

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688

www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR21-02

Title

Appellate Procedure: Appeal After Plea of Guilty or Nolo Contendere or Admission of Probation Violation

Action Requested

Review and submit comments by May 27, 2021

Proposed Rules, Forms, Standards, or Statutes

Amend Cal. Rules of Court, rule 8.304

Proposed Effective Date

January 1, 2022

Proposed by

Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Contact

Christy Simons, 415-865-7694
christy.simons@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee proposes amending the rule that governs initiating an appeal in a felony case after a plea of guilty or nolo contendere or after an admission of a probation violation. In these cases, a certificate of probable cause is required if the defendant seeks to appeal an issue that challenges the validity of the plea or admission. Currently, the rule requires the trial court clerk to mark a notice of appeal “Inoperative” if the defendant did not file the statement requesting a certificate of probable cause or the trial court denied a certificate. However, because an appeal can be based on grounds that do not require a certificate, the clerk must review the notice of appeal and decide whether it should be filed notwithstanding the lack of a certificate. The amendments would reorganize the rule, simplify procedures, and eliminate the onus on the clerk to make a legal decision. The proposal is based on a suggestion from a member of another advisory committee.

Background

Rule 8.304 of the California Rules of Court governs filing an appeal in a felony case. Subdivision (b) addresses notices of appeal filed after a plea of guilty or nolo contendere or an admission of a probation violation. The defendant filing the appeal must request a certificate of probable cause for any challenge to the validity of the plea. If the superior court does not issue a certificate, either because the defendant did not request one or the court denied the request, the rule sets forth the procedure for clerks to follow: “If the defendant does not file the statement required [to request a certificate of probable cause] or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal ‘Inoperative,’ notify the

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

defendant, and send a copy of the marked notice of appeal to the district appellate project.” (Rule 8.304(b)(3).)

However, in the next paragraph, the rule also provides that a defendant need not request a certificate of probable cause if the notice of appeal states that the appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5 or grounds arising after the plea, such as sentencing issues, that do not challenge the validity of the plea. (Rule 8.304(b)(4).)

As a result, a superior court clerk in receipt of a notice of appeal that is not accompanied by a request for a certificate of probable cause or the certificate itself must decide whether to mark it “Inoperative” or file it and allow the appeal to proceed. While the notice of appeal forms often contain check boxes that allow the defendant to specify that the appeal is from denial of a motion to suppress evidence or sentencing only and is not designed to attack the plea, it is not uncommon for both self-represented defendants and attorneys to check the wrong box or boxes, check no boxes, or otherwise submit a notice of appeal that does not alert the clerk that no certificate of probable cause is required. Incorrect decisions to mark a notice of appeal inoperative result in delay and additional work for litigants, appellate projects, and the courts.

The Proposal

This proposal would clarify the rule and eliminate a procedure that inappropriately requires clerks to make legal decisions. It would save time and reduce work for the courts, and avoid delay in felony appeals following a plea or admission of probation violation.

Currently, rule 8.304(b)(1) indicates that, “except as provided in (4),” a notice of appeal must be filed with a certificate of probable cause or the statement requesting a certificate. Under subdivision (b)(2), if a certificate is requested, the court must issue it or deny the request within 20 days. Subdivision (b)(3) requires the clerk to mark a notice of appeal filed without a certificate or a request for a certificate “Inoperative.” Subdivision (b)(4) provides that a defendant “need not comply with (1)” if the notice of appeal states grounds that do not require a certificate. Thus, the rule suggests that a notice of appeal filed without a certificate or a request for one is improper and the clerk is expected to reject the filing and take other steps unless exceptions apply. To more accurately reflect the law and clarify that the distinction to be drawn is whether the grounds for the appeal require a certificate, not whether a certificate is requested or attached to the notice of appeal, the proposed amendments would group paragraphs (1) and (2) of subdivision (b) together as provisions addressing appeals that require a certificate of probable cause.

New subdivision (b)(2) would address appeals for which no certificate of probable cause is required, that is, appeals that either challenge the denial of a Penal Code section 1538.5 motion to suppress evidence or are based on grounds such as sentencing or other post-plea matters that do not challenge the validity of the plea.

