



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 21-155

For business meeting on October 1, 2021

Title

Appellate Procedure: Notice of Appeal After
Plea or Admission of Probation Violation

Agenda Item Type

Action Required

Effective Date

January 1, 2022

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rule 8.304

Date of Report

August 11, 2021

Recommended by

Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Contact

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Executive Summary

The Appellate Advisory Committee recommends amending the rule that governs initiating an appeal in a felony case after a plea of guilty or nolo contendere or after an admission of a probation violation. The amendments would reorganize the rule, simplify procedures, and eliminate the onus on the clerk to make a legal decision regarding whether the notice of appeal should be filed.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2022, amend rule 8.304 of the California Rules of Court to:

1. Distinguish between appeals that require a certificate of probable cause and those that do not;
2. Provide that if a notice of appeal is filed without a request for a certificate of probable cause or the trial court denies the request, the appeal may proceed on noncertificate issues;
3. Add the district appellate projects to the list of persons and entities that receive notification of the filing of a notice of appeal, and include in the notification information regarding

whether the appeal is limited to noncertificate issues and whether the defendant requested a certificate of probable cause; and

4. Update the advisory committee comment to reflect the changes to the rule and to include references to Supreme Court cases analyzing circumstances in which no certificate of probable cause for an appeal is required.

The proposed amended rule is attached at pages 7–12.

Relevant Previous Council Action

As part of a multiyear project to revise the appellate rules, effective January 1, 2004, the Judicial Council repealed and adopted a number of rules governing the hearing and decision of appeals in noncapital criminal cases. Rule 30, subsequently renumbered as rule 8.304, was adopted at this time. The relevant provisions of rule 8.304 have not been amended substantively since adoption in 2004.

Analysis/Rationale

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 a probation violation. The defendant filing the 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 states the procedure for clerks to follow: “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 the next 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 challenge 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. Although 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 result in delay and additional work for litigants, district appellate projects, and the courts.

Rule 8.304

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 delay in felony appeals following a plea or admission of probation violation.

Currently, rule 8.304(b)(1) indicates that, “[e]xcept 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 that is filed without a certificate or a request for a certificate “Inoperative.” Subdivision (b)(4) provides 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, the proposed amendments would group paragraphs (1) and (2) of subdivision (b) together as provisions addressing appeals that require a certificate of probable cause.

New subdivision (b)(2) would address appeals for which no certificate of probable cause is required—that is, appeals that challenge the denial of a Penal Code section 1538.5 motion to suppress evidence or are based on grounds such as sentencing or other postplea matters that do not challenge the validity of the plea, or appeals from orders that, by law, require no certificate.

New subdivision (b)(3) would address appeals for which no certificate of probable cause was requested or granted. Rather than requiring clerks to mark the notice of appeal inoperative, notify the defendant, and send a copy of the marked notice of appeal to the district appellate project unless the notice of appeal states that the appeal is based on grounds that do not require a certificate of probable cause, the rule would simply provide that if a notice of appeal is filed without the statement requesting a certificate of probable cause or the trial court denied the request, the appeal is limited to issues that do not require a certificate of probable cause.

The proposal also includes a conforming change to subdivision (c) regarding notification of the appeal. Subdivision (c)(1) requires the superior court clerk to promptly send notification of the filing of a notice of appeal to certain individuals, including the attorneys of record, any unrepresented defendant, the reviewing court clerk, and each court reporter. It further provides that if the defendant files a statement requesting a certificate of probable cause, the clerk must not send the notification unless the superior court files a certificate. This provision would no longer be necessary because the proposed amendments provide that appeals in which a certificate is requested but denied may proceed on noncertificate issues. To address a concern expressed in a comment, further discussed below, the committee recommends amending subdivision (c) to

add the district appellate project to the list of individuals and entities receiving the notification and to require that the notification indicate whether the defendant sought a certificate of probable cause and, if so, whether the trial court filed a certificate.

Finally, the advisory committee comment to subdivision (b) has been rewritten to reflect the changes to the rule and to include references to Supreme Court cases analyzing circumstances in which no certificate of probable cause for the appeal is required.

