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Attorney for Appellant

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION [NUMBER]

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

[CLIENT NAME],

Defendant and Appellant.

A#####

([County] County
Superior Court
No. #####)

**MOTION TO AUGMENT THE RECORD AND TO EXTEND
THE TIME FOR FILING THE OPENING BRIEF**

To the Honorable Presiding Justice and Associate Justices of the
California Court of Appeal, First Appellate District, Division
[Number]:

Pursuant to California Rules of Court, rules 8.155 and 8.340(c)*, and Local Rule 4, appellant respectfully requests this Court order the record on appeal augmented with the following items:

1. The reporter's transcript of opening statements of counsel given on September 12, 2019 before the Hon. Jane Doe court reporter John Doe, CSR No. #####. (4RT 98, 2CT 494.)
2. The reporter's transcript of jury voir dire and selection on September 7 and 12, 2019 before the Hon. Jane Doe, court reporter John Doe, CSR No. #####. (2CT 491, 494; 3RT 70, 4RT 80.)

In addition, appellant requests that the time for filing the opening brief be extended to 30 days after the filing of the augmented record.

This motion is based on this notice, the memorandum of points and authorities, and the attached declaration of counsel.

Dated: [Month, Day, Year]

Respectfully submitted,

[Attorney signature]

[Attorney name]

Attorney for Appellant

* **[Practice Note:** Rule 8.410 applies to augmentation of the record in juvenile dependency and delinquency appeals. Pursuant to rules 8.480(a) and 8.483(a), the procedure for augmenting the record in LPS conservatorship and civil commitment appeals is governed by rule 8.340.]

MEMORANDUM OF POINTS AND AUTHORITIES

FACTUAL AND PROCEDURAL BACKGROUND

[Provide a description of the procedural history and/or facts only if necessary to explain or support the augment motion.]

ARGUMENT

[Carefully review Local Rule 4 and comply with its provisions for the content and timing of motions to augment.]

I. The Record on Appeal Should Be Augmented With the Reporter's Transcripts of Opening Statements and Voir Dire.

Pursuant to California Rules of Court, rule 8.155, the above-described records may be ordered to become a part of the record by way of augment. (*See People v. Gaston* (1978) 20 Cal.3d 476, 482-484; *People v. Silva* (1978) 20 Cal.3d 489, 493.) In reviewing a motion to augment the record, the court must apply a liberal standard. (*Gaston, supra*, 20 Cal.3d at pp. 482-483.) This is because an appellate record that permits “a meaningful, effective presentation” of claims on appeal is “constitutionally necessary for a ‘complete and adequate’ appeal.” (*People v. Barton* (1978) 21 Cal.3d 513, 518, citing *Britt v. North Carolina* (1971) 404 U.S. 226, 227-228; *People v. Blair* (2005) 36 Cal.4th 686, 756 [defendant entitled to a record on appeal adequate to permit meaningful review].)

Based on these principles, counsel need only specify with “some certainty” that the missing material “may be useful” to justify a request for augmentation, (*Gaston, supra*, 20 Cal.3d at p. 482.) Thus, counsel need only show that a requested transcript could reveal reversible error or otherwise show the prejudice flowing from an error. (*Silva, supra*, 20 Cal.3d at pp. 492-493.)

A. Opening Statements

A prosecutor can commit misconduct during argument, including during opening statements. (See, e.g., *People v. Kipp* (2001) 26 Cal.4th 1100, 1130 [appeal for sympathy for victim]; *People v. Centeno* (2014) 60 Cal.4th 659 [misstatement of law as to reasonable doubt]; *People v. Turner* (2004) 34 Cal.4th 406, 432-433 [improper vouching for credibility of witnesses during opening statements].) It is also misconduct for a prosecutor to make arguments based on facts that are not in evidence that are not matters of common knowledge. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.)

