

**In the Supreme Court of the State of California**

**PEOPLE OF THE STATE OF CALIFORNIA,**  
**Plaintiff and Respondent,**  
**v.**  
**DAVID EDWARD PALMER,**  
**Defendant and Appellant.**

Case No. S204409

**SUPREME COURT  
FILED**

JAN 25 2013

Sixth Appellate District, Case No. H036979  
Santa Clara County Superior Court, Case No. C1094540  
The Honorable Drew Takaichi, Judge

**Frank A. McGuire Clerk**  

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**Deputy**

**RESPONDENT'S ANSWER BRIEF ON THE MERITS**

KAMALA D. HARRIS  
Attorney General of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
GERALD A. ENGLER  
Senior Assistant Attorney General  
JEFFREY M. LAURENCE  
Deputy Attorney General  
ALISHA M. CARLILE  
Deputy Attorney General  
State Bar No. 264202  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004  
Telephone: (415) 703-5205  
Fax: (415) 703-1234  
Email: Alisha.Carlile@doj.ca.gov  
*Attorneys for Respondent*

## TABLE OF CONTENTS

	Page
Issues presented.....	1
Introduction.....	1
Statement of the Case and Facts.....	2
Summary of the Argument.....	4
Argument.....	6
I.    Appellant’s claim that the court failed to establish a factual basis for his plea is not cognizable on appeal.....	6
A.    Legal standards .....	7
1.    The effect of a plea bargain .....	7
2.    Section 1192.5 .....	9
B.    Appellant’s no contest plea and stipulation waived the claim of an insufficient factual basis for the plea .....	11
1.    Stipulating to a factual basis for a plea waives the protections of section 1192.5.....	11
2.    Appellant’s claim goes to the admissibility or sufficiency of the evidence of his guilt, not to the legality of the proceedings.....	12
C.    Holding the no contest plea and stipulation bars the issue on appeal does not exempt the trial court’s finding from review .....	15
D.    Precedent supports the proposition that review of the trial court’s procedure, not the sufficiency of its factual basis finding, is the proper scope of review .....	17
E.    The doctrines of waiver and judicial estoppel prevent appellant from challenging the factual basis for his plea .....	20

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
II. Stipulation by counsel is sufficient to establish a factual basis for a plea.....	22
A. Stipulation to a factual basis by counsel satisfies the policy goals of section 1192.5 .....	22
B. Stipulation by counsel creates a binding resolution of the evidentiary inquiry required by section 1192.5 .....	24
Conclusion.....	28

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Aguilar v. Lerner</i> (2004) 32 Cal.4th 974 .....	21, 22
<i>Ballard v. Municipal Court</i> (1978) 84 Cal.App.3d 885 .....	26
<i>Boykin v. Alabama</i> (1969) 395 U.S. 238 .....	8, 9, 27
<i>Bradshaw v. Stumpf</i> (2005) 545 U.S. 175 .....	7
<i>County of Sacramento v. Workers' Comp. Appeals Bd.</i> (2000) 77 Cal.App.4th 1114 .....	25
<i>Faretta v. California</i> (1975) 422 U.S. 806 .....	24
<i>Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.</i> (2010) 181 Cal.App.4th 752 .....	25
<i>Hill v. City of Clovis</i> (1998) 63 Cal.App.4th 434 .....	26
<i>In re Jaheim B.</i> (2008) 169 Cal.App.4th 1343 .....	26
<i>In re Tahl</i> (1969) 3 Cal.3d 122 .....	24
<i>Loftis v. Almager</i> (9th Cir. 2012) ___ F.3d ___ [2012 WL 6183531] .....	17
<i>Mary R. v. B. &amp; R. Corp.</i> (1983) 149 Cal.App.3d 308 .....	26
<i>North Carolina v. Alford</i> (1970) 400 U.S. 25 .....	17

<i>People v. Adams</i> (1993) 6 Cal.4th 570 .....	25, 26
<i>People v. Borland</i> (1996) 50 Cal.App.4th 124 .....	13, 14
<i>People v. Castillo</i> (2010) 49 Cal.4th 145 .....	21
<i>People v. Chadd</i> (1981) 28 Cal.3d 739 .....	7, 8, 15
<i>People v. Coulter</i> (2008) 163 Cal.App.4th 1117 .....	19
<i>People v. DeVaughn</i> (1977) 18 Cal.3d 889 .....	8
<i>People v. Enright</i> (1982) 132 Cal.App.3d 631 .....	10, 11, 16, 19
<i>People v. Fisk</i> (1975) 50 Cal.App.3d 364 .....	25
<i>People v. French</i> (2008) 43 Cal.4th 36 .....	18, 26
<i>People v. Gambos</i> (1970) 5 Cal.App.3d 187 .....	25
<i>People v. Gonzales</i> (1993) 13 Cal.App.4th 707 .....	19
<i>People v. Guzman</i> (1988) 45 Cal.3d 915 .....	25
<i>People v. Hoffard</i> (1995) 10 Cal.4th 1170 .....	8, 9, 18, 26
<i>People v. Holmes</i> (2004) 32 Cal.4th 432 .....	passim
<i>People v. Horton</i> (1991) 54 Cal.3d 82 .....	24, 25

<i>People v. Marlin</i> (2004) 124 Cal.App.4th 559 .....	9, 14, 15, 20
<i>People v. McGuire</i> (1991) 1 Cal.App.4th 281 .....	10, 22, 23
<i>People v. Mickens</i> (1995) 38 Cal.App.4th 1557 .....	11, 19
<i>People v. Nitschmann</i> (2010) 182 Cal.App.4th 705 .....	14
<i>People v. Ribero</i> (1971) 4 Cal.3d 55 .....	8
<i>People v. Scott</i> (1994) 9 Cal.4th 331 .....	21
<i>People v. Thurman</i> (2007) 157 Cal.App.4th 36 .....	9
<i>People v. Tigner</i> (1982) 133 Cal.App.3d 430 .....	10, 19
<i>People v. Vera</i> (1997) 15 Cal.4th 269 .....	20
<i>People v. Voit</i> (2011) 200 Cal.App.4th 1353 .....	passim
<i>People v Walker</i> (1991) 54 Cal.3d 1013 .....	20
<i>People v. Wallace</i> (2004) 33 Cal.4th 738 .....	8, 12, 13
<i>People v. Washington</i> (1979) 95 Cal.App.3d 488 .....	25
<i>People v. Watts</i> (1977) 67 Cal.App.3d 173 .....	passim
<i>People v. West</i> (1970) 3 Cal.3d 595 .....	7, 17

<i>People v. Westbrook</i> (1996) 43 Cal.App.4th 220 .....	13
<i>People v. Wilkerson</i> (1992) 6 Cal.App.4th 1571 .....	10, 20
<i>People v. Willard</i> (2007) 154 Cal.App.4th 1329 .....	10, 19, 23
<i>Willett v. Georgia</i> (5th Cir. 1979) 608 F.2d 538 .....	10, 19, 23

**STATUTES**

Health and Safety Code	
§ 11359 .....	2
§ 11378 .....	2
Penal Code	
§ 1018 .....	26
§ 1192.5 .....	passim
§ 1237.5 .....	1, 6, 8

**CONSTITUTIONAL PROVISIONS**

United States Constitution	
Sixth Amendment .....	19, 26

**COURT RULES**

Federal Criminal Procedure	
Rule No. 11 .....	22

## **ISSUES PRESENTED**

1. Is a claim that the trial court failed to establish a factual basis for appellant's plea within the meaning of Penal Code section 1192.5 cognizable on appeal when defense counsel stipulated to a factual basis for the plea?

