea that is not supported by the evidence is less likely to have been the product of the defendant's free will.

(3) *The nature and degree of coerciveness*. The court should consider psychological pressures if a third party, who has been promised leniency, is a close friend or family member whom the defendant feels compelled to help or if the defendant has been subjected to a specific physical threat (rather than a generalized fear of physical attack).

(4) *Whether a promise of leniency to a third party was a significant consideration for the defendant in choosing to plead guilty*.

IV. SCRIPTS AND FORMS

A. [§91.31] Felony Plea of Guilty or No Contest

(1) *Call the case:*

In the matter of the People of the State of California v _____, case number _____. Counsel, please state your appearances.

Are you [Mr./Ms.] [name of defendant]? What is your full true name and the date of your birth?

[Mr./Ms.] [name of defendant], if at any time during these proceedings there is anything that you do not understand or which confuses you, please stop me so that either the court or your attorney can clarify it or explain it to you.

(2) *Proposed disposition:*

I understand that there is a change of plea and a negotiated disposition. Is that correct?

[Mr./Ms.] [name of prosecutor], will you please state the terms of the proposed sentence. What are your reasons for this recommendation?

[Mr./Ms.] [name of defense counsel], do you concur in the terms of the plea as stated?

[Mr./Ms.] [name of defendant], do you understand what these attorneys have said? [Repeat proposed disposition, if appropriate.] Have you discussed it with [Mr./Ms.] [name of prosecutor]? Is that what you are prepared to do?

(3) *Advisement and waiver of rights:*

[Mr./Ms.] [name of defendant], before I take your plea and sentence you, you must also understand and give up certain constitutional and statutory rights.

a. You have the right to a jury trial.

b. At your trial, you have a right to see and hear the witnesses against you testify under oath and, through your attorney, to question those witnesses.

c. You have the right to remain silent and not incriminate yourself.

d. You have the right to present a defense, that is, to testify in your own behalf, to present evidence and witnesses, and to use the court's

subpoena power to bring evidence and witnesses before the court for your defense.

e. You have the right to a preliminary hearing to determine if there is probable cause to believe that a felony has been committed and that you are the person who committed the crime. At a preliminary hearing, you have the same rights I just explained to you, except the right to have the matter heard by a jury.

By pleading [*guilty/no contest*] to these charges, you are giving up all these rights. In fact, you are incriminating yourself by pleading [*guilty/no contest*] to these charges. Do you understand that?

If you are admitting a prior conviction or special allegation, you have all the rights I have previously explained to you to contest the validity of these allegations. Do you understand that?

[*Mr./Ms.*] [*name of defendant*], have you discussed all these rights, including your right to a trial by jury, your right to confront and cross-examine witnesses, and your right against self-incrimination, with your attorney? Have you discussed your case and defense of your case with your attorney?

[*Mr./Ms.*] [*name of defendant*], do you understand each of these rights that I have explained to you? Do you have any questions?

With full knowledge and understanding of each of these rights, do you freely and voluntarily waive and give up all these rights?

Counsel, do you join in those waivers? Do the People join?

(4) *Consequences of plea:*

[*Mr./Ms.*] [*name of defendant*], before I take your plea, you must understand the potential consequences.

a. *Potential state prison sentence or county jail sentence under Pen C §1170(h)(5)(B):*

The potential [*state prison/ county jail*] sentence for the offense(s) is [*give low, middle, high terms; add potential maximum terms for enhancements*].

[*For a straight plea with no conditions, add:*]

Do you understand the maximum term you are facing as a result of this plea?

[For conditional plea(s) ([Pen C §1192.5](#)), add as appropriate:]

[Promise of no state prison/county jail initially:]

The understanding is that you will not be sentenced to [state prison/county jail] at the outset and will be placed on probation. However, if you violate the terms and conditions of probation, you may then be sentenced to county jail or state prison, for up to the maximum sentence of ___ years, which may include a period of mandatory supervision under [Penal Code section 1170\(h\)\(5\)\(B\)](#) if sentenced to county jail. Do you understand that?

[Limit on state prison or county jail term:]

The understanding is that you will receive no more than the [low/middle/high] term of ___ years in county jail or state prison at the outset. Do you understand that?

[If defendant eligible for probation, add:]

You are eligible to be considered for probation. Probation in your case could be up to five years [or maximum prison term if higher]. The court may impose conditions of probation that may relate to your crime, including a term in the county jail of up to _____ [days/months] [state any mandatory minimum terms].

In the event that you are granted probation and then violate its terms and conditions, you could then be sentenced to county jail or state prison for up to the [upper term/maximum penalty] of ___ years, which may include a period of mandatory supervision under [Penal Code section 1170\(h\)\(5\)\(B\)](#) if sentenced to county jail. Do you understand that?

[Stipulated prison term, with no probation:]

The understanding is that you will be committed to state prison for the [low/middle/high] term of ___ years. You will not be considered for probation or for a lesser term in prison. Do you understand that?

[For no-probation offense, add:]

Do you understand that you will not be eligible for probation and you will be sentenced to [state prison/county jail] as a result of this plea?

