

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ATTORNEY NAME

State Bar No.

Address

Phone

Attorney for Defendant and Appellant

John Smith

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF [YOLO]**

PEOPLE OF THE STATE OF

CALIFORNIA,

Plaintiff,

vs.

JOHN SMITH,

Defendant

Case No.: Xxxxxx
Related Appeal No. C0xxxxx

**APPLICATION FOR PERMISSION TO
PREPARE A SETTLED STATEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
COUNSEL; VERIFICATION**

TO THE HONORABLE _____, JUDGE OF THE SUPERIOR COURT:

Pursuant to rules 8.137 and 8.346, California Rules of Court,¹ defendant and appellant **John Smith**, by and through his appointed counsel on appeal, **Panel Attorney**, hereby applies for permission to prepare a settled statement in the superior court in place of part of the reporter’s transcript on appeal, specifically, the proceedings of the afternoon of March 14, 2020 and the morning and afternoon of March 15, 2020 as set forth herein.

¹ All further rule references are to the Rules of Court unless otherwise indicated.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

This application is based on rules 2.1040, 8.120, 8.137, 8.320, and 8.346, the attached Memorandum of Points and Authorities, the declaration of appellate counsel, the attached exhibits, and the verification of counsel.

Counsel respectfully notes that this court has five days to rule on an application to settle the record under rule 8.346(b).

Dated: _____

Respectfully submitted,

Attorney Name
State Bar No.
Attorney for Defendant and
Appellant John Smith

1
2
3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. CASE BACKGROUND AND FACTS**

5 Following a jury trial, appellant was convicted of rape by force or threat upon a
6 spouse, with true findings on allegations under Penal Code section 667.61, subdivisions
7 (d), (e); kidnapping (two counts); carjacking; corporal injury on the parent of his child;
8 criminal threats; and various misdemeanors. (1CT XX; 1RT xxx.)

9 This court sentenced appellant to 25 years to life plus a determinate term of 12
10 years, four months. (1CT xx; 1RT xx.)

11 The jury began its deliberations on the afternoon of March 13, 2020. (Exhibit “A”,
12 minute order of March 13, 2020, attached hereto and incorporated by reference.) On
13 March 14, 2020, the jury sent two questions to the court. (Exhibit “B,” Jury Question No.
14 1; Exhibit “C,” Jury Question No. 2; both attached hereto and incorporated by reference.)

15 On March 14, 2020, the parties appeared before the Honorable Stephen L. Mock,
16 who requested “that the attorneys discuss the answer to these questions at 8:30 a.m. with
17 Judge Doris L. Shockley in Department One on March 15, 2020” and “Bailiff is to inform
18 the jury that Judge Shockley will answer these questions at 8:30 a.m. on Thursday, March
19 15, 2020.” (Exhibit “D,” Minute Order of March 14, 2020, attached hereto and
20 incorporated by reference; 5 RT xxx.) There are no further proceedings on March 14,
21 2007 contained in the clerk’s transcript. (5 RT xx-xx.) According to the minute order of
22 March 14, 2020 and to the court reporter, the proceedings before Judge Mock were the
23 only oral proceedings in the instant case on March 14, 2020. (Exhibit “D”; Exhibit “E,”
24 Declaration of Court Reporter; both attached hereto and incorporated by reference.)

25 However, the record shows that at 1:20 p.m. on March 14, 2020, Judge Shockley
responded to Jury Question No. 1 with a response written directly on that note (Exhibit
“B”) accompanied by an attachment, “Special Jury Instructions,” which included

1
2 CALCRIM No. 375 and “California Penal Code 207(a) Kidnapping” (Exhibit “F,”
3 Special Jury Instructions, attached hereto and incorporated by reference.)

4 Further, the record shows that Judge Shockley sent the jury a written response to
5 Jury Question No. 2 at 9:00 a.m. on March 15, 2020. (Exhibit “G,” Answers to Jury
6 Question No. 2, attached hereto and incorporated by reference.) On March 15, 2020, the
7 jury sent two further questions. (Exhibit “H,” Jury Question No. 3; Exhibit “I,” Jury
8 Question No. 3; both attached hereto and incorporated by reference.) At 11:20 a.m.,
9 Judge Shockley sent a written response directly on Jury Question No. 3 (Exhibit “H”)
10 and, at 1:50 p.m., she sent a written response directly on Jury Question No. 4 (Exhibit
11 “I”).

