

Parts of this sample form in blue print are instructions to user, not to be included in filed document unless so noted. [Parts and references in green font, if any, refer to juvenile proceedings. See Practice Note, this web page, for guidance in adapting forms to juvenile cases. NOTE: The certificate of probable cause requirement does not apply to juvenile cases. (*In re Joseph B.* (1983) 34 Cal.3d 952, 959-960.)]

## PRACTICE TIPS

### Division differences in Fourth District:

Division One: The pleading should be framed as a motion to amend the notice of appeal. (*People v. Zarazua* (2009) 179 Cal.App.4th 1054 approved this procedure.)

Division Two: The pleading should be filed as a *motion* to amend the notice of appeal if the notice itself was timely filed and the case has been assigned a Court of Appeal number. If no appeal is pending, it should be filed as a *habeas corpus petition*.

Division Three: The pleading should be framed as a petition for habeas corpus.

**Adapting sample habeas corpus petition for motion format**: If filed as a motion, the sample habeas corpus petition below should be modified. A motion need not include tables, a petition, or a verification. It should, however, include a statement of case with the relevant procedural history and facts the motion relies upon. In the argument section, counsel can change language referring to habeas petitions to more general language about relief available in the Court of Appeal.

**Manual guidance**: See chapter 2 of the ADI Appellate Practice Manual, § 2.101 et seq., for background on notices of appeal and certificates of probable cause and § 2.113 et seq., for additional information on remedies for late or defective notices of appeal.

**Sample *Benoit* filings from ADI**: Constructive filing or amendment to a notice of appeal can be based on a variety of grounds. ADI staff attorneys file most of these petitions, because often they are a prerequisite to appointment of counsel. ADI therefore has a substantial bank of sample *Benoit*-type pleadings. Panel attorneys should ask the assigned staff attorney for assistance and any sample briefing related to the particular situation of the case.

**Stay of appeal**: Stays are generally unnecessary and tend to be disfavored, unless the court decides to stay the appeal on its own motion. Counsel should not ask for a stay unless it is necessary to avoid some kind of prejudice. An extension of time to file the brief may be sufficient.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION *[NUMBER]*

*[Defendant's name]*, ) Court of Appeal No.  
 ) *[leave blank]*  
On Habeas Corpus. )  
\_\_\_\_\_)  
*[Defendant's name]*, ) Superior Court No.  
 ) *[number]*  
Petitioner and Defendant )  
 )  
v. ) Related Appeal No.  
 ) *[number]*  
 )  
*[Name]* SECRETARY, )  
DEPARTMENT OF CORRECTIONS )  
\_\_\_\_\_)  
PEOPLE OF THE STATE OF CALIFORNIA, )  
Real Party in Interest. )  
\_\_\_\_\_)

FROM THE SUPERIOR COURT OF *[NAME]* COUNTY

*[Name of trial judge]*, Presiding

\_\_\_\_\_  
**PETITION FOR WRIT OF HABEAS CORPUS FOR LEAVE  
TO FILE A LATE REQUEST FOR CERTIFICATE OF  
PROBABLE CAUSE UNDER *ROE V. FLORES-ORTEGA* (2000) 528  
U.S. 470 AND *IN RE BENOIT* (1973) 10 Cal.3d 72;  
[AND REQUEST TO STAY APPEAL]**

See **Practice tip re Stay of appeal** at the beginning of this form before adding the second request.

\_\_\_\_\_  
*[Attorney name]*  
*[Address]*  
State Bar No. *[number]*  
Attorney for Defendant

**TABLE OF CONTENTS**

*[usual list]*

**TABLE OF AUTHORITIES**

*[usual list]*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION *[NUMBER]*

<i>[Defendant's name]</i> ,	)	Court of Appeal No.
	)	<i>[leave blank]</i>
On Habeas Corpus.	)	
_____	)	
<i>[Defendant's name]</i> ,	)	Superior Court No.
	)	<i>[number]</i>
Petitioner and Defendant	)	
	)	
v.	)	Related Appeal No.
	)	<i>[number]</i>
	)	
<i>[Name]</i> SECRETARY,	)	
DEPARTMENT OF CORRECTIONS	)	
□ _____	)	
PEOPLE OF THE STATE OF CALIFORNIA,	)	
Real Party in Interest.	)	
_____	)	

FROM THE SUPERIOR COURT OF *[NAME]* COUNTY

*[Name of trial judge]*, Presiding

**PETITION FOR WRIT OF HABEAS CORPUS**

**TO THE HONORABLE JUSTICE *[NAME]*, PRESIDING JUSTICE  
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE  
COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH  
APPELLATE DISTRICT, DIVISION *[NUMBER]*:**

By this verified petition for writ of habeas corpus, defendant *[name]*  
requests leave to file a request for certificate of probable cause (Pen. Code,

§ 1237.5; Cal. Rules of Court, rule 8.304(b)), which was omitted from his otherwise timely notice of appeal.

**I.**

Defendant is currently imprisoned in *[institution]* under the judgment in *[name]* County Superior Court case number *[number]*. (See Exhibit A, Abstract of Judgment.)

**II.**

Sentence was imposed on *[date of sentencing]*. On *[date]*, *[defendant / defendant's trial counsel]* filed a timely notice of appeal purporting to challenge the sentence or other matters occurring after the plea and not attacking the validity of the plea. (See Exhibit B, Notice of Appeal.) *[State any other material proceedings.]*

**III.**

The notice of appeal did not include a request for certificate of probable cause to attack the validity of the plea, although trial counsel was informed that the defendant wished to raise an issue attacking his plea *[or: specify other issues requiring a certificate of probable cause]*.

**IV.**

The failure to include a request for a certificate of probable cause is attributable to defendant's trial counsel, not to defendant's own fault. *[State briefly the facts showing the omission was trial counsel's fault trial, not the defendant's. E.g., trial counsel failed to act on defendant's request to*

*challenge the plea, failed to recognize a legal basis to attack the plea, did not know the correct deadline or understand the requirement of a certificate of probable cause, etc.]* (See Exhibit C, Declaration of [trial counsel/defendant].)

**V.**

The due date for filing a request for a certificate of probable cause expired *[give date (60th day after judgment was imposed or first working day afterward)]*. (Cal. Rules of Court, rules 8.304(b)(1); 8.308(a).)

**VI.**

Defendant wishes to raise issues on appeal that require a certificate of probable cause. *[Briefly identify.]*

**VII.**

Defendant now seeks permission to file in the trial court the attached request for certificate of probable cause, under the doctrine of constructive filing of notice of appeal. (See Exhibit D, Proposed Request for Certificate of Probable Cause.)

**VIII.**

Defendant has no adequate remedy at law because without the requested relief the current appeal would be limited to matters not affecting the validity of the plea.

**IX.**

Defendant has sought no other relief in this or any other court regarding this matter.

**X.**

**REQUEST FOR RELIEF**

1. Defendant asks for a writ of habeas corpus permitting him to file in the trial court a request for certificate of probable cause and ordering the court to deem it timely filed.

[2. Defendant asks that appeal No. *[number]* be stayed pending this court's ruling on this petition. *[State reasons – e.g., to avoid piecemeal briefing, allow preparation of additional record, etc.]*]

3. Take judicial notice of the appellate record in case number *[direct appeal number]*;

4. Grant petitioner whatever further relief is appropriate in the interests of justice.

See <b>Practice tip re Stay of appeal</b> at beginning of this form before requesting the appeal be stayed.
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Dated: *[date]*

Respectfully submitted,

*[Attorney name]*  
State Bar No. *[number]*  
Attorney for Defendant

## VERIFICATION

I, *[attorney name]*, declare as follows:

1. I am an attorney admitted to practice before the courts of the State of California. My office is located in *[county name]* County.
2. I am the attorney for petitioner and am authorized to file this petition.
3. I am making this verification because I am familiar with these matters. I am filing this for petitioner under to Penal Code section 1474. (*In re Robbins* (1998) 18 Cal.4th 770, 783, fn. 5.)

I declare under penalty of perjury of the laws of California that the foregoing and all attachments are true and correct.

Executed *[date]* in *[city]*, California.

Respectfully submitted,

*[Attorney signature]*

*[Attorney name]*

State Bar No. *[number]*

Attorney for Defendant *[name]*



## MEMORANDUM OF POINTS AND AUTHORITIES

### I. STATEMENT OF THE CASE

*Expanded procedural history relevant to the claim.  
Unnecessary if all such facts are in part II of the formal  
petition.*

### II. ARGUMENT

#### A. A DEFENDANT MAY SHOW A NOTICE OF APPEAL OR REQUEST FOR A CERTIFICATE OF PROBABLE CAUSE WAS CONSTRUCTIVELY FILED IF TRIAL COUNSEL FAILED TO PERFORM THE DUTIES PERTINENT TO APPEAL.

