

COURT OF APPEAL OF CALIFORNIA

THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

[Court of Appeal
case No.]

Plaintiff and Respondent,

JANE DOE.,

(____ County Ct.
No. ____)

Defendant and Appellant.

**APPLICATION FOR PERMISSION TO SEEK A CERTIFICATE OF
PROBABLE CAUSE IN ____ COUNTY SUPERIOR COURT.**

**TO THE HONORABLE VANCE W. RAYE, PRESIDING JUSTICE,
AND TO THE ASSOCIATE JUSTICES OF THE COURT OF
APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE
DISTRICT:**

INTRODUCTION

Appointed counsel seeks permission from the Court of Appeal to seek a certificate of probable cause from [enter county] County Superior Court. Trial counsel for appellant filed a notice of appeal that challenged the sentence but did not request a certificate of probable cause. (CT xxxx.) Appointed counsel has reviewed the transcripts and has identified one issue that may involve a challenge to the validity of the plea

entered by appellant. Pursuant to Penal Code section 1237.5, an appellant cannot raise an argument challenging the validity of his plea without first obtaining a certificate of probable cause from the trial court.

PROCEDURAL HISTORY

[Discuss relevant procedural history of the case. For example:

Defendant was charged with two counts of second degree burglary and one count of receiving stolen property. (CT xx.) Under her plea bargain, she pleaded guilty to one count of burglary and one count of receiving stolen property with the understanding that she would not be sentenced to greater than three years eight months. (CT xx.) The receiving stolen property count pertained to the burglary she pleaded guilty to. She was sentenced to three years eight months on November 30, 20xx. (CT xx.) Trial counsel filed a notice of appeal on her behalf on December 15, 20xx. The notice of appeal properly stated that the defendant was appealing the sentence. But the attorney did not file an application for certificate of probable cause. (CT xx.)]

DISCUSSION

The Supreme Court of California decisions in *People v.*

Shelton (2006) 37 Cal.4th 759, 763, 769 and *People v. Cuevas* (2008) 44 Cal.4th 374 may require that appellant obtain a certificate of probable cause to challenge [name the issue in this case].

In *Shelton* the Supreme Court of California decided the issue of whether a defendant must obtain a certificate of probable cause to challenge the trial court's authority to impose a maximum sentence or "lid." In that case, the maximum sentence which the court could impose was set forth in a negotiated plea agreement but the sentence in part was unauthorized. (*People v. Shelton, supra*, 37 Cal.4th 759, 763, 769.) The Supreme Court of California concluded that "inclusion of a sentence lid implies a mutual understanding and agreement that the trial court has authority to impose the specified maximum sentence," and that "a challenge to the trial court's authority to impose the lid sentence is a challenge to the validity of the plea requiring a certificate of probable cause." (*Ibid.*)

In *Cuevas, supra*, 44 Cal.4th 374, the defendant and the prosecution negotiated a no contest plea agreement in which several charges would be dismissed or reduced. The defendant agreed that the maximum possible sentence he could receive on the counts he pleaded no contest to was 38 years 8 months. It was not a lid. That was simply the most

any defendant could be sentenced to on those counts. On appeal the defendant raised a Penal Code section 654 issue. The Supreme Court concluded that a certificate of probable cause was required for the defendant to argue that Penal Code section 654 should have been applied to the sentence under these circumstances as well. The court held if the plea bargain results in the dismissal of or reduction in charges or enhancements, and the new maximum sentence exposure is less than what could have been imposed under the original charges and enhancements, a certificate of probable cause is required to challenge the judge's authority to impose a particular sentence (i.e., to challenge the lawfulness of the sentence).

Appellant believes [s/he] has an issue to raise concerning [describe the issue and discuss any cases supporting your belief that a certificate is required.]

In sum, there are reasonable constitutional grounds going to the legality of the sentence under xxxxxx. However, under the cases of *Shelton* and *Cuevas*, that challenge may be deemed an attack on the validity of the plea and require a certificate of probable cause to raise that issue on appeal. (Pen. Code, § 1237.5)

REQUEST AND AUTHORITY

In this case, trial counsel filed a timely notice of appeal on appellant's behalf, but did not request a certificate of probable cause. (CT xx.) Appellant asks this court to construe his proposed statement of grounds for appeal s timely pursuant to the doctrine of constructive filing of *In re Benoit* (1973) 10 Cal.3d 72 because his trial attorney should have filed the statement.

In *Benoit*, the California Supreme Court held that where an attorney for an incarcerated defendant agrees to file a notice of appeal, but then fails to do so in a timely fashion, the appellate court may construe the late notice as having been timely filed if the defendant was diligent in attempting to have the attorney discharge the responsibility. (*In re Benoit*, *supra*, 10 Cal.3d at pp. 86-87, 89.)

There is no principled ground to distinguish constructive filing of a request for a certificate of probable cause from constructive filing of a notice of appeal. A trial attorney has the same duty to assist an incarcerated client in perfecting an appeal regardless of whether the defendant pled guilty or was convicted after a trial. And the incarcerated defendant's reliance on counsel's promise to assist in perfecting an appeal is the same whether the defendant pled guilty or had a trial.

Trial counsel's duty to assist in filing a notice of appeal is well established:

“It shall be the duty of every attorney representing an indigent defendant in any criminal ... case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.” (Pen. Code, § 1240.1, subd. (b).)

The law is just as well established that trial counsel has a duty to help an indigent, incarcerated defendant in preparing a statement of reasonable grounds for appeal. “[W]here a defendant has been convicted upon a guilty plea, his right to appeal may be dependent on many technical requirements of which he may not be aware.” (*People v. Ribero* (1970) 4 Cal.3d 55, 64.) “The Legislature has conditioned the right to appeal from a plea of guilty upon the filing of the required statement. Advice of assistance of counsel in filing the notice of appeal is meaningless if counsel does not also advise or assist in preparation and filing of the required statement. It follows that counsel's obligation to assist in filing the notice of appeal necessarily encompasses assistance with the statement required by section 1237.5.” (*Id.* at p. 66.) Thus, in the context of a guilty plea case, such as this one,

when a trial attorney agrees to file a notice of appeal for his indigent, incarcerated client, the attorney must also assist in preparing a request for certificate of probable cause if the defendant has asked for it to be prepared, or if the attorney is aware of an arguable issue that is cognizable on appeal only with a certificate.

And since appointed appellate counsel has an obligation to raise all potentially meritorious issues on appellant's behalf (*In re Smith* (1970) 3 Cal.3d 192, 202-203), it can be construed that counsel's obligations reasonably include taking any necessary steps to see that the prerequisite to raising such issues, including a request for certificate of probable cause, is filed.

In order to effectively represent appellant's interests, it appears that a certificate of probable cause from [enter county] County Superior Court should be obtained. Therefore, counsel for appellant requests leave to attempt to obtain a certificate of probable cause from the trial court. As the filing date for appellant's opening brief presently is [enter current due date], it is also requested that this date be extended to allow sufficient time to seek the certificate of probable cause.

For the reasons stated herein, appellant requests leave to

return to [enter county] County Superior Court to seek a certificate of probable cause.

Dated: _____

Respectfully submitted,

Attorney for Appellant