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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DONTE LAMONT McDANIEL,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S171393

SUPREME COURT
FILED

AUG 28 2015

Frank A. McGuire Clerk

Deputy

Los Angeles County Superior Court
Case No. TA074274
The Honorable Robert J. Perry, Judge

OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE

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TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA

On August 6, 2015, appellant filed a request for this Court to take judicial notice of the *Batson/Wheeler*[1] proceedings in codefendant Kai Harris's separately tried capital case (case number TA074314). (Motion for Judicial Notice ("Motion" or "Mtn.") at pp. 2, 5-7.) Specifically, appellant requests that this Court take judicial notice of the minute orders from February 23 and 24, 2009, as well as the corresponding reporter's transcripts. (See Mtn., Exh. A.) Respondent hereby opposes the request in its entirety based on appellant's failure to comply with the requirements for judicial notice set forth in rule 8.252 of the California Rules of Court. None of the documents was presented to, or considered by, the trial court in this case, and as a result, the documents at issue are not properly a subject for judicial review. In addition, codefendant Harris's trial occurred *after* appellant's trial; therefore, the outcome of the *Batson/Wheeler* proceedings in that trial could in no way inform the trial court's decision in this case as to whether the prosecutor violated *Batson/Wheeler*.

ARGUMENT

NONE OF THE DOCUMENTS SUBJECT TO APPELLANT'S REQUEST SHOULD BE JUDICIALLY NOTICED BECAUSE THEY WERE NOT PRESENTED TO, OR CONSIDERED BY, THE TRIAL COURT

Rule 8.252(a) of the California Rules of Court sets forth the procedure for requesting judicial notice. In addition to stating why the matters to be noticed are relevant to the appeal, the moving party must state "whether the

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

matter was presented to the trial court and, if so, whether the trial court took judicial notice of the matter," and "whether the matter relates to proceedings occurring after the order or judgment that is the subject of the appeal." Appellant's motion subtly acknowledges that the documents to be judicially noticed pertain to proceedings that occurred after appellant's trial ended. (Mtn. at p. 5.) The clear implication is that none of the documents at issue was presented to the trial court.

Respondent acknowledges that the documents at issue comply with the requirements of Evidence Code section 452. Further, "Evidence Code section 459, subdivision (a), permits but does not require a reviewing court to take judicial notice of matters specified in Evidence Code section 452." (*People v. Hardy* (1992) 2 Cal.4th 86, 134.) As a general rule, however, an appellate court should not take judicial notice of a document if it was not presented to and considered by the trial court in the first instance. (*Ibid*; *People v. Jenkins* (2000) 22 Cal.4th 900, 952-953; *People v. Zamora* (1980) 28 Cal.3d 88, 96.) Such is the case here. Obviously, because codefendant Harris's trial took place after appellant's had ended, it is impossible for any of the records from codefendant Harris's voir dire proceedings to have been presented to and considered by the trial court in the instant case.

Furthermore, contrary to appellant's assertion (Mtn. at pp. 2, 5), the documents at issue are irrelevant as to whether the trial court acted within its discretion in denying the *Batson/Wheeler* motion in this case. "Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*People v. Mai* (2013) 57 Cal.4th 986, 1048, citations and quotation marks omitted.) An appellate court reviews a trial court's determination about the sufficiency of a prosecutor's justifications for exercising peremptory challenges "with great restraint." (*Ibid.*, citations and quotation marks

omitted.) The appellate court "presumes that a prosecutor uses peremptory challenges in a constitutional manner and give[s] great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*Id.* at pp. 1048-1049, citations and quotation marks omitted; accord *People v. Chism* (2014) 58 Cal.4th 1266, 1314-1315.)

Here, it is obvious that at the time the trial court denied the *Batson/Wheeler* motion in this case, the court could not have known the prosecutor was going to violate *Batson/Wheeler* in the future in another case presided over by a different judge. Thus, on appeal, appellant cannot possibly show the trial court erred based on evidence that did not exist at the time of the trial court's ruling. In *People v. Howard* (1992) 1 Cal.4th 1132, 1156, fn. 4, this Court rejected appellant's claim that the relevant circumstances of a *Batson/Wheeler* ruling include a subsequent case in which the prosecutor violated *Batson/Wheeler*. This Court noted a trial court "obviously cannot consider the prosecutor's future" in finding no prima facie showing of discrimination. (*Ibid.*; see also *People v. Chism*, *supra*, 58 Cal.4th at p. 1319 ["'[T]he trial court's finding [on a *Batson/Wheeler* motion] is reviewed on the record as it stands at the time the . . . ruling is made.'"], citation omitted; *People v. King* (1987) 195 Cal.App.3d 923, 934 [in the context of reviewing the denial of a *Wheeler* motion, an appellate court "cannot use evidence of subsequent events to evaluate earlier decisions of the trial court" because the trial court did not have an opportunity to consider the evidence].)

