

[Attorney header]  
Attorney for Appellant  
John Doe

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
IN AND FOR THE THIRD DISTRICT

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff and Respondent,

vs,

JOHN DOE,

Defendant and Appellant.

COURT OF APPEAL  
NO. #####

YOLO COUNTY  
SUPERIOR COURT  
NO. #####

APPLICATION FOR RECALL AND RE-ISSUANCE OF OPINION;  
DECLARATION OF COUNSEL; POINTS AND AUTHORITIES

Appellant John Doe, by and through appointed counsel,  
respectfully requests that this Court exercise its power under California  
Rules of Court, rule 8.272(c)(2) to recall, then re-issue, its opinion in this  
case, so that appellant may file a timely petition for review in the  
California Supreme Court. This application is based on the attached  
points and authorities and declaration of counsel.

Dated: February 21, 2012

Respectfully submitted,

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[Attorney name]  
Attorney for Appellant

## **I. Declaration of Appointed Counsel**

1. I, [Attorney name], was appointed by this court to represent appellant in this appeal.
2. This court filed its opinion on [date], so the last day to file a Petition for Review was [date].
3. I advised appellant that I would file a Petition for Review on his behalf.
4. When I received the appellate court opinion, I calendared the due date for the petition as [date]. Clearly that was error on my part. I failed to take into consideration that January has 31 days.
5. In my office I have a white board with filing deadlines for the various appeals I have pending. As to Mr. Doe's appeal, I calendared the due date as February 1, 2013, because I prefer to have briefing done early to avoid any potential logistical problems.
6. In late January I became ill with the flu. I was bed-ridden for most of the week before the due date, and during the week the brief was due, I was unable to work full time. Because I had calculated the due date as February 7, 2013, I believed I had time to submit the petition in a timely fashion.

7. I requested same-day printing and mailed the petition to the Supreme Court by priority mail on February 7, 2013, believing it to be timely.
8. On Friday, February 8, 2013, at approximately 2:00 p.m., I received a phone call from a clerk with the Supreme Court. She advised me that the Petition was postmarked one day after the due date, and would not be accepted for filing.
9. I immediately filed a Request for Relief from Default in the California Supreme Court, explaining that the untimely filing was entirely my responsibility, and requesting relief so that appellant would not be deprived of review through my error.
10. The Court denied the Request on February 13, 2013.
11. Thus my calendaring error deprived appellant of the right to the effective assistance of counsel in filing a timely petition for review.
13. I deeply regret my error, and accept full responsibility for it; I know counsel is responsible for accurate calendaring regardless of the press of competing deadlines.
14. I respectfully request that the court recall, then re-issue its opinion, so that appellant is not penalized for my error, and may file a timely petition for review.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on [date], in [city], California.

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[Attorney name]

## II. Points and Authorities

This court has the power to recall a remittitur for good cause. California rule of court 8.272(c)(2) provides that “[o]n a party’s own motion or on stipulation, and for good cause, the court may stay a remittitur’s issuance for a reasonable period or order its recall.” (Cal. Rules of Court, rule 8.272(c)(2); see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 736-741, pp. 765-771.) “The extent of the court’s discretion in this area is poorly defined,” but “[t]ypical cases involve fraud or a mistake in fact that resulted in a miscarriage of justice.” (Appeals and Writs in Criminal Cases (Cont.Ed.Bar 2d ed. 2006) Hearing and Determination of Appeal, § 1E.36, p. 252.)

In this case, the remittitur has not yet issued. Recall and re-issuance of the Opinion would accomplish the same result as recall of the remittitur.

### A. Good Cause Exists to Recall a Remittitur When Appellate Counsel’s Error Deprives a Defendant of Judicial Review.

Good cause to recall a remittitur exists where, as here, appellate counsel’s error deprives a defendant of judicial review. Thus in *People v. Kang* (2003) 107 Cal.App.4th 43, the Court of Appeal granted a motion to recall remittitur to remedy appellate counsel’s failure to file an opening brief. (*Id.* at 47.) The defendant was a fugitive; when an unidentified court

clerk advised counsel that a fugitive could not appeal, counsel simply failed to file an appellate brief. (*Id.* at 37.) When the defendant was captured, new counsel moved for recall of the remittitur based on appellate counsel's ineffective representation. (*Ibid.*) The Court of Appeal granted the motion and reinstated the appeal. (*Id.* at 53.)