[For a strike offense under Three-Strikes Law ([Pen C §§667 and 1170.12](#)), add:]

Do you understand that the crime to which you are pleading guilty is a “serious” or “violent” felony, and as such is a “strike” under the Three-Strikes Law?

Do you understand that if you later commit any felony, you will be subject at that time, depending on the number of strikes you have, to a mandatory state prison sentence of twice the term otherwise provided or a term of at least 25 years to life?

[For a felony offense with admission of a prior “strike,” add one of the following alternatives:]

[One strike:]

Do you understand that because you are pleading to a felony and are admitting that you have suffered a prior strike, you will not be eligible for probation and you are subject to a mandatory state prison sentence of twice the term otherwise provided: *[state possible terms, including enhancements]*?

[Two or more strikes:]

Do you understand that because you are pleading to a felony and are admitting that you have suffered two or more prior strikes, you will not be eligible for probation and you are subject to a mandatory state prison sentence of *[state minimum term, including enhancements]* to life?

b. *Parole (Pen C §§3000(b), 3000.1):*

[Alternative 1. Promise of no state prison initially:]

In the event that you violate probation and are committed to county jail or state prison, you are also subject to a maximum parole period of ___ years. Do you understand that?

[Alternative 2. Prison term or straight plea:]

Following a prison commitment, you are also subject to a maximum parole period of ___ years. Do you understand that?

c. *Fine*

You can be ordered to pay a fine of up to \$_____.

d. *Penalty assessments, fees and state surcharge:*

In addition, should a fine be imposed, you will be required to pay penalty assessments, fees, and a state surcharge that will significantly

increase the amount you must pay. [See *Pen C* §§1464, 1465.7, 1465.8; *Govt C* §§70372(a), 70373, 76000, 76000.5, 76104.6, 76104.7.]

e. *Victim restitution.*

You will also be ordered to pay restitution directly to the victim(s) of your offense(s) in an amount determined by the court to fully reimburse the victim(s) for economic losses. [See *Pen C* §1202.4(a).]

f. *Restitution fine:*

Additionally, the sentencing judge will impose a restitution fine of not less than \$280 nor more than \$10,000. [Note: *The minimum fine increases to \$300 in 2014; see Pen C §1202.4(b).*]

[If sentence includes a period of parole:]

The judge will assess an additional, identical parole revocation restitution fine, but this fine will be suspended unless your parole is revoked. If parole is revoked, the fine will be reinstated against you. [See *Pen C* §§1202.45(a), (c), 3060.1.]

[If sentence includes a period of probation:]

The judge will impose an additional, identical probation revocation restitution fine, but this fine will be suspended unless your probation is revoked. If probation is revoked, the fine will be reinstated against you. [See *Pen C* §1202.44.]

[If the sentence includes postrelease community supervision under Pen C §3451:]

The judge will impose an additional, identical postrelease community supervision revocation restitution fine, but this fine will be suspended unless your postrelease community supervision is revoked. If postrelease community supervision is revoked, the fine will be reinstated against you. [See *Pen C* §1202.45(b), (c).]

[If the sentence includes mandatory supervision under Pen C §1170(h)(5)(B):]

The judge will impose an additional, identical mandatory supervision revocation restitution fine, but this fine will be suspended unless your mandatory supervision is revoked. If mandatory supervision is revoked, the fine will be reinstated against you. [See *Pen C* §1202.45(b), (c).]

[Add if crime with a victim:]

The judge will order that you pay restitution directly to the victim(s) of your offense(s) in an amount determined by the court to fully reimburse the victim(s) for economic losses. [See [Pen C §1202.4\(f\)](#).]

g. *Registration with law enforcement* ([Pen C §§186.30, 290, 457.1; Health & S C §11590](#)). *Add as appropriate:*

You will be required to register as a [*gang-related/sex/narcotics/arson*] offender with the chief of police or sheriff in the city or county in which you reside. Registration as a sex offender is a lifelong requirement. Do you understand that?

h. *Driving privilege revocation or suspension* ([Veh C §§13200–13202.7, 13210, 13350–13352.6, 13357, 13361](#)). *Add as appropriate:*

The [*Court/Department of Motor Vehicles*] [*will/may*] revoke or suspend your driver’s license. Do you understand that?

i. *Vehicle forfeiture* ([Veh C §23596](#)). *Add as appropriate:*

If you are the registered owner of the vehicle involved in the offense, as a result of your plea, the vehicle may be declared a nuisance and ordered forfeited. Do you understand that?

j. *Immigration consequences* ([Pen C §1016.5\(a\)](#); *see also Judicial Council Form CR-101 Plea Form, with Explanations and Waiver of Rights—Felony*):

If you are not a citizen of the United States, your plea *may* or, with certain offenses, *will* result in your deportation, exclusion from admission to the United States, and denial of naturalization under the laws of the United States. Do you understand that?

Do you need to discuss any immigration consequences with your lawyer?

☛ **JUDICIAL TIP:** The court must give the [Pen C §1016.5](#) advisement to all defendants because the court may not inquire into a defendant’s legal status. See [Pen C §1016.5\(d\)](#); *People v Aguilera* (1984) 162 CA3d 128, 133, 208 CR 418. For discussion, see [§91.26](#).

k. *Probation/parole revocation:*

Are you currently on probation or parole for any other criminal offense?

