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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT**

THE PEOPLE OF THE STATE OF CALIFORNIA,  
Plaintiff and Respondent,  
v.  
[INSERT CLIENT NAME],  
Defendant and Appellant.

Court of Appeal  
No. H012345

(Santa Clara  
County Case No.  
C1234567)

**APPLICATION FOR LEAVE TO PREPARE SETTLED  
STATEMENT, AND FOR EXTENSION OF TIME WITHIN WHICH  
TO FILE APPELLANT’S OPENING BRIEF**

Appellant, [INSERT CLIENT NAME], applies through [their] appointed counsel on appeal for leave to prepare a proposed settled statement in the Superior Court, Santa Clara County, under California Rules of Court, rules 8.346 and 8.137.<sup>1</sup> The settled statement will be in lieu of part of the Reporter’s Transcript on appeal from the on-the-record proceedings of the afternoon session of June 2, 2018, which included a *Batson-Wheeler* motion.<sup>2</sup>

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<sup>1</sup> All future references are to the California Rules of Court unless otherwise indicated.

<sup>2</sup> See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal. 3d 258.

The circumstances of the afternoon session of June 2, 2018, are necessary for adequate appellate review. Consequently, appellant will not receive a full and fair appellate review of his case absent the instant motion being granted.

This application is based on rules 8.120, 8.137, and 8.346, the accompanying declaration of counsel (Exhibit A), the attached Memorandum of Points and Authorities, and attached exhibits B and C.

**Request for Extension of Time.**

In connection with this application, appellant respectfully requests an extension of time of 30 days to file appellant's opening brief from the filing of the certified settled statement in this court.

WHEREFORE, appellant respectfully requests that this Court grant leave for appellant to settle the record before the Santa Clara County Superior Court, under rules 8.346 and 8.137, and order that the time to file appellant's opening brief be extended to 30 days after the filing of the certified settled statement in this court.

Dated: April 9, 2019

Respectfully submitted,



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Anna L. Stuart  
Attorney for Appellant, [INSERT CLIENT NAME]

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Case Background And Facts.

On December 14, 2017, appellant was charged by information with one count of receiving stolen property (Pen. Code, § 496, subd. (a); count one). (CT 1-4.)

Jury selection for appellant's jury trial began on June 2, 2018 and concluded that same day.<sup>3</sup> (1RTA; CT 18-19 [Exhibit B].) During the afternoon session of voir dire, the defense challenged the prosecutor's use of a peremptory challenge under *Batson/Wheeler* as noted in the clerk's trial minutes. (See CT 19 [Exhibit B].)

On June 5, 2018, the jury found appellant guilty on count one. (CT 23.) On June 20, 2018, imposition of sentence was suspended and appellant was placed on probation for three years. (CT 28-29.)

The record on appeal in this case was filed on September 18, 2018. On October 15, 2018, this court granted appellant's request to augment the record with the voir dire transcripts of June 2, 2018. The augmented transcripts were filed on February 15, 2019, but did not include the final afternoon session of June 2, 2018. (1RTA.)

On February 16, 2019, appellant filed a record omission letter under rule 8.340(b) seeking this missing portion of the reporter's transcript for June 2, 2018. On March 22, 2019, the court reported filed an affidavit stating that the "notes on the scan disk for the last p.m. session of June 2, 2018, have been corrupted, and I am unable to translate." (Exhibit C

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<sup>3</sup> On October 15, 2018, this court granted appellant's request to augment the record with the voir dire Reporter's Transcripts. The augmented records were filed on February 15, 2019. Herein, references to the augmented Reporter's Transcript will be preceded by "1RTA."

[affidavit from CSR].)

## **II. Appellate Counsel Is Moving To Settle The Record At The First Opportunity Since Learning Of The Necessity.**

Under rule 8.346(a), a party may serve an application to settle the record. In the instant case, on October 15, 2018, this court granted appellant's request to augment the record with the voir dire transcripts of June 2, 2018. The request was based in part on information from appellant's trial counsel that an objection under *Batson v. Kentucky* (1986) 476 U.S. 79, and *People v. Wheeler* (1978) 22 Cal.3d 258, had been raised during voir dire making the review of the transcripts necessary for adequate appellate review. The augmented transcripts were filed on February 15, 2019, but did not include the final afternoon session. (1RTA.)

