

[Date]

[client name and address]

Re: **Your appeal**

Dear Mr./Ms. \_\_\_\_\_:

I am the attorney who has been appointed by the Sixth District Court of Appeal to represent you on your appeal.

An appeal is limited to matters which were contained “in the record,” which is the written records contained in the clerk’s file and taken down by the court reporter at trial and all other court proceedings. However, you should let me know about any matters outside the record which you think are important. While we probably can not raise any issues about such matters in the appeal itself, there may be the potential for a separate writ proceeding in addition to the appeal.

Enclosed is a description of the appellate process. Appeals are very different from what you have experienced at the trial level, so please read the attached description carefully.

I have not yet received the transcripts in your case. Once I receive the transcripts and have had a chance to review them I will have a better understanding of the case and probably will have more specific questions for you.

If you are moved or relocate while the appeal is pending, please advise me promptly of the change. You should always feel free to write to me at the above address if you have any questions or comments about your appeal.

Very truly yours,

Attorney’s Name

Encl

## INFORMATION SHEET FOR APPEALS

I have recently been appointed to represent you on your appeal in the California Court of Appeal. The purpose of this letter is to explain what a criminal appeal is all about. It is my hope that this letter will answer some questions you undoubtedly would like to ask about the appellate process.

### What is an Appeal?

An appeal is primarily an appellate court's review of the trial court proceedings to see if procedural error was committed. The review is based upon the written records of the trial court. The appellate court accepts no new evidence. Nor does the Court of Appeal decide whether a defendant who is appealing (referred to as the "appellant" in the appellate court) is guilty or innocent. That is the function of a trial court. Instead, the Court of Appeal considers whether the trial court proceedings were conducted legally. Did you get a fair trial or hearing at which correct legal rulings on law and procedure were made? And if errors were committed, were they substantial enough to require a reversal of your conviction?

The Court of Appeal has several choices in deciding your appeal. It can *affirm* the judgment of the lower court, in which case the decision of the lower court remains unchanged. It can modify the judgment, so that the decision of the lower court remains, but with some change in it. (For example, the sentence could be modified to provide concurrent rather than consecutive sentences, or to give credit for time served.) The appellate court can also reverse the judgment of the lower court, in part or entirely. If it does reverse, the case is sent back to the trial court, usually for retrial on the reversed part, although on rare occasions a case will be reversed with directions to dismiss. Generally a reversal does not mean that the matter is closed, but rather that you are entitled to have the trial or hearing done over again – correctly – in the lower court.

In California there are two levels of appellate courts, the Court of Appeal, which is divided into six districts, and the California Supreme Court. (Misdemeanor appeals are handled separately, through the Appellate Department of the Superior Court.) Except in death penalty cases, all appeals go to the Court of Appeal in the district in which the trial court proceedings were conducted. Because your case is an appeal from Santa Clara, Santa Cruz, Monterey or San Benito County, your appeal is heard in the Sixth District of the Court of Appeal, which is located in San Jose.

After the Court of Appeal has made its decision, either party—you, the “appellant,”

or the attorney general, the “respondent” — can petition for review in the California Supreme Court. The Supreme Court has a different role than the Court of Appeal. While the Court of Appeal reviews every appeal for error, the Supreme Court grants review in only a very few cases that present legal issues of statewide importance.

### **The Record**

After you filed your notice of appeal, the clerk and court reporter in the trial court began preparing the record on appeal. The record consists of the Reporter's Transcript (the word-for-word account of the trial and other relevant hearings) and the Clerk's Transcript (consisting of pleadings, minute orders, jury instructions, the abstract of judgment, records of priors, etc.)

Unfortunately, the court prepares only one copy of the record for the appellant. While the appeal is pending, I need to keep this copy for my work on the appeal. Please keep in mind that the record will eventually be yours to keep; I will send it to you as soon as I have concluded my representation of you in your appeal.

Often the record filed in the Court of Appeal does not contain everything I need to represent you effectively on appeal. If that is the case, I will file a motion in the Court of Appeal to augment, or add to, the record. If the motion is granted, there will be further delay until the additional record is prepared. Usually our opening brief will not be due until thirty days after the augmented record is filed in the Court of Appeal.

