

If the *Blakely* issue has been raised, counsel should consider filing either a letter citing supplemental authority (citing new case law as opposed to a raising a new issue or making additional argument) or a supplemental letter brief.

### **Supplemental Authority Letter**

Once a case is fully briefed, each division has its own policy as to acceptance of a supplemental authority letter.

**Division One** -- The court encourages letters with the citation of new authority. The letter should summarize the holding of the case and the issue to which it relates. Adding argument to the letter creates due process issues for the opposing party and should be avoided.

**Division Two** -- Before the tentative opinion issues, there is no formal policy on whether such briefing is accepted or rejected. The letter will go to the chambers where the case has been assigned, and the chambers will decide to accept or reject. Some justices are less inclined to accept such a letter if it contains argument.

The court will generally not accept a letter following the issuance of the tentative opinion. Matters must then be addressed in a petition for rehearing once the final opinion issues.

**Division Three** -- The court should always be advised of significant new authority, whether before or after oral argument. However, the letter should merely tell the court which issue the authority pertains to and cite the case. If the letter argues the authority and its application to the instant case and its facts, the court will generally not accept it. If such argument is necessary, the court considers it a new argument, and the attorney should ask the court for permission to file a supplemental letter brief, which may or may not be accepted.

### **Supplemental Letter Brief**

If a supplemental letter brief is filed, a request for leave to file it is required under California Rules of Court, rule 13(a)(4). A sample supplemental letter brief for *Blakely/Black* follows.

**SAMPLE SUPPLEMENTAL LETTER BRIEF  
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 May 20, 2005, the reply brief was filed, and briefing in this case was complete."]

Appellant respectfully petitions this court, pursuant to rules 13(a)(4) and 43 of the California Rules of Court, to permit [him or her] to file a supplemental opening brief and to accept this letter as the supplemental opening brief. After the filing of the [reply brief], the California Supreme Court issued a decision affecting Argument [I] of the opening brief.

In the briefing, appellant raised the issue of whether the judicial fact-finding relied on for imposition of the upper term violated [his/her] 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* (2005) 35 Cal.4th 1238 (*Black*), 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. 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]