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Administrative and Judicial Duties in the Trial Court After a Guilty or No Contest Plea

by
GEORGE W. NICHOLSON*

In his Report, Professor Kelso discusses, among many other issues, the relationship between California trial and appellate courts. He contends that if the two courts coordinate their efforts, the amount of error can be reduced.¹ As an example of how this might operate in connection with his proposed Appellate and Trial Courts Coordination Council, Kelso cites the following paper, which presents ways to simplify coordination between trial and appellate courts after criminal defendants plead guilty or no contest.²

Introduction

Penal Code Section 1237.5 requires a defendant to do two things as a condition to an appeal from a judgment on a plea of guilty or no contest: The defendant must (1) obtain a certificate of probable cause

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Justice Nicholson presented an earlier version of this paper at the Appellate Courts Institute, conducted by the Center for Judicial Education and Research (April 1993), and the annual convention of the California Judges Association (May 1993).

Assistance, review, and criticism have been provided by Judge Thomas Cecil, Superior and Municipal Courts, County of Sacramento, State of California; Mr. Robert Liston, clerk-administrator, Court of Appeal, Third Appellate District, State of California; and Mr. David Hall, principal attorney, Court of Appeal, Third Appellate District, State of California. Justice Nicholson extends his special appreciation for assistance provided by his chambers clerk Jeffery Hogge.

1. J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 498-502 (1994); see also COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS, JUSTICE IN THE BALANCE 2020, at 168-69 (1994) (ch. 10, entitled "The Appellate Courts").

2. Kelso, *supra* note 1, at 499.

from the trial court, and (2) file a statement, under oath or penalty of perjury, stating reasonable grounds for the appeal.³ California Rule of Court 31(d) implements Section 1237.5 and, in addition, makes Section 1237.5 inapplicable when the appeal "is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to Section 1538.5 of the Penal Code."⁴ (See Form 1—Notice of Appeal, Part I, *infra*.)

From 1989 through 1991, Section 1237.5 did not require the defendant to obtain a certificate of probable cause from the trial court, but instead only required the defendant to file a statement with the notice of appeal showing the grounds affecting the legality of the plea. This gave the burden of winnowing out frivolous appeals after a guilty or no contest plea to the appellate court. Effective January 1, 1992,

3. Section 1237.5 of the California Penal Code states:

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 county clerk.

CAL. PENAL CODE § 1237.5 (West Supp. 1994).

4. The full text of California Rule of Court 31(d) states:

If a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after the judgment is rendered, file as intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate.

If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.

The time for preparing, certifying, and filing the record on appeal or for filing an agreed statement shall begin when the appeal becomes operative.

CAL. CT. R. 31(d).

By stating exceptions to the rule that a certificate of probable cause is required as a prerequisite to appeal after a guilty or no contest plea, Rule 31(d) modifies the application of § 1237.5 in accord with *People v. Ward*, 66 Cal. 2d 571 (1967), and *People v. Delles*, 69 Cal. 2d 906 (1968).

Section 1237.5 reverted to the former requirement of obtaining a certificate of probable cause from the trial court. The screening function, therefore, is shifted back to the trial courts.

The certificate of probable cause or order denying the request must be filed by the court within twenty days of the filing of the notice of appeal. (See Form 2—Order re Certificate of Probable Cause, Part I, *infra*.) Issuance or denial of the certificate of probable cause is subject to the discretion of the trial court. Thus, the appellate court, when reviewing denial of a certificate of probable cause, determines whether the trial court abused its discretion.⁵ Although no reported case has reviewed a trial court's issuance of a certificate of probable cause, there is no reason to believe such review, under the same abuse of discretion standard, would not be appropriate.

In fiscal year 1990-91, 13,024 appeals were filed in the court of appeal statewide. Of those, 6,275 (or approximately fifty percent) were criminal appeals. However, only five percent of criminal appeals filed result in an opinion published in the official reporter. Thus, most of the work of the court of appeal in criminal cases remains obscured from the public view and the trial courts. In the Third District, more than seventy-five percent of the criminal appeals were assigned as routine disposition appeals. Also, about forty-four percent of the criminal caseload consisted of appeals after a guilty or no contest plea. This represents a large portion of the district's total caseload. Of the appeals after a guilty or no contest plea, many are *Wende*⁶ appeals, which require additional staff and court time.⁷

Research suggests criminal appeals cost taxpayers an average of \$50,000 each.⁸ A reported case estimated the figure at a much lower \$6,000 per criminal appeal.⁹ Attempts to verify these figures have been unsuccessful. Nevertheless, as the only apparent data, and despite their disparity, they compel thought on how to reduce the num-

5. See *People v. Warburton*, 7 Cal. App. 3d 815, 820 (1970) ("Had the defendant requested a certificate of probable cause, it would have been an abuse of discretion for the superior court to have refused it.").

6. *People v. Wende*, 25 Cal. 3d 436 (1979).

