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

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN VALENZUELA, JR.,

Defendant and Appellant.

H036464

(Santa Cruz County

Super. Ct. No. F18683)

Pursuant to a plea agreement, defendant Ruben Valenzuela, Jr., pleaded guilty to sexual penetration of a child who is 10 years of age or younger (Pen. Code, § 288.7, subd. (b)), which carries a prison term of 15 years to life.<sup>1</sup> In exchange, the remaining three counts were dismissed: two counts of aggravated sexual assault of a child (§ 269, subs. (a)(5) and (a)(1)) (counts two and three) and a count of a forcible lewd and lascivious act upon a child under the age of 14 years (§ 288, subd. (b)(1)) (count four). Defendant unsuccessfully moved to withdraw his guilty plea. Defendant filed a notice of appeal from the judgment of conviction and obtained a certificate of probable cause. (§ 1237.5.)

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated. The abstract of judgment correctly specifies that defendant violated section 288.7, subdivision (b), but incorrectly identifies the crime as "oral copulation." The abstract should be corrected.

On appeal, defendant contends that it was an abuse of discretion to deny his motion to withdraw his guilty plea because, at the time he pleaded, he was unaware that he had valid grounds to challenge a search warrant and that he would not have entered the plea if he had been aware of those grounds. The search warrant, which issued in December 2009, had authorized the search of defendant's residence for "[p]hotos, videos and images depicting child erotica or child pornography" and "[d]airies, journals, letters and notes referencing sexual fantasies, sexual inclinations and sex with minors" among other items. In support of the motion to withdraw his plea, defendant had argued the search warrant was based upon "stale" information because the affidavit indicated that the last time the victim had seen anything inappropriate at his residence was "during the latter part of December 2008."

Defendant's waiver of the right to appeal precludes our review of his appellate contention.

## I

### *Procedural Background*

A criminal complaint was filed on December 30, 2009. On December 31, 2009, defendant was arraigned and pleaded not guilty to all counts.

On May 10, 2010, the date for the preliminary examination, the prosecutor explained that defendant was facing multiple, consecutive life terms but the People were prepared to exchange defendant's plea of guilty to count one for dismissal of the other counts in "what is technically an early phase in the proceedings without even a preliminary hearing . . . ." Defendant accepted the negotiated plea offer and pleaded guilty to count one. As part of the negotiated plea, defendant waived any right to appeal.

On October 21, 2010, defendant, represented by new counsel, moved to withdraw his guilty plea on the grounds that (1) the court failed to advise him that the possibility of proceedings under the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.) was a necessary consequence of pleading guilty and (2) his counsel

rendered ineffective assistance of counsel by failing to bring a motion to suppress evidence seized pursuant to a defective warrant and his incriminating admissions, which he asserted were the "fruit" of the illegal search and seizure. Counsel asserted that defendant would not have pleaded guilty "if his prior trial counsel had appropriately brought, litigated and prevailed on a motion to suppress . . . ." No claim was made that defendant's prior counsel had rendered ineffective assistance in negotiating or advising him regarding the plea bargain.

Attached to the motion were a copy of the search warrant with the supporting affidavit, the return and inventory on the search warrant, police reports, and defendant's and his new counsel's declarations. New counsel indicated that the former counsel's case file did not include a copy of the search warrant affidavit and he subsequently learned that the entire search warrant file had been sealed for confidentiality reasons. He stated that he obtained an order unsealing the search warrant file and he found no such earlier order in the court file. New counsel did not state that former counsel had performed deficiently under prevailing professional norms in any way.

Defendant stated in his declaration: "[H]ad my prior attorney . . . brought a motion to suppress evidence on the grounds of an illegal search and seizure . . . , I never would have entered my plea of guilty in the above-entitled case. This is particularly true if my prior attorney had prevailed on such a motion." His declaration did not state that he was unaware at the time he pleaded guilty that "he had the right under the Fourth Amendment to challenge the State's use of the evidence seized during the search of his home," as he now claims on appeal. The motion to withdraw was not supported by any other evidence suggesting that counsel had acted unprofessionally by not bringing a motion to suppress before the preliminary examination stage or provided inadequate advice regarding the plea agreement.