None of appellant's authorities supports his judicial notice request. For example, appellant cites to *People v. Scott* (2015) 61 Cal.4th 363 (Mtn. at p. 6), but the case is inapposite. In *Scott*, after the trial court found no prima facie showing of a *Batson* violation, the prosecutor was allowed to

put his reasons for excusing one juror on the record. (*Id.* at pp. 385-386.) This Court pointed out that, as part of the overall *Batson/Wheeler* ruling, the reviewing court could consider the reasons given by the prosecutor if they are facially discriminatory as they would trigger a step three analysis. (*Id.* at pp. 391-392.) Clearly, in the factual scenario discussed in *Scott*, the trial court would be aware of the discriminatory reasons during the same *Batson/Wheeler* hearing under review on appeal and could have remedied any constitutional violation. But here, appellant seeks to challenge the trial court's ruling based on facts that were not before the trial court at the time of the *Batson/Wheeler* hearing, or even before the trial was over.

Appellant's reliance on a dissenting opinion from the denial of rehearing in the Ninth Circuit case of *Williams v. Woodford* (9th Cir. 2005) 396 F.3d 1059 is equally misplaced. (Mtn. at p. 5.) In the original *Williams* decision, the Ninth Circuit found that evidence the prosecutor had violated *Batson* in other cases was irrelevant to "'the circumstances concerning the prosecutor's use of peremptory challenges at Williams's trial.'" (*Williams v. Woodford* (9th Cir. 2002) 384 F.3d 567, 584, quoting *Batson*, *supra*, 476 U.S. at p. 97.) Here, that the prosecutor in appellant's trial would be found to have violated *Batson/Wheeler* in a different trial in the future is equally irrelevant.

Riley v. Taylor (3d. Cir. 2001) 277 F.3d 261 also fails to support appellant's position. (Mtn. at p. 6.) In that case, the *Batson* issue was not raised until postconviction proceedings, and the evidence of *Batson* violations in other cases was presented at a state evidentiary hearing. Under the Antiterrorism and Effective Death Penalty Act of 1996, the federal court considered all the evidence presented in state court. (*Id.* at pp. 270-294.) Thus, the issue in *Riley* was never whether the trial court erred under *Batson* as it is in the instant case, but whether the petitioner's factual

showing in the state postconviction proceedings sufficiently showed a *Batson* violation.

Miller-El v. Cockrell (2003) 537 U.S. 322, cited by appellant (Mtn. at p. 5), can be similarly distinguished. In *Miller-El*, the evidence of historical discrimination against Black prospective jurors by the prosecution was presented in postconviction proceedings. (*Miller-El*, *supra*, at pp. 346-347.) The issue was whether the state court's postconviction ruling was reasonable, and the United States Supreme Court pointed out that the historical evidence was relevant to the extent it cast doubt on the legitimacy of the motives underlying the prosecutor's actions in petitioner's case. (*Ibid.*) As with *Riley*, the procedural posture of *Miller-El* is different from the instant case, and the issue is different as well as it pertains to the relevance of *past* discrimination by the prosecutor, not future discrimination.

In sum, this Court should deny appellant's request for judicial notice because he has failed to show that the requested documents were presented to and considered by the trial court that rendered the judgment subject to appeal before this Court, and because the documents are irrelevant to the issue of whether the trial court properly denied appellant's *Batson/Wheeler* motion.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that appellant's request for judicial notice be denied.

Dated: August 24, 2015

Respectfully submitted,

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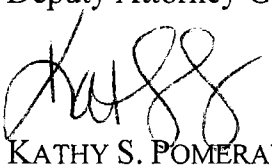

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE** uses a 13 point Times New Roman font and contains **1,448** words.

Dated: August 24, 2015

KAMALA D. HARRIS
Attorney General of California

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DECLARATION OF SERVICE

Case Name: **People v. Donte Lamont McDaniel** No.: **S171393**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On **August 24, 2015**, I served the attached **OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On **August 24, 2015**, I caused eight (8) copies of the **OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE** in this case to be served on the California Supreme Court by U. S. Mail.

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 **August 24, 2015**, at Los Angeles, California.

Nora Fung
Declarant

Signature

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