



The Nickerson Issue: Appellate Jurisdiction Over “Felony Cases”

You’ve been appointed to represent an appellant on his or her direct appeal to the California Court of Appeal. The notice of appeal was filed in the superior court, the Court of Appeal received notification of the filing of the appeal and, on CCAP’s recommendation, appointed you as counsel on appeal. Given this background, you might assume the Court of Appeal will proceed to entertain the appeal.

But, if your client was ultimately only convicted of misdemeanor offenses, be sure to consider the question of whether the Court of Appeal has jurisdiction to entertain the appeal.

Generally speaking, if your client was charged in an *information or indictment* with a felony, the Court of Appeal has jurisdiction. (*People v. Nickerson* (2005) 128 Cal.App.4th 33; *People v. Morales* (2014) 224 Cal.App.4th 1587.) However, if your client was only charged in a *complaint* with a felony, but pleaded guilty to solely misdemeanor offenses before an information or indictment was filed, then the superior court appellate division, rather than the Court of Appeal, has jurisdiction. (See *Nickerson, supra*, 128 Cal.App.4th at pp. 36-39; cf. *Morales, supra*, 224 Cal.App.4th at pp. 1594-1600.) In such cases, a *Nickerson* motion may be appropriate.

Appellate Court Jurisdiction

The Court of Appeal has jurisdiction over an appeal in a “felony case.” (Pen. Code, § 1235.) The appellate division of the superior court, by contrast, has jurisdiction in “an infraction or misdemeanor case.” (Pen. Code, § 1466.) A “felony case” is defined as a criminal action “in which a felony is charged,” and includes criminal actions in which a misdemeanor or infraction is charged with a felony. (Pen. Code, § 691, subd. (f).) This includes any criminal action in which a felony is charged, “regardless of the outcome.” (Cal. Rules of Court, rule 8.304(a)(2).)

In *Nickerson, supra*, 128 Cal.App.4th 33, the Third District Court of Appeal first analyzed what it means for a felony to be “charged,” thereby making the case a felony case and giving the Court of Appeal jurisdiction. In *Nickerson*, the complaint alleged a felony and two misdemeanors. After the preliminary hearing, the trial court, acting as a magistrate, only held the defendant to answer on the two misdemeanors. The Court of Appeal determined that a felony was not “charged” under these circumstances. Instead, a defendant is not charged with a felony until an information or indictment is filed or a

complaint is certified to the superior court. (*Id.* at p. 38.) If the case goes before the magistrate for a preliminary examination and the court as magistrate reduces all of the felony charges to misdemeanors, the defendant was never charged with a felony. The resulting case is thus a misdemeanor case, and appellate jurisdiction belongs in the appellate division of the superior court. (*Ibid.*)

The Scott Exception

In *People v. Scott* (2013) 221 Cal.App.4th, the defendant was held to answer on one felony count following the preliminary hearing. Eight days later, the prosecution filed an information charging the defendant with one felony and three misdemeanors. (*Id.* at p. 527.) Four days after that, however, the prosecution moved to dismiss the felony count for insufficiency of the evidence. The trial court dismissed the felony and the defendant pleaded not guilty to the three misdemeanors. (*Id.* at pp. 527–528.) The case was subsequently set for trial in a misdemeanor department. (*Id.* at pp. 528, 533, fn. 5.) On the first day of trial, the prosecution filed an amended misdemeanor pleading, solely charging the defendant with three misdemeanor offenses. (*Id.* at p. 528.) A jury found the defendant guilty as charged. (*Ibid.*) The *Scott* court concluded that, although there had been an information charging a felony, the case was properly considered a “misdemeanor case,” and should be heard in by the superior court appellate division. The opinion did not cite to *Nickerson*.

Scott appears to be a bit of an anomaly. Courts of Appeal have limited the holding of *Scott* to the very specific procedural circumstances presented, where there was an early motion to dismiss the felony charges, an amended misdemeanor pleading was filed, and there were proceedings in the misdemeanor department. (See *Morales, supra*, 224 Cal.App.4th at p. 1599; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1098–1099.) Otherwise, if an information charging a felony has been filed, the case is a felony case “regardless of the outcome” under California Rules of Court, rule 8.304. (*Ibid.*)

Does A Reduction to a Misdemeanor Under Proposition 47 or Penal Code Section 17, Subdivision (b) Affect Jurisdiction?

