

FIRST DISTRICT APPELLATE PROJECT

WENDE BRIEFS IN GUILTY PLEA APPEALS

(November 2002)

Dear Panel Attorney:

You have been appointed to a guilty plea appeal case. Although there are some possible issues to look into, it is also possible that the case might eventually result in a *Wende* brief. For your information, we are enclosing this short memo which discusses some aspects of *Wende* procedure in guilty plea appeals.

Specifically, there is sometimes confusion on the part of practitioners about what is the appropriate language for the Statement of Appealability and for the Argument section, in various types of guilty plea appeals. This memo notes certain types of appeals (i.e., appeals with a range of different Notices of Appeal), and presents sample language for the sections of the *Wende* brief noted above. The materials also contain a sample attorney declaration in *Wende* appeals. While you certainly do not need to use the precise language noted in these materials, you should check to see which type of NOA your appeal contains and should make sure that whatever language you do use conveys the key points noted in the sample language for that type of NOA.

Even if your guilty plea appeal is not a *Wende*, these materials can be helpful to you because it is important in every case to have an accurate Statement of Appealability. Thus, even if you are going to brief an issue you may want to refer to the sample Statements of Appealability in these materials to be sure that the Statement in your brief correctly describes the posture of the appeal.

If your NOA does not match one of the scenarios above, or if you have any general questions, please feel free to contact your FDAP buddy for advice about any of this. Your buddy can also send you samples of a full *Wende* brief, including a sample *Wende* letter to the client. Also, please remember that the decision to file a *Wende* brief should be discussed with your FDAP buddy before actually filing the brief.

If you would like to receive an emailed version of these materials, please email to Julio Molina in our office at julio@fdap.org. He will reply to your email and send an attachment of these materials (in WordPerfect).

TABLE OF CONTENTS

NOA SCENARIOS	1
1. Standard Guilty Plea NOA (i.e., with boxes to check) that has either sentencing and/or PC 1538.5 box checked (but <u>not</u> any certificate issues).	1
2. Standard Guilty Plea NOA (i.e., with boxes to check) that has either sentencing and/or PC 1538.5 box checked, <u>and</u> has certificate box checked and <u>did</u> receive a timely certificate of probable cause.	2
3. Standard Guilty Plea NOA (i.e., with boxes to check) that has either sentencing and/or PC 1538.5 box checked, <u>and</u> has certificate box checked and <u>did not</u> receive a timely certificate of probable cause.	3
4. Standard Guilty Plea NOA (i.e., with boxes to check) that has <u>only</u> certificate issues box checked and <u>did</u> receive a timely certificate.	5
5. Guilty Plea NOA which just states that the appeal is "from the judgment of conviction and sentence."	6
6 Any guilty plea appeal where the record shows that appellant signed an <u>appeal waiver</u>.	7
SAMPLE STANDARD NOA FORM	10
SAMPLE ATTORNEY DECLARATION	11

(continued next page)

TABLE OF CONTENTS
(continued)

SAMPLE CLIENT LETTER	12
SOME GENERAL CONSIDERATIONS	13
A. Determining whether issues require a certificate of probable cause	13
B. Whether to file a Wende brief when the trial court has granted a certificate of probable cause	14

NOA SCENARIOS

In many guilty plea appeals the appellant uses a "standard" notice of appeal form (or some variation of it) which contains boxes for the appellant to check-- one box is for sentencing or other post-plea proceedings, one box is for Pen.Code §1538.5 suppression motions, and one box is for challenges to the plea (which require a certificate of probable cause from the trial judge). A sample of this standard form is attached to these materials. A number of the scenarios discussed below refer to this standard form.

1. Standard Guilty Plea NOA (i.e., with boxes to check) that has either sentencing and/or PC 1538.5 box checked (but not any certificate issues)

A. Statement of Appealability

This is an appeal following a plea of guilty [no contest], raising sentencing issues [and/or: suppression issues under Penal Code § 1538.5], and is authorized by California Rules of Court, rule 31(d).¹

B. Argument

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, this court is requested to independently review the record on appeal in order to determine whether it contains any arguable sentencing issues or other post-plea [and Pen.Code § 1538.5] issues.

