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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JERRY Z., Defendant and Appellant.	A127878 (Contra Costa County Super. Ct. No. 970632-6)

INTRODUCTION

Appellant Jerry Z.[1] was convicted by plea in 1997 of one count of continuous sexual abuse of a child under age 14 (Pen. Code, § 288.5)[2] based on the molestation of his daughter, age 19 at the time of his conviction. Appellant was granted probation with a one-year jail sentence and various conditions of probation, including sex offender registration under section 290.

Appellant claims that as part of his plea bargain he was promised that if he successfully completed probation, and thereafter committed no additional offenses for a period of ten years, his statutory obligation for registration pursuant to Penal Code section 290 would be terminated, he would be allowed to withdraw his plea and have the charges dismissed under section 1203.4, to obtain a certificate of rehabilitation under section 4852.01 et seq., and be relieved pursuant to section 290.5 of his sex offender registration requirements. At the time of his plea, the statutes in question allowed the

[1] While we are aware of Penal Code sections 953 and 959, given the highly unusual circumstances of this case and in conformance, we have used a protective nondisclosure caption. (See, e.g., *People v. S. P.* (1980) 115 Cal.App.3d Supp. 12.)

[2] All statutory references, unless otherwise indicated, are to the Penal Code.

forms of relief mentioned, but they have since been amended to disallow such relief for anyone convicted under section 288.5.

Appellant has sought enforcement of these claimed provisions of his plea bargain by various means at various times as a pro se litigant. The Attorney General in fact contends he is barred from seeking relief now because he failed to appeal an earlier adverse ruling. We disagree with the Attorney General, address the merits of appellant's position, and grant the requested relief.

FACTUAL AND PROCEDURAL HISTORY OF THE CONVICTION

On January 7, 1997, it came to the attention of the police that appellant's 16-year-old daughter (Jane Doe I) had been molested by her father from spring 1993 to the beginning of 1995, when she was approximately 13 to 15 years old. In the ensuing investigation it came to light that appellant's then 18-year-old daughter (Jane Doe II) had also been molested by her father from September 1991 to October 1995, making her 13 when the molestation began.

The molestation of Jane Doe I occurred two or three times a week and involved rubbing her vagina with his hand under her clothing and several incidents of digital penetration. The molestation of Jane Doe II occurred once a week, sometimes once a month, and involved French kissing, touching and sucking her breasts, and digital penetration.

The molestation had come to the attention of the girls' mother in November 1995 when the girls confronted their father during a family argument. The mother said the abuse was a result of the father's depression and did nothing further about it. The father and both girls told investigators the abuse had stopped sometime in 1995 when Jane Doe I complained to her father that she did not think it was right, shortly before Jane Doe II told their mother about the abuse.

Appellant was charged in a six-count complaint with two counts of continuous sexual abuse of a child under age 14, naming Jane Doe I and Jane Doe II as victims (§ 288.5) , three counts of lewd and lascivious conduct with a child aged 14 or 15 (§ 288, subd. (c)) (one count relating to Jane Doe I and two counts relating to Jane Doe II), and

one count of rape with a foreign object of a minor under age 18 (§ 289, subd. (h)) relating to Jane Doe II.

On March 27, 1997, pursuant to a plea bargain, appellant pled no contest to one count against Jane Doe II under section 288.5 in exchange for dismissal of the other charges. He faced a maximum sentence of 16 years in prison for that conviction. (§ 288.5, subd. (a).) Under the plea bargain he was to be admitted to probation for five years, with one year in county jail.

There was no written plea agreement. At the change of plea proceeding defense counsel recited the foregoing major terms of the plea bargain, but there was no mention of prospective relief from conviction or registration. Appellant was informed by the court that he would be required to register under section 290, but he was not told how long the registration requirement would last. Appellant acknowledged that no promises had been made other than those recited in open court.

Before accepting his plea, the court received a psychiatric report under section 288.1. That report attributed the molestation to "extended periods of severe depression and problems within his marriage" leading appellant to take advantage of his daughters in an "inappropriate fashion," but he was "seen as 'acting out' and not being directed in a criminal or deliberate fashion to commit acts of a criminal nature." The report indicated appellant had undergone a religious awakening, had benefited from antidepressant medication, and was "not a risk to repeat the behaviors" that led to his conviction. He exhibited a "clearly heartfelt desire to never bring about pain of this nature within his lifetime ever again."

After the plea, and before sentencing, a second psychiatrist diagnosed appellant with "pedophilia, attracted to females and limited to incest but without sexual intercourse." This doctor, too, noted a "history [of] depression" then "in remission" and predicted appellant would not be a "present danger to the health or safety of others, including his two daughters." Appellant was described as having "legitimate remorse for his behavior." The doctor recommended that appellant be given "serious consideration for probation."

On April 17, 1997, appellant was granted probation for five years on condition he serve one year in county jail. He was again informed by the court he would be required to register under section 290, again without reference to the duration of that requirement. Defense counsel was asked, "[A]re there any other specific terms and conditions being requested for his probation?" She responded, "No."

On June 5, 1997, the probation department addressed a document to appellant which, among other things, advised him of the availability of relief under section 1203.4. It read in part, "If you fulfill all the conditions of your probation, you may come in at the end of the probationary period, change your plea (or conviction) from guilty to not guilty, and have the charges dismissed. Certain California Vehicle Code violations are not applicable due to Department of Motor Vehicle regulations."

CHANGES IN THE LAW

At the time of appellant's plea, a conviction under section 288.5 did not bar relief under section 1203.4 upon successful completion of probation.[3] Appellant was entitled as a matter of right to relief under that statute if he fulfilled the terms of his probation (*People v. Chandler* (1988) 203 Cal.App.3d 782, 787, 788), and then could have applied for a certificate of rehabilitation under section 4852.01.[4] To the extent he made an

[3] At the time of appellant's plea, section 1203.4, subdivision (a), provided in relevant part as follows: "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; . . . and . . . the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted . . . ." (Stats. 1994, ch. 882 § 1, p. 4460.)

[4] At the time of appellant's plea, section 4852.01, subdivision (c) provided: "Any person convicted of a felony . . . , the accusatory pleading of which has been dismissed pursuant to Section 1203.4, may file a petition for certificate of rehabilitation and pardon

appropriate showing of his rehabilitation in accord with section 4852.13, the court then "may" have granted him such a certificate. (See fn. 11, *post*.) After ten crime-free years of compliance with sex offender registration requirements, appellant could have then applied to be relieved of sex offender registration under section 290.5, subdivision (b)(3), but that section required (and still requires) an applicant to first obtain a certificate of rehabilitation before being eligible to be relieved of registration requirements. Even after obtaining such a certificate, a person convicted of violating section 288.5 "may" have been relieved of registration requirements in the court's discretion.[5]

But the law soon changed, so that effective January 1, 1998, those convicted under section 288.5 became categorically ineligible for those forms of relief. In July 1997, the Legislature amended section 1203.4 to make relief under that statute unavailable to those convicted of violating section 288.5. (§ 1203.4, subd. (b); Stats. 1997, ch. 61, § 1, p. 405.) That same bill amended section 4852.01 to disqualify those convicted of violating section 288.5 from receiving a certificate of rehabilitation. (§ 4852.01, subd. (d); Stats. 1997, ch. 61, § 2, p. 407.)

At the time of appellant's plea, as now, dismissal under section 1203.4 was a prerequisite to obtaining a certificate of rehabilitation; and a certificate of rehabilitation was, and still is, a prerequisite to being relieved of registration requirements under section 290.5. (§§ 290.5, subds. (a)(1), (a)(2), (b)(3)), 4852.01, subd. (c).) The 1997 revisions to these sections applied retroactively to one convicted before their effective

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pursuant to the provisions of this chapter if the petitioner has not been incarcerated in any prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading and is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years residence in this state prior to the filing of the petition." (Stats. 1996, ch. 981, p. 5807.)

