



**The Notice of Appeal in Criminal Appeals
January 2023**

- I. First things first 2
- II. The right to an appeal 2
- III. What judgments and orders are appealable? 2
- IV. Who files the notice of appeal? 4
- V. When must the notice of appeal be filed? 5
- VI. Who signs the notice of appeal?..... 5
- VII. Where must the notice of appeal be filed? 5
- VIII. Sufficiency of the notice of appeal 6
- IX. Counsel’s role related to the notice of appeal 6
- X. Contents of a notice of appeal 6
 - A. Notice of appeal requirements following a trial (court or jury)..... 7
 - B. Notice of appeal requirements following a plea or admission..... 7
- XI. Errors in the notice of appeal 9
 - A. Notice of appeal does not comply with Rule 8.304(b) 9
 - B. Notice of appeal does not include all cases 9
 - C. Notice of Appeal Is Untimely 10
 - 1. Reliance on Trial Counsel..... 10
 - 2. Reliance on Prison Officials 10
- XII. Requests for Relief 11
- XIII. Conclusion 11

At defendant's sentencing hearing, the trial court advises the defendant of his or her right to appeal. However, unless a notice of appeal is filed, no appeal will follow. This article discusses the notice of appeal, from filing the notice to curing any defects.

I. First things first

An appeal is initiated by filing a notice of appeal with the clerk of the superior court within 60 days of the judgment or challenged order from that court. (Cal. Rules of Ct., rule 8.308(a).)

Only defendant, or trial counsel acting on the defendant's behalf, can file the notice of appeal. Penal Code section 1240.1 requires appointed counsel to assist those clients who need help filling out all the required 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.

The notice of appeal must be filed with the superior court clerk. The application and background information forms should be returned to CCAP.

II. The right to an appeal

The right to appeal is statutory. There is no federal or state constitutional right of appeal. (*Griffin v. Illinois* (1956) 351 U.S. 12, 18; *Leone v. Medical Board* (2000) 22 Cal.4th 660, 668.) However, counsel has a constitutional duty to advise a client about an appeal. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470; *Garza v. Idaho* (2019) ___ U.S. ___ [139 S.Ct. 738].)

III. 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) Except as provided in Sections 1237.1 [error calculating presentence custody credits], 1237.2 [error calculating fines and fees], and 1237.5 [conviction upon a guilty plea or nolo contendere], from a final judgment of conviction. 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.)

Post-conviction proceedings may be appealable as an order after judgment affecting the substantial right of the defendant. After a judgment is final, the trial court no longer has jurisdiction over the defendant's case, except pursuant to specific statutory avenues or a properly filed habeas corpus petition. (*People v. King* (2022) 77 Cal.App.5th 629, 637.) For example, Penal Code section 1170.03, subdivision (a) gives a trial court the authority to recall a sentence on its own motion within 120 days of the defendant's remand, or at any time upon request by various law enforcement officials. The Legislature has also created other statutory avenues for defendants to seek resentencing or challenge their convictions (See, e.g., Pen. Code, §§ 1172.6, 1170.126, 1170.18, 1473.6, 1473.7.) Generally, the defendant may appeal the decisions in these orders. (Pen. Code, § 1237, subd. (b); see, e.g., *People v. Loper* (2015) 60 Cal.4th 1155; *Teal v. Superior Court* (2014) 60 Cal.4th 595.) If the trial court did not have jurisdiction to rule on a motion to vacate or modify a sentence, an order denying such a motion is nonappealable, and any appeal from such an order must be dismissed. (*People v. Burgess* (2022) 86 Cal.App.5th 375.)

If the calculation of presentence custody credits is the sole issue on appeal, Penal Code section 1237.1 requires the issue first be presented to the trial court for correction. Section 1237.2 imposes the same requirement for issues concerning fines, fees, and similar monetary assessments.

