In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **JAMES ANTHONY DAVEGGIO and MICHELE LYN MICHAUD,** **Appellants.**	**CAPITAL CASE** Case No. S110294

Alameda County Superior Court
Case No. 134147 A&B
The Honorable Larry J. Goodman, Judge

RESPONDENT'S OPPOSITION TO MOTION FOR JUDICIAL NOTICE

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ARGUMENT

IRRELEVANT INFORMATION IS NOT SUBJECT TO JUDICIAL NOTICE

In their opening briefs, appellants both argue that the prosecutor committed misconduct by improperly appealing to the passions and prejudices of the jury. Appellants complain that the prosecutor cried during her opening statement, made improper argument during her opening statement, argued facts not in evidence, and called appellants "vile and depraved sexual predators." (DAOB 141-168; MAOB 245-278.)[1] Appellants seek to bolster their allegations of misconduct by requesting that the court take judicial notice of transcripts and pleadings in two other capital cases tried by this prosecutor. Appellants believe that the records at issue demonstrate a pattern of past misconduct, and that based on this past alleged misconduct, "one can infer that [the prosecutor's] conduct [in this case] was *intentional*." (Motn. for Judicial Notice, decl. of David Goodwin, ¶ 7, italics added.)

The records are not subject to judicial notice because they are irrelevant. This Court has long established that a finding of prosecutorial misconduct is based on objective standards and requires no showing that the prosecutor subjectively intended to commit misconduct. Since a prosecutor's subjective intent is immaterial to a finding of misconduct, and since a finding of misconduct is based solely on events during a defendant's trial, rather than on events in other trials, the transcripts and pleadings from other trials are not subject to judicial notice.

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[1] DAOB refers to Daveggio's opening brief. MAOB refers to Michaud's opening brief.

A. Background

Appellants seek judicial notice of a motion to reduce the penalty to life without parole in *People v. Keith Lewis* (S086355). In the *Lewis* motion, defense counsel made an unverified accusation that the prosecutor cried at various times during the trial (Exhibit A, p. 5).[2] Appellants further assert that in the same case, the prosecutor committed misconduct by eliciting testimony that several responding officers, as well as bystanders, were upset and crying at the crime scene (Exhibits C, D, E, F, G, H), and that another officer referred to the crime as a "hard case" (Exhibit I). (Motn. for Judicial Notice; DAOB 169-170; MAOB 280-281.)[3]

Appellants also seek judicial notice of the prosecutor's closing argument in *People v. Ropati Seumanu* (S093803) in which she stated:

> This case is about good and evil. It is about the joyful bliss of anticipation of your wedding day which is replaced with sheer and unending terror; it is about Nolan, an innocent bridegroom, a son, a brother, who becomes Paki's captive. And the first day of the rest of your life never comes. It is about a bride's gift to her handsome husband that becomes a murderer's trophy. It is about a wedding that becomes a funeral, a plea for mercy which is denied with an intense explosion that rips apart your heart. The breath of life becomes bloody lungs filled with hot pellets. And you die, scared to death, begging for your life, all alone on your wedding day. That is the defendant's crime. That is Paki's crime for which he is on trial. And today is the day [in] which he must be held accountable for this horrible, brutal murder.

(Motn. for Judicial Notice, Exhibit B.)

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[2] All references to exhibits are to those appended to appellants' motion for judicial notice.

[3] Appellants' briefs also assert that the *Lewis* transcripts appended to their motion for judicial notice reflect that Officer Steven Thurston described the case as the worst in his career and that Officer Chris Trim was "freaked out." (DAOB 170; MAOB 280-281.) Respondent was unable to find any of the foregoing information in the reporter's transcripts appended to the motion for judicial notice.

B. Judicial Notice

Under Evidence Code section 210, relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)[4] "The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.)

