DANIEL N. ABRAHAMSON, ESQ.

COPY

918 Parker St., Bldg A21 • Berkeley, CA 94710 • (510) 229-5212 • fax (510) 295-2810

January 22, 2013

Frank A. McGuire
Court Administrator and Clerk of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: *People v. George B. Williams*, S030553
Letter Brief addressing Appellant's *Batson/Wheeler* Claim Concerning Prospective Juror Ruth C. Jordan.

Dear Mr. McGuire:

This letter brief is submitted pursuant to this Court's request dated January 11, 2013, inviting parties to address whether and to what extent the prosecutor's mistaken reference to Denise Jordan at appellant's motion for new trial hearing affects appellant's *Batson/Wheeler* claim concerning the prosecutor's excusal of prospective juror Ruth C. Jordan fifteen months earlier, during the selection of appellant's jury.

The answer, discussed below, is that the prosecutor's mistake at the motion for new trial was not preceded by any mistake by him during jury selection, and so appellant's *Wheeler* motion is unaffected.

SUMMARY OF ARGUMENT

The record is clear: At appellant's trial there was no confusion by the prosecutor (or anyone else) that the final African-American female juror excused by the prosecutor through peremptory challenge was Ruth C. Jordan. The prosecutor's stated grounds for excusing this juror could only apply to Ruth. Had the prosecutor believed (mistakenly) during jury selection that he was striking Denise, not Ruth, he would have offered wholly different, defensible grounds for his challenge. Because the prosecutor's later mistake was confined to the motion for new trial and went undetected, the analysis undertaken in *People v. Williams* (1997) 16 Cal. 4th 153, 188, and *People v. Phillips* (2007) 147 Cal.App.4th 810, 814, does not apply here and should therefore have no effect on this Court's consideration of appellant's *Batson/Wheeler* claim.

This supplemental brief first consolidates and summarizes in one place the salient facts of jury selection that span six volumes of the Clerks' and Reporters' transcripts. It then discusses why those facts do not support a finding that a mistake occurred at appellant's jury selection. The brief ends with a discussion of the inapplicability of *Williams* and *Phillips* to the record in this case.

FACTUAL BACKGROUND

During jury selection for Mr. Williams's 1991 trial, there were two prospective jurors with the surname Jordan: 39-year-old Denise Jordan ("Denise") and 65-year-old Ruth C. Jordan ("Ruth"). Denise was opposed to the death penalty; Ruth was not. Denise was challenged for cause by the prosecutor; Ruth was not. Only one of them, Ruth, was in the jury pool when the prosecutor exercised his peremptory strikes. She was the fifth African-American woman to be struck by the prosecutor. Her dismissal became the subject of voir dire counsel's third and final *Batson/Wheeler* motion. Fifteen months after jury selection, during Motion for New Trial proceedings, the prosecutor mistakenly referred to Ruth as Denise.

A. **Prospective Juror Denise Jordan.**

Denise Jordan's answers on her jury questionnaire and voir dire caused the prosecutor much concern about her willingness and ability to serve as a capital juror and provided the prosecutor with numerous, concrete and defensible grounds for not wanting her empaneled for a death penalty trial.

1. Denise Jordan's Written Juror Questionnaire.

Denise Jordan, no fewer than ten times in her juror questionnaire, expressed her opposition to the death penalty.

Her questionnaire revealed that she was a 39 year-old high school educated clerical worker with no prior jury experience. (21 CT-Supp I at 5173.) It also made abundantly clear that she opposed the death penalty.

In response to Question 95 of the juror questionnaire soliciting her general feelings about the death penalty, Denise wrote: "I'm not for the death penalty. Life in prison is what I'm for. I don't think anyone has right to take someone [sic] life. I feel if the person is guilty they should do the time." (*Id.* at 5197.)