12 However, the minute order for March 15, 2020 as well as the reporter’s transcript
13 indicate that proceedings began at 2:55 p.m. and shows no proceedings prior to 2:55 p.m.,
14 when the jury returned the verdict. (Exhibit “J,” Minute Order of March 15, 2020,
15 attached hereto and incorporated by reference; 5 RT xxx.) The court reporter has
16 indicated there are no unreported proceedings for March 15, 2020. (Exhibit “E.”)
17

18 **II. APPELLANT IS ENTITLED TO A RECORD ADEQUATE FOR**
19 **MEANINGFUL APPELLATE REVIEW.**

20 **A. Procedures For Settlement Of The Record On Appeal.**

21 Counsel files an application for permission to file a settled statement in the trial
22 court, explaining why the oral proceedings cannot be transcribed. (Rule 8.346(a).) The
23 court must rule on the application within five days after it is filed. (Rule 8.346(b).) If
24 granted, the applicant must deliver a proposed statement for settlement within 30 days of
25 that order, unless the time is extended by the reviewing court. (Rule 8.346(b).)

Respondent can stipulate that the proposed settlement is correct (rules 8.137(c)(4),

1
2 8.346(c)) or, within 20 days, respondent may serve and file proposed amendments (rule
3 8.137(b)(4)). The clerk must set a date for a settlement hearing no later than ten days
4 after respondent files its proposed amendments, or the time to do so expires, whichever is
5 earlier, giving parties at least five days' notice of the hearing date. (Rule 8.137(c)(1).) At
6 the hearing, the court must settle the statement and fix the time within which appellant
7 must prepare, serve and file it. (Rule 8.137(c)(2).)

8
9 A trial judge has “full and plenary power” to settle the record, “subject only to the
10 limitation that he does not act arbitrarily.” (*Keller v. Superior Court* (1950) 100
11 Cal.App.2d 231, 234; *Marks v. Superior Court* (2002) 27 Cal.4th 176, 195.) The court
12 has broad discretion to accept or reject counsel’s representations in accordance with its
13 assessment of their credibility, but cannot refuse to make an assessment. (*People v.*
14 *Gzikowski* (1982) 32 Cal.3d 580, 586.) The court may reply upon the suggestions of
15 respondent, the court’s own memory, the court’s notes made during trial, and the court’s
16 right to have the reporter reread such of her notes as may prove helpful (*Keller v.*
17 *Superior Court, supra*, 100 Cal.App.2d at p. 234) and the memories of the trial attorneys
18 and jurors (*People v. Moore* (1988) 201 Cal.App.3d 51, 56.) The court may not decline
19 to settle the record unless after resorting to all available aid, including the court’s own
20 memory and that of participants, the court is affirmatively convinced of its inability to do
21 so, in which case it must state reasons on the record supporting that inability. (*Marks v.*
22 *Superior Court, supra*, 27 Cal.4th at p. 196.) The court’s own failure of recollection does
23 not justify refusal to settle, where the court has no reason to doubt counsel’s
24 representations. (*Ibid.*) The court acts as a finder of fact and can determine what
25 occurred based on the recollections of others. (See *People v. Bradford, supra*, 15 Cal.4th
at pp. 1331-1332, fn. 14.)