[5] At the time of appellant's plea, section 290.5, subdivision (b)(3) provided: "The court, upon granting a petition for a certificate of rehabilitation . . . may relieve a person of the duty to register under Section 290 for a violation of Section 288 or 288.5, provided that the person was granted probation pursuant to subdivision (c) of section 1203.066, has complied with the provisions of section 290 for a continuous period of at least 10 years immediately preceding the filing of the petition, and has not been convicted of a felony during that period." (Stats. 1996, ch. 461, § 2, p. 2815.)

date. (*People v. Ansell* (2001) 25 Cal.4th 868, 884-885, 893 (*Ansell*); *People v. Arata* (2007) 151 Cal.App.4th 778, 784-785 (*Arata*).)

In 1999 section 290.5, subdivision (b), was also amended to foreclose relief from registration for individuals convicted under section 288.5, by providing, effective January 1, 2000, that relief from registration was available only if a certificate of rehabilitation had been obtained prior to January 1, 1998. (§ 290.5, subd. (b)(3); Stats. 1999, ch. 576, § 2, p. 4092.) In addition, section 290.5 was amended in 2005 to provide: "A person required to register under Section 290, upon obtaining a certificate of rehabilitation . . . , shall not be relieved of the duty to register under Section 290" if his or her conviction was for violating section 288.5. (§ 290.5, subd. (a)(2)(P); Stats. 2005, ch. 722, § 8, pp. 5913-5914.)

APPELLANT'S PREVIOUS POSTJUDGMENT PROCEEDINGS

Appellant began seeking relief from sex offender registration soon after he was convicted, specifically, on August 4, 1997, when he filed a habeas corpus petition alleging that registration under section 290 violated his freedom of religion under the First Amendment, his right to privacy, and the Eighth Amendment prohibition on cruel and unusual punishment. On August 27, 1997, the court (Hon. Garrett J. Grant) denied the petition in a written opinion.

On November 5, 1997, evidently having become aware of the upcoming statutory changes, appellant filed another habeas corpus petition requesting, inter alia, relief under sections 1203.4, 4852.01, and 290.5. He claimed the "elimination" of section 1203.4 relief, as well as relief under section 4852.01, violated due process because the statutory provisions had been "part of an inducement to accept the . . . plea bargain." This appears to be the first time appellant raised the issues now before us as a basis for relief, although at that time he had not completed probation or complied with the ten-year good behavior requirement.

Despite appellant's reliance on recent legislation, by order of December 1, 1997, Judge Grant denied his habeas petition as a successive petition that did not include an

explanation for why that claim was not included in the earlier-filed petition. Thus, the merits of his plea bargain claim were not addressed.

Appellant next filed a habeas corpus petition on March 30, 1998, again on the basis that the laws as they existed in 1997—allowing section 1203.4 relief and relief from registration—were "statutory rights, inherently implied (even stated in the probation instructions . . .) and specified as part of the 3/27/97 P.C. 1192.5 plea bargain, and [were] an inducement for the defendant to accept the plea bargain." Appellant's stated reason for filing a successive petition was to add certain legal authorities not available at the time of his earlier petition. The petition was denied by written order (Hon. Michael R. Coleman) filed April 28, 1998, again because it was a successive petition.

Appellant renewed his efforts to be relieved of sex offender registration and its consequences after successfully completing probation in 2002. The ten-year period following his plea and conviction expired in March or April 2007. Appellant claims he remained free of conviction during that entire time. Then, on May 30, 2007, the Third District Court of Appeal filed its opinion in *Arata*, *supra*, 151 Cal.App.4th 778, which, as discussed below, held that relief under section 1203.4 was implicitly included in a plea bargain entered before the law changed in 1998. As will be seen, *Arata* is a case of considerable importance here.

On August 9, 2007, appellant filed another habeas corpus petition alleging that he and his family had been subjected to harassment, assaults, vandalism of property, and death threats. Appellant claimed that when he entered his plea he "relied upon the promises & clear written Codes as depicted in P.C. 1203.4, P.C. 4852.01 and P.C. 290.5 of rehabilitative relief, as existing in 1997." Appellant compared his case to that of *Arata, supra,* 151 Cal.App.4th 778 and requested relief under the foregoing sections.

The habeas petition was denied without prejudice by order of Judge Coleman filed October 9, 2007, which expressed the opinion that the proper procedural device would be a motion under section 1203.4.

Accordingly, on October 29, 2007, appellant filed a motion to withdraw his plea and dismiss the charge under section 1203.4, for a certificate of rehabilitation under

section 4852.01, and for relief from section 290 registration under section 290.5. Appellant further expressly declared that he and his trial attorney, Paula Lorentzen, "discussed thoroughly" the above-specified forms of relief, and that she had "thorough discussions . . . with the Contra Costa District Attorney's Office" on the subject. Again, appellant cited and relied upon *Arata*.

The motion was denied by written order (Hon. Theresa Canepa) on December 12, 2007. Importantly, the court found the promise of relief under section 1203.4 was an "implicit term" of the plea bargain, citing *Arata*, *supra*, 151 Cal.App.4th 778. It found, however, that this term was not a "significant" part of the overall bargain, and so the unavailability of relief under the amended statute did not violate due process, citing *People v. Acuna* (2000) 77 Cal.App.4th 1056, 1062 (*Acuna*). In reaching that result, the order noted appellant had not stated in his declaration that "if he had known the expungement could not be obtained, he would not have agreed to plead guilty."[6] And it further held that, since appellant was not eligible for relief under section 1203.4, he also could not obtain relief under sections 290.5 and 4852.01 et seq., as dismissal under section 1203.4 is a first step in obtaining both forms of relief.

Appellant filed a motion for reconsideration, in which he requested a hearing and appointment of counsel. His motion was denied without explanation on February 27, 2008. No appeal was taken from these rulings, apparently because appellant believed he needed to further exhaust his remedies in superior court.

On October 29, 2008, appellant filed another habeas corpus petition in the superior court on the same grounds. The verified petition alleged that he "would not have agreed to the Plea bargain and would have gone to Court Trial" had it not been for the promised relief under sections 1203.4, 4852.01 and 290.5. He further requested oral argument and appointment of counsel, stating his desire to subpoena his trial attorney Lorentzen, Deputy District Attorney Brian Baker, and the Honorable Patricia Sepulveda, then (and

[6] Though the relief under section 1203.4 is often referred to as "expungement," that term is not technically correct. (*People v. Mgebrov* (2008) 166 Cal.App.4th 579, 584.)

now) a justice of this court, but the judge who sentenced appellant below. Thus, appellant alerted the court that these individuals had been involved in the plea negotiations.

The habeas petition was denied in an eight-page written order (Hon. Charles B. Burch) on December 23, 2008. The specified grounds were that it was repetitive of earlier filings, the denial of which appellant had failed to appeal; that the prior order finding the implicit term of the plea bargain not significant was not "egregiously wrong"; that the plea transcripts did not reflect such an agreement; and that the court disagreed with the reasoning of *Arata*, *supra*, 151 Cal.App.4th 778 and refused to follow it.[7]

On March 11, 2009, appellant filed a petition for writ of habeas corpus in this court, and at defendant's request we take judicial notice of the file in that case. (Evid. Code, §§ 452, subd. (d), 459.) Filed concurrently with his petition was the declaration of Lorentzen, appellant's trial attorney, which was dated February 26, 2009. Manifestly, this declaration had not previously been submitted to the court below.

