

Motion to Settle Record in the Superior Court
(Third District requires that appointed counsel file directly for permission to settle record; get EOTs in the meantime)

[YOUR NAME] (SBN)
Attorney at Law
[ADDRESS]
[TELEPHONE]
Attorney for Defendant/Appellant [APPELLANT'S NAME]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF [NAME]

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

[APPELLANT'S NAME],

Defendant.

Case No. SC-_____
Related Appeal No. _____

APPLICATION FOR
PERMISSION TO PREPARE
A SETTLED STATEMENT IN
PLACE OF THE [REPORTER'S]
TRANSCRIPT ON APPEAL;
MEMORANDUM OF POINTS &
AUTHORITIES; DECLARATION
OF COUNSEL; VERIFICATION

TO: THE HONORABLE [NAME], JUDGE OF THE SUPERIOR COURT

Pursuant to rules 8.137 and 8.346 of the California Rules of Court, defendant, [APPELLANT'S NAME], hereby applies for permission to prepare a settled statement [SPECIFY GENERALLY WHAT IS NEEDED TO SETTLE THE RECORD, e.g., "in place of a portion of the reporter's transcript on appeal."] [CITE TO THE COURT OF APPEAL ORDER TO SETTLE THE RECORD IF THERE IS ONE, e.g., "The Fifth District Court of Appeal ordered that defendant/appellant file his motion to settle the record in this court by [DEADLINE GIVEN]. A copy of the order is attached as Exhibit A."]

This motion is based on the attached Memorandum of Points and Authorities, declaration of appellate counsel, [the attached exhibits,] and verification.

DATED: _____

Respectfully submitted,

[YOUR NAME]

Attorney for Defendant/Appellant

CASE BACKGROUND FACTS

[DESCRIBE BACKGROUND CASE FACTS , WHAT AUGMENT HAS SHOWN SO FAR, STATE CLEARLY WHAT DEFENSE ATTORNEY / D.A. RECALLS OR DOES NOT RECALL, AND GIVE ANY OTHER RELEVANT FACTS SUPPORTING THE NEED TO SETTLE THE RECORD.]

MEMORANDUM OF POINTS AND AUTHORITIES

A SETTLED STATEMENT IS REQUIRED WHERE, AS HERE, THE COMPLETE REPORTER'S TRANSCRIPT CANNOT BE OBTAINED

Rule 8.346(a) of the California Rules of Court, provides as follows:

As soon as a party learns that any portion of the oral proceedings cannot be transcribed, the party may serve and file in superior court an application for permission to prepare a settled statement. The application must explain why the oral proceedings cannot be transcribed. (Cal. Rules of Court, rule 8.346(a).)

Here, [STATE WHAT NEEDS TO BE SETTLED IN THE RECORD, WHAT DEFENSE ATTORNEY / D.A. RECALLS OR DOES NOT RECALL, DESCRIBE WHAT EFFORTS HAVE BEEN MADE TO OBTAIN THE MISSING MATERIAL AND WHY THE PROCEEDINGS CANNOT BE TRANSCRIBE, e.g., on appeal which indicate that the proceedings were not reported, enclosed is a true and correct copy of the court reporter's certificate indicating the proceedings were not recorded, AND LIST ANY OTHER RELEVANT FACTS SUPPORTING THE NEED TO SETTLE THE RECORD .]

In *People v. Gzikowski* (1982) 32 Cal.3d 580, the California Supreme Court relied in part upon the contents of a settled statement of an in chambers discussion between the court and defense counsel to hold that the trial court's denial of defendant's request for a

continuance to obtain a replacement for lead counsel required reversal of the conviction and death judgment. In a footnote, the Court noted that as part of the preparation of the record in a criminal appeal, appellant may apply under former California Rules of Court, rule 36 (b)¹ “to the trial court for settlement of a statement of any part of the ‘oral proceedings’ of which a transcript ‘cannot be obtained for any reason.’” The Court then defined “oral proceedings” for the purpose of former rule 36 as an “unreported matter, then contents of which may be useful on appeal.” (*Id.*, at p. 585, fn.2.) The Court thus anticipates that the settled statement is in lieu of the usual reporter’s transcript (i.e., what was actually said or done).

By definition, therefore, “oral proceedings” subject to settlement do not include the reasoning process for acting or refraining to act. This was recognized in *People v. Williams* (1988) 44 Cal.3d 883, where, over appellate counsel’s objection, the trial court settled the record to reflect trial counsel’s explanation that no *Beagle* (*People v. Beagle* (1972) 6 Cal.3d 441) motion was made as a result of trial strategy. The Supreme Court there recognized that the “recital regarding counsel’s trial strategy may not reflect an unreported ‘oral proceeding’ that may be settled under rule 36(b)” (*Id.*, at p. 921.)

The, [STATE THE MISSING PART OF THE ORAL PROCEEDINGS BELOW] are [indisputably part of the normal record on appeal] [OR, are subject to inclusion in the record on appeal as part of the oral proceedings]. Defendant’s appeal will be meaningless unless appellate counsel can review these proceedings and determine whether they present any issues on appeal.

CONCLUSION

Based on the foregoing, defendant requests that this court grant his application for permission to prepare a settled statement.

DATED:

Respectfully submitted,

¹ Rule 36(b) was replaced by rule 32.3, and has been renumbered as 8.346.

guilty to count one (possession of methamphetamine) in exchange for a 16 month state prison sentence. Appellant's maximum was six years.

The trial court's discussion and ruling on the plea agreement was unreported and took place in-chambers just before the trial. (RT XX.) Thus a settled statement of the record is required of this proceeding. According to trial counsel, the trial court denied the parties' request for appellant to plead pursuant to the agreement due to the existence of rule 7.05(c) of the Shasta County Rules of Court. Rule 7.05(c) prohibits negotiated plea agreements following the readiness hearing.]

I declare under penalty of perjury that the foregoing is true and correct. I executed this [DATE], at [CITY], California.

[YOUR NAME]
Attorney for Appellant