

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
IN AND FOR THE FIFTH APPELLATE DISTRICT

**THE PEOPLE OF THE STATE** )  
**OF CALIFORNIA,** )  
 )  
Plaintiff and Respondent, ) **FXXXXXXX**  
 )  
vs. ) [County] County  
 ) Nos. BFXXXXXXXX and BF1XXXXXXX  
[Client Name], )  
 )  
Defendant and Appellant. )  
\_\_\_\_\_ )

On Appeal from the Judgment and Order of the  
Superior Court of California, [County] County  
Honorable [Judge], Judge

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**APPELLANT'S OPENING BRIEF**  
(*People v. Wende* (1979) 25 Cal.3d 436)

CENTRAL CALIFORNIA  
APPELLATE PROGRAM

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Executive Director

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THE PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	FXXXXXX
	)	
vs.	)	[County] County
	)	Nos. BFXXXXXXXX and BF1XXXXXXXX
[Client Name],	)	
	)	
Defendant and Appellant.	)	
_____	)	

**STATEMENT OF APPEALABILITY**

This appeal is from a judgment that finally disposes of all the issues between the parties and is made pursuant California Rules of court, rule 8.304(b).

**STATEMENT OF CASE**

**Case Number BFXXXXXXX**

On [date], the [County] County District Attorney filed a four count felony complaint against appellant. (Supplemental Clerk’s Transcript “SCT” 4-8.) Count 1 alleged a felony violation of possession of cocaine base for sale or purchase for purpose of sale (Health & Saf. Code, § 11351.5) with an arming enhancement (Pen. Code, § 12022, subd. (a)(1)) and a prior conviction under Health and Safety code section 11351.1 (Health & Saf. Code, § 11370.2). (SCT 4-5.) Count 2 alleged a felony violation of possession of cocaine base while armed with a loaded operable firearm (Health & Saf.

Code, § 11370.1, subd. (a)). (SCT 5.) Count 3 alleged a felony violation of felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)). (SCT 5-6.) Count 4 alleged a felony violation of felon in possession of ammunition (Pen. Code, § 12316, subd. (b)(1)). (SCT 6-7.)

On [date], appellant entered a plea agreement under which he pled no contest to count 1 with a stipulated sentence of 5 years to be served in county jail prison (Pen. Code, § 1170, subd. (h)). (SCT 19, 25, 30.) In exchange for his plea, all further allegations as to count 1 were stricken and the remaining counts were dismissed. (SCT 19-26, 30-33.)

**Initial Sentencing.**

On [date], the court sentenced appellant to the [County] County jail pursuant to Penal Code section 1170, subdivision (h) for the upper term of 5 years. (SCT 38.)

**Case Number BF1XXXXXX**

On [date], the [County] County District Attorney filed a five count information against appellant. (CT 62-72.) Count 1 alleged a felony violation of felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)). (CT 62.) Count 2 alleged a felony violation of felon in possession of ammunition (Pen. Code, § 30305, subd. (a)(1)) with an arming enhancement under Penal Code section 12022, subdivision (a)(1). (CT 64-66.) Count 3 alleged a felony violation of possession of cocaine base while armed with a loaded, operable firearm (Health & Saf. Code, § 11370.1, subd. (a)). (CT 66.) Count 4 alleged a felony violation of possession of cocaine base for sale or purchase for purposes

of sale (Health & Saf. Code, § 11351.5) with an arming enhancement under Penal Code section 12022, subdivision (c) and two prior drug conviction enhancements under Health and Safety Code section 11370.2, subdivision (a). (CT 68-70.) Count 5 alleged a felony violation of possession of ecstasy (Health & Saf. Code, § 11377, subd. (a)). (CT 71.) Counts 1-5 further alleged ineligibility for imprisonment in county jail (Pen. Code, § 1170, subd. (h)), a prior strike conviction (Pen. Code, §§ 667, subds. (c)-(j) and 1170.12, subds. (a)-(e)) and a prior prison term (Pen. Code, § 667.5, subd. (b).) (CT 62-72.)

On [date], the court denied appellant's motion to set aside the information as to counts 3-5. (CT 76, 94.)