As noted by the court in *Wende* (25 Cal.3d at 441-442):
"We conclude that [*Anders v. California* (1967) 386 U.S.738] requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no

¹ Note that under the proposed revision of the rules governing criminal appeals (currently under study by the Judicial Council), rule 31(d) will be renumbered as rule 30(b)(2). It is not clear if/when the proposed rules changes will take place. If the renumbered rule is enacted, the cite should be to the renumbered rule.

specific issues or describes the appeal as frivolous. This obligation is triggered by receipt of such a brief from counsel and does not depend on the subsequent receipt of a brief from the defendant personally." The *Wende* procedure was upheld by the United States Supreme Court in *Smith v. Robbins* (2000) 528 U.S. 259.

In *People v. Jones* (1995) 4 Cal.4th 1102, 1105, the court held that once a guilty plea appeal is operative as to any non-certificate issues, it is valid as to all noncertificate issues: "Where, as here, an appellant has in fact complied with rule 31(d) in his notice of appeal, the rule does not restrict the cognizability on appeal of additional, unspecified noncertificate issues or categories of issues."

2. **Standard Guilty Plea NOA (i.e., with boxes to check) that has either sentencing and/or PC 1538.5 box checked, and has certificate box checked and did receive a timely certificate of probable cause.**

A. Statement of Appealability

This is an appeal following a plea of guilty [no contest]. The appellant received a certificate of probable cause to appeal. (Cite to record) In addition, the Notice of Appeal also raises sentencing [or: suppression issues under Penal Code § 1538.5]. This appeal is authorized by Penal Code § 1237.5.

B. Argument

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, this court is requested to independently review the record on appeal in order to determine whether it contains any arguable issues.

As noted by the court in *Wende* (25 Cal.3d at 441-442): "We conclude that [*Anders v. California* (1967) 386 U.S.738]

requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous. This obligation is triggered by receipt of such a brief from counsel and does not depend on the subsequent receipt of a brief from the defendant personally." The *Wende* procedure was upheld by the United States Supreme Court in *Smith v. Robbins* (2000) 528 U.S. 259.

In *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1174, 1177-78, the court held that once a certificate of probable cause is granted as to any issue, the appeal is operative as to all other cognizable issues: "Nothing in section 1237.5 indicates the defendant must specify, and the trial court certify as nonfrivolous, each issue to be raised on appeal. ... Section 1237.5 does not expressly limit the issues that may be raised on appeal once a certificate of probable cause has been obtained. ... Section 1237.5 does not restrict the scope of inquiry into a cognizable error once a certificate has been issued."

C. Note to practitioner: Please see discussion on page 14, below, concerning whether to file a *Wende* brief when the trial court has issued a certificate of probable cause.

3. Standard Guilty Plea NOA (i.e., with boxes to check) that has either sentencing and/or PC 1538.5 box checked, and has certificate box checked and did not receive a timely certificate of probable cause.

A. Statement of Appealability

This is an appeal following a plea of guilty [no contest], raising sentencing issues [and/or: suppression issues under Penal Code § 1538.5], and is authorized by California Rules

of Court, rule 31(d).² Appellant also sought to raise issues relating to the validity of the plea (Cite to NOA in the record), but appellant did not receive a certificate of probable cause as to those issues (Cite to record if there is a denial of the COPC in the record). However, this appeal is operative as to any non-certificate issues. (See *People v. Jones* (1995) 10 Cal. 4th 1102)

B. Argument

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, this court is requested to independently review the record on appeal in order to determine whether it contains any arguable sentencing issues or other post-plea [and Pen.Code § 1538.5] issues.

As noted by the court in *Wende* (25 Cal.3d at 441-442): "We conclude that [*Anders v. California* (1967) 386 U.S.738] requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous. This obligation is triggered by receipt of such a brief from counsel and does not depend on the subsequent receipt of a brief from the defendant personally." The *Wende* procedure was upheld by the United States Supreme Court in *Smith v. Robbins* (2000) 528 U.S. 259.

In *People v. Jones* (1995) 4 Cal.4th 1102, 1105, the court held that once a guilty plea appeal is operative as to any non-certificate issues, it is valid as to all noncertificate issues: "Where, as here, an appellant has in fact complied with rule 31(d) in his notice of appeal, the rule does not restrict the cognizability on appeal of additional, unspecified noncertificate issues or categories of issues."

² Note that under the proposed revision of the rules governing criminal appeals (currently under study by the Judicial Council), rule 31(d) will be renumbered as rule 30(b)(2). It is not clear if/when the proposed rules changes will take place. If the renumbered rule is enacted, the cite should be to the renumbered rule.

