

Petition for Constructive Filing of a Notice of Appeal in a Companion VOP Case Where Trial Counsel Failed to Include Both Cases in the Notice of Appeal

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,

5 Crim. F0XXX1

v.

[Name] County
No. # # #-1

[APPELLANT NAME],

Defendant and Appellant.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

5 Crim F0XXX2

v.

[Name] County
No. # # #

[APPELLANT NAME],

Defendant and Appellant.

**PETITION FOR CONSTRUCTIVE FILING OF NOTICE OF APPEAL,
FOR LEAVE TO FILE A STATEMENT UNDER PENAL CODE SECTION 1237.5,
FOR CONSOLIDATION OF CASES ON APPEAL AND FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF**

TO THE HONORABLE JAMES A. ARDAIZ, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT:

Pursuant to California Rules of Court, rule 8.54, appellant [NAME]

petitions this court for an order deeming the Notice of Appeal filed in [COUNTY]

County Superior Court action No. [# # #-1] to be constructive notice of appeal from the

judgment in action No. [# # #-2], granting leave to file a statement pursuant to Penal

Code section 1237.5, and ordering consolidation of the appeal in case No.[# # #-2] with Court of Appeal case No. F0XXX1 ([COUNTY] County No. # # #-1) and allowing the filing of a supplemental brief.

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

Dated: .

Respectfully submitted,

[YOUR NAME, SBN]
Attorney for Appellant

Address / telephone

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

[BACKGROUND FACTS ON THE TWO CASES, CONVICTIONS,
AND SENTENCING WITH SUPPORTING CITES TO THE RECORD.]

On [DATE], the appellant was found guilty of a violation of [DESCRIBE OFFENSES FOR EXISTING APPEAL CASE] in [COUNTY] Superior Court case No. [# # #-1]. (CT __.) This judgment was appealed by notice of appeal filed on [DATE], and is presently before this court as appeal No. F0XXX1. (CT__.) A notice of appeal was not filed from the probation revocation proceedings in case No. [# # #-2].

ARGUMENT

I

THE FILING OF THE NOTICE OF APPEAL IN [COUNTY] SUPERIOR COURT ACTION NO. [# # #-1] SHOULD BE DEEMED TO BE CONSTRUCTIVE NOTICE OF APPEAL IN ACTION NO. [# # #-2].

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.)

Trial counsel is required by statute to assist a criminal defendant with the preparation and filing of a notice of appeal. (Pen. Code, sec. 1240.1, subd. (b).) The court has discretion 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.)

In this appeal from the judgment of conviction of violation of [OFFENSES] in action No. [# # #-1] (F0XXX1) the appellant has argued that [STATE ISSUE IF ALREADY BRIEFED, e.g., there was insufficient evidence to support the jury verdict].

Appellant's admission to a violation of probation in action No. [###-2] was based upon his conviction in action No. [###-1]. If the appellant is successful in overturning the conviction in action No. [###-1] for insufficiency of the evidence, the factual basis for the appellant's admission to the violation of probation will no longer exist. In that event the admission to a violation of probation in action No. [###-2] should be vacated. If this motion is granted appellant's sole argument in the supplemental brief will be that the reversal of the conviction in action No. [###-1] requires that his admission of a violation in action No. [###-2] must be set aside. Should the judgment in case No. [###-1] be reversed without the admission of violation of probation being set aside, the appellant will not be afforded complete relief in his appeal since the appellant is serving a [SENTENCE e.g., concurrent four year term] on the conviction in case No. [###-2] which will not be automatically vacated by the reversal of his conviction in case No. [###-1].

Appellant relied upon trial counsel to file a notice of appeal to preserve all his appellate rights in these matters. Appellant should not be penalized for counsel's failure to file a notice of appeal which failed to preserve his complete appellate rights. (*In re Benoit, supra*, 10 Cal.3d at pp. 88-89; *People v. Grey, supra*, 225 Cal.App.3d at p. 1340.)

II

THE FILING OF A STATEMENT PURSUANT TO PENAL
CODE SECTION 1237.5 AND THE ISSUANCE OF A
CERTIFICATE OF PROBABLE CAUSE IS REQUIRED

TO MAKE AN APPEAL FROM THE ADMISSION OF A VIOLATION OF PROBATION OPERATIVE.

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.

California Rules of Court, rule 8.304(b), provides in pertinent part as follows:

- (1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court—in addition to the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause.

Assuming the court deems the notice of appeal in case No. [## #-1] to be a notice of appeal in case No. [## #-2], the court should authorize the filing of a statement pursuant to Penal Code section 1237.5 with the trial court and the delayed issuance of a certificate of probable cause so that the appellant can argue that the revocation of probation based upon the appellant's admission of violation must be reversed if the conviction in case No. [## #-1] is reversed. (See *People v. Grey*, *supra*, 225 Cal.App.3d

1336, 1339-1340 [“A defendant who fails to make his appeal operative by filing the required statement should seek relief in the same manner as a defendant who fails to file a timely notice of appeal.”]

III

THE APPEAL IN CASE NO. [## #-2] SHOULD BE CONSOLIDATED WITH PENDING APPEAL NO. F0XXX1.

The appeal from the revocation of the appellant's probation in case No. [## #-2] should be consolidated with the existing appeal in No. F0XXX1 since that appeal is closely related to the appeal from the judgment of the superior court in case No. [## #-1], and the resolution of the appeal of the revocation of the appellant's probation will turn on the resolution of the appeal in that case. Consequently, appellant requests that the appeals be consolidated.

IV

LEAVE TO FILE A SUPPLEMENTAL BRIEF SHOULD BE GRANTED. [Note: Use this issue if the AOB has already been filed in the first appeal.]

Assuming the court deems the notice of appeal in case No. [## #-1] to be constructive notice of appeal in action No. [## #-2] and leave is granted to file for a certificate of probable cause pursuant to Penal Code section 1237.5, the appellant requests leave of court to file a supplemental brief arguing that the revocation of probation should be reversed in the event the judgment in case No. [## #-1] is reversed since the appellant's admission of a violation of probation was based upon his conviction in case No. [## #-1]. This is the only issue the appellant anticipates raising in an appeal

from the revocation of probation.

Dated:

Respectfully submitted,

[YOUR NAME]
Attorney for Appellant

DECLARATION OF [APPELLANT]

I, [APPELLANT], declare:

1. I am the appellant in the above captioned appeal.
2. On [DATE], I was sentenced on a conviction of violation of [OFFENSES #1] in [COUNTY] Superior Court case No. [# # #-1]. At that time, base upon my conviction of the new [OFFENSES #1] violation, I admitted a violation of the probation I had earlier been granted in [COUNTY] Superior Court case No. [# # #-2] on a charge of violation of [OFFENSES #2], and probation was revoked. I was sentenced to a term of [TERM #1, e.g., four years] in state prison on the new conviction in case No. [# # #-1] and to a [TERM #2, e.g., concurrent four year term] on the previous conviction in case No. [# # #-2].
3. Following the sentencing, my trial counsel, [TRIAL COUNSEL'S NAME], prepared and filed a notice of appeal on my behalf. I relied upon [TRIAL COUNSEL'S NAME] to prepare and file a notice of appeal for me which would permit appellate

review of all issues, and assumed that he had done so. I was unaware until advised by [YOUR NAME], the attorney representing me on appeal, that the notice of appeal filed by [TRIAL COUNSEL'S NAME] did not allow me to challenge the revocation of probation in the event my conviction in Case No. [# # #-1] was overturned.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on [DATE], at [CITY], California.

[APPELLANT'S NAME]
Appellant