

Reversal and Remand: Appellate Counsel's Duties

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This article is intended to provide guidance when the Court of Appeal reverses and remands a case to the trial court in the client's favor and no further petitions are pursued or granted that would alter the disposition.

Law Governing Appellate Dispositions

Penal Code section 1260¹ sets forth the authority of the Court of Appeal to draft dispositions in an appeal. The section provides:

The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

“[W]hen an appellate court remands a matter with directions governing the proceedings on remand, ‘those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void.’ [Citation].” (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 860, original italics; see also *People v. Ramirez* (2019) 35 Cal.App.5th 55, 64 [same].) Once the remittitur issues, the appellate court's jurisdiction over the case terminates, and jurisdiction reverts in the trial court. (*Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 774, fn. 5; see also *People v. Dutra* (2006) 145 Cal.App.4th 1359, 1366, original italics [on remand “the trial court is revested with jurisdiction of the case, *but only to carry out the judgment as ordered by the appellate court*”].)

If the trial court fails to follow appellate directions on remand, the client may file a notice of appeal from a final judgment or order, or, “where the remedy by appeal is not speedy and adequate,” may seek a remedy through an immediate petition for writ of prohibition or writ of mandate.² (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656; *Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982 [“failure to follow appellate directions [on remand] can be challenged by an immediate petition for writ of prohibition or writ of

¹ All future statutory references are to the Penal Code.

² If the trial court fails to comply with the appellate directive, trial counsel should first seek a remedy for the client in the trial court. If that is unsuccessful, trial counsel can next pursue the matter in the Court of Appeal by filing the petition for peremptory writ.

mandate”].)

Types of Dispositions

“The disposition constitutes the rendition of the judgment of appeal” (*Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 312.) The “actual judgment” is the disposition, usually at the end of the opinion. (*Ibid.*) “The disposition is construed according to the wording of its directions, as read with the appellate opinion as a whole.” (*Id.* at p. 313.) *court*”].)

Under section 1260, a Court of Appeal has multiple options. It may reverse, remand, modify, or a combination thereof. The reversal may be unqualified or a partial reversal with directions. A reversal in a defendant’s appeal is “deemed an order for a new trial, unless the appellate court shall otherwise direct.” (§ 1262.)

Appellate Counsel Duties

Appellate counsel should take proper steps to protect the client’s interests as soon as the opinion is filed. There are various factors to consider keeping in mind the specific disposition ordered by the Court of Appeal.

1. Timing

Determine the expected date of the remittitur. Finality of the opinion and issuance of the remittitur are governed by California Rules of Court, rules 8.366(a) and (b) and 8.272. If rehearing and/or review have not been pursued, the remittitur normally will issue 61 days after the opinion has been filed. (Cal. Rules of Court, rule 8.272(b)(1)(A); see also ADI Manual, § 7.4.4.) If review has been pursued and denied, the remittitur will likely be filed a short time after denial of review.

If the client risks serving “‘dead’ time — custody in excess of the lawful sentence,”³ then counsel should act quickly and seek a stipulation with the Attorney General for immediate issuance of a remittitur⁴ under California Rules of Court, rule 8.272(c)(1).⁵

³ [ADI Manual](#), § 1.3.14 [Protecting the Client in Time Sensitive Cases].

⁴ [Forms and Samples](#): “Remittitur, Immediate Issuance.”

⁵ Under section 2900.5, excess credits can be applied to parole, where applicable, or to the base fine. Subdivision (a) of the statute authorizes credit upon the “term of imprisonment” or to any “base fine.” Subdivision (c) defines the “the term of imprisonment” to include “any period of imprisonment and parole.” (See *People v. Morales* (2016) 63 Cal.4th 399, 406 [§ 2900.5 “states both that the person is entitled to credit for time served and that the credit can reduce or eliminate any period of parole” but does not apply where felony reduced to misdemeanor under Proposition

As more fully explained below, inform the client, trial counsel and, if necessary, the superior court. Also, alert the prison litigation coordinator of the California Department of Corrections (CDCR)⁶ and provide the opinion, stipulation, and remittitur.

If the Attorney General does not stipulate, then consider a motion for release on bail pending appeal under section 1272.1.⁷

2. Inform the Client

Inform the client of this significant development, send the client the opinion, and explain the disposition is contingent on any further petitions and their outcomes. Explain that if no further petitions are pursued or granted, the remittitur will issue on the anticipated date; at that point, jurisdiction over the case will return to the trial court and the trial court must carry out the disposition as ordered by the appellate court. Remind the client to refrain from discussing the case with anyone except appellate counsel and trial counsel. Assure the client that you will ask trial counsel to request a hearing be scheduled. Explain further that you cannot undertake the matter in the trial court and the responsibility lies with trial counsel.

If the client was pro per in the trial court, then appellate counsel may need to be more proactive, such as writing to the superior court, providing it with a copy of the opinion and remittitur, and asking it to comply with the appellate directions and to send an amended abstract of judgment or new minute order to the CDCR.

3. Contact Trial Counsel/Superior Court

Trial counsel may not be aware of the favorable disposition or may not learn of it until much later when precious time has been lost. Therefore, promptly inform counsel and provide counsel with the opinion and information on the anticipated date of the remittitur. Ask trial counsel to calendar a hearing as soon as the remittitur issues and to inform you of the hearing date. Send trial counsel a copy of the remittitur.

