



People's Remedies

Michael D. Schwartz
Chief Assistant District Attorney
October 8, 2018

Ventura County Superior Court Appellate Division



2nd Friday each month, 3 pm, Ctrm 22
Judges Mark Borrell (PJ), Nancy Ayers,
Rocky Baio, JoAnn Johnson



California Court of Appeal
Second Appellate District, Division 6
200 E. Santa Clara St., Ventura



Arthur
Gilbert, PJ



Kenneth R.
Yegan



Steven Z.
Perren



Martin J.
Tangeman

California Court of Appeal
Second Appellate District, Div. 6

California Supreme Court



350 McAllister Street
San Francisco

California Supreme Court



Mariano-Florentino Cuéllar, Kathryn M. Werdegar (ret. 8/2017), Carol A. Corrigan, Tani G. Cantil-Sakauye (CJ), Ming W. Chin, Goodwin H. Liu, and Leondra R. Kruger

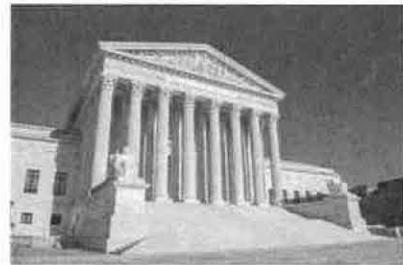


United States Court of Appeals
for the Ninth Circuit



SF, Pasadena, Portland, Seattle
22 judges, 20 senior judges

United States Supreme Court



United States Supreme Court



On the DA web, 26 page outline

AVAILABILITY OF PEOPLE'S REMEDIES
an outline of appellate and other remedies for trial prosecutors

Ventura County District Attorney's Office
 Chief Assistant District Attorney Michael D. Schwartz
 March 24, 2004
 Latest revision and cite checked October 1, 2018

I. DIVISION OF LABOR

	MISDEMEANOR	FELONY / JUVENILE
APPEALS	People's or Defense appeal: Writs, Appeals & Training Unit	People's appeal: Writs, Appeals & Training Unit Defense appeal: Attorney General of California
WRITS	By People or Defense: Writs Appeals & Training Unit	By People: Writs, Appeals & Training Unit By Defense: Writs, Appeals & Training Unit handles post-conviction writs in the Superior Court and all preconviction writs. AG handles postconviction writs in Court of Appeal, Cal. Supreme Court, and Federal court.

Note: Writs challenging jail conditions, jail treatment, probation supervision, etc. are handled by Sheriff or by County Counsel. Writs challenging parole decisions are handled by Attorney General's Correction Law unit.

Preserve record for appeal

- Make record of chambers, at-bench discussions, actions.
- Object. State your position.
- Offer exhibits. Ask for rulings.
- Judicial notice requests.
- State all grounds for 1538.5.

MISCELLANEOUS PEOPLE'S REMEDIES

Magistrate dismisses felony complaint – 4 options

1. If not HTA any counts: PC 871.5
 - motion to reinstate complaint
 - “reverse 995 motion”
 - must make motion within 15 days
2. If HTA some counts: allege on the information all crimes “shown by the evidence” (PC 739)

Magistrate dismisses felony complaint – 4 options

3. Refile (file new felony complaint) (PC 999)
 - two dismissal rule (PC 1387)
4. Grand jury indictment
 - two dismissal rule (PC 1387)

995 granted or superior court dismisses

- Minor errors: PC 995a
- Refile complaint (PC 999, 1387)
 - Even if dismissal was on speedy trial grounds
- Appeal dismissal (PC 1238(a)(1))
 - If only some counts 995’d, can writ

Discovery sanctions (PC 1054.5 (b))

- Immediate disclosure
- Contempt
- Continuance
- Jury instruction
- Delay or prohibit witness or exhibits
 - If all other sanctions exhausted

Contempt

- Criminal prosecution (PC 166(a)(4))
- Coercive contempt (CCP 1209)
 - Not available for sexual assault of DV victim (CCP 1219)