7. *Wende* requires the appellate court to review the entire record for arguable issues when appointed counsel declares he or she is unable to identify any appealable issues and asks the court to try. See *People v. Placencia*, 9 Cal. App. 4th 422 (1992). The Third District has adopted the practice of filing the opinion in *Wende* cases without asking for a waiver of oral argument.

8. Stephen Green, *Tougher Crime Laws Hit the Pocketbook*, SACRAMENTO BEE, Feb. 5, 1989, at A3.

9. *People v. Olson*, 216 Cal. App. 3d 601, 604 (1989).

bers and costs of criminal appeals, especially those which follow guilty or no contest pleas.

The savings to the judiciary in making the trial and appellate courts more efficient in handling the processing of appeals after a guilty or no contest plea could be substantial. Court-appointed counsel require more than one-third of the appellate judicial budget. Since, for example, forty-four percent of criminal appeals in the Third District follow a guilty or no contest plea, a reduction in the number of such appeals would significantly reduce the financial outlay to appointed counsel and add to the savings generated internally.¹⁰

Traditionally, the courts approach error anecdotally, not systemically. As a result, errors are often repeated many times and the cause is never cured. The same is true of judicial efficiency. Many times a court will follow a certain strategy in an individual case "in the interest of judicial economy"; however, rarely do the courts engage in a systemic review and analysis to promote efficiency.

In some instances, courts avoid efforts to make themselves more efficient because of the perception that those efforts will result in injustice. However, as long as the focus of maximizing efficiency is on avoiding avoidable error, injustice does not result. The legislature has recently passed laws seeking to make the judicial branch more efficient.¹¹

This paper presents systemic responses to judicial error and inefficiency concerning issues related to appeals following guilty and no contest plea proceedings.¹² Forms with appended use notes are proposed, and several topics connected with proceedings related to and following guilty and no contest pleas are also discussed.

10. As proposed in the Governor's budget for fiscal year 1994-95, public costs for court-appointed appellate counsel will be approximately \$42 million, or the equivalent of roughly 50% of the combined budgets of the supreme court and the courts of appeal not allotted to supplying court-appointed counsel. S.B. 1287 (1993-94 Reg. Sess.).

11. See CAL. GOV'T CODE § 12419.1 (West Supp. 1994) (Trial Court Realignment and Efficiency Act of 1991).

12. One of every four appealed criminal cases involves asserted sentencing error. Green, *supra* note 8, at A3. A systemic review of sentencing and related procedure, such as the one undertaken here for guilty and no contest pleas, would be helpful.

I. Suggested Forms for Use in the Trial Courts¹³

FORM 1 - DBAET

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF _____

THE PEOPLE OF THE STATE	)	Superior Court No. _____
OF CALIFORNIA,)	
	)	Notice of Appeal
Plaintiff and Respondent,)	
	)	(After Plea of Guilty or
v.	)	Nolo Contendere)
)	
_____)	
)	
Defendant and Appellant.)	
_____)	

The defendant appeals from the judgment of this court

entered _____
(Date of Sentencing)

(THIS NOTICE MUST BE FILED WITHIN 60 DAYS OF THE DATE OF SENTENCING. IF REQUIRED, THE PENAL CODE SECTION 1237.5 WRITTEN STATEMENT MUST BE FILED AT THE SAME TIME.)

Check one or more:

This appeal is based on the sentence or other matters occurring after the plea and not challenging the validity of the plea.

This appeal is based on the denial of a motion, made in the superior court under Penal Code section 1538.5 or 995, to suppress evidence obtained in a search or seizure.

This appeal challenges the validity of the plea. A WRITTEN STATEMENT SIGNED UNDER OATH OR PENALTY OF PERJURY REQUESTING A CERTIFICATE OF PROBABLE CAUSE MUST BE ATTACHED TO THIS NOTICE OF APPEAL AND FILED WITH THE TRIAL COURT IF THIS BOX IS CHECKED. IT MUST DEMONSTRATE WHY THE PLEA WAS NOT OBTAINED LEGALLY. (PENAL CODE SECTION 1237.5.)

DATE: _____
Signature of Defendant or Trial Counsel

13. Senate Bill 3 is under consideration in the California Legislature. It would add Penal Code Section 1018.5, which would require the Judicial Council to adopt a standard written form for pleas of guilty and no contest. The Judicial Council might similarly adopt forms, such as the ones proposed here, for the procedure in perfecting an appeal after a guilty or no contest plea.

FORM 1 - USE NOTES

1. Adoption of a mandatory form, such as Form 1, for the notice of appeal would assist defendants in perfecting operative appeals. It would also assist the courts in more expeditious handling of appeals.

2. See Use Notes 5 and 6 of Form 3, *infra*, concerning when the denial of a motion to suppress is appealable.

FORM 2 - DRAFT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF _____

THE PEOPLE OF THE STATE)
 OF CALIFORNIA,)
)
 Plaintiff and Respondent,)
)
 v.)
)
 _____,)
)
 Defendant and Appellant.)

Superior Court No. _____
Order re Certificate of
Probable Cause
 (Pen. Code, § 1237.5; Cal.
 Rules of Court, rule 31(d).)

Defendant has filed with this court a written statement, executed under oath or penalty of perjury which does does not demonstrate reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings in that:

- This court now executes and directs the filing of this certificate of probable cause.
- The court denies defendant's request for a certificate of probable cause.

Dated: _____

JUDGE OF THE SUPERIOR COURT

FORM 2 - USE NOTES

1. When certificate of probable cause may be denied:
 - a. Statement filed more than 60 days after sentencing. (People v. Everett (1986) 186 Cal.App.3d 274, 280.)
 - b. Statement not signed under oath or penalty of perjury. (See People v. Grey (1990) 225 Cal.App.3d 1336, 1339, disapproved on other grounds in In re Jordan (1992) 4 Cal.4th 116; but see People v. Forrest (1990) 221 Cal.App.3d 675, 677-678, fn. 2.)
 - c. Statement is conclusory, not specifically setting forth the grounds. (People v. Everett, supra, 186 Cal.App.3d 274, 281.)
 - d. Grounds set forth are clearly frivolous and vexatious. (People v. Holland (1978) 23 Cal.3d 77, 84.)
 - e. The right to appeal was waived as part of a negotiated plea. (See People v. Kelly (1994) 22 Cal.App.4th 533; People v. Nguyen (1993) 13 Cal.App.4th 114, 124; People v. Vargas (1993) 13 Cal.App.4th 1653; but see People v. Joseph (1983) 34 Cal.3d 936, 949 (preventing waiver of right to appeal in capital cases).)

2. Efficient handling of requests for certificates of probable cause within the trial court must be considered and addressed. The court should designate a senior member of its legal staff to be familiar with the handling of notices of appeal and written statements and deal with most routine questions. Those questions which cannot be handled routinely could be referred to a specified judge. In addition, when the clerk determines the documents filed by the defendant warrant the judge's consideration concerning a certificate of probable cause, the file should go to the designated member of the legal staff for an annotated recommendation concerning whether the certificate of probable cause should issue and a proposed draft of the order. The latter process must be refined and very efficient. There are only 20 days within which to make the ultimate judicial decision to issue or deny a certificate of probable cause. If the staff attorney completes the annotated recommendation, citing the facts from the record and the relevant law, within 5 days of the filing of the request, the trial judge has 15 days to adopt the proposed order or draft a new order. Five days should be plenty of time for staff review because the file from a guilty or no contest plea is rarely large and the issues are defined in the written statement filed by the defendant.

FORM 3 - DRAFT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF _____

THE PEOPLE OF THE STATE	)	Superior Court No. _____
OF CALIFORNIA,)	
	)	Processing of Notice of Appeal
Plaintiff and Respondent,	)	After Guilty or No Contest Plea
)	
v.	)	(Pen. Code, § 1237.5; Cal.
	)	Rules of Court, rule 31(d).)
_____)	
)	
Defendant and Appellant.)	
_____)	

Date of sentencing: _____

Filing date of notice of appeal: _____

Clerk's Duties

1. Did the defendant plead guilty or no contest?
 - Yes. Go to Number 2.
 - No. This form does not apply.

2. Was the notice of appeal filed within 60 days after sentencing?
 - Yes. Go to Number 3.
 - No.
 - (a) The appeal is not operative.
 - (b) The clerk stamps the notice of appeal "received," not "filed."
 - (c) The clerk notifies the defendant in writing [Form 5 - Notice to Defendant re Appeal After Guilty or No Contest Plea].
 - (d) The clerk sends Package A to the Court of Appeal for tracking purposes only.

3. Do the minutes of the plea indicate the defendant waived the right to appeal as part of a plea agreement?
- Yes. (a) The appeal is not operative because the defendant waived the right to appeal and that waiver is noted in the minutes of the plea.
 - (b) The clerk so notifies the defendant in writing [Form 5 - Notice to Defendant re Appeal After Guilty or No Contest Plea].
 - (c) The clerk sends Package B to the Court of Appeal for tracking purposes only.
 - No. Go to Number 4.
4. Was the notice of appeal filed with a written statement signed under oath or penalty of perjury?
- Yes. (a) The clerk sends the file to the designated senior staff attorney for an annotated recommendation and proposed order.
 - (b) The clerk sends Package C to the Court of Appeal for tracking purposes only.
 - (c) Go to Number 6.
 - No. Go to Number 5.
5. Does the notice of appeal state the appeal is based solely (1) on grounds occurring after the plea which do not challenge the validity of the plea or (2) on denial of a motion to suppress evidence made under Penal Code section 1538.5 or reviewed under section 995 in the superior court?
- Yes. (a) The appeal is operative.
 - (b) The clerk so notifies the defendant in writing [Form 5 - Notice to Defendant re Appeal After Guilty or No Contest Plea].
 - (c) The clerk sends Package B to the Court of Appeal.
 - (d) The clerk prepares the record on appeal.
 - No. (a) The appeal is not operative.
 - (b) The clerk so notifies the defendant in writing [Form 5 - Notice to Defendant re Appeal After Guilty or No Contest Plea].
 - (c) The clerk sends Package B to the Court of Appeal for tracking purposes only.