Policy implications

This proposal furthers the Judicial Council’s constitutional mandate to improve the administration of justice and its mission to increase access to justice by simplifying and streamlining the process for initiating an appeal after a plea. The proposal will save time and reduce the workload for superior court clerks, appellate courts, and the district appellate projects.

Comments

The proposed amended rule was circulated for public comment between April 9 and May 21, 2021, as part of the regular spring comment cycle. The committee received seven comments on this proposal. Four commenters—the Superior Court of Los Angeles County, the Superior Court of San Diego County, the Central California Appellate Project on behalf of all the district appellate projects (the district appellate projects), and an attorney in private practice—agreed with the proposal. The California Lawyers Association Committee on Appellate Courts, Litigation Section (CAC), agreed with the proposal if modified. One commenter, the Orange County Bar Association (OCBA), disagreed with the proposal. The seventh commenter, an attorney who practices criminal law, did not take a position but raised an issue with the proposed rule’s description of appeals that do not require a certificate of probable cause. A chart with the full text of the comments received and the committee’s responses is attached at pages 13–26.

The district appellate projects explained their role in assisting defendants with initiating appeals and stated that they “spend a lot of time trying to remedy defective [inoperative] notices of appeal either by telling the defendant or defense counsel to file an amended notice of appeal checking a noncertificate box if the 60-day deadline has not run yet, or by filing motions to amend/construe notices of appeal as being taken from grounds not requiring a certificate, which often involves an additional step of obtaining a declaration from the defendant or defense counsel of what was intended.... This rule change, therefore, will accomplish the stated goal of relieving trial court clerks of the responsibility of determining whether a notice of appeal following a guilty or nolo contendere plea is operative if no certificate was requested or if a request for a certificate was denied, and it will relieve appellate courts of the burden of entertaining motions to deem notices of appeal operative as to non-certificate issues where the defendant has not obtained a certificate.”

CAC agreed with removing legal decisionmaking from the court clerk and facilitating the processing of appeals based on issues that do not require a certificate of probable cause. CAC noted that the proposal will also reduce delay: “when clerks inaccurately deem an appeal to be

‘inoperative,’ the process of preparing an appellate record is deferred, leading to subsequent delays in resolution of the appeal.”

Both CAC and the district appellate projects suggested clarifying the language of subdivision (b)(2)(B) regarding postplea appeals that do not contest the validity of the plea. The proposed language was derived from Supreme Court opinions analyzing whether certain grounds for appeal challenged the validity of the plea, but the committee agreed with rephrasing the rule language to be more straightforward.

In his comment, criminal law attorney Adrian Contreras raised an issue with the proposed language of subdivision (b)(2) regarding appeals that do not require a certificate of probable cause. He read the proposed amendments as seeking to “enumerate the entire universe of orders that require a certificate of probable cause and those that don’t” and pointed out that, for example, appeals under Penal Code section 1473.7 from the denial of a motion to vacate a conviction do not fit into the proposed language of the rule. Subdivision (f) of section 1473.7 expressly provides for an appeal authorized by section 1237(b), for which no certificate of probable cause is required. Mr. Contreras suggested a “catch-all” provision stating that a certificate of probable cause is not needed if some other statute expressly states it is not needed. The committee agreed with clarifying this point in new subdivision (b)(2)(C) and an addition to the advisory committee comment.

The OCBA opposes the proposed amendments out of concern for litigants and attorneys who would no longer be notified when a notice of appeal is marked “inoperative” and sent to the defendant and the district appellate project. Under the amendments, such an appeal will be filed and limited to issues that do not require a certificate of probable cause.

OCBA believes this change will penalize litigants and attorneys who do not understand the certificate of probable cause process and who needed to, but did not, request a certificate to have their appellate issues considered by the reviewing court. These individuals might not know they made a mistake in failing to request a certificate and might not have the ability or opportunity to correct the mistake. The subcommittee concluded that modifications to the proposal on this point were warranted.

Although the amendments remove the requirement that defendants and the district appellate projects be notified of an inoperative notice of appeal, there is a broader notification requirement in subdivision (c). Under subdivision (c)(1), “[w]hen 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.” Under subdivision (c)(3), the notification must include a copy of the notice of appeal and any certificate of probable cause.