Do you understand that your plea in this case may constitute a violation of your [*probation/parole*], result in its revocation, and the imposition of sentence?

1. Other commitment possibilities. Use the following advisements, as appropriate, if commitment to the CDCR Division of Juvenile Justice (DJJ) or the California Rehabilitation Center (CRC) is an option.

(i) *Youthful offender (DJJ):*

How old are you?

[If defendant was under age 21 when apprehended, add (Welf & I C §§1731.5, 1766).]

You could be sentenced to the Division of Juvenile Justice for ____ [*maximum DSL sentence (upper term)*]. Do you understand that?

Note: A defendant is ineligible for DJJ commitment if the defendant is 18 years old and charged as a repeat sexual offender (Welf & I C §1732) or with a Pen C §1192.7 serious felony (Welf & I C §1732.5).

(ii) *Rehabilitation of narcotics addict (CRC) (Welf & I C §§3051, 3052(a) (limits on CRC eligibility), 3201):*

Ultimately, if the judge before whom you appear for sentencing determines that you are a narcotics addict or in imminent danger of becoming one, he or she could commit you to the California Rehabilitation Center for treatment, and you could remain subject to its jurisdiction and control for up to the maximum term of ____ years. Do you understand that?

(5) *Other waivers, if applicable:*

a. *Arbuckle waiver (People v Arbuckle (1978) 22 C3d 749, 757, 150 CR 778) when defendant will be sentenced by a different judge:*

Do you understand that another judge will be sentencing you? Do you agree to that?

b. *Harvey waiver (People v Harvey (1979) 25 C3d 754, 758, 159 CR 696) if court will consider dismissed charges at sentencing:*

[Mr./Ms.] [*name of defendant*], although count(s) _____ will be dismissed, it is agreed that the sentencing judge may nevertheless consider the facts underlying the dismissed count(s) for the purpose of determining restitution and for deciding your sentence for the count(s) to which you are entering your plea. Do you understand that? Do you agree to that?

(6) *Plea not binding on sentencing judge (Pen C §1192.5):*

You are further advised that the conditional plea(s) we are discussing, namely [*describe plea(s)*], will not be binding on the judge before whom you appear for sentencing. If that judge disapproves of the plea(s) and conditions, you will be permitted to withdraw your plea(s) of [*guilty/no contest*], your not-guilty plea will be reentered, all dismissed charges will be reinstated, and your case will be scheduled for a preliminary hearing. Do you understand that?

(7) *Factual basis (Pen C §1192.5):*

[*Mr./Ms.*] [*name of prosecutor*], please state the factual basis for the plea.

[*Mr./Ms.*] [*name of defense counsel*], do you accept the factual basis as stated?

(8) *Voluntariness of the plea:*

Have you had enough time to talk to your attorney?

Have you told your attorney all the facts and circumstances that are known to you about your case?

Other than what has been stated here in open court, has anyone made you any other promises in connection with penalty or punishment or anything else in order to convince you to plead guilty?

Have you or anyone else been threatened in any way to convince you to plead guilty?

Are you under any medications, or have you recently consumed any drugs or alcohol?

Before entering your plea, do you have any questions about what you are doing today?

[*Mr./Ms.*] [*name of defense counsel*], do you believe that you have had enough time to discuss this case with your client? Have you discussed [*his/her*] rights, defenses, and the possible consequences of [*his/her*] plea with [*him/her*]? Are you satisfied your client understands these things?

[*Mr./Ms.*] [*name of defendant*], are you prepared to enter your plea?

(9) *Taking the plea:*

Counsel, will you waive a full reading of the complaint?

[Mr./Ms.] [name of defendant], you are charged in the complaint [in count _____] with a [felony/misdemeanor] violation of section ____ of the _____ Code, in which it is alleged that you [read substantive allegation of the complaint]. To that charge, what is your plea?

[If no-contest plea ([Pen C §1016\(3\)](#)):]

For these purposes, a plea of no contest is the same as a plea of guilty. If you plead no contest, I will find you guilty on the basis of your plea and you will be sentenced as if you pleaded guilty. Do you still wish to plead no contest?

[Take admissions to enhancement and no-probation allegations:]

Do you admit that the allegation of _____ is true?

Do you admit that you were previously convicted of a violation of section _____ of the _____ Code?

Does counsel join in the waivers and concur in the plea?

(10) *Findings and acceptance of plea:*

The court finds that the defendant has expressly, knowingly, understandingly, and intelligently waived [his/her] statutory and constitutional rights. The court further finds that the plea was freely and voluntarily made with an understanding of the nature of the charges pending as well as the consequences of the plea. The court finds there is a factual basis for the plea. The court accepts the plea and finds the defendant guilty. [Find admitted allegations and prior convictions to be true.]

[For offense determined to be a misdemeanor under [Pen C §17\(b\)\(5\)](#), add:]

I determine the offense to be a misdemeanor under [Penal Code section 17\(b\)\(5\)](#).

[For dismissal of remaining counts, add:]

Is there a motion on behalf of the People concerning the remaining counts?