In juvenile appeals, Welfare and Institutions Code section 800, subdivision (a) provides for a broad right to appeal after disposition of a juvenile delinquency adjudication. “A judgment in a proceeding under Section 601 or 602 may be appealed from, by the minor, in the same manner as any final judgment, and any subsequent order may be appealed from, by the minor, as from an order after judgment.” (Welf. & Inst. Code, § 800, subd. (a).) The dispositional order is the judgment. The jurisdictional order finding that the minor comes under Welfare and Institutions Code section 601 or 602 is not separately appealable, but may be reviewed on appeal from the disposition. (*In re James J.* (1986) 187 Cal.App.3d 1339; *In re Melvin S.* (1976) 59 Cal.App.3d 898, 900.)

IV. 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).) In cases where the conviction 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).)

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, trial counsel has a duty to file 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.

V. 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 below in this article.

VI. 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.)

VII. 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.)

VIII. 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.)

Rule 8.304(b) of the Rules of Court has been recently amended to provide: “If the defendant does not file the written statement required by Penal Code section 1237.5 or the superior court denies a certificate of probable cause, the appeal will be limited to issues that do not require a certificate of probable cause.”

IX. 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. (Cal. Rules of Court, rules 8.308(d), 8.304(c)(1) 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.

X. Contents of a notice of appeal

The Notice of Appeal has three sections that must be completed.

First, the name of the defendant and the date of the judgment being appealed. This is where the notice of appeal demonstrates whether the notice is timely. The date of the judgment being appealed should be within 60 days of the date the notice was filed.

Second, the notice must comply with CRC Rule 8.304(b). The appropriate boxes must be checked.

- a. 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*):

b. 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*):

Third, the notice requires indication of whether the defendant is requesting appointment of counsel for appeal.

The notice must be signed by either defendant or trial counsel.

A. 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.)

B. 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 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, and 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 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: https://www.capcentral.org/criminal/guilty_plea/docs/cpc.pdf.

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).)

XI. Errors in the notice of appeal

The most common examples of errors in the notice of appeal are discussed below.

A. Notice of appeal does not comply with Rule 8.304(b)

When a notice of appeal raises one issue, is that sufficient to cover other issues? The answer depends on the issues listed in the notice.

For example, the notice of appeal may indicate it is based on matters occurring after the plea that do not affect the plea's validity, or the denial of a motion to suppress (i.e., non-certificate issues), but the defendant intended to raise an issue that requires a certificate of probable cause. Or the notice of appeal may state that it is an appeal "from the judgment," but defendant also intends to raise sentencing issues. In such issues, the notice of appeal should be corrected.

As noted above, if the notice of appeal is based on 1) matters occurring after the plea that do not affect its validity, or 2) the denial of a motion to suppress evidence, the defendant cannot raise issues that require a certificate of probable cause. Rule 8.304(b) has been amended to provide: "If the defendant does not file the written statement required by Penal Code section 1237.5 or the superior court denies a certificate of probable cause, the appeal will be limited to issues that do not require a certificate of probable cause."

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.

B. Notice of appeal does not include all cases

Another common 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 in which probation was revoked. If this happens, and there is no other reason sentencing on the earlier case was not appealed, the notice of appeal should 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.

C. Notice of Appeal Is Untimely

A notice of appeal must be filed within 60 days after the rendition of judgment or the appealable order. (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 trial counsel and reliance on prison officials.

1. 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.)

2. 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.)

XII. Requests for Relief

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. Otherwise, appellate counsel can raise a motion to correct the defect in the court of appeal.

A request for relief can be made by application in both the Third and Fifth Districts. The Third District prefers the request be made in a motion. (*People v. Zarazua, supra*, 179 Cal.App.4th 1054.) The Fifth District prefers the request be made with a petition for writ of habeas corpus. For examples, see:

Sample Application to Construe the Notice of Appeal to Include Required Language: [click here](#).

Sample Application for Constructive Filing of Notice of Appeal in Companion VOP Case: [click here](#).

Sample Application for Constructive Filing of Notice of Appeal: [click here](#).

XIII. Conclusion

Failure to notice and correct errors in the notice of appeal may result in dismissal of the appeal. As soon as possible, check the notice of appeal for any possible defects related to timeliness, the judgment being appealed, and whether a certificate of probable cause is required.