S255826

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent.	No.
BRYAN MAURICE JONES Real Party in Interest.	

PETITION FOR REVIEW

Appeal from the Fourth Appellate District, Division One, Case No. D074028
Superior Court of San Diego County, Case No. CR136371
The Honorable Joan P. Weber, Judge of the Superior Court

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

In a published opinion[1] the Court of Appeal, Fourth Appellate District, Division One, ruled that, in a stage three *Batson*[2] inquiry after a defendant's prima facie showing a prosecutor exercised impermissible bias to peremptory dismiss a prospective juror (stage one inquiry), the trial court may compel the prosecution to turn over its jury selection notes to the defendant because those notes are not protected attorney core work product within the meaning of Civil Code of Procedure section 2018.030 (writings and written documentation) and Penal Code section 1054.6 (work product privilege). The Court of Appeal's opinion suggests, without precedent, that there are no limits to a trial court's third stage *Batson* inquiry to compel the disclosure of a lawyer's jury selection notes.

Petitioner contends a court's order compelling disclosure of a lawyer's jury selection notes is contrary to Civil Code of Procedure section 2018.030 and Penal Code section 1054.6, conflicts with stare decisis, and is an unwarranted abrogation of the state's core work product privilege. Petition for Review should be granted to provide this states' trial courts with clear guidelines delineating their authority, or lack of authority, to compel disclosure of a trial attorney's jury selection notes consistent with existing statutory authority pertaining to the attorney's core product privilege.

On April 9, 2019, the Court of Appeal, denied petitioner's petition for writ of mandate which requested the trial court's order the prosecution's

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[1] *People v. Superior Court of San Diego County* (April 4, 2019) __Cal.App.5th __, 245 Cal.Rptr.3d 787 (D074028) (*Jones*)

[2] See *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

jury selection notes be disclosed to the respondent, be overturned. A copy of the published opinion is appended hereto.

ISSUES PRESENTED

1. Did the Court of Appeal violate Civil Code of Procedure section 2018.030, Penal Code section 1054.9, and federal and state attorney core work product privilege cases by affirming the trial court's order the prosecutor's jury selection notes be disclosed to real party in interest at the third stage of a *Batson/Wheeler* [3] review?

2. Did the Court of Appeal err by concluding that a lawyer waives core work product privilege when, during a three stage Batson review, mere comments by a lawyer that the lawyer's contemporaneously made jury selection notes were consistent with the lawyer's stated reasons for exercising peremptory challenges of prospective jurors?

REASONS FOR REVIEW

This petition for review presents a question of first impression between the application of a lawyer's core work product privilege under Civil Code of Procedure section 2018.030, and Penal Code section 1054.9, and a defendant's right to a jury selected in a manner free from discrimination.

The Court of Appeal, in a departure from stare decisis, made new law by deeming a lawyer responding to a Batson/Wheeler challenge a witness and then declaring a lawyer's reliance on his notes to guide his arguments both a waiver of core work product and evidence used to refresh a witness's recollection pursuant to Evidence Code section 771. (*Jones*, *supra*, 245 Cal.Rptr.3d at p. 795.)

Here, Bryan Maurice Jones (hereafter "defendant" or "real party") sought postconviction discovery of the prosecution's jury selection notes,

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[3] *People v. Wheeler* (1978) 22 Cal.3d 258.

within the context of the prosecution of his postconviction discovery litigation, to assist in filing his petition for writ of habeas corpus now pending before the California Supreme Court.[4]

Petitioner asserted that such notes are core work product (Gov. Code, § 6254, subd. (k); Civ. Code, § 2018.030, subd. (a)) and privileged from disclosure. Petitioner also noted that defendant's assertion of violations of *Batson v. Kentucky*, *supra*, 476 U.S. 79, and *People v. Wheeler*, *supra*, 22 Cal. 3d 258 were addressed at length in his direct appeal, and in 2013 this court affirmed the trial court's decision not to find a prima facie case of group bias against the People. (*People v. Jones* (2013) 57 Cal.4th 899, 916–920.)

During the April 2018 hearing on the postconviction discovery issue, the trial court ordered petitioner to produce the prosecutor's jury selection notes and documents to defendant in light of his intent to pursue a petition for writ of habeas corpus, despite this court's 2013 decision. (Exh. B[5] at pp. 47-48 [Transcript of Postconviction Discovery Hearing on April 27, 2018]; Exh. D at p. 18 [People's Opposition to Defendant's Motion for Postconviction Discovery and Preservation of Evidence].)[6]

In making that order, the trial court concluded *Foster v. Chatman* (2016) U.S.__ [136 S.Ct. 1737] (*Foster*) held that a defendant's

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[4] *In re Bryan Maurice Jones On Habeas Corpus*, In the Supreme Court of the State of California, Capital Case No. S217284.