With respect to Question 96(A), whether she felt the death penalty is used too often, Denise circled "YES" and wrote "I'm not for it." (*Id.*)

In response to questions about whether she would refuse to find a defendant guilty of first degree murder (question 100) or refuse to find the special circumstance true (question 101), Denise circled "Don't Know." (*Id.* at 5199.) When asked in question 103 whether she would "automatically, in every case, regardless of the evidence, vote for the death penalty," she again circled "Don't Know," but wrote next to it "I'm again [sic] Death penalty." (*Id.*)

In the very next question Denise reiterated her opposition to the death penalty. In response to question 104 she circled "Yes," indicating that she would vote for life without the possibility of parole "*regardless of the evidence*" (question 104) (21 CT-Supp I at 5200) (emphasis added). Her answer to the next question (question 105) may explain this affirmative response, as she there stated that she believed life in prison without the possibility of parole is a more severe punishment than the death penalty. (*Id.*)

Denise's juror questionnaire made clear that her opposition to the death penalty was long-standing and religiously-based. Question 97 asked whether California should have the death penalty. Denise answered: "I believe that in there time spent in prison that all the punishment we should be able to give. Death to me should be when God call them home." (*Id.* at 5198.)

Denise's jury questionnaire, in short, provided the prosecutor substantial and particularized fodder to argue that (1) Denise was unfit to serve as a juror in a capital case and so should be struck for cause, and (2) if Denise somehow survived a challenge for cause, she would rank at or near the very bottom of jurors he would want empaneled for a death penalty case.

2. Denise Jordan's Hovey Voir Dire.

Denise was interviewed on the first day of the Hovey voir dire process, August 19, 1991. Her answers in open court hewed closely to those found in her written juror questionnaire.

When the trial court asked Denise whether she had "such conscientious opinions concerning the death penalty that . . . in spite of the evidence that might be developed during the penalty phase of the trial, [Denise] would in every case automatically vote for a verdict of life in prison without the possibility of parole and never vote for a verdict of death," Denise Jordan answered "**Yes**," not once but ***four times***. (5 RT 201, line 6 and

20; *Id.* at 202 line 8 ("I would always vote for [a verdict of life in prison without the possibility of parole]); *Id.* at 203.)

However, interspersed with Denise's multiple pronouncements that she would not render a verdict of death were moments of equivocation, where, hesitant to claim she would "*never*" vote for death, Denise said instead that "it depends on the case." (*See* 5 RT 201 (lines 23-25); *id.* at 202 (lines 3-4, 10-12, 14-15), *id.* at 204 (lines 16-17).) But even in so saying, Denise averred that "it would be hard for me to vote for death." (*Id.* at 202; *see also id.* at 204, lines 8-9 ("I probably would vote for [LWOP]") and lines 24-25 ("life in prison is probably what I would vote for most of the time").)

Attempting to get a clear answer on whether Denise would vote for a verdict of life "*automatically in every case*," (5 RT 204, lines 27-28 (emphasis added)), the court inquired about the absolutist nature of her views for at least a tenth time:

DENISE JORDAN: "I know. I wrote on the paper, Yes, in all cases probably so."

COURT: "Yes. So what is your answer?"

DENISE JORDAN: "Yes."

(5 RT 205, lines 1-5.) The court, sensing finality on this issue asked one last question:

COURT: "So you do not believe in the death penalty?"

DENISE JORDAN: "No, I don't."

(5 RT 205, lines 6-7.)

Appellant's voir dire counsel, attempting to rehabilitate Denise, then elicited from her the concession that "[i]t's possible that I can vote for the death penalty even though I disagree with it" (5 RT 206, lines 8-9), though she continued to express her preference for life without the possibility of parole (*id.* at lines 13 and 15). When asked, however, whether she could follow the law if the law instructed her to "impose the death penalty in certain situations," she offered the less than resolute answer, "Probably so, yes." (*Id.* at line 20.)

Next, the prosecutor questioned Denise:

PROSECUTOR: "Clearly you don't believe in the death penalty."

DENISE JORDAN: "Right." (5 RT 207).

PROSECUTOR: "And is that a conviction . . . that is religiously based?"

DENISE JORDAN: ". . . [Y]es." (5 RT 207.)

The prosecutor asked how she would feel about being asked to participate in a death penalty decision. Denise responded, " I don't think I would want to be on something like that . . . ." (5 RT 208, lines 3-4.)

The prosecutor inquired further about the basis of her views against the death penalty:

PROSECUTOR: "Some people . . . could never be on a jury that would vote for the death penalty because they hold personal or religious or whatever reason they don't believe in it. . . . [A]re you that type of person?"

Denise responded: "Yes, I'm that type of person." (5 RT 208-209.)

