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8 SARGENT MCGREGOR BINKLEY

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF SANTA CLARA

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,

13 Plaintiff,

14 vs.

15 SARGENT MCGREGOR BINKLEY,

16 Defendant.

17 **CASE NO. BB619426**

18 **MEMORANDUM OF POINTS AND**
19 **AUTHORITIES IN SUPPORT OF**
20 **MOTION TO WITHDRAW PLEA OR, IN**
21 **THE ALTERNATIVE, TO REQUEST THE**
22 **COURT TO WITHDRAW ITS PRIOR**
23 **APPROVAL OF PLEA**

24 **DATE: September 20, 2007**

25 **TIME: 1 :30 PM**

26 **DEPT: HON. DOUGLAS SOUTHARD**

27 **STATEMENT OF FACTS**

28 Defendant Sargent Binkley, represented by attorney Alan Speare, pled No Contest on November 15, 2006 to one count of second degree robbery with two firearm use enhancements, one count of assault with a deadly weapon with one firearm use enhancement, and four counts of possession of a controlled substance, all felonies.

The charges arise out of an incident on January 20, 2006. Mr. Binkley, wearing a ski mask, robbed the Walgreens Pharmacy in Mountain View at gunpoint. Mr. Binkley told the

1 pharmacist, Dennis Pinheiro, that he wanted drugs, all narcotics, and for Mr. Pinheiro to put
2 them in a paper bag. Once Mr. Pinheiro had done that, Mr. Binkley left the store. He never
3 demanded cash. Mr. Pinheiro has been interviewed by the defense and agrees that Mr. Binkley
4 should be granted probation and receive treatment for the problems he has which stem from his
5 service to his country.
6

7 Mr. Binkley was not apprehended until March 7th after his father, Edward Binkley, had
8 requested medical assistance because his son had become ill from taking Vicodin, a pain killer.
9 The father revealed to the authorities the numerous medications that his son kept in the trunk of
10 his car. When the officers spoke to Sargent Binkley about where he had gotten the drugs, he
11 eventually admitted that he had robbed Walgreens. He also told the police that his gun was
12 unloaded, and that he had no desire for anybody to get hurt. Mr. Binkley has been forthcoming
13 with the authorities about his crimes from the beginning.
14

15 Sargent Binkley's life until 2001 was exemplary. He was a varsity athlete in high school,
16 an Eagle Scout, and a graduate of West Point Military Academy. After he received his
17 commission as an officer in the United States Army—eventually rising to the rank of captain—
18 he completed several additional military training schools including ranger school, airborne
19 school, platoon leader school, and scout leader school.
20

21 Mr. Binkley served in Bosnia during the war in the late 1990's, and in Honduras doing
22 counter drug operations. He witnessed genocide in Bosnia and executions of marijuana growers
23 in Honduras. Mr. Binkley suffers from Post Traumatic Stress Disorder as a result of his military
24 experience.
25

26 In 2001, Mr. Binkley dislocated his hip while running on the beach as part of his daily
27 exercise routine. He received inadequate and ineffectual medical treatment from the military for
28

1 his injury. To ease the excruciating pain, he took the pain killers prescribed for him by the
2 military, but because his injury was not treated properly and he was in constant pain, he soon
3 became addicted to the painkillers. In 2002, because of his crippling condition and his addiction,
4 Mr. Binkley was honorably discharged from the Army. It had been his dream to remain in the
5 military throughout his life, making the military his career, but the Army's mishandling of his
6 injury forced him to leave.
7

8 Throughout his ordeal, Mr. Binkley sought help for his addiction and his PTSD from the
9 Veterans' Administration, but it was denied because the Army was unable to verify his service
10 record because of the nature of the operations he was involved in while serving in Honduras. Mr.
11 Speare had Mr. Binkley examined by a psychologist, Paul Koller PhD., who diagnosed PTSD.
12 Dr. James Missett M.D., hired by present counsel, has also examined Mr. Binkley and confirms
13 the diagnosis of PTSD. Mr. Speare did not pursue the PTSD issue as it relates to whether the
14 condition could negate the specific intent required to establish the crime of robbery.
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16

17 ARGUMENT

18 **I. Counsel Speare's decision to accept a 12 year top/bottom 'deal' instead of** 19 **pursuing the possible defenses raised by his client's diagnosed mental disorder** 20 **constituted ineffective assistance of counsel.**

21 It is the defendant's burden of producing clear and convincing evidence that a guilty or
22 no contest plea was not the product of a knowing, intelligent, and voluntary decision. (People v.
23 Harvey (1984) 151 Cal.App.3d 660, 667.) "As a general rule, a plea of guilty may be withdrawn
24 for **mistake**, ignorance, [] inadvertance, or any other factor overreaching defendant's free and
25 clear judgment."(emphasis added) [Citations omitted] (People v. Superior Court (Giron) (1974)
26 11 Cal.3d 793, 797. People v. Caban (1983) 148 Cal.App.3d 706.) A plea may be withdrawn
27 where a defendant was denied effective assistance of counsel. People v. Smith (1993) 6 Cal.4th
28

1 684. Good cause to set aside a plea is shown when the defendant demonstrates that the plea was
2 entered as a result of mistake, ignorance, inadvertence, or some other factor that demonstrates
3 overreaching. People v. Caban, supra. When in doubt, the court should grant a prejudgment
4 motion to withdraw a guilty plea. (People v. Spears (1984) 153 Cal.App.3d 79, 88.)