2. If the claim is cognizable, did defense counsel's bare stipulation to a factual basis without reference to any document describing the facts sufficiently establish a factual basis?

## **INTRODUCTION**

The Court of Appeal correctly held defense counsel's stipulation to a factual basis, made with appellant's apparent assent, barred his challenge on appeal to the adequacy of the trial court's inquiry into the factual basis for appellant's plea of no contest. The challenge to appellant's own stipulation is not cognizable on this appeal. The claim does not go to the legality of his plea or to the power of the state to prosecute him notwithstanding guilt.

The parties are in agreement that a defendant cannot challenge the sufficiency of the evidence of his or her guilt after a plea of guilty or no contest whether or not the defendant has been granted a certificate of probable cause under Penal Code section 1237.5. In this case, a claim that the trial court at the hearing did not cause an adequate inquiry to be made into the factual basis for the plea is no different from a claim that expressly disputes the sufficiency or the admissibility of defense counsel's stipulation that the trial court accepted as the factual basis for the plea. In terms of any statutory requirement of evidence needed to establish appellant committed an offense at least as serious as the one to which he pleaded, such claims are identical here. Regardless of how that claim is articulated, appellant waived it and is estopped to attack it, because the stipulation, amounting to



an admission of appellant as a party-proponent of the plea bargain, constituted proof or a substitute for proof of factual guilt of the crime to which appellant pleaded.

Even assuming the claim is cognizable on appeal, the stipulation by counsel was a binding resolution of an evidentiary issue on which the trial court was entitled to rely. Penal Code section 1192.5 does not regulate the contents of a stipulation to a factual basis. In this case, the court's acceptance of a bare stipulation is in harmony with the policy considerations underlying the factual basis requirement in the statute.

### **STATEMENT OF THE CASE AND FACTS**

A December 9, 2010, complaint charged appellant with possession for sale of MDMA (Health & Saf. Code, § 11378; count 1) and marijuana (*id.*, § 11359; count 2). (CT 1-3.)

On March 18, 2011, pursuant to a negotiated disposition, appellant pleaded no contest to count 1 in exchange for a grant of probation and the dismissal of count 2. (CT 9-10.) As part of the plea proceeding, appellant waived both a preliminary hearing and a probation report. (RT 7-8; CT 10.)

At the plea hearing, the court had the prosecutor conduct voir dire of appellant. (RT 7.) The following colloquy occurred:

Ms. Tran [Prosecutor]: And, Mr. Palmer, you're not under the influence of any drugs or medication or alcohol that would affect your judgment in decision-making today?

The Defendant: No.

Ms. Tran: Okay. And other than the promises that have been stated here on the record, no other promises or threats have been made to you –

The Defendant: No.

Ms. Tran: – to make you change your plea today?

The Defendant: No.

Ms. Tran: And you are doing this freely and voluntary [*sic*] for yourself?

The Defendant: Yes.

Ms. Tran: Have you discussed the elements of the crime and the defense with your attorney?

The Defendant: Yeah.

Ms. Tran: Are you satisfied with her advice?

The Defendant: Yes.

Ms. Tran: Do you stipulate, Ms. Randisi [defense counsel], there's a factual basis for plea as the People do?

Ms. Randisi: Yes, I do stipulate.

Ms. Tran: And do you also waive your preliminary examination in which you have all the constitutional rights that the Court has previously stated that you would for a trial?

The Defendant: Yes.

(RT 8.)

Following the prosecutor's inquiry of appellant, the court stated: "I find that the defendant's answers and responses to the voir dire [by] the District Attorney had been intelligently given and to the extent that there were stipulated rights they were also knowingly [and] intelligently entered into by the defendant." (RT 10-11.)

On May 20, 2011, the court suspended imposition of sentence and granted appellant three years' probation on condition he serve 270 days in county jail. (CT 18-19.)

On May 26, 2011, appellant filed a notice of appeal. (CT 22.) On October 20, 2011, the Sixth District Court of Appeal granted appellant

permission to seek a certificate of probable cause from the superior court. On November 2, 2011, the superior court granted a certificate. (SCT 4.)

Appellant challenged his plea on the ground that his counsel's stipulation to a factual basis for the plea was insufficient to satisfy the requirements of Penal Code section 1192.5.<sup>1</sup> (Ct.App. Opening Br., pp. 3-4.) He sought reversal of the conviction so the trial court could make a proper inquiry into the factual basis if he reentered a plea. (*Ibid.*)

The Sixth District Court of Appeal affirmed the judgment. It found defense counsel's stipulation, made with the apparent assent of appellant, constituted an admission barring what it found to be "essentially a challenge not to the trial court's process but to its ultimate conclusion that there was a factual basis for the plea." (Typed Opn., pp. 5-6, quoting *People v. Voit* (2011) 200 Cal.App.4th 1353, 1370.)

This Court granted appellant's petition for review on October 10, 2012.

### SUMMARY OF THE ARGUMENT

In section 1192.5, the Legislature afforded unsophisticated defendants a prophylactic assurance, in the form of a requirement that the trial court inquire into the factual basis for a negotiated plea, against conviction of a felony based on conduct not amounting to crime. A defendant represented at the hearing by counsel who stipulates in open court to a factual basis for the plea, with the defendant's apparent assent, acts in his own presumed best interest to ensure the benefit of his conditional bargain and to fulfill the purpose behind the statutory requirement to prevent wrongful convictions.

In this case, defense counsel stipulated to a factual basis for appellant's plea of no contest on the record, in appellant's presence, before he entered the plea in exchange for conditional benefits of probation and

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<sup>1</sup> All further undesignated section references are to the Penal Code.

the dismissal of one count. There is no claim that counsel was ineffective in the formulation of the plea bargain, that appellant lacked adequate time to consult with counsel, or that appellant acted from inattention or lack of knowledge in entering the plea. (There was no motion to withdraw the plea, so there are no factual findings on these points to review.) No objection was made by either party to the stipulation. There was no request that the stipulation reference a document to provide more detail about the factual basis for the plea than reflected in the complaint and the record of the plea hearing itself. By offering the stipulation through his counsel, appellant waived the claim that the trial court erred by failing to inquire into the factual basis for the plea in lieu of, or in addition to, his own counsel's stipulation.