4. Standard Guilty Plea NOA (i.e., with boxes to check) that has only certificate issues box checked and did receive a timely certificate.

A. Statement of Appealability

This is an appeal following a plea of guilty [no contest]. The appellant received a certificate of probable cause to appeal. (Cite to record) This appeal is authorized by Penal Code § 1237.5.

B. Argument

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, this court is requested to independently review the record on appeal in order to determine whether it contains any arguable issues.

As noted by the court in *Wende* (25 Cal.3d at 441-442): "We conclude that [*Anders v. California* (1967) 386 U.S.738] requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous. This obligation is triggered by receipt of such a brief from counsel and does not depend on the subsequent receipt of a brief from the defendant personally." The *Wende* procedure was upheld by the United States Supreme Court in *Smith v. Robbins* (2000) 528 U.S. 259.

In *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1174, 1177-78, the court held that once a certificate of probable cause is granted as to any issue, the appeal is operative as to all other cognizable issues: "Nothing in section 1237.5 indicates the defendant must specify, and the trial court certify as nonfrivolous, each issue to be raised on appeal. ... Section 1237.5 does not expressly limit the issues that may be raised on appeal once a certificate of probable cause has been obtained. ... Section 1237.5 does not restrict the scope of inquiry into a cognizable error once a certificate has been

issued."

C. Note to practitioner: Please see discussion on page 14, below, concerning whether to file a *Wende* brief when the trial court has issued a certificate of probable cause.

5. Guilty Plea NOA which just states that the appeal is "from the judgment of conviction and sentence."

A. Statement of Appealability

The notice of appeal in this case states *inter alia* that the appeal is from the sentence. Accordingly this appeal is authorized by California Rules of Court, rule 31(d).³ (See *People v. Jones* (1995) 10 Cal.4th 1102, 1111-12, holding that under rule 31(d) the notice of appeal need only specify the type of issue and not the specific claim of error.)

B. Argument

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, this court is requested to independently review the record on appeal in order to determine whether it contains any arguable sentencing issues or other post-plea issues.

As noted by the court in *Wende* (25 Cal.3d at 441-442): "We conclude that [*Anders v. California* (1967) 386 U.S.738] requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous. This

³ Note that under the proposed revision of the rules governing criminal appeals (currently under study by the Judicial Council), rule 31(d) will be renumbered as rule 30(b)(2). It is not clear if/when the proposed rules changes will take place. If the renumbered rule is enacted, the cite should be to the renumbered rule.

obligation is triggered by receipt of such a brief from counsel and does not depend on the subsequent receipt of a brief from the defendant personally." The *Wende* procedure was upheld by the United States Supreme Court in *Smith v. Robbins* (2000) 528 U.S. 259.

In *People v. Jones* (1995) 4 Cal.4th 1102, 1105, the court held that once a guilty plea appeal is operative as to any non-certificate issues, it is valid as to all noncertificate issues: "Where, as here, an appellant has in fact complied with rule 31(d) in his notice of appeal, the rule does not restrict the cognizability on appeal of additional, unspecified noncertificate issues or categories of issues."

C. Note to practitioner: In *People v. Lloyd* (1998) 17 Cal.4th 658, the court upheld as valid a notice of appeal which simply stated that the appeal was from the "sentence," and also had the notation "Rule 31(d)." The court held that a notice of appeal must be "liberally construed in favor of its sufficiency," and that there is "no requirement that it must make the requisite statement of basis expressly rather than impliedly." (17 Cal.4th at 665.) We are not aware of any opinion which has dealt with a notice of appeal which simply specifies "sentence," but the liberal construction rule and the discussion in Lloyd would seem to indicate that such a notice of appeal is operative. To date, the court has accepted without comment *Wende* briefs with such a notice of appeal.

6. Any guilty plea appeal where the record shows appellant signed an appeal waiver.

A. Statement of Appealability

Use the appropriate statement of appealability for whatever type of NOA (the scenarios noted above) was filed in the case, **then add the following paragraphs:**

Appellant waived his appeal rights when he entered his plea in this case. (Cite to record).