The prosecutor, like the judge before him, then inquired about life in prison without the possibility of parole:

PROSECUTOR: "If . . . you are given those two options [life in prison without parole or death], is there one you would automatically accept and vote for?"

DENISE JORDAN: "Yes."

PROSECUTOR: "Which one?"

DENISE JORDAN: "Life in prison." (5 RT 209.)

The prosecutor then asked: "And knowing yourself . . . if you . . . have an out, your out being I can vote for [life in prison without the possibility of parole], would you do that in spite of what the evidence was?"

Denise answered: "I would say yes." (5 RT 209.)

The prosecutor then moved to challenge Denise for cause. (5 RT 209-210.)

Voir dire counsel sought and was given a second chance to rehabilitate her. After a series of questions, counsel got Denise to answer in the affirmative to the following question: "So if you were a juror in this particular case and you found that the death penalty was appropriate, you could impose it if you found it was appropriate?" (5 RT 212, lines 18-21.) Denise Jordan, however, added: "I just know I don't want to be the one responsible for taking a person's life." (*Id.* at 213, lines 2-4.)

The prosecutor and court posed the final two questions:

PROSECUTOR: "Understanding . . . the questions asked of you over and over and over again . . . would you be able to yourself impose the death penalty?"

DENISE JORDAN: Yes.

COURT: You feel that you could?

DENISE JORDAN: I could.

(5 RT 213.)

With that, the court denied the prosecutor's challenge to strike Denise Jordan for cause. Denise Jordan then disappeared from the court record. She was not seated in the jury box and was never the subject of a peremptory strike by the prosecutor.

B. Prospective Juror Ruth C. Jordan.

Unlike Denise Jordan, Ruth C. Jordan's responses to her jury questionnaire and in open court made clear that Ruth was a willing, able and experienced juror ready to serve as a venire member in a capital case.

1. Ruth C. Jordan's Written Juror Questionnaire.

Ruth's questionnaire revealed she was a 65-year-old college-educated agency supervisor who had previously served as a grand juror, an experience she termed "the most enlightening experience of my civil service career." (5 CT-Supp I at 1049-1050A, 1052, 1062, 1065, 1066.) Ruth considered jury service a "privilege" (*id.* at 1066), and was eager to serve, notwithstanding the potential capital nature of the case.

She explained her desire to be seated in appellant's case thus: "Because I am old

enough, experienced in life enough, and mentally capable of being objective." (*Id.* at 1076.)

Ruth's questionnaire also made clear that she harbored no reservations about the death penalty.

In response to question 97, whether California should have the death penalty, Ruth said "Yes." She explained: "Even though it would take a long time between sentencing and actual execution, the penalty would be somewhat of a solace to the friends, family of the victims." (*Id.* at 1073.)

Asked whether she believed the death penalty is used "too often," Ruth answered "No." (*Id.* at 1072.) When asked what she saw as the purpose of the death penalty, question 98, she offered not one but two reasons: "So that perpetrators and victims [sic] families and friends could end experiences with finality. To let the punishment fit the crime." (*Id.* at 1073.)

In response to a series of questions about whether, "to avoid the issue of the death penalty," she would refuse to find a defendant guilty of first degree murder (question 100); refuse to find the special circumstance true (question 101); or "regardless of the evidence," vote for life in prison without the possibility of parole (question 104), Ruth answered "No" to each. (*Id.* at 1074-1075.)

2. Ruth C. Jordan's Hovey Voir Dire.

Ruth was interviewed on September 5, 1991, near the end of the Hovey voir dire process and one week before she was excused by the prosecutor during general voir dire. Whereas Denise Jordan's voir dire spanned nearly 14 pages of the court record, Ruth's occupied a little more than three.

Ruth's voir dire was brief because her responses to questions in open court underscored her belief in the death penalty, made clear that she would follow jury instructions, and left no doubt that she was able to vote for a verdict of death at a penalty trial.

The trial court asked Ruth just one question: whether she had "such conscientious opinions concerning the death penalty that . . . in spite of the evidence that might be developed during the penalty phase of the trial, [she] would in every case automatically vote for a verdict of life in prison without the possibility of parole and never vote for a verdict of death."

Ruth answered "No." (12 RT 912-913.)

In response to the four questions posed by appellant's voir dire counsel, Ruth stated she could set aside any preconceptions about who gets executed and who does not, and the length between death sentence; further she would assume that if she rendered a verdict of death, "Mr. Williams sitting right here would be executed." (*Id.* 913-14.) Appellant's voir dire counsel passed for cause.