Appellant's plea was itself a conviction and acted as an admission of the elements of the offense to which he pleaded no contest. It waived any challenge to issues related to guilt or innocence on appeal. Consequently, his complaint on appeal that the court failed to establish a sufficient factual basis for his plea is procedurally barred. The claim challenges, in effect, the admissibility or the sufficiency of the stipulation as a factual basis, a claim that is foreclosed because he necessarily disputes the existence of a factual basis for a finding of guilt sans the stipulation.

The claim also fails on the merits. Counsel's bare stipulation satisfies the purpose of section 1192.5 and is sufficient to establish a factual basis. When, as here, a defendant has adequate time to consult with counsel prior to the entry of his plea, counsel's stipulation to a factual basis is made on behalf of his or her client's best interests. The stipulation obviates the danger that the defendant is pleading guilty based on conduct that does not amount to a crime. At the same time, it provides an assurance to the defendant that information in available documents (e.g., police reports) will not be seen as an admission of the facts contained therein that might

become the basis for the court's aggravation of sentence (when the bargain does not include a stipulated sentence), or for the rejection of the bargain (as when the agreed sentence is probation but the facts appear highly aggravating or even on their face to disqualify the defendant from probation).

Stipulating to a factual basis for a plea is similar to an evidentiary stipulation. It amounts to a limited admission of a party, which trial courts routinely accept and which represents a tactical decision best left to the discretion of defense counsel and to regulation through habeas claims of ineffective assistance of counsel. Section 1192.5 does not require counsel's stipulation to a factual basis for a plea to reference a particular document that details more information about the facts of the offense than are reflected in the charge or the record of the plea hearing.

## **ARGUMENT**

### **I. APPELLANT'S CLAIM THAT THE COURT FAILED TO ESTABLISH A FACTUAL BASIS FOR HIS PLEA IS NOT COGNIZABLE ON APPEAL**

Appellant claims the trial court failed to establish a sufficient factual basis for his plea. He acknowledges a factual basis inquiry is neither a constitutional nor a jurisdictional requirement. (ABOM 6.) Nonetheless, he maintains the issue is cognizable because it goes to the legality of the proceedings. (See § 1237.5) We disagree.

Claims relating to the *process* by which the plea was obtained, such as a claim that the court was unaware of its duty to establish a factual basis, go to the legality of the proceedings and are cognizable. (*People v. Voit*, *supra*, 200 Cal.App.4th at p. 1369.) Similarly, a defendant who declines to stipulate and holds the court to its statutory duty to establish to a sufficient factual basis can challenge its determination.

In the present case, however, the trial court was aware of its duty and accepted appellant's stipulation that a factual basis existed. The defense agreed, through its stipulation, that the court satisfied its statutory obligation to make an inquiry into a factual basis. That necessarily waived the claim that there was an insufficient factual basis for the plea or that the stipulation, made after appellant accepted a plea bargain on the advice of counsel, failed to fulfill the purpose of the section 1192.5 requirement of an inquiry into a factual basis.

Appellant's claim essentially challenges the sufficiency or the admissibility of a bare stipulation as an admission or as a substitute for proof to establish the factual basis for his guilt. That does not go to the legality of the plea or to the power of the state to prosecute appellant notwithstanding guilt. By stipulating to the factual basis, appellant waived all issues relating to guilt or innocence. Therefore, this claim is not cognizable on appeal.

#### **A. Legal Standards**

##### **1. The effect of a plea bargain**

Plea bargains play an integral role in the resolution of criminal cases and are "essential to the expeditious and fair administration of justice." [Citation]." (*People v. West* (1970) 3 Cal.3d 595, 604.) "Both the state and the defendant may profit from a plea bargain. The benefit to the defendant from a lessened punishment does not need elaboration; the benefit to the state lies in the savings in costs of trial, the increased efficiency of the procedure, and the further flexibility of the criminal process." (*Ibid.*)

"A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently. . . ." (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 182-183.) It waives formal defects in the accusatory pleading. (*People v. Chadd* (1981) 28 Cal.3d 739, 748.) It also

waives the right to a jury trial, the privilege against self incrimination, and the right to confront witnesses. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243.) The plea “ordinarily includes an admission that there is a factual basis for the plea.” (*People v. Wallace* (2004) 33 Cal.4th 738, 749, citing *People v. Holmes* (2004) 32 Cal.4th 432, 438.) Furthermore, the plea admits every element of the crime charged and acts as a conviction for the offense. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 895.) It is a stipulation that the prosecution “need introduce no proof whatever to support the accusation . . . .” (*People v. Chadd, supra*, at p. 748.) The plea has the same effect as a guilty verdict at trial. (*People v. Wallace, supra*, 33 Cal.4th at p. 749.) A no contest plea to a felony is legally equivalent to a guilty plea, and is subject to the same appellate restrictions. (*Id.* at p. 749; see § 1016, subd. (3) .)

Entering a plea of guilty or no contest substantially restricts the ability to appeal the conviction. (*People v. DeVaughn, supra*, 18 Cal.3d at pp. 895-896.) To appeal after such a plea, a defendant must obtain a certificate of probable cause. (§ 1237.5.) A certificate of probable cause neither restricts nor expands scope of appealable issues. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1178). It serves as a bar to prevent defendants from bringing frivolous claims, not to define the issues cognizable on appeal. (*Id.* at p. 1179.)

Appeal is limited to “reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.” (§ 1237.5; see also *People v. Ribero* (1971) 4 Cal.3d 55, 60-64.) A claim that a defendant’s plea was not knowing and voluntary is cognizable on appeal. (*People v. Hoffard, supra*, 10 Cal.4th at p. 1178.) Because a plea admits guilt, however, issues relating to guilt or innocence are not cognizable after a guilty or no contest plea. (*Ibid.*) Thus, a defendant who pleads guilty cannot challenge the sufficiency of the evidence of his guilt on appeal.

(*People v. Thurman* (2007) 157 Cal.App.4th 36, 43-44; see *People v. Hoffard, supra*, at p. 1178.)

The lower courts are split on whether a claim that the court failed to establish a factual basis for a plea goes to the legality of the proceedings and is cognizable after a guilty plea. (Compare *People v. Voit, supra*, 200 Cal.App.4th at pp. 1365-1366 [not cognizable] with *People v. Marlin* (2004) 124 Cal.App.4th 559, 571 [cognizable].)

## 2. Section 1192.5

The United States Constitution requires that a guilty or no contest plea and the accompanying waiver of rights be voluntarily and intelligently made, nothing more. (*Boykin v. Alabama, supra*, 395 U.S. at pp. 242-243.) California has added the statutory requirement that the court satisfy itself after inquiry of a factual basis for a negotiated plea. (§ 1192.5.)<sup>2</sup> While no constitutional requirement for a factual basis inquiry by the court exists, “the statutory mandate of section 1192.5 helps ensure that the ‘constitutional standards of voluntariness and intelligence are met.’” (*People v. Hoffard, supra*, 10 Cal.4th at p. 1182, fn. 11.)” (*People v. Holmes, supra*, 32 Cal.4th at p. 438.) “The purpose of the requirement is to protect against the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged.” (*People v. Watts* (1977) 67 Cal.App.3d 173, 178; see also *People v. Hoffard, supra*, at pp. 1183-1184.)

