

[Use of this motion:

This original application was filed in late 2003 by appellate counsel in a case where appellant entered guilty pleas in two separate cases and was sentenced to prison on both. Appellant timely filed, in pro. per., a notice of appeal and request for certificate of probable cause that listed only one of the case numbers. The superior court granted the certificate, and the appeal proceeded as to the one case only. Following the filing of this application, the Fifth District Court of Appeal allowed the AG 15 days to respond. No response was filed. The court then granted the application to deem both the notice of appeal and certificate of probable cause to apply to both case numbers. (This will still work where *Chavez* and *Mendez* timeliness problems are not present.) The sample has been updated to reflect renumbering of Rules of Court effective 1/1/07.]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

_____ APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,)	
	)	No. _____
	)	(_____ Co.
Plaintiff and Respondent,	)	No. _____)
)	
v.	)	APPLICATION FOR CON-
	)	STRUCTIVE FILING
[APPELLANT],	)	OF NOTICE OF APPEAL;
	)	DECLARATION OF
Defendant and Appellant.	)	[APPELLANT]
_____)	

TO THE HONORABLE _____, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT:

Pursuant to California Rules of Court, rule 8.54, appellant [APPELLANT] petitions this court for an order deeming the Notice of Appeal filed in [] County Superior Court action

No. _____ to be constructive notice of appeal from the judgment in [] County Superior Court action No. _____.

This petition is based upon the Memorandum of Points and Authorities, and declaration of [APPELLANT] attached hereto.

Dated: October ____, 2007

Respectfully Submitted,

DAVID L. SAINÉ
Attorney at Law
State Bar No. 143162
P.O. Box 20186
Bakersfield, CA 93390-0186
(661)325-1300

Attorney for Appellant
[APPELLANT]

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

On _____, a criminal complaint was filed in _____ County Superior Court action no. _____, charging appellant, [APPELLANT], with: carjacking

(Pen. Code, sec. 215, subd. (a)); assault with a deadly weapon (Pen. Code, sec. 245, subd. (a)(1)); and unlawful driving of a vehicle (Veh. Code, sec. 10851, subd. (a)), arising out of an incident on _____, in which appellant allegedly took a Toyota pickup truck from its owner, _____. (CT 2-3.)

Although the information or complaint in Kern County Superior Court action no. _____ is not contained in the Clerk's Transcript on appeal, the Probation Report dated _____, indicates that appellant was charged in this case with: the unlawful driving of a vehicle (Veh. Code, sec. 10851, subd. (a)); eluding a police officer (Veh. Code, sec. 2800.2); obtaining a stolen vehicle (Pen. Code, sec. 496d); and misdemeanor battery (Pen. Code, sec. 243, subd. (a)). (Prob. Rep., p. 2.) The incident giving rise to action no. _____ occurred on the same date as the first case, _____, but approximately one hour afterward, and allegedly involved the taking of a vehicle from another victim, _____. (Prob. Rep., pp. 6-7.)

On _____, pursuant to a plea agreement, appellant pleaded no contest to one count of carjacking in

action no. _____, and no contest to an amended count of assault with means likely to produce great bodily injury in action no. _____. (CT 7-8; RT 9-10.) The plea agreement provided that appellant would serve no more than a total of five years in prison. (RT 2.) Following entry of the no contest pleas, the matter was set for preparation of a probation report and sentencing. (CT 8.) On _____, appellant was sentenced to a term of five years in prison in action no. _____, and a concurrent term of three years in action no. _____. (CT 12-13.)

On _____, an abstract of judgment was prepared that reflects the pleas and sentences set forth above. (CT 15.) The abstract of judgment lists *both* case numbers in its heading. (_____.) On _____, appellant timely filed her notice of appeal in propria persona, filling in the blank space for the case number with "_____". (CT 24.) Appellant, again in propria persona, also filled out a form requesting issuance of a certificate of probable cause, again listing only the _____ case, not the _____ case. (CT 17.) This request was granted by the trial court on _____. (CT

18.) It appears that the two documents were prepared after appellant had been transported to and incarcerated in _____ in _____, California. (CT 23.)

As her declaration indicates, appellant filled out the notice of appeal herself, intending to appeal from both action nos. _____ **and** _____. (Decl of [APPELLANT], p. 2, attached.) At the time she filled out the form notice of appeal, she had no legal training and she was not given any legal advice as to how to fill out the notice of appeal. (*Ibid.*) Moreover, at the time, she did not understand or appreciate the legal significance of listing, or failing to list, the appropriate action numbers for both cases on the form. (*Ibid.*) Appellant considered both cases to be part of the same plea bargain since the dispositions and sentencing of the two cases were conducted simultaneously and she intended and desired to appeal from both cases. (*Id.* at pp. 2-3.) Had appellant understood the significance of listing action no. _____ along with no. _____ in the notice of appeal, she would have done so. (*Id.* at p. 3.)

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ARGUMENTS

I.

