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ORIGINAL

**SUPREME COURT
FILED**

DEC 21 2015

Frank A. McGuire Clerk


Deputy

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

No. S155160

Plaintiff and Respondent,

Alameda County

Superior Ct.

v.

No. 151080

IRVING ALEXANDER RAMIREZ,

Defendant and Appellant.

MOTION FOR JUDICIAL NOTICE

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant Irving Alexander Ramirez, through his attorney, the State Public Defender, requests that this Court take judicial notice pursuant to Evidence Code sections 452, subdivision (d), and 459, subdivision (a), of three pages of the record in *People v. Smithey*, Calaveras County Superior

DEATH PENALTY

Court Case No. 2639 (“*Smithey*”), which was before this Court in Case No. S011206.¹ These pages are attached to this motion as Exhibit A. Appellant’s request for judicial notice is based on the attached Memorandum of Points and Authorities and the files and records in this case.

Dated: December 17, 2015

Respectfully Submitted,
MICHAEL J. HERSEK
State Public Defender



MARIA MORGA
Deputy State Public Defender

Attorneys for Appellant

¹ All further statutory references are to the Evidence Code unless otherwise noted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE RECORD IN *PEOPLE V. SMITHEY* IS A PROPER SUBJECT FOR JUDICIAL NOTICE

Section 459, subdivision (a) provides in relevant part, that the “reviewing court may take judicial notice of any matter specified in Section 452.” Among the items set forth in section 452 which may be judicially noticed are: “(d) [r]ecords of (1) any court of this state” (§ 452, subd. (d).) Section 453 converts permissive judicial notice into mandatory judicial notice whenever a party seeking judicial notice has advised each adverse party of the items sought to be judicially noticed and provided them with sufficient information concerning the items sought to be judicially noticed.

California Rules of Court, rule 8.252, provides the means for judicial notice by a reviewing court. This rule states that to obtain judicial notice under section 459, a party must serve and file a separate motion. That 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; (C) If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453; and (D) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.

II. THE PORTION OF THE RECORD IN *SMITHEY* IS RELEVANT TO APPELLANT’S CLAIM REGARDING THE MODIFICATION OF CALCRIM NO. 521

Attached to this request are the cover page and pages 3857, and 3908-3909 of the Reporter’s Transcript, Volume XX, from the case of *People v. Smithey*, Calaveras County Superior Court Case 2639, California

Supreme Court No. S011206, decided by this Court in *People v. Smithey* (1999) 20 Cal.4th 936. (See attached Exh. A.) This portion of the record in *Smithey* is relevant to this Court's consideration of appellant's Argument I ("The Trial Court Erred In Modifying CALCRIM No. 521") in Appellant's Opening Brief. As appellant argues in Argument I, in *Smithey*, in contrast to appellant's case, the prosecutor made clear in his closing argument that while it was not necessary to prove the defendant maturely and meaningfully reflected on the gravity of his act, premeditation and deliberation required more than just malice or intent to kill. (See AOB, Argument I, Section C, p. 57.) These pages from the record in *Smithey* reflect the prosecutor's argument that was not apparent from the Court's opinion in *Smithey*. (*People v. Smithey, supra*, 20 Cal.4th at pp. 980-982.)

The selected record of the closing argument in *Smithey* was not presented to or judicially noticed by the trial court in this case, and it does not relate to proceedings occurring after the judgment that is the subject of appellant's automatic appeal. Nonetheless, this document is a record of a court of the state of California, as defined by section 452, subdivision (d)(1), sheds light on this Court's decision in *Smithey*, and is relevant to one of appellant's claims (Argument I) on appeal. A copy of this request has been served on each adverse party. Accordingly, appellant submits that the requested items may be judicially noticed by this court pursuant to section 459. (See *People v. Howard* (2010) 51 Cal.4th 15, 43, fn. 21 [granting motion for judicial notice of transcripts in codefendant's trial].)

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court take judicial notice of the documents contained in Exhibit A.

Dated: December 17, 2015

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender

A handwritten signature in black ink, appearing to read 'M. Morga', written over the printed name of Maria Morga.

MARIA MORGA
Deputy State Public Defender

Attorneys for Appellant

Exhibit A:

Reporter's Transcript, Volume XX, pages 3857, 3908-3909 in
People v. Smithey, Case No. S011206

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA,)	
)	SUPREME COURT
Plaintiff and Respondent,)	APPEAL NO.
)	
vs.)	
)	
GEORGE HATTON SMITHEY,)	
)	
Defendant and Appellant.)	