(11) *Probation referral; setting time for pronouncement of judgment* ([Pen C §§859a, 1191](#)):

The case is referred to the Probation Department for a presentence investigation and report. [Pronouncement of judgment and sentencing is set for [date] at __ __.m. in this Department (within 20 judicial days after plea).]

[*Alternative 1. If no bail:*]

[*Bail is exonerated.*] Defendant is remanded to the custody of the Sheriff of _____ County without bail.

[*Alternative 2. Bail or OR release:*]

[*Mr./Ms.*] [*name of defendant*], you may remain free on [*the bail you have previously posted/your own recognizance*]. You must go immediately to the Probation Department today, cooperate in its investigation, and keep all its appointments. You must return to [*specify court*] on [*date*], at ___ .m. for sentencing. Do you understand? You are excused.

(12) Cruz waiver (see *People v Cruz (1988) 44 C3d 1247, 1254 n5, 246 CR 1*) when defendant is released from custody in exchange for his or her promise to appear for sentencing.

[*Mr./Ms.*] [*name of defendant*], the court is allowing you to surrender at a later date to begin serving time in custody. You have agreed that if you fail to appear on the date set for surrender or sentencing without a legal excuse, your plea will become an “open plea” to the court, you will not be allowed to withdraw your plea, and you may be sentenced up to the maximum allowed by law.

B. [§91.32] Proposition 36 Conditional Plea of Guilty or No Contest

BULLETIN: Penal Code §§1210, 1210.1, and 3063.1 were amended by Stats 2006, ch 63 (SB 1137), effective July 12, 2006, to allow incarceration of offenders placed on Proposition 36 drug probation who relapse during treatment. In 2009, *Gardner v Schwarzenegger (2009) 178 CA4th 1366, 1377, 101 CR3d 229*, enjoined enforcement of the amendments, holding that the provisions of SB 1137, allowing incarceration for drug-related probation violations, were inconsistent with the purpose of Proposition 36.

Penal Code §§1210, 1210.1, and 3063.1 continue to reflect the SB 1137 amendments. Thus, the court should refer to the preamendment versions of those statutes.

Note: The following script is to be used when the court takes a plea of guilty or no contest from a defendant charged with a drug possession offense prior to conducting an investigation of the defendant’s eligibility for sentencing under Proposition 36 (Pen C §§1210 et seq). The plea is

conditioned on a finding of eligibility. If the defendant is found ineligible or the laboratory analysis proves negative for the presence of a controlled substance, the defendant may withdraw the plea. The taking of a conditional plea is but one way to proceed when presented with a potential Proposition 36 case. Some courts prefer to continue the case and have the eligibility investigation conducted before taking a plea.

(1) *Call the case:*

In the matter of the People of the State of California v _____, case number _____. Counsel, please state your appearances.

(2) *Description of conditional plea.*

[Mr./Ms.] [name of defendant], after discussing the matter with counsel and reviewing the available documentation, it appears to the court that you are eligible for sentencing under [Penal Code §1210.1](#). Before that determination is finalized, however, you must plead [guilty/no contest] to the agreed on charge(s), and a criminal records review must be conducted by Pretrial Services.

At the next court hearing, if it is determined from the criminal records review that you are not eligible for sentencing under [Penal Code §1210.1](#), you will have the right to withdraw your plea of [guilty/no contest] and resume defense of the charges set forth in the complaint. Also at the next court hearing, if it is determined from a laboratory analysis that the substance you possessed or that was in your urine or blood was not a controlled substance or was not in sufficient quantity to be analyzed, you will also have the right to withdraw your plea of [guilty/no contest] and resume defense of the charges set forth in the complaint, and those charges may be dismissed. But if it is determined that you are eligible and the laboratory analysis is positive for a controlled substance, the court will sentence you in accordance with [Penal Code §1210.1](#).

(3) *Description of treatment/probation terms.*

The court will impose drug treatment as a condition of probation in a manner and at a level either the court or the Probation Department deems appropriate based on a risk assessment performed by the Probation Department and a treatment assessment performed by the [name of assessment provider]. The treatment may last up to twelve months and may consist of outpatient treatment, in-patient residential treatment, narcotic replacement therapy, drug education or prevention courses, or a combination thereof. The court may also require participation in vocational training, family counseling, literacy training, and community service as a further condition of probation. The court may alter or intensify the treatment as may be appropriate. The treatment ordered by the court may be followed by up to six months of additional aftercare as the court or the

Probation Department finds appropriate. The court may require you to contribute to the cost of your treatment to the extent that you are able to do so.

You may also be required to submit to random drug testing, to refrain from the use of alcohol or illegal drugs, to refrain from associating with known drug users and from being present at any place where illegal drugs are used, and any other appropriate condition of probation.

(4) Probation revocation and the possibility of future incarceration.

Although [Penal Code §1210.1](#) prohibits imposition of incarceration as a condition of probation, you may be incarcerated for up to [*the maximum penalty*] __ [*months/years*] if you fail to complete the requirements of your drug treatment program or if you otherwise violate the terms of your probation.

(5) Dismissal of charges.

