

Brief 392. **Version 6** 17 Feb 93 . Revised April 96.
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MUNICIPAL COURT OF CALIFORNIA
COUNTY OF VENTURA

People v PALASCHAK, Douglas

Cases 92m034737
92m034349
91s008765
91s004450
91s002440

BRIEF #392 - VERSION 5.1

POINTS AND AUTHORITIES IN SUPPORT
OF MODIFICATION OF TERMS OF
PROBATION, IN SUPPORT OF MOTION
TO WITHDRAW GUILTY PLEA, AND IN
SUPPORT OF PETITION FOR WRIT OF
ERROR CORAM NOBIS. (Penal Code
sections 1265, 1018)

APPENDIX FEATURES COMPLETE TEXT OF:

- Bell v Burson* 402 US 535, 29 L Ed 2d 90 (May 1971)
- Pollion v Lewis* 332 F Supp 777 (7th Circuit (Illinois) October 1971)
- Rios v Cozens* 7 Cal 3d 792 (August 1972)
- Anacker v Sillas* 65 Cal App 3d 416 (December 28, 1976)

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POINTS AND AUTHORITIES

CORAM NOBIS

Definition: Coram Nobis: From Black's Law Dictionary, 5th Edition:

"Coram Nobis . . . In our presence; before us. The office of writ of coram nobis is to bring attention of court to, and obtain relief from, **errors of fact, such as a valid defense existing in facts of the case, but which, without negligence on defendant's part was not made, either through duress or fraud or excusable mistake, where facts did not appear on face of record, and were such as, if known in season, would have prevented rendition of the judgment questioned.** People v Tuthill 32 Cal 2nd 819. The essence of coram nobis is that it is addressed to the very court which renders the judgment in which injustice is alleged to have been done, in contrast to appeals or review directed to another court; the words 'coram nobis' meaning 'our court' as compared to the common law writ of coram vobis meaning 'your court' clearly point this up." -Black's Law Dictionary, 5th Edition.

Coram Nobis, generally: From Cal Jur 3rd, Criminal Law (Revised) section 3924:

"3924. Effect of Issuance. If the factual error involved in a coram nobis proceeding relates to a plea of guilty illegally induced, then modification of the judgment is not permitted, because a void plea cannot be the basis of a valid judgment. Accordingly, if the plea is a nullity, both judgment and plea must be vacated and defendant restored to the position in which he stood immediately before the entry of the plea. If an appellate court hears

the writ, it may, after hearing on the merits, order that the petitioner be permitted to withdraw his plea of guilty, and to enter a plea of not guilty with the privilege of a trial by jury if he so desires. Or it may determine only that the petitioner is entitled to a hearing on the merits of the writ, and may return the case to the lower court for that purpose." (End of section 3924.)

"3925. Appeal. Generally, an order denying defendant's petition for writ of error coram nobis is appealable as an order made after judgment. And an order granting a writ of error coram nobis is appealable by the People as an order made after judgment, affecting the substantial rights of the People An appeal from an order granting or denying a petition for a writ of error coram nobis is governed by the same procedural rules that apply to appeals from a judgment of conviction. Thus, the notice of appeal must be timely filed. And, as in a direct appeal from a judgment of conviction, an indigent defendant is entitled to an adequate record on appeal from an order denying a petition for a writ of error coram nobis. but the statutory requirement for a certificate of probable cause applies only to an appeal from a judgment of conviction, and a certificate is not required for an appeal from an order denying a post-judgment motion to vacate a judgment of conviction upon a plea of guilty and for a writ of error coram nobis, where the matters urged by defendant as grounds for setting aside his conviction, some of which involve the validity of the plea, do not appear in the record made in the trial court prior to judgment and the defendant relies wholly upon matters raised and submitted to the court after judgment." - Cal Jur 3rd Criminal Law section 3925.

Point #1. There are 3 prerequisite elements for granting a writ of error coram nobis: 1) New fact; 2) not yet adjudicated; 3) not known by defendant.

Authority: *People v Shipman* (1965) 62 Cal 2nd 226 at 230.

Application of First element: The petitioner must show that some fact existed which without fault or negligence on his part was not presented to the court at trial . . . and which, if presented, would have prevented the rendition of the judgment. (In Palaschak's case that fact is **the absence of scienter**. He believed then, as now, that *Bell* precludes validity of the purported suspension. Ultimately *Marbury v Madison* precludes enforcement of a law repugnant to the constitution. A statute that violates the constitution is void. The bare evidentiary fact of Palaschak's state of mind **was** indeed before the court but the **ultimate** fact of lack of scienter was never addressed to the court; appointed counsel, by virtue of a mistake of law, failed to develop the link between the evidentiary fact and the ultimate fact. Therefore nobody realized that Palaschak's mistake of law (regarding the validity of the suspension) could be a defense. In other words, nobody realized that mistake of law (or not) is an issue of fact in this case. In fact the text of the *Bell* case would be presented to the jury to determine whether Palaschak's belief is well founded. Considering that Palaschak has Shepardized *Bell* and found it sound, it would seem valid. Also, Palaschak brought the *Bell* issue before Superior Court for a writ but he did so too late - and ineffectively. Judge Storch denied the writ on approximately April 30, 1992 but cited no cases or reasoning.

Rebuttal to floodgates argument: Can anybody drive around and say that they don't believe that their license has been legally suspended? As practical matter, most people don't know about *Marbury v Madison* or the principles of Constitutional Law but an unconstitutional administrative mandate and even an unconstitutional court order can be violated with impunity. See discussion of *Carroll v President and Commissioners* 393 US 175, 89 S Ct 347, 21 L Ed2 325

(1968) below. Carroll and other civil rights era cases tell us yes, one can violate an unconstitutional law with impunity unless, of course, one has adjudicated the matter and received an injunction. However, a term of probation (the term being "don't drive without insurance") is not an injunction. Furthermore, 35% of the drivers have no insurance - and remember, it is insurance that kept Palaschak from a license. Furthermore, the insurance term of probation is illegal - not authorized by statute (at least we have not found for the statutory authorization).

Application of 2nd Element: The new fact must not have been adjudicated. In Palaschak's case the court seems to have given full credit to Palaschak's assertion that he believed that any suspension of his license was invalid. The court simply did not realize that Palaschak's legal opinion was of probative value on any factual issue. Therefore, although the factual issue of Palaschak's state of mind was adjudicated albeit summarily, the ultimate fact of scienter was not adjudicated. Where the court does not realize that a fact is probative, then the court cannot be said to have adjudicated that fact.

Regarding all the facts that simply were not presented to the court (Palaschak's 300 page file, chronology, letters from DMV, etc.), it cannot be said that these factual issues were adjudicated.

Application of 3rd Element: The new facts must not have been known by defendant and must not have been within his reach at any time earlier than his petition coram nobis.

The dominant new fact was the **ultimate** fact of the absence of the element of scienter not to be confused with the **evidentiary** fact of Palaschak's legal opinion. This court could, at this point, find that the facts were before it. In order for this trial court to find that Palaschak's remedy is only by appeal this court would have to determine that the ultimate fact of scienter was before it - and this it cannot find. Also, a disadvantage to appeal in Palaschak's case is that almost all the tapes of the many court sessions are inaudible or were never made.

However, we need not belabor the distinction between evidentiary and ultimate facts because many evidentiary facts were not presented to the court, specifically:

All the facts in Palaschak's 300 page file;

The chronology of events that Palaschak had prepared for this case - his work product;

The ambiguous and exculpatory letters from the DMV to Palaschak;

Letters from the DMV that tell Palaschak that his license is not suspended;

Letters from the DMV that tell Palaschak that his suspension does not affect his right to drive in the course of his employment;

Evidence that the DMV failed to update its files with Palaschak's correct address;

Letters that seem to indicate that DMV knows about constitutional infirmities in its procedure and had taken appropriate action - non-suspension;

Palaschak's computer files and details pertaining to each traffic ticket.

All these were unavailable to Palaschak because he was in jail and his appointed attorney did not retrieve the files. Palaschak did not "know" these facts. He knew where they were available but he could not remember them all - or even a substantial portion of them.

Conclusion: Writ of error Coram Nobis is a more efficient solution even if the issue is marginally one for appeal - and simple withdrawal of the guilty plea is an even more efficient solution.