--oOo--

APPEAL FROM THE SUPERIOR COURT OF CALAVERAS COUNTY
HONORABLE ORRIN K. AIROLA, JUDGE PRESIDING
REPORTER'S TRANSCRIPT ON APPEAL

VOLUME XX of XXIII

--oOo--

COUNSEL

For the Plaintiff-Responent: JOHN K. VAN de KAMP
Attorney General
State of California
1515 K Street
Sacramento, Ca 95814

For the Defendant-Appellant: GEORGE HATTON SMITHEY
In Propria Persona

1 Ladies and gentlemen, this is the time in which
2 the attorneys now will present their arguments to you.
3 The prosecution has an opening argument and then the
4 defense has their argument and then the prosecution has a
5 closing argument. And then after that, the Court will
6 proceed to read a number of instructions to you.

7 Mr. Martin, are you ready to proceed then?

8 MR. MARTIN: Yes, Your Honor.

9 THE COURT: All right, you may proceed.

10 MR. MARTIN: Thank you.

11 Good morning ladies and gentlemen.

12 The case has finally drawn to a close. You've
13 heard all the testimony you're going to hear and that is
14 all the evidence that you will have to base your decision
15 what you heard from the witnesses on the stand.

16 Now, there have been numerous other articles of
17 evidence that have been referred to in court, some of
18 which I plan to use in my argument to you today. All
19 those items of evidence will be given to you to take into
20 the jury room, and I would urge you to take a look and
21 examine each piece of evidence. You're entitled to do
22 that, you should do that in order to make your decision.

23 In thinking of a case like this, it's hard to
24 believe that something like this has happened. It's hard
25 for us to believe that one human being could commit such

1 deliberation can be done in a very short time. The cold
2 calculated intent to kill can take place rather rapidly,
3 and I have an instruction here that I want to read to you.

4 The order in which I read the paragraphs in the
5 instruction is not going to be the order the Judge reads
6 it to you.

7 It says: 'The true test, with regard to
8 premeditation and deliberation, is not the duration of
9 time.' So you don't have to have somebody that has been
10 planning to kill their spouse for a week, but rather the
11 extent of the reflection. A cold calculated judgment and
12 decision may be arrived at in a short period of time. 'But
13 a mere unconsidered and rash impulse, even though it
14 includes an intent to kill, is not such deliberation and
15 premeditation as will fix an unlawful killing as murder in
16 the first degree.'

17 Under this theory we also have a felony murder
18 theory that I will talk to you about next.

19 To constitute a deliberate and premeditated
20 killing, the slayer must weigh and consider the
21 consideration of killing and the reason for, and against the
22 choice, and having in mind the consequence, he decides to
23 and does kill.

24 To prove the killing was deliberate and
25 premeditated, it shall not be necessary to prove the

1 defendant maturely and meaningfully reflected upon the
2 gravity of his act.

3 I would ^{CONTRAST} ~~cast~~ premeditation and deliberation with
4 another phrase that you have heard, and that is malice
5 aforethought. A lot of times people think malice
6 aforethought and premeditation and deliberation are the
7 same thing. They are not. Malice aforethought simply
8 means you intend to kill before you do it. Premeditation
9 and deliberation requires a little bit more.

10 When the courts talk about premeditation and
11 deliberation they talk about planning. That is one of the
12 things that the people do beforehand.

13 In this case the defendant knew that Cheryl
14 Nesler lived alone in a trailer with two small children.
15 He knew there was no man there. He had been there before
16 on previous occasions. He knew it was a relatively
17 isolated area.

18 He knew she had money because she had to support
19 two children. He knew there would be money in the house
20 when he went there. He had been there before.

21 With regard to his state of mind, and I am not
22 offering this to indicate to you whether or not it is
23 true, but with regard to Cheryl's state of mind was a
24 statement that she had made to Wayne Bunnell. She thought
25 George Smithey had stolen the arc welder from the property

DECLARATION OF SERVICE

Re: *People v. Irving Alexander Ramirez*

Cal. Supreme Court No. S155160
Alameda County Superior Ct. No. 151080

I, Marcus Thomas, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. On this day, I served a copy of the following document(s):

MOTION FOR JUDICIAL NOTICE; EXHIBIT A

by enclosing it in envelopes and

- / / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
- / X / **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on December 18, 2015, as follows:

GLENN R. PRUDEN
Capital Case Coordinator
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

CLERK OF THE COURT
Honorable Jon R. Rolefson
Alameda County Superior Court
1225 Fallon Street, Dept. 10
Oakland, CA 94612

IRVING ALEXANDER RAMIREZ, F-82088
CSP-SQ
3-EB-41
San Quentin, CA 94974

CALIFORNIA APPELLATE PROJECT
101 Second Street, Suite 600
San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Signed on December 18, 2015, at Oakland, California.



DECLARANT