

The Notice of Appeal in Criminal Appeals

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Sentencing has been pronounced and the trial court has advised the defendant of his or her right to appeal. Now what? This article discusses the notice of appeal, from filing the notice to curing any defects.

First things first

The right to appeal is not a constitutional right, but rather a statutory right. (*People v. Connor* (2004) 115 Cal.App.4th 669, 677.) An appeal is initiated by filing a notice of appeal with the clerk of the superior court within 60 days from rendition of the judgment or challenged order from that court. (Cal. Rules of Ct., rule 8.308(a).)

Trial Counsel Practice Tip: Take the notice of appeal, the application for appointment of counsel, and the defendant background information forms with you to sentencing. Penal Code section 1240.1 requires appointed counsel to assist those clients who need help filling out all three forms. Forms for the Third and Fifth District Courts of Appeal can be found on the CCAP website at:

http://capcentral.org/procedures/start_appeal/trial_attorney.asp.

File the notice of appeal with the superior court clerk. Return the application and background information forms to CCAP.

What judgments and orders are appealable?

“[T]he general rule [is] that a criminal defendant can appeal only from final judgments and those orders deemed by statute to be final judgments.” (*People v. Mazurette* (2001) 24 Cal.4th 789, 792.) Note that a verdict is not a final judgment, and thus is not appealable. (*People v. Valladoli* (1996) 13 Cal.4th 590, 597.) A defendant must wait until a sentence has been imposed after the guilty verdict, as the sentence is the final, and thus appealable, judgment. (*In re Gray* (2009) 179 Cal.App.4th 1189, 1196.) In juvenile cases under Welfare and Institutions Code section 602, the disposition is the appealable order. (*In re Mario C* (2004) 124 Cal. App. 4th 1303, 1307-1308.)

Penal Code section 1237 details which court actions are appealable. An appeal may be taken by the defendant:

- (a) From a final judgment of conviction except as provided in Section 1237.1 [error calculating presentence custody credits] and Section 1237.5 [conviction upon a guilty plea or nolo contendere]. A sentence, an order granting probation, or the commitment of a defendant for insanity, the indeterminate commitment of a defendant as a mentally disordered sex offender, or the commitment of a defendant for controlled substance addiction shall be deemed to be a final judgment within the meaning of

this section. Upon appeal from a final judgment the court may review any order denying a motion for a new trial.

- (b) From any order made after judgment, affecting the substantial rights of the party.

(Pen. Code, § 1237.)

Who files the notice of appeal?

The notice of appeal may be filed either by the defendant or defendant's trial counsel. (Pen. Code, § 1239, subd. (a).) However, where any plea results in a judgment of death, an appeal is automatic without any action being required by the defendant or trial counsel. (Pen. Code, § 1239, subd. (b).)

Trial Counsel Practice Tip: If the defendant tells trial counsel that he or she wishes to appeal, trial counsel has a duty not to ignore that request. (Pen. Code, §1240.1; *People v. Camarillo* (1967) 66 Cal.2d 455, 458.) This duty requires trial counsel "either to file the notice of appeal, or to instruct the defendant as to the proper procedure, or to see that the defendant has counsel to do these things for him." (*People v. Camarillo* (1967) 66 Cal.2d 455, 458.)

Further, "[i]t shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment 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 a 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).)

Trial counsel's duty does not obligate him or her to prosecute the appeal. (*People v. Camarillo, supra*, 66 Cal.2d 455, 458.) But, to be certain there is no understanding, if you provide your name and address in the caption of the notice of appeal form (CR-120), be sure to check box 3 indicating the defendant wants appointment of counsel on appeal.

When must the notice of appeal be filed?

A notice of appeal must be filed within 60 days from the date of the judgment or order being appealed. (Cal. Rules of Court, rule 8.308(a).)

"A timely notice of appeal, as a general matter, is 'essential to appellate jurisdiction.' [Citation.] It largely divests the superior court of jurisdiction and vests it in the Court of Appeal. [Citation.] An untimely notice of appeal is 'wholly ineffectual: The delay cannot be waived, it cannot be cured by nunc pro tunc order [(an order having retroactive effect)], and the appellate court has no power to give relief, but must dismiss the appeal on motion or on its own motion.' [Citation.]" (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094.)