### **Communications About Your Case**

When I receive the record on appeal, I will write to you as soon as I have had an opportunity to read the record. I will let you know what issues I believe, at that point, can be raised on appeal and ask you for your thoughts and suggestions regarding the appeal, so that I can research any issues you raise to determine whether they can be raised to your benefit on your appeal. Please write back, if only to confirm your whereabouts and to let me know that you are receiving my letters. If you are transferred or move, please promptly notify me of your new location.

Ordinarily I will communicate with you by mail. This attorney-client mail is confidential, and no authorities in a state institution are entitled to read it. Be sure to write “Attorney-Client Mail” or “Legal Mail” on the envelope of every letter you send me. Your correspondence, and all other documents I acquire in relation to your case, will be kept in a

confidential file in my office.

You should feel free to write to me as your attorney at any time; you will receive a prompt response. If you have legal questions about your case, you should write to me directly. Do not have third parties call to ask me about your case. I cannot discuss your case with any non-attorney other than you without violating the attorney-client privilege. If there are matters which cannot be resolved by mail, you can telephone me collect at my office number, which is (408) 241-6171. I much prefer communication by mail because I know it remains confidential. We can sometimes arrange a “confidential” phone conference, though I am never sure how confidential any call is from a prison. Very occasionally if a personal visit is really necessary, I can ask for approval of my time and travel expenses to visit you if you are incarcerated, though such requests are often turned down. If you are out of custody you can make an appointment to come into the office to see me.

Although your communications with me as your attorney are privileged and cannot be revealed to others without your permission or used against you, your communications with most people are probably not so protected. Therefore, you should be extremely cautious about discussing the details of your case with prison guards, other inmates, or people visiting you. If you divulge incriminating information to them, you may someday find these people as witnesses against you should your appeal succeed in gaining you a retrial.

### **Preparation of the Briefs**

Appellant's opening brief is due forty days after the completed record on appeal is filed in the Court of Appeal. Often I will request one or more extensions of thirty days because more time is needed to complete the research and writing, or because of my need to complete work on other cases.

The brief is a written argument stating the reasons why the trial court's decision should be reversed or modified. The purpose of the brief is to point out any errors that may have occurred in the court below which were serious enough that the result must be changed. It is not enough to show that some error occurred; just because your trial was not error-free does not mean you are entitled to a new trial. We must show that the errors were “prejudicial” — that absent the error, it is likely that you would not have been convicted — so that the judgment must be reversed or modified. The brief is based strictly on the record on appeal, and may not contain arguments based on statements, documents, or events which are not included in that record. In other words, your appeal can only challenge the things which the

record shows actually occurred in the lower court. Everything which the appellate court has to consider in determining the issues raised on appeal must be included in the brief, whether it is favorable or unfavorable to you. Although I will emphasize your side of every issue, I am obligated to present the whole picture in the brief.

You may be sure that I will conscientiously review the record on appeal for error. In order to uncover any arguable issues which may be presented on your behalf, I will read the transcripts, talk with your trial counsel, ask for your suggestions, and review the trial court files where appropriate. Any issues I find will be set forth in the Appellant's Opening Brief.

However, sometimes even after this careful review I do not find any significant errors that have occurred in the lower court proceedings. In this unusual situation, I will write to you promptly informing you of the results of my research and investigation, and asking how you wish to proceed. When I have no arguable issues to raise, there are basically two available options: (1) abandoning the appeal; or (2) filing what is known as a "*Wende*" brief. If you file an abandonment of your appeal, it is almost certain that the Court of Appeal will dismiss your appeal, and appellate process will be ended. There will ordinarily be no further review of your conviction by an appellate court. In a *Wende* brief, I would set forth a statement of the case and a statement of the facts, and ask the court to review the record to determine if there are any arguable issues. If, after reviewing the record, the court concludes that there *are* arguable issues, it will direct me to brief them, which I will do. If the court concludes that there are *no* arguable issues, it will so notify you, and give you an opportunity to raise any issues you may think exist in the case. If you do raise issues and submit them to the court, the court will consider them. If you do not, the court will affirm your conviction or dismiss your appeal.