You may petition the court for dismissal of the charges on successful completion of the court-ordered drug treatment, including aftercare. If the court finds that you successfully completed drug treatment and substantially complied with the conditions of probation, the conviction will be set aside and the case dismissed. In that event, you will be released from all penalties and disabilities under California law resulting from the conviction except that you will not be permitted to own, possess, or have in your custody or control any concealable firearm, and will be subject to prosecution for such acts.

In addition, you may deny, in response to any question concerning your prior criminal record, that you were arrested for or convicted of the offense except that you must disclose the arrest and conviction in any questionnaire or application for public office, for a position as a peace officer, for licensure by any state or local agency, for contracting with the California State Lottery, or for purposes of serving on a jury.

(6) Query defendant regarding conditional plea.

[*Mr./Ms.*] [*name of defendant*], your attorney has told the court that you wish to enter a conditional plea of [*guilty/no contest*] so that your case can be referred to Pretrial Services for criminal records review, and to the Probation Department for a risk assessment and to the [*name of assessment provider*] for a treatment assessment. Do you have any questions about the conditional plea as I have described it?

[*Defendant responds.*]

[*Mr./Ms.*] [*name of defendant*] do you wish to proceed with the conditional plea?

[If defendant responds, “no,” continue with normal proceedings. If defendant responds, “yes,” continue.]

(7) *Waiver of constitutional rights.* Inform defendant of his or her constitutional rights and obtain waiver of those rights. Use script in §91.31(3).

(8) *Direct consequences of plea.* Advise the defendant of the direct consequences of the plea, in addition to the drug treatment program, *e.g.*, payment of restitution, registration with law enforcement. Use script in §91.31(4).

(9) *Arbuckle waiver* (*People v Arbuckle (1978) 22 C3d 749, 757, 150 CR 778*) when defendant will be sentenced by a different judge:

[Mr./Ms.] [name of defendant], you have the right to be sentenced by the judge who takes your plea. Do you waive that right?

Does defense counsel join?

(10) *Factual basis.* Determine factual basis for the plea. See §91.31(7).

(11) *Taking of plea.*

[Mr./Ms.] [name of defendant], you are charged in the complaint [in Count ____] with a felony violation of section ____ of the _____ Code. To that charge, what is your plea?

[If no-contest plea (*Pen C §1016(3)*):]

For these purposes, a plea of no contest is the same as a plea of guilty. If you plead no contest, I will find you guilty on the basis of your plea and you will be sentenced as if you pleaded guilty. Do you still wish to plead no contest?

(12) *Findings and acceptance of plea.*

The court finds that the defendant has expressly, knowingly, and intelligently waived [his/her] constitutional rights. The court further finds that the defendant has freely and voluntarily entered a conditional plea of [guilty/no contest] with an understanding of the consequences of the plea. The court finds that there is a factual basis for the plea. It is ordered that the defendant’s conditional plea of [guilty/no contest] and waiver of constitutional rights be accepted.

(13) *Probation referral; setting time for pronouncement of judgment.*

Pronouncement of judgment and sentencing is set for [date] at ____ .m. in this Department (*within 20 judicial days*). The case is referred to

Pretrial Services for a criminal records review, to the Probation Department for a risk assessment, and to [*name of assessment provider*] for a treatment assessment—all returnable on that date. [*Mr./Ms.*] [*name of defendant*], you are ordered to report within 48 hours to Pretrial Services, the Probation Department, and [*name of assessment provider*] at [*address*].

C. [§91.33] Judicial Council Form CR-101: Plea Form With Explanations and Waiver of Rights—Felony

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME	CR-101 FOR COURT USE ONLY
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
PLEA FORM, WITH EXPLANATIONS AND WAIVER OF RIGHTS—FELONY	CASE NUMBER:

- INSTRUCTIONS:**
- (1) Fill out this form if you want to plead guilty or no contest.
 - (2) Read this form carefully. For each item, if you understand and agree with what you read, put your initials in the box to the right of the item. For any item that does not apply to you or that you do not understand, leave the box blank.
 - (3) On page 6, sign and date the form under "DEFENDANT'S STATEMENT."
 - (4) Keep in mind that the court cannot give legal advice. If you have any questions about anything in this form, ask your attorney.

1. **CHARGES AND MAXIMUM TERM.** I want to plead guilty or no contest ("nolo contendere") to the charges and allegations listed below. I understand that the minimum and maximum penalties for the charges to which I am pleading guilty or no contest are listed below.

COUNT	CHARGES (SECTION & DESCRIPTION)	YEARS/MONTHS		PRIOR CONVICTIONS, ENHANCEMENTS, & SPECIAL ALLEGATIONS (SECTION & DESCRIPTION)	YEARS/MONTHS		TOTAL MAXIMUM TIME	
		MINIMUM	MAXIMUM		MINIMUM	MAXIMUM		
AGGREGATE MAXIMUM TIME OF IMPRISONMENT								

2. **PLEA AGREEMENT.** I understand that I must tell the court on this form about any promises anyone has made to me about the sentence I will receive or the sentence recommendations that will be made to the court. My attorney, the court, or the prosecutor has explained to me that if I plead guilty or no contest to the charges and admit the allegations listed above, the court will sentence me as follows:

- a. Check one: **State Prison** (or the Division of Juvenile Justice) **County Jail** for
- (1) _____ years and _____ months or
 (2) not less than _____ years and _____ months and/or not more than _____ years and _____ months.
 (3) Other: *(specify)*: _____
- b. **Probation** for _____ years under conditions to be set by the court, including:
- _____ days in the county jail or
 up to _____ days in the county jail.
- I understand that a violation of any of the conditions of probation, including failure to complete a drug education or treatment program, if ordered by the court, may cause the court to send me to county jail or state prison for up to the "Aggregate Maximum Time of Imprisonment" specified in item 1, which may include a period of mandatory supervision under Penal Code section 1170(h)(5)(B) if the court sends me to county jail.
- c. **Split Sentence (1170(h)(5)(B))**: _____ years and _____ days in the county jail and _____ years and _____ days on mandatory supervision under conditions set by the court.

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2. d. **Narcotics Addiction Confinement**

I understand that if the court finds that I am addicted to narcotics or in immediate danger of becoming a narcotics addict, the court may send me to a narcotics detention, treatment, and rehabilitation facility for up to the amount of time I would otherwise have served in prison.

e. **Open Plea**

1. I understand the maximum and minimum sentences for the charges and allegations stated on page 1. No one has made any other promises to me about what sentence the court may order.

2. I understand that I am not eligible for probation.

3. I understand that I will not be granted probation unless the court finds at the time of sentencing that this is an unusual case where the interests of justice would be best served by granting probation.

f. **Restitution, Statutory Fees, and Assessments**

I understand that the court will order me to pay the following amounts (if an amount is not yet known, "TBD" for "to be determined" is entered next to the \$); I must prepare financial disclosure statements to assist the court in determining my ability to pay; and refusal or failure to prepare the required financial disclosure statements may be used against me at sentencing:

1. \$ _____ to the Victim Restitution Fund
2. \$ _____ restitution to actual victims
3. \$ _____ restitution to the State of California, Victims of Crime Fund
4. \$ _____ court operations assessment
5. \$ _____ court facilities assessment
6. \$ _____ base fine plus any applicable penalties, assessments, and surcharges
7. \$ _____ other (specify): _____
8. \$ _____ other (specify): _____
9. An (additional) amount to be determined by the court at sentencing or such other hearing as the court may set.

g. **Parole Revocation or Probation Revocation Fine**

I understand that if I am sentenced to state prison, the court will impose a parole revocation fine, which will be collected only if my parole is later revoked. I also understand that if I am granted probation, the court will impose a probation revocation fine, which will be collected only if my probation is later revoked.

h. **Dismissal of Other Counts**

I understand that as part of the plea agreement bargain, the following counts will be dismissed after sentencing:

I understand and agree that the sentencing judge may consider facts underlying dismissed counts to determine restitution and to sentence me on the counts to which I am entering a plea.

i. **Other Terms (specify):**

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3. CONSEQUENCES OF MY PLEA

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a. No Contest ("Nolo Contendere") Plea

I understand that a no contest plea is the same as pleading guilty and that if I plead no contest I will be convicted and my no contest plea could be used against me in a civil case.

b. Parole and Postrelease Community Supervision

I understand that if I am sentenced to state prison or a narcotics treatment facility (1) I will be placed on parole or postrelease community supervision for up to _____ years after my release.

(2) If I abscond or the court tolls my supervision, the total time of parole or postrelease community supervision can be extended.

(3) If I violate any of the terms or conditions of my parole, I can be sentenced to county jail for up to 180 days for each violation, or returned to state prison for up to one year, up to a maximum of ____ years. If I violate any of the terms or conditions of postrelease community supervision, I can be sentenced to county jail for up to 180 days for each violation, for up to a maximum of 3 years.

c. Effect of Conviction on Other Cases

I understand that a conviction in this case may constitute a violation of any other current grant of parole, mandatory supervision, postrelease community supervision, or probation in any other case and that I may receive additional punishment as a result of that violation.

d. Registration

I understand that I will be required to register with the local police agency or sheriff's department in the city or county in which I reside as

(1) an arson offender (4) a sex offender (this registration is a lifelong requirement)

(2) a gang member (5) other (specify):

(3) a narcotics offender

and that if I fail to register or to keep my registration current for any reason, new felony criminal charges may be filed against me.

e. Prints and DNA Samples

I understand that I must provide biological samples and prints for identification purposes—including buccal (mouth) swab samples, right thumb prints, palm prints of each hand, and blood specimens or other biological samples required by law—and that failure to do so constitutes a new criminal offense.

f. Serious or Violent Felony

(1) I understand that by pleading guilty or no contest to a serious or violent felony ("strike"), the penalty for any future felony conviction will be increased as a result of my conviction in this case, depending on the number of strikes I have, up to a mandatory prison sentence of double the term otherwise provided or a term of at least 25 years to life.

(2) I understand that if I am convicted of a violent felony, jail or prison conduct/work-time credit I may accrue will not exceed 15%.

(3) I understand that if I am admitting a prior strike conviction, prison work-time credit that I may accrue will not exceed 20% of the total term of imprisonment.