Although a court may take judicial notice of the "[r]ecords of . . . any court of this state" under section 452, subdivision (d), judicial notice "cannot be taken of any matter that is irrelevant . . . ." (*People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6 [court refused to take judicial notice of alleged prosecutorial misconduct in other proceedings because no showing of relevance was made]; *People v. Young* (2005) 34 Cal. 4th 1149, 1171, fn. 3 [motion for judicial notice denied where defendant failed to show how records in other proceedings were relevant to claim of prosecutorial misconduct]; but see *People v. Hill* (1998) 17 Cal.4th 800, 847-848 [court took judicial notice of judicial findings in other cases that the prosecutor had committed misconduct].) Furthermore, even if the existence of a document is judicially noticeable, the truth of statements contained in the document, and the document's proper interpretation, are not subject to judicial notice if the matters in the document are reasonably disputable. (*StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9.)

C. Prosecutorial Misconduct

The standards governing a claim of prosecutorial misconduct are settled:

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[4] Unless stated otherwise, all further statutory references are to the Evidence Code.

> "A prosecutor's conduct violates a defendant's constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects '"the trial with unfairness as to make the resulting conviction a denial of due process." [Citation.]' (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) *The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor.* (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

(*People v. Hamilton* (2009) 45 Cal.4th 863, 920, italics added.) Thus, "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1; accord, *People v. Friend* (2009) 47 Cal.4th 1, 31 [prosecutor's violation of evidentiary ruling, "whether done intentionally or not," constituted misconduct].)

D. Discussion

In this case, appellants' request for judicial notice is based on the notion that the transcripts in other cases reflect misconduct, and that from that prior purported misconduct, this Court "can infer" that the prosecutor's conduct in this case "was *intentional*." (Motn.for Judicial Notice, decl. of Goodwin, ¶ 7, italics added.) Appellants further assert that a motion in *Lewis* to reduce the penalty to life without parole is also relevant because trial counsel in that case made an unverified allegation that prosecutor Backers committed misconduct by crying during opening statements and closing arguments in the guilt and penalty phases. Counsel for Daveggio asserts that since the motion in *Lewis* reported "similar conduct in the form of Ms. Backers crying," it "confirms the allegations made by the trial attorney in this case" because two people independently claimed to have observed the same type of behavior. (Motn. for Judicial Notice, decl. of Goodwin, ¶ 8.)

Appellants are incorrect. The records at issue are not judicially noticeable because a prosecutor's intent has no bearing on the issue of whether he has committed misconduct. (See *People v. Hamilton*, *supra*, 45 Cal.4th at p. 920 [in determining whether misconduct has occurred, focus is on effect on the defendant, not the intent of the prosecutor].) Consequently, since appellants' stated rationale for taking judicial notice of other cases is to show the prosecutor intentionally committed misconduct, and a finding of misconduct does not require a showing of culpable intent, evidence regarding the prosecutor's purported misconduct conduct in other trials is manifestly irrelevant, and therefore not subject to judicial notice. (See *People v. Young*, *supra*, 34 Cal. 4th at p. 1171, fn. 3 [motion for judicial notice denied where defendant failed to show how records in other proceedings were relevant to claim of prosecutorial misconduct]; *People v. Rowland*, *supra*, 4 Cal.4th at p. 268, fn. 6 [court refused to take judicial notice of alleged prosecutorial misconduct in other proceedings because no showing of relevance was made].)

This Court's decision in *People v. Hill*, *supra*, 17 Cal.4th 800, does not suggest a contrary result. In *Hill*, the Court found that the prosecutor had committed gross misconduct in that case, and took judicial notice of the prosecutor's misconduct in other proceedings. The *Hill* Court stated:

> In reaching this conclusion, we address an institutional concern as well. Our public prosecutors are charged with an important and solemn duty to ensure that justice and fairness remain the touchstone of our criminal justice system. In the vast majority of cases, these men and women perform their difficult jobs with professionalism, adhering to the highest ethical standards of their calling. This case marks an unfortunate exception. We take judicial notice of a 1987 unpublished opinion of the Court of Appeal, Second Appellate District, Division Two, affirming a conviction of Roderick Congious, which not only cites Deputy District Attorney Rosalie Morton for prosecutorial misconduct, but identifies her as the offending prosecutor in two other, published appellate court decisions in which the Court of Appeal

