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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID REYES, JR.,

Defendant and Appellant.

F064435

(Super. Ct. No. 08CM7574)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

J. Peter Axelrod, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant David Reyes, Jr., was charged with first degree murder (Pen. Code,¹ § 187, subd. (a)), with the special circumstance allegation of intentional murder with the infliction of torture (§ 190.2, subd. (a)(18)), and assault by a life prisoner by means of force likely to produce great bodily injury (§ 4500). It was further alleged (1) defendant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)), (2) defendant had two prior serious or violent convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and (3) he suffered two prior prison terms within the meaning of section 667 subdivision (a) and section 667.5, subdivision (b). Pursuant to a negotiated disposition, defendant entered a no contest plea to the section 4500 charge, stipulating to a sentence of life without the possibility of parole. Defendant was subsequently sentenced to life without the possibility of parole.

In this appeal, defendant asserts he is entitled to withdraw his plea because: (1) a term of his plea agreement was unenforceable, (2) his plea was not knowingly and intelligently made, (3) he was denied effective assistance of counsel in entering his plea, and (4) the trial court imposed a larger restitution fine than allowed by the plea agreement. As we shall explain, defendant is not entitled to withdraw his plea; however, we will reduce the restitution fine imposed to \$200. In addition, defendant's argument that a parole revocation fine must be stricken is well taken. Consequently, we will modify the judgment to delete the parole revocation fine and affirm the judgment as modified.

FACTUAL AND PROCEDURAL HISTORY

As the facts of the underlying crime are not at issue in this appeal, we provide only a brief summary of the facts as relayed by the crime scene reports attached to the probation report.

Defendant, an inmate serving a life term at California State Prison, Corcoran, killed his cellmate Robert Blauser. During a routine security check, a correctional officer

¹All further references are to the Penal Code unless otherwise indicated.

observed defendant standing at the front of his cell while Blauser was lying motionless on the floor, covered in blood. Upon entry to the cell, prison personnel discovered Blauser was bound at the wrists and had a cloth tied tightly around his neck. Blauser had multiple lacerations to his arms and legs as well as multiple injuries to his head. He was cold, stiff, and did not have a pulse; he was later pronounced dead. The cause of death was due to asphyxia.

During the pendency of the proceedings, as a means to facilitate settlement in the present case, defendant's counsel filed a writ of habeas corpus in the Kings Superior Court challenging a \$5,000 restitution fine imposed by the Santa Clara Superior Court in 1999 in association with defendant's prior conviction. The petition, heard under case No. 11W0104A, was denied by the trial court after a hearing on the issue. The court found it lacked jurisdiction to modify the Santa Clara court's restitution order.

Prior to entering a plea in this case, defendant's counsel articulated the offer extended to defendant by the prosecution. The offer was first mentioned on the record, on December 15, 2011, after the denial of defendant's motion made under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). At that hearing, defense counsel recounted the offer as follows:

“The offer was to plead to Count II, the 4500 allegation, admitting both strike priors, and stipulate to an LWOP sentence. The 187 would be dismissed, both 667(a) enhancements, which are five years a piece [*sic*], would be dismissed, the Court would impose the minimum restitution fine, and he would waive appeal on all issues except for the writ case that the Court litigated here so that he could pursue that writ case as well. That is the offer by the People. I think the offer is still open this morning. I'd like to have [defendant] contemplate that offer when we come back on January 6th.”

According to the exchange, this was the first time defendant was advised of the offer. The following court appearance began with a representation that defendant was advised of the offer and was willing to enter a negotiated disposition. In a discussion between the prosecutor and the court, the prosecution stated the offer was to enter a plea

to count 2, with an admission of the strike allegations for a term of life without the possibility of parole. Defense counsel then added the following:

“And we’re stipulating to that punishment. In exchange, the People are dismissing all the other allegations and additional enhancements, he does have postured some five year enhancements. The People are also stipulating in an agreement with the Court that he would receive the minimum restitution fine. He would waive his rights to appeal as to this case, but he’s able to appeal the writ of habeas corpus issue previously litigated in this court. And that’s our agreement.”

