

EDMUND G. BROWN JR.  
Attorney General of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
GERALD A. ENGLER  
Senior Assistant Attorney General  
RENÉ A. CHACÓN  
Supervising Deputy Attorney General  
NANETTE WINAKER  
Deputy Attorney General  
State Bar No. 186025  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004  
Telephone: (415) 703-5934  
Fax: (415) 703-1234  
Email: Nanette.Winaker@doj.ca.gov  
*Attorneys for Respondent*

SUPREME COURT  
FILED

AUG - 5 2010

Frédéric K. Ohlrich Clerk

---

Deputy

## In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

Plaintiff and Respondent,

v.

**ARTURO JESUS HERNANDEZ,**

Defendant and Appellant.

Case No. S175615

First Appellate  
District, Division Two,  
Case Nos. A119501,  
A124474

Contra Costa County  
Superior Court, Case  
No. 050707604

### RESPONDENT'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE,  
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE  
CALIFORNIA SUPREME COURT:

In a motion filed on July 28, 2010, appellant seeks judicial notice of  
three declarations filed as exhibits to his petition for writ of habeas corpus

filed in the First District Court of Appeal, Division Two, in Case No. A124474. Respondent opposes this request.

Evidence Code sections 452 and 459 authorize this Court to take judicial notice of the records of any court of this state. Appellant seeks judicial notice of three declarations to support his claim that the trial court abused its discretion by placing a deputy near the witness stand during his testimony at trial. (Appellant’s Motion for Judicial Notice, p. 1; Answer Brief on the Merits, pp. 20-21, 36-37.)

This Court should decline to take judicial notice of these documents for two reasons. First, while the Court may take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy” (Evid. Code § 452), there is no authority for appellant’s claim that declarations may be judicially noticed. To the contrary, courts “may not take judicial notice of allegations in . . . declarations . . . in court records because such matters are reasonably subject to dispute and therefore require formal proof.” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882; see also *Big Valley Band of Pomo Indians* (2005) 133 Cal.App.4th 1185, 1192 [where petitioner asked court to judicially notice truth of statements contained in declaration, court denied request, finding that it “would transform the demurrer proceeding into a contested evidentiary dispute”].)<sup>1</sup>

---

<sup>1</sup> While this Court may notice the existence of the declarations filed as part of the court record in connection with the habeas petition, it cannot judicially notice the truth of the statements made therein. (See *Big Valley Band of Pomo Indians, supra*, 133 Cal.App.4th at p. 1192; see also *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 [when  
(continued...)]

Second, the declarations sought to be judicially noticed by appellant are outside the record and therefore may not be considered on appeal. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183 [review on direct appeal limited to appellate record].) As such, they are more appropriately considered in a habeas corpus proceeding. (See e.g., *People v. Wilson* (1992) 3 Cal.4th 926, 936 [claim of ineffective assistance of counsel more appropriately decided in habeas corpus proceeding where court can consider and determine factual matters outside appellate record].)

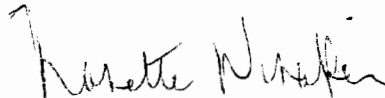
### CONCLUSION

Accordingly, appellant's request for judicial notice should be denied.

Dated: August 5, 2010

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
GERALD A. ENGLER  
Senior Assistant Attorney General  
RENÉ A. CHACÓN  
Supervising Deputy Attorney General



NANETTE WINAKER  
Deputy Attorney General  
*Attorneys for Respondent*

NW:er  
SF2009202458  
20319861.doc

---

(...continued)  
document judicially noticed, truthfulness and proper interpretations of document is disputable].)

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **People v. Hernandez**  
No.: **S175615**

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 that same day in the ordinary course of business.

On August 5, 2010, I served the attached **RESPONDENT'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Gail E. Chesney  
Attorney at Law  
P. O. Box 27233  
San Francisco, CA 94127  
(2 copies)

County of Contra Costa  
Main Courthouse  
Superior Court of California  
P.O. Box 911  
Martinez, CA 94553

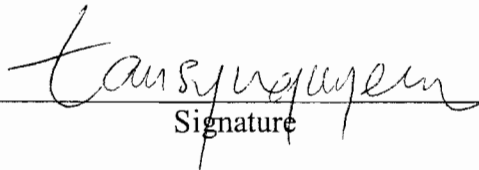
The Honorable Robert J. Kochly  
District Attorney  
Contra Costa County District Attorney's Office  
P.O. Box 670  
Martinez, CA 94553

First District Appellate Project  
Attn: Executive Director  
730 Harrison St., Room 201  
San Francisco, CA 94107

Clerk, California Court of Appeal  
First Appellate District, Division Two  
350 McAllister Street  
San Francisco, CA 94102

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 August 5, 2010, at San Francisco, California.

Tan Nguyen  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature