SIXTH DISTRICT APPELLATE PROGRAM
William M. Robinson, Staff Attorney
State Bar #95951
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050
(408) 241-6171

Attorney for Appellant
ERNEST KILPATRICK

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

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ERNEST KILPATRICK, Defendant and Appellant.	No. H020228 (Santa Clara County Superior Court No. C9917268)

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

To: The Honorable Conrad L. Rushing, Presiding Justice of the Court of Appeal, Sixth Appellate District:

Appellant Ernest Kilpatrick, through his counsel, hereby moves for leave to prepare a proposed settled statement in the Superior Court, Santa Clara County, pursuant to Rule 36(b) of the Rules of Court.

The record on appeal needs to be settled before the Superior Court because appellant believes that one of the two potentially meritorious sentencing issues on appeal may conceivably be subjected to the waiver rule of *People* v. *Scott* (1994) 9 Cal.4th 331 unless a settled statement is prepared to correct an error in the

reporter's transcript of the sentencing hearing in the present case, which took place on June 25, 1999. The issue concerns the trial court's conclusion in imposing sentence that the charges in counts 2 and 3 in the present case involved "separate occasions" under Penal Code section 667.6, subdivision (d). As the attached declaration makes clear, appellate counsel believes that this conclusion can be challenged on appeal. (See Declaration of William M. Robinson, paragraph 1.)

The record on appeal indicates that Part III of trial counsel's "Statement in Mitigation" contains a specific argument disagreeing with the probation officer's conclusion that these crimes constituted "separate occasions." (CT 61-62) However, in the reporter's transcript of sentencing, following sentence in which the trial court found separate occasions as to the charged counts (RT 18), defense counsel purportedly made the following statement, following off-the-record discussion:

> "Mr. Briedenthal: One further comment I wanted to state to the court. I agree with the court's assessment of 667.6(d), with respect to counts two and three, I believe, the statement in mitigation. I just wanted to note that for the record as well." (RT 19)

Appellate counsel's declaration shows that, since, this comment was inconsistent with the position stated in the sentencing memorandum, appellate counsel telephoned trial counsel, John Briedenthal, and asked about this statement in the record. Mr. Briedenthal recalled making the written objection, and stated that it was not conceivable that he would have agreed with the trial court's contrary ruling. After reviewing a copy of the transcript, which appellate counsel faxed to him, Mr. Briedenthal unequivocally stated that the reporter erred in writing down his comments, and told appellate counsel that what he actually said at the hearing was the following:

> "One further comment. I **dis**agree with the court's assessment of 667.6(d), with respect to counts two and three, I believe **I made that argument in** the statement in mitigation. I just wanted to note that

for the record as well." (RT 19, added language in bold)

Mr. Briedenthal further advised appellate counsel that, after receiving the fax, he spoke to the trial prosecutor in the case, Deputy District Attorney Jay Boyarsky, and that both Mr. Briedenthal and Mr. Boyarsky recalled that Mr. Briedenthal had raised an objection in chambers to the court's intended finding of separate occasions, and that Mr. Boyarsky recalled that the comments made by Mr. Briedenthal on the record accurately reflected that objection, and the transcript was in error in this respect. (Declaration of William M. Robinson, paragraph 2.)

In *People* v. *Gzikowski* (1982) 32 Cal3d 580, the California Supreme Court held that unreported aspects of the trial proceedings may properly be made part of the record on appeal through a settled statement where the appellant demonstrates that the unreported matter may be useful on appeal. (*Id*., at pp. 584-585, fn. 2.) Because it is necessary for the record on appeal to accurately reflect the fact that appellant's trial counsel disagreed with, and objected to, the court's conclusion of "separate occasions," to forestall a *Scott* wavier claim, correction of the record as proposed above is both useful and necessary to the present appeal.

Request for Extension of Time. In connection with this request, appellant asks that this Court order that the opening brief be filed within thirty days of the filing of the settled statement in this Court. There have been no prior requests for extension of time made in the instant case. For the reasons discussed in the attached declaration, the instant motion is raised by appellate counsel at the first opportunity after completing review of the record in the instant case and speaking by telephone to trial counsel as described herein.

WHEREFORE, appellant respectfully requests that this Court grant leave for appellant to file a motion to have the record settled before the Santa Clara County Superior Court, pursuant to Rule 37, and order that the opening brief be filed within thirty days of the filing of the settled statement in this Court.

Dated: August 31, 1999

Respectfully submitted,

_____

WILLIAM M. ROBINSON
Attorney for Appellant
ERNEST KILPATRICK

DECLARATION OF APPELLATE COUNSEL

I, William M. Robinson, state:

1. I am the attorney appointed to represent appellant in this appeal. I completed my review of the record in the instant case on or about August 12, 1999. Based on my review, I determined that one of the two potential issues in this case concerned error by the trial court in concluding that the separate acts charged in the present case amounted to "separate occasions" under Penal Code section 667.6, subdivision (d), which mandate full consecutive sentences. However, I noted that while defense counsel had argued against such a conclusion in his sentencing brief (CT 61-62), in the reporter's transcript of the sentencing hearing, he is described, as detailed above, as stating that he *agreed* with the court's conclusions as to 667.6(d)."

2. Based on this inconsistency, I telephoned Mr. Briedenthal on or about August 25, 1999, after I returned from a one week vacation, leaving a message for him to call me concerning this matter. Mr. Briedenthal phoned me on August 31, 1999. In that conversation, recalled the case, and told me that he had objected in his memorandum, and would not have "agreed" with the court's contrary assessment.

At Mr. Briedenthal's request, I faxed him a copy of the reporter's transcript. Mr. Briedenthal phoned me back shortly after this, and unequivocally stated that the reporter erred in writing down his comments. Mr. Briedenthal told me that what he actually said, was the following

> "One further comment. I **dis**agree with the court's assessment of 667.6(d), with respect to counts two and three, I believe **I made that argument in** the statement in mitigation. I just wanted to note that for the record as well."

Mr. Briedenthal further advised me that, after receiving the fax, he spoke to the trial prosecutor in the case, Deputy District Attorney Jay Boyarsky, and that both Mr. Briedenthal and Mr. Boyarsky recalled that Mr. Briedenthal had raised an objection in chambers to the court's intended finding of separate occasions, and that Mr. Boyarsky recalled that the comments made by Mr. Briedenthal on the record accurately reflected that objection, and the transcript was in error in this respect.

3. I am bringing the instant motion at my first opportunity after reviewing the record in this case and speaking with trial counsel. I have made no prior requests for extension of time in the instant case.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. This declaration was executed at Santa Clara, California, on August 31, 1999.

_____

William M. Robinson