(4) I understand that if I am convicted of murder or a third felony conviction of certain offenses, I am ineligible to receive work-time credits. Count _____ is such an offense.

g. Prior Prison Term or County Jail Sentence Under Penal Code Section 1170(h)(5)

I understand that if I am sentenced to prison or county jail under Penal Code section 1170(h), the penalty for any future felony conviction may be increased as a result of my incarceration in this case.

h. Driver's License and Vehicle Forfeiture

I understand that my privilege to drive a motor vehicle may be revoked or suspended by the court or the California Department of Motor Vehicles and my vehicle may be ordered forfeited if it was involved in the offense.

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3. i. Immigration Consequences

I understand that if I am not a citizen of the United States, my plea of guilty or no contest may or, with certain offenses, will result in my deportation, exclusion from reentry to the United States, and denial of naturalization and amnesty and that the appropriate consulate may be informed of my conviction. The offenses that will result in such immigration action include, but are not limited to, an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, and, under certain circumstances, a moral turpitude offense.

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j. Firearms

I understand that federal and state laws prohibit a convicted felon from possessing firearms or ammunition for life.

k. Other Consequences (specify):

4. RIGHT TO AN ATTORNEY

I understand that I have the right to an attorney of my choice to represent me throughout the proceedings. If I cannot afford to hire an attorney, the court will appoint one to represent me.

I hereby give up my right to be represented by an attorney.

5. OTHER CONSTITUTIONAL RIGHTS

I understand that I am entitled to each of the following rights as to the charges listed in item 1 (on page 1):

a. Right to a Jury Trial

I understand that I have a right to a speedy and public jury trial. At the trial, I would be presumed to be innocent, and I could not be convicted unless, after hearing all of the evidence, 12 impartial jurors chosen from the community were convinced beyond a reasonable doubt that I am guilty.

b. Right to a Court Trial

I understand that, as an alternative to a jury trial, if the prosecutor agrees, I may give up a jury trial and have a court trial in which the judge alone, without a jury, hears the evidence. I still could not be convicted unless, after hearing all of the evidence, the judge was convinced beyond a reasonable doubt that I am guilty.

c. Right to Confront and Cross-Examine Witnesses

I understand that I have the right to confront and cross-examine all witnesses testifying against me. This means that the prosecution must produce the witnesses in court, they must testify under oath in my presence, and my attorney may question them.

d. Right to Remain Silent and Not to Incriminate Myself

I understand that I have the right to remain silent, and my silence cannot be considered as evidence against me. I understand that I also have the right not to incriminate myself, and I cannot be forced to testify.

e. Right to Produce Evidence and to Present a Defense

I understand that I have a right to present evidence and to have the court issue subpoenas to bring to court all witnesses and evidence favorable to me, at no cost to me. I also have the right to testify on my own behalf.

6. BEFORE THE PLEA

a. Discussion With My Attorney

Before entering this plea, I have had a full opportunity to discuss the following with my attorney:

- (1) The facts of my case;
- (2) The elements of the charged offenses, prior convictions, enhancements, and special allegations;
- (3) Any defenses that I may have;
- (4) My constitutional and statutory rights and waiver of those rights;
- (5) The consequences of this plea, including the immigration consequences; and
- (6) Anything else I think is important to my case.

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6. b. **Questions**
I have no further questions of the court or of my attorney with regard to my plea and admissions in this case, any of the rights, or anything else on this form.

c. **Stipulation to Commissioner**
I understand that I have the right to have a judge take my plea and sentence me. I give up this right and agree to have a commissioner, sitting as a temporary judge, take my plea and sentence me.

d. **Medications or Controlled Substances**
I am not taking any medication that affects my ability to understand this form and the consequences of my plea, have not recently consumed any alcohol or drugs, and am not suffering from any medical condition, except for the following: _____

e. **Discovery of New Facts**
I understand that the plea agreement in item 2 (on pages 1 and 2) is based on the facts before the court, and if the court discovers new facts, such as an additional prior felony conviction not listed on this form, the court may refuse to accept the plea agreement. If the court discovers new facts and refuses to accept this plea agreement, I understand that I will be allowed to withdraw my plea.

7. **STATUTORY RIGHT TO A PRELIMINARY HEARING**
I understand that before I have a trial, the law gives me the right to a speedy preliminary hearing at which the prosecution would produce evidence and the court must find reasonable cause to believe I committed the crimes with which I have been charged. I understand that I have all of the above constitutional rights at the preliminary hearing, except for the right to a jury trial.
I give up my right to a preliminary hearing and the constitutional rights listed in item 5 (on page 4).

8. **WAIVER OF CONSTITUTIONAL RIGHTS**
I give up, for each of the charges and allegations listed in item 1 (on page 1) my right to a jury trial, my right to a court trial, my right to confront and cross-examine witnesses, my right to remain silent and not to incriminate myself, and my right to produce evidence and to present a defense, including my right to testify on my own behalf. I understand that I am, in fact, incriminating myself with my plea.