"A defendant may waive the right to appeal as part of a plea bargain where the waiver is knowing, intelligent, and voluntary. (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.) A

broad or general waiver of appeal rights ordinarily includes error occurring before but not after the waiver because the defendant could not knowingly and intelligently waive the right to appeal any unforeseen or unknown future error. (*In re Uriah R.* (1999) 70 Cal.4th 1152, 1157.) Thus, a waiver of appeal rights does not apply to “possible future error” [that] is outside the defendant's contemplation and knowledge at the time the waiver is made.’ (*People v. Panizzon, supra*, 13 Cal.4th at p. 85; see also *People v. Sherrick* (1993) 19 Cal.App.4th 657, 659; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662.)” (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815.)

Two divisions of the First Appellate District have also explained the parameters of appellate review when there has been an appeal waiver: *People v. Olson* (1989) 216 Cal.App.3d 601, 604, fn. 2 [Div. 5; holding that the waiver does not “prevent an appeal where the sentence imposed is not in accordance with the negotiated agreement or other sentencing error occurs”], and *People v. Charles* (1985) 171 Cal.App.3d 552, 563-564 [Div. 4; holding that the record must show “that the waiver [of appeal rights] was free, knowing and intelligent”].

Accordingly, in the argument section below, appellant requests that this court independently review the appellate record to determine if the appeal waiver was free, knowing and intelligent, and to determine if sentencing error occurred in this case.

B. Argument

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, this court is requested to independently review the record on appeal in order to determine whether it contains arguable issues.

More specifically, as noted above appellant waived his appeal rights when he entered his plea in this case. (Cite to

record). Pursuant to the cases noted in the Statement of Appealability above, appellant therefore requests that this court independently review the appellate record to determine if the appeal waiver was free, knowing and intelligent, and to determine if sentencing error occurred in this case which is not encompassed by the waiver.

SAMPLE "STANDARD" NOTICE OF APPEAL FORM

SAMPLE ATTORNEY DECLARATION IN *WENDE* APPEAL

DECLARATION

1. I am an active member of the California State Bar, and I am appointed counsel on appeal for appellant.

2. I have thoroughly reviewed the entire record on appeal in this case.

3. Based upon my review of this case, I have determined that a brief pursuant to *People v. Wende* is appropriate.

4. I have written to appellant at his last known address and advised him that a *Wende* brief would be filed in this case.

5. I have advised appellant that he may personally file a supplemental brief in this case raising any issues which he wishes to call to the court's attention.

6. I remain available for any further briefing this court may request; however, I have informed appellant that he may request the court to relieve me as counsel in this case.

7. I am sending appellant a copy of this brief.

I declare under penalty of perjury of the laws of the state of California that the foregoing is true and correct. This declaration was executed at San Francisco, California, on

_____.

Counsel for Appellant

**SAMPLE CLIENT LETTER, IN CASES WHERE
YOU HAVE DETERMINED THAT A WENDE BRIEF WILL BE FILED.**

Dear [Client]:

I wrote to you earlier to explain that it is possible that we will not be able to argue any issues in your appeal. [Insert appropriate explanations of particular issues the client wants raised, and why they are not arguable.] Since then, I have done further research and have consulted with another lawyer at the First District Appellate Project. That lawyer has agreed with me that there are no arguable issues in your case.

In this situation, I am required to file the type of brief described in the case of *People v. Wende* (1979) 25 Cal.3d 436. A “*Wende* brief” tells the Court of Appeal the history of your case, and summarizes the evidence given [at the preliminary hearing][in the probation report][in any other part of the record.] It then asks the Court to review the record for itself, to determine if there are any arguable issues. The Court is required to carry out this review. If it finds any issues which it thinks may be arguable, it will ask me to brief them.

When I file a *Wende* brief, you can ask the Court of Appeal to have me replaced with another lawyer. You should be aware that the Court of Appeal does not usually replace a lawyer simply because a *Wende* brief has been filed. But you have the right to ask, and you can do so by writing to the clerk of the Court of Appeal, First Appellate District, Division [number], at 350 McAllister Street, San Francisco CA 94102. Be sure to refer to your case by name and number in your letter: *People v. [name]*, A[xxxxx].

You also have the right to file a supplemental brief of your own, making any arguments you think I should have made in your case. You can do this even if you do not ask to have me replaced as your lawyer. You will have 30 days from the date I file my *Wende* brief to file a supplemental brief. I intend to file my *Wende* brief on [date], so your deadline is [date]. You should send your supplemental brief to the Court at the same address as above. I am sending you a copy of the brief which I will be filing on [date.]