We denied the habeas petition on June 11, 2009, on grounds that appellant was no longer in actual or constructive custody, nevertheless also holding out a ray of hope to him: "it appears, however, that petitioner is not without a remedy. In his petition here, petitioner has included a declaration from trial counsel regarding the importance petitioner placed on the Penal Code section 1203.4 relief. Although petitioner has previously moved for relief under Penal Code section 1203.4 in the trial court, the declaration may constitute new evidence supporting his claim and thus may warrant renewal of his motion under *People v. Arata*[, *supra,*] 151 Cal.App.4th 778." (Haerle, Acting P.J.)

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[7] The court in the December 23, 2008 opinion expressed its belief that *Arata* was "wrongly decided" and purported to interpret it as applying only to cases in which relief under section 1203.4 was statutorily available at the time the application was made. This interpretation is untenable, however, since Arata himself moved for relief long after section 1203.4 had been amended to preclude relief. (*Arata*, *supra*, 151 Cal.App.4th at p. 781.) In short, the superior court erred in refusing to follow authority of an appellate court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

On September 21, 2009, appellant followed our suggestion and filed in the superior court a renewed pro se motion for relief under sections 1203.4, 4852.01 and 290.5. That motion was denied by written order on November 20, 2009, without a hearing, by the same judge who had earlier refused to follow *Arata*.[8] It is from that order that appellant presently appeals. We appointed counsel to represent him on appeal.

APPELLANT'S EVIDENTIARY SHOWING ON HIS MOTION

In his motion, appellant claimed he entered his plea in reliance on an agreement that the sex offender registration requirement would be for a limited period of no more than ten years, and that he would be granted relief under sections 1203.4, 4852.01 and 290.5 if he "did not have any new or additional criminal charges in the ensuing 10 years, successfully completed probation, and lived a moral, productive, and upright life." He submitted a supporting declaration under oath that he had "lived a completely honest and upright life" in the ensuing years, had "conducted himself with sobriety and industry," had "exhibited good moral character," had resided continuously in California, and had complied with all provisions of section 290.

Appellant attached copies of many of his prior filings, including the declaration in which he testified that he would not have accepted the plea bargain had it not been for his reliance upon the prospect of future relief from sex offender registration. He also attached the 1997 probation notice, which had informed him of the availability of relief under section 1203.4.

In addition to his own declaration, appellant filed that of his trial attorney Lorentzen, swearing that "[d]uring the course of negotiations, it was . . . agreed between the court, the District Attorney's Office of Contra Costa County, and myself on behalf of Mr. [Z.], that should he successfully complete probation, and thereafter commit no

[8] The order of November 20, 2009—by the same judge who authored the order of December 23, 2008—also contained a statement indicating that *Arata*, *supra*, 151 Cal.App.4th 778 applies only to those cases in which "expungement is legally available at the time defendant makes the motion." As noted above, this is a clear misconstruction of *Arata*. (See fn. 6, *ante*.)

additional offenses for a period of 10 years from the date of his plea, that his statutory obligation for registration pursuant to Penal Code section 290 . . . would be terminated, and he would be deemed eligible for the findings and relief pursuant to Penal Code Section 1203.4, Penal Code Section 4852.01, and Penal Code Section 290.5." Lorentzen claimed she had negotiated this agreement with Deputy District Attorney Brian Baker and then-Judge Sepulveda. Lorentzen further declared on information and belief, as appellant's attorney, that he "would not have accepted a negotiated plea and disposition" in the absence of that promised relief.

Lorentzen further averred on information and belief that the substance of this agreement would be reflected in the transcript of the "plea proceeding," but this transcript was "no longer available." An attachment suggests the transcript to which she referred was the sentencing transcript of April 17, 1997, and the notes of that proceeding reportedly had been destroyed. We, however, have reviewed the transcript of both the change of plea proceeding and the sentencing hearing, and there was no mention at either proceeding of any promise to afford appellant relief under section 1203.4 or to relieve him of section 290 registration requirements after ten years.[9]

The district attorney's office filed no response to appellant's motion or any form of proof disputing his recitation of the terms of the plea agreement. In fact, the district attorney has never responded to any of the above motions or petitions.

THE SUPERIOR COURT'S RULING

The November 20, 2009 order denying appellant's motion was ten pages long, and denied the motion on several separate grounds: (1) the claims were procedurally barred because they were repetitive of earlier requests for relief ; (2) appellant had waived any claims asserted because he failed to appeal the order of December 12, 2007; (3) the underlying claims were without merit because any implied terms of the plea agreement relating to section 1203.4 and related relief were not material to the plea agreement in

[9] The transcript of the April 17, 1997 sentencing was submitted by the Attorney General as Exhibit I in opposition to the petition for writ of habeas corpus, of which we take judicial notice.

light of the significant sentencing benefit appellant received, and in any case, any such agreement was subject to subsequent changes in the law; (4) the Lorentzen declaration did not constitute newly discovered evidence because appellant failed to explain why it could not have been produced earlier; (5) Lorentzen's declaration was "close to being incredible on its face" because, inter alia, it recounted purported plea negotiations between Lorentzen and a deputy district attorney named Brian Baker, with the involvement of then-Judge Sepulveda, whereas the change of plea transcript shows that proceeding was conducted by Deputy District Attorney Phyllis Redmond before Judge Gerald A. Belleci; (6) there is nothing in the record of the plea proceedings to support appellant's claim; and (7) even if a promise had been made that appellant's plea could be withdrawn and the charges dismissed under section 1203.4, the state actors were not empowered to guarantee him relief from sex offender registration or a certificate of rehabilitation because the statutes governing those forms of relief were discretionary with the court.[10] The order also held that, even if the plea agreement included a term relating to prospective relief, specific performance was an improper remedy because that would require the court to act contrary to statute. Finally, the order indicated that the proper remedy would be to vacate the judgment and reinstate the charges, and that the People would be prejudiced by such a result due to the long passage of time since the conviction.

DISCUSSION

Standards of review

The thrust of appellant's motion was that, based on the terms of the plea bargain he entered in 1997, he was entitled to the relief provided under sections 1203.4, 4852.01 and 290.5, despite the apparent inapplicability of those statutes on their face.

On application of a defendant who meets the requirements of section 1203.4, the court not only can, but must, grant relief in accord with that statute. (*In re Griffin* (1967) 67 Cal.2d 343, 347, fn. 3; see also, *People v. Mgebrov*, *supra*, 166 Cal.App.4th at p. 584;

[10] The court also resolved other issues not before us on appeal, specifically whether appellant could be relieved of being listed on the Megan's Law website and whether his conviction violated *People v. Hofsheier* (2006) 37 Cal.4th 1185.

People v. Johnson (1955) 134 Cal.App.2d 140, 144 (*Johnson*).) We have held the availability of relief under section 1203.4, at least if it involves statutory construction, is subject to de novo review. (*People v. Mgebrov*, *supra*, 166 Cal.App.4th at p. 585.) When the court's duty is invoked under the mandatory provisions of section 1203.4, subdivision (a), the same standard should apply. If the superior court had ruled under the discretionary "interests of justice" exception under section 1203.4, subdivision (a) (see fn. 3, *ante*), the abuse of discretion standard would apply on review. (*People v. McLernon* (2009) 174 Cal.App.4th 569, 572 (*McLernon*).)

The other sections under which appellant seeks relief (§§ 290.5, 4852.01) are of a more discretionary nature.[11] Whether a court properly denied a motion for relief under section 4852.13 is ordinarily reviewed for abuse of discretion. (*People v. Lockwood* (1998) 66 Cal.App.4th 222, 226.) The same standard should apply to a denial of discretionary relief under section 290.5.

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[11] Section 4852.13, subdivision (a), provides in pertinent part as follows: "[I]f after hearing, the court finds that the petitioner has demonstrated by his or her course of conduct his or her rehabilitation and his or her fitness to exercise all of the civil and political rights of citizenship, the court may make an order declaring that the petitioner has been rehabilitated, and recommending that the Governor grant a full pardon to the petitioner." The district attorney, however, may petition to rescind the certificate and will be successful in doing so if he proves by "a preponderance of the evidence that the person who has received the certificate presents a continuing threat to minors . . . ." (§ 4852.13, subd. (c).)