[5] Exhibits referenced in this petition for review are the exhibits that were attached to the People's writ filed in the Court of Appeal and should be contained in the records this court will request from the Court of Appeal.

[6] All references to the Exhibits are to the exhibits attached to Petitioner's Writ Petition filed in the Fourth District Court of Appeal.

Constitutional rights to access such documents supersedes the petitioner's core work product privilege, that a prosecutor's verbal reference to the notes when arguing the peremptory challenge to prospective jurors was warranted rendered the privilege waived, and that disclosure of jury selection notes is contemplated within postconviction discovery. (Exh. B at p. 48.)

Under California Rules of Court, rule 8.500, subdivision (b)(1), this court should grant review to secure uniformity of decision and settle an important question of law whether a trial court has authority to compel a lawyer's disclosure of jury selection notes that are core work product under Civil Code of Procedure section 2018.030, and Penal Code section 1054.9. This case presents an issue of first impression.[7] There is no published case to provide guidance to trial courts whether the holding in *Foster* requires disclosure of attorney core work product in the context of a *Batson/Wheeler* claim. Nor is there case law holding that a prosecutor's review of jury selection notes thereby waives any applicable privileges over those notes. And yet that is exactly what the trial court did here, in contravention of the attorney core work product privilege.

PROCEDURAL BACKGROUND

Petitioner is the People of the State of California ("the People") represented by its counsel, San Diego County District Attorney Summer Stephan, and Samantha Begovich, Deputy District Attorney. Respondent is the Superior Court of the State of California, for the County of San Diego,

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[7] The issue at hand has been recently presented to the Fourth District Court of Appeal, Divisions Two and Three. (*Albert Jones v. Superior Court* (January 16, 2018, E067896) [nonpub. opn.] pp. 2-3; *Salas v. Superior Court* (March 3, 2018, G055165) [petition summarily denied, review den., May 11, 2018, S247515].) Pursuant to California Rule of Court 8.1115, subd. (a), this unpublished opinion is not cited for its legal conclusions, but rather to inform this court that this legal issue has presented itself elsewhere in California.

Central Division ("superior court"). Real Party is Bryan M. Jones, defendant in San Diego County Superior Court case number CR136371, a felony criminal action.

Defendant Bryan Maurice Jones was convicted in 1994 of the first-degree murders of JoAnn Sweets and Sophia Glover (§§ 187, 189), attempting to murder Maria R. and Karen M. (§§ 664, 187), and committing forcible rape, sodomy and oral copulation against Karen M. (§§ 261, subd. (a)(2), 286, subd. (c) & 288a, subd. (c)). The jury further sustained an allegation that defendant used a deadly weapon when attempting to murder Maria R. (§ 12022, subd. (b).) Finally, the jury sustained three special circumstance allegations rendering defendant eligible for the death penalty: that he murdered both Sweets and Glover during the commission or attempted commission of the crime of sodomy (§ 190.2, subd. (a)(17)) and that he committed multiple murders (§ 190.2, subd. (a)(3)).

On April 6, 1994, following a penalty trial, the jury set the punishment at death under the 1978 death penalty law. (§ 190.1 et seq.) Jones' appeal was automatic, and the judgment was affirmed in all respects. (*People v. Jones*, *supra*, 57 Cal.4th 899.)

This petition for review arises from an April 27, 2018 hearing before the Honorable Joan P. Weber to litigate issues of postconviction discovery and orders arising therefrom pursuant to Penal Code section 1054.9. (Exh. A [The Honorable Joan P. Weber's Court Order]; Exh. B at pp. 41–43.)

Defendant, represented by the Habeas Corpus Resource Center, sought postconviction discovery of the prosecutor's jury selection notes taken and policy memoranda on jury selection used at the time of his trial. (Exh. C at pp. 10–11 [Reply in Support of Defendant's Initial Motion for Postconviction Discovery].)

Petitioner asserted that such notes are core work product (Gov. Code, § 6254, subd. (k); Civ. Code, § 2018.030, subd. (a)) and privileged from disclosure. Petitioner also noted that defendant's assertion of violations of *Batson* and *Wheeler* were addressed at length in his direct appeal, and the appellate court affirmed the trial court's decision not to find a prima facie case of group bias against the People. (*People v. Jones* (2013) 57 Cal.4th 899, 916–920; Exh. D at p. 18.) The superior court granted defendant's section 1054.9 motion to discover the trial prosecutor's jury selection notes. (Exh. B at pp. 41–43.)

