

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR21-__

Title

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

Action Requested

Review and submit comments by May 21,
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

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Executive Summary and Origin

The Appellate Advisory Committee proposes amending the rule that governs initiating an appeal after a plea of guilty or nolo contendere or after an admission of 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. 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. 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 probation violation. The defendant in such an 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:

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 It is circulated for comment purposes only.

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

However, in a later 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 attack 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 or to file it 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 causing delays in filing 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) states 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, subdivision (b)(1) and (2) would be reorganized to separate provisions addressing appeals requiring a certificate of probable cause from appeals not requiring a certificate.

New subdivision (b)(3) would address an appeal with no certificate of probable cause. Rather than requiring clerks to mark a notice of appeal inoperative, notify the defendant, and send a copy of the marked notice of appeal to the district appellate project, the rule would simply

provide that appeals initiated by notices of appeal filed without a certificate of probable cause or the statement requesting a certificate are limited to issues that do not require a certificate of probable cause.

The proposed amendments would also lessen the reliance on the notice of appeal document that is currently written into the rule. For example, the rule provides that a defendant need not request a certificate of probable cause “if the notice of appeal states that the appeal is based on” grounds not requiring a certificate. (Rule 8.304(b)(4).) If the “notice of appeal contains [such] a statement, the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also” requests a certificate. (Rule 8.304(b)(5).) The proposed amended language would shift the focus from what is stated on the notice of appeal to the underlying basis for the appeal.

The proposal also includes conforming changes to subdivision (c) regarding notification of the appeal and the advisory committee comment to subdivision (b).

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 filing notices of appeal 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

1 Title 8. Appellate Rules

2
3 Division 1. Rules Relating to the Supreme Court and Courts of Appeal

4
5 Chapter 3. Criminal Appeals

6
7 Article 1. Taking the Appeal

8
9
10 Rule 8.304. Filing the appeal; certificate of probable cause

11
12 (a) Notice of appeal

- 13
14 (1) To appeal from a judgment or an appealable order of the superior court in a
15 felony case—other than a judgment imposing a sentence of death—the
16 defendant or the People must file a notice of appeal in that superior court. To
17 appeal after a plea of guilty or nolo contendere or after an admission of
18 probation violation, the defendant must also comply with (b).
19
- 20 (2) As used in (1), “felony case” means any criminal action in which a felony is
21 charged, regardless of the outcome. A felony is “charged” when an
22 information or indictment accusing the defendant of a felony is filed or a
23 complaint accusing the defendant of a felony is certified to the superior court
24 under Penal Code section 859a. A felony case includes an action in which
25 the defendant is charged with:
26
- 27 (A) A felony and a misdemeanor or infraction, but is convicted of only the
28 misdemeanor or infraction;
29
- 30 (B) A felony, but is convicted of only a lesser offense; or
31
- 32 (C) An offense filed as a felony but punishable as either a felony or a
33 misdemeanor, and the offense is thereafter deemed a misdemeanor
34 under Penal Code section 17(b).
35
- 36 (3) If the defendant appeals, the defendant or the defendant’s attorney must sign
37 the notice of appeal. If the People appeal, the attorney for the People must
38 sign the notice.
39
- 40 (4) The notice of appeal must be liberally construed. Except as provided in (b),
41 the notice is sufficient if it identifies the particular judgment or order being
42 appealed. The notice need not specify the court to which the appeal is taken;

1 the appeal will be treated as taken to the Court of Appeal for the district in
2 which the superior court is located.

3
4 *(Subd (a) amended effective January 1, 2007.)*
5

6 **(b) Appeal after plea of guilty or nolo contendere or after admission of probation**
7 **violation**

8
9 (1) Appeal based on grounds requiring a certificate of probable cause
10

11 ~~(1)(A)~~ Except as provided in (4), To appeal from a superior court
12 judgment after a plea of guilty or nolo contendere or after an admission
13 of probation violation on grounds that attack the validity of the plea or
14 admission, the defendant must file in that superior court—with the
15 notice of appeal required by (a)—the statement required by Penal Code
16 section 1237.5 for issuance of a certificate of probable cause.

17
18 ~~(2)(B)~~ Within 20 days after the defendant files a statement under (1), the
19 superior court must sign and file either a certificate of probable cause
20 or an order denying the certificate.

21
22 ~~(4) The defendant need not comply with (1) if the notice of appeal states that the~~
23 ~~appeal is based on:~~
24

25 (2) Appeal that does not require a certificate of probable cause
26

27 To appeal from a superior court judgment after a plea of guilty or nolo
28 contendere or after an admission of probation violation on grounds that do
29 not attack the validity of the plea or admission, the defendant need not file the
30 statement required by Penal Code section 1237.5 for issuance of a certificate
31 of probable cause. No certificate of probable cause is required for an appeal
32 based on:
33

34 (A) The denial of a motion to suppress evidence under Penal Code section
35 1538.5; or

36
37 (B) Grounds that arose after entry of the plea or admission and do not affect
38 the validity of the plea or admission.