(There are some exceptions to the bar on untimely notices of appeal, which are discussed later in this article.)

Who signs the notice of appeal?

The notice of appeal must be signed by either the defendant or the defendant's attorney. (Cal. Rules of Court, rule 8.304(a)(3); see also Judicial Council form CR-120 [Notice of Appeal].)

“[I]mperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court.” (*Becker v. Montgomery* (2001) 532 U.S. 757, 767.) Thus, a failure to sign a timely notice of appeal does not result in a dismissal of that appeal, but rather may be remedied by a corrected notice of appeal. (*Id.* at p. 768.)

Where must the notice of appeal be filed?

The notice of appeal must be filed in the superior court where the matter being appealed was decided. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094.)

Sufficiency of the notice of appeal

“[A] notice of appeal will be liberally construed to permit a hearing on the merits and avoid a dismissal because of some technical defect or irregularity.” (*People v. Robinson* (1954) 43 Cal.2d 143, 145; see also Cal. Rules of Court, rule 8.304(c)(6) [“Failure to comply with any provision of this subdivision does not affect the validity of the notice of appeal.”].)

Counsel's role related to the notice of appeal

Where trial counsel is involved in the filing of the notice of appeal, he or she must make certain that the form is correctly filled out and timely filed. Court Rules require superior court clerks to send copies of “inoperative” and “late” notices of appeal to the appellate projects. (Calif. Rules of Ct., rules 8.308(d), 304(a)(3) and 8.406(c)). If CCAP receives an inoperative notice of appeal within 60 days of judgment, efforts are made to contact both trial counsel and the defendant to describe the reason the notice of appeal is inoperative and suggest ways to correct the defect.

Notice of appeal requirements following a trial (court or jury)

Beyond the requirement that an appeal be from a final judgment, an appeal brought following a trial requires only that a timely notice of appeal be filed. “When a defendant pleads not guilty and is convicted as the result of a trial, in general any issue bearing on the determination of guilt and apparent from the record is cognizable on appeal.” (*In re Chavez* (2003) 30 Cal.4th 643, 649; see Pen. Code, § 1237.)

Notice of appeal requirements following a plea or admission

A criminal defendant appealing a plea or the admission of a violation of probation, is subject to stricter requirements than defendants appealing a trial or contested probation revocation. (Pen. Code, § 1237.5.) This is because “[b]y admitting guilt a defendant waives an appellate challenge to the sufficiency of the evidence of guilt.” (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1364.)

Section 2(a) on the first page of the Judicial Council notice of appeal form (CR-120) addresses appeals following an “entry of a plea of guilty or no contest or an admission of a probation violation.” There are four options from which the defendant must select all that apply.

Penal Code section 1237.5 provides the procedure for bringing an appeal following a plea or admission. First, the defendant must file a written statement under the penalty of perjury that there are “reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings” that he or she wishes to raise on appeal. (Pen. Code, § 1237.5.) The second page of the Judicial Council notice of appeal form (CR-120) is titled “Request for Certificate of Probable Cause,” and has space for the defendant to provide his or her written statement. This statement gets filed when the notice of appeal is filed. Following this, the trial court will either “certify any arguably meritorious appeal” by issuing a certificate of probable cause, or deny the request. (*People v. Holland* (1978) 23 Cal.3d 77, 84; Pen. Code, § 1237.5.)

For a detailed discussion of when a notice of appeal must include a request for a certificate of probable cause, see CCAP’s Certificate of Probable Cause article found at: (**link pending.)

Obtaining a certificate of probable cause does not reinstate issues waived as a result of the defendant’s guilty plea or probation violation admission (i.e. issues related to defendant’s guilt or innocence). (*People v. Turner* (1985) 171 Cal.App.3d 116, 124–125.) Rather, the certificate allows the defendant to raise issues related to the legality of the proceedings. (*People v. Turner* (1985) 171 Cal.App.3d 116, 127.)