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<sup>2</sup> Penal Code section 1192.5 provides in pertinent part:

“Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony . . . [¶] . . . [t]he court shall also cause an inquiry to be made of the appellant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.”



The trial court may establish a factual basis by directly questioning the defendant, or by eliciting statements or admissions by his counsel. (*People v. Holmes, supra*, 32 Cal.4th at p. 440, fn. 5; *People v. Watts, supra*, 67 Cal.App.3d at pp. 179-180.) The parties may stipulate that a document, such as a police report, establishes a factual basis. (*People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1578; *People v. Enright* (1982) 132 Cal.App.3d 631, 634-635.) Additionally, reference to a complaint containing a factual basis for each essential element of the charge is sufficient. (*People v. Holmes, supra*, at p. 441.) A summary assertion by the court that “[t]here’s a factual basis for the plea,” without any other attempt to develop a factual basis, however, is insufficient. (*People v. Tigner* (1982) 133 Cal.App.3d 430, 433.) The Courts of Appeal are divided on whether a stipulation to a factual basis by counsel which does not reference a specific document is sufficient to satisfy the requirements of section 1192.5. (Compare *People v. Willard* (2007) 154 Cal.App.4th 1329, 1334-1335 [insufficient] with *People v. McGuire* (1991) 1 Cal.App.4th 281, 283 [sufficient].)

The trial court has broad discretion in determining whether there is an adequate factual basis for the plea. (*People v. Watts, supra*, 67 Cal.App.3d at p. 180 [“The trial court is free to utilize whatever procedure is best for the particular case before it to ensure that the defendant is entering a plea to the proper offense under the facts of the case”].) The court need not find a factual basis for each element of the offense. (*Ibid.*) Nor does the court need to be convinced beyond a reasonable doubt of defendant’s guilt. (*Id.* at p. 179.) Instead, the trial court is only required to establish a prima facie factual basis for the charges. (*People v. Holmes, supra*, 32 Cal.4th at p. 441.) In absence of a stipulation, the trial court’s finding of a factual basis is reviewed for abuse of discretion. (*Id.* at p. 443.)

**B. Appellant's No Contest Plea and Stipulation Waived the Claim of an Insufficient Factual Basis for the Plea**

Analysis of appellant's claim demonstrates that it goes to the admissibility or the sufficiency of the evidence of his guilt, not to the legality of the proceedings. Therefore, it is not cognizable on appeal.

**1. Stipulating to a factual basis for a plea waives the protections of section 1192.5**

Section 1192.5 imposes a duty on the trial court to satisfy itself as to the factual basis for a guilty plea in a negotiated disposition involving a plea to a felony. As noted, the purpose of the requirement is to protect a legally unskilled defendant from pleading guilty and suffering a conviction when his conduct does not amount to a violation of the law. (*People v. Watts, supra*, 67 Cal.App.3d at p. 178.) The court may satisfy its duty in any number of ways, such as reviewing the preliminary hearing transcript, examining the police reports regarding the incident, enquiring of the defendant, or by accepting a stipulation from counsel that a factual basis exists. (*People v. Holmes, supra*, 32 Cal.4th at p. 437 [inquiry of defendant]; *People v. Voit, supra*, 200 Cal.App.4th at p. 1361 [preliminary hearing transcript]; *People v. Mickens* (1995) 38 Cal.App.4th 1557, 1565 [probation report], *People v. Enright, supra*, 132 Cal.App.3d at p. 634 [police reports].)

In *People v. Voit, supra*, 200 Cal.App.4th at page 1366, the Sixth District Court of Appeal said: "Particularly where a defendant not only personally pleads guilty or no contest but also personally or through counsel concedes the existence of a factual basis for his or her pleas, that defendant should not be allowed to create an appellate issue by simply changing his or her mind about the existence of a factual basis for the plea, without also establishing that this concession resulted from a mistake." As in *Voit*, appellant here made a tactical choice and stipulated to the factual

basis, thereby waiving further inquiry and relieving the court of any obligation to find a factual basis for the plea based on other available documents or examinations. (See also *People v. Wallace, supra*, 33 Cal.4th at p. 750 [noting that defendant could not have appealed his conviction based on insufficient evidence after stipulating to a factual basis].)

Moreover, counsel's stipulation, made after adequate time was afforded to consult with appellant, ensured that he did not plead guilty based on ignorance of the law. (See *People v. Watts, supra*, 67 Cal.App.3d at p. 178.) When a defendant is represented at the plea hearing, has adequate time to consult with counsel, and agrees to stipulate to a factual basis for his plea rather than requiring the court to independently make a finding, the stipulation waives a challenge to the adequacy of the factual basis for the plea—absent at least a reviewable record reflecting mistake or fraud or ineffective assistance of counsel with respect to the stipulation. No such extrinsic claims are involved here.

**2. Appellant's claim goes to the admissibility or sufficiency of the evidence of his guilt, not to the legality of the proceedings**

Appellant contends that his claim goes to the legality of the proceedings as it challenges the court's procedure in soliciting facts. (ABOM 11.) But his real quarrel is with the trial court's decision to accept his counsel's stipulation, not with the plea colloquy. He does not claim that the court did not explain the rights he was giving up as part of the plea, or that he entered into the agreement due to mistake or inadvertence. He acknowledges that the record reflects an inquiry as to the factual basis of his plea. (RT 8.)

Appellant's complaint is that, aside from the stipulation by his counsel, the record did not show information establishing the factual basis for his plea. This claim is indistinguishable from one directly challenging the

sufficiency or the admissibility of defense counsel's stipulation as the factual basis for the plea and necessarily relates to the sufficiency of the evidence of guilt for the crime to which appellant pleaded.

As the Sixth District Court of Appeal explained:

[A] plea of guilty or no contest waives an appellate claim of the nature "there is insufficient evidence supporting my plea." We see no material difference between that assertion and an appellate claim that "there is no factual basis for my plea." We believe that these assertions are fundamentally equivalent, so that a plea of guilty or no contest forecloses an appellate challenge that the plea lacks a factual basis. Section 1192.5 requires a factual inquiry by the trial court, not by the appellate court. Particularly where a defendant not only personally pleads guilty or no contest but also personally or through counsel concedes the existence of a factual basis for his or her pleas, that defendant should not be allowed to create an appellate issue by simply changing his or her mind about the existence of a factual basis for the plea, without also establishing that this concession resulted from a mistake.

(*People v. Voit, supra*, 200 Cal.App.4th at pp. 1365-1366.)