The People petitioned for a writ of mandate and/or prohibition pursuant to the provisions of Code of Civil Procedure sections 1086 and 1103 because there was no plain, speedy, and adequate remedy at law.[8] On June 21, 2018, the Court of Appeal summarily denied the petition for writ of mandate after considering the petition and an informal opposition filed by real party.

The People appealed, and this court granted the petition for review and transferred the matter to the Court of Appeal.

On April 9, 2019, the Court of Appeal denied the petition for writ of mandate and issued a published opinion.

ARGUMENT

I.

THE TRIAL COURT ERRED BY GRANTING DISCOVERY PURSUANT TO SECTION 1054.9 BECAUSE CALIFORNIA AND FEDERAL LAW PROTECT PRIVILEGED ATTORNEY WORK PRODUCT

On Friday, April 27, 2018, the trial court held a hearing to address real party's motion for discovery. (Exh. B at p. 7.) With regard to the

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[8] Mandamus is the proper procedure to challenge a superior court's order regarding a discovery motion. (*In re Steele*, *supra*, 32 Cal.4th 682, 688; see *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 363.)

prosecution's jury notes, the trial court specifically stated, "I think *Foster* versus *Chapman* is a game changer in this area." (Exh. B at p. 46.) The trial court further stated that because *Foster* held that prosecutor notes can be enlightening as to whether there was a racial bias, she was making a tentative ruling in favor of disclosure. (Exh. B at p. 46.) Petitioner objected, asserting the core work product privilege and stating that the *Batson* issue had already been addressed in a prior appeal. (Exh. B at p. 46.) Real Party responded that their reply discussing the core work product and Evidence Code section 771 sufficiently stated their position. (Exh. B at p. 47.) The trial court noted that it agreed with the Real Party's reasoning. (Exh. B at p. 47.) Petitioner objected, stating that simply because an attorney referenced his notes during an argument, it was not a waiver of privilege. (Exh B at p. 47.) The trial court stated:

> But in my view, if there are specific notes taken by that attorney that could possibly impeach what he said on the record – and that's exactly what happened in the *Foster* case. I mean, the prosecutor's notes showed that he was not being honest with the Court in terms of why. And I'm not saying that's at all going to be the facts with Mr. Dusek. But how can counsel ever investigate whether there was a legitimate *Batson* with regard to the exercise of challenges against minority jurors unless she has access to that material? So I think she's entitled to it under *Foster* versus *Chapman*, which I think indicates that – that these material can be relevant. (Exh. B at p. 48.)

The trial court then ordered the disclosure with a protective order. (Exh. B at p. 48.)

Despite the trial court's rationale in ordering disclosure of the prosecutor's jury selection notes, petitioner has found no California law that recognizes the right to discovery of an attorney's jury selection notes during a *Batson* hearing, or waives the statutory core work product privilege upon an attorney's reliance on his work product. Nor has

petitioner found California law that mandates disclosure of these notes in the postconviction discovery context. By ordering postconviction disclosure of the prosecution's jury notes to the real party, the trial court erred.

A. *Foster v. Chatman* Does Not Require Disclosure of Records Protected By the Attorney Core Work Product Privileged During a *Batson* Hearing

The Court of Appeal wrongly relied on *Foster* as the basis for the propriety of the trial court's order requiring disclosure of the prosecution's jury selection documents within the context of defendant's section 1054.9 request, over the People's objection. Despite the Court of Appeal's conclusion, *Foster* does not stand for the proposition that a prosecution claim of core work product privilege is overruled upon a defendant's assertion of *Batson* error. The following in-depth analysis of *Foster* shows what *Foster* did and did not hold, supporting that the court's decision was made in error.

As an initial matter, *Foster* in no way involved whether or not a prosecutor's claim of privilege on jury selection documents is meaningless in the adjudication of *Batson* violations. Rather, the Supreme Court's decision in *Foster* hinged on several apparent misrepresentations made by the prosecution, established in the record by the prosecution's jury selection file, which had a focus on race and was obtained through the State of Georgia's Open Records statutes. (*Foster v. Chapman*, *supra*, 136 S.Ct. at pp. 1743–44.)