An appellant in a guilty plea case may raise two types of issues without obtaining a certificate of probable cause: sentencing issues and search and seizure issues. (*People v. Panizzon* (1996) 13 Cal.4th 68, 74; Cal. Rules of Court, rule 8.304(b)(4)(a) & (B).) If either of these issues are to be raised, the appropriate box on the notice of appeal must be checked, indicating that the appeal does not challenge the validity of the plea. (Cal. Rules of Court, rule 8.304(b)(4)(a) & (B).)

For a comprehensive discussion of which issues can be raised without a certificate of probable cause and which require a certificate, see CCAP’s Certificate of Probable Cause article found at: http://www.capcentral.org/criminal/guilty_plea/docs/cpc.pdf.

Correcting Errors in the Notice of Appeal

If the 60-day window for filing a notice of appeal has not expired, a defect can be corrected by trial counsel by filing an amended notice of appeal with the superior court. The most common scenarios are discussed below.

Notice of Appeal Does Not Comply with CRC Rule 8.304(b)

If the appeal is after entry of a plea of guilty or no contest or an admission of a probation violation, the Judicial Council notice of appeal form (CR-120) requires the defendant to indicate whether:

- (1) This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea. (Cal. Rules of Court, rule 8.304(b).)
- (2) This appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5.
- (3) This appeal challenges the validity of the plea or admission. (You must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature.)
- (4) Other basis for this appeal (you must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature) (*specify*):

For all other appeals, the defendant must indicate:

- (1) This appeal is after a jury or court trial. (Pen. Code, § 1237(a).)
- (2) This appeal is after a contested violation of probation. (Pen. Code, § 1237(b).)
- (3) Other (*specify*):

If the party who filled out the notice of appeal did not check the correct box(es), the notice of appeal is defective and must be corrected.

Notice of appeal does not include all cases

Another defective notice of appeal scenario is where the defendant's current case caused a revocation of probation in an earlier case. Both the current case and the violation of probation case move along together procedurally and then are sentenced at the same time. The defect that can occur is that the notice of appeal will include the case number for the current case, but not for the case for which probation was revoked. If this happens, and there is no reason sentencing on the earlier case was not appealed, the notice of appeal must be amended to include the earlier case. CCAP will alert trial counsel if more than one case is listed in the abstract of judgment and the notice of appeal only lists one case for the appeal.

Notice of Appeal Is Untimely

A notice of appeal must be filed within 60 days after the rendition of judgment or the

making of the order that is appealable. (Cal. Rules of Court, rule 8.308(a).) There are two exceptions, both of which are based on a criminal defendant's good faith efforts to timely file a notice of appeal: reliance on the defendant's trial counsel and reliance on prison officials.

Reliance on Trial Counsel

The defendant may be entitled to relief if his or her attorney failed to follow through on the defendant's timely request to file a notice of appeal. (*In re Benoit* (1973) 10 Cal.3d 72.) The defendant's reliance on trial counsel must be reasonable. (*In re Chavez* (2003) 30 Cal.4th 643, 658.) "[W]hen a notice of appeal in a criminal case is received by the trial court after the jurisdictional deadline to perfect the appeal, the appellate court may deem the notice of appeal to have been constructively filed in a timely manner if, prior to the deadline, the defendant expressly relied on his or her trial counsel to file it, but trial counsel neglected to do so." (*People v. Zarazua* (2009) 179 Cal.App.4th 1054, 1058.)

Reliance on Prison Officials

If the notice of appeal received by the superior court clerk was mailed from a correctional institution, the date of mailing or the date that it was handed to the custodial officials is determinative, even if the envelope was not received until after the time to appeal had expired. (Cal. Rules of Court, rule 8.308(e).) If the notice was timely mailed or handed to a custodial official, the defendant may be entitled to relief under the doctrine of constructive filing. (*In re Jordan* (1992) 4 Cal.4th 116.) Additionally, the defendant may be entitled to relief if he or she relied upon representations made by prison officials, which caused the defendant to have a false sense of security. (*In re Benoit, supra*, 10 Cal.3d 72, 83.)

Request for Relief

A request for relief from an untimely notice of appeal as a result of reliance on others can be made by application for constructive notice in both the Third and Fifth Districts. The Third District prefers the request be made in a motion and the Fifth District prefers the request be made with a petition for writ of habeas corpus. For an example, see:

http://www.capcentral.org/resources/motion/noa_constructive/noa_constructive.pdf.