After the Appellant's Opening Brief is filed on your behalf, the Attorney General, who is the respondent in almost all criminal appeals, has thirty days to prepare and file a Respondent's Brief. Usually the attorney general will request an extension of thirty days in which to file that brief, a request which is usually granted by the Court of Appeal. Sometimes the Attorney General will request and receive several such extensions. The Attorney General's brief, like the one filed on your behalf, must be based solely on the record on appeal.

If some response is needed to counter an argument made by the Attorney General, I can file an Appellant's Reply Brief on your behalf, which must be filed within twenty days of the day the Attorney General's brief was filed. I file a reply brief in most, but not all cases.

I will promptly send you a copy of all briefs which I file on your behalf, and of the brief filed by the Attorney General in opposition. You will also receive copies of all motions

which I file in the court of appeal.

### **Oral Argument**

Some time after all the briefs have been filed—anywhere from a few months to a year or so, depending on the court’s schedule—I will receive a notice from the court indicating that they have reviewed the case and that oral argument of the appeal is available upon request. I will request argument if there is any advantage to your appeal which could be gained by arguing your case to the Court. Otherwise, oral argument will be waived.

On the day of oral argument, I, as your attorney, and an attorney from the Attorney General's office appear before three judges of the Court of Appeal and argue the case. Argument is relatively brief—seldom more than half an hour, and often much shorter. Argument is limited to the record in the case and the relevant legal authorities upon which the appeal is based; there are no witnesses testifying, and the court does not hear any new evidence. If you are in custody, you will not be brought to the court for the argument. If you are out of custody, you are welcome to attend and watch, although you are not permitted to participate.

### **The Court's Opinion**

Within ninety days of oral argument, the Court of Appeal will write an opinion stating whether the judgment should be affirmed, reversed, or modified. I will send a copy of the decision to you as soon as I receive it. Every defendant should be aware that, simply as a matter of statistics, less than ten percent of all the criminal convictions appealed to the Court of Appeal are actually reversed. A somewhat larger percentage of cases do receive partial reversals or modifications of the judgment. These modifications, particularly those related to sentencing, can be very important in affecting the time you actually serve, even though they fall short of total reversal of your conviction.

### **Further Review**

As soon as the opinion of the Court of Appeal is received, I will make a careful review of the opinion and the case to determine whether any further legal steps will be taken on your behalf. If I conclude that the answer is no, I will notify you promptly by letter and send you the record on appeal under separate cover. You will, of course, still be entitled to proceed further on your own. If you do, you must comply with the time requirements discussed below.

If I conclude that further review is appropriate, there are two possibilities. A petition for rehearing can be filed in the Court of Appeal. Its purpose is to point out to the Court of

Appeal some misstatement of the law and ask the court to reconsider its decision. The petition for rehearing must be filed within fifteen days of the filing of the court's written opinion. The Court of Appeal has another fifteen days to decide whether to grant a rehearing, which it rarely does. If no rehearing is granted within thirty days of the court's opinion, that opinion becomes final.

Once the opinion of the Court of Appeal becomes final, the other possibility for further review becomes available. A petition for review can be filed in the California Supreme Court within ten days after the opinion of the Court of Appeal becomes final, that is, by the fortieth day after the date stamped on the Court of Appeal's opinion. I would only file such a petition on your behalf only if I concluded that your case presents a legal issue of statewide importance, or where there is a federal constitutional issue which I believe should be preserved for possible future review in the federal courts.

Once review in the California courts has been exhausted, it is possible to seek review in the federal court, either by petition for certiorari in the United States Supreme Court (to be filed within ninety days of the denial of petition for review by the California Supreme Court), or habeas corpus petition in the United States District Court (which must be filed within one year plus ninety days of denial of review). Federal review is appropriate only where you can contend that a federal constitutional right has been violated. The likelihood of obtaining hearing and relief from the United States Supreme Court is very small. Ordinarily I do not represent clients seeking such review in the federal courts. If you are interested in pursuing these channels on your own, we can discuss what steps must be taken.

### **Conclusion**

I appreciate the opportunity to represent you on your appeal. For my part, I will do my best to provide you with excellent representation. If you will cooperate with me in the presentation of your appeal, we will have together done the best we can on your behalf. I look forward to working with you.