In *Foster*, defendant Timothy Foster claimed that the prosecution used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury in his trial for capital murder, in violation of *Batson*. (*Foster v. Chapman*, *supra*, 136 S.Ct. at p. 1742.) The trial court denied his claim, and the Georgia Supreme Court affirmed. (*Ibid.*) Foster renewed his *Batson* claim in a state habeas proceeding. (*Ibid.*) The state

habeas court considered the prosecution's jury selection file but denied relief. (*Id.* at p. 1745.) The Georgia Supreme Court likewise denied relief, concluding that Foster's *Batson* claim was without merit because he had failed to demonstrate purposeful discrimination. (*Id.* at p. 1745.) The Supreme Court granted certiorari. (*Ibid.*)

Foster obtained copies of the file used by the prosecution during his trial through the Georgia Open Records Act. (*Foster v. Chapman*, *supra*, 136 S.Ct. at pp. 1743–44.) The prosecution's jury selection file was replete with documents referencing race, including: (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in green, with a legend indicating that the green highlighting "represents Blacks"; (2) a draft of an affidavit prepared by an investigator at the request of the prosecutor, comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) handwritten notes identifying three black prospective jurors as "B# 1," "B# 2," and "B # 3"; (4) a typed list of qualified jurors with "N" appearing next to the names of all five black prospective jurors; (5) a handwritten document titled "definite NO's" listing six names, including the names of all five qualified black prospective jurors; (6) handwritten document titled "Church of Christ" with notation that read: "NO. No Black Church"; and (7) the questionnaires filled out by several of the prospective black jurors, on which each juror's response indicating his or her race had been circled. (*Id.* at p. 1744.)

The Supreme Court reemphasized the principle that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." (*Foster v. Chapman*, *supra*, 136 S.Ct. at p. 1747.) The Supreme Court also reaffirmed the well settled, three-part process established in *Batson* for determining when a strike is discriminatory: First, a defendant must make a prima facie showing that a peremptory challenge

has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. (*Ibid.*)

Despite uncertainty about who within the prosecutor's office wrote the notes obtained by Foster, the Supreme Court relied upon their existence. (*Foster v. Chapman*, *supra*, 136 S.Ct. at p. 1748.) The Supreme Court "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." (*Ibid.*) "[D]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available." (*Ibid.*)

The Supreme Court asserted that the contents of the prosecution's file plainly belied the State's claim that it had exercised its strikes in a "color-blind" manner. (*Ibid.*) The Supreme Court described the number of references to race in the prosecution's file as "arresting." (*Ibid.*) The Supreme Court held that "the focus on race in the prosecution's file plainly demonstrat[ed] a concerted effort to keep black prospective jurors off the jury." (*Ibid.*)

Foster also noted that the jury selection documents were admitted into evidence and considered in the *Batson* analysis "[o]ver the State's objections" and that the State was "downright indignant" in the use of the jury selection notes and the ensuing inferences and conclusions reached. (*Id.* at pp. 1743–1744, 1755.) Yet, *Foster* did not address how a trial court should rule based on such objections from the prosecution.

The Supreme Court concluded that the "prosecutors were motivated in substantial part by race[.]" (*Ibid.*) The court reversed the judgment and

remanded the case for further proceedings because "[t]wo peremptory strikes on the basis of race are two more than the Constitution allows." (*Ibid.*)

Foster simply contains no discussion by the Court of what weight should be given to the prosecution's claim of privilege over jury selection notes and records. There is no holding that a trial court must summarily dismiss the prosecution's claim that its notes during the jury selection process are privileged.

This is especially true where *Foster* obtained the prosecution's jury selection notes through Georgia's Open Records Act, in essence, by consent. Nowhere in *Foster* did the Supreme Court imply—let alone clearly establish—that a state court is mandated or has a sua sponte duty to overrule the prosecution's assertion of core work product privilege over jury selection notes when a defendant asserts a claim of *Batson* error.

Foster is also devoid of any discussion concerning whether or not the core work product privilege is waived as to jury selection notes if a prosecutor relies on those notes to respond to a claim of *Batson* error. Thus, the court of appeal's conclusion that the prosecutor became a witness upon responding to the trial court's finding of a prima facie case of racial animus thus making the notes in question subject to disclosure as items used to refresh his collection is neither stated or suggested by *Foster* as to render the appellate court's conclusion speculative and implicitly erroneous.

Presumably *Foster* could have expanded its Equal Protection Clause guarantees by holding that in *Batson* inquiries the defendant's right to know the prosecutor's thought processes supersede any core work product privileges. *Foster* did not reach such a conclusion and, as such, the Court of Appeal's decision to the contrary is in error.