The prosecutor then asked four questions:

PROSECUTOR: ". . . [D]o you have the ability to render a death verdict against another person?

RUTH JORDAN: "Yes, I believe I would have."

PROSECUTOR: "You would listen to all the evidence carefully."

RUTH JORDAN: "Of course."

PROSECUTOR: "And make an evaluation as to whether in your judgment the things that Mr. Williams has chosen to do in his life warrant the death penalty?"

RUTH JORDAN: "Of course."

PROSECUTOR: "And if the death penalty is warranted you would return that verdict?"

***

RUTH JORDAN: "Yes, I would." (*Id.* at 915.)

With that, neither counsel raised objections and the court directed Ruth to return for general voir dire. (*Id.*)

C. General Voir Dire and the Third *Batson/Wheeler* Motion

General voir dire was held September 12, 1991. The court employed a "20-pack" selection process for choosing appellant's jury.1 The record reflects that the clerk of court called "Ruth C. Jordan" to take the place of a prospective juror who had been excused by a peremptory challenge. (15 RT 1214.) Ruth took seat number 2 in the jury box. When asked, Ruth told the court she understood the burden placed on the prosecution and agreed to hold the prosecution to that burden. (*Id.*)

After counsel for both parties exercised more peremptories, the prosecutor accepted the jury as constituted, with Ruth on it. (15 RT 1224.) The defense then exercised a peremptory and the prosecutor again accepted the panel, with Ruth on it. (*Id.*)

Both counsel, beginning with the defense, then exercised additional peremptory challenges. The prosecutor's excusal of Retha Payton, an African-American woman, gave rise to the defense's second *Batson/Wheeler* objection. (*Id.* at 1226.) Shortly after the court denied the defense motion, the prosecutor exercised his peremptory challenge against Ruth Jordan. (*Id.* at 1232.) Appellant's voir dire counsel then raised his third *Batson/Wheeler* motion.

Defense counsel noted that Ruth was on the panel that the prosecutor had previously accepted, and asked "If she was a problem before why wasn't she preempted?" (*Id.* at 1233.)

The prosecutor explained that he had accepted Ruth "because the composition was somewhat satisfactory to me." (*Id.*) He admitted to being "somewhat reluctant" to excuse her "out of fear of making a Wheeler motion." (*Id.*)

The prosecutor then said that, upon further reflection, he excused Ruth because "she was rated . . . low for her inability to impose the death penalty . . . . It has to do with her responses." (*Id.* at 1234.) The prosecutor, though, did not identify what responses he was referring to – her written responses, or those offered on voir dire – nor did the prosecutor discuss the substance of any responses that gave him pause.

Defense counsel countered: "I have heard nothing wrong with . . . Miss Jordan." (*Id.* at 1235.) The prosecutor replied:

It is my impression not only from her answers to the questions but her demeanor

---

1 The jury selection process is described at 13 RT 1093-94.

> and the fashion in which she answered them, I don't think she can impose the death penalty on any case. It doesn't matter the circumstances regardless. **I don't know how to exactly express it for the record**."

(*Id.* at 1236-37 (emphasis added.).) Once again, the prosecutor did not identify what answers he was referring to – her written answers or those offered on voir dire – nor did he discuss the substance of any answers that gave him pause.

The prosecutor attempted a final explanation about why he struck Ruth: "**[S]ometimes you get a feel for a person that you just know that they can't impose it based upon the nature of the way that they say something**." (*Id.* at 1237 (emphasis added.).)

The trial court stated "I can only go by what [the prosecutor] is saying because I stopped making notes on my Hovey." (*Id.* at 1239.) In addition, the court acknowledged: "I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is. I have found it to be true." (*Id.*)
The court then denied the defense's *Batson/Wheeler* motion and Ruth C. Jordan was dismissed. (*Id.* 1240.)

D. Appellant's Motion for New Trial Hearing

On December 17, 1992, fifteen months after general voir dire and on the final day of appellant's hearing on his motion for new trial, the trial court observed that the prosecutor had brought to court a "box" containing his "notes . . . taken during examination" of prospective jurors. 54 RT 4163. The court expressed concern that it "did not make a very good record" about the *Wheeler* objections at the time of trial (*id.*), so it asked the prosecutor to take the opportunity afforded by the new trial hearing to supplement the record on jury selection by summarizing his jury selection notes. (*Id.*)2

The prosecutor then "read into the record [his] recollection from [his] notes." (*Id.* at 4163.) He itemized sixteen peremptory challenges that he made.