On [date], appellant entered a plea agreement in which he pled no contest to Count 1 (Pen. Code, § 29800) and Count 4 (Health & Saf. Code, § 11351.5) and admitted the prior strike conviction<sup>1</sup> with a stipulated sentence of a doubled determinate term of 6 years (Pen. Code, § 667, subd. (e)) as to each count with the understanding that Count 1 would run concurrent with Count 4. (CT 98, 104.) Counts 2, 3 and 5 were dismissed and all remaining allegations were stricken. (CT 113-114; 109.)

**Sequential Sentencing of BFXXXXXXX and BF1XXXXXX.**

On [date], the court sentenced appellant in case number BF1XXXXXX and set aside the initial sentence and resentenced appellant in case number BFXXXXXXX. (CT

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<sup>1</sup> Appellant admitted a 1987 felony conviction for assault with a deadly weapon other than a firearm (Pen. Code, § 245, subd. (a)(1), conditioned upon the conviction being a valid strike. (CT 107.)

119; SCT 42; 2RT 51-53.)

In BF1XXXXXX, the court sentenced appellant under Penal Code section 667, subdivision (e)(1) to the doubled low term of 6 years on Count 4 and a concurrent doubled low term of 32 months on Count 1. (2RT 52.) The court ordered appellant to register as a drug offender (Health & Saf. Code, § 11590). (2RT 52.) The court awarded appellant 198 days actual time and 198 days conduct credits in this case. (2RT 53.) The court imposed a \$50 fee (Health & Saf. Code, § 11372.5) with \$145 dollar penalty assessment, a \$100 fee (Health & Saf. Code, § 11372.7) with a \$290 penalty assessment, a \$30 Conviction Assessment (Govt. Code, § 70373) for each count, a \$40 Court Operations Assessment (Pen. Code, § 1465.8) for each count, a \$300 restitution fine (Pen. Code, § 1202.4, subd. (b) and a \$300 suspended restitution fine (Pen. Code, § 1202.45). (2RT 52.)

In BFXXXXXXX, the court set aside the sentence ordered on [date], and sentenced appellant to the Department of Corrections for the upper term of 5 years to be served concurrent with the sentence imposed in BF1XXXXXX. (2RT 53.) The court awarded appellant 848 actual days and 470 days conduct credit for a total of 1,318 days. (2RT 53.) The court imposed a \$30 Conviction Assessment (Govt. Code, § 70373) a \$40 Court Operations Assessment (Pen. Code, § 1465.8) a \$240 restitution fine (Pen. Code, § 1202.4, subd. (b) and a \$240 suspended restitution fine (Pen. Code, § 1202.45). (2RT 53)



On [date], appellant filed a timely notice of appeal.<sup>2</sup> (CT 131.)

**STATEMENT OF FACTS**

**BFXXXXXXX**

On [date], appellant possessed, or purchased for purposes of sale, cocaine base.<sup>3</sup>  
(SCT 4, 30.)

**BF1XXXXXX**

On [date], [city] Police Officer Alex Paiz searched appellant's residence at [address] and found 10.7 ounces of cocaine base, a loaded .38 caliber black derringer firearm, and a total of \$1239.00 in appellant's bedroom. (CT 33-59.)

**ARGUMENT**

**PURSUANT TO *PEOPLE* v. *WENDE* (1979) 25 CAL.3d 436 APPELLANT REQUESTS THE COURT TO MAKE ITS OWN INDEPENDENT EXAMINATION OF THE RECORD ON APPEAL.**

Pursuant to the opinion of the California Supreme Court in *People v. Wende*, *supra*, 25 Cal.3d 436, counsel requests that this court independently review the entire record on appeal in this case. Appellant has been advised by present counsel of his right to file a supplemental brief in this court within 30 days of the date this brief is filed.

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<sup>2</sup> On [date], this Court granted appellant's motion to construe the notice of appeal to include case number BFXXXXXXX as well as BF1XXXXXX. (See Docket.)

<sup>3</sup> Counsel stipulated that there was a factual basis for appellant's plea to Count 1 based upon law enforcement and investigation reports. (SCT 30.)

Appellant has been advised that in the supplemental brief he may bring to the court's attention any issues he believes deserve review. Appellant has been further advised that he may ask the court to relieve present counsel, that present counsel will forward Appellant's copy of the record on appeal for the purpose of preparing a supplemental opening brief upon his request, but that counsel will retain the record for the present to allow proper representation in the event the court requests further briefing.