The Court of Appeal also failed to acknowledge that several limiting phrases emanate from the jurisprudence on the litigation of *Batson* error, as

addressed below, and failed to reconcile these phrases with the Court of Appeal's broad, sweeping opinion.

B. "Circumstantial and Direct Evidence of Intent as May be Available"

Petitioner recognizes that *Foster*, " 'demands a sensitive inquiry into such . . . circumstantial and direct evidence of intent as may be available' " in order to determine whether invidious discriminatory purpose was a motivating factor. (*Foster*, *supra*, 136 S.Ct. at p. 1748, quoting *Arlington Heights v. Metro. Hous. Dev. Corp.* (1977) 429 U.S. 252, 266 (*Arlington Heights*).)

However, jury selection notes are not "available," because they are privileged work product documents. *Foster's* desire for available "evidence of intent" does not expressly or impliedly mean *all* evidence. (*Foster*, *supra*, 136 S.Ct. at p. 1748.) With an apparent appreciation for the proverbial slippery slope[9] that may ensue from the abrogation of work product privilege, no court has codified the discoverability of jury selection notes.

C. "Entire Record"

During the final stage of a *Batson/Wheeler* analysis, courts must consider " ' "all relevant circumstances" ' " in determining whether a strike was improperly motivated, and this requires a careful "review of the entire record." (*People v. Lenix* (2008) 44 Cal.4th 602, 616 (*Lenix*); see *Arlington Heights*, *supra*, 429 U.S. at p. 266; Answer, p. 16.)

While a comparative juror analysis hinges on the lawyer's stated reasons for a peremptory challenge and whether such statements withstand scrutiny when examined against the stricken jurors' profiles and the profiles

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[9] Without being facetious, would a trial court next codify the accessibility of a lawyer's email, social media accounts or professional and personal affiliations?

of jurors that were not excused, no comparative juror analysis case suggests an expansion of evidence to include a lawyer's privileged work product. Further, especially in a post-conviction discovery context, a desire to review the "entire record" does not suggest an automatic supplementation of the static record with postconviction requests for additional privileged work product. (*Lenix*, *supra*, 44 Cal.4th at p. 616.)

D. "Plausibility of Rationale"

"[W]hen illegitimate grounds like race are in issue," a prosecutor's decision to strike a juror must "stand or fall on the plausibility of the reasons he gives." (*Miller-El*, v. Dretke (2005) 545 U.S. 231, 252, (*Miller*).)

One can deduce that the *Miller-El* Court was proposing that courts engage in a credibility assessment of the reasons given, which might include a review of what a lawyer says versus what is written in her file. However, the court did not suggest the production of a lawyer's jury selection notes as a viable option.

Although given the chance to address what evidence could be elicited to reach such a conclusion, the Court did not suggest that jury selection notes are discoverable.

E. "All Relevant Circumstances"

Comparative juror analysis[10] is an important tool in identifying improper discrimination. The mandate to consider "all relevant circumstances" means a court must undertake comparative juror analysis even if it is raised for the first time on appeal.[11] (*Lenix*, *supra*, 44 Cal.4th at

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[10] When comparative analysis is requested in the trial court, "*the prosecution is afforded* a fair opportunity" to explain its failure to challenge similarly situated jurors. (*Lenix*, *supra*, 44 Cal.4th at p. 633, italics added.)

[11] This court concluded as much in *People v. Johnson* (2003) 30 Cal.4th 1302, 1323 [stating that comparative juror analysis is useful and

p. 622; See *Foster, supra*, 136 S.Ct. at p. 1755; *Snyder v. Louisiana* (2008) 552 U.S. 472, 483; *Miller-El, supra*, 545 U.S. at p. 241; and *Johnson v. California* (2005) 545 U.S. 162, 170 [the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated]; Answer, p. 16.)

Petitioner notes, as this Court should, the absence of holdings that mandate the overruling of the assertion of work product privilege or that transform the lawyer's notes into discoverable "witness" statements upon reference to the notes.[12]

F. Penal Code Section 1054.9 Makes Limited Post-Conviction Discovery Available to Real Party

California law does not require the production of jury notes in a postconviction discovery motion. On January 1, 2003, the Legislature enacted section 1054.9, which reads, in pertinent part:

> (a) Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be

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can be conducted by trial courts, "we cannot expect, and do not demand, trial courts to engage sua sponte in the sort of comparative juror analysis that appellate lawyers and courts can do after scouring the often lengthy appellate record during the appeal."].)