39
40 ~~(3) If the defendant does not file the statement required by (1) or if the superior~~
41 ~~court denies a certificate of probable cause, the superior court clerk must~~
42 ~~mark the notice of appeal “Inoperative,” notify the defendant, and send a~~
43 ~~copy of the marked notice of appeal to the district appellate project.~~

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(3) Appeal with no certificate of probable cause

If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the appeal is limited to issues that do not require a certificate of probable cause.

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

~~(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)(4) If the defendant's notice of appeal contains a statement under appeal is based on grounds stated in (2), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1) and the court issues a certificate of probable cause.~~

(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) 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

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

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

7
8 (4) A copy of the notice of appeal is sufficient notification under (1) if the
9 required information is on the copy or is added by the superior court clerk.

10
11 (5) The sending of a notification under (1) is a sufficient performance of the
12 clerk’s duty despite the discharge, disqualification, suspension, disbarment,
13 or death of the attorney.

14
15 (6) Failure to comply with any provision of this subdivision does not affect the
16 validity of the notice of appeal.

17
18 **Advisory Committee Comment**

19
20 **Subdivision (a).** Penal Code section 1235(b) provides that an appeal from a judgment or
21 appealable order in a “felony case” is taken to the Court of Appeal, and Penal Code section 691(f)
22 defines “felony case” to mean “a criminal action in which a felony is charged. . . .” Rule
23 8.304(a)(2) makes it clear that a “felony case” is an action in which a felony is charged *regardless*
24 *of the outcome of the action*. Thus the question whether to file a notice of appeal under this rule or
25 under the rules governing appeals to the appellate division of the superior court (rule 8.800 et
26 seq.) is answered simply by examining the accusatory pleading: if that document charged the
27 defendant with at least one count of felony (as defined in Penal Code, section 17(a)), the Court of
28 Appeal has appellate jurisdiction and the appeal must be taken under this rule *even if the*
29 *prosecution did not result in a punishment of imprisonment in a state prison*.

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

40
41 Trial court unification did not change this rule: after as before unification, “Appeals in felony
42 cases lie to the [C]ourt of [A]ppel, regardless of whether the appeal is from the superior court,
43 the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) [except in death

1 penalty cases, Courts of Appeal have appellate jurisdiction when superior courts have original
2 jurisdiction ‘in causes of a type within the appellate jurisdiction of the [C]ourts of [A]ppeal on
3 June 30, 1995. . . .’.” (“Recommendation on Trial Court Unification” (July 1998) 28 *Cal. Law*
4 *Revision Com. Rep.* 455–56.)

5
6 **Subdivision (b).** Under (b)(1), to raise an issue challenging the validity of the plea, the defendant
7 is required to file both a notice of appeal and the statement required by Penal Code section
8 1237.5(a) for issuance of a certificate of probable cause. ~~Requiring a notice of appeal in all cases~~
9 ~~simplifies the rule, permits compliance with the signature requirement of rule 8.304(a)(3), ensures~~
10 ~~that the defendant’s intent to appeal will not be misunderstood, and makes the provision~~
11 ~~consistent with the rule in civil appeals and with current practice as exemplified in the Judicial~~
12 ~~Council form governing criminal appeals. Subdivision (b)(2) addresses appeals that do not~~
13 ~~require a certificate of probable cause, including the grounds upon which such appeals may be~~
14 ~~based. Under (b)(3), if the defendant does not file the statement in (b)(1) or the superior court~~
15 ~~denies the certificate, the appeal is limited to grounds that do not require a certificate of probable~~
16 ~~cause.~~

17
18 ~~Because of the drastic consequences of failure to file the statement required for issuance of a~~
19 ~~certificate of probable cause in an appeal after a plea of guilty or nolo contendere or after an~~
20 ~~admission of probation violation, Subdivision (b)(5)(4) alerts appellants to a relevant rule of case~~
21 ~~law, i.e., that, although such an appeal may be maintained without a certificate of probable cause~~
22 ~~if the notice of appeal states the appeal is based on the denial of a motion to suppress evidence or~~
23 ~~on grounds arising after entry of the plea and not affecting its validity, no issue challenging the~~
24 ~~validity of the plea is cognizable on that appeal without a certificate of probable cause. (See~~
25 ~~*People v. Mendez* (1999) 19 Cal.4th 1084, 1104.)~~