5
6 Based upon the Declaration of attorney Geoffrey Carr filed herewith, defendant contends
7 he was denied effective assistance of counsel. To sustain a claim of ineffective assistance of
8 counsel, a court must determine that counsel's performance fell "below" an objective standard of
9 reasonableness...under prevailing professional norms" (People v. Ledesma (1987) 43 C3d 171,
10 216, 233 CR 404, quoting Strickland v. Washington (1984) 466 US 668, 688, 80 L Ed 2d 674,
11 693, 104 S Ct 2052), and that a reasonable probability exists that "but for counsel's
12 unprofessional errors, the result of the proceeding would have been different" People v. Ledesma
13 (1987) 43 C3d 171, 216, 233 CR 404, quoting Strickland v. Washington (1984) 466 US 668,
14 688, 80 L Ed 2d 674, 693, 104 S Ct 2052).

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17 **II. The Court failed to adequately advise the defendant of the consequences of his**
18 **plea. Specifically, the Court failed to advise defendant that the gun allegation**
19 **carried a mandatory 10 year enhancement that could not be stricken by the**
20 **Court.**

21 In the plea proceedings on November 15, 2006, defendant was never advised that the
22 Penal Code 12022.53(b) allegation required a minimum of 10 years in prison and that the Court
23 had no power to strike, suspend, or grant probation. Colloquy occurred at p. 18 ln. 18 through p.
24 19 ln. 20 between the Court and prosecutor Baker regarding the import of the allegation, but Mr.
25 Binkley was not part of the conversation and never acknowledged that he understood the
26 *minimum* sentence based upon his plea would be 12 years. Indeed, on the one hand the Court
27 never advised Mr. Binkley that a 12 year prison term was the absolute minimum he could
28 receive based upon the charges in the Information, while, on the other hand, advised Mr.

1 Binkley that a full probation report was being prepared and the Court would not make a 'final'
2 decision on sentencing until receipt of the report. At Page 2 line. 25 through Page 3 line 13 the
3 Court stated:

4
5 There are other possible relevant issues, but as happens in court, the Court
6 makes an indicated sentence on cases; we refer them over for sentencing
7 proceedings; we get a full report from the probation department; I consider all the
8 information and then make final decision. So my indicated sentence is 12 years to
9 be run concurrent with the San Mateo Case, as I understand it. That's not etched
10 in absolute stone. When we come back for sentencing on your case after I
11 consider all available information, it might be that an inappropriate final
12 disposition of the case and I might refuse to honor my promise today. Now I
13 can't say I don't recall that ever happening before, but it's possible, and if so, you
14 will have the right to withdraw your plea of guilty or no contest and reinstate your
15 plea of not guilty and litigate the case if you wish to do. So that's the status of
16 this disposition here. Do you understand that indicated sentence and disposition?
17
18

19 THE DEFENDANT: Crystal clear, your honor."

20
21 Later, at Page 12 lines 6-14 the Court reiterated to Mr. Binkley that the Court had discretion and
22 would not make a sentencing decision until receipt of the report:

23 THE COURT: Okay. Now under the terms of this plea, the matter is
24 going to be referred to the probation department. They will evaluate you by
25 talking to you; they're going to talk to the victims in this case. They are going to
26 make inquires regarding the restitution claims. And they're going to come back
27
28

1 with a full and fairly lengthy report and recommendation, which I will consider
2 before finally sentencing you. Do you understand that?

3 THE DEFENDANT: Yes, Your Honor.”
4

5 The Court never advised Mr. Binkley that the sentencing decision in this case was not in the
6 hands of the Court, but rather, the Legislature mandated a 12 year minimum no matter what the
7 Court believed to be appropriate. Mr. Binkley was left in a state of mind similar to the defendant
8 in Caban that a lesser sentence or probation was possibly in the cards depending upon the report
9 to be prepared by adult probation. The Court did tell Mr. Binkley that he would be sentenced to
10 state prison (p.12 In 24-28) but never told him that 12 years was the best possible sentence he
11 could receive.
12

13 **III. In the Alternative, Defense Requests that the Court Utilize Its Authority to**
14 **Withdraw Its Prior Approval of the Plea**

15 Under Penal Code section 1192.5, the Court “may at the time set for the ...
16 pronouncement of judgment, withdraw its approval in the light of further consideration of the
17 matter.”
18

19 The Court of Appeal, Second Appellate District, elaborated on this authority in Gifford:

20 “Implicit in the language of section 1192.5 is the premise that the court, upon
21 sentencing, has broad discretion to withdraw its prior approval of a negotiated
22 plea. Such withdrawal is permitted, for example, in those instances where the
23 court becomes more fully informed about the case (People v. King (1981) 123
24 Cal.App.3d 406, 408), or where, after further consideration, the court concludes
25 that the bargain is not in the best interests of society (People v. Woodward (1982)
26 131 Cal.App.3d 107, 110).”
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