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

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
DONAVAN WAYNE JOHNSON,
Defendant and Appellant.

No. H049257
(Monterey
County
Superior
Court No.
18CR010752)

**Application to Augment the Record on Appeal and
Request for Extension of Time**

Appellant Donovan Wayne Johnson applies, through counsel, pursuant to rules 8.155(a) and 8.340(c) of the California Rules of Court, to augment the record on appeal with the following items:

1. The reporter's transcript of appellant's plea of no contest on May 21, 2019;
2. The reporter's transcript of the court granting the motion to withdraw plea on September 26, 2019;
3. The reporter's transcript of appellant's plea of no contest on January 30, 2020;

4. The reporter's transcript of hearing, held pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, heard on May 11;
5. The reporter's transcript of hearing, held pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, heard on June 4, 2020 and the motion to withdraw plea, on the same day;
6. The reporter's transcript of opening statements on March 4, 2021;
7. The reporter's transcript of the hearing on the motion for a new trial, held on May 13, 2021;
8. The reporter's transcript of the beginning of the sentencing hearing, held on June 22, 2021;
9. The written jury instructions that were requested or denied.

This motion is based on this notice, the accompanying declaration of counsel and the Memorandum of Points and Authorities which follows.

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 8.155, California Rules of Court, states that on suggestion of any party a judge of the reviewing court may order that portions of the oral proceedings be transcribed. The rule is designed to supplement an incomplete but existing record. (*People v. Brooks* (1980) 26 Cal.3d 471, 484.) It should be liberally construed. (*People v. Gaston* (1978) 20 Cal.3d 476, 483.) The reviewing court should not resolve the underlying substantive issues in ruling on a motion to augment. (*People v. Silva* (1978) 20 Cal.3d 489, 493, fn. 4.)

Augmentation of material necessary for appellate review is required to protect an indigent client's right to equal protection and due process on appeal under the Fourteenth Amendment to the United States Constitution and to protect the right to effective assistance of counsel on appeal under the Sixth and Fourteenth Amendments. (*Draper v. Washington* (1963) 372 U.S. 487, 496-497.) "[A]n appellate record that will permit a meaningful, effective presentation of the indigent's claims" is "constitutionally necessary for a 'complete and adequate' appeal by an indigent . . ." (*People v. Barton* (1978) 21 Cal.3d 513, 518; accord, *Draper, supra*, 372 U.S. at pp. 496-497.) As a component of due process, the United States Supreme Court has repeatedly identified an appellate record that permits a meaningful, effective presentation of an indigent's claims as a "basic tool" that is constitutionally necessary. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227; *Griffin v. Illinois* (1956) 351 U.S. 12; see also *Barton, supra*, at pp. 519-520.)

Appellant was eventually convicted by a jury of torture and other crimes and sentenced to serve life in prison consecutive to 11 years 4 months. The requested augmentation is requested because:

1-5. Entries of pleas of no contest, withdrawal of plea, *Marsden* motion. Appellant twice pled no contest to a determinate term and then his pleas were withdrawn. The second time his plea was withdrawn immediately followed a *Marsden* hearing. The reporter's transcripts of the pleas, motions to withdraw the pleas, and the *Marsden* motion are necessary to determine if his rights were properly protected in the effort to resolve the case.

6. Opening statements. According to a passage in the reporter's transcript, the court memorialized it earlier sustained an objection by the prosecution concerning appellant's opening statement. (4RT 261-271.) The reporter's transcript of the opening statement itself is necessary to determine if the court erred.

7. Hearing on new trial motion. The reporter's transcript does not include the hearing on the denial of appellant's motion for a new trial. It should have been include as part of the normal record on appeal. (Cal. Rules of Court, rule 8.320(c)(9)(A).)

8. Start of sentencing hearing. The clerk's transcript indicates the sentencing hearing on June 22, 2021 was continued to July 1, 2021. (2CT 539-540.) The reporter's transcript of the hearing on July 1 indicates the matter has been continued to brief

whether some punishments should be stayed pursuant to Penal Code section 654. (8RT 612.) A reporter's transcript of the June 22 hearing is necessary to have a full record of the court's sentencing decisions.

9. Instructions. The clerk's transcript is missing the written jury instructions that were requested or given. They should have been included as part of the normal record on appeal. (Cal. Rules of Court, rule 8.320(b)(4).)

In this case, appellant is seeking to supplement an incomplete but existing record. He has shown how the requested transcripts may prove helpful on appeal. Accordingly, his request for augmentation should be granted.

DATED: October 25, 2021

Respectfully submitted,

By: */s/ Jonathan Grossman*
Jonathan Grossman
Attorney for Appellant
Donavan Wayne Johnson

DECLARATION OF COUNSEL

I, Jonathan Grossman, am counsel for appellant, and I respectfully request that the record be augmented to include the above listed items.

I am a staff attorney with the Sixth District Appellate Program which has been appointed to represent Donovan Wayne Johnson. I am handling the appeal as a staff case.

Appellant was convicted of torture (Pen. Code, § 205), mayhem with a deadly weapon (Pen. Code, §§ 203, 12022, subd. (b)(1)), attempted false imprisonment (Pen. Code, §§ 664, 236), domestic violence with a deadly weapon and great bodily injury (Pen. Code, §§ 273.5, subd. (a), 12022, subd. (b)(1), 12022.7, subd. (e)), assault with force likely to cause great bodily injury with an enhancement for great bodily injury (Pen. Code, §§ 245, subd. (a)(4), 12022.7, subd. (e)), assault with a deadly weapon with great bodily injury (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (e)), and misdemeanor child endangerment (Pen. Code, § 273a, subd. (b)). He was acquitted of attempted murder with premeditation (Pen. Code, §§ 664, 187, subd. (a)), aggravated mayhem (Pen. Code, § 205), attempted kidnapping (Pen. Code, §§ 664, 207, subd. (a)), and residential burglary (Pen. Code, §§ 459, 460, subd. (a)). He was sentenced to serve 11 years 4 months consecutive to life. He is not on bail pending appeal.

As reflected in the attached motion, it is my professional opinion that appellant cannot receive a full and fair review of the trial court proceedings unless the motion to augment is granted. It is also my good faith belief that the items requested are

essential for appellate review.

I request that the time for filing the opening brief be extended to a date 30 days after the filing of the requested augmented record. The original record was filed on September 22, 2021. I was assigned to the case on September 28, 2021. There have been no previous extensions of time.

The original record consists of 557 pages of clerk's transcript (not including the transcript of the preliminary hearing) and 641 pages of reporter's transcript. I have read the clerk's transcript and reporter's transcript and learned material is missing from the original record which is necessary for adequate review.

I need the additional time to assimilate the information requested in this application to augment in order to fully develop the issues and draft the opening brief.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed at San Jose, California, on October 25, 2021.

/s/ Jonathan Grossman
Jonathan Grossman

[add proof of service]