[12] Petitioner asserts that the work product privilege, per se, excludes discovery of a lawyer's jury selection notes. A ruling by this court that holds such notes are discoverable, begs the questions: when and how? Are such notes discoverable upon a claim of *Batson* error, when a comparative juror analysis is requested, after a trial court's determination of a prima facie case or pretext? Or, are such notes discoverable only in the postconviction context? What are the bounds?

> provided reasonable access to any of the materials described in subdivision (b).
> (b) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.

(§ 1054.9.)

On March 8, 2004, this court decided the case of *In re Steele* (2004) 32 Cal.4th 682, which interpreted the meaning of section 1054.9. In evaluating the meaning and scope of section 1054.9, this court made several important interpretations of the statute including the scope of materials that were subject to disclosure. This court held section 1054.9 modified the rule of *People v. Gonzalez* (1990) 51 Cal.3d 1179, which stated that after a judgment had become final, nothing was pending in the trial court to which a discovery motion could attach, and the defendant had to state a prima facie case for relief before receiving discovery. (*In re Steele*, *supra*, 32 Cal.4th 682, 691.) Now, "a defendant is entitled to seek discovery if he or she is preparing to file the petition as well as after the petition has been filed." (*In re Steele*, *supra*, 32 Cal.4th 682, 691.) In addition to procedural issues, this Court also discussed the scope of materials that would be subject to disclosure under section 1054.9. This court identified four distinct categories of materials:

> Accordingly, we interpret section 1054.9 to require the trial court, on a proper showing of a good faith effort to obtain the materials from trial counsel, to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show either (1) the prosecution did provide at time of trial but have since become lost to the defendant; (2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have

> provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or (4) *the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them.*

(*In re Steele*, *supra*, 32 Cal.4th 682, 697, italics added; accord, *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, 529.)

In re Steele established that the statute "does not allow 'free-floating' discovery asking for virtually anything the prosecution possesses. [Citation.]" (*In re Steele*, *supra*, 32 Cal.4th 682, 695.) Also, discovery under section 1054.9 is limited to the materials the defendant would have been entitled to at the time of trial. (*Kennedy v. Superior Court*, *supra*, 145 Cal.App.4th at p. 366.)

In the instant case, the defendant's requests for jury selection notes do not fall under the limited categories of discovery allowed under section 1054.9. Thus section 1054.9 does not entitle defendant to receive the prosecutor's jury selection notes as part of his motion for postconviction discovery. However, despite section 1054.9's inapplicability, the Court of Appeal held that the trial court properly ordered the discovery of the requested jury selection records.

G. A Non-Statutory Motion for Discovery is Unavailable to Real Party

Because section 1054.9 does not govern defendant's request for postconviction discovery of the prosecutor's jury selection records, defendant's request can only be characterized as a non-statutory motion for discovery. And non-statutory motions for discovery do not entitle a defendant to privileged jury selection records. There is no general right to make a motion for postconviction discovery in a criminal case that is final following appeal. Indeed,

> [T]he federal Constitution does not confer a general right to criminal discovery (*Weatherford v. Bursey* (1977) 429 U.S. 545, 549 and does not mandate the full panoply of pretrial rights in collateral efforts to overturn a final conviction (*Pennsylvania v. Finley* (1987) 481 U.S. 551.)

(*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258, partially superseded by statute as explained in *In re Steele*, *supra*, 32 Cal.4th at p. 691 & *People v. Superior Court* (*Morales*) (2017) 2 Cal.5th 523, 528.) Significantly, "[a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [government's] files. [Citations.]" (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 59.)

The right to discovery under section 1054.9 is limited as set forth in a recent opinion addressing preservation orders:

> The statute carves out particular categories of material as subject to postconviction discovery, and nothing in its language or the legislative history suggests the Legislature intended the statute to serve as a predicate for more wide-ranging postconviction discovery.

(*People v. Superior Court (Morales)*, *supra*, 2 Cal.5th 523, 533.)

Aside from defendant's statutory right to limited postconviction discovery, there is no general right to additional postconviction discovery. (See *People v. Superior Court (Morales)*, *supra*, 2 Cal.5th 523, 528 [non-availability of postconviction discovery partially abrogated by section 1054.9], 533 [nothing in section 1054.9 or the legislative history suggests an intent to permit more wide-ranging discovery].)