To ensure that the district appellate projects are aware of appeals that have been limited to issues that do not require a certificate and whether the defendant requested a certificate, the committee recommends amending the (c)(1) notification requirement to include the district appellate project

and to require that the notification state whether the court has limited the appeal to issues that do not require a certificate of probable cause and, if so, whether the defendant filed the written statement required for issuance of a certificate.

Alternatives considered

The committee considered the alternative of recommending no amendments to the rule but rejected this option because of the clear benefits of clarifying the rule and relieving the burden on trial court clerks of making legal decisions regarding whether to file notices of appeal.

The committee also considered the alternative of not including a subdivision (b)(2)(C) catch-all category of appeals that do not require a certificate of probable cause. Statutes that expressly provide that no certificate of probable cause is required for an appeal do not seem likely to cause confusion regarding whether a certificate is required, and the committee was aware of no problems caused by the lack of such provision in the current rule. However, for added clarity, the committee supports making this addition.

Fiscal and Operational Impacts

The committee anticipates no significant fiscal or operations impacts beyond training and implementation of new procedures. The committee expects that the rule changes will save time and resources for courts, district appellate projects, and appellants.

The Superior Court of Los Angeles County opined that the amendments would likely result in more timely preparation of the record, whereas the Superior Court of San Diego County expected no impact to preparation of the record because the court already follows the proposed practice. Both the Los Angeles court and CAC noted that because the record is prepared upon the filing of an operative notice of appeal, the amendments may result in some appellate records being prepared for cases that do not present appealable issues. According to the Los Angeles court, “[t]his is not a reason to reject the proposal; the clarity provided by the proposal is necessary. But there may be no net cost savings from this proposal.”

Attachments and Links

1. Cal. Rules of Court, rule 8.304, at pages 7–10
2. Chart of comments, at pages 11–24

Rule 8.304 of the California Rules of Court is amended, effective January 1, 2022, to read:

Rule 8.304. Filing the appeal; certificate of probable cause

(a) * * *

(b) Appeal from a judgment of conviction after plea of guilty or nolo contendere or after admission of probation violation

(1) Appeal requiring a certificate of probable cause

~~(1)(A)~~ ~~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 on grounds that affect the validity of the plea or admission, the defendant must file in that superior court—with the notice of appeal required by (a)—the written statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause.

~~(2)(B)~~ Within 20 days after the defendant files a written statement under ~~(4)~~ Penal Code section 1237.5, the superior court must sign and file either a certificate of probable cause or an order denying the certificate.

(2) Appeal not requiring a certificate of probable cause

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

~~(3) If the defendant does not file the statement required by (1) 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.~~

~~(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;

Rule 8.304 of the California Rules of Court is amended, effective January 1, 2022, to read:

(B) ~~Grounds that arose after entry of the plea and do not affect the plea's validity.~~ The sentence or other matters occurring after the plea or admission that do not affect the validity of the plea or admission; or

(C) An appealable order for which, by law, no certificate of probable cause is required.

(3) Appeal without a certificate of probable cause

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.

~~(5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).~~

(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, any unrepresented defendant, the district appellate project, the reviewing court clerk, each court reporter, and 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).~~ The notification must specify whether the defendant filed a statement under (b)(1)(A) and, if so, whether the superior court filed a certificate or an order denying a certificate under (b)(1)(B).

(2) The notification must show the date it was sent, the number and title of the case, and the dates that the notice of appeal and any certificate or order denying a certificate under (b)(2) (b)(1)(B) were filed. If the information is available, the notification must also include:

(A)–(C) * * *

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

(4)–(6) * * *

Rule 8.304 of the California Rules of Court is amended, effective January 1, 2022, to read:

Advisory Committee Comment

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

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

Trial court unification did not change this rule: after as before unification, “Appeals in felony cases lie to the [C]ourt of [A]ppeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) [except in death penalty cases, Courts of Appeal have appellate jurisdiction when superior courts have original jurisdiction ‘in causes of a type within the appellate jurisdiction of the [C]ourts of [A]ppeal on June 30, 1995. . . .’].” (*Recommendation on Trial Court Unification: Revision of Codes*” (July 1998) 28 Cal. Law Revision Com. Rep. (1998) pp. 455–456.)