The trial court denied defendant's motion to withdraw his guilty plea. As to the first ground, the court rejected it based on case law holding that a trial court is not

required to advise a criminal defendant of the potential consequences under the SVPA before he pleads guilty because civil commitment under the SVPA is a collateral consequence rather than a direct penal consequence. (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 546; see *People v. Moore* (1998) 69 Cal.App.4th 626, 630-631.) Defendant is not attempting to challenge that aspect of the ruling on appeal. As to the second ground, the trial court concluded that defendant failed to establish that the search warrant was defective on staleness grounds.

## II

### *Discussion*

#### *A. Waiver of Right to Appeal*

##### *1. Defendant's Argument*

Defendant does not dispute that, as part of his plea agreement, he waived his right to appeal. "The negotiated plea agreement, which results in the waiver of important constitutional rights, 'is an accepted and integral part of our criminal justice system.' [Citations.] Such agreements benefit the system by promoting speed, economy and finality of judgments. [Citation.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 79.) "Just as a defendant may affirmatively waive constitutional rights to a jury trial, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to counsel as a consequence of a negotiated plea agreement, so also may a defendant waive the right to appeal as part of the agreement. [Citations.]" (*Ibid.*)

Defendant argues that his appeal is cognizable despite his waiver of the right to appeal because he was unaware at the time of his plea that "he had the right under the Fourth Amendment to challenge the State's use of the evidence seized during the search of his home." Based on this asserted unawareness, he further contends that "his general waiver of his right to appeal could not have been a knowing and intelligent waiver of his right to that specific issue."

Defendant asserts that this case is "squarely controlled" by *People v. Pastrano* (1997) 52 Cal.App.4th 610 ("*Pastrano*"). Since defendant Pastrano had not waived his right to conflict-free representation when signing the change of plea form, the appellate court addressed the merits of his appellate contention that his plea, part of a negotiated package deal, was invalid because of a conflict of interest between his attorney and codefendants' attorneys even though Pastrano had waived his right to appeal as part of his plea agreement. (*Id.* at pp. 614-616.)

## 2. *People v. Pastrano*

The People argue that reliance on *Pastrano* is misplaced because that case involved the Sixth Amendment right to conflict-free counsel, which must be specifically waived.<sup>2</sup> "The federal and state constitutional rights to the assistance of trial counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to representation by counsel without any conflict of interest (*People v. Jones* (1991) 53 Cal.3d 1115, 1133–1134 . . .)." (*People v. McDermott* (2002) 28 Cal.4th 946, 989-990.) The California Supreme Court has stated: "While the right to conflict-free counsel may generally be

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<sup>2</sup> "[T]he Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. *Patterson v. Illinois*, 487 U.S. 285, 292, n. 4, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988); *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)." (*Montejo v. Louisiana* (2009) 556 U.S. 778, \_\_\_ [129 S.Ct. 2079, 2085].) But the U.S. Supreme Court also had recognized: "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 346-347, fns. omitted [100 S.Ct. 1708].) "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial [to multiple representation] must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." (*Id.* at pp. 348-349; see *Mickens v. Taylor* (2002) 535 U.S. 162, 172, fn. 5 [122 S.Ct. 1237] ["An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance"].)

waived [citations], waivers of constitutional rights must, of course, be 'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' (*Brady v. United States* (1970) 397 U.S. 742, 748, fn. omitted, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747.) No particular form of inquiry is required, but, at a minimum, the trial court must assure itself that (1) the defendant has discussed the potential drawbacks of joint representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of joint representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right. [Citations.]" (*People v. Mroczko* (1983) 35 Cal.3d 86, 109-110, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421; see *People v. McDermott, supra*, 28 Cal.4th at p. 990.)

We do not see the distinction. The Sixth Amendment right to counsel protects a criminal defendant against both an actual conflict of interest adversely affecting a defense counsel's performance and ineffective assistance of counsel. (*Mickens v. Taylor* (2002) 535 U.S. 162, 172, fn. 5, 174 [122 S.Ct. 1237]; *Cuyler v. Sullivan, supra*, 446 U.S. 335, 348-349 [100 S.Ct. 1708]; see also *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052].) Unless a defendant has validly waived the Sixth Amendment right to counsel, a defendant is entitled to representation free of actual conflict (see *ante*, fn. 2) and effective assistance of counsel.