Date sent to senior staff attorney for recommendation: _____

Senior Staff Attorney's Duties

- 6. (a) Senior staff attorney prepares an annotated recommendation, including citations to the record and relevant law, and a proposed order [Form 2 - Order re Certificate of Probable Cause].
- (b) Senior staff attorney sends to sentencing judge for a determination concerning a certificate of probable cause.
- (c) Go to Number 7.

Date sent to judge concerning certificate of probable cause: _____

Judge's Duties

Note: A certificate of probable cause or an order denying a certificate of probable cause must be filed within 20 days after filing of the notice of appeal with an accompanying written statement signed under oath or penalty of perjury.

- 7. Is the written statement conclusionary, not specifically setting forth the grounds challenging the validity of the plea?
 - Yes. (a) The judge issues an order denying the certificate of probable cause [Form 2 - Order re Certificate of Probable Cause].
 - (b) The judge returns the file to the clerk.
 - (c) Go to number 9.
 - No. Go to number 8.

- 8. Are the grounds stated in the written statement clearly frivolous and vexatious?
 - Yes. (a) The judge issues an order denying the certificate of probable cause [Form 2 - Order re Certificate of Probable Cause].
 - (b) The judge returns the file to the clerk.
 - (c) Go to number 9.
 - No. (a) The judge issues a certificate of probable cause [Form 2 - Order re Certificate of Probable Cause].
 - (b) The judge returns the file to the clerk.
 - (c) Go to Number 10.

Date returned to clerk: _____

Clerk's Duties

9. (a) The appeal is not operative.
 (b) The clerk so notifies the defendant in writing [Form 5 - Notice to Defendant re Appeal After Guilty or No Contest Plea].
 (c) The clerk sends Package D to the Court of Appeal for tracking purposes only.
10. (a) The appeal is operative.
 (b) The clerk so notifies the defendant in writing [Form 5 - Notice to Defendant re Appeal After Guilty or No Contest Plea].
 (c) The clerk sends Package D to the Court of Appeal.
 (d) The clerk prepares the record on appeal.

Package A: two copies of each of the following documents.

- (1) Notice of appeal stamped "received"
- (2) File stamped abstract of judgment and/or order appealed from
- (3) Notice to defendant advising the appeal is not operative [Form 5 - Notice to Defendant re Appeal After Guilty or No Contest Plea]
- (4) Appeal information sheet [Form 4 - Information Sheet - Criminal Appeal After Guilty or No Contest Plea]
- (5) Penal Code section 1240.1 statement (if the defendant is indigent)
- (6) This processing form

Package B: two copies of each of the following documents.

- (1) Notice of appeal stamped "filed"
- (2) File stamped abstract of judgment and/or order appealed from
- (3) Notice to defendant concerning status of the notice of appeal [Form 5 - Notice to Defendant re Appeal After Guilty or No Contest Plea]
- (4) Appeal information sheet [Form 4 - Information Sheet - Criminal Appeal After Guilty or No Contest Plea]
- (5) Penal Code section 1240.1 statement (if the defendant is indigent)
- (6) This processing form

Package C: two copies of each of the following documents.

- (1) Notice of appeal stamped "filed"
- (2) File stamped abstract of judgment and/or order appealed from
- (3) Appeal information sheet [Form 4 - Information Sheet - Criminal Appeal After Guilty or No Contest Plea]
- (4) Penal Code section 1240.1 statement (if the defendant is indigent)
- (5) This processing form

Package D: two copies of each of the following documents.

- (1) Notice to defendant concerning status of the notice of appeal [Form 5 - Notice to Defendant re Appeal After Guilty or No Contest Plea]
- (2) Order granting or denying certificate of probable cause [Form 2 - Order re Certificate of Probable Cause]
- (3) This processing form

FORM 3 - USE NOTES

1. See Use Note 1 of Form 1, supra, concerning filing of both a notice of appeal and a written statement.

2. The waiver of the right to appeal has been the topic of recent Court of Appeal decisions. (*People v. Kelly* (1994) 22 Cal.App.4th 533; *People v. Nguyen* (1993) 13 Cal.App.4th 114, 124; *People v. Vargas* (1993) 13 Cal.App.4th 1653, review denied.) Nguyen holds the defendant may waive, at the time of the plea, such prospective error as sentencing as long as it is within the range of the negotiated plea.

