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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JACOB TOWNLEY HERNANDEZ,

Defendant and Appellant.

Case No. S1788 SUPREME COURT
FILED
JUN 24 2010
Frederick K. Ohlrich Clerk
Deputy

Sixth Appellate District, Case No. H031992
Santa Cruz County Superior Court, Case No. F12934
The Honorable Jeff Almquist, Judge

RESPONDENT'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE

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

In a motion filed with the answer brief on the merits, appellant seeks judicial notice of the State Bar Court's "STIPULATION RE: FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING PUBLIC REPROVAL" in *In the Matter of Arthur G. Dudley*, Bar No. 56921 (Case No. 06-O-10112; filed Feb. 23, 2007.) 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 state bar records to support an inference that the state bar's public reproof of defense counsel one month prior to the trial in this case would have had a chilling effect on counsel's performance and caused him to interpret the trial court's orders cautiously so as not to risk a contempt finding by the court. (Appellant's Motion for Judicial Notice, p. 2; Answer Brief on the Merits, pp. 70-71 & fn. 20.)

This court should decline to take judicial notice of the identified document for several reasons. First, appellant seeks to draw inferences that are irrelevant to the issue before this Court of whether the trial court's limitation placed on Townley's consultation with his counsel regarding specific items of evidence was structural error. Appellant resists an assessment of defense counsel's actual performance in this case and argues against the use of the test for incompetence in *Strickland v. Washington* (1984) 466 U.S. 668. (Answer Brief on the Merits at pp. 62-68.) The appellate court found structural error in reversing appellant's convictions by refusing to consider the actual effect of the trial court's order on counsel's performance or on the outcome of the trial. Extrinsic evidence of

an attorney's reaction to an erroneous order has no bearing on whether the error is structural or instead should be analyzed for prejudice.

Second, as this court has recognized, it is inappropriate to judicially notice documents that have the effect of enlarging the appellate record beyond its four corners in order to determine the merits of a claim of ineffective assistance of counsel. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1012 & fn. 12; see also *People v. Sanchez* (1995) 12 Cal.4th 1, 59-60 & fn. 5, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421) Should this court agree with respondent that the limitations placed on counsel's consultation with his client are properly addressed under the two-prong test of *Strickland*, the proper forum for taking evidence regarding defense counsel's subjective decisionmaking is a petition for writ of habeas corpus. (*People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1.) Notably, appellant supports his judicial notice request of state bar records by citing a decision of this court involving a habeas corpus proceeding with a reference hearing on an ineffective assistance claim. (*In re Visciotti* (1996) 14 Cal.4th 325, 329, 349-350 & fn. 6.)

Third, the inference appellant seeks to draw from the bar record is speculative. Defense counsel evidently was publicly reproved by the bar after he failed to provide relevant documentation to his former client and failed to assist the client in preparing a federal writ of habeas corpus having repeatedly promised to do so. (Appellant's Motion for Judicial Notice, Exh. A at pp. 6-7.) Such reproof could suggest that defense counsel would be more assertive, rather than less so, in safeguarding defendant's constitutional rights in the instant trial. Lacking counsel's declaration or testimony offered in a collateral proceeding respecting counsel's actual performance at defendant's trial, the proper inference to be drawn from the face of a state bar pleading in a different action remains an unknown.

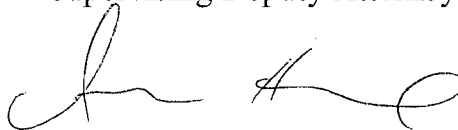
CONCLUSION

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

Dated: June 23, 2010

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People of the State of California v. Jacob Townley Hernandez**
No.: **S178823**

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 June 24, 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:

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Santa Cruz County Superior Court
701 Ocean Street
Santa Cruz, CA 95060-4086

Clerk of the Court
Sixth District Court of Appeal
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San Jose, CA 95113

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Sixth District Appellate Project
100 No. Winchester Blvd., Ste. 310
Santa Clara CA 95050

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 June 24, 2010, at San Francisco, California.

Esther A. McDonald
Declarant

Esther McDonald

Signature