

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

SUPREME COURT
FILED

JUL 28 2010

Frederick K. Ohlrich Clerk

Deputy

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

ARTURO JESUS HERNANDEZ,

Defendant and Appellant.

S175615

**First District Court of
Appeal No. A119501;
Contra Costa County
Superior Court
No. 50707604**

**APPELLANT'S MOTION FOR JUDICIAL NOTICE,
MEMORANDUM OF POINTS AND AUTHORITIES,
AND SUPPORTING EXHIBITS**

SUPREME COURT
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Deputy

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**Attorney for Appellant ARTURO JESUS HERNANDEZ
By Appointment of the California Supreme Court**

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APPELLANT'S MOTION FOR JUDICIAL NOTICE

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

Appellant **ARTURO JESUS HERNANDEZ**, through his appointed counsel, hereby requests that this Court take judicial notice of the exhibits to Appellant's Petition for Habeas Corpus, heard with the appeal in the underlying action, as those exhibits relate to issues set forth in Appellant's Answer Brief on the Merits.¹ Authority for this request is found in California Evidence Code sections 452, 453, and 459, and California Rules of Court, Rule 8.252.

The documents submitted for judicial notice are copies of the exhibits attached to Appellant's Petition For Writ Of Habeas Corpus, filed April 1, 2009, in the First District Court of Appeal, Division Two, Case No. A124474. By order of that court, dated April 2, 2009, the petition was considered with the appeal in Case No. A119501, which is the subject of the present appeal. The Court of Appeal reversed the trial court decision on appeal, and dismissed the habeas petition as moot. (Maj. opn., p. 2.)

¹See Answer Brief on Merits, page 20, fn 2.

The exhibits, attached to the present motion, are true and correct copies of the original declarations filed in the Court of Appeal in Case No. A124474. They are as follows:

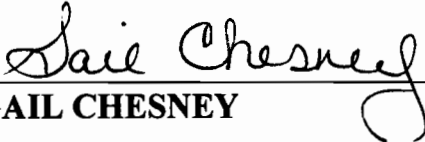
Exhibit A: Declaration of Petitioner
Arturo Jesus Hernandez

Exhibit B: Declaration of Trial Counsel
Joni Spears

Exhibit C: Declaration of Counsel
Jack Funk

DATED: July 28, 2010

Respectfully submitted,



GAIL CHESNEY

Attorney for Appellant **ARTURO
JESUS HERNANDEZ**

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR JUDICIAL NOTICE**

The California Evidence Code allows California courts, including appellate courts, to take judicial notice of their own records, as well as the records of any court of this state. (Evid. Code § 452, subd. (d), 453, 459.) This includes records in underlying or related actions. (See e.g. *In re Johnson* (1998) 18 Cal.4th 447, 465, fn. 4; *People v. Carmony* (2002) 99 Cal.App.4th 317, 322, fn. 3; *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1470, fn. 1.)

California Rules of Court, rule 8.252(a), implements Evidence Code 459, and requires a party seeking judicial notice to file a separate motion, stating why the matter to be noticed is relevant to the appeal; whether the matter was presented to the trial court; and whether the matter relates to proceedings occurring after the judgment.

1. Relevance of the Exhibits

The issue before this Court is whether the trial court prejudicially abused its discretion by requiring a uniformed, armed deputy sheriff to stand or sit immediately behind the defendant during his testimony and by refusing a defense request for an instruction on that issue. The exhibits are relevant to this issue as follows:

A. Exhibit A, Hernandez Declaration: Appellant's declaration shows that he had no prior history of violence or disruption of court proceedings. The declaration also describes the courtroom scene, the close placement of the deputy directly behind appellant during his testimony, the placement of the jury and the view presented, the distracting effect of the deputy on the appellant's testimony and on the jury while observing appellant testify, appellant's inability to concentrate while testifying, and how his decision to waive his right not to be called as a witness would have been affected had he known of the deputy's placement.

B. Exhibit B, Spears Declaration: Trial counsel's declaration sets the courtroom scene and describes the closeness of the deputy to appellant during his testimony and what the jury saw while observing appellant testify. The declaration also notes the trial court's knowledge of specific information about appellant's history, showing he was not a security risk. It also explains that, had counsel known the deputy would be placed there in advance, she may not have called appellant as a witness.

C. Exhibit C, Funk Declaration: The declaration of counsel, highly experienced in criminal defense in Contra Costa County, establishes that defense counsel was justified in not anticipating the deputy's placement

during appellant's testimony, as the policy was not routine in Contra Costa Superior Court, but rather was a routine practice of this one judge.