Section 290.5, subdivision (b)(3) provides in relevant part that the court, upon issuing a certificate of rehabilitation, "may relieve a person of the duty to register under Section 290 for a violation of Section 288 or 288.5, provided that the person was granted probation pursuant to subdivision (c) of Section 1203.066, has complied with the provisions of Section 290 for a continuous period of at least 10 years immediately preceding the filing of the petition, and has not been convicted of a felony during that period." That subdivision, since 2000, has limited such relief to instances in which "the petition [under section 4852.13] was granted prior to January 1, 1998." (Stats. 1999, Ch. 576, § 2, p. 4092.)

The law relating to enforcement of plea agreements

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*Santobello v. New York* (1971) 404 U.S. 257, 262 (*Santobello*).) "The [United States] Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea [citation], but that the requirements of due process attach also to implementation of the bargain itself. It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860; see also, *People v. Walker* (1991) 54 Cal.3d 1013, 1024 (*Walker*).)

When a party seeks to enforce a term of a plea agreement, the court's first task is to determine the terms of the agreement. To determine whether a plea agreement was violated, the court must first determine "what the parties to the plea bargain reasonably understood to be the terms of the agreement." (*United States v. Arnett* (9th Cir. 1979) 628 F.2d 1162, 1164.)

A plea agreement is interpreted according to the same rules as other contracts, and subject to the same standards of review. (*People v. Feyrer* (2010) 48 Cal.4th 426, 437.) The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties, determined by objective manifestations of their intent, including the words used, as well as evidence of the surrounding circumstances under which the parties negotiated or entered into the contract, the object, nature and subject matter of the contract, and the subsequent conduct of the parties. (*Ibid*.)

The terms of an oral contract are determined by objective, rather than subjective, criteria. The question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) "When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed." (*Ibid.*) Even if the evidence is undisputed,

if different inferences may be drawn, an appellate court will defer to the lower court's resolution of conflicting inferences. (*Id*. at p. 633.) The fact that an agreement is reflected in a transcript of court proceedings does not transform it into a written agreement nor does it change the rules on appeal. (*Id.* at pp. 632-633)

Plea agreement relating to relief under section 1203.4

Appellant is in a rare position, as most offenders under sections 288 and 288.5 are foreclosed from being granted probation. (§ 1203.066.) Before probation may be granted the court must find numerous pre-conditions, including that there is no threat of harm to the victim, that it is in the victim's best interests to allow probation for the defendant, and that "rehabilitation of the defendant is feasible." (§ 1203.066, subd. (d)(1)(A), (d)(1)(B), (d)(1)(E).)

As a result of having been granted probation, appellant, unlike most sex offenders, appears to have been in a strong position to obtain section 1203.4 relief at the time of his plea. Indeed, in the absence of a statutory exception, section 1203.4 imposes a mandatory duty on the court to grant a defendant relief whenever the term of probation has been completed successfully. (*Arata, supra*, 151 Cal.App.4th at p. 783.) In addition, *Arata* can be read to hold that such relief was an implicit part of the plea agreement simply because probation was granted. (*Id*. at p. 783; see also *Johnson*, *supra*, 134 Cal.App.2d at p. 143 ["The granting of probation, aside from being an act of clemency extended to one who has committed a crime, is also in substance and effect a bargain made by the People, through their Legislature and courts, with the malefactor."].) Thus, under *Arata* it is at least arguable that relief under section 1203.4 was available to appellant simply because the law made it available at the time he was placed on probation. (See fn. 12, *post*.)

It is not clear whether the law existing at the time of a plea bargain is implicitly incorporated into the agreement. Speaking about California commercial contracts, the Supreme Court asserted, "The parties are presumed to have had existing law in mind when they executed their agreement." (*Swenson v. File* (1970) 3 Cal.3d 389, 394.) "[T]o hold that subsequent changes in the law which impose greater burdens or responsibilities

upon the parties become part of that agreement would result in modifying it without their consent, and would promote uncertainty in commercial transactions." (*Ibid*.)

However, several more recent court of appeal cases, such as *Acuna*, *supra*, 77 Cal.App.4th 1056, hold otherwise in the context of a criminal plea bargain. (See also, *People v. Gipson* (2004) 117 Cal.App.4th 1065, 1069-1070 [bargain incorporates not only existing law but authority of state to amend law].) The issue is currently before the California Supreme Court.[12]

In any case, appellant and his attorney go further and claim he was expressly promised such relief. But even if the term was merely implicit—and the court below found in December 2007 it was at least that—appellant would be entitled under *Santobello, supra,* 404 U.S. 262, to have the bargain enforced, so long as the state's actual conduct constituted a "significant variance" from the bargained-for term of the agreement. (*Arata, supra,* 151 Cal.App.4th at p. 787.)

Relief under section 1203.4 for sex offenders placed on probation before 1998

At the outset we are faced with two rather disparate cases. *Acuna*, *supra*, 77 Cal.App.4th 1056, held that a defendant who had entered a plea to violation of section 288, subdivision (a) in 1993, and who, like appellant here, was granted five years' probation with a year in jail, was not deprived of the benefit of his plea bargain based on the change in the availability of relief under section 1203.4 by reason of the 1997 amendments. (*Id*. at pp. 1058-1059, 1062.) Defendant Acuna "point[ed] to no express

[12] The question whether a statute in existence at the time of a plea bargain becomes part of the bargain for a defendant was recently discussed in the Ninth Circuit case of *Doe v. Harris* (9th Cir. 2011) 640 F.3d 972, 975-977, also dealing with sex offender registration. Noting the conflict between the views taken by *Arata* and *Acuna* (as well as other cases), the Ninth Circuit certified the question to the California Supreme Court for resolution. That request for certification was granted on June 15, 2011, and the issue is now pending in *Doe v. Harris,* S191948, where the Supreme Court phrased the question as follows: "Under California law of contract interpretation as applicable to the interpretation of plea agreements, does the law in effect at the time of a plea agreement bind the parties or can the terms of a plea agreement be affected by changes in the law?" In light of the pendency of that question, we are reluctant to deny relief on the basis of the opinion in *Acuna, supra*, 77 Cal.App.4th 1056.

provision in his plea bargain that mentions expungement." (*Id*. at p. 1062.) Division Six of the Second District held there was no due process violation of Acuna's plea bargain in applying the amended law to him, which prevented him from obtaining relief under section 1203.4. (*Id.* at pp. 1061-1062.)

On the other hand, *Arata, supra*, 151 Cal.App.4th 778, held on facts closely analogous to ours that for a defendant placed on probation prior to 1998 pursuant to a plea agreement, availability of relief under section 1203.4 was implicitly part of the bargain, and it held that Arata's motion under section 1203.4 should have been granted—and ordered that relief. Specifically:

The defendant in *Arata* was convicted in 1996 of violating section 288, subdivision (a), based on having touched the buttocks of a 13-year-old. (*Arata*, *supra*, 151 Cal.App.4th at p. 781.) After considering a report prepared under section 288.1, the court granted probation with 150 days in jail, which Arata was allowed to complete via work furlough. In 2005, Arata moved to withdraw his guilty plea and have the charges dismissed pursuant to section 1203.4. (*Ibid.*) He alleged that his trial attorney had told him "if he successfully completed probation, he would be able to withdraw his plea and have the case dismissed under section 1203.4. The promised section 1203.4 relief was a motivating factor in his plea, although not the only one." (*Id.* at p. 782.) Notably, Arata submitted a declaration stating that he had relied upon his understanding regarding the availability of section 1203.4 relief in accepting the plea bargain. (*Id.* at p. 786.) And his claim was further supported by a declaration from his trial attorney indicating it was his "habit, custom and practice to inform clients of section 1203.4 relief because expungement was often an important consideration." (*Id.* at p. 782.) In addition, the probation document given to Arata spelled out the possibility of such relief, and defense counsel said it was his practice to go over that document with his clients. (*Ibid*.)

