

[ATTORNEY INFO]

Attorney for Appellant
[John Doe]

**COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	3 Crim. C0XXXX
Plaintiff and Respondent,)	
)	(El Dorado County
)	Superior Court
)	No. XXXXX)
v.)	
)	
[JOHN DOE],)	
)	
Defendant and Appellant.)	
)	

**MOTION TO EXPAND THE SCOPE OF APPOINTMENT TO INCLUDE THE FILING
OF A WRIT OF MANDATE**

TO THE HONORABLE ARTHUR SCOTLAND, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT:

Appellant [JOHN DOE], through his counsel, hereby moves this court for an order expanding the scope of appellate counsel’s appointment to include:

- (a) The preparation and filing of a petition for writ of mandate in the Court of Appeal to compel the [El Dorado] County Superior Court to issue a certificate of probable cause.

The applicable procedural history of the case, and the need for expansion, are detailed in the memorandum section.

Dated: [DATE], at [Sacramento], California.

Respectfully submitted,

[ATTORNEY NAME]
Attorney for Appellant
[John Doe]

One of the potential issues on appeal is that the trial court did not give a Penal Code section 1192.5 advisement, and another is that the trial court relied on what it called a *Cruz* waiver to impose a term higher than that agreed upon in the plea proceedings. (1 RT 1-4.)

The defendant entered a no contest plea to a violation of Penal Code section 484e, subdivision (a) and admitted a strike prior. (1 RT 4.) Then, and only then, did the court turn to the defendant's request to be released on a forty-eight hour furlough to attend his father's funeral, at which time discussion of an increased term if the defendant failed to return was discussed and agreed to by the defendant. (The court mentioned at RT 1 that it was considering a "Cruz" waiver to let the defendant out on furlough, but did not discuss that with the defendant, or obtain the defendant's assent to those terms, prior to the entry of his no contest plea.) And there were several additional hearings between January 6, 2006, and January 20, 2006, when the defendant finally got an eight-hour furlough, which could be considered proceedings arising after the plea, and the only things discussed at the subsequent hearings was how long the defendant would be out, and what would happen if he did not return.

2. There is not Clear Authority That a Certificate is, or is not, Needed in This Situation

The requirements of Penal Code section 1237.5 are inapplicable where the appellant seeks review on appeal "not of the validity of the guilty plea itself, but of proceedings occurring subsequent to the entry of the plea." (*In re Harrell* (1970) 2 Cal.3d 675.)

The need for a certificate of probable cause will revolve around whether defendant is attacking the validity of the plea by raising the Penal Code section 1192.5 issue and/or the *Cruz* waiver issue. The court must look to the substance of the appeal, that is, what defendant is challenging. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094-1097, 969 P.2d 146; *People v. Panizzon* (1996) 13 Cal.4th 68, 76, 913 P.2d 1061.)

The State of California customarily asserts in cases such as this that the defendant must first obtain a certificate of probable cause. And that was the conclusion of the Second Appellate District in *People v. Preciado* (1978) 78 Cal.App.3d 144:

However, such error as may have occurred in the court's failure to advise appellant pursuant to the mandatory provisions of section 1192.5 of his right to withdraw his plea in the event Judge Jackson was not available to sentence him occurred before the entry of the plea, affects its validity, and thus cannot be raised on appeal without a certificate of probable cause, which was not obtained. (*Kaanehe, supra*, 19 Cal.3d at p. 8.) (*People v. Preciado, supra*, at p. 148.)

There are other authorities that have reached the opposite result, finding that a defendant can challenge the trial court's invocation of a *Cruz* waiver that is "grafted on" after the plea bargain was taken, where no Penal Code section 1192.5 admonishment was given. (*People v. Osorio* (1987) 194 Cal. App. 3d 183, 187; *In re Harrell* (1970) 2 Cal.3d 675, 705-706.)

Accordingly, in an abundance of caution, the defendant is seeking expansion of appointment to prepare a writ of mandate that would challenge the trial court's denial of the request for certificate of probable cause.

3. Mandate is the Appropriate Remedy

Where a certificate of probable cause has been denied on the merits, the remedy is to seek review of the propriety of the denial. On a timely application therefore, the writ of mandate lies. (*People v. Warburton* (1970) 7 Cal. App. 3d 815, 820, fn. 2.) No request for writ of mandate was filed by the appellant or appellant's counsel. The order denying the certificate was filed April 24, 2006, and more than sixty days have elapsed.

In *Wagner v. Superior Court* (1993) 12 Cal.App.4th 1314, the court noted that there was no "absolute deadline" for filing a petition for writ of mandamus. (*Wagner v. Superior Court* (1993) 12 Cal.App.4th 1314, 1317; accord *People v. Superior Court (Clements)* (1988) 200 Cal.App.3d 491, 495-496.) As such, mandate is the appropriate remedy.

4. Conclusion

For the reasons stated herein, appellate counsel respectfully requests that this court expand the scope of his appointment to allow him to prepare and file a petition for writ of mandate in the Court of Appeal, seeking relief that would direct the [El Dorado] County Superior Court to issue the certificate of probable cause.

Dated: [DATE], at [Sacramento], California.

Respectfully submitted,

[ATTORNEY NAME]
Attorney for Appellant
[John Doe]