Subdivision (b). ~~Under (b)(1), the defendant is required to file both a notice of appeal and the statement required by Penal Code section 1237.5(a) for issuance of a certificate of probable cause. Requiring a notice of appeal in all cases simplifies the rule, permits compliance with the signature requirement of rule 8.304(a)(3), ensures that the defendant’s intent to appeal will not be misunderstood, and makes the provision consistent with the rule in civil appeals and with current practice as exemplified in the Judicial Council form governing criminal appeals.~~

~~Because of the drastic consequences of failure to file the statement required for issuance of a certificate of probable cause in an appeal after a plea of guilty or nolo contendere or after an admission of probation violation, (b)(5) alerts appellants to a relevant rule of case law, i.e., that,~~

Rule 8.304 of the California Rules of Court is amended, effective January 1, 2022, to read:

~~although such an appeal may be maintained without a certificate of probable cause if the notice of appeal states the appeal is based on the denial of a motion to suppress evidence or on grounds arising after entry of the plea and not affecting its validity, no issue challenging the validity of the plea is cognizable on that appeal without a certificate of probable cause. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1104.)~~ Subdivision (b)(1) reiterates the requirement stated in Penal Code section 1237.5(a) that to challenge the validity of a plea or the admission of a probation violation on appeal under Penal Code section 1237(a), the defendant must file both a notice of appeal and the written statement required by section 1237.5(a) for the issuance of a certificate of probable cause. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1098 [probable cause certificate requirement is to be applied strictly].)

Subdivision (b)(2) identifies exceptions to the certificate-of-probable-cause requirement, including an appeal that challenges the denial of a motion to suppress evidence under Penal Code section 1538.5 (see *People v. Stamps* (2020) 9 Cal.5th 685, 694) and an appeal that does not challenge the validity of the plea or the admission of a probation violation (see, e.g., *id.* at pp. 694–698 [appeal based on a postplea change in the law]; *People v. Arriaga* (2014) 58 Cal.4th 950, 958–960 [appeal from the denial of a motion to vacate a conviction based on inadequate advisement of potential immigration consequences under Penal Code section 1016.5]; and *People v. French* (2008) 43 Cal.4th 36, 45–46 [appeal that challenges a postplea sentencing issue that was not resolved by, and as a part of, the negotiated disposition]).

Subdivision (b)(2)(C) clarifies that no certificate of probable cause is required for an appeal from an order that, by law, is appealable without a certificate. (See, e.g., Pen. Code, § 1473.7.)

Subdivision (b)(3) makes clear that if a defendant raises on appeal an issue that requires a certificate of probable cause, but the defendant does not file the written statement required by Penal Code section 1237.5 or the superior court denies the certificate, then the appeal is limited to issues, such as those identified in subdivision (b)(2), that do not require a certificate of probable cause. (See *Mendez, supra* 19 Cal.4th at pp. 1088–1089.)

SPR21-02

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

(Amend Cal. Rules of Court, rule 8.304)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	California Lawyers Association; Committee on Appellate Courts, Litigation Section By Erin Smith Chair Saul Bercovitch Director of Governmental Affairs	AM	<p>The Committee on Appellate Courts of the Litigation Section of the California Lawyers Association submits the following response to a proposal to amend Rule of Court, rule 8.304. The Committee broadly supports this proposed amendment, but suggests that one point of ambiguity be addressed before adoption.</p> <p>Criminal defendants who enter a no-contest or guilty plea must generally request a certificate of probable cause prior to filing an appeal that challenges the validity of the plea. However, issues that do not challenge the validity of a plea (or that challenge the denial of a suppression motion) may be raised on appeal even without the certificate of probable cause.</p> <p>The determination of whether an issue challenges the validity of a plea may ultimately be litigated by the parties, and certainly involves legal decision-making. Nevertheless, current rule 8.304 requires the superior court clerk to decide whether a certificate is required at the outset of an appeal—i.e., the clerk must determine whether an appeal will challenge the validity of a plea at the time a notice of appeal is initially filed. If the clerk determines that an appeal will present a certificate issue, and no certificate has been obtained, the rule requires the clerk to mark that notice of appeal as “inoperative.”</p>	<p>The committee notes the commenter’s support for the proposal if modified and appreciates the thoughtful comments.</p> <p>No response required.</p> <p>No response required.</p>