3. Form 3 calls for the clerk to make a determination early in the process whether the right to appeal has been waived. This is intended to identify efficiently and deter attempted appeals when the defendant has expressly given up the right. However, a word of caution is in order. Some issues, such as the trial court's fundamental jurisdiction or the validity of the waiver of the right to appeal may survive the waiver and be cognizable on appeal. Who makes the determination of whether the issues sought to be raised on appeal are waived and when that determination is made should be matters for each court to consider.

4. California Rules of Court, rule 31(d), uses the term "operative" to refer to notices of appeal meeting the rule's requirements. The terms "operative" and "inoperative" are used in Form 3 to describe an appeal for which the time for preparing the record has or has not been reached. While the terms may not be widely used other than in rule 31(d), they are used in this form in an attempt to standardize the language used in referring to notices of appeal.

5. A section 1538.5 motion is properly used only to suppress evidence obtained in violation of the defendant's Fourth Amendment rights. Thus, a motion to exclude admissions and confessions obtained in violation of Fifth or Sixth Amendment rights is not a section 1538.5 motion. (See *People v. Mattson* (1990) 50 Cal.3d 826.)

6. A motion to suppress must be made in the superior court to preserve the issue for appeal. (Pen. Code, § 1538.5, subd. (m); *People v. Miranda* (1987) 44 Cal.3d 57, 80; *People v. Lilienthal* (1978) 22 Cal.3d 891, 896-897; *People v. Kain* (1989) 212 Cal.App.3d 816, 819, 821.) The issue may be raised in the superior court by a direct section 1538.5 motion or a section 995 motion, challenging the municipal court's denial of a section 1538.5 motion. (Lilienthal, supra, 22 Cal.3d at p. 897.) *People v. Alderson* (1978) 86 Cal.App.3d 274, 279-280, decided shortly before Lilienthal held that a defendant who pleaded guilty before the magistrate preserved the suppression issue for appeal by first moving to suppress evidence in the municipal court. However, in light of the holding in Lilienthal, Alderson's continued viability is doubtful. (See *People v. Burns* (1993) 20 Cal.App.4th 1266, 1273, fn. 4.)

7. Circumstances under which appeal is operative and record must be prepared:

- a. A certificate of probable cause is filed. (§ 1237.5.)
- b. The notice of appeal is timely filed and the notice states the

appeal is based on one or both of the following grounds:

- i. Proceedings occurring after entry of the plea which do not challenge the validity of the plea. (Rule 31(d).)
- ii. Proceedings involving a search and seizure, the validity of which was contested in a section 1538.5 or 995 motion in the superior court. (Rule 31(d); *Lilienthal, supra*, 22 Cal.3d at p. 897.)

8. Deciding that a notice of appeal does not conform to California Rules of Court, rule 31(d), in that it does not include a written statement and does not state the appeal is based solely on the grounds excepted from the filing of a written statement is critical to judicial efficiency. In *People v. Ballard* (1988) 174 Cal.App.3d 982, 985, Division One of the First District held the failure to state appropriate grounds in the notice of appeal was a jurisdictional defect requiring dismissal of the appeal. (See *People v. Knauer* (1988) 206 Cal.App.3d 1124, 1127-1128.) In *Knauer*, however, the same division retreated from its holding in *Ballard* and opined that whether an appeal is "operative" merely signals to the clerk whether the duty to prepare the record exists. *Knauer* held that if the clerk prepares the record, the appellate court should consider the appeal on its merits, even if the notice of appeal was defective and the record should not have been prepared. (*Id.* at p. 1130.) While *Ballard* appears to represent the better view and eliminates doubt on the part of the trial and appellate court clerks concerning the efficacy of the appeal, applying *Knauer*, the appeal may become operative if the trial court clerk prepares the record in error. The Fifth District has declined to follow *Knauer*, instead continuing to follow *Ballard*. (*People v. Earls* (1992) 10 Cal.App.4th 184, 193.) Whether the appeal is operative should be determined by judicial application of the statutes and rules, not by the mistake of a clerk.

9. To assist in determining, by clerical rather than judicial personnel, whether the right to appeal has been waived as part of a negotiated plea, the judge who takes the plea should make sure the clerk notes prominently in the minutes, by marking a box specifically designed for the purpose, whether the right was waived. The judge should also insure the clerk notes prominently whether a motion to suppress evidence was made under Penal Code section 1538.5 or reviewed under Penal Code section 995 in the superior court.

FORM 4 - DRAFT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF _____

THE PEOPLE OF THE STATE	)	Superior Court No. _____
OF CALIFORNIA,)	
	)	<u>Information Sheet - Criminal Appeal</u>
Plaintiff and Respondent,)	
)	
v.)	
)	
_____,)	
)	
Defendant and Appellant.)	
_____)	

1. Trial Judge:
2. Reporter:
3. Defendant's date of birth:
4. Has any codefendant filed a notice of appeal? Yes No
If yes, give their names:

5. Institution to which the defendant was committed or, if granted bail or probation, last known address:

6. Trial counsel was (appointed)(retained).
7. Name and address of trial counsel:

- 8. a. Defendant pled guilty or no contest.
- b. Defendant was convicted after a
 - jury trial lasting _____ days.
 - court trial lasting _____ days.