On February 16, 2019, appellant filed a record omission letter under rule 8.340(b) seeking this missing portion of the reporter's transcript for June 2, 2018. On March 22, 2019, the court reported filed an affidavit stating that the "notes on the scan disk for the last p.m. session of June 2, 2018, have been corrupted, and I am unable to translate." (Exhibit C [affidavit from CSR].)

Because review of the filed voir dire transcripts did not include any reference to a *Batson/Wheeler* objection, appellant's appellate counsel contacted appellant's trial counsel and confirmed that the *Batson/Wheeler* objection was raised in the late afternoon session of June 2, 2018. (See Exhibit A [declaration of appellate counsel].)

Having learned that there is no reporter's transcript available for the final June 2, 2018 session, and having communicated with trial counsel, appellate counsel is raising this motion at the first opportunity.

**III. Appellant Is Entitled To A Record Adequate For Meaningful Appellate Review.**

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

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

others. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1331-1332, fn. 14.)

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

Under both California law and the United States Constitution, a criminal defendant is entitled to a record on appeal that is adequate to permit meaningful appellate review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 198, fn. 8.) This principle protects an indigent defendant's right to equal protection and due process on appeal. (*Draper v. Washington* (1963) 372 U.S. 487, 496-497; U.S. Const., 6th & 14th Amends.) Appellate counsel has a duty to raise all viable issues on appeal (*Barton, supra*, 21 Cal.3d at p. 519), a duty to exhaust all methods to reconstruct necessary record items, and a duty to ensure the record on appeal is complete in order to affirmatively demonstrate error. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 66 [if the record can be reconstructed with other methods, such as "settled statement" procedures, the defendant must employ such methods to obtain appellate review]; *People v. Whalen* (2013) 56 Cal.4th 1, 85 [it is appellant's burden to present a record adequate for review and to affirmatively demonstrate error].)

As part of the preparation of the record in a criminal appeal, an appellant may apply 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. (*Marks, supra*, 27 Cal.4th at pp. 192-194.) An oral proceeding subject to settlement is an "unreported matter, the contents of which may be useful on appeal." (*Gzikowski, supra*, 32 Cal.3d at p. 585, fn. 2.) An appellant need only establish "with some certainty how the materials" may be

useful on appeal. (*Gaston, supra*, 20 Cal.3d at p. 482.) The showing of “some certainty” must be made as to the *manner* in which the materials may be useful, not as to the contents of the materials themselves.” (*Ibid.*, emphasis in original.) In order to make such a showing, it is permissible to rely on the “memories and notes of the participants” and so, “counsel may fairly be required to draw on those sources to demonstrate how a particular unreported matter may be useful on appeal.” (*Gzikowski, supra*, 32 Cal.3d at p. 585, fn. 2.) A settled statement is required where, as here, a complete transcript cannot be obtained, but the appellate record can be reconstructed through a settled statement. (*People v. Young* (2005) 34 Cal.4th 1149, 1170.)

Here, one of the potential issues on appeal is whether the trial court properly denied the defense *Batson/Wheeler* motion. The existing appellate record does not contain any of the transcribed discussions or rulings of the parties or trial court regarding the *Batson/Wheeler* motion. (CT 18-19.) Because there is no reporter’s transcript or minute order showing the substantive content of the *Batson/Wheeler* motion, a settled statement is necessary. (Rule 8.137(a)(2)(B).)

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

Appellate counsel’s preliminary review of the record and communication with appellant’s trial counsel indicates that there may be a viable issue regarding whether the trial court properly conducted the voir dire proceedings when the People exercised a peremptory challenge. In order for counsel to raise issues regarding this aspect of the trial, and for this court to rule effectively on those issues, the requested record must be reconstructed. As the record stands, there is no information regarding the

grounds, objections, or trial court rulings for the peremptory challenge exercised by the People. Without the record of these communications, requests, objections, rulings and so forth, the record is inadequate for this court to review the trial court's conduct. Therefore, the substantive contents of the June 2, 2018 afternoon session are "helpful" to the appeal. (See *Gzikowski, supra*, 32 Cal.3d at p. 585, fn. 2.)

