

COPY

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SUPREME COURT
FILED

DEC 18 2013

Frank A. McGuire Clerk

Deputy

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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|------------------------------------|---|-----------------------|
| _____ |) | |
| PEOPLE OF THE STATE OF CALIFORNIA, |) | |
| |) | |
| Plaintiff and Respondent, |) | |
| |) | No. S119296 |
| v. |) | |
| |) | San Bernardino County |
| THOMAS LEE BATTLE, |) | Superior Court |
| |) | No. FVI012605 |
| |) | |
| Defendant and Appellant. |) | |
| _____ |) | |

APPELLANT'S REQUEST FOR JUDICIAL NOTICE

Appellant, THOMAS LEE BATTLE, by his counsel, Nina Rivkind of the Office of the State Public Defender, hereby requests that this Court take judicial notice pursuant to Evidence Code sections 452, subdivision (d) and 459,

THREE PENALTY

subdivision (a) of the following documents:

Clerk's Transcript pages 1181 and 1198 and the Reporter's Transcript cover page for the volume dated November 19, 1996, and page 4192 from *People v. Edwards*, California Supreme Court Case No. S073316 and Orange County Superior Court No. 93WF1180. These documents are attached as Appendix A to this motion and to Appellant's Opening Brief, which is filed simultaneously with this request.

This request is based on the attached Memorandum of Points and Authorities and the records and files in this case.


Dated: December 17, 2013

Respectfully Submitted,

MICHAEL J. HERSEK
California State Public Defender

NINA RIVKIND
Supervising Deputy State Public Defender

HEIDI BJORNSON-PENNELL
Deputy State Public Defender

By: 
Nina Rivkind

ATTORNEYS FOR APPELLANT

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE**

Appellant seeks judicial notice of two pages from the Clerk's Transcript and one page from the Reporter's Transcript in a case decided by this Court, *People v. Edwards* (2013) 57 Cal.4th 658. These transcripts show that the first penalty phase jury in *Edwards*, which could not reach a verdict, had been instructed on lingering doubt as a mitigating factor. The instruction in *Edwards* is relevant to determining the constitutionality of the trial court's denial of appellant's request for a similar instruction at his trial, which is the subject of Argument IV of Appellant's Opening Brief.

These transcripts are appropriate subjects of judicial notice in this Court. Evidence Code section 459, subdivision (a) permits a reviewing court to take judicial notice of "any matter specified in Section 452." Evidence Code section 452, subdivision (d) states that judicial notice may be taken of the "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." The transcripts filed in *Edwards* plainly come within this statutory authorization. Moreover, this Court previously has taken judicial notice of court documents in automatic appeals. (*People v. Watkins* (2012) 55 Cal.4th 999; Case No. S026634 [order granting appellant's requests for judicial notice, filed October 2, 2012]; *People v. Sanchez* (1995) 12 Cal.4th 1, 85, fn. 10 [at the State's request in an automatic appeal, Court took judicial notice of amicus brief filed in United States Supreme Court which was relevant to defendant's constitutional challenge to state capital-sentencing scheme].) It should do so again here.

Accordingly, appellant asks that this Court take judicial notice of the transcripts documenting the lingering doubt instruction at the first penalty trial in *People v. Edwards*, *supra*, 57 Cal.4th 658.


Dated: December 17, 2013

Respectfully Submitted,

MICHAEL J. HERSEK
California State Public Defender

NINA RIVKIND
Supervising Deputy State Public
Defender

HEIDI BJORNSON-PENNELL
Deputy State Public Defender

By: 
Nina Rivkind

ATTORNEYS FOR APPELLANT

Appendix

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PEOPLE OF CALIFORNIA
PLAINTIFF

v.

Edwards, Robert
DEFENDANT

FILED
ORANGE COUNTY SUPERIOR COURT

NOV 26 1996

ALAN SLATER, Executive Officer/Clerk
J. Galen
BY T. WALSH

CASE NO. 93WF1180

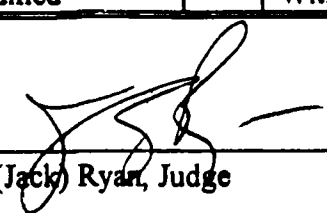
*VOL
IV*

JURY INSTRUCTIONS

GIVEN
REFUSED

Penalty Phase

| | | | | | |
|-------------------------|-------------------------------------|--------------------|-------------------------------------|-----------|--------------------------|
| Requested by People | <input type="checkbox"/> | Given as Requested | <input type="checkbox"/> | Refused | <input type="checkbox"/> |
| Requested by Def. | <input checked="" type="checkbox"/> | Given as Modified | <input checked="" type="checkbox"/> | Withdrawn | <input type="checkbox"/> |
| Given on Court's Motion | <input type="checkbox"/> | | | | |



