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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN JAIME BANDERAS,

Defendant and Appellant.

E051589

(Super.Ct.No. INF057815)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas N. Douglass, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Dismissed.

Michael S. Cabrera for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Juan Jaime Banderas appeals from the trial court's order denying his petition for writ of habeas corpus. Defendant argues he should be allowed to withdraw his guilty plea because his trial counsel was ineffective for failing to advise him of the clear immigration consequences of his plea. The People argue this appeal should be dismissed because the trial court's order denying defendant's writ petition is not an appealable order. As discussed below, we agree with the People that defendant's remedy is to file a petition for writ of habeas corpus in this court, which he has done. Consequently, we dismiss this appeal.

#### **FACTS AND PROCEDURE**

Defendant became a lawful permanent resident of the United States in 2004, when he was 19 years old, after having been brought to the United States by his parents when he was 15 years old. Defendant's parents are lawful permanent residents, and his son is a United States citizen.

On June 27, 2007, defendant pled guilty to possessing methamphetamine for sale. (Health & Saf. Code, § 11378.) The trial court suspended execution of sentence and placed defendant on probation for three years on condition he serve 180 days in jail on weekends.

As a result of this 2007 conviction, defendant was arrested on May 7, 2010, by agents of the United States Immigration and Customs Enforcement (ICE) and placed in immigration removal proceedings. On June 14, 2010, defendant filed a combined motion to dismiss and vacate judgment under Penal Code section 1385 and petition for writ of habeas corpus seeking to allow him to withdraw his 2007 guilty plea. The gist of this

filing was that defendant's 2007 defense counsel did not specifically advise him that he was pleading guilty to an "aggravated felony," under federal immigration law, which would inevitably subject him to mandatory removal proceedings. Defendant pointed to *Padilla v. Kentucky* (2010) \_\_\_ 509 U.S. \_\_\_[130 S.Ct. 1473, 176 L.Ed.2d 284], in which the United States Supreme Court had recently decided that, where the law on immigration consequence is clear, defense counsel acts below the acceptable standard by misadvising a criminal defendant that a guilty plea to an aggravated felony would not cause any adverse immigration consequences.

The trial court held a hearing on the filing on July 14, 2010. The trial court denied the writ petition on the ground that *Padilla* applies only to *affirmative* misrepresentations that a plea will have no adverse immigration consequences, rather than the passive failure to advise of immigration consequences that defendant alleged. The trial court also pointed to the Supreme Court's seeming approval of Penal Code section 1016.5<sup>1</sup> as a satisfactory measure to avoid ineffective assistance of counsel claims when a criminal defendant asserts he or she was not advised of the immigration consequences of a guilty plea. (*Padilla v. Kentucky, supra*, 130 S.Ct. at p. 1473, fn. 15.)

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<sup>1</sup> "(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law . . . the court shall administer the following advisement on the record to the defendant:

If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (Pen. Code, § 1016.5, subd. (a).)

Defendant timely filed a notice of appeal challenging the trial court's denial of his petition for writ of habeas corpus. However, the denial of a petition for habeas corpus is not an appealable order. (See *In re Hochberg* (1970) 2 Cal.3d 870, 876.) As the People point out, the proper vehicle for defendant to challenge the denial of his petition for writ of habeas corpus is to file a habeas corpus petition in this court. (See *In re Resendiz* (2001) 25 Cal.4th 230, 237, fn. 2) Defendant has done so. This appeal is improper and so is dismissed.

**DISPOSITION**

The appeal is dismissed.

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RAMIREZ  
P. J.

We concur:

MILLER  
J.

CODRINGTON  
J.