The court then noted it would “take a waiver of right to appeal only as to the sentence imposed by this case.” Subsequently, the court advised defendant that he would plead to the section 4500 charge and be sentenced to life without the possibility of parole, that the charge would be a serious felony due to the great bodily injury allegation, and that defendant would admit his two prior strike offenses that occurred in Santa Clara County.²

During the plea proceedings, the court asked defendant if he “heard [the court] describe with the People and [defense counsel] what the agreement is in this case?” and defendant indicated he did and this represented his agreement. The court then specifically advised defendant, as relevant here, “The Court’s required to order a restitution fine. The minimum is 200, the maximum is 10,000. In this case the agreement is the Court would impose a \$200 restitution fine, and the Court intends to do that; do you understand?” Defendant responded in the affirmative.

When taking the plea, the court advised defendant of each of his constitutional rights that he was waiving as a result of the plea. In addition, the court stated: “The sentence to be imposed is one fixed by law that we’ve explained to you, it’s life without the possibility of parole. Do you understand that because the sentence is as stated, an additional requirement that you’ve agreed to is to waive the right to appeal from the

²As there was no change of plea form utilized in this case, this is the only articulation of the plea that can be found in these exchanges.

sentence imposed by the Court; do you understand your right to appeal?” Defendant indicated he understood. The court then asked, “And you waive the right to appeal only as to the sentence?” Again, defendant responded yes. After being advised by defense counsel that she had enough time to discuss the case with defendant and advise him regarding the consequences of the plea, the court asked defendant if he had any questions regarding the plea. Defendant responded “I have no questions.” Defendant entered his plea and the court found the defendant made “a knowing, voluntary, express, explicit, and understanding waiver of his statutory and Constitutional rights” and that his plea was “freely and voluntarily made with an understanding of the nature of the charges and the consequences of the plea.” The court set the matter for a sentencing hearing.

A probation report was prepared that recommended a prison term of life without the possibility of parole³ as well as a minimum restitution fine of \$240 in accordance with the plea. At the sentencing hearing, the court stated that it wanted

“to correct one minor item. In reviewing the entry of the plea, I indicated to [defendant] I would impose the minimum restitution fine and we did this on January 6th, and unbeknownst to me at the time, the minimum restitution fine had gone up \$40 from 200 to \$240. So I am required by law to impose the \$240 fine as opposed to the \$200, and I told him I would impose the minimum fine. So my intention is the same, to impose the minimum fine, but it is \$240 not \$200.”

Prior to pronouncing sentence, the court asked defense counsel if she had any further comments. She responded: “No, we’re submitting it on our stipulation, your Honor. And I do have prepared with [defendant’s] signature the notice of appeal as to the Court’s ruling on the 11W0171A [*sic*] writ of habeas corpus that was incorporated in these proceedings.” At the conclusion of the proceedings defense counsel asked if she could present the notice of appeal to the court, and the court replied she could provide it to the clerk if she so chose. The notice of appeal was filed the same day.

³The report also recommended an additional three-year term for the infliction of great bodily injury allegation (§ 12022.7). However at sentencing, the parties and the court agreed that defendant did not admit to that allegation as part of the plea.

Defense counsel attached a request for a certificate of probable cause to the notice of appeal. The grounds for the requested certificate stated: “During the course of the proceedings, Defendant filed a petition for writ of habeas corpus, 11W0104A, in order to facilitate settlement of this case. The court denied the writ of habeas corpus ... on the grounds of jurisdiction. Defendant appeals this ruling based on People v. Griggs (1976) 128 Cal.Rptr. 223.” The court subsequently denied the request for a certificate of probable cause noting “No appeal from denial of habeas petition. (People v. Garrett (1998) 67 Cal.App.4th 1419, 1422.)”