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Commenter	Position	Comment	Committee Response
		<p>The Committee agrees with the Invitation to Comment that this current procedure “inappropriately requires clerks to make legal decisions.” The Committee also notes that the current rule frequently leads to unnecessary delays: when clerks inaccurately deem an appeal to be “inoperative,” the process of preparing an appellate record is deferred, leading to subsequent delays in resolution of the appeal.</p> <p>The Committee therefore generally supports the proposed amendment to eliminate the clerk’s role in determining whether appeals should be operative. The current proposal appropriately removes legal decision-making from the court clerk, while still limiting post-plea appeals in general to “issues that do not require a certificate of probable cause.” The change properly vests this determination entirely with the court, rather than the clerk.</p> <p>However, the Committee offers the following minor suggestion for the proposed amendment. The current proposal would amend rule 8.304 (b)(2)(B) as follows: “Grounds that arose after entry of the plea or admission and do not affect the plea’s validity, <u>as a substantive matter, challenge the validity of the plea or admission.</u>” But the qualifier “as a substantive matter” appears to be unnecessary, and may open the door to confusion about the appealability of issues that only secondarily or incidentally</p>	<p>No response required.</p> <p>No response required.</p> <p>The committee agrees and has modified rule 8.304(b)(2)(B). See response below to comment from Central California Appellate Program.</p>

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			<p>“affect the plea’s validity.” The Committee therefore recommends either omitting the qualifier or retaining the prior language. Retaining the prior language would also ensure consistency with the existing body of case law—where the term “affect the plea’s validity” has already been well-defined by California courts.</p> <p>The Committee also notes that clerk’s and reporter’s transcripts must be prepared by the superior court once an operative notice of appeal has been filed. The amendment may therefore result in appellate records being prepared for some cases even when they do not present appealable issues. Since notices of appeals in felony matters are generally filed by attorneys rather than the litigants themselves, these will hopefully be uncommon. However, a review of internal court statistics involving inoperative appeals—comparing the number that are subsequently deemed operative with the number that receive no further action—would help reveal the scope of this potential hurdle. Superior court clerks and staff may have additional insight, assuming adoption of the proposed amendment, on whether the amended rule has required the use of additional resources.</p>	<p>The committee appreciates these thoughts on whether the proposed new procedure may result in preparation of appellate records in cases that do not raise appealable issues and, if so, how to measure the impact.</p>
2.	Central California Appellate Program By Lena Thorpe Executive Director	A	<p>Appellate projects' interest</p> <p>The Court of Appeal projects [FN 1 Another project, the California Appellate Project, San Francisco (CAP-SF), administers appointed</p>	<p>The committee notes the commenter’s support for the proposal and appreciates the information on the role and perspective of the appellate projects.</p>

SPR21-02**Appellate Procedure: Appeal After Plea of Guilty or Nolo Contendere or Admission of Probation Violation**
(Amend Cal. Rules of Court, rule 8.304)

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	Commenter	Position	Comment	Committee Response
	<p>On Behalf of: Elaine A. Alexander, Executive Director Appellate Defenders, Inc.</p> <p>Patrick McKenna, Executive Director Sixth District Appellate Program</p> <p>Jonathan Soglin, Executive Director First District Appellate Project</p> <p>Rick Lennon, Executive Director California Appellate Project, Los Angeles</p>		<p>death penalty cases in the California Supreme Court.] are non-profit corporations created pursuant to California Rules of Court, rule 8.300(e), which contract with the Courts of Appeal through the Judicial Council of California, Appellate Court Services, to oversee the system of court-appointed counsel on appeal in their respective districts. [FN 2 The Court of Appeal projects include the First District Appellate Project (FDAP), located in Oakland; California Appellate Project, Los Angeles (CAP-LA), serving the Second District; Central California Appellate Program (CCAP), located in Sacramento and serving the Third and Fifth Districts; Appellate Defenders, Inc. (ADI), located in San Diego and serving the Fourth District; and Sixth District Appellate Program (SDAP), in San Jose.] The central goal of the offices is to improve the quality of indigent representation on appeal, assist the Court of Appeal in administering criminal, juvenile, and limited civil appeals by indigents who are entitled to the appointment of counsel at public expense. Their caseload covers criminal, juvenile delinquency and dependency, and civil commitment appeals, certain writs, and other proceedings requiring appointed counsel in the appellate courts. The projects also handle non-capital appointed cases from their respective districts in the California Supreme Court.</p> <p>The guiding concept of the projects is to strengthen the resources of appellate</p>	<p>Nor further response required.</p>

