

COPY

SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff and Respondent,

v.

RANDY EUGENE GARCIA,

Defendant and Appellant.

CAPITAL CASE

Case No. S045696

SUPREME COURT  
**FILED**

MAY 07 2010

Frederick K. Ohlrich Clerk

Deputy

Los Angeles County Superior Court Case No. BA077888  
The Honorable Jacqueline A. Connor, Judge

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

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DEATH PENALTY

**TABLE OF CONTENTS**

|  | <b>Page</b> |
|--|-------------|
| Introduction.....  | 1           |
| Argument .....   | 2           |
| I.    Appellant’s motion for judicial notice should be denied..... | 2           |
| Conclusion .....   | 5           |

TABLE OF AUTHORITIES

Page

CASES

*Brosterhous v. State Bar*  
(1995) 12 Cal.4th 315..... 4

*City of Oakland v. Hassey*  
(2008) 163 Cal.App.4th 1477..... 4

*Reserve Insurance Co. v. Pisciotta*  
(1982) 30 Cal.3d 800..... 4

*Violante v. Communities Southwest Development  
& Construction Co.*  
(2006) 138 Cal.App.4th 972..... 4

*Vons Companies, Inc. v. Seabest Foods, Inc.*  
(1996) 14 Cal.4th 434..... 4

STATUTES

Evid. Code,  
§ 452 ..... 3, 4  
§ 452, subd. (h)..... 2, 3  
§ 459 ..... 4

CONSTITUTIONAL PROVISIONS

U.S. Const., 14th Amend. .... 1

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

Respondent submits the following in opposition to the Motion for Judicial Notice filed by appellant on March 22, 2010.

**INTRODUCTION**

As his first contention on appeal in this automatic appeal from a judgment of death, appellant contends that the trial court erred in denying his motion to dismiss the indictment, because he made a prima facie showing that Hispanics and women had been systematically excluded from serving on the Los Angeles County grand jury that indicted him. Appellant alleges this was error under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and argues his convictions should be reversed as to the indicted counts. (AOB 60-103.)

Before trial, appellant filed a written motion to set aside the indictment, based upon “a denial of equal protection in the selection of the grand jury.” (1CTSupp.I 51, 1CTSupp.VIII 8; see also 1CTSupp.I 49-53; 1CTSupp.VIII 6-10; 2RT 335.) Although the written motion did not specify which groups were being denied equal protection, appellant orally argued that females and Hispanics were underrepresented on the grand jury.

In support of the motion, appellant was allowed to incorporate transcripts of a hearing on a grand jury challenge in another Los Angeles County case, *People v. Vallarino et al.*, BA027100 (*Vallarino*), which included expert testimony on population statistics, evidence relating to the county’s grand jury selection procedures, and gender, race, and ethnicity information of grand jurors for the six-year period preceding the 1992-1993 grand jury which indicted appellant. (2RT 347-348, 373, 377, 423.) These transcripts are located at 1CTSupp.VII through 19CTSupp.VII. Additionally, the final briefs on the issue filed by the parties in *Vallarino*

were also incorporated into this case. (2RT 425.) The trial court heard argument concerning and denied appellant's motion to dismiss the indictment on November 4, 1994. (2RT 417, 469.)

Included in the evidence presented in the *Vallarino* case, and by incorporation to the trial court below, showing Los Angeles County's efforts to recruit Hispanic grand jurors was a copy of a "Briefs" item that was included in the Monday, November 27, 1989, edition of the Los Angeles Daily Journal. (15CTSupp.VII 3688.) In his recent Motion for Judicial Notice (hereinafter "Motion") filed contemporaneously with his Reply Brief on March 22, 2010, appellant asks this Court to take "[j]udicial notice of the indisputable fact that this article was buried on page three of a small newspaper with limited circulation and readership . . . ." (Motion 2.) Respondent opposes and submits this Court should deny the Motion based on the following.

## **ARGUMENT**

### **I. APPELLANT'S MOTION FOR JUDICIAL NOTICE SHOULD BE DENIED**

Evidence Code section 452, subdivision (h), provides that judicial notice may be taken of, "Facts 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." Citing and relying on this provision, in his Motion, appellant asks this Court to take judicial notice of the "indisputable fact" that the "Briefs" item that appeared in the Monday, November 27, 1989, edition of the Los Angeles Daily Journal "was buried on page three of a small newspaper with limited circulation and readership." (Motion 2, 4-5.)