///

1
2 **B. A Complete Record From Trial That Is Adequate For Meaningful Appellate**
3 **Review Includes All Oral Proceedings At Trial.**

4 An appellant has a Fourteenth Amendment right to a record which is adequate to
5 permit meaningful appellate review, and appellate counsel has a duty to ensure that the
6 record on appeal is complete and to raise all viable issues on appeal. (*People v. Alvarez*
7 (1996) 14 Cal.4th 155, 198, fn. 8; *In re Smith* (1970) 3 Cal.3d 192, 202.) As part of the
8 preparation of the record in a criminal appeal, an appellant may apply to the trial court for
9 settlement of a statement of any part of the oral proceedings of which a transcript cannot
10 be obtained for any reason. (*Marks v. Superior Court, supra*, 27 Cal.4th at pp. 192-194.)
11 An oral proceeding subject to settlement is an “unreported matter, the contents of which
12 may be useful on appeal.” (*People v. Gzikowski, supra*, 32 Cal.3d at p. 585, fn. 2.) A
13 settled statement is required where, as here, a complete transcript cannot be obtained, but
14 the appellate record can be reconstructed through a settled statement. (*People v. Young*
15 (2005) 34 Cal.4th 1149, 1170.) A settled statement generally operates to make up for the
16 absence of a court reporter’s transcript of oral proceedings. (*People v. Griffin* (2004) 33
17 Cal.4th 536, 554; rules 8.346, 8.137.) Rules authorizing settlement of the record on
18 appeal are intended to ensure that the record transmitted to the reviewing court preserves
19 and conforms to the proceedings actually undertaken in the trial court. (See, e.g., *People*
20 *v. Pinholster* (1992) 1 Cal.4th 865, 922; *People v. Wright* (1990) 52 Cal.3d 367, 401, fn.
21 6; *People v. Holloway* (1990) 50 Cal.3d 1098, 1116.) Appellate counsel has a duty to
22 settle the record where appropriate, and failure to undertake such an effort can result in a
23 waiver of appellate issues. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102.)

24 Here, one of the issues which will be briefed on appeal is whether the jury was
25 properly instructed as to the kidnapping charges and related Penal Code section 667.61
enhancements and whether the jury’s questions were properly answered. The record

1
2 contains the jury questions and the apparent court responses. However, no reporter's
3 transcript of the oral proceedings surrounding those questions and answers has been
4 provided. The minute orders do not reflect the proceedings. There is no reporter's
5 transcript or minute order showing whether the attorneys were notified, what the content
6 of the discussions among the court and attorneys about the four questions was, whether
7 the parties agreed to the instructions, whether defense counsel objected to the instructions
8 or asked for alternative instructions, and so forth. Accordingly, a settled statement is
9 necessary because the designated oral proceedings were not reported or cannot be
10 transcribed. (Rule 8.137(a)(2)(B).)

11 Under rule 8.320(c)(3), all oral proceedings at trial are a normal part of the record
12 on appeal. Therefore, the oral proceedings on the afternoon of March 14, 2020 and the
13 morning and afternoon of March 15, 2020 before the taking of the verdict should have
14 been part of the record on appeal, but they have not been included in the reporter's
15 transcript. The court reporter has indicated that she has fully transcribed her notes and
16 has no further notes not already prepared for March 14 and 15, 2020. (Exhibit "E";
17 Exhibit "K," Rule 8.340(b) letter dated February 1, 2021, attached hereto and
18 incorporated by reference.)

19 **C. The Requested Proceedings Would Be Useful On Appeal Because They Bear On**
20 **Viable Appellate Issues.**

21 Counsel's preliminary review of the record and related research indicates that there
22 may be a viable issue regarding whether the jury was properly instructed as to kidnapping
23 and the Penal Code section 667.61 enhancement. In order for counsel to raise issues
24 regarding jury instructions and for the Court of Appeal to rule effectively on those issues,
25 the requested record must be reconstructed. As the record stands, it appears the court
unilaterally, without consultation with the parties, devised the answers to the jury's

1
2 questions and sent those answers to the jury. Without the record of whether the attorneys
3 were notified (as to the last two questions), whether the parties met and discussed a
4 response, what the content of the discussions among the court and attorneys about the
5 four questions was, whether the parties agreed to the instructions, whether defense
6 counsel objected to the instructions or asked for alternative instructions, and so forth, the
7 record is inadequate for the Court of Appeal to review the decision of this court as to the
8 exclusion of evidence. (See *People v. Arias* (1996) 13 Cal.4th 92, 158.) Therefore, the
9 contents of the tape transcripts are “helpful” to the appeal. (See *People v. Gzikowski*,
10 *supra*, 32 Cal.3d at p. 585, fn. 2.)