New subdivision (b)(3) would address appeals for which no certificate of probable cause was requested or granted. Rather than requiring clerks to mark the notice of appeal inoperative, notify

the defendant, and send a copy of the marked notice of appeal to the district appellate project unless the notice of appeal states that the appeal is based on grounds that do not require a certificate of probable cause, the rule would simply provide that if a notice of appeal is filed without the statement requesting a certificate of probable cause or the trial court denies the request, the appeal is limited to issues that do not require a certificate of probable cause.

The proposal also includes a conforming change to subdivision (c) regarding notification of the appeal. Subdivision (c)(1) requires the superior court clerk to promptly send notification of the filing of a notice of appeal to certain individuals including the attorneys of record, any unrepresented defendant, the reviewing court clerk, and each court reporter. The rule further provides that if the defendant also files a statement requesting a certificate of probable cause, the clerk must not send the notification unless the superior court files a certificate. This provision would no longer be necessary because the proposed amendments provide that appeals in which a certificate is requested but denied may proceed but will be limited to issues that do not require a certificate of probable cause.

Finally, the advisory committee comment to subdivision (b) has been rewritten to reflect the changes to the rule and to include references to Supreme Court cases analyzing circumstances in which no certificate of probable cause for the appeal is required.

Alternatives Considered

The committee considered taking no action, but determined that the proposed changes would provide a substantial benefit to litigants and the superior courts by simplifying procedures and avoiding delay caused by the incorrect rejection of notices of appeal presented for filing.

The committee also considered a more limited option of amending only the provision requiring the clerk to mark the notice of appeal inoperative. That option would still have required action by the clerk to indicate that the appeal would be limited to issues that do not require a certificate of probable cause. The committee rejected this option in favor of clarifying the rule and eliminating the need for the clerk to review and evaluate the sufficiency of the notice of appeal and take action based on that evaluation.

Fiscal and Operational Impacts

Implementation requirements include providing training for superior court staff and publicizing the change in procedure to the criminal defense bar and the appellate projects. There should be minimal implementation costs, if any. The operational impacts would include time savings for superior court clerks processing notices of appeal filed in these cases.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Would the proposed changes have an impact on preparation of the record on appeal? If so, please describe.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 8.304, at pages 5–9

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

1 **Rule 8.304. Filing the appeal; certificate of probable cause**

2
3 **(a) Notice of appeal**

4
5 (1) To appeal from a judgment or an appealable order of the superior court in a
6 felony case—other than a judgment imposing a sentence of death—the
7 defendant or the People must file a notice of appeal in that superior court. To
8 appeal after a plea of guilty or nolo contendere or after an admission of
9 probation violation, the defendant must also comply with (b).

10
11 (2) As used in (1), “felony case” means any criminal action in which a felony is
12 charged, regardless of the outcome. A felony is “charged” when an
13 information or indictment accusing the defendant of a felony is filed or a
14 complaint accusing the defendant of a felony is certified to the superior court
15 under Penal Code section 859a. A felony case includes an action in which
16 the defendant is charged with:

17
18 (A) A felony and a misdemeanor or infraction, but is convicted of only the
19 misdemeanor or infraction;

20
21 (B) A felony, but is convicted of only a lesser offense; or

22
23 (C) An offense filed as a felony but punishable as either a felony or a
24 misdemeanor, and the offense is thereafter deemed a misdemeanor
25 under Penal Code section 17(b).

26
27 (3) If the defendant appeals, the defendant or the defendant’s attorney must sign
28 the notice of appeal. If the People appeal, the attorney for the People must
29 sign the notice.

30
31 (4) The notice of appeal must be liberally construed. Except as provided in (b),
32 the notice is sufficient if it identifies the particular judgment or order being
33 appealed. The notice need not specify the court to which the appeal is taken;
34 the appeal will be treated as taken to the Court of Appeal for the district in
35 which the superior court is located.

36
37 **(b) Appeal after plea of guilty or nolo contendere or after admission of probation**
38 **violation**

39
40 (1) Appeal requiring a certificate of probable cause
41

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

1 ~~(1)(A)~~ Except as provided in (4), To appeal from a superior court
2 judgment after a plea of guilty or nolo contendere or after an admission
3 of probation violation on grounds that challenge the validity of the plea
4 or admission, the defendant must file in that superior court—with the
5 notice of appeal required by (a)—the written statement required by
6 Penal Code section 1237.5 for issuance of a certificate of probable
7 cause.

