

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

OSWALDO BARRAGÁN,

Petitioner and Appellant

vs

SUPERIOR COURT OF MADERA,

Respondent

PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest

No: \_\_\_\_\_

No. FO44337

Madera County  
Superior Court

No. MCR 015480

Related Pending Appeal from the Superior Court  
in and for the County of Madera  
Hon. John W. DeGroot, Judge

**PETITION FOR WRIT OF MANDATE**

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By Appointment of the Court  
under the Central California Appellate Project  
Independent Case System

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vs

SUPERIOR COURT OF MADERA,

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PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest

No. \_\_\_\_\_

Appeal No. FO44337

Madera County  
Superior Court  
No. MCR 015480

**PETITION FOR MANDATE**

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF  
THE FIFTH DISTRICT COURT OF APPEAL:

Petitioner alleges as follows:

1. This petition for a peremptory writ of mandate is filed in connection with the related pending appeal in *People v. Barragán*, Court of Appeal number FO44337, Madera County Superior Court number MCR 015480. Appeals involving petitioner are also pending in Court of Appeal case numbers F044645 and F044647 (Madera Country Superior Court numbers BCR 02089 and BCR 09977) and counsel

for petitioner herein will be filing a motion to consolidate the appeals. Petitioner, Oswaldo Barragán, is the defendant and appellant in all of the aforementioned appeals.

2. On 5 June 2003 by and through a certified court translator, petitioner pled guilty to a violation of inflicting corporal injury (Pen. Code, § 273.5, subd.(a)) in exchange for dismissal of the remaining charges, assault likely to produce great bodily injury (Pen. Code., § 245, subd.(a)) and criminal threats (Pen. Code, § 422.) The plea did not include any disposition with respect to any of petitioner's other pending cases. (CT 8-10)

3. Thereafter, on 7 July 2003, petitioner was sentenced to the upper term of four years with presentence credit for 69 days. (CT 11-12)

4. On 17 October 2003, petitioner's privately substituted counsel moved to withdraw the previously entered plea on the ground that it had been entered into without effective assistance of counsel and in the mistaken belief that he would not be sentenced to more than two years on the charge to which he pleaded. (CT 14-18) The motion was accompanied by declaration under penalty of perjury by petitioner attesting to the material allegations in support thereof. (CT 19-20)

5. The motion was opposed on the ground that a petition coram nobis was the proper *form* for contesting or setting aside the plea. (CT 22-23)

6. On 30 October 2003, the trial court denied the motion without comment. (CT 25)

7. A notice of appeal was initially filed on 17 November 2003. (CT 26) A subsequent notice of appeal with a request for certificate of probable cause was filed on 18 December 2003.<sup>1</sup> (CT 33) Petitioner's declaration stated:

“When I plead guilty on June 5, 2003, the interpreter assured me that I would only get two years. I never got a chance to speak with my attorney about the consequences of my pleas. When I was sentenced I received 4 years. The interpreter would not let me speak in Court. Had I known that my plea would result in a 4 year conviction I would not have plead guilty. At a very minimum my attorney should have explained the consequences of pleading of guilty.” (Ibid.)

8. On 30 January 2004, the trial court denied the requested certificate of probable cause.

9. Respondent Superior Court abused its discretion by failing to issue a certificate of probable cause in the reasonable constitutional, jurisdictional or other

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<sup>1</sup> The second notice of appeal was included in the supplemental record on appeal. Attached thereto was a “post-it” note of unknown provenance which stated that the prior notice of appeal had been “premature”

grounds going to the legality of the proceedings to be challenged on appeal exist. Specifically, the record fails to affirmatively demonstrate under the totality of the circumstances that petitioner's plea was voluntary and intelligent. On its face, petitioner's declaration raised cognizable issues as to whether he pleaded with effective assistance of counsel and not under a mistake of material fact.

10. Petitioner has a clear, present and substantial right to the performance of respondent's duty to properly exercise its discretion by virtue of Penal Code section 1237.5 which requires petitioner to seek a certificate of probable cause and the court to grant it upon a proper showing.