Even though Arata did not claim there had been an express promise by the district attorney that relief under section 1203.4 would be available, the Third District found the availability of such relief was implicitly part of the plea bargain: "Not all terms of a plea bargain have to be express; plea bargains may contain implied terms. . . . Section 1203.4

relief is part of the bargain made with a probationer. [Citation.] By agreeing to give defendant probation, the plea bargain implicitly included the promise of section 1203.4 relief as part of probation. Section 1203.4 relief was within 'defendant's contemplation and knowledge' when he entered his plea. [Citation.]" (*Arata, supra,* 151 Cal.App.4th at p. 787; see also, *Johnson, supra,* 134 Cal.App.2d at p. 143.) Consequently, *Arata* ordered the lower court to grant defendant's motion for relief under section 1203.4. (*Id*. at p. 789.)

Arata, supra, 151 Cal.App.4th 778 is of special importance to our resolution of the issue before us because it so closely parallels this case and was decided shortly before appellant filed his habeas petition in August 2007. *Arata* may be distinguished from *Acuna, supra,* 77 Cal.App.4th at p. 1060 on grounds that Acuna was facing an eight-year prison term (§ 288, subd. (a)), whereas Arata's offense was clearly not a " 'state prison case' " from the beginning. (*Arata, supra,* 151 Cal.App.4th at p. 788.) Thus, Acuna gained more from the grant of probation itself. Indeed, *Arata* itself distinguished *Acuna* on that basis. (*Ibid.*; see also *Acuna, supra,* 77 Cal.App.4th at p. 1062 ["[e]ven without expungement Acuna received a substantial benefit from his plea bargain by avoiding a prison sentence"].)

If we thought this were the only distinguishing feature of the two cases and the proper standard for judging the "significance" of a plea bargain term, we would practically be compelled to conclude that appellant's avoidance of a 16-year prison sentence was so weighty a benefit that any promise regarding future relief under the provisions appellant now invokes would have to be deemed insignificant, as the court below held. But to call a bargained-for exchange "insignificant" simply because the original charges would have carried a much stiffer penalty than in *Arata* is to underestimate the probative value of declarations attesting to an express agreement—and to trivialize what is, in fact, a life-altering difference.

We think the more important distinguishing factor between *Acuna* and *Arata* is that both defendant Arata and his attorney, as in our case, filed declarations supporting the claim about the communications that led to Arata's reliance on the prospective relief

and its importance to him in entering his plea. (*Arata*, *supra*, 151 Cal.App.4th at pp. 781-782.) Acuna, on the other hand, appears to have relied solely on the state of the law at the time of his plea to establish both the incorporation of prospective relief as part of the bargain and his reliance on that relief. We think this difference in proof may have had a profound influence on the different outcome in the two cases.

Express promise versus implicit incorporation

Analyzing an ex post facto claim, the Supreme Court has held that the amendment to section 4852.01, disallowing relief for certain sex offenders, applies retroactively to convictions prior to 1998.[13] (*Ansell*, *supra*, 25 Cal.4th at pp. 884-885, 893.) Since the amendment to section 1203.4 was passed as part of the same bill, section 1203.4's current disallowance of relief would also apply retroactively to persons convicted in 1997. (*Arata*, *supra*, 151 Cal.App.4th at pp. 783-786.) These authorities make it difficult to conclude the law applicable at the time of the plea would make prospective relief available on a general basis.

At least with respect to relief under section 1203.4, we need not decide whether the rule incorporating existing law into an agreement (*Swenson v. File*, *supra*, 3 Cal.3d at p. 393) applies to criminal plea bargains, because the court below found in its December 12, 2007 order that relief under section 1203.4 *was* an "implicit term" of the plea bargain. And the order of November 20, 2009 did not dispute this finding.

Even more, though, if there was an *express* agreement by the prosecutor and court ―and we read appellant's briefing and declarations as making just such a claim―the state was obligated to keep its promise so long as the plea rested "in any significant

[13] *Ansell*, *supra*, 25 Cal.4th 868, did not, however, involve a claim that the entitlement to relief was incorporated in the defendant's plea bargain. *Ansell* held that retroactive application did not violate ex post facto principles. (*Id*. at pp. 884-885.) *Arata* accepted the holding of *Ansell* as a general matter of retroactivity, and held the same rule applied to section 1203.4, but it concluded the defendant was nevertheless entitled to relief under section 1203.4 because he claimed he had relied on that prospective relief in entering his plea. (*Arata*, *supra*, 151 Cal.App.4th at p. 787.)

degree" on the promise, making it "part of the inducement or consideration" for the plea. (*Santobello, supra*, 404 U.S. at p. 262.)

Significant variance from the plea bargain

The order appealed from rested in large part on the court's determination that the alleged promise under section 1203.4—which it regarded as implicit only—was nevertheless unenforceable because it was not a "material" part of the plea agreement. Indeed, this was the linchpin of the decision. This emphasis on "materiality" apparently derives from the Supreme Court's decision in *Santobello*, which mandated enforcement of plea terms if the failure to effectuate the bargain amounted to a "significant" variance from the original agreement.[14] (*Santobello, supra,* 404 U.S. at p. 262.)

True, not just "*any* deviation from the terms of the agreement is constitutionally impermissible." (*Walker, supra,* 54 Cal.3d at p. 1024.) Rather, the unfulfilled promise or added punishment must be "a 'significant' variation in the context of the entire plea bargain so as to violate defendant's constitutional rights." (*Arata, supra,* 151 Cal.App.4th at p. 787.) "A punishment or related condition that is insignificant relative to the whole, such as a standard condition of probation, may be imposed whether or not it was part of the express negotiations." (*Walker, supra,* 54 Cal.3d at p. 1024.)

Whether the government's conduct violated the agreement is reviewed de novo. (*United States v. Fisch* (9th Cir. 1988) 863 F.2d 690.) We think the "significance" of a term of a plea bargain, a mixed question of law and fact, is predominantly legal in this context, so we also subject that issue to de novo review. But even applying a deferential abuse of discretion standard would require reversal if the court applied the wrong legal

[14] The promise in *Santobello, supra*, 404 U.S. 257 was nothing more than that the prosecution would not make any recommendation to the court regarding the defendant's sentence. (*Id.* at p. 258.) The prosecutor who stood in at sentencing was unaware of the bargain and recommended the maximum sentence of one year. (*Id.* at p. 259.) The defendant objected on the basis of the plea agreement. The court imposed the maximum sentence but said it reached that conclusion independently of the prosecutor's recommendation. (*Ibid.*) If the promise in *Santobello* was a "significant" one, we think the promises here alleged by appellant were at least equally significant.

standard. (See *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239 [trial court's application of the wrong test or standard constitutes an abuse of discretion].)

The Supreme Court in *Walker supra*, 54 Cal.3d at p. 1024, described the enforcement of plea agreements as follows: "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." To determine whether a deviation from a plea bargain is "significant" the Supreme Court examined whether "its consequences to the defendant are severe enough that it qualifies as punishment for this purpose," even though it may not have had a punitive intent. (*Ibid.*) In *Walker* the court determined that a $5,000 restitution fine was a "significant deviation" from the plea bargain so as to require a remedy. (*Id.* at p. 1029.)