*Trial counsel have a number of duties with respect to appeals. Adapt headings and arguments to facts and particular failings of counsel in the case.*

##### 1. TRIAL COUNSEL HAS THE DUTY TO FILE A NOTICE OF APPEAL ON REQUEST OR TO ADVISE THE CLIENT ABOUT APPEALING IF A REASONABLE DEFENDANT WOULD WANT TO APPEAL OR IF THE CLIENT HAS EXPRESSED INTEREST IN APPEALING.

Trial counsel is responsible for securing a meaningful appeal for a defendant who wants to appeal or reasonably should want to. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470; *In re Benoit* (1973) 10 Cal.3d 72; Pen. Code, § 1240.1, subs. (b), (d).) *Roe v. Flores-Ortega, supra*, 528 U.S. at pp. 478, 480, concluded an attorney renders ineffective assistance by failing to consult about an appeal with a defendant in a case where the defendant has informed the attorney of a desire to appeal or where a reasonable defendant in that defendant's position would want to appeal (e.g., counsel is aware of a non-frivolous appellate issue).

Penal Code section 1240.1, subdivision (b), codifies this affirmative duty:

It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

*In re Benoit, supra*, 10 Cal.3d 72, 80, held that if, before the time for filing an appeal has expired, the defendant asks the trial counsel to file a notice of appeal, and trial counsel fails to do so, the defendant's timely request to counsel may be deemed a constructive filing of the notice of appeal – it will be treated as if it had actually been filed on time. The court determined a defendant who makes arrangements with the trial attorney to file a notice of appeal should be able to rely on that. (*Id.* at p. 86.) *Roe v. Flores-Ortega, supra*, 528 U.S. at p. 477, similarly found a “defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice” and ordered a factual hearing on whether the conditions for reinstating the appeal were met. (See also *Peguero v. United States* (1999) 526 U.S. 23, 28 [if counsel fails to file requested appeal, defendant is entitled to new appeal without showing appeal likely has merit].) Relief is available through habeas corpus filed in the reviewing

court. (*People v. Lyons* (2009) 178 Cal.App.4th 1355, 1362; see also *In re Jordan* (1992) 4 Cal.4th 116.)

**2. TRIAL COUNSEL’S DUTIES INCLUDE SEEKING A CERTIFICATE OF PROBABLE CAUSE, IF ONE IS NEEDED TO ACHIEVE THE CLIENT’S OBJECTIVES ON APPEAL.**

Counsel’s duties include taking *all steps necessary* to secure adequate appellate review. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 389-390, 396 [right to effective assistance of counsel in complying with procedures needed to perfect appeal, such as Kentucky law requiring “statement of appeal” in addition to brief].)

A certificate of probable cause is required to attack a guilty plea on appeal or to raise issues that would effectively attack it. (Pen. Code, §1237.5; Rules of Court, rule 8.304(b); see *In re Chavez* (2003) 30 Cal.4th 643, 657 [request for CPC is notice of appeal and subject to same principles on timeliness].) Specifically, the notice of appeal must request, and the superior court must grant, a certificate of probable cause. (*Ibid.*) It follows that trial counsel has a duty to file (or assist the defendant in filing) a request for a certificate of probable cause when the defendant wishes to raise an issue requiring it.

A certificate of probable cause is equivalent to a notice of appeal. (*In re Chavez, supra*, 30 Cal.4th 643, 653.) Therefore, *Benoit* relief applies to failure of counsel to file a declaration requesting a certificate of probable

cause. (See *People v. Ribero* (1971) 4 Cal.3d 55, 66 [“counsel’s obligation to assist in filing the notice of appeal necessarily encompasses assistance with the statement required by section 1237.5”]; see also *People v. Buttram* (2003) 30 Cal.4th 773, 779 [noting grant of constructive filing to obtain certificate of probable cause]; *People v. Duncan* (2003) 112 Cal.App.4th 744, 746, fn. 2 [granting unopposed request to amend notice of appeal to comply with certificate of probable cause requirement]; cf. *Chavez, supra*, 30 Cal.4th 643 [declining to decide whether *Benoit* applies].) Thus, when a notice of appeal is technically imperfect or is unclear and the flaw is due substantially to counsel’s, not the defendant’s, fault, the defendant should be permitted to amend it to secure the intended appeal.