11. Petitioner is the person beneficially interested in the issuance of the writ because he is the appellant in *People v. Barragán*, case number F044337, pending before this Court, in which he intends to raise issues going to the validity of his plea and the judgement and sentence thereon.

12. Real party in interest are the People of the State of California, who have an interest directly affected by this proceeding in that they are the plaintiffs and respondent's in petitioner's appeal.

13. Contemporaneously herewith, the undersigned appellate counsel is serving an application to expand the scope of his appointment so as to represent petitioner on this petition for a writ of mandate. Time is of the essence in that petitioner has 60 days, from the date of the court's denial to issue a certificate of prob-

able cause, to seek the appropriate remedy.

14. Petitioner has performed all conditions precedent to the filing of the petition by requesting the Superior Court to issue the certificate of probable cause. At all times herein mentioned, respondent has been able to properly exercise its discretion by issuing the certificate but has refused to do so.

15. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law other than the relief sought herein in that a certificate of probable cause is required by Penal Code section 1237.5 for an appeal attacking a judgement based on a plea of guilty or no contest and has been denied by respondent.

16. This petition is made to this Court in the first instance rather than to the Superior Court because that court is the respondent herein and the party that failed to properly exercise its discretion.

WHEREFORE, petitioner prays that this court issue a peremptory writ of mandate ordering respondent to issue a certificate of probable cause for petitioner's appeal in Case No. F044337, Madera Country Superior Court No. MCR 015480

Date: 15 March 2004

Respectfully submitted

Kieran D.C.Manjarrez  
Attorney for Appellant/Petitioner

**VERIFICATION**

I, Kieran D. C. Manjarrez, am the attorney for petitioner in his related appeals. I have read the foregoing petition and know the contents thereof. The matters set forth in the petition are true of my knowledge, except as to matters alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 15 March 2004

Respectfully submitted

Kieran D.C.Manjarrez  
Attorney for Appellant/Petitioner

## POINTS & AUTHORITIES

### **I. Mandate is the Proper Remedy for a Court’s Failure to Issue a Certificate of Probable Cause.**

Review of an order denying an application in the trial court for a certificate of probable cause is properly raised by a petition for a writ of mandate in the court of appeal. (*In re Brown* (1973) 9 Cal.3d 679, 683; *People v Castelan* (1995) 32 Cal. App.4th 1185, 1188.)

### **II. The Superior Court Abused Its Discretion in Failing to Issue a Certificate of Probable Cause because Appropriate Grounds Going to the Legality of the Proceedings were Presented in Petitioner’s Request**

#### **A. A Certificate of Probable Cause is Properly denied only when The Issues Raised are Clearly Frivolous and Vexatious.**

Penal Code section 1237.5 authorizes appeals based on “reasonable constitutional, jurisdictional or other grounds going to the legality of the proceedings,” provided the defendant files a statement with the trial court showing such grounds and trial court executes and files a certificate of probable cause. These requirement seek to preclude appeals that raise no issues cognizable after a guilty plea or which are “clearly frivolous and vexatious” (Pen. Code, § 1237.5; Cal. Rules of Court, rule 31(d); *In re Chavez* (2003) 30 Cal.4th 643, 647; *People v. Panizzon* (1996) 13 Cal.4th 68, 75-76;; *People v. Ribero* (1971) 4 Cal.3d 55, 63.)

In this respect, it is not the trial court’s province to determine if there was an error in the proceedings but simply to eliminate those appeals “having no possible

legal basis” (*People v. Warburton* (1970) 7 Cal.App.3d 815, 819.) “Thus if the statement submitted by the defendant in accordance with section 1237.5 presents any cognizable issue for appeal which is not *clearly* frivolous and vexatious, the trial court abuses its discretion if it fails to issue a certificate of probable cause. (*People v. Holland* (1978) 23 Cal.3d 77, 84 [original italics].) The trial court should issue the certificate wherever there is an honest difference of opinion about the issue. Signing the certificate does not mean the trial court believes the contention is meritorious. (*People v. Ribero*, supra, 4 Cal.3d, at pg. 63, fn. 4.)