H. Evidence Code section 771 Does Not Compel Disclosure of the Prosecutor's Notes Mentioned Before the *Batson/Wheeler* Hearing as the Trial Prosecutor Was Not a Witness and Did Not Testify

The Court of Appeal also wrongly decided that Evidence Code section 771 expressly requires the production of a writing used to refresh a

prosecutor's recollection in the course of a hearing. (*Jones*, *supra*, at pp. 11-14.)

> Evidence Code section 771, subdivision (a), expressly provides:
>
> Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(Evid. Code, § 771, subd. (a).)

The statute by its own express terms applies to a "witness" "while testifying or prior thereto" and "about which he testifies." A prosecutor or defense attorney engaged in litigating a criminal trial (or a judge utilizing his or her notes) is not a "witness" and even if making factual representations to the court, the attorney is not "testifying."

Evidence Code section 771 only permits disclosure of the writing when it was used by the witness to "refresh his [or her] memory[.]" (Evid. Code, § 771, subd. (a).) Here, evidence of the use of jury selection notes by the trial prosecutor is tenuous.

In some cases, Evidence Code section 771 does not pierce applicable privileges. (See *Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64, 73 ["the word 'writing' in section 771 was never intended to mean a transcription of a client's original discussion with her attorney concerning an accident as to which she is employing his legal services[]"].)

Here, the argument that the mere review of notes by a lawyer to guide him as he advances an argument thereby waives his ability to claim core work product privilege over the document is flawed. A lawyer will frequently rely on his or her notes to guide his or her arguments before a court and to extrapolate the trial court's ruling that reference to such notes is a waiver of privilege has no basis in the law.

There is no case law supporting the notion that, based on California authority, Evidence Code section 771 would have permitted access to the prosecutor's jury selection notes during trial, and a reasonable reading of the statute dispels such a notion.

There is no controlling California law in existence that creates a waiver of core work product privilege upon reference to a document by a lawyer during litigation. Nor is there a California case that holds that a defendant is entitled to a prosecutor's jury selection notes during the litigation of a *Batson* claim. As such, the Court of Appeal's holding to the contrary is erroneous and in contravention of stare decisis.

I. Ordering Disclosure of a Prosecutor's Jury Selection Notes as a Typical Aspect of Criminal Trial Discovery Would Be Unprecedented

No cases stand for the proposition that a postconviction court can order the disclosure of the prosecution's jury selection notes in connection with an actual or anticipated *Batson* claim. There is no caselaw upon which to conclude that defendant would have been entitled to such notes at the time of trial, which is what he is required to demonstrate in this statutory postconviction discovery proceeding. As such, the Court of Appeal's holding to the contrary is erroneous.

J. At This Stage of the Proceeding Defendant is Not Entitled to Discovery of the Prosecutor's Jury Selection Notes

The showing required under section 1054.9 to entitle defendant to the jury selection notes is a showing that he would have been entitled to them at the time of trial upon request. (*In re Steele*, *supra*, 32 Cal.4th 682, 697 ["the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them[]"].)

No controlling authority permits, approves, or requires discovery of the prosecution's jury selection notes at trial or in advance of an order to

show cause in a habeas corpus proceeding. The Court of Appeal's decision is unsupported by precedent.

II.

THE PROSECUTOR'S JURY SELECTION NOTES ARE PRIVILEGED PURSUANT TO *HICKMAN V. TAYLOR*

Discovery of work product is not permitted "unless the court determines that the denial of discovery will unfairly prejudice the party seeking discovery or will result in an injustice." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 381, citing Code Civ. Proc., § 2018, subd. (b).) More significantly, "any writing that reflects 'an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstance.' [Citation.]" (*Ibid.*)

In California, an attorney's work product is protected by statute. (Code Civ. Proc., § 2018.010 et seq.) Absolute protection is afforded to writings that reflect "an attorney's impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc., § 2018.030, subd. (a).) All other work product receives qualified protection; such material "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Code Civ. Proc., § 2018.030, subd. (b); *Coito v. Superior Court* (2012) 54 Cal.4th 480, 494–496.)

A prosecutor's notes relating to his or her thought processes during jury selection in a criminal trial are a prime example of attorney work product. (See *Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 380–382.) Jury selection is a significant aspect of a criminal trial, and it is factually intensive with respect to an attorney's decisions to challenge jurors for cause or peremptorily in hopes of seating jurors potentially more favorable to the attorney's position.

Discovery of the type sought in the instant case would disturb an attorney's methods of functioning by invading the zone of privacy that a lawyer's work requires. Proper preparation of a case demands that the lawyer assemble information, sift the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue interference. Production of the trial prosecutor's jury selection notes falls outside the normal boundaries of discovery.