Contempt, continued

- Punitive contempt (CCP 1209)
 - Direct contempt – in presence of court
 - Indirect contempt – based on affidavit
 - 5 days jail and/or \$1000
 - 3 day stay for attorney or agent
 - 3 day stay for pub. safety ee – failure to respond to subpoena
- Writ of certiorari (writ of review) or habeas corpus

Other remedies

- CCP 177.5 – sanction of up to \$1500, if violate court order without good cause or substantial justification
- Complaint to State Bar
- Complaint to Comm'n Judicial Performance
- For commissioners, complaint to Comm'n Judicial Performance or presiding judge

APPEALS

No appeal from acquittal,
including 1118 or 1118.1

People's right to appeal
PC 1238, 1466, WIC 800(b)

- Dismissals before jeopardy (995, 1385, demurrer)
- New trial
- Recusal
- Unlawful sentencing
 - Probation order via writ within 60 days
- Reduction of degree, lesser offense
- Order after judgment

Appeals Procedure

- Certification of record
- Appellant's Opening Brief
- Respondent's Brief
- Appellant's Reply Brief
- Oral argument
- Issuance of opinion
- Remittitur

Appeals timeline

- Notice of appeal: 30 days misdemeanor, 60 days felony
- Misdemeanors: notice of appeal to remittitur: minimum 4-5 months
- Felonies: minimum 7 months
 - Average for Division 6: 12 months, 90% in 20 months
 - If Supreme Court grants review, add at least a year

Standard of review

- Presumption trial court correct
- Appellate court reviews rulings, not reasons
- Credibility determinations and findings of fact upheld if substantial evidence
- Independent judgment as to questions of law
- Discretion/abuse of discretion

VCDA Procedure

- Discuss with supervisor
- Discuss with Writs, Appeals and Training Unit attorney
- Get transcript or recording in advance of due date

Consideration for People's appeals

- Likelihood of prevailing given applicable standard of review
- Did DA make adequate record and preserve the issue for appeal
- Bad facts for DA?
- Availability of other options (resources)
- Importance of issue for present case, to the victims, or for future cases

Review of 1538.5

- Generally trial court has no jurisdiction to reconsider ruling or hear second motion
- Misdemeanor: People can appeal grant.
 - Need not dismiss.
 - Trial stayed, defendant released OR
- Misdemeanor: Appeal from dismissal on court's own motion based on suppression of evidence

Review of 1538.5

- Felony: If 1538.5 granted but HTA, relitigate de novo (PC 1538.5(j))
- Felony, 1538.5 granted at “special hearing”
 - Writ of mandate/prohibition, trial stayed, OR release
 - Or can appeal dismissal on court’s own motion based on 1538.5
 - Or dismiss and refile, but 1538.5 must be heard by same judge

WRITS

APPEALS

- Statutory grounds
- Limited to trial record
- Court prepares record
- Appeal is of right

WRITS

- Appeal inadequate or beyond jurisdiction or statutory grounds
- Can go beyond record
- Petitioner provides record
- Court can summarily deny

Requirements for People’s writs

People v. Superior Court (Howard)
(1968) 69 Cal.2d 491

- If no statutory right to appeal, can’t writ either
- Excess of jurisdiction BUT that does not mean court misinterpreted statute, constitutional provision, or controlling precedent

Requirements for People's writs, revisited

- Excess of jurisdiction allows writ if misinterpret statute or constitutional provision or controlling precedent
- Court refused to exercise discretion, or abuse of discretion

Examples of rulings People can writ

- Court had no authority to appoint private prosecutor, to order deposition, etc.
- Right to appeal not sufficiently timely or adequate
- Plea bargain in violation of 1192.7
- Discovery orders
- Bail not authorized by statute
- Quashing of subpoena