**B. The Record Raises Legitimate and Cognizable Issues on Appeal as to whether Petitioner’s Plea was Knowing, Voluntary and with Effective Assistance of Counsel and as to whether the Trial Court abused Its Discretion in Denying Petitioner’s Motion to withdraw His Plea.**

The issues raised in the request for certificate of probable cause are cognizable on appeal and are not frivolous or vexatious.

The record must affirmatively demonstrate that a guilty or no contest plea is intelligently made and voluntary under the totality of the circumstances. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242, 244; *People v. Howard* (1992) 1 Cal.4th 1132, 1178.) A plea which is made under fraud, misrepresentation or a material mistake of fact is not knowing and voluntary and is properly withdrawn upon request. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896.) In addition, a defendant is entitled to effective assistance of counsel at the time he enters a plea of guilty or no con-

test. (*Hill v. Lockhart* (1985) 474 U.S. 52.)

Since the trial court summarily denied petitioner's request to withdraw and set aside his plea, there is no evidence in the record other than appellant's change of plea and his subsequent declaration to the effect that he was misinformed as to the consequences of his plea and that he pleaded without advice and assistance of counsel. A certified translator is a an expert witness as any other. (Evid. Code, § 750 ["A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses."]; Gov. Code, §68561 Cal. Rules. Crt., rule 984.4.) There is no conclusive presumption that a certified court interpreter's translations are correct. Such translations may be deemed correct *until* challenged. (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 69-70.) Petitioner's declaration clearly raised a challenge as to the correctness of the translators translations to him and thereby raised a facially legitimate issue as to whether his plea was knowing and voluntary. In addition, there is no evidence in the record to rebut defendant's declarations that his attorney did not consult with him and did not advise him as to the consequences of his plea. A defendant is entitled to effective assistance of counsel, not simply assistance of interpreter, and petitioner's declaration stated legitimate grounds for appeal on this ground as well.

A frivolous appeal is one that is prosecuted for an improper motive -- to harass the other party or delay the effect of an adverse judgement, or when it indis-

putably has no merit. (*Collison & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1621.) For the reasons summarized, such is not the case at bar. Moreover, a cursory review of the record on appeal lends objective support to petitioner's declarations in support of his motions to set aside his plea and in support of a certificate of probable cause.

The probation report prepared for sentencing indicates that the three filed charges arose out of a transactionally singular domestic dispute occurring at the same time and place, in which petitioner allegedly choked, slapped and threatened the victim. It is thus at the very least an arguable appellate contention that, given the applicability of Penal Code section 654, the dismissal of the remaining charges conferred no benefit whatsoever on petitioner. That fact coupled with the fact that no "cap" was placed on sentencing, leads to the conclusion that petitioner entered into an illusory bargain from he derived no benefit in exchange for his plea. That fact in turn lends circumstantially objective credence to petitioner's claim that he thought he would be sentenced to mid-term of two years; ie. that his plea would protect him from an upper term sentence.

Petitioner's appeal is not frivolous and he respectfully urges that even if the issues raised are not ultimately deemed meritorious they present arguable and legitimate grounds for appeal.

**CONCLUSION**

For the foregoing reasons, petitioner respectfully requests that this Court issue a writ of mandate directing the trial court to grant his previously denied request for a certificate of probable cause.

Date: 15 March 2004      **Word Count Certification**

The undersigned counsel certifies that the word count for this brief is: 2708 words

Respectfully submitted

Kieran D.C.Manjarrez  
Attorney for Appellant/Petitioner

PROOF OF SERVICE BY MAIL

Title: People v. Barragan

Case No.: F044337

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The undersigned declares:

I am a citizen of the United States of America, over the age of eighteen years and counsel for appellant herein. My business address is Post Office Box 278, Middletown, CA 95461.

On 17 March 2004 , I served the attached, **PETITION FOR WRIT OF MANDATE** on the parties in this action by placing a true copy thereof, in a sealed envelope with first class postage fully prepaid, in the United States Mail at Middletown, California, addressed as follows:

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District Attorney, Madera Cty  
209 West Yosemite  
Madera CA 93637

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Sworn this 17 March 2004, at Middletown, California.

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Stephanie Merrida-Grant