---

2 The prosecutor was the only attorney present at the motion for new trial proceeding who had knowledge of the juror who was the subject of the third Batson/Wheeler objection. As a result, when the trial court invited the prosecutor to backfill the record for jury selection, no one representing appellant was able to correct the prosecutor's mistake or offer for the record a more complete and accurate context regarding the prosecutor's actions.

When the prosecutor reached his fourteenth challenge he said: "The 14th challenge was to Dennis [sic] Jordan, a married 39-year-old black female."3 (54 RT 4165.)

In so describing prospective juror Jordan, the prosecutor confused Denise Jordan, for whom there is no record of her being present at general voir dire, and Ruth Jordan. As noted above, Denise's written questionnaire identified her as age 39, whereas Ruth was age 65.

The prosecutor then expanded on his previous justifications for striking the black women who gave rise to the defense's three *Batson/Wheeler* objections. (54 RT 4165.) When he reached the fifth African American female peremptorily challenged by him, the prosecutor again referred to "Denise Jordan," not Ruth whom he had in fact challenged.

Reading from his notes from his box, the prosecutor gave the following explanation for his challenge:

> And as to Denise Jordan I've got her responses 95 through 107, and 103 and I have a note to myself, 'plus look at her responses to my voir dire at the Hovey,' and I had made a challenge for cause so apparently I felt that she shouldn't have been around even by the time we got to general voir dire.

(*Id.* at 4167.)

When the prosecutor finished, the trial court made "a finding that [the court] has been satisfied," and declared that the *Batson/Wheeler* objections were "properly overruled." (*Id.* at 4168.) The court did not corroborate or supplement any of the prosecutor's explanations.

---

3 The prosecutor's notes from which he read likely referred to "Denise" Jordan, not "Dennis" Jordan. It is unclear whether the prosecutor misread Ms. Jordan's first name into the record, or whether the court reporter made a typographical error. But the prosecutor's bigger mistake – reading from notes about a juror about whom he did not exercise a peremptory challenge (Denise) instead of the juror whom he actually challenged (Ruth) – is discussed below.

ARGUMENT

At the motion for new trial hearing, the prosecutor referenced the responses of Denise Jordan, who opposed the death penalty, in an attempt to backfill and strengthen the record to thwart a finding of *Batson/Wheeler* error on appeal. The prosecutor did not mention Ruth Jordan, who was for the death penalty, but whom the prosecutor excused.

Appellant does not dispute that at the motion for new trial hearing, some fifteen months after voir dire, the prosecutor mistakenly discussed Denise. Nor does appellant dispute that the reasons offered by the prosecutor at this hearing pertained to Denise, not Ruth.

The full record makes clear, however, that the prosecutor's confusion was confined to his brief words during the motion for new trial. The prosecutor's error in December 1992 did not reflect a misunderstanding in September 1991. Indeed, the justification (or, more properly, the lack thereof) offered at general voir dire for striking Ruth pertained only to Ruth and Ruth's circumstances; it did not fit Denise or Denise's circumstances.

In short, the prosecutor's error at appellant's motion for new trial hearing is irrelevant to the consideration of appellant's *Batson/Wheeler* claim.

I. The Prosecutor's Contemporaneous Explanation for Excusing Ruth Makes Clear That He Knew He was Striking Ruth, not Denise.

The reason offered at the time of trial by the prosecutor for excusing Ruth applied to Ruth. Had the prosecutor intended to challenge Denise, the record would reflect his prior attempt to strike Denise for cause during her Hovey voir dire, and the many concrete grounds for that cause challenge. As it stands, however, all aspects of the record made contemporaneously with the prosecutor's striking of Ruth ineluctably point to the conclusion that Denise was nowhere in the prosecutor's thoughts.

It is undoubtedly for this reason that Respondent, in its Response, did not refer to or otherwise rely upon the motion for new trial record in defending against appellant's *Batson/Wheeler* claim or argue that the prosecutor was confused, much less that he made a mistake.

