

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

STEPHEN FRIDAY,  
Petitioner and Appellant,  
v.  
SUPERIOR COURT OF MONTEREY,  
Respondent  
PEOPLE OF THE STATE OF CALIFORNIA,  
Real Party in Interest

No. \_\_\_\_\_  
Related Appeal  
No. H032863

Monterey  
Superior Court  
No. SS041854

**PETITION FOR WRIT OF MANDATE**

RELATED APPEAL PENDING  
from the Superior Court  
County of Monterey

The Honorable Timothy P. Roberts, Judge

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by appointment of the Court of  
Appeal under Sixth District  
Appellate Program's  
Independent Case System

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No. \_\_\_\_\_  
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No. SS041854

**PETITION FOR WRIT OF MANDATE**

RELATED APPEAL PENDING

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

Petitioner respectfully petitions for a writ of mandate to the Superior Court of the County of Monterey and alleges as follows:

1. This petition for a peremptory writ of mandate is filed in connection with the related pending appeal in *People v. Friday*, Court of Appeal No. H032863.

Petitioner respectfully requests this Court to take judicial notice of the record filed in the related appeal. References *infra* to a court's transcript (CT) or reporter's transcript (RT) are to the record in No. H032863.

2. On January 16, 2008, after being advised that, if he pleaded guilty, he would receive a sentence of four years in prison if a motion to dismiss the prior conviction allegation should be denied, or two years if it should be granted, and that he would begin earning presentence credits from the day he began his parole in 2005, petitioner changed his plea to no contest and admitted an allegation of a prior conviction within the meaning of the Three Strikes law. (CT 185, 186, 190-192.)

3. The prosecutor said that she would verify the parole date and calculate the credits. (CT 194.) She sent defense counsel a memorandum by facsimile on the same day, January 16, 2008. It indicated that credits as of January 30, 2008, would be based on 854 actual days. (CT 262.)
4. Petitioner believed that after application of presentence custody credits he would either be released, having served his full sentence, or have very little sentence left to serve. (CT 257.)
5. After learning that he would not receive the full presentence credit he expected, petitioner on March 3, 2008, filed a motion to withdraw the plea. (CT 234.) That motion was denied on April 16, 2008. (CT 248, 6RT 1505.)
6. Also on April 16, 2008, the court sentenced petitioner to four years in prison (the low term of two years, doubled due to the strike), and granted presentence custody credits of only 420 actual days plus 210 conduct credits. (CT 248.)
7. Petitioner filed a timely notice of appeal on April 21, 2008 and requested a certificate of probable cause, based upon the motion to withdraw the plea. (CT 250.)
8. On May 5, 2008, the Superior Court denied the request for certificate of probable cause. (CT 251.)
9. Respondent Superior Court abused its discretion by failing to issue a certificate of probable cause. Petitioner stated a reasonable constitutional, jurisdictional or other ground going to the legality of the proceedings to be challenged on appeal. 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<sup>1</sup> section 1237.5. That section requires petitioner to seek a certificate of probable cause and the court to grant it upon a proper showing.
10. Petitioner is the person beneficially interested in the issuance of the writ because he is the appellant in *People v. Friday*, case number H032863, pending

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<sup>1</sup> Further statutory references are to this Code unless otherwise noted.

before this Court, in which he intends to raise issues going to the validity of his plea and the judgment and sentence thereon.

11. The People of the State of California are the real party in interest. The People have an interest directly affected by this proceeding in that they are the plaintiffs and respondents in petitioner's appeal.

12. Petitioner has performed all the 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.

13. 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 judgment based on a plea of guilty or no contest and has been denied by respondent.

14. 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 fulfill its responsibility.

WHEREFORE, petitioner prays that this court take judicial notice of the record in Case No. H032863 and issue a peremptory writ of mandate ordering respondent to issue a certificate of probable cause for petitioner's appeal in Case No. H032863, Monterey Superior Court Case No. SS0-41854.

Respectfully submitted,  
By his attorney,

June 25, 2008

\_\_\_\_\_  
Maureen L. Fox

**VERIFICATION**

I, Maureen L. Fox, am the attorney for petitioner in his related appeal. 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.

June 25, 2008

\_\_\_\_\_  
Maureen L. Fox

## 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 superseded by statute on another point; *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.

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 requirements seek to preclude appeals that raise no issues cognizable after a guilty plea or which are clearly frivolous and vexatious. (*In re Chavez* (2003) 30 Cal.4th 643, 650-651; *People v. Panizzon* (1996) 13 Cal.4th 68, 75-76; *People v. Hoffard* (1995) 10 Cal.4th 1170, 1178-1179.)

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, overruled on another point in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097, fn. 7. Italics in original.)