9. **THE PLEA**
I freely and voluntarily plead GUILTY NO CONTEST to the charges listed in item 1 (on page 1) and admit the allegations listed in item 1 (on page 1), understanding that this plea and admission will lead to the penalties listed in item 2 (on pages 1 and 2).
a. I offer my plea of guilty or no contest freely and voluntarily and with full understanding of everything in this form. No one has made any threats; used any force against me, my family, or my loved ones; or made any promises to me, except as listed in this form, in order to convince me to plead guilty or no contest.
b. I understand that the court is required to find a factual basis for my plea to make sure that I am entering a plea to the proper offenses under the facts of the case.

I offer to the court the following as the basis for my plea of guilty or no contest and any admissions:
(1) I understand that the court may consider the following as proof of the factual basis for my plea:
(a) Preliminary hearing transcript
(b) Police report
(c) Probation report
(d) Welfare investigator's declaration
(e) Court documents regarding any alleged prior offenses
(f) Other (specify): _____
(g) (Specify facts): _____

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9. b. (2) I am pleading guilty or no contest to take advantage of a plea agreement (my attorney will stipulate to a factual basis for the plea). (*People v. West* (1970) 3 Cal.3d 595.) INITIALS
10. AFTER THE PLEA
- a. **Surrender**
I understand that the court is allowing me to surrender at a later date to begin serving time in custody.
- I agree that if I fail to appear on the date set for surrender or sentencing without a legal excuse, my plea will become an "open plea" to the court, I will not be allowed to withdraw my plea, and I may be sentenced up to the maximum allowed by law.
- b. **Sentencing Court**
I understand that I have the right to be sentenced by the same judge or commissioner who takes my plea. I give up that right and agree that any judge or commissioner may sentence me.
- c. **Sentencing Date**
I understand that I have the right to be sentenced within 20 court days. I give up that right and agree to be sentenced at a later date.
11. **MANDATORY WARNING**
- I understand that if I am charged with violating Vehicle Code section 23103, as specified in Vehicle Code section 23103.5, or Vehicle Code sections 23152 or 23153, the following warning applies:
- You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and as a result of that driving someone is killed, you can be charged with murder.**

DEFENDANT'S STATEMENT

I have read or have had read to me this form and have initialed each of the items that applies to my case. If I have an attorney, I have discussed each item with my attorney. By putting my initials next to the items in this form, I am indicating that I understand and agree with what is stated in each item that I have initialed. The nature of the charges, possible defenses, and effects of any prior convictions, enhancements, and special allegations have been explained to me. I understand each of the rights outlined above, and I give up each of them to enter my plea.

DEFENDANT'S SIGNATURE

DATE

ATTORNEY'S STATEMENT

I am the attorney of record for the defendant. I have reviewed this form with my client. I have explained each of the items in the form, including the defendant's constitutional and statutory rights, to the defendant and have answered all of his or her questions with regard to those rights, the other items in this form, and the plea agreement. I have also discussed the facts of the case with the defendant and have explained the nature and elements of each charge; any possible defenses to the charges; the effect of any prior convictions, enhancements, and special allegations; and the consequences of the plea.

I concur in the plea and admissions and join in the waiver of the defendant's constitutional and statutory rights, and I hereby stipulate that there is a factual basis for the plea and refer the court to the police report preliminary hearing transcript probation report other (specify): _____ (*People v. West* (1970) 3 Cal.3d 595.)

ATTORNEY'S SIGNATURE

DATE

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INTERPRETER'S STATEMENT

I, having been duly sworn or having a written oath on file, certify that I truly translated this form to the defendant in the language noted below. The defendant stated that he or she understood the contents on the form and then initialed and signed the form.

Language: Spanish Other (specify): _____

 INTERPRETER'S SIGNATURE DATE

 INTERPRETER'S NAME (TYPE OR PRINT)

DISTRICT ATTORNEY'S STATEMENT

I have read this form and understand the terms of the plea agreement.

I agree do not agree with the terms of the plea agreement and the indicated sentence.

 ATTORNEY'S SIGNATURE DATE

COURT'S FINDINGS AND ORDER

The court, having reviewed this form (and any addenda), and having orally examined the defendant, finds as follows:

1. The defendant has read or has had read to him or her and understands each of the initialed items in this form.
2. The defendant understands the nature of the crimes and allegations listed in item 1 (on page 1) and the consequences of the plea and any admissions.
3. The defendant expressly, knowingly, understandingly, and intelligently waives his or her constitutional and statutory rights.
4. The defendant's plea, admissions, and waiver of rights are made freely and voluntarily.
5. A factual basis exists for the plea and admissions, or the defendant is pleading pursuant to a plea bargain under *People v. West*.

The court accepts the defendant's plea, admissions, and waiver of rights, and the defendant is hereby convicted based thereon.

It is ordered that this document be filed with the court's records of this case and that the defendant's plea, admissions, and waiver of rights be accepted and entered in the minutes of this court.

 JUDGE'S SIGNATURE DATE

V. [§91.34] ADDITIONAL REFERENCES

- California Criminal Law Procedure and Practice, chaps 3, 5-6, 26, 48 (Cal CEB 2012).
- 4 Witkin & Epstein, California Criminal Law, *Pretrial Proceedings*, §§87-139 (bail and OR), 252-258 (arraignment), 285-338 (pleas), 385-399 (deferred entry of judgment) (4th ed 2012).

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