Dated: _____ County Clerk

By: _____
Deputy Clerk

FORM 4 - USE NOTES

1. This form is designed for use in appeals following either a plea or a trial. All other forms are specifically designed for use only if the defendant pleads guilty or no contest.

FORM 5 - DRAFT
SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF _____

THE PEOPLE OF THE STATE	)	Superior Court No. _____
OF CALIFORNIA,)	
	)	<u>Notice to Defendant re Appeal</u>
Plaintiff and Respondent,	)	<u>After Guilty or No Contest Plea</u>
)	
v.)	
)	
_____)	
)	
Defendant and Appellant.)	
_____)	

- Your appeal is not operative and no record on appeal will be prepared because:
 - The notice of appeal was not filed because it was not received within 60 days after sentencing.
 - You waived the right to appeal as part of a negotiated plea.
 - You did not file a written statement, signed under oath or penalty of perjury, as required by Penal Code section 1237.5 and your notice of appeal does not state the appeal is based solely on grounds occurring after the plea which do not challenge the validity of the plea or on denial of motion to suppress evidence made or reviewed in the superior court.
 - The judge has denied your request for a certificate of probable cause and the notice of appeal does not state the appeal is based on grounds occurring after the plea which do not challenge the validity of the plea or on denial of a motion to suppress evidence made or reviewed in the superior court.
- Your appeal is operative and the record on appeal will be prepared because:
 - The notice of appeal states the appeal is based on grounds occurring after the plea which do not challenge the validity of the plea or on denial of a motion to suppress evidence made or reviewed in the superior court.
 - The judge has issued a certificate of probable cause.

Dated: _____ County Clerk
 By: _____ Deputy Clerk

II. Waiver of the Right to Appeal

Trial courts can streamline subsequent procedure by encouraging waiver of the right to appeal when the plea is negotiated and entered.

Many frivolous criminal appeals—taken at taxpayer expense—are filed each year. Little can or should be done to affect appeals in criminal cases which have gone to trial, but a powerful tool is available in those cases where a negotiated plea is entered. In cases where the defendant negotiates to receive an agreed-upon sentence (and the additional benefit of dismissal of other charges pending against the defendant), prosecutors *and trial judges* should consider obtaining the defendant's waiver of the right to appeal as part of the negotiated plea.¹⁴

A defendant may waive the right to appeal the denial of a Penal Code Section 1538.5 motion to suppress.¹⁵ The general right to appeal the conviction and sentencing may also be waived as part of a plea agreement if the waiver is knowing, intelligent, and voluntary.¹⁶ In order to ensure that the waiver is knowing, intelligent, and voluntary, the judge should admonish the defendant before taking the plea. The following is a suggested admonition to a defendant when taking a plea:

If you accept and the trial court approves this plea agreement, you will waive the right to appeal any and all issues. This includes waiver of any issues arising at sentencing if you are sentenced in conformance with this plea agreement. Have you had adequate time to discuss with your lawyer the nature of appeal and what your rights are relative to appeal in the circumstances of this disposition? Do you fully understand your right to appeal? Do you waive it freely and voluntarily?

Counsel, do you join?

III. Announcement of Appeal Rights and Procedures

The trial courts can also assist the defendant in understanding appellate procedures, both through announcement directly to the defendant and by a requirement that trial counsel assist the defendant. Several factors affect whether and how the trial court notifies the defendant of appeal rights and procedures after sentencing. California Rule of Court 470 requires the trial court, after a conviction following a trial, to advise the defendant of how and when to appeal and, if

14. *Olson*, 216 Cal. App. 3d at 604 (footnote omitted) (emphasis added).

15. *People v. Kelly*, 22 Cal. App. 4th 533, 536 (1994); *People v. Castrillon*, 227 Cal. App. 3d 718, 721 (1991); *People v. Charles*, 171 Cal. App. 3d 552, 557-62 (1985).

16. *People v. Vargas*, 13 Cal. App. 4th 1653 (1993); *People v. Nguyen*, 13 Cal. App. 4th 114 (1993).

indigent, of the right to appointed counsel on appeal. Even though not statutorily required, further announcements would be useful to provide clarification on the record as to the defendant's knowledge of appellate rights and procedures so the appellate court may later juxtapose any claimed ignorance alleged as an excuse for violations of the rules and laws about perfecting appeals. Such a record would also assist the appellate court in dealing with claims of incompetency of counsel arising from the notice of appeal, the appeal itself, or a writ of habeas corpus.

