

Motion to Vacate Judgment

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**COURT OF APPEAL OF THE STATE OF CALIFORNIA
[THIRD/FIFTH] APPELLATE DISTRICT**

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	Crim. _____
Plaintiff and Respondent,)	
)	([County]
)	Superior Court
)	No. [county no.]
v.)	
)	
APPELLANT'S NAME,)	
)	
Defendant and Appellant.)	

**APPELLANT'S MOTION TO VACATE JUDGMENT
AND ORDER NEW TRIAL**

STATEMENT OF THE CASE

[INSERT AN ABBREVIATED STATEMENT OF THE CASE]

STATEMENT OF FACTS

[INSERT AN ABBREVIATED STATEMENT OF FACTS, include information
about destruction/loss of the records in last paragraph]

ARGUMENT

Penal Code section 1181, subdivision (9) provides that when the right to a phonographic report has not been waived, and when it is not possible to have a phonographic report of the trial transmitted by a stenographic reporter as provided by law or by rule because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the trial court or a judge thereof, or the reviewing court shall have the power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding.

In this case [DESCRIBE LOSS/DESTRUCTION, i.e. the entire reporter's transcript of the court trial was destroyed in the Nevada County fire on September 12, 1988.] Under the provisions of Penal Code section 1181, subdivision (9) this court has statutory authority to set aside the judgment and to order a new trial. Appellant asks this court to exercise that statutory authority in this case because no adequate substitute for the complete record is available. Where a substantial part of the record is missing, there is no adequate substitute for a complete record. (*In Re Stephen B.* (1979) 25 Cal.3d 8.) Further, appellant should not be required to obtain a settled statement where submission of a settled statement would be considered ineffective to permit effective appellate review. (*People v. Apalatequi* (1978) 82 Cal.App.3d 973.)

The question is whether, based on the facts of this case, a fair substitute for the missing record can be created. Appellant contends that while a substitute record may

be created by settled statement, that record would not constitute an adequate reconstruction of the record to permit effective representation on appeal. The entire record of the trial has been destroyed. Although the preliminary hearing transcript is available, both the prosecution and the defense offered witnesses at trial who did not testify at the preliminary hearing examination. Although part of the trial may be reconstructed from memory, it is not possible for both counsel and the court to remember the trial including all the testimony, objections and the court's rulings. Appellant's right to an effective appeal should not be conditioned on the memories of court and counsel. (*In Re Steven B.* (19) 25 Cal.3d 8.)

Without the actual transcripts of trial, appellant will be precluded from raising arguable issues on appeal since those issues may not be apparent in preparation of a settled statement and cannot be identified in advance of the settled statement. In this case the loss of the transcript of the oral proceedings at trial has effectively precluded appellant from perfecting his appeal.

CONCLUSION

There is insufficient record on appeal from which appellant can identify arguable issues. Appellant requests that this court grant his motion to vacate judgment and order a new trial.

Date:

Respectfully submitted,

YOUR NAME and SBN

Attorney for Appellant