Appellate counsel filed a timely amended notice of appeal and request for certificate of probable cause stating defendant did not intelligently enter his plea as defendant believed his right to appeal the denial of the writ was a term of his plea agreement. The trial court granted the certificate, but explained:

“[N]owhere in the excerpts provided did the court or any party represent and/or otherwise promise to Defendant the right to appellate or habeas corpus relief. In addition, the court never represented to Defendant that he actually possessed the statutory ability to pursue his challenge of the decision in Case No. 11W0104A via appeal rather than a new petition for writ of habeas corpus with the California Court of Appeal, Fifth Appellate District. This court is also unaware of any reason why Defendant could not today pursue his claim for habeas corpus relief via a new petition for writ of habeas corpus with the Santa Clara County Superior Court and/or petition to the California Court of Appeal, Fifth Appellate District.”

This appeal followed.

DISCUSSION

I. Defendant Is Not Entitled to Withdraw His Plea

Defendant contends his plea was conditioned upon the right to appeal the denial of the writ and, because no appeal lies from a denial of a writ of habeas corpus, he must be allowed to withdraw his plea. We disagree.

Initially we note that, as the parties correctly state, the court’s denial of the petition for a writ of habeas corpus is not reviewable on direct appeal. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 983; *People v.*

Garrett, supra, 67 Cal.App.4th at pp. 1421-1422.) Rather, an order denying a petition for writ of habeas corpus can be reviewed by filing a new petition for writ of habeas corpus in the court of appeal. (*Ibid.*) The question then becomes whether defendant's plea was premised upon his right to appeal the trial court's decision. "Where a guilty plea ... has been improperly induced by unenforceable promises that issues have been preserved for appeal the defendant ... is entitled to an opportunity to withdraw the plea." (*Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 792.) A review of the cases analyzing whether the right to appeal was a term of a plea bargain demonstrates that the right to appeal the writ was not a term of defendant's plea.

In *People v. Lee* (1980) 100 Cal.App.3d 715, during the change of plea, defense counsel noted that "the Court has indicated that it would file a Certificate of Probably [*sic*] Cause with the Clerk under Penal Code Section 1237.5 indicating that there is a constitutional issue relating to these proceedings, and that an appeal would lie following a guilty plea." (*Id.* at p. 718, fn. 1, italics omitted.) The court found that the plea was expressly conditioned upon the right to appeal. (*Id.* at p. 718.)

In *Ricki J. v. Superior Court*, a case upon which defendant relies, the minor waived the right to review a denial of a speedy trial claim, "even though her admission was expressly conditioned on preservation of those claims." (*Ricki J. v. Superior Court, supra*, 128 Cal.App.4th at p. 792.) As the plea was induced by an unenforceable promise, the minor was entitled to withdraw her plea. (*Ibid.*) Likewise in *People v. DeVaughn* (1977) 18 Cal.3d 889, the defendants entered into a plea after the denial of their motion to suppress their confessions. As part of the plea bargain, the court issued certificates of probable cause that purported to preserve for review the issues raised in the motions. On appeal, the court held denial of the motion was not reviewable. (*Id.* at p. 893.) Finding that the "defendants' pleas were induced by misrepresentations of a fundamental nature," the court allowed the defendants to withdraw their pleas. (*Id.* at p. 896; see *id.* at p. 900.)

In *People v. Bonwit* (1985) 173 Cal.App.3d 828, after the trial court denied the defendant's pretrial motion to dismiss based on destruction of evidence, the defendant entered into a negotiated plea. During the plea proceeding, the "court expressly stated one of the promises or representations made to Bonwit inducing his guilty plea was the court's own promise to issue a certificate of probable cause '[in] order to protect the defendant's rights on appeal.'" (*Bonwit, supra*, at p. 833.) The appellate court reversed finding the court's "promise was illusory and therefore was an improper inducement which void[ed] the plea." (*Ibid.*)

The above cases all share a common characteristic, namely, the plea bargains at issue all expressly provided that the trial court would issue a certificate of probable cause or otherwise assured the defendant as to the appealability of a ruling, which ultimately did not survive a guilty plea. In each of the above cases, the court was active in assuring the defendant that he would in fact have a right to appeal. Here, there was never an express promise that defendant would in fact have the right to review of the writ.