A. **The Things Not Said.**

Had the prosecutor been inclined to confuse the women, he would have invoked Denise's questionnaire to defend against a *Wheeler* objection. He did not do so.

Even a cursory comparison of Ruth and Denise reveals an enormous gulf between the two women regarding their views about capital punishment and their willingness to participate as a juror in a death penalty case.

Yet during general voir dire, as discussed in more detail below, the prosecutor did not invoke any of the many answers given by **Denise** on her juror questionnaire or on voir dire to fend off a third *Wheeler* objection. Moreover, the prosecutor, after twice accepting the composition of the jury, professed reluctance at exercising his peremptory challenge against the person seated in seat number 2 in the jury box.

The prosecutor's silence and reluctance in these regards cannot be squared with the notion that he believed he was exercising his peremptory challenge against Denise rather than Ruth Jordan. There can be no dispute: had the prosecutor believed he was excusing Denise Jordan, the record gave him plenty of evidence to point to Denise Jordan's:

- deep, religious opposition to the death penalty;
- oft-repeated position that she would automatically vote for life in prison without possibility of parole, if given the option;
- belief that life without parole is a more severe punishment than death;
- lack of clarity and inconsistency about her ability to impose the death penalty; and
- great discomfort at the prospect of participating in a capital penalty trial.

But in defending against the third *Wheeler* motion related to Ruth, the prosecutor mentioned none of these points. His failure to do so points undeniably to twin conclusions that (1) he was not laboring under the mistaken belief that he had excused Denise, and (2) he was, in fact, saddled with the far more difficult task of justifying his strike of Ruth Jordan, whose answers on her questionnaire and voir dire paint her to be a model juror in a capital case.

1. "Responses 95 through 107, and 103"

At the motion for new trial, the prosecutor said he struck Ms. Jordan from appellant's jury in light of "her responses 95 through 107, and 103," of her juror questionnaire. (54 RT at 4167.) As noted above, Denise Jordan's responses to those

questions provided the prosecutor with multiple grounds for not wanting Denise on appellant's jury. Specifically, her written responses made clear -- repeatedly -- that she opposed the death penalty (21 CT-Supp I at 5197), that she believed life without parole to be a more serious punishment than death (*id.* at 5200), and that she would vote for life instead of death, regardless of the evidence (*id.*). By contrast, Ruth Jordan took *none* of these positions in her written questionnaire.

It is telling that at jury selection, however, when asked to justify his strike of Ruth Jordan, the prosecutor did *not* refer to *any* of *Denise* Jordan's responses in her juror questionnaire, by number or substance.

The prosecutor knew that by striking the fifth black woman from the venire he would provoke a *Batson/Wheeler* objection, the third such objection lodged against him that day. (*See* 15 RT 1233) (noting prosecutor feared "another *Wheeler* motion" should he strike Ruth Jordan). Such a strike would require him, for the third time, to defend his choice. Had the prosecutor believed he was striking Denise, not Ruth, he could have easily, quickly, and persuasively pointed to *just one* specific response given by Denise, from among the nearly one dozen anti-death penalty responses that could be mined from her written questionnaire.

The prosecutor did not do so. The prosecutor's silence speaks volumes. That silence cannot be reconciled with the notion that the prosecutor believed he was striking Denise Jordan; it can only be explained by the simple fact that during appellant's jury selection (as opposed to the motion for new trial) the prosecutor was trying to justify his strike of Ruth, a pro-death penalty juror.

2. "Plus look at her responses to . . . voir dire at the Hovey."

At the motion for new trial, the prosecutor said he struck Ms. Jordan from appellant's jury in light of her responses to "voir dire at the Hovey." As noted above, Denise's responses on voir dire provided the prosecutor with multiple grounds for not wanting Denise on appellant's jury. Specifically, her responses indicated that her opposition to the death penalty ranged from absolute to incredibly strong, and her willingness to render a verdict of death ranged from never to highly unlikely. (5 RT 201-213.)

By contrast, Ruth's voir dire responses offered the prosecutor nothing to support Ruth's excusal. In fact, the prosecutor appeared fine with Ruth at voir dire.

It is telling then, that at the time of jury selection the prosecutor did not refer to *any* of Denise's responses on voir dire in defending against the third *Wheeler* objection: not her clear statements opposing the death penalty; not her claim, repeated four times, that she would in every case automatically vote for a verdict of life; not her characterization of herself as someone who could never vote for death. (5 RT 201-209.)