Point #2. Superfluity does not vitiate. Coram nobis is appropriate where denial of right to effective counsel is a separate independent grounds for relief. The strongest argument against Palaschak's motion is that coram nobis will not vacate a judgment simply because defendant was denied effective counsel. The cases cited in *Writs and Appeals in Criminal Cases* for this proposition is *People v Sharp* (1958) 157 Cal App 2nd 205. But a close look at the *Sharp* decision reveals that Sharp failed to prove his case. Sharp was not denied the relief because he had a claim of ineffective counsel; Sharp was denied relief because factually he failed to

establish that a mistake of fact was made. Furthermore, Civil Code section 3537 holds that superfluity does not vitiate.

SCIENTER

Point #3. Defendant Palaschak's state of mind regarding the validity of the alleged suspension of his driver license is a factual issue that should have been resolved at trial. Palaschak's state of mind including his legal opinion is probative on the issue of **scienter** which is an element of the crime of Vehicle Code section 14601.1 - driving with knowledge of suspension.

Authority: Vehicle Code section 14601.1:

"No person shall drive a motor vehicle when his . . . driving privilege is suspended or revoked . . . when the person so driving has **knowledge** of the suspension or revocation. Knowledge shall be **presumed** if notice has been given by the department to the person. The presumption established by this subdivision is a presumption affecting the burden of proof."

Point #4. The continuing validity of *Bell v Burson* 1971, 29 L Ed2d 90 is a factual issue of probative value pertaining to the element of scienter. Furthermore, the element of scienter essential for conviction is lacking even if Palaschak was mistaken in his belief in the applicability of *Bell* to his alleged suspension.

Authority: CALJIC 4.36, footnote citing *People v Goodin* 1902, 136 Cal 455. *Goodin* and CALJIC hold that **mistake of law can be a defense to 14601.1** if the mistake of law precludes the element of scienter. Of course, *Bell* presents a legal as well as a factual issue.

Application: Apparently appointed counsel Henry Harris failed to consider the factual aspect of the *Bell* issue. Harris was mistaken in at least the 2 following points of law:

1) Harris mistakenly thought that the presumption mentioned in VC 14601.1 was irrebuttable;

2) Harris mistakenly thought that ignorance of the law is never a defense.

Palaschak pleaded guilty on mistaken advice of appointed counsel Harris who advised Palaschak that the *Bell* issue could be dealt with on appeal - and only on appeal. Palaschak emphasized this in a statement qualifying his plea before Judge Dobroth on 27 April 1992. Palaschak has been unable to obtain the tape recording of that session if one was made. Judge McGrath acting upon a petition for Writ of Habeas Corpus inquired and reported to Palaschak that the tape was unavailable.

Point #5. The scienter defense fits squarely into the definition of coram nobis quoted above. Paraphrasing the Black's Law Dictionary definition of coram nobis, **the scienter defense is that valid defense existing in the facts of the case that was, without negligence on defendant's part, not made because appointed counsel did not prepare for trial and did not even obtain Palaschak's 300 page file in this case.** Neglect of appointed counsel cannot be imputed to the defendant. The Tuthill definition of coram nobis, as quoted in Black's Law Dictionary, explains that the purpose of coram nobis is to provide relief from "**errors of fact, such as a valid defense existing in [the] facts of the case, but which, without negligence on defendant's part was not made, either through duress or fraud or excusable mistake, where facts did not appear on [face] of record, and were such as, if known in season would have prevented rendition of the judgment questioned.**"

INEFFECTIVE ASSISTANCE OF COUNSEL

Point #6. Harris prevented several valid existing defenses. Whether Harris's statements to Palaschak on April 27th were the product of negligence, incompetence, lack of preparation, or fraud, or a combination of some or all of the above, they amount the "**duress or fraud or excusable mistake**" that justify coram nobis relief according to the dictionary definition of coram nobis. As the attached declaration #392-d shows, Harris advised Palaschak that the knowledge

requirement, scienter, could be proved by a DMV printout and the statutory presumption of knowledge. Harris also told Palaschak that Palaschak would qualify for work furlough (because Harris's similarly self-employed attorney associate, Phil Gunnels, had qualified), that Palaschak would receive concurrent time for the crime (but only if he acted that day), and that Harris had a commitment for a package deal including the VOPs for which Palaschak was then beginning to serve 120 days as a condition of probation. The commitment to the package deal is reflected in the plea form. We are not alleging fraud and we need not allege fraud to obtain coram nobis relief. Whether Harris's acts were fraud, neglect, lack of preparation, or incompetence, they are a basis for coram nobis relief.

Point #7. Denial of effective counsel to defendants in traffic court is a **systemic** problem.

Point #8. Harris was mistaken about the presumption of scienter. Harris was mistaken in telling Palaschak that the prosecution could prove the element of knowledge of the suspension by proving that the DMV had mailed a notice to Palaschak. Either Harris had not read the footnote to CALJIC 16.641 or did not know the meaning of the language of Vehicle Code section 14601.1. Harris failed to advise Palaschak on this key point; the presumption that arises upon proof of notice is a presumption that dissipates upon presentation of controverting evidence. The statutory presumption is not an irrebuttable presumption. Harris made a mistake. Harris thereby failed to notice a "**valid defense existing in [the] facts of the case . . . which, without negligence on defendant's part was not made . . . [due to] excusable mistake.**" Whether the mistake is excusable as seen below simply depends upon the situation; in Palaschak's situation it is excusable because it was made by appointed counsel who breached his duty to investigate and prepare for the case.

Authority: CALJIC 16.641, footnote, says that the presumption is rebuttable.

Point #9. Harris's ineffective assistance precludes a knowing plea. Where an incarcerated

defendant's lack of an alternative to a plea is due to appointed counsel's failure to prepare for trial, the defendant cannot be said to have made a free and knowing plea - and the defendant cannot be said to have made a mere tactical decision. Palaschak was in no position to go to trial on the day of trial because his appointed counsel Harris had failed to investigate and prepare for trial - and had even failed to obtain Palaschak's 300 page case file. Palaschak was not prepared and it was not his fault.

Authority: Proof of Facts 2nd 16:549 *Legal Malpractice - Inadequate Case Investigation*. Proof of Facts 2nd 5:267 *Ineffective Assistance of Counsel* at page 284 says "**Defense counsel has an affirmative duty to prepare for trial**".

Point #10. Palaschak's 6th amendment right to effective assistance of counsel has been violated.

Authority: *Gideon v Wainwright* (1963) 9 L.Ed. 2nd 799, 6th Amendment, 14th Amendment.

Point #11. The remedy for a guilty plea based on ineffective assistance of counsel is withdrawal.

Authority: *People v Hunt* (1985. Ventura. Judge Marvin Lewis) 174 Cal App 3rd 95:

"When a defendant has been denied the effective assistance of counsel in entering a plea of guilty, he is entitled to reversal and an opportunity to withdraw his plea if he so desires." - *People v Hunt*

Although the court in *Hunt* found inadequate basis for a claim of inadequate basis, Palaschak's claim is distinguishable in that Palaschak's claim fulfills the requisite elements prescribed in *Hunt*. The elements prescribed in *Hunt* are all present in Palaschak's case. They are:

- 1) Ignorance of trial counsel;
- 2) Plea entered without the knowledge that would have been obtained from effective counsel.

Point #12. Harris's failure to prepare for trial deprived Palaschak of his 6th amendment right to effective assistance of counsel - and his right to a knowing plea. The 2 rights are intertwined.

Authority: ALR 4th 10:8 *Adequacy of defense counsel's representation of criminal client regarding guilty pleas.* ALR 4th 8:660 *Adequacy of defense counsel's representations of criminal client regarding plea bargaining.* *People v Ibarra* 60 Cal 2nd 460: "If counsel's failure to raise a particular defense is a result of counsel's unfamiliarity with the applicable rule of law [e.g. *People v Goodin* found in CALJIC 4.36 footnotes] then defendant **has been deprived of his right to counsel.**" (Traynor, Justice; Mosk, Attorney General.)

Point #13. Harris's lack of pre-trial consultation and his failure to investigate possible defenses (such as the absence of scienter) easily constitute ineffective assistance of counsel.

Authority: Proof of Facts 2nd 5:267 *Ineffective Assistance of Counsel* has a check list of things that constitute ineffective assistance of counsel. The checklist reads in pertinent part:

- " Lack of pre-trial consultation. . .
- Attorney's failure to investigate possible defenses."

Proof of Facts 2nd 5:267 *Ineffective Assistance of Counsel* at page 283 says:

"At attorney can properly advise a client whether to plead guilty only after an adequate investigation of the pertinent law and facts and . . . lack of such preparation or failure to consult with a client may result in a person pleading guilty without knowing his legal rights." - Proof of Facts 2nd 5:267 *Ineffective Assistance of Counsel.*

Point #14. Palaschak was entitled to rely on appointed counsel as he did. Palaschak should not be penalized for relying on counsel and following advice of counsel. Because Palaschak was incarcerated he could not retrieve his 300 page case file. Palaschak asked Harris in writing to retrieve it. Harris failed to retrieve it. Because Palaschak was not at the time in pro per his access to the law library was limited; pro per inmates receive priority - as Palaschak did when

he became pro per (and when he began working in the jail law library). Palaschak can not be faulted for failing to prepare for this case before he came to jail because he was working on his LSD defense when he came to jail. Furthermore Judge Gutierrez of this municipal court promised to delay remand until the completion of the LSD trial - a promise that Judge Klopfer breached.

Point #15. Lesser instances of ineffective assistance of counsel: Aside from the indisputable deficiencies in the performance of Attorney Harris, a multitude of other performance deficiencies are obvious from the only transcript available.

1) Harris joined with the prosecution in misrepresenting to the court that Palaschak was presently serving 120 days for 14601.1; In fact Palaschak was serving a term of probation for violation of probation.

2) Harris failed to point out that Prosecutor Nelson misled the court at transcript page 1, line 17-18 when she said that Palaschak's license was suspended at the time of the citations "both for an accident and for negligent operator reasons." The accident was not Palaschak's fault; he was rear-ended in 1988. Palaschak is not a negligent operator.

3) Harris failed to rectify the incorrect impression left by Prosecutor Nelson at transcript page 1, lines 18-19 where she said "He's picked up five 14601s in a year and he continues to drive on a suspended license." Palaschak has never received a 14601 - it was a 14601.1. The difference is rather interesting. Furthermore, Palaschak's license was not suspended - but Harris refused to address that issue.

4) Harris refused to address Prosecutor Nelson's inflammatory statement that Palaschak "knows he is not supposed to be driving." (Transcript, page 1, line 21). In fact, that is the key issue in this case; Palaschak knows that his license was never lawfully suspended.

5) Harris refused to contest Prosecutor Nelson's misrepresentation that Palaschak has never

received increased scrutiny because of his LSD case. (Transcript, page 1, line 23.) In fact, Palaschak was arrested by the arresting officer in the LSD case 3 times in the same week.

6) Harris compounded Prosecutor Nelson's misrepresentation that Palaschak was "doing 88 in a rainstorm" (transcript, page 1, line 24) by agreeing that it had been raining (transcript, page 2, lines 25-26) rather than emphasizing that the sky was clear, there was no rainstorm, no rain falling, and the freeway was nearly abandoned. Harris then mumbled some psycho-babble about Palaschak being "self-destructive" (transcript, page 3, line 4). Palaschak is not self-destructive.

7) Harris, of course, could not comment on the fact that Judge Gutierrez and Prosecutor Nelson persuaded Palaschak to plead guilty in December 1991 in exchange for assurances that there would be no penalty in addition to the 120 day sentence for violation of probation; now, a few months later we see that the DMV failed to grant that contemplated concession and gave Palaschak additional points but more pertinently, Prosecutor Nelson has now breached her promise and is arguing for punishment based on 14601.1's for which Palaschak pleaded guilty with a guarantee of no penalty.

8) Harris did not clarify the misrepresentation by Prosecutor Nelson at transcript page 1, lines 12-13 where she says "the 2 new cases that he has are 2 new 14601s, each with 3 priors and each with 3 active VOPS". Harris should have pointed out that Palaschak has never been even accused of 14601 - just 14601.1. Furthermore, it makes little difference how many VOPs there are; the bottom line is that Palaschak's insurance lapsed and triggered DMV action with no hearing - in violation of the provisions of the constitution as explained in *Bell v Burson* 1971, 29 L Ed2d 90.

9) Harris failed to rectify Prosecutor Nelson's misrepresentation at transcript, page 3, line 7 that Palaschak "keeps going through the system for the same thing". In fact Palaschak is being

punished multiple times for one breach of insurance coverage mandated by a statute that fails constitutional muster.

ABSENCE OF FACTUAL BASIS FOR GUILTY PLEA

Point #16. Judge Hunter's sentence was based on a mistake of law; Judge Hunter thought that the DMV does not assign violation points for 14601s. It is outrageous that neither the defense attorney, prosecution, or judge took the time to confirm the point count rules - especially after Judge Hunter announced that the rules had changed. See transcript of audio tape of 28 March 1992, page 5, line 24: (Judge Hunter speaks) "Well, it used to be that way but **right now a conviction of 14601 is no points. It used to be years ago that it was points and it was suspended.**" In fact Judge Hunter was absolutely mistaken. Palaschak was correct when he stated (transcript, page 5, lines 20-21) "It's quite possible my license would not have been suspended had I not received the additional points from my 14601." Palaschak was discussing the fact that Judge Gutierrez had promised no additional penalties for the guilty plea to 14601.1 (after having sentenced Palaschak on a violation of probation rather than give Palaschak the jury trial that Palaschak desired); the DMV, in violation of that promise (and understandably so, since they were presumably not privy to Judge Gutierrez's promise) penalized Palaschak by awarding him 2 points for each 14601.1 thereby causing his license to be suspended in March 1992 when he received the ticket for which he was sentenced by Judge Hunter. In fact, Palaschak's license was **not** legally suspended and therefore not suspended. The DMV in its return to Palaschak's Petition for Writ of Habeas Corpus in Superior Court case 120849 indicates (on page 3) that Palaschak's points as of March 1992 were as follows:

<u>Violation Date</u>	<u>Conviction Date</u>	<u>Nature of Violation</u>	<u>Points</u>
1 April 89	6 Feb 92	VC 22349 Speeding	1
1 May 92	31 May 92	VC 21460 Double Line	1
18 Oct 90	2 July 91	VC 22349 Speeding	1
13 March 91	24 May 91	VC 14601.1 Driving	2

Note that aside from the 14601s the record reveals only 3 points in the 3 year period between April 89 and May 92 - although we recall that there were more. Nonetheless, the point is that it was the 14601 convictions that triggered the suspension and therefore the suspension is illegal because the 14601.1 plea was given in exchange for a promise of no additional penalties. Furthermore, the original 14601.1 was the illegal insurance suspension. Therefore, the subsequent 14601.1's stand or fall with the validity of the original suspension which, we contend, was illegal due to *Bell*.

Authority: (As proof that the traffic laws are largely unconstitutional simply by their lack of notice, try finding the statutes, rules, and regulations that determine "point count". The indexes do not contain the word "point".) Vehicle Code Section 12810 - 2 points for 14601 - revised in 1991:

Vehicle Code section 12810: " . . . (i) Any conviction of . . . 14601.1

. . . shall be given a value of two points."

Point #17. Guilty pleas need not be final if they are the products of misunderstanding or misrepresentation.

Authority: *Blackledge v Allison* (1977) 431 US 63, 52 L Ed2d 136: Guilty pleas are final "unless they are products of misunderstanding or misrepresentation".

Application: Either the court (Judge Hunter) or Palaschak misunderstood or misrepresented the terms of the plea agreement - 1 year top including everything - including the December VOPs. It is very understandable that Judge Hunter would not know the terms of the plea bargain. He was not in chambers when it was struck (and neither was Palaschak).

Point #18. If the term "VOPs" is deemed ambiguous then the ambiguity in a plea bargain must be resolved in favor of the defendant.

Authority: *People v Daugherty* (1981) 123 Cal App 3rd 314 at 319 citing the "well known rule

that the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact or as to the true interpretation of words."

Point #19. Absence of a factual basis precludes acceptance of a guilty plea and acceptance of such a plea is **reversible error**. Judge Dobroth should have recognized from Palaschak's narrative in court on 27 April 92 that Palaschak's qualification of his plea constituted a denial of the element of scienter and an expression that Palaschak was relying on Attorney Harris's mistaken advice that Palaschak's belief was a matter of law and not of factual significance in the case. Apparently Judge Dobroth did not seriously consider the scienter element of the crime of 14601. Nonetheless the record of the session with Judge Dobroth would prove the absence of scienter - but we have no record of that session.

Authority: *People v Tigner* (1982) 133 Cal App 3rd 430: **Accepting a plea without a factual basis is reversible error**. Penal Code section 1192.5 pertains to felonies but the legislative intent is manifested therein:

"The court shall . . . satisfy itself . . . that there is a factual basis for such a plea." - Penal Code section 1192.5, 3rd paragraph.

Point #20. The attempted suspension of Palaschak's driver license was void because the authorizing statute, Vehicle Code section 12810(i) became effective January 1, 1992 - **after** the date of the driving offenses on which the suspension was based on thus constitutes an **EX POSTE FACTO** law - and hence void as applied.

Authority: U.S. Constitution, Section 9, Article 3:

"No Bill of Attainder or ex post facto Law shall be passed."

Point #21. Pleas coupled with a claim of innocence should not be accepted unless there is a factual basis for the plea.

Authority: *North Carolina v Alford* 27 L Ed2d 162: "Pleas coupled with a claim of innocence

should not be accepted unless there is a factual basis for the plea."

Application: Palaschak's situation is not one where his factual story has changed. He merely thought that his innocence was by virtue of an **appellate** remedy. He did not know (due to ineffective assistance of counsel) that his legal opinion that he would argue on appeal also constituted a state of mind that precluded the requisite scienter. And neither did the Judge. Thus, although there seemed to be a factual basis for the plea - in fact there was no factual basis. And this is the error that the court made. Therefore we bring this Petition for Writ of Error Coram Nobis. This writ brings to the attention of the court a defense that exists on the facts of the case but that was not brought before the court in season through no fault of the defendant. See the exact definition at the beginning of this brief.

Point #22. The record clearly shows that Palaschak's words indicate that he did not realize the significance of his state of mind (his opinion regarding the invalidity of the suspension of his license) and therefore he did not make a knowing plea.

Authority: *Boykin* 23 L Ed 2d 274.

Point #23. Where the judge, prosecutor, and defense counsel all are mistaken then coram nobis is appropriate. *People v Odum* (1949) 91 Cal App 2nd 761. False inducement by defense counsel alone might not justify Coram Nobis but the failure of everyone concerned to recognize the significance of scienter in this case constitutes an absence of a **FACTUAL BASIS** for the guilty plea. *People v Kirk* 96 Cal App 2nd 687.

Application: The judge, prosecutor, and defense counsel all failed to consider the significance of Palaschak's unique and exculpatory state of mind at the time when he drove and received the tickets. There is no doubt about Palaschak's state of mind while he was driving. All the arresting officers chatted with Palaschak about the concept of Due Process (and the **Bell** case specifically) and that is why he was ticketed - and not arrested (except when stopped by the LSD arresting

officer, Dawson.) Indeed, defense counsel Harris (transcript, page 3, line 4) failed to adequately consider the fact of innocence even after Palaschak explained it to him. Instead, Harris accused Palaschak in court of being self-destructive.

Point #24. Palaschak was **NOT** engaged in Civil Disobedience. He simply came to a different legal conclusion regarding the issue of the validity of the purported taking of a liberty and property interest without a prior hearing.

Point #25. Palaschak's statements at his plea rebut the general presumption that a guilty plea admits all elements of the crime. Palaschak's statements at his plea before Judge Dobroth and at his sentencing prove that he believed that *Bell* precluded suspension of his license in his situation. *People v Sabados* (1984) 160 Cal App 3rd 691 is the case that holds that a guilty plea admits all elements of the crime.

ARBUCKLE ERROR - BAIT AND SWITCH IN DECEMBER 1991

Point #26. Palaschak was entitled to withdraw his guilty plea when Judge Dobroth recused himself but was never given the opportunity; permitting withdrawal of the plea now remedies this problem.

Authority: *People v Arbuckle* (1978) 22 Cal 3d 749, 756, 150 Cal Rptr 778:

"Whenever 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. Because of the range of dispositions available to a sentencing judge, the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant's decision to enter a guilty plea."
- *People v Arbuckle* (1978) 22 Cal 3d 749.

Point #27. Palaschak's agreement to consolidate the cases and plead them out in November 1991 was conditioned upon the cases being sentenced by Judge Smiley - and condition that the court reneged; Palaschak is entitled to unconsolidate the cases and withdraw his plea.

REMEDIES

Point #28. Where court reneges, defendant may withdraw. Where the prosecution or the court extract a guilty plea in exchange for some promise (such as the promise by Judge Gutierrez to delay remand until completion of the LSD trial) the defendant may withdraw the plea if the promise is breached. In cases 765, 450, and 440, Judge Gutierrez promised to delay remand until the completion of the LSD trial but Judge Klopfer failed to fully honor that promise. The statutory 6 month limit for withdrawal of pleas (Penal Code section 1018) is not applicable to withdrawals that are based on constitutional grounds.

Authority: In *People v Morgan* (1971) 21 Cal App 3rd 33 the court said that **when a defendant pleads guilty as part of a plea bargain with the trial court by which he is assured of receiving in return for his plea some form of consideration, the trial judge cannot impose judgment contrary to the terms of such bargain without giving the defendant an opportunity to withdraw his guilty plea.**

Application: The trial judge must give Palaschak an opportunity to withdraw his guilty plea since the court and prosecution violated several terms of the several plea bargains by 1) remanding Palaschak to custody prior to the conclusion of his LSD trial, 2) by imposing a sentence greater than 1 year; 3) by punishing Palaschak for pleading guilty to 14601.1 in December (when the Judge Gutierrez assured Palaschak that there would be no penalty for the plea), and by imposing additional DMV points despite assurances to the contrary.

See also ALR 3d 66:906 *Right to withdraw guilty plea in state criminal proceeding where court refuses to grant concessions contemplated by plea bargain*. Section 8 of this ALR report indicates that the defendant's possession of a defense to the crime is a factor to be considered; Palaschak had a defense to the crime of 14601.1 and the continued existence of this defense is a dominant factor in this case. See also Proof of Facts 2nd 27:133 *Government's breach of plea bargain*; Am Jur Trials 42:607 *Withdrawal of Guilty Plea*.

Point #29. Unfairly obtained guilty pleas should be vacated.

Authority: Kercheval v US 71 L Ed 1009: "Unfairly obtained guilty pleas should be vacated."

Simple enough for even Ross Perot.

Point #30. In similar recent cases, the court of appeal ordered withdrawal of the guilty plea in similar situations. Over 300 cases can be found by Shepardizing Penal Code section 1018. Several pertinent cases are discussed herein and the less pertinent are in memo #334 not filed.

Similar case: *People v Spears* (1984) 153 Cal App 3rd 79. The court of appeal ordered that the plea in *Spears* be withdrawn where *Spears* was housed in state prison rather than county jail as promised. This breach of promise is less serious than the breach in Palaschak's case where Palaschak was promised work furlough. In fact probation was precluded in *Spears* by Penal Code 1203 et seq for his particular crime. Upon appeal the court ordered that he be permitted to withdraw his plea. Similarly Palaschak's main incentive to plead guilty was that he would receive work furlough and thereby continue to practice law - a very substantial and compelling motivator. In Palaschak's case work furlough was promised to him and then denied to him. To compound the harm, defense counsel Harris failed to follow up and either communicate with Work Furlough to do an administrative appeal or to ask for a writ of administrative mandate.

Similar case: *People v Rutledge* 140 Cal App 3rd 960 has a similar fact pattern in that the plea was taken and then a new judge was put on the case - similar to Judge Dobroth having been taken off Palaschak's case. There was also a new public defender in *Rutledge*. The judge in *Rutledge* did not know the terms of the plea bargain. Similarly it is apparent that Judge Hunter similarly either did not know of the plea bargain, or did not think that it included the VOPs, or did not realize that 120 days plus 270 days exceeded the 1 year ceiling contemplated in the plea bargain - although defense counsel Harris did announce the terms of the plea bargain. See word-processed transcript of audio tape of 28 March 1992, page 1, lines 2 and 3: "Judge Dobroth

took a plea with a commitment of 1 year or less." The court in Rutledge ordered that the guilty plea be withdrawn; Palaschak's guilty plea should similarly be withdrawn.

Similar case: *Harvey* 151 Cal App 661. Withdrawal of guilty plea was permitted one year after trial because the plea was not knowingly made because the public defender had failed to obtain a psychiatrist's report after sentencing. Significance: Just as in Palaschak's case the defendant did not know that her state of mind precluded her guilt. Palaschak did not know that his legal opinion was a fact that precluded the scienter that is an element of the crime of Vehicle Code section 14601.1. Mistake a law can be a factual issue.

The gist of all the cases is that the law is just what the treatises says it is. Pleas can be withdrawn for the reasons stated in this brief. Palaschak has several independent reasons for withdrawal. Together they act **synergistically** to make plea withdrawal a compelling remedy. Furthermore, legislative policy favors withdrawal of the plea in Palaschak's case.

Point #31. There is abundant statutory authority and legislative policy favoring withdrawal of the guilty plea in Palaschak's situation.

"This section shall be liberally construed to effect these objects and to promote justice." - Penal Code section 1018, the statute authorizing withdrawal of guilty pleas.

"The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." - Penal Code section 4 - Construction.

Point #32. When in doubt, a court should grant a motion to withdraw.

Authority: *Spears*.

Point #33. Appeal will only delay adjudication of the issues in this case.

Point #34. Coram Nobis is the appropriate remedy where defense attorney has spent little or no time preparing for trial.

Authority: Am Jur Trials, Volume 18, *Coram Nobis*, section 17.

Point #35. Relief by Writ of Error Coram Nobis has been granted where, as here, defendant's attorney promised defendant that if he pleaded guilty then he would receive a lesser sentence or at least would be placed on probation - and these representations were corroborated by statements of prosecuting officials.

Authority: Am Jur Trials, Volume 18, *Coram Nobis*, section 17 citing *People v Elmer* 112 Cal App 2nd 415.

Application: Note the similarity:

Palaschak's case:

Promised work furlough

Promised 1 year ceiling

Corroboration in plea form and 270 days

announced by Judge Hunter (see transcript).

People v Elmer:

Promised probation

Promised a lesser sentence

Corroboration

Point #36. Coram Nobis is the appropriate vehicle for dealing with unforeseen results even if they are foreseeable (such as unexpected redundant points by the DMV).

Authority: *People v Wiedersperg* (1975) 44 Cal App 3rd 550. In *Wiedersperg* a 5 year old conviction regarding marijuana was expunged pursuant to Penal Code section 1203.4 but caused unforeseen deportation problems similar to Palaschak's unforeseen DMV point problems and state bar problems. ***Wiedersperg*** is just one of several cases annotated in ***California Digest of Official Reports***, section 489 (and in the old digest at section 1038). Other cases cited in the same annotation are: *People v Esquibel* (1975) 44 Cal App 3rd 591, *People v Brady* (1973)

30 Cal App 3rd 81 (wherein no new facts were presented), *People v Wheeler* (1970) 5 Cal App 3rd 534, and *People v Rhoades* (1969) 1 Cal App 3rd 442.

Point #37. Withdrawal is the correct remedy.

Authority: *Daugherty* quotes from *People v Barajas* (1972) 26 Cal App 3rd 932, 937:

"Where the prosecution repudiates its part of the plea bargain, the defendant's remedy is to move to withdraw his plea."

Point #38. Election of the remedy is the defendant's option in this situation.

Authority: Supreme Court Justice Douglas in *Santobello* cited below. Also see Proof of Facts 2nd 27:133 *Government's breach of plea bargain* page 149, Section 7 - Remedies available in general. The cases cited in *Government's breach of plea bargain* are: *Santobello* (cited below), *Blackledge* (cited above), *People v Ramos* 26 Cal App 3rd 108, *U.S. v Carter* 454 F2d 426, *Correale v U.S.* 479 F2d 944, *Palermo v Warden* 545 F2d 286, *People v Wadkins* 63 Cal 2nd 110, *U.S. v Brown* 500 F2d 375, *Bergman* 569 F2d 705. See also: ALR 20:1445 *Right to withdraw guilty plea*, ALR 66:628 *Right to withdraw guilty plea*. See *Cal Jur 3rd*, Criminal Law (Revised) sections 2816-2840 regarding withdrawal of guilty plea.

Point #39. Imprisonment due to unkept plea bargain is collaterally attackable.

Authority: *Machibroda v U.S.* 7 L Ed2d 473 but query the validity of this decision's view of recent Supreme Court abridgment of Habeas Corpus Jurisdiction. Furthermore Palaschak already filed a complaint in federal court. The magistrate held that it was a state court problem. And he is right. Why make a federal case out of a simple matter of failing to do what we know we should have done. Marching up and down the appellate ladder merely wastes everybody's time - and this is the genius of the Writ of Error Coram Nobis. It doesn't work in every case so let's be glad it does work here and let's just do the case right.

See also ***Supreme Court's view as to Plea Bargains and its effects*** 50 L Ed2d 876; ALR 4th

3:1181 ***Accused's Right to be sentenced by the same Judge who accepted the Guilty Plea Entered Pursuant to Plea Bargain.***

Although Habeas Corpus is an appropriate vehicle for violation of right to counsel (*Johnson* (1979) 24 Cal 3rd 769, *Hochberg* (1970) 2 Cal 3rd 870) it is not the only remedy - especially where the violation is coupled with other violations - and clearly not where there is an independent basis for trial court relief - and an appropriate trial court remedy - and particularly where there was no trial.

Point #40. Regarding the remedy, *Santobello* holds that Palaschak is entitled to elect the remedy of withdrawal - not merely enforce specific performance of the pre-ex parte 270 day sentence.

Authority: *Santobello v New York* 1971, 30 L Ed2d 427, 436 (concurring opinion of Justice Douglas):

"In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State."

We contend that whether the prosecutor or the court breach a plea bargain - or whether the plea is given mistakenly due to denial of the right to effective assistance of counsel - defendant should be entitled to withdraw the plea for the reasons set forth in the quote from Justice Douglas.

Point #41. The appropriate and most efficient court for relief is here - not on appeal. The appropriateness and inadequacy of alternative remedies (such as habeas corpus or appeal) is what compels the decisions that support this contention. The trial court does not lose jurisdiction to hear a petition for writ of coram nobis by virtue of appeal.

Reason: The writ of error coram nobis addresses facts that are **not on the record** and therefore are not susceptible to resolution by an appellate court.

Authority: Although there are cases that support a general proposition that a trial court is without jurisdiction to vacate judgment once appeal is taken, this general proposition has exceptions and coram nobis is one prominent exception. A close reading of Cal Jur 3rd Criminal Law section 3925 quoted above at page 2 reveals an implication that a petition for writ of coram nobis would routinely be done before an appeal. Section 3925 says that appeal is a remedy for a writ of error coram nobis - or a denial of a writ. Furthermore, the issue of jurisdiction regarding coram nobis is mentioned in Penal Code Section 1265 which is reprinted here in its entirety:

"After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate is remitted; provided, however, that if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a **petition for writ of error coram nobis** shall be brought to procure the vacation of said judgment, except in the court which affirmed the judgment on appeal. When a judgment is affirmed by a court of appeal and a hearing is not granted by the Supreme Court, the application for the writ shall be made to the court of appeal." - Penal Code Section 1265.

Point #42. The trial court does not lose jurisdiction upon appeal in the case of coram nobis and or motion to withdraw guilty plea.

Authority: People v Quesada 1991 230 Cal App 3rd 525 as summarized in *California Digest of*

Official Reports, section 489 as follows:

Although a motion to change a plea of guilty must ordinarily be made before judgment is pronounced (Penal Code section 1018), **both motions to vacate the judgment and petitions in the nature of coram nobis may be addressed to the trial court after judgment, if there has been no affirmance on appeal** (Penal Code section 1265). Thus, a motion to set aside a judgment of conviction and for permission to withdraw a plea of guilty may ordinarily be considered as a petition for writ of error coram nobis."

Although California Digest of Official Reports, section 489 also cites a case where coram nobis was not appropriate, that case is fundamentally distinguishable from Palaschak's case. That distinguishable case is People v Soriano (1987) 194 Cal App 3rd 1470. Other cases cited in *Quesada* are: *People v Wadkins* (1965) 63 Cal 2nd 110, 113; *People v Standworth* (1974) 11 Cal 3rd 588, 594 footnote 5; *People v Superior Court (Giron)* 11 Cal 3rd 793, 796; and *People v Shipman* (1965) 62 Cal 2nd 226, 230 cited above (in which the court defines 3 elements prerequisite to coram nobis - see above).

Point #43. Palaschak's remedy is not merely appeal.

Authority: Stuart v Superior Court 94 Cal. App. 3rd 182 is a case quite similar to Palaschak's. Stuart was charged with possession of drugs - H&S code section 11350. Stuart pleaded guilty **upon the condition that the sentence be stayed pending appeal** - like Palaschak's plea of guilty in exchange for delay of remand until completion of his drug trial. The prosecution in Stuart subsequently brought 2 more charges against Stuart - receiving stolen property and possession of a sawed off shotgun. Prosecution moved to vacate the stay and Stuart's trial court complied. Stuart obtained a writ of mandate from the court of appeal which had the following

pertinent comments:

"We reject the Attorney General's suggestion that petitioner's remedy is by appeal. If the trial court erred in revoking its stay of execution, it will benefit [Stuart] little to discover that fact after the appeal process has been exhausted. The result of waiting in prison for a decision on any appeal from the order revoking the stay would likely be the same as would have resulted had petitioner never bargained for the stay."

Application: The application of this decision to Palaschak's case is as follows: Palaschak also made a bargain for a stay of execution which the Municipal Court breached. Furthermore the Municipal Court breached its commitment to a 1 year top. This breach was even more egregious because it was done ex parte after Palaschak and his counsel had left court on 28 April 1992. But we are straying. The point is that rules follow logic and not the converse. Either the trial court or the appellate court must remedy the breaches in Palaschak's case. It is more efficient and pertinent to do it at the trial level. Since coram nobis involves bringing facts before the court the appellate remedy is merely to send it back to the trial court level. Therefore judicial efficiency is best served by handling the writ here at the trial level.

Reasoning, Logic and Analysis in Selecting the Remedy: The remedy of coram nobis is an ancient remedy that is recognized and codified in Penal Code section 1265 (quoted in its entirety above) which spells out the conditions under which the writ may statutorily be invoked. Furthermore, a writ of error coram nobis is only applicable in a very limited situation - and Palaschak's case is that situation as we prove in the first portion of this brief. Palaschak's case is complicated because 1) there are actually 5 cases regarding perhaps 7 or more tickets; and 2) there were a multitude of alleged mistakes and curtailments of constitutional rights. These

mistakes and curtailments combined **synergistically** to result in a miscarriage of justice. Each mistake and curtailment can be remedied in several ways but the cleanest and most correct remedy is simply to permit withdrawal of the plea. The mistakes and curtailments are the following:

1. Mistake: Palaschak was innocent and nobody realized it. Remedy: Withdrawal.
2. Curtailment: Nobody realized that Palaschak was innocent because his appointed attorney did not take the time to communicate with Palaschak, investigate, and prepare for trial. Remedy withdrawal.
3. Curtailment: The court did not honor its December 3rd plea bargain; the court reneged; it remanded Palaschak too early. Remedy: Withdrawal.
4. Mistake: The court did not honor its one year limit in the plea bargain. Remedy: Although the court has attempted to remedy the situation by modifying the jail term, the U.S. Supreme Court in *Santobello* says that the defendant should be permitted to elect the remedy - and Palaschak would elect withdrawal of the plea.
5. Mistake: Although Judge Gutierrez promised no additional punishment (in addition to the VOP punishment) for pleading guilty to 14601.1, the court did not realize that the DMV would give Palaschak additional points resulting in further license suspension. Remedy: Withdrawal.
6. Mistake: Jennifer Nelson led Judge Hunter to believe that Palaschak had been given the previous 120 day jail term for a 14601.1. (See word-processed transcript of audio tape, page 1, lines 13 and 14.) Remedy: Withdrawal.
7. Curtailment: The action by the DMV in giving Palaschak additional points after Judge Gutierrez promised no further ramifications amounted to a breach of the plea bargain. Remedy: Withdrawal.
8. Mistake and Curtailment: Prosecutor Nelson made approximately 12 inflammatory

statements that went unanswered on 28 April 1992 because Palaschak's appointed counsel Harris apparently did not know the true facts. Remedy: Withdrawal.

9. Curtailment: The pleas of December 2 and 3 were the product of denial of counsel and a multitude of constitutional rights. Remedy: Withdrawal.

So many of the mistakes and curtailments point to withdrawal of the guilty plea as the best remedy. Furthermore, this messy case is a product of the Municipal Court's zeal to clear its calendar. Municipal court aggravates the situation by cooperating with police in emphasizing enforcement of trivial traffic laws to alleviate budget shortfalls. The result is a shortfall in the area of constitutional liberties. Since the municipal court created this monster, it is appropriate that the municipal court deal with this monster.

For contrast, we list here situations where coram nobis will not lie. From CEB, *Writs and Appeal in Criminal Cases* (1982), Section VI, Writs of Error Coram Nobis and Coram Vobis, page 374, coram nobis will not vacate a judgment when:

- 1) An error of law occurred;
- 2) The fact was or should have been discovered in time for a motion for a new trial (seemingly inapplicable here where there was no trial);
- 3) Failure to present the fact was due to the negligence of the defendant;
- 4) The defendant was party to the fraud (not applicable);
- 5) The fact, if known to the court, would not have produced a different result.

These 5 situations are not Palaschak's situation but are listed to demonstrate the uniqueness of Palaschak's situation.

Point #44. There are several remedies for this combination of infringements of Palaschak's fundamental constitutional rights.

INFRINGEMENT

REMEDY

OBSTACLE

Ineff. Asst. of Counsel.	Withdrawal. See <i>Hunt</i> herein.
No trial record.	Dismissal? Re-trial?
Court reneges on year ceiling.	Withdrawal. Court partially unreneges at 11th hour.
No verbatim trans. of Plea	Withdrawal. Plea form. But reservations are not noted.
Ex Parte Modification.	Undo modification.

Penal Code section 1265 and the cases annotated there explain the general limitations of coram nobis. Whether Palaschak's relief is by way of coram nobis or by simple self-enacting clauses of the constitution as in *Bivens v Six Unknown Agents of the Federal Bureau of Narcotics* 29 L Ed2d 619 it is appropriate for a judge at the trial court level to take a second look at what happened on April 27th and 28th and since then. It is convenient for the court to say that the errors are addressable by appeal but they simply are not addressable by appeal - mainly because all the court session except one are unrecorded. (This rather dismal performance record for the court tape recording system is in itself a substantial issue.) There is no clear record for appeal, but the more important issue is that all parties failed to adequately consider this case - and in particular the factual issue of Palaschak's belief regarding the validity of the purported suspension of his license and its bearing upon the element of scienter; in short, we all failed to recognize that scienter is a factual issue in this case. If Palaschak had not been sentenced but had been placed on probation instead, then a motion to withdraw his guilty plea would have been statutorily permitted - as it is now for one or more of his traffic tickets for which he is now on probation. Any remedy other than withdrawal of the guilty plea is inadequate for the following reasons. If an appeal is taken, then the problem of the absence of an adequate record arises making the appeal difficult for everyone and we are still stuck with the withdrawal motion for those cases that are not on appeal. In short, appeal does not address all the cases and even for the 2 cases that it does address, appeal does not address them well due to the

absence of a transcript. Furthermore, one of the possible results of appeal would be a trial - which is the relief that defendant seeks.

Point #45. The interests of the defendant in this particular case are more compelling than the courts natural inclination to clear its calendar on the basis that other forms of relief are available.

Point #46. Four criteria to used in evaluating the choice of an appropriate remedy. Withdrawal of Guilty Plea is the logical choice considering the various wrongs and the various remedies. The problem is that the several wrongs considered individually point to various remedies which seem, at first, to preclude each other. Specifically, the court might be inclined to point to appeal as a remedy because it is available instead of coram nobis. The following factors would make a remedy desirable:

- 1) An efficient remedy is desirable;
- 2) A remedy that puts the parties where they would have been if things had gone right is desirable;
- 3) Speed is desirable;
- 4) Ultimate justice is desirable.

If the trial court looks at this problem as one of a mistaken plea and permits withdrawal of the plea then most of the other problems go away. This remedy is desirable because it is ultimately just, efficient, speedy, and puts the parties where they would have been had the infringements not occurred. The propriety of returning the parties to the status quo ante is validated by the quotation from Cal Jur Criminal Law section 3924 cited above; "[The] plea must be vacated and defendant restored to the position in which he stood immediately before the entry of the plea", in other words the status quo ante must be restored.

Point #47. Palaschak's LSD trial detracted his attention from his traffic matters. Due Process implicates some consideration to prevent 2 nearly simultaneous trials. Some consideration must

be given to the fact that on the day set for trial, April 27, 1992, defendant Palaschak was distracted by his nearly simultaneous drug trial. Palaschak was at the time attempting to do all of the following as best he could from jail:

- 1) Reduce felony drug charges to misdemeanor (this was done successfully);
- 2) Prevent automatic interim state bar suspension upon conviction of felony that was later reduced to a misdemeanor (this was not done successfully yet);
- 3) Keep office rent paid and phones turned on;
- 4) Keep work furlough option viable.

Rather than take a holistic approach and help defendant with these problems, appointed counsel Harris did not even properly do the one task that was assigned to him - prepare for trial.

CONSTITUTIONAL INFIRMITIES IN COURT SESSIONS OF DECEMBER 1991

Point #48. On December 2 and 3, 1991 Judge Gutierrez reneged on the court's bargain with Palaschak to have Palaschak's case heard by Judge Smiley. This renege also violated the court's own 30 day rule. Furthermore Judge Gutierrez violated Palaschak's right to a fair trial by 1) denying Palaschak an expected and justifiable continuance; 2) denying counsel to Palaschak; and 3) committing a multitude of other constitutional infractions in an antagonistic session. We do not have a record of these court session. Judge Gutierrez has a prejudice against Palaschak and should have recused himself. The record may show that Gutierrez was already papered in at least one of Palaschak's cases that Gutierrez heard that day.

Authority: Municipal court 30 day rule; Kansas Law Review 19:622 *Accused's constitutional rights violated by denial of continuance.*

Point #49. The December pleas may be withdrawn due to a combination of constitutional infirmities including 1) bait and switch of judges, 2) denial of counsel, and 3) absence of a record. The guilty pleas of December 2nd and 3rd were fraught with constitutional infirmities and now

there seems to be no tape recording of the proceeding. Although Palaschak waived counsel before Judge Smiley, he then requested counsel when Judge Gutierrez unlawfully took over the case. Gutierrez denied Palaschak's request saying that Palaschak had already waived counsel. Palaschak's waiver was a polite move when the court seemed polite. In effect the court did a bait and switch. The court offered Judge Smiley, obtained a waiver of counsel, and then changed judges in violation of its own 30 day rule (which rule, incidentally, cannot be found by Palaschak). Palaschak was denied his right to counsel. A waiver may be withdrawn upon change in circumstances. Palaschak's rights were being violated so fast by Judge Gutierrez that Palaschak's only consolation was that there would be a record for appeal.

Point #50. Where the absence of a record masks a multitude of denials of substantial fundamental rights, the absence of a record must be deemed reversible error. In Palaschak's case, plea withdrawal must be permitted - especially where it now appears that Palaschak's license was not lawfully suspended - or at least he did not have knowledge of its lawful suspension. Incidentally, the practices of this court cannot be justified simply because other defendants fail to complain about them; most other defendants do not know their rights - and the purported explanation of rights is both incomplete and mistaken in what it does say. Example: the statutory limit for many misdemeanors is 6 months in jail yet the tape says 1 year.

Point #51. Palaschak's pleas in case 2440 and 4450 were conditioned on no jail time and a fine. Palaschak paid the rather stiff fine rather than spend days in court which would have wasted even more money in lost billable hours. The policy of the court to use probation and a fine or probation and a jail sentence is over-reaching and essentially legalized (or not) renegeing. Palaschak now contends that if the court is going to undo the deal after having collected the fine then Palaschak is entitled to withdraw his guilty plea in those cases.

Point #52. Palaschak's revocation of his waiver of appointed counsel should have been honored

by Judge Gutierrez on December 2 and 3, 1991. Palaschak only agreed to consolidate the cases and waive counsel because Judge Smiley was the judge. Then Judge Gutierrez wrongly took the cases. This switching of judges constitutes renegeing by the court on a material provision of the bargain to consolidate the cases.

Point #53. Because Palaschak requested appointed counsel and was qualified for the services of appointed counsel on December 2nd and 3rd, 1991, he was entitled to appointed counsel and appointed counsel was obligated to file the notice of appeal; therefore this court must deem Palaschak's notice of appeal filed. (Palaschak himself filed a notice of appeal on the 31st day - 1 day late.)

Point #54. It is denial of due process and pedantic beyond permissible limits to deny filing a notice of appeal filed exactly a month after the decision where the statute specifies 30 days and the month has 31 days since 30 days and 1 month are considered synonymous. Furthermore, between December 3rd and January 3rd, there were 4 holidays, 2 for Christmas and 2 for New Years.

Authority: Penal Code Section 4 set forth fully as follows:

"Section 4. Construction. Construction of the Penal Code. The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

CONSTITUTIONAL INFIRMITIES OF TRAFFIC COURT - IN GENERAL

Point #55. The local District Attorney policy of not prosecuting citizen complaints on infractions unfairly denies equal protection of the laws and is arguable a basis for dismissal of almost any traffic prosecution. The related policy of permitting the court to prosecute traffic cases without

a prosecutor is also constitutionally suspect since the judge in such cases has the additional and conflicting task of asking the correct questions to obtain a prosecution. The error of this policy is compounded by the local prosecution policy of using prosecutors whenever Palaschak has a ticket that would otherwise be handled without prosecutors.

Point #56. The court's policy of negotiating pleas in chambers in defendant's absence is constitutionally infirm. It is convenient but the public really wonders what goes on in there - and defendants wonder just exactly what the deal was.

Application: Palaschak's plea was committed to writing on the plea form. The terms of the deal were included and written by hand on the 2 plea forms. It said something like "1 year top for everything including the VOPs". It is the policy of the Ventura Municipal Court and the standard operating procedure that the Judge, Prosecutor, and Defense Counsel meet in chambers at 8:30 to review the case. The prosecutor and defense counsel each state their opinion regarding the appropriate sentence. Then Judge Hunter typically says something like "this looks like a 60 day case" indicating the court's position. The judge's mere oral commitment to a 1 year top is efficient for the court because it eliminates the need for anything more formal than the plea form.

Point #57. The Ventura County practice of plea bargaining in chambers out of the presence of defendant is an unconstitutional deprivation of Palaschak's right to be present at all stages of his criminal proceeding.

Point #58. The Constitution is self-enacting. Palaschak needs no statutory authority or permission. Thus, failure to meet a statutory limit, such as the 6 month limitation of PC 1018 does not preclude relief. A void statute is void ab initio - from the beginning.

Authority: *Bivens*, cited above.

Point #59. Statutes repugnant to the constitution are void.

Authority: *Marbury v Madison* (1803) 1 Cranch 137: "A law repugnant to the constitution is void."

Application: Many DMV (Department of Motor Vehicles) regulations and vehicle code sections are void as applied. Specifically, the requirement to buy insurance before a license will issue - or posting bond upon being involved in an accident without insurance is unconstitutional for many reasons - most obviously because the driver who caused the accident does not suffer the same restriction as the victim of the crash. The means-end matching is constitutionally defective in this statute - and the statute thus denies equal protection. But we digress. *Bell* holds that at least the proof of insurance requirement is void - because in the words of Former Chief Justice John Marshall it is "repugnant to the constitution."

Incidental Point #60. Palaschak has put forth similar arguments in 2 federal civil rights cases and Superior Court case 120849. There is more factual detail in those pleadings. Factual detail has been what is missing in these cases. Palaschak did not want to spend time in court (and it is unfair to make defendants wait so long to get a hearing - as compared to an appointment) and pleaded rather than fight the case (having spent part of last summer in Los Angeles County Jail for trying to fight a ticket in Valencia). Everyone was interested in an expeditious solution - and that is the way the court operates generally - and we should, of course, stick by our deal.

Point #61. The standard operating procedure of traffic court includes many procedures and policies that are constitutionally infirm in the nature of dirty tricks. Sadly, traffic court is in the business of systematically extracting money from people and uses tricks and little known laws to achieve this extraction efficiently. Example: Penal Code section 1045 specifies that the defendant must give 5 days warning to other side to order a court reporter in a criminal case. Defendants - and many lawyers - don't know that! The dirty tricks done by Judge Gutierrez are other examples. Palaschak cannot remember them all. He just remembers how infuriated he

was at having been fooled. Palaschak thought "I can read the record later and sort it out on appeal." But now that there is no tape recording of the session, Palaschak is deprived of his opportunity to challenge those constitutional infirmities that he cannot recall. Also, Palaschak filed Notice of appeal was one day late - on the 31st day.

Point #62. Traffic court policy of having the judge ask questions of the police officer constitutes systemic denial of the right to an unbiased judge. In Palaschak's case this constitutional infirmity is compounded since the court deviates from its policy to ensure that prosecutor's are available for Palaschak - thus depriving him of his right to equal treatment in traffic court.

Point #63. Palaschak is entitled to 2 for 1 credit rather than 3 for 2 credit. Penal Code section 4019 unfairly discriminates against county prisoners as compared to state prisoners whose time is computed pursuant to Penal Code sections 2900.5 and 2933.

DENIAL OF DUE PROCESS RENDERS MANY DMV ORDERS VOID

Point #64. Unconstitutional Orders may be violated with impunity.

Authority: *Constitutional Law, 5th Edition* Lockhart, Kamisar, and Choper, (1705 pages), West, 1980, pages 1024 et seq wherein they compare 2 similar situations where an injunction was upheld in one case but not in the other. In *Carroll v President and Commissioners* 393 US 175, 89 Sct 347, 21 Led2 325 (1968) the United States Supreme Court vindicated the right to violate an illegal order. By comparison, in *Walker v Birmingham* 388 US 307, 87 SCT 1824, 18 Led2d 1210 (1967) that same United State Supreme Court upheld the conviction of Martin Luther King and others for violating a court order.

Point #65. Denial of the right to be heard is denial of due process.

Authority: *In Re Ming* 469 F2d 1352 (7th Cir. 1972) - quoted in its entirety in the appendix.

Point #66. Notices from the DMV are constitutionally defective and thus do not constitute notice since 1) they do not come from a human being, 2) they are ambiguous, 3) they are not written

in English (since they contain so many abbreviations), and 4) they reveal patent flaws in DMV computer programming.

After receiving several letters, one can see that the DMV computer sends out a letter upon triggering but without checking out some other facts that could make the letter incorrect. Example: In Palaschak's case the computer sent out a letter that told him he had only 2 points on his record - implying that his license was still good - and maybe it was still good.

Are we obligated to obey a computer? If the DMV does not have time to put a human in the loop, and they don't have time to properly program their computers, then does the law expect us to obey their mistaken commands? Of course not!

DMV printouts are written in abbreviations. Palaschak asked the DMV for a dictionary of their abbreviations and was told that he must bring his form to them for interpretation. Then when he presented the form for interpretation, they told him that they did not know what the abbreviation meant. In other words, the DMV could not interpret its own form. (As another example of this widespread bureaucratic abuse, the court need look no further than its own docket printouts - the ridiculous unintelligible pieces of paper that it gives to every person who appears before it. Query whether even this court can read and understand the abbreviations on its own document that it gives to defendants?)

DMV printouts contain a section at the top that is unavailable to the public. This section details when the license was suspended and when it was good. When Palaschak asked to look at his at the DMV he was told that this section is not available to the public.

Point #67. Government is designed to serve the people. Bureaucracies forget that. There is a pattern here. Bureaucracies expect humans to understand that bureaucracies cannot be perfect. Yet the bureaucracies expect people to toe the mark. Example: When we cannot receive a trial, the court bureaucracy explains that it is overcrowded. However, it nonetheless

expects us to pay their fine plus penalty assessment without any serious consideration of the reason for the fine or inability to pay. We digress, the point is pertinent because it is sloppy drafting of law, legislation by special interest groups, and failure of the courts to take time to try traffic cases that lead to this mess.

Point #68. There must be some relief from the dilemma of driving to court and receiving a ticket for 14601 (as did Palaschak) or not going to court and being punished for failure to appear. We cannot expect citizens to relinquish their use of a car without some good cause. It is ridiculous - and perhaps cruel and unusual. When Palaschak received his March 1992 ticket he was on his way back from Simi Court where his ticket was to have been adjudicated but the ticket was not adjudicated that day.

THE CONTINUING VALIDITY OF BELL V BURSON IN CALIFORNIA

SUMMARY AND ANALYSIS OF BELL AND ITS PROGENY

The 4 leading cases are set forth in their entirety in the appendix to this brief and listed below:

Bell v Burson 402 US 535, 29 L Ed 2d 90 (May 1971)

Pollion v Lewis 332 F Supp 777 (7th Circuit (Illinois) October 1971)

Rios v Cozens 7 Cal 3d 792 (August 1972)

Anacker v Sillas 65 Cal App 3d 416 (December 28, 1976)

Bell was the high water mark for procedural due process in the United States Supreme Court. *Pollion* applied *Bell* in a state that had a universal car insurance requirement - like California's almost-universal car insurance requirement. *Rios* cites follows *Bell* and cites *Pollion* with approval. *Anacker* is an anomaly - a poorly written decision that can be proven wrong; the driver in *Anacker* was a non-lawyer doing his appeal in pro per. The key to understanding the decisions as they pertain to current California law is in footnote #2 in the dissent in *Pollion* which footnote is set forth in full as follows:

"[Footnote] 2. Section 7-201 repeats the directive that the financial responsibility provision be applied to persons involved in any manner in an accident if none of the exemptions provided in section 7-202 apply. *None of the exemptions provided in this statutory scheme relate to consideration of fault or potential liability of uninsured motorists involved in any manner in accidents, even if such persons are victims of another's negligence.*" (Italics by dissenting Chief Judge Robson.)

The footnote tells us that a particular Illinois statute did not require fault consideration but was nonetheless subject to the *Bell* decision. In other words, the *Pollion* court found (as did the United States Supreme Court in *Bell*) that Illinois financial responsibility was essentially a fault-based system despite the one almost-universal statute. The California Supreme Court in *Rios* found that the California financial responsibility law was also fault-based and that *Bell* was applicable in California. Incidentally, *Rios* was before the United State Supreme Court but was dropped when the California Supreme Court decided *Rios*. The *Anacker* decision is founded on the mistaken premise that California insurance law changed significantly after *Rios*.

Point #69. California had a general car insurance requirement prior the *Rios* decision and therefore *Anacker* is founded on a specious premise - that the general statute law changed significantly between *Rios* (1972) and *Anacker* (1976). Deering's annotated statutes state that the prior law was Vehicle Code section 420 enacted in 1959 and that it was similar to the current general insurance requirement which is Vehicle Code section 16020. (We are presently trying to find an old copy of the pre-1972 pertinent vehicle code section from Legislative Research Institute or another source.)

Point #70. The legislature and the people of California have rejected no-fault (by referendum

in 1988) and the enforcement of the general insurance law (by repeal effective 1991); therefore, the continuing validity of *Anacker's* premise (that premise being that California's car insurance law is universal and non-fault oriented) is dubious (assuming *arguendo* that it ever was valid in Palaschak's situation).

Point #71. As a matter of public policy, California's post-Bell insurance laws must not be permitted to intimidate non-at-fault uninsured victims of insured drivers into avoiding seeking insurance benefits for fear of losing their driver license; the marginal social utility therein is negligible - and benefits only the insurance industry - the main insurance law lobbyists.

Point #72. Because Rios was a class action, the order is Rios is binding on the DMV and precludes their lawful suspension of Palaschak's licenses regardless of whether Palaschak availed himself of the constitutionally infirm DMV hearing.

Point #73. The vehicle code section which purports to suspend Palaschak's license for failure of proof of insurance is void because it fails the rational basis test in that it punishes the uninsured more than the person who caused the crash - and because it contains so many exceptions.

Point #74. Vehicle Code section 16072 et al are unconstitutional as applied to Palaschak and other victims of negligent drivers.

Authority: *Bell*, cited above.

Point #75. Vehicle Code section 13665 is unconstitutional as applied in that it purports to permit suspension without a hearing but more importantly what is not clear from the statute is that the courts inform the DMV of a failure to appear but do **NOT** inform the courts when the FTA is cleared; they leave that up to the driver who must drive to the court and pay \$4 for an abstract - another example of bureaucratic abuse. In Palaschak's case he was arrested 3 times for failure to appear in Valencia despite his having appeared approximately 8 times in an attempt to have

a trial on a speeding ticket earned on a trip to Bakersfield to apologize for another attorney's having failed to file a special Bakersfield fast track form. A pattern is emerging; Bureaucracies are causing much unjustified grief and waste of time for Palaschak.

Summary

Denial of the right to effective counsel Palaschak's case precluded a knowing plea - as in the *Boykin* line of cases. An entire law review article is dedicated to differentiating between cases where denial of counsel precludes a knowing pleas and the cases where it does not. The remedy is withdrawal of plea - or dismissal.

The prosecution's leading objection is that Palaschak's plea was merely a tactical decision; the rebuttal is that Palaschak was denied his constitutional right to make an educated decision by denial of the right to effective assistance of counsel. A tactical decision without benefit of effective assistance of counsel is not binding when that decision results in a mistaken plea of guilty. Ultimately the foundation is reason.

The authority supporting withdrawal of this guilty plea lies in the pertinent statutes, in California cases, and in cases based on our constitution. But ultimately, the foundational basis is logic and fairness.

Respectfully submitted,

Douglas Palaschak

Appendix has been moved to "Bell v Burson" do to space limitations on uploading.