Rather, the case is more analogous to *People v. Hernandez* (1992) 6 Cal.App.4th 1355. There, the defendant attempted to appeal the denial of his speedy trial motion after he entered a guilty plea on the substantive charge. He claimed a reading of the plea agreement and the certificate of probable cause demonstrated that his plea agreement was conditioned on his right to appeal. In rejecting this claim, the court explained:

"[T]he change of plea form signed by defendant merely recites that 'Deft Remain Free Pending Appeal' In accepting the plea, the court merely ensured that defendant understood the rights he was giving up and that the court was bound only by a midterm 'lid.' At the actual sentencing, the court apparently signed a certificate of probable cause (Pen. Code, § 1237.5), as to which it is only apparent that some earlier discussions had been held. The record contains no representation by the court that an appeal would be permitted, nor any understanding that defendant's plea was conditioned upon such an assumption." (*People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1360-1361, fn. omitted.)

Likewise here, there was no discussion regarding whether defendant actually possessed the right to appeal in this case. Rather, defendant's claim that the right to

appeal was a term of his plea rests upon defense's counsel's assertion that defendant "would waive his rights to appeal as to this case, but he's able to appeal the writ of habeas corpus issue previously litigated in this court." This statement, taken in context, plainly states that defendant was in fact waiving his right to appeal the sentence as part of the plea, but was not waiving any right he may have as to the denial of the writ in the other case. Nowhere on the record does defense counsel, defendant, the prosecutor, or the trial court state that defendant in fact has a right to appeal the denial of the writ. Nor is there any indication that the right to appeal was in any way a part of the plea agreement itself, rather than a statement as to defendant's intention. The trial court never promised defendant that he had the right to appeal the writ, nor did the court ever indicate that it would issue a certificate of probable cause to perfect an appeal.

Defense counsel's preparation of a notice does not make the right to appeal a term of the plea bargain. At the sentencing hearing, when defense counsel presented the notice of appeal, the court did not simply sign it or acknowledge that it was in any way part of the plea; rather, the court merely allowed counsel to file the document: "You can give that to the Clerk if you wish." There is nothing in the record that leads to the reasonable conclusion that the right to appeal was in fact a term of the plea agreement.

Nothing in *People v. Hollins* (1993) 15 Cal.App.4th 567 causes this court to change the above conclusion. There, the defendant entered a plea after the trial court denied his motion to compel disclosure of a confidential surveillance location. Prior to entering a plea, the defense counsel stated "'to the extent we have a right of appeal, and to the extent it would be necessary to get a certificate of probable cause or whatever is indicated, it is my understanding that the court is willing to preserve that right of appeal for us.'" (*Id.* at p. 572.) The trial court stated in the event that anything was required to perfect the appeal, the court would provide it. Subsequently, the plea agreement was stated for the record. In taking the plea, the trial court explained, "'you understand that you are preserving your right to an appeal under the 995 motion, but that that may or may

not avail you of anything, you understand that?” The defendant stated he understood and entered his plea. (*Ibid.*)

At the sentencing hearing, the court stated:

“I want to make it clear on the record, I think we may have some confusion in the record on the right of appeal. Obviously [the defendant] can appeal the judgment in this case, but the 995 motion I think is not subject to appeal, although it is subject to a writ. And so there may be no confusion about that, if any document or certificate is required, [defense counsel] will provide you with that.” (*People v. Hollins, supra*, 15 Cal.App.4th at pp. 572-573.)