SPR21-02

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	Commenter	Position	Comment	Committee Response
			<p>practitioners, to oversee this work, and attempt to assure consistently satisfactory representation of all clients. In fulfillment of its goals, the projects perform the preliminary case processing of notices of appeal. This includes the screening of notices of appeal once they have been filed and processed by the Court of Appeal. Also, California Rule of Court, rule 8.406(c) requires that the superior court clerk must mark a late or inoperative notice of appeal as received but not filed and send a copy of the marked notice of appeal to the district appellate project. This places a responsibility on the appellate project to screen the notice of appeal and the clerk's notice. In certain instances, the appellate project communicates with the superior court to request reconsideration of the determination that a notice was untimely or failed to meet other requirements. Also, the appellate project may communicate with the party and trial attorney based on the clerk's notice.</p> <p>In some instances, the late or inoperative filing is only noticed after a notice of appeal has been processed, a record prepared, and before or after the appointment of counsel. In those instances, it is the appointed counsel project that is responsible for interacting with the party whose appeal has been dismissed or assisting the appointed counsel upon the dismissal of the appeal. [FN 3 The appellate projects have a number of other contractual responsibilities, not</p>	<p>The committee notes that subdivision (c) of rule 8.406, which governs the time to appeal in juvenile appeals, addresses notices of appeal that are late; it does not address notices of appeal that are rejected for filing for other reasons. However, to ensure that the district appellate projects are aware of appeals that have been limited to non-certificate issues, the proposal includes amendments to rule 8.304(c) regarding notification of the filing of a notice of appeal. See response to comment from OCBA, below.</p> <p>No further response required.</p>

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	Commenter	Position	Comment	Committee Response
			<p>specified here because they are not directly related to the subject of this comment.]</p> <p>Projects' position</p> <p>The appellate projects favor a rule change that facilitates the processing of the notices of appeal in criminal cases that follow a plea of guilty or no contest or an admission of a probation violation.</p> <p>Request for Specific Comments</p> <p>1. Does the proposal appropriately address the stated purpose?</p> <p>The proposed rule amendments are a useful improvement to reach the committee's stated goals. The addition of the revised rule 8.304(b)(3) clarifies that an appeal is operative after a certificate of probable cause has been denied. The trial court's denial of a certificate allows the appeal to proceed on limited issues. Currently, the clerk's determination is relatively easy if the form notice of appeal, CR-120, is used because either box 2.a.(1) (sentencing only) or box 2.a.(2) (motion to suppress under Penal Code section 1538.5) is marked. The onus on the clerk comes when trial counsel or a defendant in propria persona fashions their own notice that requires review of paragraphs or pages of description to distill whether the appeal fits within one of the form boxes.</p>	<p>The committee notes the commenters' support for the proposal.</p> <p>The committee appreciates this response to its request for specific comments.</p>