No, after a felony information or indictment has been filed, a reduction of the felony to a misdemeanor does not affect the appellate court’s jurisdiction. (*Rivera, supra*, 233 Cal.App.4th 1085; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1104.)

Both Penal Code section 17 and Proposition 47 have language that, once reduced, the conviction is “a misdemeanor for all purposes.” (Pen. Code, §§ 17, subd. (b); and 1170.18, subd. (k).) However, courts have held that this language means that the conviction will be deemed a misdemeanor for all purposes *after* the misdemeanor

judgment has been imposed; the reduction is not retroactive. (*Rivera, supra*, 233 Cal.App.4th at p. 1087, citing *People v. Feyrer* (2010) 48 Cal.4th 426, superseded by statute on other grounds, as noted in *People v. Park* (2013) 56 Cal.4th 782, 789, fn. 4.) Therefore, following *Nickerson* and California Rules of Court, rule 8.304, a felony was still originally “charged” for the purpose of determining appellate jurisdiction when an information or indictment accusing the defendant of a felony was filed. (*Rivera, supra*, 233 Cal.App.4th at p. 1096; *Lynall, supra*, 233 Cal.App.4th at p. 1111.) This is true even if the defendant was originally charged with a wobbler: the offense was deemed a felony and remained a felony until the trial court decided to impose a misdemeanor sentence. (*Ibid.*) Once a felony was charged, a reduction to a misdemeanor does not impact whether the case may be deemed a “felony case” for purposes of appellate jurisdiction.

My Case May Be in the Wrong Court Under *Nickerson*. What Now?

If jurisdiction for your case belongs in the appellate division of the superior court, consult with the CCAP staff attorney assigned to your case about possibly filing a *Nickerson* motion, requesting the court to determine whether it has jurisdiction in the matter. A sample motion is available on CCAP’s website. (See CCAP’s Motion Samples Book, *Appealability, Application for Order Concerning Misdemeanor Case*, <https://www.capcentral.org/resources/motion.asp#A>.)

Some thoughts to consider in filing a *Nickerson* motion: First, it is important to look for this issue as early as possible. If the Court of Appeal does not have jurisdiction, you may not be compensated for unnecessary work in the Court of Appeal when the case is ultimately transferred back to the superior court.

Additionally, double-check the date of the notice of appeal filed in your case. Misdemeanor appeals must be filed within 30 days of the judgment (Cal. Rules of Court, rule 8.853), as opposed to the 60-day limitation that applies to a notice of appeal to the Court of Appeal (Cal. Rules of Court, rule 8.308). If the defendant did not file his or her notice of appeal within the 30 days, and the case is transferred back to superior court, the original notice of appeal may not be timely. In such a case, the appellant may also need to seek relief under the constructive filing doctrine, also known as the *Benoit* doctrine (*In re Benoit* (1973) 10 Cal.3d 72), if and when the Court of Appeal transfers the appeal to the superior court appellate division. Please consult with the CCAP staff attorney assigned to your case about whether an application for relief under *Benoit* is within the scope of your appointment.

My Case is Correctly in the Court of Appeal Under *Nickerson*. What Now?

You do not have to file any motions to confirm the Court of Appeal's jurisdiction. If the court has any doubts as to its own jurisdiction, it may raise that issue on its own initiative. (*Rivera, supra*, 233 Cal.App.4th at p. 1089.)

An additional issue for a felony case that is properly in the Court of Appeal, but involves only misdemeanor convictions, is the statute of limitations. Review whether the misdemeanor conviction can be challenged on statute-of-limitations grounds. The statute of limitations on misdemeanors is generally just one year. (Pen. Code, § 802, subd. (a).) Defendants may expressly waive the affirmative defense of the statute-of-limits bar if they plead to time-barred lesser offenses as part of a negotiated disposition. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 374.) However, a timeliness defense might not be forfeited if a jury returns a guilty verdict on a lesser-included misdemeanor offense. (See, e.g., *People v. Meza* (2019) 38 Cal.App.5th 821, 821, criticizing *People v. Stanfill* (1999) 76 Cal.App.4th 1137.)