On appeal, the Sixth Appellate District first determined that both appellate and writ review were unavailable to the defendant on the contested issue. (*People v. Hollins, supra*, 15 Cal.App.4th at p. 571.) Thus, the court considered whether the defendant’s plea was induced by the promise that the issue was preserved. Ultimately, the court found the advisements, both pre- and postplea, “led appellant to believe that appellate review was preserved.” (*Id.* at p. 573.) Therefore, the defendant was entitled to withdraw his plea, as the promise of appellate review was illusory. (*Id.* at pp. 574-575.)

People v. Hollins is clearly distinguishable from defendant’s case. The court in *Hollins* expressly informed the defendant of the right to review, through either appeal or writ, both of which were unavailable to him. That is not the case here. While it is clear that defendant may not appeal the writ (*In re Clark, supra*, 5 Cal.4th at p. 767, fn. 7; *People v. Gallardo, supra*, 77 Cal.App.4th at p. 983; *People v. Garrett, supra*, 67 Cal.App.4th at pp. 1421-1422), it is equally as clear that he is able to file an appropriate writ in the appropriate court. On the record before us, we cannot say the right to appeal the denial of the writ was a term of the plea agreement that induced defendant to enter the plea. Consequently, defendant is not now entitled to withdraw his plea.

II. Defendant’s Plea Was Knowingly and Intelligently Made

Defendant’s next contention centers upon a claim that his trial counsel misadvised him as to the terms of the plea agreement, therefore his plea was not knowingly and intelligently made. Defendant misconstrues the issue. As we have already explained, the

record does not support a finding that a right to appeal the ruling on the writ was in fact a term of defendant's plea agreement. There is no evidence on the record that defendant's counsel advised defendant he would in fact have a right to appeal as part of the plea agreement. There is no representation that a right to appeal exists or a promise that he can in fact appeal the ruling. Rather the record only discloses defendant was not waiving any rights to review the denial of the writ, and that counsel apparently believed the appropriate vehicle for review was an appeal.

Defendant in his argument confuses two issues. He claims his plea was not knowing and intelligent because he was misinformed as to a term of the plea agreement, thus, he claims, he is entitled to withdraw his plea. To support his claim, he relies on *People v. Howard* (1992) 1 Cal.4th 1132 and *North Carolina v. Alford* (1970) 400 U.S. 25. These cases, however, do not support defendant's contentions. *People v. Howard* dealt with the advisement of constitutional rights that are waived with a plea and the advisement of the direct consequences of a plea. (*People v. Howard, supra*, at p. 1178.) *North Carolina v. Alford* dealt with the situation of whether a plea could be voluntary when it was made to avoid the death penalty. (*North Carolina v. Alford, supra*, at p. 31.) While it is true these cases note that the court must apply a totality of the circumstances test to determine whether a plea was knowing and intelligent, it is equally clear that neither case dealt with the situation where a defendant claims he was misadvised as to a term of the plea agreement that does not appear on the record.⁴

Rather, defendant argues that his counsel misunderstood the terms of the plea agreement and, therefore, improperly advised him either as to the terms or consequences of his plea.⁵ Consequently, defendant is arguing that his plea was not knowing or

⁴Even if we were to apply this standard to this case, we would still find the plea was knowingly and intelligently made for the reasons stated above.

⁵Defendant, relying on *In re Moser* (1993) 6 Cal.4th 342, 353-354, argues "[a] violation of a plea bargain is not subject to harmless error analysis." While we agree with this general statement (see *Santobello v. New York* (1971) 404 U.S. 257), the question here is not whether the

voluntary due to counsel's erroneous advice. A claim that a defendant entered a plea due to erroneous advice from counsel is analyzed under the familiar standard of ineffective assistance of counsel. (*Hill v. Lockhart* (1985) 474 U.S. 52, 56; see *People v. Ribero* (1971) 4 Cal.3d 55, 61-62 superseded by statute on another point as stated in *In re Chavez* (2003) 30 Cal.4th 643, 656 [alleged misrepresentations by defense counsel do not rise to a term of the plea "in the absence of at least apparent substantial corroboration by a responsible public official"].) We will now address that contention.