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			<p>The boxes, however, can also be a source of the problem. In our experience, and as noted in the proposal itself ("it is not uncommon for both self-represented defendants and attorneys to check the wrong box or boxes, [or] check no boxes"). If a defendant or defense counsel uses the form and only checks the certificate of probable cause box, and the certificate of probable cause is denied, some clerks may deem the notice of appeal inoperative instead of construing it as operative as to non-certificate issues. This proposed rule change solves that problem by directing court clerks to treat such an appeal as operative as to non-certificate issues.</p> <p>The appellate projects spend a lot of time trying to remedy these defective notices of appeal either by telling the defendant or defense counsel to file an amended notice of appeal checking a non-certificate box if the 60-day deadline has not run yet, or by filing motions to amend/construe notices of appeal as being taken from grounds not requiring a certificate, which often involves an additional step of obtaining a declaration from the defendant or defense counsel of what was intended. (See, e.g., <i>People v. McEwan</i> (2007) 147 Cal.App.4th 173, 177-179. [denying such a motion because "Defendant's application to this court could have included proof of his intent to appeal on non-certificate grounds based on matters outside the</p>	<p>No further response required.</p> <p>The committee notes this feedback that, under the current rule, the projects spend a lot of time trying to remedy defective notices of appeal that are deemed defective due to lack of a certificate of probable cause.</p>

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			<p>record" – e.g., a declaration – "but it failed to do so"].) This rule change, therefore, will accomplish the stated goal of relieving trial court clerks of the responsibility of determining whether a notice of appeal following a guilty or nolo contendere plea is operative if no certificate was requested or if a request for a certificate was denied, and it will relieve appellate courts of the burden of entertaining motions to deem notices of appeal operative as to non-certificate issues where the defendant has not obtained a certificate.</p> <p>2. Would the proposed rule changes have an impact on preparation of the record on appeal? If so, please describe.</p> <p>The record on appeal is no different for any operative appeal from a judgment of conviction. The composition of the normal record on appeal is defined in rule 8.320. The proposal that would clarify the process for determining whether an appeal is operable would not affect the preparation of the record.</p> <p>The essential portions of the record on appeal following a guilty plea or admitted probation violation would be the same as one in which a certificate of probable cause was issued. Even though a “sentencing only” appeal does not challenge the plea, the record still requires the reporter’s transcript of the plea and other portions of record to determine whether the trial</p>	<p>The committee appreciates this analysis regarding benefits to trial and appellate courts.</p> <p>The committee appreciates this response to its request for specific comments.</p> <p>No further response required.</p>

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			<p>court carried out the terms of the plea. When a plea bargain is not implemented according to its terms, due process principles are implicated. (<i>People v. Villalobos</i> (2012) 54 Cal.4th 177, 182; accord, <i>People v. Mancheno</i> (1982) 32 Cal.3d 855, 860.) A due process claim based on a failure to implement the plea bargain may be forfeited where the trial court provides the advice pursuant to Penal Code section 1192.5 so that the defendant is aware that he may withdraw his plea if the sentencing court does not accept the plea terms. However, where the lay defendant may not be aware that the terms of the agreement have been breached, his failure to object or withdraw his plea does not constitute forfeiture of the due process claim. (See <i>People v. Newton</i> (1974) 42 Cal.App.3d 292, 298.)</p> <p>Additional considerations</p> <p>1. How could the grounds be more clearly stated in layman's terms to exercise their right to appeal?</p> <p>The grounds for appeal stated in proposed rule 8.304(b)(2)(B) could be simplified for the layperson by using the language of the CR-120 notice of appeal form: <u>"(B) The sentence or other matters occurring after the plea that do not affect the validity of the plea."</u></p> <p>Conclusion</p>	<p>The committee agrees and has modified this provision.</p>

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			Thank you for reviewing our comments. The projects look forward to an amended rule that addresses current problems in initiating an appeal.	No response required.
3.	Adrian Contreras Attorney	NI	I practice criminal law and have a concern with this proposed rule change. The proposed amendment seeks to enumerate the entire universe of orders that require a certificate of probable cause and those that don't. However, I can already see that it does not account for motions to vacate a conviction under Penal Code section 1473.7, subdivision (a)(1). Subdivision (f) of that statute expressly states it is an appeal order under Penal Code section 1237, subdivision (b). I could see a situation where either a defendant or defense attorney wants to file an appeal on a PC 1473.7 order and the superior court clerk disagree about whether a notice of appeal is needed. Perhaps the proposed rule change could have a "catch-all" provision saying a certificate of probable cause is not needed if some other statute expressly states it is not needed, like in PC 1473.7, subdivision (f). Plus, that would avoid having to amend the rule every time the Legislature in the future expands the class of orders that do not need a certificate of probable cause.	The committee appreciates the commenter's feedback. Under the rule, the two categories of appeals that do not require a certificate of probable cause are unchanged substantively by the proposed amendments. However, the committee agrees with adding a catch-all provision to make clear that no certificate of probable cause is required for an appeal from an order for which, by law, no certificate of probable cause is required. Penal Code section 1473.7 is noted as an example in the advisory committee comment.
4.	Robert Gant Owner North Hollywood	A	No specific comment.	The committee notes the commenter's support for the proposal.

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5.	Orange County Bar Association By Larisa M. Dinsmoor President	N	<p>The proposed amendment to California Rules of Court, Rule 8.304 would negatively impact litigants and deny them due process.</p> <p>Under Penal Code section 1237.5, litigants who decide to appeal a plea of guilty or an admission of a probation violation must file both a notice of appeal and a certificate of probable cause. Under the current law, if a litigant fails to file a certificate of probable cause, the clerk is required to notify the litigant and send a copy of the marked appeal to the district appellate project.</p> <p>With the proposed amendments, the clerk would no longer notify the litigant or the appellate project. If the certificate of probable cause is missing, any appellate issues from the plea or admission could not be addressed by the appellate court.</p> <p>This proposed amendment would harm a number of individuals who are seeking appellate review on pleas or admissions. First, many people who file for appeal after a plea or admission are doing so pro per and likely do not have the legal acumen to know that they must file the certificate of probable cause. In addition, some lawyers do not understand the certificate of probable cause process and could unintentionally harm defendants seeking an appeal under these circumstances. This proposed amendment will cause litigants to lose</p>	<p>The committee notes the commenter's opposition to the proposal.</p> <p>No response required.</p> <p>The committee has modified the proposal to ensure that the district appellate project receives notification of a notice of appeal filed without a certificate of probable cause and whether the defendant requested a certificate (which request the trial court denied).</p> <p>See response above.</p>

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			the ability to have certain appellate issues considered by reviewing courts. Moreover, litigants will not even know that they made a mistake and will not have the ability to correct the mistake.	
6.	Superior Court of California, County of Los Angeles By Bryan Borys	A	<p>In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:</p> <p>Does the proposal appropriately address the stated purpose? Yes. Clarification of the current rule is welcome.</p> <p>Would the proposed changes have an impact on preparation of the record on appeal? If so, please describe. The impact is likely to be more timely preparation of the record for appeals that fall within this category, as the court will not have to wait for the ruling on the certification of probable cause, or for appeals court review, to prepare the notice.</p> <p>The advisory committee also seeks comments from courts on the following cost and implementation matters:</p> <p>Would the proposal provide cost savings? If so, please quantify. The proposal will provide cost savings associated with elimination of the notice requirement. Note, however, that in instances in which the appeal goes forward, the trial court prepares the record, and then the Court of</p>	<p>The committee notes the commenter's support for the proposal.</p> <p>No response required.</p> <p>The committee appreciates these comments on the impact of the proposed rule change.</p> <p>The committee appreciates this information on cost and implementation matters.</p>

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			<p>Appeal subsequently determines that the appeal is invalid, the trial court will have wasted time and money in preparing the record. This is not a reason to reject the proposal; the clarity provided by the proposal is necessary. But there may be no net cost savings from this proposal.</p> <p>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. Minor programming and training costs.</p>	No further response required.
7.	Superior Court of California, County of San Diego By Mike Roddy Executive Officer	A	<ul style="list-style-type: none">• Does the proposal appropriately address the stated purpose? Yes.• Would the proposed changes have an impact on preparation of the record on appeal? If so, please describe. No. The appeals clerks already follow this proposed practice.• Would the proposal provide cost savings? If so, please quantify. No.• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of	<p>The committee notes the commenter's support for the proposal and appreciates the feedback on its request for specific comments.</p> <p>No further response required.</p> <p>No further response required.</p>

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			<p>training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?</p> <p>The information would need to be incorporated into written procedures.</p> <p>• Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.</p> <p>• How well would this proposal work in courts of different sizes? There should be no disparate impact between courts of different sizes.</p>	<p>No further response required.</p> <p>No further response required.</p> <p>No further response required.</p>