Some federal courts have recognized an exception to enforcement of a waiver of the right to appeal where ineffective assistance of counsel tainted the plea that included the appellate waiver. (See e.g. *U.S. v. Porter* (10th Cir. 2005) 405 F.3d 1136, 1143-1144; *U.S. v. Andis* (8th Cir. 2003) 333 F.3d 886, 891 (en banc); *U.S. v. Teeter* (1st Cir. 2001) 257 F.3d 14, 25, fn. 9; *U.S. v. Hernandez* (2nd Cir. 2001) 242 F.3d 110, 113-114; *U.S. v. Craig* (4th Cir. 1993) 985 F.2d 175, 178.) It is arguable that an express waiver of the right to appeal should not preclude an appellate claim of ineffective assistance of counsel in connection

with a negotiated plea that included a waiver of the right to appeal. (Cf. *People v. Orozco* (2010) 180 Cal.App.4th 1279, 1281-1282 [refusing to enforce the defendant's waiver of the right to bring a motion to withdraw his plea based on ineffective assistance of counsel plea where "the claimed ineffectiveness relates to the advice he received at the time he entered the plea containing that purported waiver"], 1285 ["We agree with the federal authorities and find justice dictates that a claim of ineffective assistance of counsel in connection with the making of the waiver agreement cannot be barred by the agreement that is the product of the alleged ineffectiveness"], 1286 [reversing and remanding the case to allow the defendant the opportunity to bring a motion to withdraw his plea].)

But defendant Valenzuela did not argue in his opening brief that his prior counsel provided ineffective assistance with respect to his negotiated plea. Rather, his contention on appeal is that there were Fourth Amendment grounds for challenging the search warrant of which he was unaware at the time he pleaded guilty and he would not have entered that plea if he had been aware of those grounds.<sup>3</sup> Defendant does not claim that he was unaware of an ineffective assistance claim at the time he pleaded.

Defendant's approach is understandable since claims of ineffective assistance of counsel at the plea stage are very difficult to establish, especially on appeal.<sup>4</sup> "[T]he two-

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<sup>3</sup> Defendant argues for the first time in his reply brief that his original defense counsel "failed to advise him regarding a potentially meritorious challenge to the constitutional sufficiency of the warrant used by police to search his home." This contention is forfeited by his failure to raise it in the opening brief. (See *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.) In any case, defendant's reply brief presents no argument that this alleged failure constitutes ineffective assistance of counsel under *Strickland v. Washington*, *supra*, 466 U.S. 668.

<sup>4</sup> "If the record on appeal ' 'sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected," ' and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.' (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267 . . .)" (*People v. Vines* (2011) 51 Cal.4th 830, 876.)

part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." (*Hill v. Lockhart* (1985) 474 U.S. 52, 58 [106 S.Ct. 366].) To prevail on an ineffective assistance claim under *Strickland v. Washington*, *supra*, 466 U.S. 668), a defendant must show deficient performance of counsel and prejudice. (*Id.* at p. 687.) To establish deficient performance of counsel, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Id.* at pp. 687-688.) When a criminal defendant is evaluating a plea offer, "the critical obligation of counsel [is] to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Libretti v. United States*, 516 U.S. 29, 50–51, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995)." (*Padilla v. Kentucky* (2010) \_\_\_ U.S. \_\_\_, \_\_\_ [130 S.Ct. 1473, 1484].)

"The second, or 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." (*Hill v. Lockhart*, *supra*, 474 U.S. at p. 59.) "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Ibid.*, fn. omitted.) "In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the

'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial [citation]." (*Id.* at p. 59.)

In *Premo v. Moore* (2011) \_\_\_ U.S. \_\_\_ [131 S.Ct. 733], the United States Supreme Court faced a question concerning "the adequacy of representation in providing an assessment of a plea bargain without first seeking suppression of a confession assumed to have been improperly obtained." (*Id.* at p. 738.) The court made clear that *Strickland* erected a high bar in the pretrial, plea bargaining stage.