Respondent submits such is not the proper subject of judicial notice. Contrary to his Motion, appellant does not request this Court to take judicial notice of a fact or proposition not reasonably subject to dispute and

capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Rather he asks this Court to take judicial notice of his argumentative and unsupported statement that the item “was buried on page three of a small newspaper with limited circulation and readership.” Appellant’s use of the term “buried” is argumentative and, as discussed below, in any event inaccurate.

Moreover, appellant offers absolutely no support for his further argumentative statement that the item appeared in “a small newspaper with limited circulation and readership.” Indeed no information whatsoever is provided concerning the circulation and readership of the publication and, in any event, such matters do not constitute “Facts 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,” within the meaning of subdivision (h) of Evidence Code section 452. Appellant’s request for this Court to take judicial notice not of facts, but instead of his argumentative statements, should be denied.

Indeed, even if appellant had limited his motion for judicial notice to a request for this Court to take judicial notice that the subject item appeared on page three of the November 27, 1989, edition of the Los Angeles Daily Journal, the motion would still properly be subject to denial. As noted, the trial court made its challenged ruling denying appellant’s motion to dismiss the indictment on November 4, 1994. (2RT 417, 469.) It is the propriety of that ruling that is at issue concerning appellant’s first contention in this appeal. Although he easily could have done so at the time he presented his motion to dismiss the indictment to the trial court, appellant made no effort to present the page number on which the item was printed or to make any argument based thereon. Rather, after waiting more than 15 years after the trial court made its challenged ruling, and more than three years after filing his Opening Brief in this appeal, appellant now, for the first time, asks this

court to take judicial notice of something he did not present, or even attempt to present, to the trial court. Such a request is improper and should accordingly be denied.

Appellant proffers no reason for not presenting the page number on which the item was printed or any argument based thereon in the trial court. As this Court has held and explained under analogous circumstances, “An appellate court may properly decline to take judicial notice under Evidence Code sections 452 and 459 of a matter which should have been presented to the trial court for its consideration in the first instance.” (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326; see *City of Oakland v. Hassey* (2008) 163 Cal.App.4th 1477, 1488, fn. 5.) Indeed, contrary to appellant’s Motion, “Reviewing courts generally do *not* take judicial notice of evidence not presented to the trial court. Rather, normally ‘when reviewing the correctness of a trial court’s judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.’” (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3, emphasis added, quoting *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813; see *Violante v. Communities Southwest Development & Construction Co.* (2006) 138 Cal.App.4th 972, 978.) Here, as in *Vons*, “No exceptional circumstance[] exist[s] that would justify deviating from that rule [].” (*Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 444, fn. 3.) Accordingly, appellant’s Motion for Judicial Notice should be denied.

Although the above is sufficient to warrant the denial of appellant’s Motion, respondent adds that appellant’s characterization of the item being “buried” on page three is also inaccurate. Given the very nature of the “Briefs” item printed in the November 27, 1989, edition of the Los Angeles Daily Journal (see 15CTSupp.VII 3688), such an item simply would not

have been printed on the front page, and the third page was the very next page that would come into a reader's view upon turning the front page.

### CONCLUSION

Appellant's Motion for Judicial Notice should, accordingly, be denied.

Dated: May 6, 2010

Respectfully submitted,

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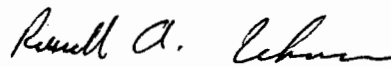


**CERTIFICATE OF COMPLIANCE**

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 1,271 words.

Dated: May 6, 2010

EDMUND G. BROWN JR.  
Attorney General of California



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Attorneys for Respondent

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

Case Name: *People v. Randy Eugene Garcia*  
No.: S045696

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 May 6, 2010, 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 with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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**To be delivered to**  
**Hon. Jacqueline A. Connor, Judge**


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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 May 6, 2010, at Los Angeles, California.

\_\_\_\_\_  
M. O. Legaspi  
Declarant

  
\_\_\_\_\_  
Signature