> found prosecutorial misconduct without identifying the prosecutor. (See *People v. Kelley*, *supra*, 75 Cal.App.3d 672, 680-682; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 726-727.) As the opinions in these cases make clear, defendant's is not the first case in which this prosecutor committed misconduct. We are confident the prosecutors of this state need no reminder of the high standard to which they are held, and that the rule prohibiting reversals for prosecutorial misconduct absent a miscarriage of justice in no way authorizes or justifies the type of misconduct that occurred in this case.

(*Id.* at pp. 847-848.) Based on the "gross misconduct" of the prosecutor at issue, the *Hill* Court reported its decision to the State Bar for possible disciplinary proceedings. (*Id.* at p. 853, fn. 13.)

Hill is inapposite because it took judicial notice of *findings* of prosecutorial misconduct which were relevant to the Court's decision to refer the prosecutor to the State Bar for possible disciplinary action.

In this case, there are no findings of any misconduct. On the contrary, an examination of the appended exhibits reflects that many of the questions *appellants* deem objectionable, were not subject to any objection by defense counsel in those cases. Thus, for example, there is no record of defense counsel making any objection to the prosecutor's closing argument in *Seumanu* (Exhibit B). (Motn. for Judicial Notice, Exhibit B.) Similarly, there were no objections to the prosecutor's questions which are set forth in Exhibits C, G, H, and I. (Motn. for Judicial Notice, Exhibits C, G, H, and I.) It is therefore apparent that in many instances, defense counsel for other defendants in other proceedings did not find objectionable the comments that appellants in this proceeding wish to deem objectionable.

Moreover, although there were objections to the prosecutor's questions set forth in Exhibits D, E, and F, those objections were *overruled.* (Motn. for Judicial Notice, Exhibits D, E, and F.) Under these circumstances, the proper interpretation of the appended documents is unclear at best. Therefore, judicial notice of the documents is precluded.

(See *StorMedia, Inc. v. Superior Court*, *supra*, 20 Cal.4th at p. 457, fn. 9 [Although the existence of a document may be judicially noticeable, the truth of statements contained in the document and the document's proper interpretation are not subject to judicial notice if those matters are reasonably disputable"]; accord, *Fremont Indem. Co. v. Fremont General Corp.*, *supra*, 148 Cal.App.4th at p. 113 ["A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute"].)

Respondent further observes that even if the legal import of the appended documents were clear, the fact that the documents pertain to different defendants in different proceedings provides yet another basis to deny the request for judicial notice. As a matter of hornbook law, it is axiomatic that a defendant has standing only to complain about the infringement of his own right to a fair trial. Therefore, any claim of prosecutorial misconduct necessarily depends on what occurred in his case, not what occurred in other cases. (See *County Court of Ulster v. Allen* (1979) 442 U.S. 140, 154-155 ["A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights"].) Consequently, even if there were findings of misconduct in other cases, and even if the prosecutor cried in a different trial as alleged in appellants' Exhibit A, the records would nonetheless be irrelevant because the only issue before this Court is whether appellants' rights were violated in this case. Accordingly, appellants' motion for judicial notice should be denied for failure to make the requisite showing of relevance.

CONCLUSION

For the foregoing reasons, appellants' request for judicial notice should be denied.

Dated: July 7, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPPOSITION TO MOTION FOR JUDICIAL NOTICE uses a 13 point Times New Roman font and contains 2,056 words.

Dated: July 7, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. James Anthony Daveggio and Michele Lyn Michaud**
No.: **S110294**

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 July 7, 2010, I served the attached RESPONDENT'S OPPOSITION TO MOTION 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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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 7, 2010, at San Francisco, California.

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