

Sample motion to recall the remittitur and allow briefing under *Blakely*.

MOTION TO RECALL REMITTITUR AND REINSTATE APPEAL
AND REQUEST FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

TO THE HONORABLE XXXXXXx, PRESIDING JUSTICE, AND TO THE
HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE
STATE OF CALIFORNIA, FOURTH DISTRICT, DIVISION XXX:

Appellant XXXXXXXX makes this application for an order recalling the
remittitur which was issued on XXXXXXXX, and reinstating the appeal to permit filing
of the supplemental opening brief submitted herewith, and appointing CCCCCC as
appellate counsel. The motion is based upon this application, the attached
Memorandum of Points and Authorities and Exhibits, as well as the declaration of
CCCCCCC.

Dated:

Respectfully submitted,

**MEMORANDUM IN SUPPORT OF RECALLING THE
REMITTITUR AND REINSTATING THE APPEAL**

A. PROCEDURAL POSTURE OF CASE

Set forth the procedural posture of your case, including when the opinion and remittitur issued. You may want to attach a copy of the opinion and the remittitur as exhibits to the motion.

B. THE COURT HAS THE AUTHORITY TO GRANT THIS MOTION

California Rules of Court, rule 26(c)(2) provides that on a party's or the court's own motion, and for good cause, the court may order recall of a remittitur. A fundamental change in the law is a ground for recalling the remittitur. "As a general rule, an error of law does not authorize the recalling of a remittitur. [citation omitted] An exception is made, however, when the error is of such dimensions as to entitle the defendant to a writ of habeas corpus. The remedy of recall of the remittitur may then be deemed an adjunct to the writ, and will be granted when appropriate to implement the defendant's right to habeas corpus. [citations omitted]." (*People v. Mutch* (1971) 4 Cal. 3d 389, 396-397; see also *People v. Ketchel* (1966) 63 Cal.2d 859, 868; *People v. Curtis* (1971) 21 Cal.App.3d 704, 705, 708, overruled on other grounds in *In re Earley* (1975) 14 Cal.3d 122, 130, fn. 11.)

1. *Blakely* has created a fundamental change in the law.

The recent decision of the United States Supreme Court decision in *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403], has created fundamental change in the law justifying recall of the remittitur in this case. *Blakely*

held a state may impose an increased sentence on the basis of specified facts (such as California’s circumstances in aggravation) only if the defendant has been afforded, or has waived, a jury trial on those facts, and they have been proved beyond a reasonable doubt. (*Ibid.*) Until this time, however, California has allowed courts to impose a sentence beyond the statutory maximum, that is, above the mandated middle term (Penal Code, § 1170, subd. (b)), based on facts proven to the court – without a jury trial waiver – and proven by only a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).) Thus, *Blakely* will create a fundamental change in California’s sentencing law structure. Indeed, shortly a month after the issuance of the decision, the California Supreme Court has already granted review in two cases that consider *Blakely*’s application to California’s sentencing scheme.¹

Under that case, as discussed at length in the proposed Supplemental Opening Brief, which is concurrently-filed with this motion, the upper terms to which he was sentenced were based upon factors found by the judge by a preponderance of the

¹ In the case of *People v. Towne*, review granted July 14, 2004, S125677, the court requested specific briefing on two questions “(1) Does *Blakely* ... preclude a trial court from making the required findings on aggravating factors for an upper term sentence? (2) If so, what standard of review applies, and was the error in this case prejudicial?”

And in *People v. Black*, review granted July 28, 2004, S126182, the court asked for briefing on two issues: “(1) What effect does *Blakely* have on the validity of defendant’s upper term sentence? (2) What effect does *Blakely* have on the trial court’s imposition of consecutive sentences?”

evidence, rather than by a unanimous jury, a clear violation of the new rule declared in *Blakely*.

2. Because appellant's case was still pending at the time *Blakely* was issued, *Blakely*'s principals apply.

When the Supreme Court issues a decision which constitutes a new rule of law, that rule applies to all cases still pending on direct review. (*Schriro v. Summerlin* (2004) 542 U.S. ____ [124 S.Ct. 2519, 159 L.Ed.2d 442, 04 D.A.R. 7569, 7570][new procedural rule announced in *Ring* does not apply retroactively to cases already final on direct review]; see also *Teague v. Lane* (1989) 489 U.S. 288, 295 [109 S.Ct. 1060, 103 L.Ed.2d 334].) Direct review for federal purposes concludes when no further state appellate remedies are available on direct appeal and the time for petitioning for certiorari to the United States Supreme Court has expired or a timely filed petition for certiorari has been denied.² (See *Beard v. Banks* (2004) 542 U.S. __ [124 S.Ct. 2504; 159 L.Ed.2d 494, 04 D.A.R. 7563, 7564]; *Caspari v. Bohlen* (1994) 510 U.S. 383, 390 [114 S.Ct. 948, 127 L.Ed.2d 236].)

Because *Blakely* was decided June 24, 2004, for retroactivity purposes, a case in which the California Supreme Court denied a petition for review on or after March

² Certiorari requires a previous petition for review. The certiorari petition must be filed within 90 days from the entry of the decision by the California Supreme Court. (U.S. Supreme Ct. Rules, rule 13.) That decision may be the denial of review, the filing of an opinion, the denial of a petition for rehearing following a decision on a grant of review, or other order concluding state appellate proceedings (e.g., Cal. Rules of Court, rule 29.3(b) [dismissal of review]).

26, 2004, would be considered still pending on “direct review” at the time *Blakely* was decided. Here, XXXXXXXX’s petition for review was denied by the California Supreme Court on XXXXXXXXX. Thus, even though the remittitur in this case issued before the *Blakely* opinion, the principals announced therein apply.

C. CONCLUSION

For the foregoing reasons, appellant respectfully requests this court grant his request to recall the remittitur and reinstate his appeal for the limited purpose of considering the application of *Blakely v. Washington* to his case. Further, appellant requests this court to appoint counsel on his behalf and accept for filing Mr. XXXX’s supplemental brief.

Dated:

Respectfully submitted,

APPELLATE DEFENDERS, INC.

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Attorneys for Defendant and Appellant