MICHAEL J. HERSEK
State Public Defender
PETER R. SILTEN
Supervising Deputy State Public Defender
Bar No. 62784
ELIAS BATCHELDER
Deputy State Public Defender
1111 Broadway, 10th Floor
Oakland, California 94607
Telephone: (510) 267-3300
Fax: (510) 452-8712
email: silten@ospd.ca.gov

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONTE LAMONT MCDANIEL, Defendant and Appellant.	No. S171393 Los Angeles Superior Ct. No. TA074274

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

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

On August 28, 2015, respondent filed its opposition to appellant's request for judicial notice of the *Batson/Wheeler* proceedings in

codefendant Kai Harris's penalty retrial ("Opposition"). Respondent concedes that the documents satisfy Evidence Code section 452, which governs judicial notice. (Opposition at p. 2.) However, respondent offers several reasons why the otherwise properly judicially noticed documents should not be considered.

Respondent first complains that appellant did not request judicial notice of the codefendant's proceedings at the trial court level. However, respondent quickly acknowledges the impossibility of defense counsel requesting judicial notice of events which post-dated appellant's trial. Even where a defendant fails to request judicial notice at trial when he had the opportunity, an appellate court may still take judicial notice of consequential relevant evidence. (See, e.g, *People v. Terry* (1974) 38 Cal.App.3d 432, 438-442 [taking judicial notice of the death certificate of a police officer that undercut the credibility of a testifying officer's version of events regarding voluntariness claim].) Appellant had no such opportunity. He should not be faulted for his lack of precognition.

Relatedly, respondent claims that appellant violated California Rules of Court, rule 8.252(a) by not stating whether judicial notice was requested and/or ruled upon in the trial court, or whether the proceedings occurred after the judgment that is the subject of the appeal. Appellant made quite clear in his motion that the events subject to judicial notice post-dated his trial. (Motion at p. 5.) Respondent claims that these statements only "subtly acknowledge" that judicial notice was not requested at trial. (Opposition at p. 2.) There was nothing subtle about appellant's motion. It satisfied rule 8.252(a).

The real issue is respondent's final point. Respondent claims that the prosecutor's subsequent *Batson/Wheeler* violation in the codefendant's case

– only months after the same prosecutor was found to have violated *Batson/Wheeler* in appellant's related case – is not relevant to appellant's claim. The ultimate issue in appellant's claim is the credibility of the prosecutor's denial of race-based jury selection with respect to Prospective Juror No. 28. Respondent's position that this Court should simply ignore subsequent *Batson/Wheeler* violations (or indeed any evidence that post-dates the trial court decision) elevates form over substance and should not be countenanced by this Court. Under respondent's theory, even if the trial prosecutor admitted in a subsequent proceeding that he frequently let race infect his decision-making in the exercise of peremptory challenges, or in fact that he had violated *Batson/Wheeler* as to all jurors excused in appellant's case, this evidence could not be judicially noticed because it was inaccessible to the trial court. This cannot be the law.

If appellant's argument was simply that the trial court erred by not considering the evidence subject to the request for judicial notice, respondent's position might have some force. But that is not appellant's claim. Appellant has urged this Court to engage in *de novo* review of the prosecutor's credibility, independent of normal deference and procedural restrictions placed on review of *Batson/Wheeler* claims. (See AOB at pp. 57-67.) Because this Court will be the first court to properly consider the evidence bearing on appellant's *Batson/Wheeler* claim, it must assess the plausibility of the prosecutor's reason "in light of all evidence with a bearing on it." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 252.)

Courts reviewing *Batson* challenges frequently take into consideration evidence that was not presented to the trial court. *Miller-El*, in which the court took into consideration pattern and practice evidence collected years after the trial, is a prime example. (See *Miller-El v. Dretke*,

supra, 545 U.S. at p. 264 [discussing prosecution manual "outlining the reasoning for excluding minorities from jury service"].)[1] In fact, the *Miller-El* court *specifically* considered *Batson* violations by the same prosecutor which were found by the Texas Supreme Court while the defendant's case was pending on appeal. (*Id.* at p. 261 ["Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case"]; see also *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 382 [reversing for *Batson* violation and relying upon the fact that one the same prosecutors violated *Batson* in subsequent trial later reviewed in *Miller-El*].)

The teaching of these and many other cases in which courts considered evidence not before the trial court at the time of the ruling is that the issue in *Batson* cases is not simply whether the trial court properly considered the evidence before it. Instead, the question is always whether the evidence presented to the reviewing court shows that discrimination infected the selection of the jury. If the totality of the evidence demonstrates that the jury selection process was tainted, a new trial must be held.