2. Presentation to Lower Court

The exhibits were not presented to the trial court but were presented to the Court of Appeal.

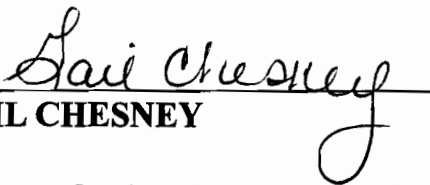
3. Relation to Proceedings After Judgment

The exhibits relate to matters occurring at the trial of this case in Contra Costa Superior Court.

THEREFORE, appellant requests that this Court take judicial notice of the materials, attached to this motion, as Exhibits A, B, and C.

DATED: July 28, 2010

Respectfully submitted,



GAIL CHESNEY
Attorney for Appellant **ARTURO**
JESUS HERNANDEZ

EXHIBITS

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**EXHIBIT A: DECLARATION OF PETITIONER
ARTURO JESUS HERNANDEZ 1**

**EXHIBIT B: DECLARATION OF TRIAL COUNSEL
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**EXHIBIT C: DECLARATION OF COUNSEL
JACK FUNK 11**

DECLARATION OF PETITIONER

I, Arturo Jesus Hernandez, declare:

1. I am the petitioner in this matter. I am now a prisoner at San Quentin. I was sent here not long after the judge sentenced me to prison.

2. I was in jail from the time I was arrested in this case and all through my trial. I would not have had enough money to post bail.

3. During the trial, I wore plain clothes and sat at the defense table with my lawyer Ms. Spears. There was at least one guard somewhere behind our table. I don't think the jury paid much attention to that because the jury box and the witness chair were on the other side of the room from where we were.

4. Sometime during the trial, my lawyer and I decided I would testify. I had been in courtrooms before but I had never testified. I can't really remember the details about walking up to the witness chair because I was so nervous and afraid that everything seemed like a blur. I do remember that when I realized that the guard was going to be up there with me while I was supposed to testify, I was shocked. I had watched other people testify at the preliminary hearing and during the trial but no guard went up there while those witnesses were on the stand. I didn't know then why the guard was there.

5. When I sat down in the witness chair, the guard was standing about an arm's length behind me. The second day I was on the stand, the guard was sitting, and not standing. The jury was on my right side. I think the closest juror was about 8 feet away, so it would be impossible for the jurors on either day to look my way and not see the guard standing or sitting behind me. Most of time while I was testifying, I could hear the guard coughing and shuffling his feet and just moving around. I could see that some of the jurors, and even the D.A., were looking back and forth between me and the guard. Sometimes I thought the jurors weren't really listening to what I was saying because they seemed to be paying more attention to whatever the guard was doing.

6. Having the guard so close to me while I testified really spooked me. I know it did affect my testimony. I was already nervous, but the noise the guard was making and having the feeling that someone was very close behind me made me feel so on edge that sometimes I lost a lot of concentration. Also , sometimes, I was distracted from the questions I was being asked because of the way the jurors and the D.A. kept looking at the guard. It was hard not to watch them watch the guard.

7. I did not have very much time to talk to my lawyer alone before I testified, but she did explain that I had a right not to be a witness. If I had known that guard would be up there with me all the time I was on the witness stand, I probably would not have waived that right because its pretty likely that testifying with the guard up there hurt me more than it helped. My lawyer did tell me she thought I should testify but she didn't say there would be a guard sitting or standing behind me. I think she was just as surprised as I was when that happened.

8. What made testifying even worse for me was that I was so uncomfortable with the guard right behind me, and then the D.A. started saying over and over that I had some kind of prior arrest on a felony for soliciting prostitution. I was just stunned. I knew that never happened, and I kept trying to tell everybody it wasn't true but she kept saying it anyway. The judge wouldn't listen to my attorney objecting and I could see the jury was looking at me like I was a dog. It was a nightmare because I felt like the jury must think, from the guard being so close and then the D.A. basically saying I was a liar and some kind of felon, that I must be a really serious criminal. By the time the judge told the jury I never had any felony before and never was arrested for anything about prostitution, it was too late. I don't think anybody was listening.

9. I was there when my lawyer told the judge that there shouldn't be a uniformed armed guard standing behind me when I testified. I couldn't believe the judge said it was really OK because what my lawyer was telling the judge was true. That whole thing was embarrassing and humiliating. It was like being shackled in front of the jury.