8
9 ~~(2)(B)~~ Within 20 days after the defendant files a written statement under
10 ~~(1)~~Penal Code section 1237.5, the superior court must sign and file
11 either a certificate of probable cause or an order denying the certificate.

12
13 (2) Appeal not requiring a certificate of probable cause

14
15 To appeal from a superior court judgment after a plea of guilty or nolo
16 contendere or after an admission of probation violation on grounds that do
17 not challenge the validity of the plea or admission, the defendant need not file
18 the written statement required by Penal Code section 1237.5 for issuance of a
19 certificate of probable cause. No certificate of probable cause is required for
20 an appeal based on:

21
22 (A) The denial of a motion to suppress evidence under Penal Code section
23 1538.5; or

24
25 (B) Grounds that arose after entry of the plea or admission and do not ~~affect~~
26 ~~the plea's validity~~, as a substantive matter, challenge the validity of the
27 plea or admission.

28
29 ~~(3) — If the defendant does not file the statement required by (1) or if the superior~~
30 ~~court denies a certificate of probable cause, the superior court clerk must~~
31 ~~mark the notice of appeal “Inoperative,” notify the defendant, and send a~~
32 ~~copy of the marked notice of appeal to the district appellate project.~~

33
34 (3) Appeal without a certificate of probable cause

35
36 If the defendant does not file the written statement required by Penal Code
37 section 1237.5 or the superior court denies a certificate of probable cause, the
38 appeal will be limited to issues that do not require a certificate of probable
39 cause.

40
41 ~~(4) — The defendant need not comply with (1) if the notice of appeal states that the~~
42 ~~appeal is based on:~~

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

~~(A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or~~

~~(B) Grounds that arose after entry of the plea and do not affect the plea's validity.~~

~~(5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).~~

(c) Notification of the appeal

(1) When a notice of appeal is filed, the superior court clerk must promptly send a notification of the filing to the attorney of record for each party, to any unrepresented defendant, to the reviewing court clerk, to each court reporter, and to any primary reporter or reporting supervisor. ~~If the defendant also files a statement under (b)(1), the clerk must not send the notification unless the superior court files a certificate under (b)(2).~~

(2) The notification must show the date it was sent, the number and title of the case, and the dates the notice of appeal and any certificate under ~~(b)(2)~~ (b)(1)(B) were filed. If the information is available, the notification must also include:

(A) The name, address, telephone number, e-mail address, and California State Bar number of each attorney of record in the case;

(B) The name of the party each attorney represented in the superior court; and

(C) The name, address, telephone number and e-mail address of any unrepresented defendant.

(3) The notification to the reviewing court clerk must also include a copy of the notice of appeal, any certificate filed under (b)(1), and the sequential list of reporters made under rule 2.950.

(4) A copy of the notice of appeal is sufficient notification under (1) if the required information is on the copy or is added by the superior court clerk.

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

- 1 (5) The sending of a notification under (1) is a sufficient performance of the
2 clerk’s duty despite the discharge, disqualification, suspension, disbarment,
3 or death of the attorney.
4
- 5 (6) Failure to comply with any provision of this subdivision does not affect the
6 validity of the notice of appeal.
7

8 **Advisory Committee Comment**
9

10 **Subdivision (a).** Penal Code section 1235(b) provides that an appeal from a judgment or
11 appealable order in a “felony case” is taken to the Court of Appeal, and Penal Code section 691(f)
12 defines “felony case” to mean “a criminal action in which a felony is charged. —.” Rule
13 8.304(a)(2) makes it clear that a “felony case” is an action in which a felony is charged *regardless*
14 *of the outcome of the action*. Thus the question whether to file a notice of appeal under this rule or
15 under the rules governing appeals to the appellate division of the superior court (rule 8.800 et
16 seq.) is answered simply by examining the accusatory pleading: if that document charged the
17 defendant with at least one count of felony (as defined in Penal Pen. Code, section § 17(a)), the
18 Court of Appeal has appellate jurisdiction and the appeal must be taken under this rule *even if the*
19 *prosecution did not result in a punishment of imprisonment in a state prison*.
20