The court below, in its order of December 12, 2007, seemed to require that the plea term not only be "significant," but that it be so important that appellant would have gone to trial if the term had not been offered. And the November 20, 2009 order both relied upon, and agreed with, that ruling and repeatedly referred to the term's lack of "materiality." But we question whether this type of analysis placed too heavy a burden on appellant—and skewed the court's resolution of the "significance" issue. In this respect *Walker, supra,* 54 Cal.3d at pp. 1027-1028, fn. 3 is instructive: "Courts should generally be cautious about deeming nonbargained punishment to be insignificant. The test whether a punishment greater than that bargained for is 'significant' under *Santobello v. New York*, *supra*, 404 U.S. 257, is stricter than the prejudice test for a mere failure to advise of the consequences of a nonbargained plea. Punishment that is not prejudicial, i.e., when it is not reasonably probable the defendant would not have pleaded guilty if informed of the punishment (see *People v. Mancheno*, *supra*, 32 Cal.3d at pp. 865-866), may well be 'significant' if imposed after a negotiated plea."

There is ample evidence in the record before us that gaining eventual relief from the sex offender registration requirement was significant to appellant who, since 1997, has sought to bring to the court's attention the aspect of his plea bargain allowing him to

obtain such relief. We cannot doubt, on a subjective level, that the elements of the plea bargain in issue, taken together, were "significant" to him. By focusing solely on objective factors, such as the length of the prison term appellant faced, the court below tended to underestimate the importance of the subjective element.

Viewed as a consequence to appellant, it cannot be gainsaid that sex offender registration is a substantial and onerous burden. (*People v. Hofsheier*, *supra*, 37 Cal.4th 1185, 1197.) Registration as a sex offender is a "grave and direct consequence" of a plea to a sex-related offense, an "ignominious badge" which the defendant must bear long after his incarceration has ended. (*In re Birch* (1973) 10 Cal.3d 314, 322.) Registered sex offenders must update registration annually and with each change of address, with penal consequences for failure to comply. (§§ 290.012, 290.013, 290.018.) They are restricted in where they can live (§ 3003.5.), their identity available to the public on the Internet. (§ 290.46.) Aside from the legal consequences, their presence in a community may create a backlash against them. It cannot be doubted that sex offender registration may lead to public humiliation, social ostracism, potential joblessness or underemployment. Indeed, according to appellant's declaration, it has led in his case to harassment, assaults, and death threats.

Although not identified as punitive for other purposes (*In re Alva* (2004) 33 Cal.4th 254, 268 [§ 290 not punitive for Eighth Amendment purposes]), we think the state's promise that appellant could be relieved of registration after ten crime-free years may nevertheless make the consequence of a broken promise a form of increased "punishment" for a given defendant. We cannot call the burdens of registration "insignificant," nor can we attach such a label to the state's purported promise that appellant could be relieved of these burdens if he conducted himself properly for ten years.[15]

[15] In a similar vein, *People v. Zaidi* (2007) 147 Cal.App.4th 1470 held that the failure to inform a defendant that his sex offender registration was a *lifetime* requirement entitled him to withdraw his plea. (*Id.* at pp. 1482, 1484, 1491.) The court specifically

But rather than speculate now about whether the promise was significant to appellant, we can look to his behavior in the ensuing years. He claims he has lived up to the bargain by remaining crime-free ever since his conviction. If so, the People have secured a meaningful additional benefit beyond the punishment exacted for the original offense. Appellant's detrimental reliance and the benefit to the state should be weighed in determining the "significance" of the alleged plea bargain. (*Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155, 1161-1162.) " '[D]ue respect for the integrity of plea bargains demands that once a defendant has carried out his part of the bargain the Government must fulfill its part.' " (*Id.* at p. 1159.)

In reaching this conclusion, we by no means intend to minimize the gravity of appellant's misconduct. But he contends he presents no significant risk of re-offense, and available psychiatric reports predicted he would not re-offend. In addition to his good performance on probation, appellant had no criminal record before this offense, and he voluntarily stopped the molestation before it was reported to the police. Therefore, the prospect of relief under sections 4852.01 and 290.5 was not unquestionably beyond appellant's reach.

Indeed, the dismissal of the charges under section 1203.4 would be a sufficient benefit that we would deem it, standing alone, to be "significant" within the context of the whole plea bargain. "While the '[r]emoval of the blemish of a criminal record' (*People v. Johnson*, *supra*, 134 Cal.App.2d 140, 143) is not complete, it is still a 'reward.' (*Ibid*.) It would have "enabled defendant to 'truthfully represent to friends, acquaintances and private sector employers that he has no conviction.' [Citation.]" (*Arata, supra,* 151 Cal.App.4th at p. 788.)

Perhaps most importantly for appellant, relief under section 1203.4 is a prerequisite to applying for a certificate of rehabilitation (§ 4852.01)—and thus the first step to achieving appellant's goal of having his registration requirement eliminated

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held the *duration* of a registration requirement is an important consideration in entering a plea.

(§ 290.5). In sum, we conclude that, even if relief under section 1203.4 was the *only* promise (explicit or implicit) made by the state, breach of the promise of that relief alone would have been a "significant variance" from the original bargain.

The type of analysis conducted by the superior court to determine the "materiality" of the plea bargain term bears striking resemblance to a harmless error analysis, which the Supreme Court has specifically eschewed in this context. "A violation of a plea bargain is not subject to harmless error analysis. A court may not impose punishment significantly greater than that bargained for by finding the defendant would have agreed to the greater punishment had it been made a part of the plea offer. 'Because a court can only speculate why a defendant would negotiate for a particular term of a bargain, implementation should not be contingent on others' assessment of the value of the term to defendant. [¶] . . . [¶] Moreover, the concept of harmless error only addresses whether the defendant is prejudiced by the error. However, in the context of a broken plea agreement, there is more at stake than the liberty of the defendant or the length of his term. "At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice . . . ." ' [Citations.]" (*Walker, supra*, 54 Cal.3d at p. 1026; see also, *In re Moser* (1993) 6 Cal.4th 342, 353-354.)

We also echo the Supreme Court in *Santobello, supra*, 404 U.S. 257: "at this stage the prosecution is not in a good position to argue that its . . . breach of agreement is immaterial." (*Id*. at p. 262.) Throughout the history of appellant's attempts to enforce the plea bargain, the district attorney's office, though served with appellant's papers, has never once responded to his contentions—not once in over fourteen years. We do not know whether the prosecutor's office was simply disinterested. Or overconfident. Or whether its silence constituted a tacit admission that appellant's statements about the terms of the plea bargain were true—and its lack of opposition its way of conforming to the plea bargain, i.e., not opposing appellant's attempts to be granted relief. Whatever its meaning, we cannot ignore the district attorney's silence in assessing the adequacy of

appellant's showing that the court's denial of relief under section 1203.4 violated his plea bargain.

Appellant's claims under sections 4852.01 and 290.5

Whether appellant has shown himself entitled to specifically enforce his alleged plea bargain for relief under sections 4852.01 and 290.5 is more uncertain. As discussed above, if the plea agreement merely incorporated the statutes as of the date of his plea, then appellant would simply retain the right to *apply* for such relief under the standards in place in 1997; he would not be entitled to relief from registration except in the discretion of the court.

Although he and his attorney Lorentzen both claim appellant was expressly promised *relief* from the registration requirements of section 290 if he remained crime-free for ten years, his own description of the exact nature of the promised relief has been not altogether consistent. At one point in his renewed motion appellant described the district attorney's agreement as an "absolute promise" that his office would "absolutely support" the relief he requested, and the court agreed to grant relief if he lived up to the statutory requirements. Later on the same page appellant characterized the district attorney's promise as one "to not oppose" his efforts to gain relief under sections 1203.4, 4852.01 and 290.5. Still, the combined declarations of appellant and his attorney appear to go beyond stating that the statutory provisions in effect at the time of the plea bargain were implicitly part of the bargain. They describe an express agreement with the district attorney's office.