The court explained: "Acknowledging guilt and accepting responsibility by an early plea respond to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and advice leading to the plea took place. Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. The opportunities, of course, include pleading to a lesser charge and obtaining a lesser sentence, as compared with what might be the outcome not only at trial but also from a later plea offer if the case grows stronger and prosecutors find stiffened resolve. A risk, in addition to the obvious one of losing the chance for a defense verdict, is that an early plea bargain might come before the prosecution finds its case is getting weaker, not stronger. . . ." (*Id.* at p. 741.) The court reasoned: "Failure to respect the latitude *Strickland* requires can create at least two problems in the plea context. First, the potential for the distortions and imbalance that can inhere in a hindsight perspective may become all too real. The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision. There are, moreover, special difficulties in evaluating the basis for counsel's judgment: An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial." (*Ibid.*) The court continued: "Second, ineffective-assistance claims that lack necessary foundation may

bring instability to the very process the inquiry seeks to protect. *Strickland* allows a defendant 'to escape rules of waiver and forfeiture,' *Richter*, \_\_\_ U.S., at \_\_\_, 131 S.Ct. 770. . . . The prospect that a plea deal will afterwards be unraveled when a court second-guesses counsel's decisions while failing to accord the latitude *Strickland* mandates . . . could lead prosecutors to forgo plea bargains that would benefit defendants, a result favorable to no one." (*Id.* at pp. 741 -742.) The court further stated: "In the case of an early plea, neither the prosecution nor the defense may know with much certainty what course the case may take. It follows that each side, of necessity, risks consequences that may arise from contingencies or circumstances yet unperceived. The absence of a developed or an extensive record and the circumstance that neither the prosecution nor the defense case has been well defined create a particular risk that an after-the-fact assessment will run counter to the deference that must be accorded counsel's judgment and perspective when the plea was negotiated, offered, and entered." (*Id.* at p. 742.)

While defendant may be intimating that his prior counsel acted incompetently, he has not actually argued on appeal that he received ineffective assistance in connection with his plea or the attendant appellate waiver under the governing legal standard.<sup>5</sup>

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<sup>5</sup> We have grave doubts that defendant can establish that his prior counsel acted ineffectively by failing to bring a motion to suppress before he accepted the negotiated plea. Even if we assume that the search warrant was defective because it was based on "stale information" that defendant made the victim watch "a gross movie" in which all the boys and girls were undressed and pornographic movies (but cf. e.g. *U.S. v. Darr* (8th Cir. 2011) 661 F.3d 375, 378 [seven-month-old information not stale]; *U.S. v. Lacy* (9th Cir. 1997) 119 F.3d 742, 745-746 [10-month-old information not stale]), the good faith exception to the exclusionary rule would in all likelihood apply since "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." (*U.S. v. Leon* (1984) 468 U.S. 897, 921 [104 S.Ct. 3405].) Moreover, defendant was charged with four sexual crimes against the same victim, his daughter. Even if counsel had valid grounds to suppress the evidence seized pursuant to the warrant and defendant's incriminating admissions, it appears that his daughter would still be available to testify against him. In addition, it appears that defendant's admissions would still be admissible against him for impeachment purposes if he chose to testify. (*U.S. v. Havens* (1980) 446

Accordingly, we see no basis for extending *Pastrano* to this case or recognizing an exception to enforcement of defendant's waiver of his right to appeal based on ineffective assistance of counsel.

3. *Defendant's Waiver of His Right to Appeal was Knowing, Intelligent and Voluntary*

Insofar as we can assess, defendant is claiming that his waiver of the right to appeal was not "knowing and intelligent" with respect to the claim raised on appeal because he was unaware of the possibility of challenging adverse evidence on Fourth Amendment grounds. He is not asserting, and has not shown, that his decision to accept the plea agreement and waive the right to appeal was unknowing and involuntary because defense counsel gave him inadequate advice.

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [58 S.Ct. 1019].) "Just as a defendant may affirmatively waive constitutional rights to a jury trial, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to counsel as a consequence of a negotiated plea agreement, so also may a defendant waive the right to appeal as part of the agreement. [Citations.]" (*People v. Panizzon, supra*, 13 Cal.4th at p. 80, fn. omitted.) "To be enforceable, a defendant's waiver of the right to appeal must be knowing, intelligent, and voluntary. (*People v. Vargas, supra*, 13 Cal.App.4th at p. 1659 . . . ; *People v. Nguyen, supra*, 13 Cal.App.4th at p. 119 . . . .) Waivers may be

