

**SAMPLE SUPPLEMENTAL BRIEFING LETTER
FOLLOWING TRANSFER FROM SUPREME COURT TO COA
LETTERHEAD**

[Date]

Court of Appeal
Fourth Appellate District, Division [Number]
Attn: [Clerk's Name]
[Address]

*Re: Request to File Supplemental Brief and Supplemental Opening Brief in People v.
[Name], Court of Appeal No. [Number]*

Dear [Clerk's Name]:

[Brief summary of case's procedural status -- e.g., "On **, the California Supreme Court transferred this case back to the Court of Appeal for further proceedings in light of *People v. Black* (2005) 35 Cal.4th 1238 (*Black*)."] Pursuant to California Rules of Court, rule 13(b)(1), appellant respectfully requests this court to accept this letter as a supplemental opening brief.

In its opinion filed on ****, and as argued in appellant's [opening/supplemental opening] brief, this court found that imposition of the upper term based on judicial fact-finding violated appellant's federal constitutional rights to a jury trial and proof beyond a reasonable doubt, under the Sixth and Fourteenth Amendments and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). On June 20, 2005, the California Supreme Court decided *People v. Black, supra*, 35 Cal.4th 1238, holding that there is no federal constitutional right to a jury trial on fact-finding relating to aggravating factors used to impose an upper term under California's Determinate Sentencing Law. The Supreme Court remanded appellant's case to this court for further proceedings in light of *Black*. Appellant acknowledges this court is bound by the Supreme Court's ruling in *Black* under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.

However, this acknowledgment is not a concession as to the merits of appellant's argument. Appellant continues to maintain that the sentencing violated his federal constitutional rights. (See, e.g., *New Jersey v. Natale* (August 2, 2005) ___ N.J. ___, 2005 N.J. LEXIS 938, *24 [finding sentencing scheme very like California's violates *Blakely* and rejecting California's approach in *Black* because it appears to be in direct conflict with *Blakely*]; accord as to *Blakely* violations, *Lopez v. People* (Colo. 2005) 113 P.3d 713, 728; *State v. Hughes* (2005) 154 Wn.2d 118 [110 P.3d 192] *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 681-685; *State v. Dilts* (2004) 337 Ore. 645, 654 [103 P.3d 95]; *State v. Shattuck* (Minn. 2004) 689 N.W.2d 785 (*per curiam* order); *State v. Brown* (2004) 209 Ariz. 200, 202-204 [99 P.3d 15]; but see *State v. Gomez* (Tenn. 2005) 163 S.W.3d 632, 658). [He/she] also

continues to urge this court to correct the constitutional violation. (See *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 844-845 [119 S.Ct. 1728, 144 L.Ed.2d 1] [state prisoner seeking federal habeas corpus relief must give state court a fair opportunity to act on claims].)

Respectfully submitted,

[Attorney Name]

State Bar No. [number]

Attorney for Appellant

[Appellant's Name]