The Lorentzen declaration as grounds for a renewed motion

The trial court found the Lorentzen declaration was not newly discovered evidence and did not warrant a renewed motion. We would be hard-pressed to dispute that finding. However, Code of Civil Procedure section 1008, subdivision (b), which requires a showing of "new or different facts, circumstances, or law" before a motion may be

renewed,[16] does not directly apply in criminal cases; rather, a challenge to a criminal judgment during the postappeal period is governed by the more general provisions of Code of Civil Procedure section 128, which allow a court "[t]o amend and control its process and orders so as to make them conform to law and justice." (Code Civ. Proc., § 128, subd. (a)(8); *Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1066-1067; *People v. Castello* (1998) 65 Cal.App.4th 1242, 1246-1247.)

The fact that appellant's trial attorney has now come forth to corroborate his version of the plea agreement is in our view a new circumstance meriting a renewed motion in the interests of justice. Appellant and his trial attorney have now both submitted sworn declarations attesting to a promise of prospective relief under sections 203.4, 4852.01 and 290.5 as an explicit part of the plea bargain. Since no hearing has ever been held on appellant's claims—this, despite several requests—and since the court below did address the merits of appellant's claims, we will not dismiss his appeal on procedural grounds.

Credibility of Lorentzen's declaration

The trial court found Lorentzen's declaration "close to being incredible on its face." We normally give deference to a trial court's credibility assessment, even if based on declarations rather than live testimony. (*In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 492.) We further acknowledge that self-serving declarations tend to lack trustworthiness (*People v. Duarte* (2000) 24 Cal.4th 603, 612), and may be rejected by a court even if they are uncontradicted. (*People v. $9,632.50 United States Currency* (1998) 64 Cal.App.4th 163, 175 [fact finder entitled to reject even uncontradicted testimony].) Thus, we would defer to the lower court's ruling if it had simply rejected appellant's own declaration as being incredible.

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[16] " '[W]hile leave to renew will rarely be granted unless it appears that a new state of facts has arisen since the former hearing . . . leave may, in the discretion of the court, be granted upon the same facts more fully stated.' " (*People v. Brahm* (1930) 103 Cal.App. 247, 248 [motion to withdraw guilty plea and vacate judgment]; see also, *Film Packages, Inc. v. Brandywine Film Productions, Ltd.* (1987) 193 Cal.App.3d 824, 829.)

But disparaging the credibility of Lorentzen's declaration constitutes a serious accusation against a member of the State Bar, who stands to lose much by filing a false declaration. Her declaration was not self-serving, but rather put her in a position of potential controversy which an attorney predictably would prefer to avoid. Thus, Lorentzen's declaration does not appear to us to be facially incredible.

We also think it important that the court stopped short of calling the declaration "in fact, incredible"; it merely used the document's "apparent lack of trustworthiness . . . [to] inform the court's judgment as to why [the] renewed motion/petition should be denied." The court had "grave doubts" about the accuracy of Lorentzen's declaration, but we are required to defer to a lower court's credibility *determinations*, not to its vaguely expressed "doubts" about credibility. Since the court merely called into question the reliability of Lorentzen's declaration and did not actually decide as a factual matter that it was incredible, we believe we are justified in considering Lorentzen's declaration at face value in determining appellant's entitlement to relief.

The trial court based its suspicion of Lorentzen's declaration largely on the fact that the negotiated terms described by Lorentzen are not reflected in the transcripts of the plea and sentencing. But since those provisions related to potential relief in the long-dstant future, they may not have been deemed worthy of recitation in open court. Appellant still had to earn the fruits of his agreement by performing all of the terms of his probation, and for termination of the registration requirement he had to live a law-abiding life for a total of ten years.

The court also pointed out that a different deputy district attorney and judge were present at the change of plea proceeding than those named as having been involved in plea negotiations. The record shows, however, that both then-Judge Sepulveda and Deputy District Attorney Brian Baker were involved in the case, the former as the sentencing judge and the latter as the deputy who signed the felony complaint. We therefore believe it is not facially "incredible" that they may have been involved in plea negotiations.

Another reason given for considering Lorentzen's declaration facially "incredible" is that she gave "little specific detail" regarding the negotiations, such as "exactly where and when the supposed plea bargain term was negotiated . . . ." But Lorentzen spelled out the terms of the plea bargain and identified the state actors with whom she purportedly negotiated the disposition. We see no need for further details in a declaration supporting a motion such as appellant's.

It cannot be emphasized enough that the district attorney's office filed no responsive brief and no opposing declaration disputing the terms of the plea bargain as recited by appellant and Lorentzen. Section 1203.4 clearly anticipates that the district attorney must respond to a defendant's motion under that section within 15 days if he or she has any response to make; failure to respond forfeits the right to appeal or otherwise challenge the court's ruling. (§ 1203.4, subds. (e), (f).) Here, the defense declarations stand undisputed as the only evidence of the plea agreement aside from the transcripts of the proceedings.

In such circumstances, "the prosecutor must reasonably be deemed to have defaulted as to any factual defense he may have had . . . ." (*Bortin v. Superior Court* (1976) 64 Cal.App.3d 873, 879; see also, *People v. Moya* (1986) 184 Cal.App.3d 1307, 1311.) We therefore accept as true the contents of the declarations of appellant and attorney Lorentzen.

We also have difficulty understanding the trial court's ruling that Lorentzen's declaration failed to raise a "triable issue as to the materiality of the plea agreement term at issue." Lorentzen's declaration not only supported the claim that there were express negotiations and agreements relating to the availability of the requested relief, but also that this relief was important to appellant in deciding whether to enter a no contest plea. Lorentzen's view was not, as the court below characterized it, simply a "speculative opinion." She had negotiated the plea bargain on appellant's behalf and would have known first-hand not only what matters were discussed, but how appellant reacted during those discussions and what his attitude was about agreeing to a plea. In short,

Lorentzen's declaration went to the "significance" of the purported term of the plea bargain, as well as its existence.

Procedural Bar

We turn now to the Attorney General's first line of defense: that the present action is procedurally barred. The Attorney General calls attention to the many ways in which appellant has previously sought relief from his conviction and from the requirement that he register as a sex offender. We agree with appellant, however, that the proceedings that occurred less than ten years after probation was granted are essentially irrelevant to appellant's current claim that he is entitled to relief from sex offender registration, as that claim could not have been asserted before the expiration of ten years. And his claim that his plea bargain guaranteed him relief under section 1203.4 was never addressed on the merits in response to petitions filed prior to 2007.

Nor do we find appellant's claims barred because the same arguments were raised in appellant's motion for relief under section 1203.4 filed October 29, 2007. As outlined above, that motion was denied on December 12, 2007, and no appeal was taken. The Attorney General contends that order is now final, appellant is foreclosed from obtaining relief via the present motion, and the appeal should be dismissed.

Appellant does not challenge the validity of the original judgment,[17] but rather seeks to enforce a plea bargain which, at least in part, did not go into effect until ten years after the judgment was entered. He seeks to withdraw his plea not because it was invalidly entered, but because he has fulfilled the terms of a separate remedial statute as it

[17] The Attorney General cites habeas cases, in which there are rather stringent rules forbidding successive petitions and piecemeal litigation. (*In re Clark* (1993) 5 Cal.4th 750, 767-768; *In re Connor* (1940) 16 Cal.2d 701, 705.) The other cases cited in the court's order deal with attacks on the validity of a plea (*People v. Totari* (2003) 111 Cal.App.4th 1202, 1207-1208 [court's failure to advise the defendant of immigration consequences]; *In re Soriano* (1987) 194 Cal.App.3d 1470, 1474 [same]), and thus attacks on the original judgment.

existed at the time of his plea, and more precisely because he seeks to enforce the district attorney's alleged promise regarding that and additional remedies.[18]

The Attorney General cites *People v. DeLouize* (2004) 32 Cal.4th 1223, 1232, for the proposition that a "party's failure to file a timely appeal from an appealable order generally shows acquiescence in the ruling. . . ." It would be highly artificial, though, to infer appellant "acquiesced" in the court's December 2007 order, considering he has continued to litigate this issue with vigor and tenacity ever since. *DeLouize* also identifies the policy underlying the rule of finality as preventing "a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination." (*People v. DeLouize*, *supra,* at p. 1232.) But appellant has never had a fair adversary hearing on the matter, because no evidentiary hearing has ever been held.