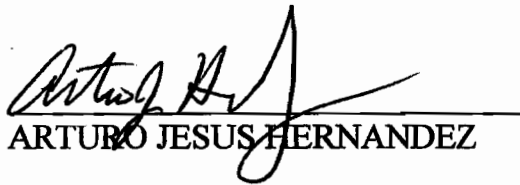
10. I had never caused any trouble in any courtroom, and I caused no trouble either at this trial or during the preliminary hearing. I never made any threats or attempts to escape during any of the proceedings.

11. I did not have a history of violence. I did have a drinking problem for many years, and I did have a history of misdemeanor convictions, almost all related to my drinking. Before this case, I had no felony convictions and none of the misdemeanors had anything to do with prostitution. There were some restraining order violations related to my ex-wife, but none of them had anything to do with violence.

12. It seemed to me like what happened in my case was that the judge and the D.A. just wanted to rush through the trial and get me convicted as quick as possible. I thought that was why they didn't care about how dangerous I looked by having that guard up there with me when I testified.

13. I thought the great bodily injury enhancement was only about the accusation that I hit Ms. Belarde with a stick. At first, I didn't realize the enhancement was still there after the jury said I wasn't guilty about the stick. I did know at sentencing that my attorney was asking the judge to give me a chance with probation. My lawyer didn't tell me and I didn't know any other way that we could ask the judge to strike that enhancement.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17 day of March, 2009, at San Quentin, California.


ARTURO JESUS HERNANDEZ

DECLARATION OF TRIAL COUNSEL

I, Joni Spears, declare:

1. I am an attorney licensed to practice law in the State of California. My state bar number is 222149.

2. I have been employed as a Deputy Public Defender with Contra Costa County's Office of the Public Defender for approximately six years. In 2007, I represented Arturo Jesus Hernandez, the defendant, in Contra Costa Superior Court Case No. 50707604.

3. My client was charged with felony assault with a deadly weapon and assault by force likely to produce great bodily injury under Penal Code section 245, subdivision (a)(1). An enhancement for the personal infliction of great bodily injury under Penal Code section 12022.7, subdivision (a), was also alleged. The case was tried before a jury which found defendant guilty of the section 245 assault by force likely to produce great bodily injury but not guilty of assault with a deadly weapon. The jury found the enhancement to be true. My client was sentenced to two years for the assault and three years for the enhancement.

4. During the trial, Mr. Hernandez was dressed in civilian clothes, and sat with me at the defense table, which was on the opposite side of the room from the jury box and the witness stand. There was a bailiff's desk just on the other side of the bar behind the defense table. At least one bailiff or deputy¹ sat at that desk or stood against the wall or near the desk during most of the trial. In my opinion, the placement of the deputy behind the defense table would have looked simply

¹ In Contra Costa County, bailiffs are deputies from the Contra Costa Sheriff's Department.

coincidental to the jury. In that placement, jurors may have thought the deputy was guarding the courtroom as a whole, rather than being focused exclusively on my client.

5. During the trial I called Mr. Hernandez to testify in his own defense. Before the second day of his testimony, during a court-counsel conference, outside the jury's presence, I placed on the record my objections to the court's security, and specifically made my objections to the placement of the deputy behind my client during his testimony. I have reviewed the portions of the transcript in which I made and later referenced those objections and I believe those transcripts to be accurate.²

6. In addition to what was stated in the transcripts, I can add what was obvious to all in the courtroom at the time. The deputy was placed both days just a few feet behind my client during his testimony. On the first day, Mr. Hernandez was seated while the deputy stood behind him, with his arms crossed, throughout the testimony. On the second day, after my objections, the deputy no longer stood, but he was still close behind my client. On both days, the deputy would have been highly visible to the jury as the jurors were within five to fifteen feet or so from the witness stand. If the jurors looked towards my client, they would have had to see the deputy. It would have been obvious to anyone in the courtroom during that testimony that the deputy was not guarding the courtroom, but was instead was exclusively guarding Mr. Hernandez, and that my client was in custody.

² See 3 RT 406-410, 460-461, 486-487.

7. I was quite surprised by the deputy's actions because I had represented clients in numerous criminal jury trials, including felony trials, and had never before seen a deputy accompany a defendant to the witness stand and stand or sit behind the defendant during his testimony. None of the other witnesses testifying during this trial were accompanied by a deputy to the witness stand.

8. I did not immediately object when my client was called to the stand because I did not want to draw attention to the situation. I had appeared in front of this particular judge a number of times. I had also completed at least one jury trial with the judge. On that basis, I felt that, had I then objected, the judge's reaction to the objection would have drawn a lot of negative attention to the situation. Just before my client's testimony, I had asked for a recess and been denied. Additionally, as stated in the last paragraph, I was taken by surprise by the situation, and needed to research the issue.