Several other courts have reached a similar conclusion. In *Wallace*, this Court noted that a defendant who stipulated to a factual basis "could not have appealed from his ensuing conviction on the basis of insufficiency of the evidence." (*People v. Wallace, supra*, 33 Cal.4th at p. 750.) In *People v. Westbrook* (1996) 43 Cal.App.4th 220, 223-224, Division One of the Fourth District found the defendant's challenge to the sufficiency of the factual basis of an enhancement was not cognizable. The court reasoned that the defendant pleaded guilty and stipulated to a factual basis to his plea, thus admitting the truth of the enhancement. (*Ibid.*) In *People v. Borland* (1996) 50 Cal.App.4th 124, 127, Division Six of the Second District declined to consider the defendant's challenge to the factual basis of his no contest plea when he stipulated to a factual basis. The court noted that the defendant's plea and stipulation were a judicial admission that he

committed the offense alleged, and he was estopped from raising the issue on appeal. (*Ibid.*) In *People v. Nitschmann* (2010) 182 Cal.App.4th 705, 709, the same court relied on estoppel to preclude a defendant's challenge to the factual basis for his plea after he had stipulated that the police reports concerning the incident supplied a sufficient basis.

In *People v. Marlin, supra*, 124 Cal.App.4th at page 571, the Third District reached the opposite conclusion. After identifying the policy considerations underlying the requirement for a factual basis inquiry, the court reasoned:

Given these significant policy considerations, a failure to make a sufficient inquiry, while not a constitutional or jurisdictional requirement, is one of the "other" grounds going to the legality of the proceedings in the trial court. Even though a defendant may in fact be guilty of the offense to which he pleads guilty, given the policy considerations underlying the intent behind section 1192.5, an adequate inquiry into the factual basis for the plea addresses broader issues such as the voluntariness of the plea and a knowing decision to plead guilty. A sufficient factual inquiry must be considered a necessary component of the legality of the proceedings. To decide otherwise would preclude review of the factual basis for a plea of guilty or no contest thereby frustrating the policies the statute is intended to advance. Thus, defendant's claim that the factual inquiry undertaken here was insufficient is, after issuance of a certificate of probable cause, cognizable on appeal.

(*People v. Marlin, supra*, 124 Cal.App.4th at p. 571.)

This Court should reject *Marlin*. Notwithstanding the court's assertion in *Marlin* that the claim went to the legality of the proceedings, the court in fact reviewed the substance of the trial court's conclusions.

The defendant in *Marlin* pleaded guilty to second degree murder—a crime committed while driving under the influence—and stipulated to a factual basis for his plea. (*People v. Marlin, supra*, 124 Cal.App.4th at p. 562.) On appeal, defendant claimed an insufficient factual basis for his plea because there was no evidence that he acted with express or implied

malice. (*Id.* at p. 571.) After finding the claim cognizable, the appellate court examined the preliminary hearing transcript to determine if there was a factual basis for the plea. (*Id.* at p. 572.) The court concluded that the record demonstrated that the defendant acted with implied malice because he chose to drink and drive after suffering numerous prior drunk driving convictions, and thus was aware of the grave risk created by his actions. (*Ibid.*)

The appellate court's substantive review of the contents of the police report demonstrates that the claim in *Marlin*, as here, was "essentially a challenge not to the trial court's process, but to its ultimate conclusion." (*People v. Voit, supra*, 200 Cal.App.4th at p. 1370.) Indeed, there was nothing procedurally infirm about the plea colloquy. The trial court was aware of its duty under 1192.5 and satisfied its duty by accepting the stipulation. As *Voit* explained, "[i]n such a case, the defendant's position is concerned with the sufficiency of the evidence of his or her guilt. A defendant who belatedly disputes the existence of evidence of his or her guilt is making a substantive, not a procedural claim." (*Ibid.*) Thus, *Marlin's* assertion that examination of the factual basis finding relates to the legality of the proceedings is incorrect.

Likewise, in this case, appellant's claim is, at bottom, that the prosecution failed to adduce evidence of his guilt. That claim is waived by his plea. (*People v. Chadd, supra*, 28 Cal.3d at p. 748.)

**C. Holding the No Contest Plea and Stipulation Bars the Issue on Appeal Does Not Exempt the Trial Court's Finding from Review**

In *Marlin*, the court opined that holding a guilty plea and stipulation waives a challenge to the factual basis for the plea would effectively foreclose any appellate review of the issue. (*People v. Marlin, supra*, 124 Cal.App.4th at p. 571.) Not so. A defendant who pleads guilty may still

challenge the process that resulted in the plea. (*People v. Voit, supra*, 200 Cal.App.4th at p. 1369.) For example, a claim that the trial court failed to make any inquiry regarding the factual basis is cognizable. Additionally, in cases where the defendant declines to stipulate, a claim that the inquiry is inadequate is also cognizable. As *Voit* explained, “[a] trial court’s alleged complete failure to conduct the required inquiry does not concern the defendant’s guilt or innocence or the sufficiency of the evidence of guilt.” (*Ibid.*) It is a challenge to the procedure by which the plea was obtained, and is not waived by a guilty plea. (*Ibid.*) Similarly, if a defendant declines to stipulate and the Court of Appeal finds that the trial court’s inquiry was inadequate, it may then review the record for a factual basis for the plea. (*People v. Holmes, supra*, 32 Cal.4th at p. 443; *People v. Watts, supra*, 67 Cal.App.3d at p. 182.) If the record supplies a factual basis, the error is harmless. (*Ibid.*)

Additionally, a defendant who pleads guilty but declines to stipulate to a factual basis may challenge the sufficiency of the trial court’s finding of a factual basis on appeal. By entering into a stipulation, the defendant relieves the court of its obligation under section 1192.5 to make a further inquiry as to the factual basis for the plea. (See *People v. Watts, supra*, 67 Cal.App.3d at p. 179 [“statements and admissions made by the defendant, his counsel, and the prosecutor” provide an adequate factual basis]; *People v. Enright, supra*, 132 Cal.App.3d at p. 634 [stipulation to a factual basis fulfills the requirements of section 1192.5].) If a defendant declines to stipulate, however, he does not waive his protections under 1192.5, and the court must make findings based on the information in the record. (See *People v. Holmes, supra*, 32 Cal.4th 432, 437 [defendant did not stipulate, and court found factual basis based on admission to allegations in the complaint].) In any case where the defendant preserves his section 1192.5 protections, rather than stipulating that they had been satisfied, the trial

court's findings pursuant to section 1192.5 remain subject to review, and can be overturned for an abuse of discretion. (*Id.* at p. 443.)

Finally, if a defendant enters an *Alford* plea, due process may require the court accepting the plea to make findings that there is a factual basis for it. (*North Carolina v. Alford* (1970) 400 U.S. 25, 36-37; see also *People v. West*, *supra*, 3 Cal.3d 595.) As the Ninth Circuit Court of Appeals recently observed, “[w]hile *Alford* did not explicitly hold that a factual basis was constitutionally necessary, lower federal courts have drawn [from language in the opinion] that if a defendant pleads guilty while claiming innocence the trial court must find a factual basis.” (*Loftis v. Almager* (9th Cir. 2012) \_\_\_ F.3d \_\_\_ [2012 WL 6183531 at p. \*5], citing *Willett v. Georgia* (5th Cir. 1979) 608 F.2d 538, 540.) Accordingly, review is foreclosed only when the defendant has affirmatively waived further inquiry under section 1192.5 by stipulating to the satisfaction of the factual basis requirement at the time of the plea.<sup>3</sup> Having stipulated to the sufficiency of the factual basis, a defendant cannot be heard to challenge that sufficiency on appeal.

**D. Precedent Supports the Proposition that Review of the Trial Court’s Procedure, Not the Sufficiency of Its Factual Basis Finding, Is the Proper Scope of Review**

Although a number of cases discuss the sufficiency of the trial court’s factual basis findings, they do not dictate the rule advanced by appellant. Analysis of this Court’s precedent, as well as leading Court of Appeal cases, demonstrates that review of the procedure by which a factual basis was established is the proper inquiry. For example, *Holmes* discussed what types of information may supply a sufficient factual basis for a guilty plea. (32 Cal.4th at pp. 438-442.) This Court noted, however, that the discussion

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<sup>3</sup> Additionally, a defendant may also bring a habeas petition alleging that his counsel was ineffective for agreeing to stipulate to a factual basis if none in fact existed.



was intended “to provide guidelines for the trial courts regarding how to comply with their obligations under section 1192.5 and what constitutes a ‘factual basis for the plea.’” (*Id.* at pp. 435-436.) The actual claim at issue was procedural, that is, whether the trial court made a sufficient inquiry into the factual basis when it asked the defendant if he did “what it says you did in Count 1 [of the complaint] on March 24th, 2000 in Riverside County?” (*Id.* at p. 437.) This Court held that the trial court established an adequate factual basis based on its brief inquiry and defendant’s admissions to the allegations in the complaint. (*Id.* at p. 443.) To the extent that *Holmes* can be read as addressing the substance of the defendant’s factual basis claim, the Court discussed the issue because there was no stipulation to a factual basis for the plea, and thus, no waiver of the trial court’s obligation to make a further inquiry. (See *id.* at p. 437.) Therefore, while the opinion provided guidance to the lower courts on establishing a sufficient factual basis for a plea, the holding in *Holmes* addressed the nature of the trial court’s inquiry into a factual basis, not the trial court’s ultimate conclusion. (See also *People v. Voit, supra*, 200 Cal.App.4th at p. 1370.)

The other California Supreme Court cases that have addressed the factual basis requirement of section 1192.5 focus on the procedural requirements to bring a claim and the effect of the trial court’s finding. In *Hoffard*, this Court addressed whether it was necessary to specifically list the lack of a factual basis for the plea as a ground for appeal on an application for a certificate of probable cause. (10 Cal.4th at pp. 1176-1181.) Although concluding that such a specification was not required, *Hoffard* nonetheless refused defendant relief because section 1192.5 did not apply to the unconditional plea before this Court. (*Id.* at pp. 1180-1181.) *People v. French* (2008) 43 Cal.4th 36, 50-51, held that a defendant’s admission of a factual basis for his plea was insufficient to obviate the

Sixth Amendment jury trial right to establish a fact that increased defendant's sentence above the maximum authorized for the conviction.

Several leading Court of Appeal opinions support the principle that appellate courts should review the procedure for obtaining a plea, not the trial court's conclusion that a factual basis exists. Similar to *Holmes*, *People v. Watts*, *supra*, 67 Cal.App.3d at page 180, evaluated the process by which the plea was obtained. There, the trial court made no inquiry as to the factual basis for the plea, and the Court of Appeal held that a statement by defense counsel that he had discussed the legal implications of the plea with his client was insufficient to overcome the trial court's failure. (*Ibid.*) In *People v. Tigner*, *supra*, 133 Cal.App.3d at page 433, the trial court again made no inquiry regarding the factual basis for the plea, and merely asserted that a factual basis existed. *People v. Enright*, *supra*, 132 Cal.App.3d at page 634, also involved a challenge to the procedure leading to the plea. In that case, the appellate court found no error in the trial court's acceptance of a stipulation that the police reports supplied a factual basis for the plea, despite the absence of a record showing the court had read or considered the police reports. (*Id.* at pp. 634-635.) In *People v. Coulter* (2008) 163 Cal.App.4th 1117, 1122, the court evaluated the whether there was a required sequence for making a factual basis finding, holding that the court was permitted to make the finding at the time of sentencing, rather than when the plea was entered.

In several other cases, the Court of Appeal reached the merits of the defendants' claim, and substantively evaluated the evidence supporting the trial court's finding of a factual basis for the plea. (See, e.g., *People v. Willard*, *supra*, 154 Cal.App.4th at p. 1329; *People v. Mickens*, *supra*, 38 Cal.App.4th at pp. 1564-1565; *People v. Gonzales* (1993) 13 Cal.App.4th

707, 715; *People v. Wilkerson*, *supra*, 6 Cal.App.4th at pp. 1578-1580.)<sup>4</sup>

These cases are wrongly decided. As explained above, review by the appellate court of the sufficiency of the evidence to show the factual basis for a plea to the particular crime is tantamount to an evaluation of the evidence of guilt, a matter that a defendant concedes by pleading guilty. (*People v. Voit*, *supra*, 200 Cal.App.4th at pp. 1355-1356.)

**E. The Doctrines of Waiver and Judicial Estoppel Prevent Appellant from Challenging the Factual Basis For His Plea**

Finally, well-settled principles of waiver and judicial estoppel dictate that appellant not be allowed to challenge the factual basis for his plea after admitting one existed in the plea proceeding. “Error is waived absent a timely objection.” (*People v Walker* (1991) 54 Cal.3d 1013, 1023.) Here, appellant waived preliminary hearing and preparation of a probation report. (RT 7.) He acknowledged discussing the charge and defenses with counsel, was satisfied with her advice, and stipulated there was a factual basis. (RT 8, CT 9.) He made no claim that this procedure failed to satisfy section 1192.5. He made no claim that the court or counsel should identify the particular documents that support a factual basis. In order to encourage prompt detection and correction of simple errors, and to reduce the number of unnecessary appellate claims, reviewing courts have required parties to raise certain issues in the trial court. (*People v. Vera* (1997) 15 Cal.4th 269, 276 [“[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided”].) “In such cases, lack of a timely and meaningful objection forfeits or waives the claim. [Citations.] These principles are invoked as a matter of policy to ensure the fair and orderly

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<sup>4</sup> As with *Marlin*, it does not appear that the People contended that the claim was noncognizable in the cited cases.

administration of justice.” (*People v. Scott* (1994) 9 Cal.4th 331, 351.) The absence of a statement by the court or counsel identifying the documents supporting the factual basis, like a court’s failure to state the reasons for its particular sentence choice, would have been easily cured by calling the matter to the court’s attention at the time. (See *ibid.*) Therefore, failure to raise the matter below waived the claim of statutory error.

Even if the claim is not waived, this Court should invoke judicial estoppel to prevent appellant from raising this claim. “Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.” (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986, internal quotation marks omitted.) “The doctrine applies when ‘(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.’ [Citations.]” (*Id.* at pp. 986-987.) Judicial estoppel applies to stipulations made in the context of plea bargains, and prevents a party from stipulating to one position in the trial court and then attempting to take a different position for purposes of appeal. (See *People v. Castillo* (2010) 49 Cal.4th 145, 169-170 [finding stipulation by the district attorney in the trial court binding on appeal].)

In this case, appellant, through counsel, stipulated to the existence of a factual basis for his plea when he appeared before the trial court. (RT 8 see also *People v. Holmes, supra*, 32 Cal.4th at p. 438 [“a plea ordinarily includes an admission that there is a factual basis for the plea”].) The trial court accepted this admission, and appellant successfully entered a plea that decreased his potential exposure to punishment. (RT 7-10.) He does not contend, nor could he on this record, that his plea was a result of ignorance

or mistake or ineffective assistance of counsel. Rather, he contends on appeal, contrary to his position below, that the failure to establish a factual basis invalidates his plea. (See *Aguilar v. Lerner*, *supra*, 32 Cal.4th at pp. 986-987.) Where a defendant concedes in the trial court the existence of a factual basis for his or her plea, “that defendant should not be allowed to create an appellate issue by simply changing his or her mind about the factual basis for the plea . . . .” (*People v. Voit*, *supra*, 200 Cal.App.4th at p. 1366.) Appellant is trifling with the Court by attempting to get a proverbial second bite at the apple, and his claim should be rejected.

## **II. STIPULATION BY COUNSEL IS SUFFICIENT TO ESTABLISH A FACTUAL BASIS FOR A PLEA**

Appellant contends that a stipulation by counsel without reference to a supporting document is insufficient to satisfy the factual basis requirement set forth in section 1192.5. (ABOM 13, 18-19.) Contrary to his claim, a stipulation by counsel satisfies the policy goals of the statute. Furthermore, the requirement of a factual basis finding for a guilty plea is a narrow, statutorily-based right, which like other rights, may be satisfied by a defendant via a guilty plea and stipulation.

### **A. Stipulation to a Factual Basis by Counsel Satisfies the Policy Goals of Section 1192.5**

In *People v. McGuire*, *supra*, 1 Cal.App.4th at page 283, the First District Court of Appeal, Division Four, held that a general stipulation by counsel met the requirements of section 1192.5. Relying on the reasoning of *People v. Watts*, *supra*, 67 Cal.App.3d 173, the court noted that the analogous factual basis requirement in Federal Criminal Procedure Rule 11 did not require a particular type of inquiry; that rule permitted the court to base its finding on statements made by the defendant, his counsel, or the prosecutor. (*Ibid.*)

In *People v. Willard*, *supra*, 154 Cal.App.4th at page 1335, the Third District Court of Appeal disagreed, holding that a stipulation by counsel to a factual basis without reference to supporting documents in the record was insufficient. Relying on the dissenting opinion in *McGuire*, the *Willard* court reasoned that a general stipulation provided no more information about the underlying crime than the plea itself. (*Ibid.*, citing *People v. McGuire*, *supra*, 1 Cal.App.4th at pp. 284-287 (dis. opn. of Poché, J.) Examination of the policy goals underlying the factual basis inquiry demonstrates that the *McGuire* opinion is correct, and that a general stipulation by counsel is sufficient to satisfy the requirements of 1192.5.

As the court noted in *People v. Watts*, *supra*, 67 Cal.App.3d 173, 178, the primary purpose for the factual basis requirement is to prevent a legally unsophisticated defendant from pleading guilty when his actions do not constitute a crime. “Inquiry into the factual basis for the plea ensures that the defendant committed a crime at least as serious as the one to which he is willing to plead.” (*Ibid.*) When the defendant is represented by counsel when entering his plea, the policy concerns reflected in the statute are adequately addressed.<sup>5</sup>

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<sup>5</sup> Quoting from the commentary to a draft proposal for guilty plea procedures proposed by the American Bar Association, *Watts* identified other benefits resulting from a detailed factual basis inquiry. (*People v. Watts*, *supra*, 67 Cal.App.3d at p. 178.) However, in quoting the ABA proposal, *Watts* was not suggesting that any other consideration was fundamental to California’s enactment of section 1192.5 requiring a factual basis. Indeed, one benefit cited by the ABA commentary was that a factual basis “aids correctional agencies in the performance of their functions.” (*Ibid.*) However, this “benefit” is of dubious applicability in California, where correctional agencies might never receive a transcript of the factual basis colloquy, let alone use it as an aid in the performance of their functions. If the Legislature believed that was a critical consideration, it more likely would have made probation reports—which are far more

(continued...)

Examination of the record in this case demonstrates that the procedure by which appellant entered his plea satisfies the primary policy considerations of section 1192.5. Appellant was represented by counsel. He stated that he had enough time to consult with his attorney and understood the charges against him. (RT 8.) Counsel assented to entry of the plea. (RT 5.) As noted, appellant does not contend that his counsel provided ineffective assistance. Thus, there is no concern that he pleaded guilty when his conduct did not amount to a crime.

We recognize that this Court has found a stipulation by counsel that does not reference a document containing a factual basis raised a “close[] question.” (*People v. Holmes, supra*, 32 Cal.4th at p. 441, fn. 8.) The foregoing analysis demonstrates that a stipulation by counsel is in itself sufficient to satisfy the policy considerations that underlie the factual basis requirement. While it may be “the better approach under section 1192.5 . . . for a stipulation by counsel to a factual basis to be accompanied by reference to a [supporting document],” such a reference is not necessary to fulfill the requirements of the statute. (*Ibid.*)

**B. Stipulation by Counsel Creates a Binding Resolution of the Evidentiary Inquiry Required by Section 1192.5**

Apart from a limited number of personal rights, such as the right against self-incrimination (*In re Tahl* (1969) 3 Cal.3d 122, 132), or the right to counsel (*Faretta v. California* (1975) 422 U.S. 806, 834), which can be waived only by the defendant, counsel has the authority to enter into a wide array of binding stipulations on behalf of his client. As this Court explained in *People v. Horton* (1991) 54 Cal.3d 82, 95:

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(...continued)  
beneficial to correctional agencies than a factual basis colloquy—  
nonwaivable.

In the criminal context, too, counsel is captain of the ship. As we said recently: “When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of ‘fundamental’ personal rights to counsel’s complete control of defense strategies and tactics.” (*People v. Hamilton* [(1989)] 48 Cal.3d [1142,] 1163.) . . . As to these [personal] rights, the criminal defendant must be admonished and the court must secure an express waiver; as to other fundamental rights of a less personal nature, courts may assume that counsel’s waiver reflects the defendant’s consent in the absence of an express conflict. (*People v. Guzman* (1988) 45 Cal.3d 915, 936.)

Stipulations are commonly used to avoid the delay, trouble, or expense resulting from the need to prove certain facts, and also to avoid unnecessary prejudice to the accused. (See *Fireman’s Fund Ins. Co. v. Workers’ Comp. Appeals Bd.* (2010) 181 Cal.App.4th 752, 763; *People v. Gambos* (1970) 5 Cal.App.3d 187, 194.) A stipulation need not be justified or based on evidence. (Cf. *County of Sacramento v. Workers’ Comp. Appeals Bd.* (2000) 77 Cal.App.4th 1114, 1118.) “Evidentiary stipulations have long been recognized as tactical trial decisions which counsel has discretion to make without the express authority of the client.” (*People v. Adams* (1993) 6 Cal.4th 570, 578.) Counsel may stipulate to factual elements of a criminal charge, such as an admission that a defendant had knowledge the narcotic nature of a substance (*People v. Washington* (1979) 95 Cal.App.3d 488, 491-492), or that a defendant charged with being a felon in possession of a firearm was in fact an ex-felon (*People v. Fisk* (1975) 50 Cal.App.3d 364, 371). Such stipulations resolve contested issues standing by themselves, and do not require reference to additional documentary support. (See *People v. Adams, supra*, at pp. 578-579; *People v. Horton, supra*, 54 Cal.3d at p. 95.)



Stipulations are not permitted only in limited circumstances. For example, parties may not stipulate to the abridgement of a statute designed to protect public welfare. (See, e.g., *Mary R. v. B. & R. Corp.* (1983) 149 Cal.App.3d 308, 316-317 [parties could not stipulate to confidentiality order shielding doctor accused of misconduct from investigation by the state medical board].) Nor may parties attempt to manipulate the jurisdiction of the court via stipulation. (See, e.g., *In re Jaheim B.* (2008) 169 Cal.App.4th 1343, 1348 [parties cannot stipulate to expand jurisdiction of juvenile court]; *Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, 445 [parties cannot stipulate to vest jurisdiction in an appellate court where none exists].)

Stipulating to a factual basis for a plea is akin to an evidentiary stipulation, which counsel may enter into on behalf of his client. (See *People v. Adams, supra*, 6 Cal.4th at p. 578.)<sup>6</sup> As noted, there is no constitutional requirement for a factual basis finding upon entry of a guilty plea. (*People v. Hoffard, supra*, 10 Cal.4th at p. 1183.) The factual basis requirement is a statutory right limited in scope. It applies only to negotiated pleas, not to unconditional pleas. (*Id.* at pp. 1181-1182.) It does not apply to misdemeanor pleas. (*Ballard v. Municipal Court* (1978) 84 Cal.App.3d 885, 894.) A court making a factual basis finding may rely on statements by counsel and need not inquire of the defendant himself when making its determination. (*People v. Watts, supra*, 67 Cal.App.3d at p.

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<sup>6</sup> In *People v. French, supra*, 43 Cal.4th 36, 52, this Court noted that a stipulation to a factual basis may not constitute a binding admission for all purposes. While a factual basis stipulation may be insufficient to satisfy a defendant's Sixth Amendment right to a jury trial on facts that would increase his potential sentence, it is sufficient to satisfy the statutory right to a factual basis inquiry. Additionally, a defendant who stipulates may still withdraw his plea under Section 1018, or may argue that his waiver of rights was not knowing and voluntary.

180.) The factual basis finding does not operate as a conviction in the same manner as the plea itself, which must be made personally by the defendant. (See *Boykin v. Alabama*, *supra*, 395 U.S. at pp. 242-243.) The statute is intended to benefit only the defendant, by preventing him from entering a guilty plea when his conduct does not amount to a crime. The factual basis requirement provides no public benefit. The district attorney, who makes charging decisions and is aware of the defendant's actions and what he stands accused of, represents the public interest in the proceedings.

Stipulations are commonly used to prevent potential prejudice to the defendant, and there may be a number of reasons why defense counsel chooses to stipulate to a factual basis without referring to available documents providing additional details about the offense. In cases where there is no stipulated sentence, counsel may fear that the police reports will demonstrate the existence of aggravating factors and cause the court to impose a higher sentence. Or, if the police reports indicate that the crime was serious and the defendant has negotiated a sentence of probation, counsel may be concerned that the court could reject the plea bargain all together. Similarly, in sensitive cases involving inter-family violence and abuse, a defendant may want to avoid having confidential information about the victim become part of the public record in the case.

Thus, like many other evidentiary questions affecting a defendant's rights, a stipulation by counsel is a binding resolution of the factual inquiry upon which the court may rely. A stipulation to a factual basis should be treated no differently than any other evidentiary stipulation by counsel which binds the defendant and conclusively resolves the facts in dispute. The Court of Appeal correctly concluded that counsel's stipulation was sufficient to satisfy the factual basis requirement of section 1192.5.

## CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed.

Dated: January 25, 2013

Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
GERALD A. ENGLER  
Senior Assistant Attorney General  
JEFFREY M. LAURENCE  
Deputy Attorney General



ALISHA M. CARLILE  
Deputy Attorney General  
*Attorneys for Respondent*

SF2012205290

**CERTIFICATE OF COMPLIANCE**

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 9,193 words.

Dated: January 25, 2013

KAMALA D. HARRIS  
Attorney General of California

A handwritten signature in black ink that reads "Alisha M. Carlile". The signature is written in a cursive, flowing style.

ALISHA M. CARLILE  
Deputy Attorney General  
*Attorneys for Respondent*



**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: *People v. David E. Palmer*

No.: S204409

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 25, 2013, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing true copies enclosed in sealed envelopes in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Jean M. Marinovich  
Attorney at Law  
Post Office Box 2079  
Aptos, CA 95001-2079 (2 copies)

Santa Clara Superior Court  
Criminal Division - Hall of Justice  
Attention: Criminal Clerk's Office  
191 North First Street  
San Jose, CA 95113-1090

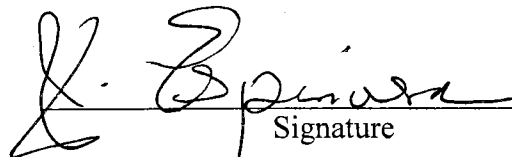
Sixth District Appellate Project  
Attn: Executive Director  
100 North Winchester Blvd., Suite 310  
Santa Clara CA 950590

The Honorable Jeffrey F. Rosen  
District Attorney  
Santa Clara District Attorney's Office  
70 W. Hedding Street  
San Jose, CA 95110

Sixth Appellate District  
Court of Appeal of the State of California  
333 West Santa Clara Street, Suite 1060  
San Jose, CA 95113

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 25, 2013, at San Francisco, California.

J. Espinosa  
Declarant

  
Signature

