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

<p><b>PEOPLE OF THE STATE OF CALIFORNIA,</b> Plaintiff and Respondent,</p> <p>v.</p> <p><b>TODD DAVID BURPEE,</b> Defendant and Appellant.</p>
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No. H034797  
(Santa Clara  
County Superior  
Court No.  
BB730348)

**MOTION FOR LEAVE TO EXAMINE SEALED PORTION OF  
CLERK’S TRANSCRIPT AND TO EXTEND TIME FOR FILING  
OPENING BRIEF**

Appellant Todd David Burpee moves, through counsel, to unseal portions of the clerk’s transcript, and extend the time for filing the opening brief.

Pursuant to rule 8.328(c)(6) of California Rules of Court, appellant moves to examine a sealed portion of the clerk’s transcript which is part of the record on appeal, and asks that copies of said documents be transmitted to his

appointed counsel on appeal. The sealed portions consist of a mental health evaluation of appellant in a proceeding pursuant to Penal Code section 1367 et seq. (2CT 416-427.)

Pursuant to rules 8.60 and 8.63, appellant moves that the deadline for filing the opening brief be extended to 30 days after the filing of the augmented record and the transmission of the sealed record.

The motions are based on this notice, the accompanying declaration of counsel and the Memorandum of Points and Authorities which follows.

## MEMORANDUM OF POINTS AND AUTHORITIES

### **APPELLATE COUNSEL IS ENTITLED TO VIEW REPORTS WHICH ARE NOT CONFIDENTIAL AS TO THE CLIENT.**

Mental health reports are generally confidential, and the public is not permitted access to the reports. (See, e.g., Welf. & Inst. Code, § 5328.) Thus, they might properly be considered confidential records under rule 8.328(c) of the California Rules of Court. The patient, however, is permitted to review his own mental health records. Psychological reports on a defendant submitted to the court must be made available to the defendant or his attorney. (See Pen. Code, §§ 1026.5, subd. (b)(7), 1027; Welf. & Inst. Code, § 5328, subd. (j).) Psychological evaluations pursuant to Penal Code section 1367 et seq. are normally disclosed to trial counsel (see Pen. Code, § 1368), and were done in this case (see 2RT 139). Under rule 8.328(c)(6), “parties and their attorneys who had access to the material in the trial court may also examine it” when confidential records are lodged in the court of appeal. Accordingly, this court should order that the psychological evaluations pursuant to Penal Code section 1368 be disclosed to counsel.

In order 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 Fourteenth Amendment, appellate counsel must be permitted

to review the records. (*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.)

There is good cause presented as to why the requested sealed portion of the clerk’s transcript should be copied and transmitted under seal to counsel on appeal. Wherefore, appellant respectfully requests that the Court order that copies of the mental health records be sent to counsel for appellant.

DATED: January 8, 2010

Respectfully submitted,

By:

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Jonathan Grossman  
Attorney for Appellant  
Todd David Burpee

## DECLARATION OF COUNSEL

I, Jonathan Grossman, am counsel for appellant, and I respectfully request that I be permitted to view the sealed portions of the clerk's transcript.

I am a staff attorney with the Sixth District Appellate Program which has been appointed to represent Todd David Burpee. I am handling the appeal as a staff case.

Appellant was convicted of forcible sexual penetration (Pen. Code, § 289, subd. (a)(1)) with a one strike allegation (Pen. Code, § 667.61). He was also convicted of two counts of sexual assault (Pen. Code, § 220), two counts of assault with force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)), one count of aggravated kidnapping (Pen. Code, § 209, subd. (b)(1), each with an enhancement for personally inflicting great bodily injury (Pen. Code, § 12022.7). On September 11, 2009, the court imposed a sentence of 25 years to life consecutive to 18 years.

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 motions to view the sealed records 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 January 29, 2004. There has been no previous extension of time.

The record consists of 659 pages of clerk's transcript (excluding the transcript of the preliminary hearing) and 1227 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 motion 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 Santa Clara, California, on January 8, 2010.

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Jonathan Grossman