Present counsel has reviewed the entire record and remains available to brief any additional issues upon the court's request.

DATED: April \_\_\_, 2015

Respectfully submitted,

CENTRAL CALIFORNIA  
APPELLATE PROGRAM  
George Bond  
Executive Director

*/s/ [Attorney Name]*

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By [Attorney Name]  
Staff Attorney

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THE PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	
	)	FXXXXXXX
Plaintiff and Respondent,	)	
	)	[County] County
vs.	)	BFXXXXXXXX and BF1XXXXXXXX
	)	
	)	
[Client Name],	)	<u>DECLARATION OF</u>
	)	<u>COUNSEL</u>
Defendant and Appellant.	)	
_____	)	

I, [Attorney Name], hereby declare:

As counsel appointed to represent Appellant [client name], in this appeal, I have read the entire record, consisting of 184 pages of clerk’s transcript and 7 pages of reporter’s transcript. By correspondence, I have discussed with [client name] my findings and his views regarding the case.

In a letter dated [date], I advised him of the nature of this brief; that I would serve a copy of this brief on him; that he may file a supplemental brief on his own behalf within 30 days of the date this brief is filed; that I would send him the appellant’s copy of the record on appeal, upon his request, to aid his in the preparation of a supplemental brief, if any; that I would remain available to brief issues as requested by the court; and that he may file a request for the court to relieve me as the appellant’s counsel in this appeal.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April \_\_\_\_, 2015, in Sacramento, California.

/s/ [Attorney Name]  
[Attorney Name]  
Attorney for Appellant

**Certificate of Appellate Counsel  
Pursuant to rule 8.204 (c)(1) of the California Rules of Court**

I, [Attorney Name], appointed counsel for Appellant [client name], certify pursuant to rule 8.204 (c)(1) of the California Rules of Court, that I prepared this opening brief on behalf of my client, [client name], and that the word count for this opening brief is 1,744.

This brief complies with the rule that limits an opening brief to 14,000 words, including footnotes. I certify that I prepared this document in WordPerfect 9 and that this is the word count WordPerfect generated for this document.

Dated: April \_\_\_\_, 2015

*/s/ Attorney Name* \_\_\_\_\_  
[Attorney Name]  
Attorney for Appellant

Re: *[CASE NAME]*, No. *[DCA CASE NUMBER]*

**DECLARATION OF ELECTRONIC SERVICE AND  
SERVICE BY PLACEMENT AT PLACE OF BUSINESS  
FOR COLLECTION AND DEPOSIT IN MAIL**

(Code Civ. Proc., § 1013a, subd. (3); Cal. Rules of Court, rules 8.71(f) and 8.77)

I, *[NAME OF PERSON WHO IS SERVING DOCUMENT]*, declare as follows:

I am, and was at the time of the service mentioned in this declaration, over the age of 18 years and am not a party to this cause. My electronic service address is *eservice@capcentral.org* and my business address is 2150 River Plaza Dr., Ste. 300, Sacramento, CA 95833 in Sacramento County, California. On *[DATE]*, I served the persons and/or entities listed below by the method checked. For those marked “Served Electronically,” I transmitted a PDF version of *[EXACT TITLE OF DOCUMENT BEING SERVED]* by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. Transmission occurred at approximately *[TIME]*. For those marked “Served by Mail,” I enclosed a copy of the document identified above in an envelope or envelopes, addressed as provided below, and placed the envelope(s) for collection and mailing on the date and at the place shown below, following the Central California Appellate Program’s ordinary business practices. I am readily familiar with this business’s practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelope(s) with postage fully prepaid.

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Attorney for Respondent  
State of California

*[APPELLANT’S NAME]*  
*[ADDRESS]*

\_\_\_\_\_ Served Electronically  
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Office of the Clerk  
[NAME] County Superior Court  
[COURT ADDRESS]

\_\_\_\_\_ Served Electronically  
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[ALL CO-APPELLANT ATTORNEYS]  
[BUSINESS ADDRESS]

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Office of the District Attorney  
[COUNTY NAME] County  
[D.A. ADDRESS]

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\_\_\_\_\_ Served by Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on [DATE], at [TOWN], California.

/s/ [Signature line]  
\_\_\_\_\_  
[TYPED NAME OF DECLARANT]