Respondent contends that consideration of information not before the trial court is foreclosed by a footnote in *People v. Howard* (1992) 1

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[1] In the upcoming term, the United States Supreme Court will consider a *Batson* case in which the defendant collected – after the fact – the prosecutor's notes on jury selection. (*Foster v. Humphrey* (Georgia, Dec. 4, 2014, No. 1989-V-2275) [nonpub. opn.], cert. granted May 26, 2015 ___ U.S. ___ [135 S.Ct. 2349, 192 L.Ed.2d 143].)

Cal.4th 1132.) Respondent misreads *Howard.* In *Howard,* this Court confronted a particularly bare-bones prima showing by trial counsel, but actually *reaffirmed* the principle that "we have not limited our review in such cases solely to counsel's presentation at the time of the motion" because "other circumstances might support the finding of a prima facie case even though a defendant's showing" was inadequate. (*Id.* at p. 1155.) Later in the analysis, in a somewhat ambiguous footnote, the Court stated as follows:

> Defendant argues that the relevant circumstances include the fact that, four and one-half years after the trial in this case, the Court of Appeal reversed on *Wheeler* grounds an unrelated case tried later by the same prosecutor. (*People v. Granillo* (1987) 197 Cal.App.3d 110, 242 Cal.Rptr. 639 [prosecutor failed to carry his burden of justification as to a single juror].) However, even if a trial court might properly consider a prosecutor's past in determining whether a prima facie case exists, a court obviously cannot consider a prosecutor's future.

(*People v. Howard, supra,* 1 Cal.4th 1132 at p. 1156.)

Howard is notably factually distinguishable: it was a stage one claim seeking to bolster the prima facie case with evidence from an "unrelated case" that occurred almost half a decade later. Here, where the sole issue at stage three is the prosecutor's credibility, appellant points to a related trial occurring only months later where the same prosecutor was found to have violated *Batson/Wheeler.*

Regardless, beyond stating the self-evident – that it is impossible for trial courts to rely on events which have not yet transpired – it is not clear whether the *Howard* court categorically forbids reviewing courts from relying upon subsequent *Batson/Wheeler* violations. In fact, as noted

above, the *Howard* decision itself appears to contemplate the opposite, stating that "we have not limited our review in such cases solely to counsel's presentation at the time of the motion." (*People v. Howard*, *supra*, 1 Cal.4th 1132 at p. 1156.) Even if *Howard* did intend to foreclose consideration of subsequent *Batson* violations, it was overruled by intervening United States Supreme Court precedent. (*Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 261.)

As respondent points out, the rules governing judicial notice specifically contemplate reviewing courts relying on proceedings which post-date the trial. (California Rules of Court, rule 8.252(a)(2)(D).) Controlling Supreme Court precedent demands that subsequent findings of *Batson* violations by the same prosecutor be taken into consideration at stage three. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 261.) Accordingly, this Court should grant appellant's motion for judicial notice.

Dated: September 9, 2015

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender

PETER R. SILTEN
Supervising Deputy State Public Defender

ELIAS BATCHELDER
Deputy State Public Defender

Attorneys for Appellant

DECLARATION OF SERVICE BY MAIL

People v. Donte Lamont McDaniel

Supreme Court No. S171393
Superior Court No. TA074274

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California, 94607. I served a copy of the following document(s):

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

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/X/ placing the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **September 9, 2015,** as follows:

Kathy Pomerantz, Deputy Attorney General
Office of the Attorney General
300 S. Spring St., Ste. 1702
Los Angeles, CA 90013

Donte McDaniel #G-53365
CSP-SQ
4-EB-41
San Quentin, CA 94974

LeQuincy Stuart
Clerk of the Court–Appeals Division
Los Angeles County Superior Court
210 W. Temple St.
Los Angeles, CA 90012

James Brewer, Esq.
333 Washington Blvd. #449
Marina Del Rey, CA 90292

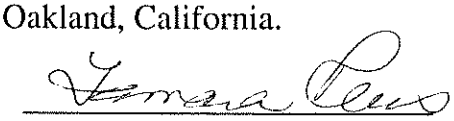
//
//

John Daley, Esq.
7119 West Sunset Blvd. #1033
Los Angeles, CA 90046

California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105

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

Signed on September 9, 2015, at Oakland, California.



TAMARA REUS