

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,)	
)	E026671
Plaintiff and Respondent,)	
)	Superior
v.)	Court No.
)	FWV-17587
BENJAMIN WAYNE WRIGHT,)	
Defendant and Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT
OF SAN BERNARDINO COUNTY

Honorable Joan Borba, Judge

APPELLANT'S MOTION TO CONSOLIDATE
AND TO CONTINUE ORAL ARGUMENT

TO THE HONORABLE MANUEL A. RAMIREZ,
PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE
JUSTICES OF THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Appellant, BENJAMIN WAYNE WRIGHT, moves the

Court for an order consolidating case number E026671 and the collateral petition for writ of habeas corpus filed contemporaneously herewith, now pending in this Court. Appellant further moves to continue the date for oral argument. The basis for this motion is more particularly set forth in the attached declaration of appellant's appointed counsel, Howard C. Cohen.

Respectfully submitted,

APPELLATE DEFENDERS, INC.

Dated:

Howard C. Cohen
State Bar No. 53313
Attorney for Appellant

DECLARATION OF APPELLATE COUNSEL

I, Howard C. Cohen, declare:

1. I am the appellate counsel appointed to represent appellant, Benjamin Wayne Wright, in case number E026671.

2. The opening and reply briefs were previously filed by former Appellate Defenders, Inc. (ADI) staff attorney Pantheha Ebrahimi. in regard to arguable abuse of discretion in denying Mr. Wright probation.

3. On September 6, 2000, the court issued its tentative opinion. However, at about the same time, Ms. Ebrahimi departed ADI to pursue employment in the Bay Area. I was tentatively assigned to relieve Ms. Ebrahimi. On September 13, 2000, I forwarded to the court a confirmation of oral argument, noting that my substitution as counsel of record was pending.

4. I sought confirmation of oral argument, since I was not familiar with the matter at all. I could not, in good conscience, waive oral argument without any familiarity with appellant, the record, or the issues. I was formally appointed counsel on September 18, 2000.

5. I have undertaken a review of the record and issues. I have concluded that Ms. Ebrahimi may have overlooked an issue. In this case, appellant was, in essence, promised probation if he received a favorable

recommendation in a diagnostic evaluation undertaken pursuant to Penal Code section 1203.03. Because the diagnostic evaluation was not favorable, probation was denied. In reviewing the diagnostic study itself, I perceived certain inherent inconsistencies and contradictions. Further, I concluded that some of the conclusions and opinions voiced in the evaluation were without adequate support, either as a matter of law or fact. I have sought the advice of an expert psychologist who has confirmed my concerns.

6. Unfortunately, trial counsel did not object to the diagnostic study, and original appellate counsel did not perceive the issue. Therefore, I am contemporaneously filing a petition for writ of habeas corpus based on ineffective assistance of counsel in order to address the deficiency of the all important diagnostic study.

7. Because oral argument is presently set for November 7, 2000, and though I always look forward to appearing before the Court on election day with my American flag tie, because the issue as presented solely in the appeal would not warrant oral argument whereas the issue set forth in the petition for writ of habeas corpus would, I would respectfully request oral argument be continued until after full briefing on the petition has been completed. This request is not meant to be dilatory. Previously,

on October 11, 2000, I wrote the Court to inform it of my intentions as soon as I was able. (See Exhibit A attached hereto.)

6. Appellant therefore requests the Court consolidate the petition for writ of habeas corpus with the opening brief and vacate the pending oral argument date.

Pursuant to the laws of California, I declare under penalty of perjury that this statement is true.

Dated: _____

Howard C. Cohen
Attorney at Law
State Bar No. 53313

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF CONSOLIDATION

I.

THE REVIEWING COURT HAS INHERENT
POWER AND BROAD DISCRETION TO
CONSOLIDATE CAUSES INVOLVING
COMMON ISSUES OF FACT OR LAW.

There is no express Rule of Court governing applications to consolidate appeals. However, Rule 11 (b), California Rules of Court, refers to use of records from prior appeals on subsequent appeals in the same case, and has been interpreted in a manner which promotes consolidation of appeals, unless it can be shown that a party would be prejudiced by consolidation. (*General Elec. Co. v. Fed. Etc., Distribution Co.* (1954) 122 Cal.App.2d 509, 511.)

Witkin is in agreement:

Where separate actions, related in subject matter and issues, are consolidated for trial (see Pleading, §298), or where actions separately tried are nevertheless so related, they may often profitably be considered together on appeal. So far as the reviewing court is concerned, it may without order place them on the calendar

together, make use of briefs and arguments interchangeably, and write only one detailed opinion, deciding the other cases on the authority of the first. (See *infra*, §562.) An order of consolidation, however, goes further: It allows the parties to all the appeals to prepare a single record and set of briefs.

(9 Witkin, *California Procedure* (3d Ed., 1985), Appeals, §539, Consolidation of Cases on Appeal, pp. 528-529.)

Rule 43, California Rules of Court, affords the Court of Appeal broad discretion to grant or deny applications relating to "matters of routine," depending upon the showing of good cause. Certainly, judicial economy, as well as public economy (*vis-a-vis* payment at public expense of appointed counsel's fees for several, versus a single, brief, as well as the public expense of the respondent governmental entity in opposing several, versus a single, brief), compel a conclusion all interests would be best served by an order consolidating the appeals in this action.

Thus, consolidation of these causes is warranted.

CONCLUSION

For the foregoing reasons, appellant requests that his opening brief and petition for writ of habeas corpus be consolidated for briefing and decision.

Respectfully submitted,

APPELLATE DEFENDERS, INC.

Dated: _____

Howard C. Cohen
State Bar No. 53313
Attorney for Appellant

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APPELLATE DEFENDERS, INC.

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Attorneys for Defendant and
Appellant

Case Name: BENJAMIN WAYNE WRIGHT

No: E026671

DECLARATION OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which county the within mentioned delivery occurred, and am not a party to the subject cause. My business address is 233 "A" Street, Suite 1200, San Diego, California. I served the APPELLANT'S MOTION TO CONSOLIDATE AND TO CONTINUE ORAL ARGUMENT, of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for the addressee named hereafter, addressed to such addressee respectively as follows:

Office of the Attorney General
110 W. "A" St., Ste 1100
P.O. Box 85266
San Diego, CA 92186-5266

The envelope was then sealed and, with the postage thereon fully prepaid, deposited in the United States mail by me at San Diego, California on October 26, 2000.

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

Executed by me on October 26, 2000, at San Diego, California.

DOROTHY JIMENEZ
Appellate Defenders, Inc.