The trial court should issue the certificate if 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* (1971) 4 Cal.3d 55, 63, fn. 4.)

**B. The Record Raises Legitimate And Cognizable Issues On Appeal As To Whether Petitioner Should Be Allowed To Withdraw His Plea.**

The issue of the denial of petitioner's motion for leave to withdraw his plea, raised in the request for certificate of probable cause, is cognizable on appeal and is not frivolous or vexatious.

[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive - to harass the respondent or delay the effect of an adverse judgment - or when it indisputably has no merit - when any reasonable attorney would agree that the appeal is totally and completely without merit.

(*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

Petitioner's appeal is not of that nature.

A plea of guilty or no contest is valid if the record demonstrates the plea was voluntarily and intelligently made. (*People v. Howard* (1992) 1 Cal.4th 1132, 1178; *People v. Lytle* (1992) 10 Cal.App.4th 1, 4.) The defendant's waiver of constitutional rights "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (*Brady v. United States* (1970) 397 U.S. 742, 748.) A plea is involuntary when induced by threats, misrepresentation, "including unfulfilled or unfulfillable promises" or improper promises. (*Brady, supra*, 397 U.S. at p. 755.) A guilty plea that is not made knowingly or intelligently is involuntary, and has been obtained in violation of due process and cannot form the basis of a criminal conviction. (*Henderson v. Morgan* (1976) 426 U.S. 637, 644-645; *McCarthy v. United States* (1969) 394 U.S. 459, 466; U.S. Const., 5th & 14th Amends.)

“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.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.) “A sentence that imposes a punishment more severe than that specified in the plea bargain violates not only section 1192.5 but also implicates due process concerns and raises a constitutional right to some remedy.” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1221; *People v. Walker*, supra, 54 Cal.3d at p. 1024.) Some pleas not coming within section 1192.5’s provision for plea bargaining may likewise present a danger of involuntary, unintelligent, or inaccurate pleading. These pleas “may have been at least implicitly negotiated, as when the court provides the defense with an ‘indicated’ sentence. These pleas may present the same dangers of false pleading as explicit plea bargains reached under section 1192.5.” (*People v. Hoffard*, supra, 10 Cal.4th at p. 1184, fn 12.)

Prior to petitioner’s change of plea, the court assured him that he would be deemed as having started earning presentence custody credits from the time that he began his parole. (CT 186.) The memorandum faxed by the prosecutor to defense counsel on January 16, 2008, indicated that credits as of January 30, 2008, would be based on 854 actual days. (CT 262.) That memorandum lends support to petitioner’s position (CT 257) that, based on what he heard in court prior to his guilty plea, he understood that he would receive substantially more than the 420 actual days of credit (630 days total) that he received at sentencing. (CT 248.) Through a motion to withdraw the plea petitioner brought to the court’s attention the fact that, in changing his plea, he had relied on the court’s assurance that he would begin earning credits as of the day of his release on parole. (CT 234.) The court denied that motion at the sentencing hearing. (6RT 1505.)

Where a defendant has entered a plea based upon an assurance by an officer of the state and that assurance is not honored, and the matter is brought to the

court's attention at the time of sentencing, the defendant is entitled to a remedy that "redress[es] the harm caused by the violation without prejudicing either party or curtailing the normal sentencing discretion of the trial judge." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860, quoted in *People v. Walker, supra*, 54 Cal.3d at p. 1028.) Permitting petitioner to withdraw his plea would have that effect.

Because the issue of the denial of petitioner's motion for leave to withdraw his plea is neither frivolous nor vexatious, a certificate of probable cause should issue so that he may present this issue in his appeal. (See (*In re Chavez, supra*, 30 Cal.4th at p. 647; *People v. Panizzon, supra*, 13 Cal.4th at pp. 75-76; *People v. Ribero, supra*, 4 Cal.3d at p. 63.)

### **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.

Respectfully submitted,  
By his attorney,

June 25, 2008

\_\_\_\_\_  
Maureen L. Fox

## WORD COUNT CERTIFICATION

I, Maureen L. Fox, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 2,089 words, excluding the tables, this certificate, and any attachment permitted under the rules. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Gatos, California, on June 25, 2008.

---

Maureen L. Fox  
Attorney for Petitioner  
Stephen Friday

DECLARATION OF SERVICE BY MAIL

STEPHEN FRIDAY V. SUPERIOR COURT

No. H032863

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is PMB 431, 15732 Los Gatos Blvd., Los Gatos, CA 95032-2504. On the date set forth below, I served the foregoing PETITION FOR WRIT OF MANDATE upon all parties by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Gatos, California, addressed as follows:

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Steven Friday

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on June 25, 2008.

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Maureen L. Fox