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Attorney for Appellant  
By appointment under the Central California  
Appellate Program independent case system

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

<p>THE PEOPLE OF THE STATE OF CALIFORNIA,  Plaintiff and Respondent,  v.  JOHN JAMES PENN,  Defendant and Appellant.</p>	<p>Court of Appeal No. C074438  Superior Court No. SF116912A</p>
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**MOTION TO FILE APPELLANT'S UNREDACTED OPENING BRIEF  
UNDER SEAL ALONG WITH A PUBLIC REDACTED VERSION**

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Pursuant to rule 8.47 (c)(2) of the California Rules of Court (rules), appellant John James Penn, requests permission to file his opening brief under seal and to file concurrently a public redacted brief. The unredacted brief refers to personal information in appellant's confidential probation report, which requires that his opening brief be sealed in this Court.

**MEMORANDUM OF POINTS AND AUTHORITIES**

Appellant, who was 16 years old at the time of the crimes charged in this case, was convicted of felony murder and related crimes and was sentenced to 48

years to life in state prison. Appellant's opening brief, argument III, argues that his trial counsel rendered ineffective assistance by not arguing for a reduction of appellant's sentence on cruel and/or unusual punishment grounds and for not arguing that appellant's sentence on counts 1 and 2 be made concurrent. To support these arguments, appellant's opening brief sets forth "personal information," as defined by law, from appellant's confidential probation report to show that trial counsel failed to argue factors in mitigation in appellant's personal background.

Appellant's opening brief is required to be filed under seal. A probation report is a confidential record. (Pen. Code, § 1203.05; *People v. Connor* (2004) 115 Cal.App.4th 669, 676; rule 8.45 (b) (5); advisory committee comment to rule 8.45 (b)(5) [listing probation reports as confidential records].) Consistent with rule 8.45 (d)(4), appellant's probation report has been marked confidential in this Court and has been transmitted only to appellant's counsel and the attorney general.

This Court's Miscellaneous Order 2013-002 provides:

Absent leave of court, parties shall not submit for filing an unredacted brief, application, petition, memorandum, or other document that contains "personal information" derived from a probation report. (Pen. Code § 1203.5; *People v. Connor* (2004) 115 Cal.App.4th 669; Cal. Rules of Court, rules 8.45, 8.47 (effective January 1, 2014).)

"Personal information" in a probation report includes information such as the defendant's family background, employment, military, medical and psychological histories, financial status and history of substance abuse. (*People v. Connor, supra*, 115 Cal.App.4th at pp. 681, 695.)

Rule 8.47 (c) governs the treatment of confidential records in the reviewing court [e]xcept as otherwise provided by law or order of the reviewing court."

Rule 8.47 (c)(1) states, " Nothing filed publicly in the reviewing court--including any application, brief, petition, or memorandum--may disclose material contained

in a confidential record. . . .” “[I]f it is necessary to disclose such material in a filing in the reviewing court, a party may serve and file a motion or application in the reviewing court requesting permission for the filing to be under seal.” (Rule 8.47 (c)(2).) The party must file a declaration containing “facts sufficient to establish that the record is required by law to be closed to inspection in the reviewing court and to justify sealing of the brief.” (Rule 8.47 (c)(2)(B).)

At the time the motion or application is filed, the party must: (i) file a redacted version of the brief requested to be filed under seal, with a cover identifying the brief as “Public--Redacts material from conditionally sealed record;” and (ii) lodge an unredacted version of the brief in a sealed envelope, with a cover on both the unredacted brief and the envelope stating, “May Not Be Examined Without Court Order--Contains material from conditionally sealed record,” with an accompanying citation of authority establishing that the record is required by law to be closed to inspection in the reviewing court. (Rule 8.47 (c)(2)(C).)

Because it is necessary for appellant to refer to personal information in his confidential probation report to support his arguments on appeal, appellant requests permission to file his unredacted brief under seal along with a redacted brief for the public.

Dated: March 14, 2014

Respectfully submitted,

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SHARON G. WRUBEL  
Attorney for Appellant John James Penn

## **DECLARATION OF SHARON G. WRUBEL**

I, Sharon G. Wrubel, declare:

1. I am an attorney licensed to practice law in California and can testify competently to the following. I was appointed to represent appellant in *People v. John James Penn* (C074438). Mr. Penn was convicted of felony murder and related crimes as a 16-year-old offender and was sentenced to 48 years to life in state prison.

2. The record on appeal includes appellant's confidential probation report.

3. Argument III of appellant's opening brief argues that his case should be remanded for a new sentencing hearing because his trial counsel rendered ineffective assistance by not arguing that appellant's sentence constitutes cruel and/or unusual punishment under the Eighth Amendment and under article I, section 17 of the California Constitution and by not arguing for concurrent sentences on counts 1 and 2. To support these arguments, it is necessary to refer to appellant's "personal information" from the background section of appellant's confidential probation report and to letters attached to the probation report that contain personal information regarding appellant. Trial counsel did not argue this information in the trial court.

3. The inclusion of this "personal information" in appellant's opening brief requires that the brief be sealed under Rule 8.47 (c) and this Court's Miscellaneous Order 2013-002.

4. As required by rule 8.47 (c)(2)(C), I have submitted to this Court for filing a redacted opening brief, with a cover identifying the brief as "Public--Redacts Material from Conditionally Sealed Record," and I have lodged with the Court an unredacted version of the brief in a sealed envelope, with a cover on both the brief and the envelope stating, "May Not Be Examined Without Court Order--Contains Material from Conditionally Sealed Record."

5. In accordance with advice from the clerk of this Court regarding proper service, I have served only the redacted version of the brief. I am not opposed to

the attorney general's receipt of a copy of the unredacted brief, if kept confidential, so that the attorney general is able to respond to appellant's arguments.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on March 14, 2014, in Pacific Palisades, California.

Respectfully submitted,

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SHARON G. WRUBEL  
Attorney for Appellant John James Penn

## PROOF OF SERVICE BY MAIL

I am over 18 years of age, employed in the Los Angeles County, California, and am not a party to the subject action. My business address is: Post Office Box 1240, Pacific Palisades, CA 90272. On March 14, 2014, I served the attached Motion to File Appellant's Unredacted Opening Brief Under Seal Along with a Public Redacted Version by placing a true copy of the motion in a sealed envelope with postage prepaid, in the United States mail in Pacific Palisades, California, addressed as follows:

Office of the Attorney General  
P.O. Box 944255  
Sacramento, CA 94244-2550

San Joaquin County Superior Court  
Attn.: Judge George J. Abdallah, Jr.  
222 East Weber Avenue  
Stockton, CA 95202

Office of the District Attorney  
222 E. Weber Ave., Room 202  
Stockton, CA 95202

John James Penn # AR0736  
Deuel Vocational Institution  
P.O. Box 600 [G-wing 236]  
Tracy, CA 95378

Jonathan Fattarsi  
Deputy Public Defender  
102 South San Joaquin Street  
Stockton, CA 95202

Central California Appellate Program  
2407 J Street, Suite 301  
Sacramento, CA 95816

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

Executed on March 14, 2014, at Pacific Palisades, California.

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