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

**IV. Request For A 30-Day Extension Of Time To File Appellant's Opening Brief After The Filing Of The Settled Statement.**

In connection with this application, appellant respectfully requests an extension of time of 30 days beyond the filing of the certified settled statement to file appellant's opening brief. The present due date for appellant's opening brief is April 30, 2019. A notice under rule 8.360, subdivision (c), has not been issued.

It will be necessary for appellate counsel to review the contents of any settled statement on appeal before filing appellant's opening brief. Accordingly, appellant requests an extension of time of 30 days to file appellant's opening brief after the filing of the settled statement in this court.

## CONCLUSION

Based on the foregoing, appellant requests that this court grant his application for permission to prepare a settled statement, and his request for an extension of time to file appellant's opening brief after the filing of the settled statement in this court.

Dated: April 9, 2019.

Respectfully submitted,



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Anna L. Stuart  
Attorney for Appellant, [INSERT CLIENT NAME]

### **Declaration of Anna L. Stuart**

1. I, the undersigned, am counsel for appellant and hereby request leave to obtain a settled statement in the Santa Clara County Superior Court, and move for an extension of time to file appellant's opening brief.
2. I am a Staff Attorney with the Sixth District Appellate Program (SDAP), and have been appointed to represent appellant, [INSERT CLIENT NAME] on appeal.
3. On October 15, 2018, this court granted appellant's request to augment the record with the voir dire transcripts of June 2, 2018. The request was based in part on information from appellant's trial counsel that an objection under *Batson v. Kentucky* (1986) 476 U.S. 79, and *People v. Wheeler* (1978) 22 Cal.3d 258, had been raised during voir dire making the review of the transcripts necessary for adequate appellate review.
4. The augmented transcripts were filed on February 15, 2019, but it did not include the final afternoon session of June 2, 2018. (1RTA.)
5. On February 16, 2019, appellant filed a record omission letter under rule 8.340(b) seeking this missing portion of the Reporter's Transcript for June 2, 2018. On March 22, 2019, an affidavit from the Court Reporter, was filed stating that her "notes on [her] scan disk for the last p.m. session of June 2, 2018, have been corrupted, and [she] is unable to translate." (Exhibit C [affidavit from CSR].)
6. My review of the filed augmented transcript did not reveal any reference to a *Batson/Wheeler* motion. Accordingly, I contacted appellant's trial counsel. On or about March 24, 2019, [INSERT TRIAL COUNSEL'S NAME] confirmed that the *Batson/Wheeler* motion occurred during the afternoon session of June 2, 2018.
7. Having learned that there is no reporter's transcript available for the June 2, 2018 afternoon session, and having communicated with trial counsel, I am raising this motion at the first opportunity.
8. Based on the information I have received from trial counsel and my review of the record, I intend to raise an issue concerning the trial court's handling of the People's peremptory challenge concerning. In this way, I can ensure that there was no error under *Batson/Wheeler*. I do not believe that I can adequately raise these issues without knowing what discussions occurred on this point. Additionally, any

claim of prejudice as to errors occurring at trial will also be dependent on this issue.

9. Appellant is constitutionally entitled to a record on appeal that provides him with a way to meaningfully and effectively present his claims. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227; *Griffin v. Illinois* (1956) 351 U.S. 12.) Absent the information requested herein, I believe that appellant will be deprived of his Fourteenth Amendment right to due process.
10. Additionally, I am respectfully requesting that this court grant an extension of time of 30 days after the filing of the certified settled statement in this court, for the filing of appellant's opening brief. I will need to review the contents of the certified settled statement before filing the opening brief.
11. The record was filed on September 18, 2018, and the augmented record was filed on February 15, 2019. The existing record consists of 427 pages of clerk's transcript (excluding the preliminary hearing) and 978 pages of reporter's transcript.
12. The present due date for appellant's opening brief is April 30, 2019. A notice pursuant to rule 8.360, subdivision (c), has not been issued.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed at San Jose, California on April 9, 2019.



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Anna L. Stuart  
Attorney for Appellant  
[INSERT CLIENT NAME]