I regret not finding any arguable issues, but the Court will now be reviewing the record in your case and we will see if they find any issues which they want me to argue. I’ll let you know when the Court acts.

SOME GENERAL CONSIDERATIONS

A. Determining whether issues require a certificate of probable cause.

If you are thinking of raising an issue, instead of filing a *Wende* brief, it will be necessary for you to determine whether or not the issue requires a certificate of probable cause. The distinction between certificate and noncertificate issues is not always clear. Particularly in cases where there has been a plea agreement for a “top” rather than for a fixed sentence, the Courts of Appeal are divided as to when a challenge to a sentence at or below that top is a challenge to the plea agreement, requiring a certificate, and when it is simply a post-plea claim, which does not require a certificate. The issue is currently pending before the Supreme Court.

People v. Panizzon (1996) 13 Cal.4th 68 did not answer the question, as it involved (and rejected) a noncertificate challenge to a fixed sentence. As of this writing (October 2002), the California Supreme Court has granted review in *People v. Buttram*, S103761, formerly at 94 Cal.App.4th 1249, in which the Fourth District, Division Three held that a bargain for a maximum estopped D from complaining about the maximum sentence, since he had agreed to it.

The Court has also granted review, on a grant-and-hold basis, in two other cases. In *People v. Chico*, S104024 [formerly at 94 Cal.App.4th 867] the First District, Division Four held that a plea agreement for a maximum sentence was an agreement for an exercise of discretion within that maximum. The Court of Appeal concluded that D was free to challenge “the sentencing calculus” without challenging the plea agreement, and thus without a certificate of probable cause. In *People v. Schlager*, S104634, [formerly at 95 Cal.App.4th 259], the Third District held that D needed a certificate to raise a section 654 challenge to two counts, where the maximum term to which he had agreed “depended in part on a calculation that sentenced defendant separately and consecutively for each of the two charges that he now challenges”

Pending a decision in *Buttram*, some opinions concerning the cognizability of sentencing arguments in plea agreement cases are *People v. Foster* (2002) 101 Cal.App.4th 247 [pet.rev.pending] and *People v. Young* (2000) 77 Cal.App.4th 827 [rev.den.], both of which hold that D cannot argue that a sentence to which he has agreed is cruel and unusual, without a certificate. See also *People v. Cole* (2001) 88 Cal.App.4th 850 [rev. den.]; *People v. Stewart* (2001) 89 Cal.App.4th 1209 [rev. den.]

FDAP has written materials on which issues require a certificate; which issues do

not; and which issues are waived even with a certificate. These materials are currently being updated; the last revision was in 1995.

B. Whether to file a *Wende* brief when the trial court has granted a certificate of probable cause.

In *Delgado v. Lewis* (9th Cir. 2000) 223 F.3d 976, 981) the 9th Circuit stated: “To represent to an appellate court [by filing a *Wende* brief] that there were no non-frivolous issues after a state trial court had issued a probable cause certification to the contrary would be unusual in any case; ...” This broad language might seem to indicate that where the trial court issues a certificate of probable cause the issue should generally be briefed on the merits.

However, we do not believe that this language in *Delgado* meant to overturn the clear requirement that appellate counsel must exercise his/her independent judgment in determining what issues should be raised on appeal. (See, e.g., *Jones v. Barnes* (1983) 103 S.Ct. 3308, 3314: “For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies [*Anders v. California* (1967) 386 U.S. 738.]” *People v. Davis* (1987) 189 Cal.App.3d 1177, 1188n.7: “The defendant’s appellate counsel rightfully asserts that the responsibility for determining all questions of strategy and tactics is hers and hers alone.”)

In *Delgado* itself, the quoted language simply points out that it should be an “unusual” case in which a *Wende* is filed where there was a certificate granted; the court does not state that a *Wende* brief could never be filed in that situation. Further, immediately following the language quoted above, the *Delgado* court went on to note that there were very strong arguable issues in the case.

There have certainly been *Wende* appeals in cases where trial courts have issued certificates; in those cases, upon close examination the appellate attorney has simply found the issue non-arguable. Thus, we suggest that where a certificate of probable cause has been issued, counsel should give weight to that fact. In looking at the issue, if counsel finds it a close call, the issue should probably be briefed. However, if the issue is clearly not arguable, counsel should file a *Wende* brief. In the brief, counsel should make sure to note that the trial court issued a certificate of probable cause.