9. As the record shows, I did ask the court to make an individualized finding of the need for the deputy's placement. I knew my client was not a security risk because I had reviewed his file, and spoken to his family. Mr. Hernandez was present during the preliminary hearing when the complaining witness testified, and was not violent or threatening in any way then. Moreover, prior to Mr. Hernandez's testimony, the court, the district attorney and I had reviewed my client's criminal history to determine what convictions would be admissible. He had no felony convictions, and none of the misdemeanors involved violence. The restraining order violations which the court mentioned during my objection to the deputy's placement related only to my client's contact

with his ex-wife and did not involve any hint of violence. This was later established to the court's satisfaction when the court spoke to his ex-wife and his daughter during the sentencing hearing. Finally, there was no suggestion that Mr. Hernandez had ever threatened or attempted to escape and nothing like that happened with respect to this case.

10. Had I known that the deputy would be placed behind Mr. Hernandez during his testimony, and that the court would refuse an instruction on the issue, I would have considered advising my client not to testify because, as I told the court, I believe this procedure made my client look like a highly dangerous individual and had a prejudicial effect akin to shackling. I rarely advise the defendant to testify and I was aware that my client was not particularly eloquent or articulate. He had never testified before, and had been an alcoholic for years. In addition, I was concerned about other events which negatively affected the favorable presentation of my client's testimony. I did not believe I had sufficient time to discuss my client's proposed testimony with him prior to calling him as a witness because the interview room at the courthouse was unavailable despite the court's agreement to make it available. Although I had informed the court of the problem and requested that Mr. Hernandez be permitted to wait and testify the following day, the court refused. I was also completely taken by surprise when the district attorney was allowed, over my objections, to impeach Mr. Hernandez on a claimed felony arrest for soliciting prostitution which did not exist. My mistrial motion was denied. Under these circumstances, I believe that the

defendant's right to present a defense and to testify without unnecessary handicaps and distractions was severely impaired.

11. I cannot recall at this time any tactical reasons I may have had for not asking the court to strike the great bodily injury enhancement during sentencing. I do recall being focused on trying to get Mr. Hernandez probation and into a program which would help him deal with his alcohol problems.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 21²⁰⁰⁹, in the State of California.



JONISPEARS

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DECLARATION OF COUNSEL

I, Jack Funk, hereby declare the following to be true and correct:

1. I am an attorney licensed to practice law in the State of California. My state bar number is 95421.

2. I am employed as an Assistant Public Defender with Contra Costa County's Office of the Public Defender in Martinez, California, and am currently one of the supervising attorneys at that office.

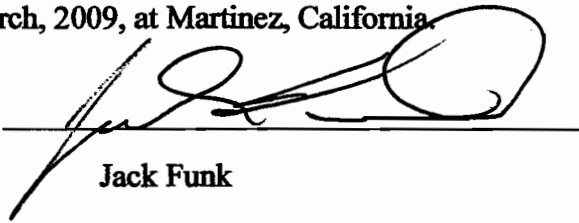
3. I have worked in Contra Costa County as a public defender since 1981. During those 28 years, I have completed 140 plus jury trials. Approximately 100 of those were felony jury trials.

4. During my tenure, Contra Costa County has not had a policy or a practice of having security accompany a defendant to the witness stand or of placing a bailiff, armed or otherwise, behind, beside, or near a defendant, while that defendant testified.

5. Since I have practiced as a public defender, I have never experienced a situation in any trial in which security was posted behind, beside, or near the defendant during the defendant's testimony.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 11th day of March, 2009, at Martinez, California.



Jack Funk

PROOF OF SERVICE BY MAIL

I declare that I am a citizen of the United States, over the age of 18, and not a party to this action. My business address is P.O. Box 27233, San Francisco, CA 94127-0233. On the date shown below, I served the within

APPELLANT'S MOTION FOR JUDICIAL NOTICE,

MEMORANDUM OF POINTS AND AUTHORITIES, AND

SUPPORTING EXHIBITS (*People v. Hernandez*, S175615) on the

following parties/interested persons or entities hereafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Nanette Winaker
Deputy Attorney General
California Attorney General's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
[Counsel, State of California]

Richard Such, Staff Attorney
First District Appellate Project
730 Harrison Street, Ste 201
San Francisco, CA 94107
[Appellate Project]

Arturo J. Hernandez, F90764
San Quentin State Prison
San Quentin, CA 94974
[Appellant]

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 28, 2010, at San Francisco, California.


GAIL CHESNEY