

**SAMPLE PETITION FOR REHEARING
FOR ERROR IN LAW OR PROCEDURAL PROCESS**

TO THE HONORABLE PRESIDING JUSTICE AND THE
HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL,
____ APPELLATE DISTRICT:

Pursuant to rule 8.268 of the California Rules of Court, appellant,
[NAME], petitions this Court for a rehearing in the above-entitled matter
after an unpublished opinion, dated [INSERT DATE FILED], which
affirmed the conviction, but vacated the sentence and remanded to the trial
court for further proceedings in accord with the opinion.

INTRODUCTION

This Court issued its Opinion on [INSERT DATE], reversing the
judgment, but not remanding for a new trial. Instead, the court directed the
trial court to “(1) allow both parties the opportunity to file motions, adduce
evidence, and present argument at noticed hearings but also (2) to make
finds of fact and issue rulings.” (Opinion, p. 3.) The court also stated that
“[a]fter those rulings, the court shall conduct such further proceedings as
may be just under the circumstances, including re-entry of the judgment if
appropriate. (Pen. Code, sec. 1260.)” (Opinion, p. 4.) The court noted in a
footnote that it did not consider any of the other issues, because they were
not “yet ripe... Only after the adjudication on remand...will any of

Renteria's other issues conceivably be ripe." (Opinion, p. 4, fn 2.)

Appellant petitions this Court for rehearing regarding the undecided arguments (Argument I, II, IV, V, VI, VII and VIII) or for clarification of the procedural ruling related to Argument III. (See Calif. Rules of Court, rule 8.268.)

ARGUMENT

The Opinion cites Penal Code section 1260 as basis for its remand of a single issue. Section 1260 states: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the 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."

Remand for a single issue, with reinstatement of the judgment, as ordered here is a proper remedy in certain cases. (See, *People v. Minor* (1980) 104 Cal.App.3d 194, 199 [determination of good cause for appointment of new counsel]; *People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 405-407 [remand for evidentiary hearing on fairness of pretrial identification procedures]. However, unlike the instant case, the courts in

both *Minor* and *Vanbuskirk* had decided the other issues raised in the appeal. Only the single issue remained for decision.

Appellant has not discovered any other case where several issues have been left undecided and remand has been ordered on a single issue, with reinstatement of the judgment to follow if that issue is not granted. This procedural order, although attempting to foster judicial economy, results in a possible procedural nightmare for appellant. Obviously, if the search is found to be a Fourth Amendment violation, a new trial can be ordered and the rest of the appeal would be moot. However, if the search hearing in this matter is decided against appellant, and the judgment is reinstated, under what procedure will this Court hear the undecided issues. Will there be a problem with waiver? Will the appeal need to be started over from the beginning, or will there be supplemental briefing granted on the new issue of the search matter?

Appellant respectfully disagrees with the Court's footnote stating these issues are not "ripe." The undecided issues were decided in a final judgment in the trial court and properly appealed. Instead, it is possible that they would become "moot." Rehearing on the undecided issues or clarification of the Opinion is necessary to avoid the procedural difficulties, and the problem of a later finding that the issues were waived because the

new judgment will only present appealable issues as to the new issues. (See, *People v. Barlow* (1980) 103 Cal.App.3d 351 [“Stated in terms of the procedural events of the case before us, we observe that although an appeal may lie from the subsequent order of April 11, 1979, which found probation to have been violated and which then placed defendant on probation again, the matters arising before pronouncement of the judgment of September 8, 1979, cannot thereby be reviewed. (*People v. Howerton* (1953) 40 Cal.2d 217, 220 .)”]

Appellant, therefore, requests that this court either rehear the matter and decide the merits of the remaining issues and then remand for a search hearing, or in the alternative, requests that this Court modify its Opinion to clarify this issue. It is suggested that the Opinion should be modified so that following remand and decision on the search matter, it is clear that the unresolved issues in the previous briefing will be resubmitted for decision in this Court, and that supplemental briefing will be permitted based on an appeal of the newly decided issue of the search hearing, if a notice of appeal on the decision in that hearing is filed by either party.