

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

PEOPLE OF THE STATE OF CALIFORNIA ,] C0XXXX
]
Plaintiff and Respondent,] (X Co. Superior Court
v.] No. X)
]
APPELLANT,]
]
Defendant and Appellant.]
_____]

REQUEST FOR JUDICIAL NOTICE

TO THE HONORABLE XXX, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, XXX APPELLATE DISTRICT:

Pursuant to rule 8.252 of the California Rules of Court, and to Evidence Code sections 452 and 459, appellant, through his counsel, requests this court to take judicial notice of the reporter's transcript of the trial which was the subject of the prior appeal in this case under case no C0XXXXXX, and this court's opinion filed in that case.

This request for judicial notice is based on the following points and authorities.

Dated: _____

Attorney for Appellant

MEMORANDUM OF POINTS & AUTHORITIES

California Rules of Court, rule 8.252 provides the means for judicial notice on appeal. The rule provides in subdivision (a)(2) that the motion must state:

(A) Why the matter to be noticed is relevant to the appeal; (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; and (C) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.

(Cal. Rules of Court, rule 8.252(a)(2).)

Describe what you would like the court to take judicial notice of.

Example:

Appellant is asking this court to take judicial notice of the trial transcript in the prior appeal in this case under case no C0XXXXX, and this court's opinion filed in that case.

This court may properly take judicial notice of the court records in a related appeal. The California Supreme Court, in *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1170, fn. 1, did so, finding that:

Because this appeal is taken from a judgment of dismissal after the sustaining of a demurrer without leave to amend, we draw the operative facts, as did the Court of Appeal, from the complaint and from the record in an appeal (*Drever Partners, Inc. v. Stephenson* (Aug. 12, 1996) A071120, A071148 [nonpub. opn.]) in a related action between the same parties (*Drever Partners, Inc. v. Stephenson* (Super. Ct. S.F. County, 1995, No. 962810).) We may take judicial notice of the latter

record. (Evid. Code, § 452, subd. (d)(1), 459.)

This appeal follows an appellate opinion filed on [date] in case number C0xxxx. The case was reversed for a hearing because the trial court failed to conduct the inquiry required under *People v. Marsden* (1970) 2 Cal.3d 118. (See copy of the opinion from C0xxxxx, attached as Exh. A.) A *Marsden* hearing was conducted in which the appellant told the court of the investigation that he would have described, if given the opportunity, before trial. Trial counsel indicated that he did not recall one of the witnesses who was the subject of a request for investigation. (RT 31, sealed.) In fact that person was the subject of testimony at trial. (See C0xxxxx: RT xxx-xxx.) Defense counsel described that he wished he had done other investigation because of the court's rulings which precluded him from presenting witnesses who were under subpoena and who would have impeached the credibility of Joel Magana. (RT xx, sealed.) He did not interview another witness who he felt was more remote with regard to Magana's credibility. (RT xx, sealed.) The context of the hearing is such that the trial court weighed the investigation that was done and found that what was not done was not enough to say there was a substantial impairment of the right to counsel. (RT 45, sealed.)

The trial transcript is the context of the *Marsden* discussion. There were no references to particular portions of the testimony, exhibits or trial

during the hearing. However, it was the context against which the court's findings must be based. The trial court's determination will not be disturbed on appeal absent a showing that denial of the motion substantially impaired the defendant's right to the effective assistance of counsel. (*People v. Clemons* (2008) 160 Cal. App. 4th 1243, 1250, citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1085 .)

There is particular testimony from the trial which is necessary to support appellant's argument that the *Marsden* ruling resulted in an abuse of discretion. The trial court did not take judicial notice of the trial. Appellant, in presenting the *Marsden* motion, did not request that the court take judicial notice. The statements by appellant, trial counsel, and the court concerned the relevance of the proposed investigation, what trial counsel did present in the trial, and what impact there might have been on credibility issues in the trial. The trial preceded the *Marsden* hearing which is the subject of this appeal.

References to portions of the trial testimony and exhibits are a necessary part of the argument in this appeal. Appellant requests that judicial notice be taken of the record of the trial so that references to it may be included in the opening brief to support the statements made at the *Marsden* hearing.

Dated:

Respectfully submitted,