

Supreme Court Transfer/Remand Orders - Status of Issues Not the Subject of Remand Order -

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In recent weeks, there have been several Supreme Court orders granting petitions for review and transferring the cases to the Court of Appeal for consideration of S.B. 620, the recent legislation (eff. Jan. 1, 2018) giving sentencing courts discretion to strike firearm enhancements. We are likely to see similar Supreme Court orders in the near future transferring grant-and hold cases for reconsideration in light of the Court's recent opinion requiring juvenile fitness hearings for cases not yet final at the time of enactment of Prop. 57. ([People v. Superior Court \(Lara\)](#) (Feb. 1, 2018; S241231) _ Cal.5th _.)

We have had several inquiries from panel attorneys regarding the status of a petition for review's *other* claims following a Supreme Court retransfer or remand order such as this. In particular, attorneys have asked whether such an order can be treated as a denial of review as to all claims other than the subject of the retransfer order.

An order granting review and remanding to the appellate court for consideration of a specific issue (or remanding after an earlier grant-and-hold) does **not** constitute a denial of review as to the petition's other claims and does not terminate the appeal as to those issues. Such orders typically do not say anything about denial of review as to other claims. By transferring the cause to the Court of Appeal, the Supreme Court effectively remands the entire appeal to it – even if the purpose of that remand concerns only a limited issue. Moreover, upon a transfer back to the appellate court, the parties may file supplemental briefs addressing *any* “matters arising after the previous Court of Appeal decision in the cause.” (Cal. Rules of Court, [rule 8.200\(b\)\(2\)](#).) Significantly, that rule does not limit the subject matter of the supplemental briefs to the issue specified in the remand order. The parties are also free to address new cases or legislation affecting other issues of the appeal, as long as those matters arose after the original appellate decision. Similarly, the appellate court's opinion following such a remand will generally not be limited to the issue specified in the Supreme Court. Instead, in addition to its discussion of the specified issue, the post-remand opinion will reiterate the original opinion's discussion of the other issues (unless there have been intervening legal developments calling for revisions of those sections as well). In light of the facts that the Supreme Court has not explicitly denied review as to other claims and that the new appellate opinion covers *all* the issues of the appeal, those other issues remain alive in the appeal. **Consequently, in order to ensure exhaustion and preservation of those issues, counsel will need to file a new petition for review on those claims.**

This analysis also provides the answer to another frequent question – calculation of the AEDPA deadline for a federal habeas corpus petition in Supreme Court remand situations such as this. Some attorneys have wondered whether the one-year period commences upon the Supreme Court’s transfer order. In our view, the answer is no, *because that order does not represent a denial of review and the appeal is still pending*. Consequently, the AEDPA statute of limitations will not begin to run until final conclusion of the appeal – including the remand proceedings in the Court of Appeal, a second petition for review, and expiration of the period for filing a cert. petition. Moreover, if the appeal results in a remand to the trial court for resentencing – e.g., for a new sentencing hearing to consider possible striking of firearm enhancements or for a juvenile fitness hearing – *the time will not begin to run until those resentencing proceedings have concluded*, including any appeal following the resentencing hearing. The AEDPA “limitations period [does] not begin until both [the] conviction *and* sentence ‘[become] final...’” *Burton v. Stewart* (2007) 549 U.S. 147, 156-157 (emphasis in original).

However, it is not clear if the same is true if the remand to the sentencing court is *only* for purposes of a *Franklin* record development hearing, rather than an actual resentencing. A remand for record development only would not appear to affect the finality of the sentence itself. In that situation, the safest course would be to assume that the statute begins to run upon conclusion of the original appeal and that the “record development” proceedings in superior court do *not* toll or defer commencement of the statutory period.

Finally, a remand which only corrects “scrivener’s error” in the abstract of judgment – that is, purely clerical errors in accurately memorializing the terms of judgment in the abstract, rather than judicial error in the judgment itself – does *not* defer running of the limitations period. “Correcting a scrivener’s error in the abstract of judgment does not lead to a new judgment because the judgment itself does not change, only the written record that erroneously reflects that judgment.” *Gonzalez v. Sherman* (9th Cir. 2017) 873 F.3d 763, 772.

This is also a good occasion for a reminder regarding another aspect of the previously-cited rule on post-remand briefing, rule 8.200(b). When the Supreme Court has remanded or transferred a case to the Court of Appeal, **counsel should not wait and expect the Court of Appeal to set a briefing schedule**. Rule 8.200(b)(1) already does so. Within **15 days** of a remand or transfer order, either party may file a supplemental brief, and the opposing party may file a responsive brief 15 days after that. These deadlines are extendable. But, if an extension is needed, counsel should be sure to file the request before expiration of the initial 15-day period.