 John J. (Jack) Ryan, Judge

8.85.0m

Although the jury has found the defendant guilty of murder in the first degree, and found the special circumstances of torture and burglary to be true, by proof beyond a reasonable doubt, [the jury may demand a greater degree of certainty of guilt for the imposition of the death penalty]. It is appropriate to consider in mitigation any lingering doubt you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
DEPARTMENT 45

THE PEOPLE OF THE STATE)
OF CALIFORNIA,)
)
 PLAINTIFF,)
)
 VS.) NO. 93WF1180
)
 ROBERT MARK EDWARDS,)
)
 DEFENDANT.)
-----)

HONORABLE JOHN J. RYAN, JUDGE PRESIDING

REPORTER'S TRANSCRIPT

NOVEMBER 19, 1996

APPEARANCES OF COUNSEL:

FOR THE PEOPLE: MICHAEL R. CAPIZZI
DISTRICT ATTORNEY
BY: DAVID BRENT, DEPUTY

FOR THE DEFENDANT: RONALD Y. BUTLER
PUBLIC DEFENDER
BY: TIM SEVERIN, DEPUTY
BY: DANIEL BATES, DEPUTY

CHERI A. VIOLETTE, CSR NO. 3584
OFFICIAL COURT REPORTER

1 OF EXECUTION OR MAINTAINING A PRISONER FOR LIFE.

2 "ALTHOUGH THE JURY HAS FOUND THE DEFENDANT
3 GUILTY OF MURDER IN THE FIRST DEGREE AND FOUND THE
4 SPECIAL CIRCUMSTANCES OF TORTURE AND BURGLARY TO BE TRUE
5 BY PROOF BEYOND A REASONABLE DOUBT, THE JURY MAY DEMAND
6 A GREATER DEGREE OF CERTAINTY OF GUILT FOR THE
7 IMPOSITION OF THE DEATH PENALTY.

8 "IT IS APPROPRIATE TO CONSIDER IN MITIGATION
9 ANY LINGERING DOUBT YOU MAY HAVE CONCERNING THE
10 DEFENDANT'S GUILT. LINGERING OR RESIDUAL DOUBT IS
11 DEFINED AS THAT STATE OF MIND BETWEEN A REASONABLE DOUBT
12 AND BEYOND ALL POSSIBLE DOUBT.

13 "AS TO THE ALLEGED PRESENCE OF CRIMINAL
14 ACTIVITY BY THE DEFENDANT OTHER THAN THE CRIME FOR WHICH
15 THE DEFENDANT HAS BEEN TRIED IN THE PRESENT PROCEEDINGS
16 WHICH INVOLVED THE USE OR ATTEMPTED USE OF FORCE OR
17 VIOLENCE AND AS TO THE ALLEGED PRESENCE OF A PRIOR
18 FELONY CONVICTION, THE DEFENDANT IS PRESUMED TO BE
19 INNOCENT UNTIL THE CONTRARY IS PROVED. THIS PRESUMPTION
20 PLACES UPON THE PEOPLE THE BURDEN OF PROVING THE
21 PRESENCE OF SUCH ALLEGED CRIMINAL ACTIVITY AND
22 CONVICTION BEYOND A REASONABLE DOUBT.

23 "IF THERE IS A REASONABLE DOUBT AS TO SUCH
24 CRIMINAL ACTIVITY OR CONVICTION, IT MAY NOT BE
25 CONSIDERED AS AN AGGRAVATING FACTOR.

26 "REASONABLE DOUBT IS DEFINED AS FOLLOWS:

DECLARATION OF SERVICE

Re: *People v. Thomas Lee Battle*

Cal. Sup. No. S119296
San Bernardino County Sup. Ct.,
No. FVI012605

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California, 94607; that I served a copy of the attached:

**APPELLANT'S REQUEST FOR JUDICIAL NOTICE;
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE**

on each of the following, by placing same in an envelope addressed respectively as follows:

Holly D. Wilkens
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101-3702

Honorable Eric M. Nakata
San Bernardino County Sup. Ct.
14455 Civic Drive
Victorville, CA 92392

Each said envelope was then, on December 18, 2013, sealed and deposited in the United States mail at Oakland, California, in Alameda County in which I am employed, with the postage thereon fully prepaid.

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, the above-described documents will be hand delivered to appellant, Thomas Lee Battle, at San Quentin State Prison within 30 days.

I declare under penalty of perjury that the foregoing is true and correct. Signed on December 18, 2013, at Oakland, California.



DECLARANT