

COPY

In the Supreme Court of the State of California

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

WARREN JUSTIN HARDY,

Defendant and Appellant.

CAPITAL CASE

Case No. S113421

Los Angeles County Superior Court Case No. NA039436
The Honorable John David Lord, Judge

**RESPONDENT'S OPPOSITION TO APPELLANT'S
MOTION FOR JUDICIAL NOTICE**

**SUPREME COURT
FILED**

JUL 03 2013

Frank A. McGuire Clerk
Deputy

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
YUN K. LEE
Deputy Attorney General
State Bar No. 222348
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2051
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

	Page
ARGUMENT	1
This Court Should Not Take Judicial Notice of Portions from the Transcript of the Separate and Subsequent Pearson Trial.....	1
CONCLUSION.....	3

TABLE OF AUTHORITIES

Page

CASES

People v. Payton
(1992) 3 Cal.4th 1050 1

People v. Sakarias
(2000) 22 Cal.4th 596 1, 2, 3

People v. Sanchez
(1995) 12 Cal.4th 1 1, 2

People v. Waidla
(2000) 22 Cal.4th 690 1

STATUTES

Evid. Code
§ 452, subd. (d) 1
§ 453..... 1

Respondent respectfully submits this opposition to Appellant Warren Hardy's Motion for Judicial Notice ("Motion"). Taking judicial notice of pages 4883 through 4903 of the reporter's transcript of the penalty phase of separately tried codefendant Kevin Darnell Pearson would "improperly augment" the record of appellant's appeal. (*People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1; *People v. Sanchez* (1995) 12 Cal.4th 1, 59, fn. 5.)

ARGUMENT

THIS COURT SHOULD NOT TAKE JUDICIAL NOTICE OF PORTIONS FROM THE TRANSCRIPT OF THE SEPARATE AND SUBSEQUENT PEARSON TRIAL

Relying on Evidence Code section 452, subdivision (d), appellant asks this Court to take judicial notice of portions of the reporter's transcript of the penalty phase of separately tried codefendant Pearson. (Motion at pp. 1-4.) Respondent submits that appellant's request should be denied because taking judicial notice of the transcripts from codefendant Pearson's trial would "improperly augment" the record of appellant's appeal.

Evidence Code section 452, subdivision (d), states, in relevant part, that a court may take judicial notice of records of any court of this state. Nevertheless, "[e]ven if a matter is a proper subject of judicial notice, it must still be *relevant*. [Citations.]" (*People v. Payton* (1992) 3 Cal.4th 1050, 1073, italics original.) The party requesting judicial notice must give sufficient notice of the request to each adverse party and "[f]urnish the court with sufficient information to enable it to take judicial notice of the matter." (Evid. Code, § 453.)

In *People v. Sakarias* (2000) 22 Cal.4th 596, Sakarias asked this Court to take judicial notice of the appellate record in the trial of Waidla, Sakarias' crime partner, arguing that the prosecutor argued inconsistent

factual theories in the two trials. (*Id.* at p. 633.) This Court denied the request and stated, “Where . . . the asserted inconsistencies in prosecutorial theory were not the subject of any proceeding in the trial court and, hence, neither the inconsistencies nor any explanations the prosecutor may have been able to offer appear in the appellate record, any due process claim defendant can state should be ‘presented by petition for writ of habeas corpus rather than by appeal.’ [Citation.]” (*Id.* at p. 635.) Indeed, the Court held that “to take notice under these circumstances and for the purpose requested would be to augment improperly the appellate record. [Citation.]” (*Id.* at p. 636.)

In *People v. Sanchez, supra*, 12 Cal.4th at page 59, footnote 5, this Court rejected a request by the defendant to have the Court take judicial notice of records in four separate proceedings occurring after the defendant’s trial. As to two of the proceedings, the Court denied the request because “it would improperly augment the appellate record.” (*Ibid.*) As to the other two proceedings, the Court denied the request “on the ground that reference to them is unnecessary to [the Court’s] discussion of the issues raised by defendant.” (*Ibid.*)

Here, including portions of the transcripts of codefendant Pearson’s trial would “improperly augment” the record in this case. Since codefendant Pearson’s trial was severed from appellant’s and later tried before a different judge, the transcripts of that trial was obviously not before the trial court in the instant case. Further, appellant’s claim of inconsistent theories was not presented before the trial court. “Where . . . the asserted inconsistencies in prosecutorial theory were not the subject of any proceeding in the trial court and, hence, neither the inconsistencies nor any explanations the prosecutor may have been able to offer appear in the appellate record, any due process claim defendant can state should be ‘presented by petition for writ of habeas corpus rather than by appeal.’

[Citation.]” (*People v. Sakarias, supra*, 22 Cal.4th at p. 635.) Accordingly, appellant’s request for judicial notice should be denied.

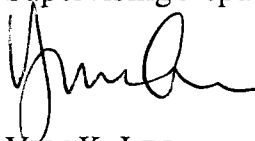
CONCLUSION

Based on the foregoing arguments, respondent respectfully requests that Appellant’s Motion for Judicial Notice be denied.

Dated: July 1, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General



YUN K. LEE
Deputy Attorney General
Attorneys for Respondent

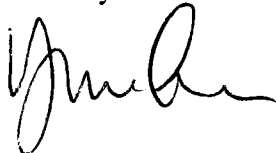
YKL: nf
LA2003XS0001
51321107.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE** uses a 13 point Times New Roman font and contains **635** words.

Dated: July 1, 2013

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read 'Yun K. Lee', written in a cursive style.

YUN K. LEE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: **People v. Warren Justin Hardy**

No.: **S113421**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **July 1, 2013**, I served the attached **RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Susan K. Shaler, Attorney at Law (2 Copies)
991 Lomas Santa Fe Drive, Suite C, #112
Solana Beach, CA 92075

Corene Locke-Noble
Deputy District Attorney
L. A. County District Attorney's Office
18000 Foltz Criminal Justice Center
210 West Temple Street, Suite 18000
Los Angeles, CA 90012

Aundre M. Herron, Senior Staff Attorney
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3672

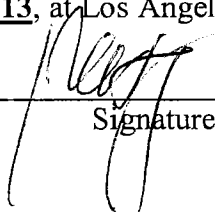
Maria Arvizo-Knight
Death Penalty Appeals Clerk
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice
Center
210 West Temple Street, Room M-3
Los Angeles, CA 90012

Honorable John David Lord, Judge
Los Angeles County Superior Court
South District, Long Beach Courthouse
415 West Ocean Blvd., Department S
Long Beach, CA 90802

On **July 1, 2013**, I caused eight (8) copies of the **RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE** in this case to be delivered to the California Supreme Court at 350 McAllister Street, 1st Floor, San Francisco, CA 94102-3600 by U. S. MAIL.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 1, 2013**, at Los Angeles, California.

Nora Fung
Declarant


Signature