We are aware of no rule imposing stringent limits on postjudgment motions under section 1203.4. On the contrary, "the denial of a prior request for relief under section 1203.4 does not preclude a subsequent request based upon different facts."[19] (*McLernon*, *supra*, 174 Cal.App.4th at p. 577.) Prior rulings are not res judicata in this context (*ibid*.), especially where, as here, appellant never had an opportunity to fully and fairly litigate the matter. A similar rule applies to motions under section 4852.01. (*People v. Lockwood*, *supra*, 66 Cal.App.4th at pp. 229-230 [improper to deny motion under § 4852.01 with prejudice].)

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[18] As *Ayala v. Superior Court* (1983) 146 Cal.App.3d 938 observed: "The continued imposition of punitive disabilities—long after the ex-felon has served his time and demonstrated for a period of years that he is able to live crime-free in society—frustrates the goal of rehabilitation and thereby increases the likelihood of recidivism. If the societal goal of rehabilitation is to represent something more than a hollow promise, it is imperative that the ex-felon be freed of these disabilities at the earliest feasible moment." (*Id*. at p. 944, fns. omitted.)

[19] This at least is true when the defendant seeks relief under the "interests of justice" clause of section 1203.4, subdivision (a), since the application by its nature seeks relief based on facts existing at the time of the motion. (*McLernon*, *supra*, 174 Cal.App.4th at p. 577.)

Nor did appellant's failure to appeal the order of December 12, 2007, constitute a waiver of his claims. A waiver is "an intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *People v. Mancheno, supra*, 32 Cal.3d at p. 864.) Since appellant appears to have been motivated by an attempt to fully exhaust his remedies in superior court, we will not treat his failure to appeal as a waiver of his claims.

The appropriate remedy

"The usual remedies for violation of a plea bargain are to allow defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain." (*People v. Mancheno*, *supra*, 32 Cal.3d at pp. 860-861.) The court below was concerned that granting specific performance would require it to violate the statutes in question, citing *Walker, supra*, 54 Cal.3d at p. 1027. The court further opined that allowing defendant to withdraw his plea and have the charges reinstated would be the appropriate remedy.

In *Walker*, rather than relieving the defendant entirely of paying a mandatory restitution fine, the court ordered him to pay the minimum statutory fine of $100, which it deemed an insignificant variance from his plea agreement. (*Walker*, *supra*, 54 Cal.3d at p. 1027.) One of the reasons for not ordering specific performance was that it would require the court to violate the statute making such fines mandatory. (*Ibid.*)

But the remedy for violation of a plea agreement depends on the circumstances of each case. (*People v. Mancheno, supra*, 32 Cal.3d at p. 860.) "Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances." (*Id.* at p. 861.)

Here, unlike in *Walker, supra*, 54 Cal.3d at p. 1027, we cannot devise a suitable remedy short of ordering specific performance of the implicit term of the plea bargain. The court in *Arata* did not hesitate to grant immediate relief under section 1203.4, despite any technical violation of the statute. (*Arata, supra*, 151 Cal.App.4th at p. 789; see also, *Doe v. Brown* (2009) 177 Cal.App.4th 408, 413 [trial court issued relief under section

1203.4 in 2007 for a sex offender convicted in 1992 of violating § 288, subd. (a)].) In light of the strong parallels between this case and *Arata*, appellant is entitled to immediate relief under section 1203.4.

Appellant has, by all evidence presented to the court below, more than fulfilled his part of the bargain by successfully completing probation and remaining crime free for many years thereafter. Given his detrimental reliance on the state's promises, we cannot realistically place him back in his pre-plea position by allowing him to withdraw his plea and the state to reinstate the charges. (*Brown v. Poole*, *supra*, 337 F.3d 1155 at pp. 161 162, quoting *United States v. Anderson* (9th Cir. 1992) 970 F.2d 602, 607 [" 'A plea induced by an unfulfillable promise is no less subject to challenge than one induced by a valid general promise which the government simply fails to fulfill,' "]; accord, *People v. McClellan* (1993) 6 Cal.4th 367, 383-384 (dis. opn. of Mosk, J.).) Both parties stand to suffer prejudice by such a remedy due to the long passage of time since the charges were originally filed.

Appellant and his trial attorney also assert he was promised relief under sections 852.01 and 290.5, including that the district attorney promised to "absolutely support" his applications for relief, "as long as [he] did not have any new or additional criminal charges in the ensuing 10 years, successfully completed probation, and lived a moral, productive and upright life . . . ." Relief under those sections is now, and was in 1997, discretionary. But even if the district attorney had no authority to bind the court to such a promise, he could have promised not to oppose or to support an application for such relief. And if, as appellant and his attorney testified, there was an express promise by the sentencing judge to grant such relief, then the promise must be fulfilled.

In *Brown v. Poole*, *supra*, 337 F.3d 1155, the prosecutor told the defendant at sentencing that, although she was being sentenced to 15 years in prison, "if you behave yourself at the state prison, . . . you are going to get out in half the time." (*Id*. at p. 1158.) She performed as a model prisoner in custody but was not released at the predicted time, and in fact had served 17 years by the time the case reached the Ninth Circuit. The court rejected the Attorney General's argument that the plea agreement was unenforceable

because the promise was not an absolute guarantee of release: "The state court could not find, and we do not find, that Brown had an absolute right to be released after seven-and a-half years. Rather, Brown agreed that she would garner the benefit of early release only if she provided the consideration of a spotless prison record for seven-and-a-half years. Contract terms do not become less enforceable for their being conditional." (*Id*. at pp. 1160-1161.)

Although the prosecutor had no authority to make a promise binding prison authorities, the Ninth Circuit nevertheless granted specific performance by ordering defendant released "forthwith." (*Brown v. Poole*, *supra*, 337 F.3d at p. 1162.) The defendant had already "met the terms of the agreed-upon bargain, and paid in a coin that the state cannot refund. Rescission of the contract is impossible under such circumstances; Brown cannot conceivably be returned to the status quo ante. That leaves specific performance as the only viable remedy." (*Id*. at p. 1161.) We find ourselves in a similar position.

We therefore remand the case with instructions to the court to grant the relief requested under section 1203.4, subdivision (a). Though this will require a technical violation of section 1203.4, subdivision (b), we cannot believe the Legislature intended the 1997 amendments to have such sweeping effect as to allow the state to violate the terms of a pre-existing plea bargain. In addition, appellant must be granted the promised relief under sections 4852.01 et seq. and 290.5.

DISPOSITION

The order denying appellant's renewed motion is reversed and the case is remanded to the superior court with directions to grant appellant immediate relief by allowing him to withdraw his plea and then dismissing the charges in accord with section 1203.4, subdivision (a). The court shall then issue him a certificate of rehabilitation under section 4852.13, subdivision (a), without necessity of a hearing, and it shall then order him relieved of his section 290 registration requirements in accordance with section 290.5, subdivisions (b)(3), without regard to the provisions of

subdivision (a)(2)(P) and without regard to the date of issuance of the certificate of rehabilitation.

_____
Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.

A127878, *People v. Z.*

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Honorable Charles B. Burch
Attorney for Defendant and Appellant:	Mark Shenfield, First District Appellate Project, under appointment by the Court of Appeal
Attorneys for Plaintiff and Respondent:	Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Catherine A. Rivlin, Supervising Deputy Attorney General, Ann P. Wathen, Deputy Attorney General