THE FILING OF THE NOTICE OF APPEAL IN KERN SUPERIOR COURT ACTION NO. _____ SHOULD BE DEEMED TO BE CONSTRUCTIVE NOTICE OF APPEAL IN ACTION NO. _____.

California Rules of Court, rule 8.304(a)(4), regarding notice of appeal provides in pertinent part as follows:

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

Although in *People v. Chavez* (2003) 30 Cal.4th 643, the California Supreme Court narrowly interpreted former Rules of Court, Rule 45, subdivision (e), providing for relief from default, as inapplicable to late-filed notices of appeal, nevertheless, an appellate court has discretion to "liberally" construe a notice of appeal "in favor of its sufficiency" (Rules of Court, rule 8.304(a)(4)), and also to find a constructive filing of an otherwise untimely notice of appeal when a defendant has justifiably relied upon trial counsel to protect his appellate rights. (*In re*

Benoit (1973) 10 Cal.3d 72; *People v. Casillas* (1990) 218 Cal.App.3d 1365, 1368; *People v. Grey* (1990) 225 Cal.App.3d 1336, 1340; *People v. Serrano* (1973) 33 Cal.App.3d 331.)

Moreover, the long-standing policy of the courts is to hear appeals on their merits to avoid forfeiture of substantial rights on technical grounds. (*People v. Chapman* (1971) 5 Cal.3d 218, 225; *People v. Acosta* (1969) 71 Cal.2d 683, 685; *People v. Casillas* (1964) 61 Cal.2d 344, 345-346.) All doubts should be resolved in favor of the right to appeal. (*People v. Bailey* (1969) 1 Cal.3d 180, 187; *People v. Diehl* (1964) 62 Cal.2d 114, 117; *People v. Tucker* (1964) 61 Cal.2d 828, 832.)

Here, unlike the situation in *Chavez*, in which no notice of appeal was ever filed within the sixty-day jurisdictional time period, appellant **did** file a timely notice of appeal as well as a request for issuance of a certificate of probable cause. Appellant intended that these documents apply to [his/her] entire plea bargain, *i.e.*, to *both* criminal cases. However, because appellant was unschooled in the law, had no legal counsel or advice while filling out the forms, and was incarcerated at the

time, [he/she] did not realize that, legally, the notice of appeal should list both case numbers.

This was a completely understandable ministerial error on the part of appellant, who at the time of [his/her] plea was a [e.g., twenty-five year old female with a high-school equivalency certificate, a limited employment history as a cashier for _____, and a criminal history consisting solely of one prior misdemeanor assault.]

[Supporting facts if applicable: First, the underlying facts giving rise to the two separate criminal cases were temporally related, occurring within an hour of each other. Second, the two incidents were factually related in that after appellant and her companion, _____, driving _____ truck, pulled into a turnout because of an argument, appellant left _____ truck and contacted _____, allegedly forcing her to get out of her car, after which appellant drove off. While these are technically separate crimes, they could reasonably be understood by appellant to be part of one continuous series of events.]

[Third, both cases were processed together in the _____ County Superior courts: appellant was offered a plea

bargain that included both cases, she pleaded guilty to charges in both cases, she was represented by the same public defender in both cases, she was advised about both cases by her attorney at the same time, and she was sentenced on both cases at the same hearing, the sentences in the two cases running concurrently. Fourth, a single probation report was prepared for both cases and the abstract of judgment lists both case numbers.]

From all of this, an incarcerated defendant with appellant's limited educational and criminal background could not reasonably be expected to appreciate the legal significance of listing both case numbers on the notice of appeal and the request for certificate of probable cause. This case is a perfect one for the exercise of this court's discretionary power under rule 8.304(a)(4), to deem appellant's notice of appeal sufficient as to both case numbers, or else to deem the notice of appeal in the first case as a constructive notice of appeal in the second, pursuant to the rationale of *People v. Benoit, supra*.

It bears emphasis that, notwithstanding the language in *Chavez* regarding the unavailability of relief from

default under former rule 45, the cases discussed in *Chavez* all concerned defendants who did **not** file any notice of appeal whatsoever.

By contrast, in this case, appellant exercised due diligence in timely filing both [his/her] notice of appeal and [his/her] request for issuance of a certificate of probable cause. Indeed, the *only* error made by appellant was [his/her] technical failure to list the second case number on the documents [he/she] filled out at the prison, an error that was, under the circumstances of this case, entirely understandable.

As such, the facts in this case are arguably *stronger* than the constructive notice situation discussed in *Benoit* since here, of course, appellant actually *did* file a notice of appeal well within the statutory time period. In such a situation, there is literally no prejudice to the State of California or to the courts by deeming the notice of appeal to include both case numbers since the appellant's timely notice of appeal in the first case has already put everyone on notice that appellant wishes further review of her case.