Similarly, in *People v. Valenzuela* (1985) 175 Cal.App.3d 381, the Court of Appeal granted a motion to recall the remittitur to safeguard appellant's right to judicial review. (*Id.* at 394.) Counsel had raised two issues on appeal, and had limited the statement of facts to four sentences. (*Id.* at 385, 391.) The appellate court found that counsel had failed to raise several arguable issues, including lack of instruction on a lesser included offense, so recalled the remittitur to allow new counsel to represent the defendant in a new appeal. (*Id.* at 392, 394.)

Counsel's error here, like those in *Kang* and *Valenzuela*, deprived appellant of a level of judicial review to which she was entitled. The same remedy adopted by those Courts of Appeal is appropriate here.

Recall of the remittitur has been used to remedy ineffective assistance of appellate counsel that caused procedural defaults resulting in disposition of appeals other than on the merits, e.g., dismissals for failure to file appellant's opening brief. (See *In re Serrano* (1995) 10 Cal.4th

447; *In re Martin* (1962) 58 Cal.2d 133; *In re Grunau* (2008) 169 Cal.App.4th 997.)

To secure relief based on ineffective assistance of appellate counsel, the defendant must not himself be at fault in the original loss of his appellate rights. (*Serrano, supra*, 10 Cal.4th at p. 453, fn. 4.) In this case, there is no doubt that counsel failed to file appellant's petition for review and that Mr. Doe bore no responsibility for counsel's error. (*In re Grunau, supra*, 169 Cal. App. 4th at pp. 1003-1004.)

B. Good Cause Does Not Depend on a Showing that Appellant's Petition is Likely to Prevail.

An appellant is entitled to judicial review whether or not his issues are likely to prevail. Thus one appellate court has recalled a remittitur to allow review even where the defendant had no arguable issue. In *In re Olsen* (1986) 176 Cal.App.3d 386, a misdemeanor appeal, defendant's counsel filed a statement that did not comply with the requirements of *People v. Wende* (1979) 25 Cal.3d 436. The defendant raised the error through a succession of petitions for habeas corpus, and the California Supreme Court ordered a hearing before this Court to show cause why the remittitur should not be recalled. (*Id.* at 388.) Even though the defendant had not demonstrated that he had an arguable issue, this Court found

recall appropriate to allow the judicial review to which the defendant was entitled.

It explained that a defendant claiming ineffective assistance of appellate counsel does not need to show that counsel's error deprived him of a potentially meritorious defense. (*Ibid.*) The error lay in the denial of review itself: appellant was not trying to get a second appeal, or "bite at the apple," but had "not had the first bite at the apple." (*Ibid.*)

The Court of Appeal in *People v. Valenzuela, supra*, 175 Cal.App.3d 381, also recalled a remittitur to grant the defendant review of issues that were not necessarily likely to prevail. Appellate counsel had failed to raise various arguable issues. The court noted that it was not assessing their probable disposition in a second appeal, but granted the motion on the "sole ground" that appellate counsel's failure to raise arguable issues had deprived appellant of his Fourteenth Amendment right to effective assistance of appellate counsel. (*Id.* at 394)

Thus this court does not need to consider the merits of appellant's petition for review: good cause for recall does not depend on the likelihood that a timely filed petition would succeed. As in *Kang, Valenzuela*, and *Olsen*, the error lies in denial of review itself.

C. Recall of Remittitur is Appropriate to Allow a Defendant to File a Petition.

The California Supreme Court has held that it is appropriate to grant a motion to recall remittitur “as an adjunct” to allow a defendant to file a petition. In *People v. Mutch* (1971) 4 Cal.3d 389, the Court granted a motion for recall of remittitur because the nature of defendant's claim could be addressed by a petition for writ of habeas corpus. It held that in such a case, recalling the remittitur is an appropriate remedy for addressing the habeas-like error. (*Id.*, at 396.) Thus it ordered the remittitur recalled to clear the way for the defendant to file a petition for writ of habeas corpus, deeming the remedy to be “an adjunct to the writ, which should be granted when appropriate to implement the defendant's right to habeas corpus.” (*Id.* at. 397-398.)

Here, recall of the remittitur is an adjunct to another type of petition – a petition for review. For the reasons listed above, this court should recall and re-issue the opinion so that appellant may file a timely petition for review.

### **III. Conclusion**

For the foregoing reasons, appellant respectfully requests that this court recall its opinion in this case and then re-issue it to allow appellant to see review before the California Supreme Court.

Dated: [date]

Respectfully submitted,

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[Attorney name]  
Attorney for Appellant  
John Doe

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[Add Proof of Service for all parties]