Here, the record suggests the prosecutor may have committed misconduct during closing argument by, among other things, vouching for the credibility of prosecution witnesses, referencing facts not in evidence, and misadvising the jury about critical legal principles. (6RT 723-726, 748-759.) Defense counsel also indicates that the prosecutor may have committed misconduct in both closing and opening argument in his presentation of the theory of murder. (See Declaration of [Counsel’s Name].) Appellate counsel must review the transcripts

of opening statements to adequately assess the scope of this misconduct and to review objections or rebuttal argument by defense counsel. Counsel also needs to review the transcript of defense counsel's opening statement to compare the evidence presented with the evidence counsel expected would be presented and to evaluate the prejudicial impact of any errors. (See *In re Smith* (1970) 3 Cal.3d 192, 202 [appellate counsel has duty to raise all viable issues].)

B. Jury Voir Dire

A prosecutor may be found to have committed misconduct during voir dire by preconditioning jurors to return a guilty verdict or referring to matters outside the record. (*People v. Castillo* (2008) 168 Cal.App.4th 364, 386.) Here, in the course of the initial review of the record and after discussion with defense counsel, it appears the prosecutor may have made statements during voir dire designed to improperly bolster the credibility of key witnesses and precondition the jury to return a guilty verdict. (See 6RT 736-737; Declaration of [Counsel's Name].) To assess whether such errors occurred, counsel must review the transcript of jury voir dire.

II. The Time For Filing Appellant's Opening Brief Should Be Extended.

California Rules of Court, rules 8.60 and 8.63, provide that the time for filing a brief may be extended upon a showing of good cause. Here there is good cause to extend the filing of appellant's

opening brief because the materials for which appellant seeks augmentation are an important part of the record on appeal. Appellant's counsel must review the requested materials and determine whether they support any appealable issues prior to drafting appellant's opening brief. Accordingly, appellant requests that the time for filing [his/her/their] opening brief be extended to 30 days from the filing of the augmented record.

CONCLUSION

Appellant respectfully requests an order augmenting the record with the reporter's transcript of voir dire and opening statements and an order extending the time for filing the opening brief.

DECLARATION OF COUNSEL

1. I am an attorney licensed to practice law in the State of California, State Bar No. [#####]. I have been appointed by this Court to represent appellant [Client Name] in this appeal.

2. Appellant was convicted of first-degree murder and is serving a 25-year-to-life sentence. The record on appeal was filed on December 11, 2020, and consists of the clerk's transcript of 668 pages and the reporter's transcript of 818 pages. As of the date of this request, I have reviewed the entire record, researched potential issues on appeal, and conferred with trial counsel.

3. ***[If applicable, explain why counsel was unable to file the augment motion within 30 days of appointment pursuant to Local Rule 4.]***

For example:

Due to the length of the record on appeal and a pre-planned, pre-paid vacation that kept me out of the office from December 26, 2020 through January 6, 2021, I was not able to fully review the record within 30 days of appointment pursuant to Local Rule 4. Having now had the opportunity to review the record and confer with trial counsel, I am bringing this motion as soon as practicable under that rule.]

4. Based on my review of the record and discussion with trial counsel, I determined that I need to review the transcripts of counsels' opening statements. The record suggests that the prosecutor may have committed misconduct during closing argument by, among other things, vouching for the credibility of prosecution witnesses, referencing facts not in evidence, and

misadvising the jury about corroboration of accomplice testimony. (6RT 723-726, 748-759.) Defense counsel also informed me that the prosecutor may have committed misconduct in both closing and opening argument in his presentation of the theory of murder.

5. I must review the transcripts of opening statements to adequately assess the scope of this misconduct and to review objections or rebuttal argument by defense counsel. I also need to review the transcript of the opening statements of defense counsel to compare the evidence presented with the evidence counsel expected would be presented and to evaluate the prejudicial impact of any errors.

6. In the course of my review of the record and discussion with trial counsel, I also determined that I need to review the jury voir dire transcript to evaluate, among other things, whether the prosecutor made statements designed to improperly bolster the credibility of key witnesses and precondition the jury to return a guilty verdict. (See 6RT 736-737.)

7. Appellant's opening brief is due on [Date]. A default notice has not been issued. Appellant has requested one extension of time. I am requesting an extension of time to a date 30 days from the date of filing of the augmented record.

8. Without the requested record and extension of time, I will be unable to fully assess potential appellate claims or prepare a brief that competently represents appellant and assists this Court in deciding the issues on appeal.

I declare under the penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed on this [Date] in [City, State].

/s/ [Attorney Name]