No right to writ

- Pretrial ruling re admissibility of evidence (not binding at trial)
 - Exception if “tantamount to a dismissal”
- Admission or exclusion of evidence at trial
- Where would be double jeopardy (e.g., dismissal during trial)

Writ petition

- Formal allegations like a civil complaint
- Points and authorities
- Exhibits (record): pleadings, orders, transcripts, declarations
- Prayer for relief

Case names

- Appeal: *People v. Smith*
- People's writ: *People v. Superior Court (Smith)*
- Defense writ: *Smith v. Superior Court (People)*
- Habeas: *In re Smith*

Court's response to writ petition

- Summary denial
- Request informal response
- Order to show cause
- *Palma* notice (considering issuing peremptory writ in the first instance)

Outcomes – Calif. 2016

- Defense appeals: 91% affirmed, 7% reversed
- People's appeals (171 in DCA): 73% affirmed (D won), 25% reversed (People won)

Outcomes Ventura County DA Writs, Appeals & Training, 2015-2018

- D misd. appeals (113): P won 88%
- D writs to Super Ct (40): P won 83%
- D writs/appeals to DCA (5): P won 80%
- D writs/appeals to Cal Supreme (5): P won 80%
- P misd. appeals (16): P won 69%
- P writs to Super Ct (2): P won 50%
- P writs/appeals to DCA(5): P won 33%
- P writs/appeals to Cal Supreme (6): P won 33%

PROCEDURE FOR APPELLATE REVIEW BY PEOPLE

1. A deputy district attorney considering appellate review of a misdemeanor case shall first discuss the case with their supervisor. An important consideration shall be whether, should the appellate review be successful, the office will proceed with prosecution on the charges.
2. If the supervisor agrees that appellate review may be appropriate, the attorney shall discuss the matter with an attorney in the Writs, Appeals and Training Unit. The attorney shall provide the case file and all relevant pleadings. A memorandum explaining the case may be appropriate.
3. In misdemeanor cases, the attorney shall order an audio recording of the proceedings. The FTR format for audio recordings is preferred.

In a felony case the transcript of the relevant proceeding (ex. preliminary hearing or 1538.5 motion) should be ordered as soon as possible.

Absent compelling circumstances, the Writs, Appeals and Training Unit should review the transcript or audio recording before filing an appeal or seeking other appellate relief.

4. Review should be sought promptly in light of the 30-day deadline for filing a notice of appeal in misdemeanor cases (60 days for felony cases).
5. Factors to consider in whether to seek appellate review include the following:
 - a. What is the likelihood of prevailing? The standard for review for the purported error is important. Are we asserting (i) a clear error of law, (ii) a legal issue on which we have a reasonable chance of prevailing, (iii) that the ruling was not supported by substantial evidence (bearing in mind the presumption that it was), or (iv) that the court abused its discretion?
 - b. Are there bad facts that may result in a negative ruling?
 - c. Is the record sufficiently clear? Were appropriate objections and arguments made in the trial court?
 - d. Is the undesirable result due in part to acquiescence or inadequate handling by the prosecution?
 - e. Are other options available? Consider the amount of work required for different options, the speed with which they can be accomplished, and the likelihood of a satisfactory outcome.

(OVER)

- f. Is the case sufficiently important, or the issue sufficiently important to the given case, to justify the time and effort of appeal? We should consider both the resources of our office and of the court.
- g. Is there an injustice to the victim or to the People that must be corrected?
- h. We generally should not appeal a case or a count that is likely to be dismissed, even if the appeal is successful.
- i. Is it a recurring issue for which appellate guidance would be helpful? Have subsequent factual or legal developments rendered the issue moot for future cases?
- j. Does the trial judge have a pattern of bad rulings that should be corrected?
- k. Will we hurt the credibility of our office with the appellate court by bringing a writ or appeal on which we have little chance of winning, or which involves a minor issue not worthy of the appellate court's resources, or which we did not handle well in the trial court?

mds 3/30/15