The only credible explanation for the prosecutor's failure at trial to invoke with any specificity Denise's answers on voir dire is that the prosecutor *knew* he had struck Ruth, not Denise, and so had no helpful voir dire to reference. He struck her not because she would be an inappropriate capital juror, but because she was an African-American.

3. "I have heard nothing wrong with . . . Miss Jordan."

Appellant's voir dire counsel, in arguing his third *Batson/Wheeler* objection, exclaimed: "I have heard nothing wrong with . . . . Miss Jordan." (15 RT 1235.)

If the prosecutor had confused Ruth with Denise, he would have taken issue with this statement of the defense. The prosecutor would have replied along the lines of: "Are you kidding me? Nothing wrong?" He would then have provided a litany of examples of how Denise, in writing and in open court, said she opposed the death penalty and could not impose it, and that she did so (borrowing the prosecutor's refrain) "over and over and over." (5 RT 213.) He would probably have added that, given her staunch opposition to the death penalty, it was shocking that she had survived the earlier motion to strike for cause.

The prosecutor offered no such rebuttal. Rather, he eventually mustered a response about juror number 2 that was unmoored from the record and which rested on his inexpressible (and unexpressed) "impressions" and "feeling" regarding her "demeanor". The reason was simple: the prosecutor was not talking about Denise. He was talking about Ruth.

4. "I don't know how to exactly express it for the record / "[S]ometimes you get a feel for a person."

These were the words of the prosecutor during appellant's jury selection as he grasped (unsuccessfully) for something tangible to support his excusal of Ruth. (15 RT 1237.) As noted above, had the prosecutor believed he was in fact striking Denise, he would not have been at a loss for words, or concrete examples to justify his actions: he would have had evidence. But it was not easy for the prosecutor to justify the striking of a qualified African-American juror. *Cf.* Opening Brief 90-91, 99-100, 105-106; Reply at

18-25 (discussing how Ruth's written and voir dire answers required the prosecutor to resort to highly subjective, intangible excuses that could not be verified on a cold record).

5. "[S]omewhat reluctant" to excuse juror 2.

This is how the prosecutor described his hesitancy to use a peremptory challenge against Ruth, knowing that his actions would prompt a *Batson/Wheeler* objection. (54 RT at 1233.) It is impossible to reconcile the prosecutor's professed reluctance with the notion that the prosecutor believed he was striking Denise. It also strains credulity that the prosecutor would twice have accepted a jury panel and described that panel as "somewhat satisfactory to me," (54 RT at 1233) while believing Denise to be on that panel.

Finally, had the prosecutor believed he was striking a juror with Denise's responses (had he truly believed he had valid reasons for the strike), it would have been unnecessary (indeed odd) for him to soliloquize defensively and at some length, about how he refused to be cowed by the prospect of facing *Wheeler* objections ("I'm not going to call this case from a hesitancy position . . . [for] fear of getting *Wheeler*ed . . ." (15 RT 1234).)

The prosecutor was hesitant and reluctant to strike Ruth (and initially willing to accept a panel with Ruth on it) for the same reasons he hesitated in striking Retha Payton, a pro-death penalty juror with a nearly identical background and questionnaire to Ruth's: he did not have a race-neutral reason for doing so. 4

---

4 Retha Payton, the subject of the defense's second Batson/Wheeler motion, was, like Ruth, in her early sixties, college-educated, had prior jury experience, and was pro-death penalty. (*See* 10 CT-Supp I at 2412, 2416, 2418, 2429-31.) The prosecutor, after *thrice* accepting a panel with Ms. Payton on it, excused Ms. Payton and defended the use of his peremptory using words similar to the ones he offered about his strike of Ruth: "*It was just my impression* that she didn't have the ability in spite of what her answers were. It had a lot more to do with not what she said but how I read what she was saying from being present in court with her and *observing her demeanor* and the way she answered questions. It clearly isn't from the words that are written down. *It was my general impression from the way she answered questions*, not what she said. (15 RT 1230 (emphases added.).)

B. **Mind the (Age) Gap.**

Had the prosecutor been inclined to confuse the two women, merely looking at them would have corrected the error.