11 **D. Appellant Requests Permission To Prepare A Settled Statement.**

12 The anticipated settled statement would consist of all oral proceedings (1) on
13 March 14, 2020 leading up to the 1:20 p.m. answer to Jury Question No. 1, including any
14 discussion about Jury Question No. 2; (2) on March 15, 2020 leading up to the 9:00 a.m.
15 answer to Jury Question No. 2; (3) on March 15, 2020 leading up to the 11:20 a.m.
16 answer to Jury Question No. 3; (4) on March 15, 2020 leading up to the 1:50 p.m. answer
17 to Jury Question No. 4. The anticipated settled statement would include all oral
18 proceedings between the parties and the court, including whether the attorneys were
19 notified (as to the last two questions), whether a telephonic or in-person discussion was
20 held as to each of the four questions, who was present on the phone or in person at these
21 discussions, what the content of the discussions about the four questions was, what each
22 party proposed, whether the parties agreed to the instructions, whether defense counsel or
23 the deputy district attorney objected to the instructions or asked for alternative
24 instructions, and so forth.

25 Appellant respectfully asks this court to grant his application for permission to
prepare a settled statement.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CONCLUSION

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

Dated: March 23, 2021

Respectfully submitted,

Attorney Name
Attorney for Defendant and
Appellant John Smith

1
2
3 **DECLARATION OF _____**

4 I, **Attorney Name**, declare:

5 1. I am an attorney licensed to practice law in the state of California.

6 2. I was appointed by the Court of Appeal to represent appellant John Smith in his
7 appeal in Court of Appeal no. C0xxxxx (Yolo County case number CRF0xxxxx).

8 3. Following review of the record and legal research, I determined that an
9 arguable issue on appeal exists as to whether the jury was correctly instructed and their
10 questions correctly answered as to the kidnapping counts and related Penal Code section
11 667.61 enhancements. I found that four questions from the jury on March 14 and 15,
12 2020, and the court's responses to each question dated March 14 and 15, 2020, were
13 contained in clerk's transcripts. However, other than the proceedings before Judge
14 Stephen L. Mock on March 14, 2020, in which he deferred any response to the jury until
15 the following morning before Judge Shockley, there was no reporter's transcript of oral
16 proceedings related to these questions and answers. I determined that the oral
17 proceedings were necessary to determine whether there was any error in the jury
18 instructions and answers to the jury's questions, as well as any waiver or forfeiture of the
19 issue on appeal. I also decided that the transcripts were necessary to comply with my
20 duty as appellate counsel to ensure that the record on appeal is complete.

21 4. On February 1, 2021, I wrote the Yolo County Superior Court pursuant to rule
22 8.340(b) requesting any missing portions of the reporter's transcripts for March 12, 14,
23 and 15, 2020 relating to the jury's questions and the court's answers. (Exhibit "K.")

24 ////

25 ////

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

5. On February 9, 2021, court reporter _____ executed a declaration that she had already transcribed any and all proceedings for the dates of March 12, 14, and 15, 2020. (Exhibit "E.")

I declare under penalty of perjury that the foregoing is true and correct. Executed at _____, California on March 23, 2021.

Attorney Name
Attorney for Defendant and
Appellant John Smith

1
2
3 **VERIFICATION**

4 I am an attorney licensed to practice law in the State of California. My office is in
5 _____ County. I have been appointed by the Third District Court of Appeal on an
6 independent basis through the Central California Appellate Program to represent
7 appellant in his appeal and am authorized to file this motion.

8 Appellant is unable to make verification because he is absent due to his
9 incarceration in state prison in another county. For this reason, I make verification on his
10 behalf.

11 I have read the foregoing application and declaration. I verify that the facts
12 alleged are supported by citations to the record in appellant's appeal or by reference to
13 exhibits attached hereto.

14 I declare under penalty of perjury that the foregoing is true and correct. Executed
15 at _____, California on March 23, 2021.

16 _____

17 Attorney Name
18 Attorney for Defendant and
19 Appellant
20
21
22
23
24
25