Rule 470 concerning announcement of appeal rights does not apply when a defendant admits a violation of probation or enters either guilty or no contest pleas.¹⁷ Nonetheless, advising a defendant of appeal procedures after an admission to a violation of probation or entry of a guilty or no contest plea assists the defendant in preserving appeal rights *and* makes a record that the appellate court can use in case the defendant defaults and claims ignorance of the procedures. In addition, an announcement after sentencing—whether following trial, a plea, or a violation of probation, and whether proven or admitted—can be used to inform trial counsel for indigents of their duty to assist in the preliminary steps of an appeal.¹⁸

A. Announcement of Appeal Rights

The following announcement of appeal rights is suggested by Judge John (Jack) J. Ryan,¹⁹ and reads:

You have a right to appeal from this sentence. If you wish to appeal you must file a written notice of appeal with the clerk of this court within sixty days from today's date. If you do appeal and are unable to hire a lawyer, the appellate court will appoint a lawyer to represent you on appeal, free of charge. You will also have the right to a free transcript and record of the necessary proceedings in this court. The written notice of appeal must be timely filed.

17. *People v. Serrano*, 33 Cal. App. 3d 331, 337 (1973) (referring to CAL. CT. R. 250, subsequently adopted as CAL. CT. R. 470).

18. CAL. PENAL CODE § 1240.1 (West Supp. 1994).

19. Judge John (Jack) J. Ryan, Orange County Superior Court, *Judge Ryan's Sentencing Script*. Judge Ryan's script is available on at least two electronic bulletin boards: the California Judges Association's CJA board (contact: Philip Meier, (415) 495-1999) and the Los Angeles Municipal Court's JIBBS bulletin board (contact: Steven Tamura, (213) 974-6181). Any registered judicial user may access and obtain a full text and current copy of the book from either bulletin board. Judge Ryan and Dean Thomas Johnson, School of Public Safety and Professional Studies, University of New Haven, are collaborating on developing and publishing a software system and database that will include Judge Ryan's sentencing script, a new and comprehensive plea script, relevant rules of court, and all California codes that define crimes and penalties.

Do you have any questions about how to begin an appeal? Do you understand how to appeal?

B. Suggested Announcement of Appeal Rights After Entry of a Guilty or No Contest Plea

This suggested admonition is adapted from Judge Ryan's script,²⁰ and reads:

You have a right to appeal from this sentence. If you wish to appeal you must file a written notice of appeal with the clerk of this court within sixty days from today's date. If your appeal challenges the validity of the plea, you must additionally file, with your notice of appeal, a written statement signed under oath or penalty of perjury showing the grounds for appeal. If your appeal does not challenge the validity of the plea, you must include in your notice of appeal a statement that your appeal is based solely on proceedings occurring after entry of the plea (or denial of a motion to suppress evidence obtained in a search or seizure). If you do appeal and are unable to hire a lawyer, the appellate court will appoint a lawyer to represent you on appeal, free of charge. You will also have a right to a free transcript and record of the necessary proceedings in this court. The written notice of appeal and, if required, the accompanying written statement signed under oath or penalty of perjury must be timely filed.

Do you have any questions about how to begin an appeal? Do you understand how to appeal?²¹

C. Additional Announcement After Sentencing Following a Guilty or No Contest Plea if the Defendant Is Indigent

To the defendant: Your trial attorney must counsel and advise you as to whether you should appeal except concerning your trial attorney's own competency. If you decide to appeal and your attorney believes grounds for appeal are arguably meritorious, your attorney must file a notice of appeal, a brief statement of points to be raised on appeal, a designation of the record to be used on appeal, and an application for appointment of appellate counsel for you. If your appeal challenges the validity of the plea, your trial attorney must also assist you in preparing and filing a written statement, signed under oath or penalty of perjury, showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. Do you understand these duties of your trial attorney?

To the trial attorney: Do you understand your duty, under Penal Code Section 1240.1, to give your client counsel and advice as to

20. A similar announcement is appropriate after revocation of probation following an admission of a violation. The announcement could also state the defendant may raise, on appeal, *only* issues arising from the revocation of probation, not from the original proceedings during which the defendant was convicted and placed on probation.

21. See Use Note 1 of Form 1, Part 1, *supra*.

whether arguably meritorious grounds exist to appeal and, if the defendant decides to appeal and you believe such grounds exist, to file a notice of appeal, a brief statement of points to be raised on appeal, designation of the record on appeal, and an application for appointment of appellate counsel? And do you also understand that if the appeal challenges the validity of the plea you must assist your client in preparing and filing a written statement, signed under oath or penalty of perjury, showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings? Are you familiar with [Form 1—Notice of Appeal, Part I, *supra*]? Will you utilize it in any effort to perfect an appeal in this case?²²

D. If the Defendant Is Not Indigent

If the defendant is not indigent a similar admonition to obtain the counsel and advice of the trial attorney concerning whether and how to appeal would be helpful, and would similarly make a record for potential use on appeal.