III. Defendant Was Not Denied Effective Assistance of Counsel

Defendant argues his counsel's mistaken belief the writ could be reviewed on appeal deprived him of effective assistance of counsel. This is because, he claims, his acceptance of the plea was premised upon his ability to review the court's ruling on the writ. We find the record fails to support defendant's argument.

"Plea bargaining and pleading are critical stages in the criminal process at which a defendant is entitled, under both the Sixth Amendment to the federal Constitution and article I, section 15 of the California Constitution, to the effective assistance of legal counsel. [Citations.] 'It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.' [Citations.] [¶] To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239, fn. omitted, abrogated on another ground in *Padilla v. Kentucky* (2010) 559 U.S. 356; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 934.)

We need not decide whether counsel in this case provided ineffective assistance as we find defendant has failed to demonstrate any prejudice from the alleged error. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 ["a court need not determine

plea agreement was followed, as we have already determined the right to appeal was not a term of the plea, but rather whether defendant was misadvised by his counsel regarding the plea.

whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'].) In order to demonstrate prejudice stemming from inadequate representation in advising a defendant to enter a plea, the defendant must establish a reasonable probability that but for the improper advice, he or she would not have pled guilty. (*In re Resendiz*, *supra*, 25 Cal.4th at p. 253; *In re Moser*, *supra*, 6 Cal.4th at p. 352.)

The record here simply does not support defendant's assertion that he would not have entered the plea had he been properly advised that the denial of the writ was not reviewable on appeal. Initially, we note, defendant's argument is premised upon the assumption he was advised that he in fact had the right to appeal as opposed to a right of review through the filing of another writ. Nothing on the record supports a finding that he was actually misadvised. While it is inferable from the record that defendant's counsel believed defendant had the right to appeal the writ based on the statement in the request for a certificate of probable case, that does not lead to the conclusion that a right to appeal was ever discussed between defendant and his counsel. Likewise, we cannot say on this record that a right to appeal instead of a right to have the writ reviewed through the filing of another writ either in Santa Clara Superior Court or in this court, was important to defendant. Defendant postulates he is prejudiced because he has no right to counsel regarding the filing of a writ, but does on direct appeal. However, nothing in the record shows he was informed of this or that it had any bearing on his decision to enter a plea. While the record does support defendant's claim that the amount of the fines imposed upon him were an important part of the plea deal, we note his fines were reduced to the absolute minimum as a part of the plea agreement. It is true defendant's counsel filed a writ in the Kings Superior Court to reduce the restitution fines in his Santa Clara County case in order to facilitate this plea. However, it is likewise apparent that defendant entered the plea in this case without the fines in his prior case

being reduced, or any promise that any review would be successful. Given the limited record provided on appeal,⁶ we cannot say there is a reasonable probability defendant would not have entered his plea had he known he could only have attacked the denial of the writ through the filing of another writ. Therefore, his claim of ineffective assistance of counsel must fail.

IV. The Restitution Fine Must Be Reduced to \$200

As recounted above, prior to taking the plea, defense counsel articulated the plea agreement for the record. The agreement was to impose a minimum restitution fine. When the trial court went over the details of the plea with defendant, the court advised him the restitution fine ranged from a \$200 minimum to a \$10,000 maximum, but the court would be imposing the \$200 minimum in accordance with the plea agreement. The plea was taken on January 6, 2012. However, the minimum restitution fine increased from \$200 to \$240 on January 1, 2012. (§ 1202.4, subd. (b)(1).) At the sentencing hearing, the court explained the minimum restitution fine amount had increased by \$40 and it was still the court's intention to impose the minimum fine required by law, which now was \$240. Defendant argues his plea agreement was breached when the trial court imposed a \$240 restitution fine rather than the agreed-upon \$200 fine. We find that the fine must be reduced to \$200, the minimum amount allowed at the time of offense, in accordance with the plea agreement.