If a copy of the record would benefit trial counsel, emailing a scanned copy would be ideal. If that is not possible, remember that the hard copy of the record belongs to the client, whose consent must be obtained to send it to counsel. Explain why it would benefit counsel and that, once the case is concluded, trial counsel can return the record to the client.

If the disposition would necessarily require the client's presence, appellate counsel

47]; see also *People v. Pinon* (2016) 6 Cal.App.5th 956, 966-967 [excess custody credits can be applied to the base fine.]

⁶ <https://www.cdcr.ca.gov/ombuds/ombuds/litigation/>

⁷ [Forms and Samples](#): “Bail Motion, Superior Court” and “Bail Motion, Court of Appeal.”

should provide trial counsel with the client's prison identification number and current address so that the trial court will have the correct information to order the client's transfer to court.

Sometimes, trial counsel does not respond or is no longer available. Seek out a supervisor or, if the Office of the Public Defender is the trial attorney, ask to speak to the attorney who handles appeals. If this is not successful, write to the superior court requesting prompt compliance with the appellate directives and ask that trial counsel be appointed.

4. Get a Copy of the Minute Order/Amended Abstract of Judgment

Determine whether the new minute order and/or amended abstract of judgment⁸ have issued and whether the disposition ordered by the Court of Appeal is correctly reflected. Trial counsel may be able to assist in obtaining these documents or contact ADI.

5. Particular Dispositions and Course of Action

On occasion a win is big, like an unqualified reversal, but more often it is for resentencing or some other correction of the sentence. The following are examples of dispositions and what actions counsel can undertake.

- Unqualified reversal

This may occur, for example, where the judgment was reversed based on insufficiency of the evidence to support the conviction(s). Double jeopardy bars retrial. (*Burks v. U.S.* (1978) 437 U.S. 1, 18 [double jeopardy clause precludes a second trial after conviction reversed based on insufficient evidence]; *People v. Seel* (2004) 34 Cal.4th 535, 544.)

In such a case, even if there are other sustained convictions, client could be serving dead time if custody time exceeded the time attributable to the sustained convictions. (See § 1, *ante*, and Partial Reversals, *post*.)

If there are no other sustained convictions, section 1262 provides for discharge from custody, exoneration of bail, refund of money that had been deposited in lieu of bail, and return of any paid fine and penalty assessment.

- Reversal and retrial

Reversal and retrial may occur, for example, because of an instructional or evidentiary error. Trial counsel would benefit from obtaining a copy of the

⁸ See section 1213 concerning the commitment document.

record. (See § 3, *ante*.)

Section 1382, subdivision (a)(2), requires a defendant to be “brought to trial within 60 days . . . after the filing a remittitur in the trial court . . .” If the prosecution fails to do so, trial counsel may seek dismissal of the case on speedy trial grounds. (See e.g., *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 90, italics added [“The only duty placed upon an accused in protecting his right to a speedy trial is to object when his trial is set for a date beyond the statutory period and then move to dismiss once that period expires, *or merely move to dismiss if the statutory period expires without a trial date being set*”]; see also *People v. Martinez* (2000) 22 Cal.4th 750, 766, original italics [“No affirmative showing of prejudice is necessary to obtain a dismissal for violation of the state constitutional speedy trial right *as construed and implemented by statute*”].) Appellate counsel can remind the client to refrain from discussing the case with anyone except appellate counsel and trial counsel. (See §§ 2 and 3, *ante*.)

- Partial reversal with directions

This may occur, for example, where one or more of several counts is reversed for insufficiency of the evidence and a resentencing must take place, or where a retrial is ordered due to instructional or evidentiary error. As to the former, the client may risk serving dead time. (See § 1, *ante*.)

- Remand with directions to modify the judgment

The judgment may be modified, for example, to reduce a conviction to a lesser included offense if the evidence was deemed insufficient to support the greater offense (e.g., *People v. Ruiz* (1975) 14 Cal.3d 163, 165 [modifying conviction for possession of heroin for sale to simple possession of heroin]) or to strike an invalid prior conviction (e.g., *People v. Denard* (2015) 242 Cal.App.4th 1012, 1034 [strike conviction determination reversed and remanded for resentencing]). In effect, the sentence will qualify for modification, and the client may risk serving dead time. (See § 1, *ante*.)

Sentence modifications may also include fines/fees/assessment correction or hearing on ability to pay, custody credits correction, a section 654 stay, striking or modifying a probation condition, etc. (See § 3, *ante*.)

Beware of the full resentencing rule: “[W]hen part of a sentence is stricken on review, on remand for resentencing ‘a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances. [Citations.]’” (*People v. Buycks* (2018) 5 Cal.5th 857, 893.) This has also been extended to the recall provisions under section 1170, subdivision (d). (*Ibid.*) Advise the client about this rule in cases in which it applies, so that the client understands there is no guarantee of a reduced

sentence.⁹

⁹ The sentence cannot, however, be *increased* absent such problems as an unauthorized sentence. (*People v. Henderson* (1963) 60 Cal.2d 482, 495-497; see ADI Manual, § 4.6.2.)