IV. Municipal and Justice Court Felony Pleas

Municipal and justice court judges, by statute, may take felony pleas and pronounce judgments in noncapital cases.²³ In addition, municipal and justice court judges may be designated by the Chief Justice to sit as superior court judges and, as such, may take felony pleas and pronounce judgments.²⁴ Appeals from such judgments must be processed by and through the superior court. However, when acting by statute, municipal or justice courts must process resultant appeals, utilizing the same forms, procedures, and coordination employed by the superior courts to process felony appeals.²⁵ When a municipal or justice court judge accepts a felony plea and pronounces judgment, the judge must expressly state and enter into the court's minutes the authority by which the court acts.²⁶ Only by such explicit

22. "The trial court may require trial counsel to certify that he or she has counselled the defendant as to whether arguably meritorious grounds for appeal exist at the time a notice of appeal is filed." CAL. PENAL CODE § 1240.1(a).

23. CAL. PENAL CODE § 1462(b) (West Supp. 1994).

24. CAL. CONST. art. VI, §§ 6, 11, 15; CAL. GOV'T CODE §§ 68546-48 (West 1982 & Supp. 1994); *Edler v. Hollopeter*, 214 Cal. 427, 430 (1931); *see People v. Najera*, 88 Cal. App. 3d 930, 933-34 (1979).

25. *See* CAL. PENAL CODE § 1466(b) (West Supp. 1994) (authorizing appeal of municipal and justice court judgments, entered following felony pleas, directly to the court of appeal). Use of the same forms and procedures logically follows to avoid disparate treatment in the court of appeal.

26. Paul R. Porreca, *The Judge: Energizer of the Criminal Process*, CT. REV. (Am. Judges Ass'n), Summer 1990, at 10.

specifications may appeals be processed properly and, in particular, may appellate courts know where to transmit remittiturs and remands.

V. Cooperation Between Trial Courts and Appellate Courts

Close cooperation between the trial courts and appellate courts is essential to conserving judicial resources and optimizing the process with respect to appeals after guilty or no contest pleas. On the trial court's part, the clerks handling appeals must be trained and experienced in processing these appeals. They must establish a long-term working relationship with the court of appeal and be confident in applying the laws and rules that terminate an appeal at the trial court level. Without application of these laws and rules, a record on appeal is prepared and the case is often well into the costly and time-consuming appeal before the problem can be identified and, if possible, rectified. On the appellate court's part, the staff must be committed to working closely with the trial courts. Feedback on handling of cases assists the trial courts to optimize their process.²⁷

This process can be enhanced greatly by the appointment of an Appeals Supervising Judge (ASJ) in each county.²⁸ The First District Court of Appeal in San Francisco has done so, requesting the Chief Justice to make the appointments.²⁹ The ASJ meets with the local staff members responsible for appeals and with justices and staff of the court of appeal to insure appeals are being handled properly and to evaluate and ameliorate the process.³⁰ Participation of the ASJ lends credibility and authority to the processing of appeals and expedites judicial intervention in dealing with problems.³¹

Experience establishes that when either or both the trial courts and courts of appeal fail to use their best senior staff in handling guilty and no contest pleas, immense waste of judicial time and personnel resources results. For example, inoperative appeals are processed

27. In this regard, each district of the court of appeal should prepare and distribute to the counties within the district a quarterly report showing record preparation statistics for each county. See The Honorable Carl West Anderson, *Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?*, 27 U.S.F. L. REV. 301 (1993).

28. *Id.* at 321-23.

29. *Id.* at 321.

30. *Id.* at 322-23. Another alternative available to speed record preparation is the use of sanctions against delinquent clerks and reporters. CAL. CT. R. 46.5. However, the preferred method is to establish a better working relationship and a more efficient process through coordination.

31. See RITA M. NOVAK & DOUGLAS K. SOMERLOT, *DELAY ON APPEAL: A PROCESS FOR IDENTIFYING CAUSES AND CURES* 100-01 (1990) (discussing the advantages of designating supervising judges).

through the court of appeal, unnecessary records are prepared, frustration and stress result, and increased costs to both courts unnecessarily accrue. Competent senior staff, on the other hand, can form close ties between the courts, apply the laws and rules effectively, and save considerable public funds. To meet the challenges of communication and coordination, regular meetings between the presiding justice and clerk of the court of appeal and the presiding judge and clerk of the trial court may be useful. While these meetings need not be frequent, they could insure a regular forum for cooperation.

Conclusion

Considerable benefit can accrue to the judiciary, counsel, litigants, and the public by reviewing and refining internal workings of the trial courts and administrative relationships between trial and appellate courts relative to processing felony pleas and facilitating perfection of related appeals. The forms and procedures suggested in this paper may alter existing practice only modestly. They may, nevertheless, substantially increase predictability, ease compliance by litigants and their counsel, and foster less costly and more timely, reliable, and credible court processes.