“When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 183.)

⁶To the extent defendant's complaints about counsel's effectiveness arise from matters that occurred outside the parameters of the appellate record, they are more properly addressed by way of habeas corpus petition. (See *People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

When a plea rests in any significant degree on a prosecutor's promise or agreement, so that it is part of the inducement or consideration, the promise must be fulfilled.

(*Santobello v. New York*, *supra*, 404 U.S. at p. 262; *People v. Walker*, *supra*, at p. 1024.)

The requirements of due process attach to the plea bargain itself. (*Walker*, at p. 1024.) A negotiated plea agreement is in the nature of a contract and is interpreted according to general contract principles. The trial court's approval of the agreement binds the court to the terms of the bargain, and the defendant's sentence must be within the negotiated terms of the agreement. (*People v. Martin* (2010) 51 Cal.4th 75, 79.)

It is clear from a plain reading of the plea proceedings, recounted above, that a term of the plea bargain was to impose the minimum restitution fine allowable by law. In arguing the \$240 restitution fine was proper, plaintiff relies upon the amount of the minimum fine at the time defendant was sentenced. However, the relevant date for determining the minimum fine would be the date defendant committed his offense. To use the greater amount that was enacted after defendant committed the offense would violate principles of ex post facto. (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31 [as restitution fines qualify as punishment, an increase in the fine "cannot be applied to a defendant whose offenses were committed before the effective date of the amendment"].)

Although sentencing took place on February 8, 2012, and the minimum fine was increased to \$240 as of January 1, 2012 (Stats. 2011, ch. 358, § 1), the minimum fine at the time defendant committed the offense was \$200 (Stats. 2005, ch. 240, § 10.5, No. 7 West's Cal. Legis. Service, p. 2037). Because the trial court intended to impose the minimum fine, and the minimum fine at the time defendant committed the offense was \$200, the fine should be reduced to \$200. (See *People v. Palomar* (1985) 171 Cal.App.3d 131, 136 [restitution fine not applied retroactively to offenses occurring before effective date of enactment of statute imposing fine]; *People v. Downing* (1985) 174 Cal.App.3d 667, 672 [ex post facto clause prohibited § 1202.4 restitution fine where crime was committed before operative date of statute].)

V. The Section 1202.45 Parole Revocation Fine Must Be Stricken

Defendant contends, and plaintiff rightly concedes, that the abstract of judgment must be amended to delete a reference to a section 1202.45 parole revocation fine of \$240.

At the time of defendant's sentencing, section 1202.45 provided:

"In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine shall ... be suspended unless the person's parole is revoked."

At the sentencing hearing the trial court imposed a section 1202.4 restitution fine of \$240 as discussed above. There was no mention of the imposition of a section 1202.45 parole revocation fine at the hearing, but both the minute order and the abstract of judgment reflect such a fine.

While a section 1202.45 parole revocation fine is mandatory whenever a section 1202.4 restitution fine is imposed, such a fine is not authorized when the sentence does not encompass a period of parole. (*People v. Oganesyanyan* (1999) 70 Cal.App.4th 1178, 1183; see *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 [parole revocation fine proper where defendant, in addition to being sentenced to death, was also sentenced to determinate prison term].) Defendant was sentenced to life without the possibility of parole and no other determinate term, a sentence that has no parole eligibility. (*Oganesyanyan, supra*, at pp. 1183-1184.) Thus, the fine may not be imposed in this instance. (*Id.* at p. 1183.)

DISPOSITION

The judgment is modified to reduce the section 1202.4 restitution fine to \$200 and reflect the deletion of the section 1202.45 parole restitution fine. In addition, we note defendant's date of birth is wrong on the abstract of judgment and should be corrected. The trial court is ordered to prepare an amended abstract of judgment and minute order

consistent with this opinion and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

PEÑA, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

FRANSON, J.