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U.S. 620, 628 [100 S.Ct. 1912]; *Walder v. United States* (1954) 347 U.S. 62, 65 [74 S.Ct. 354].) By entering a guilty plea at the very early stages of the criminal process, defendant received a substantial benefit in the dismissal of three out of four counts and defendant's self-serving declaration that he would not have entered a guilty plea if his counsel had brought a motion to suppress does not appear sufficient to establish the requisite prejudice for an ineffective assistance claim. (Cf. *In re Alvernaz* (1992) 2 Cal.4th 924, 938; *Hill v. Lockhart, supra*, 474 U.S. at pp. 59-60.) "A defendant who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit that evidence." (*Premo v. Moore, supra*, 131 S.Ct. at p. 744.)

manifested either orally or in writing. (*People v. Berkowitz* (1995) 34 Cal.App.4th 671, 678 . . . .) The voluntariness of a waiver is a question of law which appellate courts review de novo. (*People v. Vargas, supra*, 13 Cal.App.4th at p. 1660 . . . .)" (*Ibid.*)

Even as to the constitutional rights necessarily waived by the entry of a guilty plea, "the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it." (*U.S. v. Ruiz* (2002) 536 U.S. 622, 629 [122 S.Ct. 2450].) Although "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences" (*Brady v. U.S.* (1970) 397 U.S. 742, 748, fn. omitted [90 S.Ct. 1463]), the U.S. Supreme Court "has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See *Brady v. United States*, 397 U.S., at 757, 90 S.Ct. 1463 (defendant 'misapprehended the quality of the State's case'); *ibid.* (defendant misapprehended 'the likely penalties'); *ibid.* (defendant failed to 'anticipate' a change in the law regarding relevant 'punishments'); *McMann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (counsel 'misjudged the admissibility' of a 'confession'); *United States v. Broce*, 488 U.S. 563, 573, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) (counsel failed to point out a potential defense); *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (counsel failed to find a potential constitutional infirmity in grand jury proceedings)." (*U.S. v. Ruiz, supra*, 536 U.S. at pp. 630-631.)

" 'Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing

leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.' (*Brady v. United States* (1970) 397 U.S. 742, 756–757, 90 S.Ct. 1463, 1473, 25 L.Ed.2d 747.) This logic applies with equal force to dispel any notion that the subsequent unfolding of unknown or unforeseen events somehow renders a waiver of appellate rights unintelligent or otherwise defective at the time it was given." (*People v. Panizzon, supra*, 13 Cal.4th at pp. 86-87.)

Defendant Valenzuela has not demonstrated that his plea or his general waiver of the right to appeal was unknowing and unintelligent because he was unaware of the possibility of a Fourth Amendment challenge to certain evidence. "Although a defendant may not know the specific nature of the appeal he is giving up in return for dismissal of pending charges, if he understands he is receiving a benefit in return, his decision to enter into the agreement reflects a highly rational judgment, and that is sufficient to make the plea and waiver knowing, intelligent and voluntary. (*United States v. Navarro–Botello, supra*, 912 F.2d at p. 320, citing *Town of Newton v. Rumery* (1987) 480 U.S. 386, 394, 107 S.Ct. 1187, 1192, 94 L.Ed.2d 405.)" (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1661.)

Defendant has not claimed that he did not understand the right of appeal or the meaning of a waiver. At the change of plea hearing, the court went over defendant's rights and obtained defendant's waivers. In response to the court's inquiries, defendant acknowledged that he had talked to his attorney about "the things that the People would have to prove in order to convict" him, he understood his possible defenses to the charges, he agreed that the prosecutor's description of the factual basis for the plea was

true, and he understood that his sentence would be 15 years to life and it was possible that he would serve more than 15 years or the rest of his life in prison. Defendant acknowledged that he had discussed all the consequences of the plea with his attorney and defendant was satisfied that he understood those consequences.

Before accepting defendant's waiver of his right to appeal and his plea, trial court engaged in an extensive colloquy with defendant. It included the following exchange: "The Court: Do you also understand that by entering a plea and having your case disposed of pursuant to this plea agreement you are waiving any right to appeal in this case? [¶] Do you understand that? [¶] The Defendant: Yes. [¶] The Court: Do you understand and give up each of these rights that I have just described? [¶] The Defendant: Yes. [¶] The Court: Have you had a chance to discuss all of these procedural rights with your attorney? [¶] The Defendant: Yes. . . . [¶] The Court: Are you pleading guilty freely and voluntarily because that is what you want to do and because you believe that this is in your best interest? [¶] The Defendant: Yes. [¶] [Defense Counsel]: You need to speak up. [¶] The Defendant: Yes, sir."