The facts in this case are actually much closer to the older cases involving the sufficiency of the notice of appeal itself. (E.g., *In re Gonsalves* (1957) 48 Cal.2d 638 [letter to

trial judge and clerk stating "I am dissatisfied with the judgment, please accept my notice of appeal" construed as expression of desire that clerk accept letter as notice of appeal, although it does not state name or number of case nor date of rendition of judgment]; *People v. Robinson* (1954) 43 Cal.2d 132 [where revocation of probation and pronouncement of judgment were practically one act and defendant, in taking his appeal from such adjudication, improperly designates objectionable ruling as "order revoking probation" rather than judgment of which order was an integral part, and where attempted appeal was timely taken and respondent suffered no prejudice by reason of improper designation, notice of appeal should be construed as sufficient to constitute an appeal from the "judgment," as authorized and intended, and merits of appeal will be considered in interest of justice]; *People v. Collins* (1922) 60 Cal.App. 271 [where it cannot be determined from defendant's notice of "an appeal to the appellate court" whether his intention was to appeal from judgment or order only, or from both, but, inasmuch as defendant himself conducted proceedings in court below occurring after judgment of sentence was pronounced, and is not an attorney at law, reviewing court could assume that his intention was to appeal both from judgment and

order denying him new trial and will so regard his notice of appeal].)

II.

FOR THE SAME REASONS, THE FILING OF A STATEMENT PURSUANT TO PENAL CODE SECTION 1237.5 AND THE ISSUANCE OF A CERTIFICATE OF PROBABLE CAUSE AS TO ACTION NO. _____ SHOULD BE DEEMED A STATEMENT AND CERTIFICATE OF PROBABLE CAUSE AS TO ACTION NO. _____.

Penal Code section 1237.5 provides in pertinent part as follows:

No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.

Pursuant to California Rules of Court, rule 8.304(b), and for the same reasons as set forth above in Argument I, should this court deem _____ appellant's notice of appeal

in case no. _____ to be sufficient as a constructive notice of appeal in case no. _____, this court should likewise deem appellant's request for issuance of a certificate of probable cause in case no. _____ to be a constructive request for issuance of a certificate of probable cause in case no. _____, and the certificate of probable cause issued by the trial court in the former should be deemed constructively to include the latter.

CONCLUSION

For the reasons set forth above, appellant respectfully requests that this court deem the notice of appeal and certificate of probable cause in this case to constructively include case no. _____, that undersigned counsel's appointment as appellate counsel be deemed to include both action nos. _____ and _____, and that the appeal record in this case be augmented to include all trial court files and documents in case no. _____ that would normally have been included in the record on appeal.

Dated: _____, 200__

Respectfully Submitted,

DAVID L. SAINÉ
Attorney at Law
State Bar No. 143162
P.O. Box 20186
Bakersfield, CA 93390-0186
(661) 325-1300

Attorney for Appellant
[APPELLANT]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

_____ APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	No. _____
	)	(_____ Co.
Plaintiff and Respondent,	)	No. _____)
)	
v.)	
	)	DECLARATION OF
_____,	)	[APPELLANT]
)	
Defendant and Appellant.)	
_____)	

I, [APPELLANT], declare:

1. I am the defendant and appellant in the above-entitled appeal, and as such I have personal knowledge of the facts stated herein. If called upon to testify on these matters, I could and would testify to the facts as set forth below.

2. On or about _____, I was charged in a criminal complaint in the _____ County Superior Court in Case No. _____ with carjacking and assault with a deadly weapon arising out of an incident on _____, involving one _____.

3. Subsequently, I was charged in _____ County Superior Court Case No. _____, arising out of another incident of carjacking on the same date and involving one _____.

4. On _____, I accepted a plea bargain in

which I agreed to plead, and did plead, no contest to one count of carjacking in Case No. _____, and no contest to one count of assault with a deadly weapon in Case No. _____.

5. On _____, I was sentenced to a five-year term in Case No. _____, and a concurrent three-year term in Case No. _____. I am presently incarcerated at the _____ in _____, California.

6. On _____, acting in propria persona, I filled out a form entitled Notice of Appeal in Case No. _____, along with a request for the issuance of a Certificate of Probable Cause and a request for the appointment of an attorney on appeal.

7. The Notice of Appeal was provided to me and I filled out the document myself. I have no legal training and was not given any legal advice to assist me in filling out the Notice of Appeal. When I did so, I intended to appeal from both case no. _____ and case no. _____.

8. At the time I filled out the Notice of Appeal, I did not understand, and was not advised by anyone, that there was any legal significance to failing to list both of the separate case numbers for the two "no contest" pleas in the Notice of Appeal. I considered the two pleas as one case since they were both part of the same plea bargain, since I entered pleas in the two cases at the same court appearance, and since I was

sentenced on both cases at the same time.

9. My attorney on appeal, _____, has informed me that my Notice of Appeal included only the case number for no. _____, and not no. _____. Had I realized when I filled out the Notice of Appeal that both case numbers had to be listed in the Notice of Appeal in order for me to appeal from both cases, I would have listed both case numbers.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this _____ day of _____, 200__, at _____, California.

APPELLANT