21 It is settled case law that an appeal is taken to the Court of Appeal not only when the defendant is
22 charged with and convicted of a felony, but also when the defendant is charged with both a felony
23 and a misdemeanor (Pen. Code, § 691(f) but is convicted of only the misdemeanor (e.g., *People*
24 *v. Brown* (1970) 10 Cal.App.3d 169); when the defendant is charged with a felony but is
25 convicted of only a lesser offense (Pen. Code, § 1159; e.g., *People v. Spreckels* (1954) 125
26 Cal.App.2d 507); and when the defendant is charged with an offense filed as a felony but
27 punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a
28 misdemeanor under Penal Code section 17(b) (e.g., *People v. Douglas* (1999) 20 Cal.4th 85;
29 *People v. Clark* (1971) 17 Cal.App.3d 890).
30

31 Trial court unification did not change this rule: after as before unification, “Appeals in felony
32 cases lie to the [C]ourt of [A]ppeal, regardless of whether the appeal is from the superior court,
33 the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) [except in death
34 penalty cases, Courts of Appeal have appellate jurisdiction when superior courts have original
35 jurisdiction ‘in causes of a type within the appellate jurisdiction of the [C]ourts of [A]ppeal on
36 June 30, 1995.—.’]” (“~~Recommendation on~~ Trial Court Unification: Revision of Codes” (July
37 1998) 28 *Cal. Law Revision Com. Rep.* 455–456.)
38

39 **Subdivision (b).** ~~Under (b)(1), the defendant is required to file both a notice of appeal and the~~
40 ~~statement required by Penal Code section 1237.5(a) for issuance of a certificate of probable~~
41 ~~cause. Requiring a notice of appeal in all cases simplifies the rule, permits compliance with the~~
42 ~~signature requirement of rule 8.304(a)(3), ensures that the defendant’s intent to appeal will not be~~

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

1 ~~misunderstood, and makes the provision consistent with the rule in civil appeals and with current~~
2 ~~practice as exemplified in the Judicial Council form governing criminal appeals.~~

3
4 ~~Because of the drastic consequences of failure to file the statement required for issuance of a~~
5 ~~certificate of probable cause in an appeal after a plea of guilty or nolo contendere or after an~~
6 ~~admission of probation violation, (b)(5) alerts appellants to a relevant rule of case law, i.e., that,~~
7 ~~although such an appeal may be maintained without a certificate of probable cause if the notice of~~
8 ~~appeal states the appeal is based on the denial of a motion to suppress evidence or on grounds~~
9 ~~arising after entry of the plea and not affecting its validity, no *issue* challenging the validity of the~~
10 ~~plea is cognizable on that appeal without a certificate of probable cause. (*People v. Mendez*~~
11 ~~(1999) 19 Cal.4th 1084, 1104.)~~ Subdivision (b)(1) reiterates the requirement set forth in Penal
12 Code section 1237.5(a) that to challenge the validity of a plea or the admission of a probation
13 violation on appeal under Penal Code section 1237(a), the defendant must file both a notice of
14 appeal and the written statement required by section 1237.5(a) for the issuance of a certificate of
15 probable cause. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1098 [probable cause certificate
16 requirement is to be applied strictly].)

17
18 Subdivision (b)(2) identifies exceptions to the certificate of probable cause requirement. These
19 include an appeal that challenges the denial of a motion to suppress evidence under Penal Code
20 section 1538.5 (see *People v. Stamps* (2020) 9 Cal.5th 685, 694) and an appeal under Penal Code
21 section 1237(b) that does not challenge the validity of the plea or the admission of a probation
22 violation (see, e.g., *id.* at pp. 694–698 [appeal based on a post-plea change in the law]; *People v.*
23 *Arriaga* (2014) 58 Cal.4th 950, 958–960 [appeal of the denial of a motion to vacate a conviction
24 based on inadequate advisement of potential immigration consequences under Penal Code section
25 1016.5]; and *People v. French* (2008) 43 Cal.4th 36, 45–46 [appeal that challenges a post-plea
26 sentencing issue that was not resolved by, and as a part of, the negotiated disposition]).

27
28 Subdivision (b)(3) makes clear that if a defendant raises an issue on appeal that requires a
29 certificate of probable cause, but the defendant does not file the written statement required by
30 Penal Code section 1237.5 or the superior court denies a certificate, then the appeal is limited to
31 issues, such as those identified in subdivision (b)(2), that do not require a certificate of probable
32 cause. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1088–1089.)

33