Defense counsel indicated that she was satisfied that defendant's plea was knowing, voluntary, and intelligent and in his best interest. Before taking defendant's plea, the court asked defendant whether he had any questions for the court or he needed more time to discuss anything with his attorney. Defendant answered "no" to both questions. The record reflects that defendant understood the terms of the plea agreement and knowingly and voluntarily waived his right to appeal.

#### 4. *Scope of General Waiver of Right to Appeal*

"Because a 'negotiated plea agreement is a form of contract,' it is interpreted according to general contract principles. (*People v. Shelton* (2006) 37 Cal.4th 759, 767 . . . , citing Civ.Code, § 1635 et seq.) Acceptance of the agreement binds the court and the parties to the agreement. [Citations.] ' "When a guilty [or nolo contendere] 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." ' (*Panizzon, supra*, 13 Cal.4th at p. 80 . . . , quoting *People v. Walker* (1991) 54 Cal.3d 1013, 1024 . . . ; see *In re Troglin* (1975) 51 Cal.App.3d 434, 438 . . . )" (*People v. Segura* (2008) 44 Cal.4th 921, 930-931, fn. omitted.) "If the court does not believe the agreed-upon disposition is fair, the court 'need not approve a bargain reached between the prosecution and the defendant, [but] it cannot change that bargain or agreement without the consent of both parties.' [Citations.]" (*Id.* at p. 931.)

The California Supreme Court has nevertheless recognized that "a defendant's general waiver of the right to appeal, given as part of a negotiated plea agreement, will not be construed to bar the appeal of sentencing errors occurring subsequent to the plea" that "were left *unresolved* by the particular plea agreements involved." (*People v. Panizzon, supra*, 13 Cal.4th 68, 85; see *People v. Sherrick* (1993) 19 Cal.App.4th 657 [erroneous standard used to determine eligibility for probation]; *People v. Vargas* (1993) 13 Cal.App.4th 1653 [alleged misapplication of conduct credits].) One appellate case has expansively stated that "a waiver of appeal rights does not apply to "possible future error" [that] is outside the defendant's contemplation and knowledge at the time the waiver is made.' (*People v. Panizzon, supra*, 13 Cal.4th at p. 85 . . . ; see also *People v. Sherrick* (1993) 19 Cal.App.4th 657, 659 . . . ; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662 . . . )" (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815 [issue whether out-of-state conviction was a strike under Three Strikes law].)

In *Panizzon, supra*, 13 Cal.4th 68, the plea agreement specified the sentence and required a waiver of appellate rights that specifically included the right to appeal the sentence. (*Id.* at pp. 85-86.) Consequently, defendant Panizzon's claim that the sentence was unconstitutionally disproportionate when compared to codefendants' sentences was within his waiver of appellate rights since the sentence was "an integral element of the negotiated plea agreement" and "both the length of the sentence and the right to appeal

the sentence" could not "fairly be characterized as falling outside of defendant's contemplation and knowledge when the waiver was made . . . ." (*Id.* at p. 86)

Even though defendant's general waiver of appellate rights was unlimited, he now argues that he did not waive the right to raise his present appellate contention because, at the time he pleaded guilty, he was unaware of the grounds for challenging the search warrant. The quantum of evidence against a defendant is necessarily a contemplated aspect of a negotiated guilty plea even though the available evidence may have developed differently than anticipated at the time of the plea had the case gone forward. Accordingly, defendant's appellate claim, which essentially concerns the body of evidence against him, is within the scope of defendant's negotiated plea and attendant waiver of the right to appeal. This court is precluded from reaching defendant's contention on appeal. (Cf. *People v. Berkowitz* (1995) 34 Cal.App.4th 671, 675 [defendant who waived his right to appeal as part of a plea bargain waived the right to challenge suppression ruling on appeal]; 677 ["no reason not to accord the waiver its plain meaning: a waiver of whatever appellate rights appellant may have had"].)

*DISPOSITION*

The appeal is dismissed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.