In considering how to exercise his fourteenth peremptory challenge, the prosecutor was confronted with a 65-year-old woman seated in position 2 in the jury box. This bit of information would have been jarringly at odds with the very first page of Denise Jordan's juror questionnaire which identified her age as 39 (21 CT-Supp I at 5173) -- a questionnaire that (as the record reflects, 54 RT 4165) the prosecutor summarized in his juror notes, complete with information about her age. Had the prosecutor mistakenly referred to his voir dire notes and materials on Denise Jordan at any point before striking Ruth Jordan, the generational difference in age between the two prospective jurors would have stopped him cold.

***

For the foregoing reasons, the record does not support the proposition that at the time of appellant's jury selection the prosecutor mistakenly believed he exercised his peremptory challenge against Denise, not Ruth, Jordan.

II. *Phillips* and *Williams* are Inapposite.

As the above discussion makes clear, the prosecutor's contemporaneous reason for striking juror number two quite clearly applied to Ruth Jordan, not Denise. For this reason, *People v. Williams* (1997) 16 Cal.4th 153 and *People v. Phillips* (2007) 147 Cal.App.4th 810, do not apply to appellant's case because the prosecutor's confusion between two jurors took place only after appellant's trial and did not infect his jury selection process.

In both the *Williams* and *Phillips* cases, prosecutors exercised peremptory challenges against minority jurors about whom they mistakenly believed they had real concern, either because of a clerical error (*Williams*) or because they confused the juror with another who had the same last name (*Phillips*). In both cases, the prosecutors acknowledged their mistakes during or shortly after providing a justification in response to a *Wheeler* motion. In neither case did defense counsel (trial or appellate) or the court (trial or appellate) dispute that the prosecutor made a mistake. And in both cases, there was, at least in theory, the opportunity to rectify the error. (In the *Williams* case, the

prosecutor offered to reseat the juror mistakenly excused.)

The reviewing court in both cases held that because the prosecutor's peremptory challenge was the result of an honest mistake, the prosecutor's justification for his challenge was properly deemed by the trial to be "race-neutral," for purposes of a *Wheeler* analysis.

Here, by stark contrast, the prosecutor did not make a mistake while exercising a peremptory challenge during jury selection. Nor has the prosecutor – or anyone else present at trial – alleged that the prosecutor made a mistake during jury selection. Rather, the prosecutor made a mistake at the motion for new trial while trying to backfill the reasons he gave for the challenge fifteen months earlier.

Accordingly, neither the facts nor the analyses of *Williams* and *Phillips* apply here.

Further, any attempt to shoehorn *Williams* and *Phillips* into the facts of this case would have to grapple with other material differences between those cases and appellant's, including the fact that neither the prosecutor, nor the court, or appellant's counsel caught the prosecutor's (belated) juror mistake, and the fact that there was no opportunity here for the mistake to be rectified.

More fundamentally, however, even if the prosecutor's mistake at the motion for new trial could somehow be attributed back in time to jury selection -- an attribution that the record in no way supports -- because that mistake went entirely unnoticed both at the time of trial and 15 months later at the motion for new trial, there was no opportunity for the trial court (aided by the defense) to independently assess the authenticity of that mistake, a predicate to deeming the mistake "race-neutral." As this Court observed in *Williams*, "we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." 16 Cal.4th at 189.

No such reliance is possible here. Not only was the trial court ignorant about a prosecutorial mistake at the motion for new trial, it had no independent recollection of the juror who was the subject of the mistake. Nor does the record in this case afford this Court, on review, the freedom to backdate the prosecutor's mistake of December 1992 to September 1991, and to christen it genuine. As detailed above, the record of general voir dire cannot be reconciled with the notion that the prosecutor believed he was excusing Denise Jordan.

CONCLUSION

For the reasons set forth above, the prosecutor made no mistake during jury selection. The prosecutor's mistaken reference to Denise instead of Ruth fifteen months after appellant's trial had no bearing on appellant's jury selection and did not affect the basis for the defense's *Batson/Wheeler* objection to the prosecutor's excusal of Ruth Jordan by peremptory challenge. Accordingly, the Court must find *Batson/Wheeler* error and reverse appellant's conviction and sentence.

DATED: January 23, 2013

Respectfully submitted,
DANIEL N. ABRAHAMSON

By _____
Counsel for Appellant
George B. Williams