**B. DEFENDANT REASONABLY RELIED ON TRIAL COUNSEL TO FILE THE NOTICE OF APPEAL PROPERLY AND TO ASSURE IT WAS ADEQUATE TO RAISE THE DESIRED CHALLENGE TO THE PLEA.**

*[If failure was something additional or different, such as failure to consult, tailor heading and argument accordingly.]*

Here, no question exists that defendant’s trial counsel agreed to file the notice of appeal on defendant’s behalf because defendant expressed the desire to appeal. *[Cite to exhibits, record. State different facts, if applicable.]*

The failure to file a certificate of probable cause request resulted from counsel’s fault. *[Insert argument showing late certificate request is attributable to persons or factors other than defendant’s lack of diligence.]*

*Also, provide brief argument of why issue is non-frivolous, and in turn, counsel was obligated to consult with the client about it and/or seek a certificate to preserve the issue. Support with defendant's declaration and/or trial counsel's declaration; or if trial counsel admits fault to defendant counsel, but refuses to provide a declaration, appellate counsel may execute a declaration recounting the conversation with trial counsel.]*

Counsel's omission was not and could not reasonably be a strategic choice. *[State relevant facts.]* (See *People v. Lucas* (1995) 12 Cal.4th 415, 436-437 [if trial counsel acts below a reasonable level of competence and no reasonable tactical explanation exists for trial counsel's conduct, then a defendant is entitled to relief].) Obtaining a certificate of probable cause does not require a defendant to challenge the validity of his plea but merely leaves open this option.

Under the circumstances trial counsel was under an obligation to file a request for a certificate of probable cause, a reasonable trial attorney would have done so to secure a meaningful appeal, and defendant is prejudiced by being precluded from raising appellate issues requiring it. (See *Roe v. Flores-Ortega*, *supra*, 528 U.S. at pp. 478-480; *In re Chavez*, *supra*, 30 Cal.4th at p. 652.) Defendant was reasonable to have relied on trial counsel – his agent for navigating the esoteric legal system – to complete not only part of the notice of appeal, but the entire notice of

appeal, and to secure him his right to appellate review of the evident subject of his concern. (See *In re Benoit, supra*, 10 Cal.3d at pp. 86-87; *Chavez*, at p. 652.) At minimum, he was reasonable to trust trial counsel to adequately consult with him about the possibility of attacking the validity of the plea, before foreclosing that option. (See *Roe*, at pp. 478, 480.)

Because the failure to file a timely request for a certificate of probable cause was not defendant's fault, but rather was due to the ineffective assistance of counsel, this court should permit defendant to amend his notice of appeal and order the superior court to consider the request for a certificate of probable cause in Exhibit D. (See Pen. Code, § 1240.1; *Roe, supra*, 528 U.S. at p. 484; *Chavez, supra*, 30 Cal.4th at p. 652; *Benoit, supra*, 10 Cal.3d at p. 88.) “[T]o deprive the client of his day in court for no fault of his own seems to be a result to be avoided if possible.” (*In re Martin* (1962) 58 Cal.2d 133, 139.) It is “[t]he policy of appellate courts . . . ‘to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technical grounds.’” (*Ibid.*)

### **C. CONCLUSION**

Defendant asks this court to:

1. Issue a writ of habeas corpus permitting him to file in the trial court a request for a certificate of probable cause. [; and]

[2. Stay appeal number *[number]* pending this court's ruling on this petition to avoid piecemeal briefing.]

See **Practice tip re Stay of appeal** at the beginning of this form before adding the second request.

Dated: *[date]*

Respectfully submitted,

*[Attorney name]*

State Bar No. *[number]*

Attorney for Defendant *[name]*

## CERTIFICATION OF WORD COUNT

I, *[attorney name]*, hereby certify that, according to the computer program used to prepare this document, this petition contains *[number]* words.<sup>1</sup>

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed *[date]*.

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*[Attorney name]*  
State Bar No. *[number]*  
Attorney for Defendant *[name]*

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<sup>1</sup>**Practice note:**

Technically, under rule 8.384(a)(2), the word limit of rule 8.204(c) – 14,000 – applies only to the *memorandum of points and authorities*, not to the petition itself. But in a relatively short petition like the typical *Benoit*, counsel need not be concerned with such a distinction.

In other, much more complex situations, if counsel finds word limits potentially troublesome, ADI has authorities showing the history of the rule limit and its intentional omission of the petition itself.



## **PROOF OF SERVICE**