In light of the potential for *Batson/Wheeler* motions – whether meritorious or not – and the requirement that attorneys potentially be able to defensively discuss the irrelevance of race or other immutable characteristics of the stricken or seated jurors, those notes will contain information instrumental to the drafter's ability to litigate the matter yet will likely not be complete enough to generally be useable by another party. Indeed, if a court were to hold the prosecutor's notes are necessary to litigate a *Batson/Wheeler* motion, then the courts could not possibly protect the defense attorney's notes or the trial court's notes that also may include mental thought impressions regarding the suitability of prospective jurors.

The central justification for the work product doctrine is that it preserves the privacy of preparation that is essential to the attorney's adversary role. Any invasion of this privacy could distort or modify the attorney's function to the detriment of the adversary system. The function of work product privilege is to preserve the benefits of adverse representation without frustrating the goals of discovery. The core work product privilege recognizes the need to protect the privacy of the attorney's mental processes. Without such actual privilege, an attorney may rightfully believe that his efforts might benefit his adversary more than his client and be deterred from detailed note-taking. The privilege, however, creates a zone of privacy allowing an attorney to litigate without the possibility that his mental impressions, theories, and opinions will be discoverable.

Moreover, the preceding argument is not undermined by *Hickman v. Taylor* (1947) 329 U.S. 495. In that case, the United States Supreme court found the interests of clients and the cause of justice would be poorly served by unrestricted violation of an attorney's zone of privacy within which to prepare and advance litigation. If an attorney's trial preparations were freely discoverable, "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." (*Hickman v. Taylor*, *supra*, 329 U.S. at p. 511.)

Hickman v. Taylor, *supra*, created a two-tiered protection from discovery for attorney work product. To the extent that work product contains relevant, nonprivileged facts, the *Hickman* doctrine merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show "adequate reasons" why the work product should be subject to discovery. (*Hickman v. Taylor*, *supra*, 329 U.S. at p. 508.) However, to the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification. (*Id.* at p. 511.)

The core work product privilege protects material prepared by an adversary's counsel in the course of his legal duties provided that the work was done with an eye toward litigation. (*Hickman v. Taylor*, *supra*, 329 U.S. at p. 511.) This material includes the attorney's interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs. (*Ibid.*)

Thus, the work product privilege affords greater protection to opinion work product, which reveals the mental impressions, conclusions, opinions, or legal theories of a party's attorney which, in point of fact, are

exactly the type of documents the Court of Appeal has ruled have zero protection. Such an order is erroneous.

Here, the Court of Appeal carved out a heretofore unrecognized division between what is protected core work product and what is not. The Court of Appeal stated that "there is a difference between a prosecutor's thoughts and opinions about the quality of the legal case or trial strategy and the thoughts and opinions about the adequacy of prospective jurors." (*Jones*, *supra*, at p. 9.) Without providing a logical justification for such an arbitrary and capricious standard, the Court of Appeal wrongly decided that a prosecutor's notes as to jury selection are unequivocally not covered by the core work product privilege. (*Ibid.*)

CONCLUSION

Because the Court of Appeal wrongly decided that this issue of core work product privilege as a bar to the disclosure of a prosecutor's jury selection notes, this court should grant review to remedy the erroneous ruling.

Date: May 14, 2019

Respectfully Submitted,

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MARK A. AMADOR
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CERTIFICATE OF WORD COUNT

I certify that this PETITION FOR REVIEW, including footnotes, and excluding tables and this certificate, contains 6,809 words according to the computer program used to prepare it.

SAMANTHA BEGOVICH
Deputy District Attorney

Filed 4/9/19

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent; BRYAN MAURICE JONES, Real Party in Interest.	D074028 (San Diego County Super. Ct. No. CR136371)

Petition for writ of mandate and/or prohibition from an order of the Superior Court of San Diego County, Joan P. Weber, Judge. Petition denied.

Summer Stephan, District Attorney, Mark A. Amador and Samantha Begovich, Deputy District Attorneys, for the Petitioner.

No appearance for Respondent.

Habeas Corpus Resource Center, Shelley J. Sandusky, Cliona Plunkett and Rachel Gabrielle Schaefer, for Real Party in Interest.

The San Diego County District Attorney petitions for a writ of mandate and/or prohibition challenging the superior court's order directing the district attorney to turn over to defense habeas counsel the prosecution's jury selection notes, contending the materials are privileged work product not subject to discovery. We are called upon to determine whether these notes, when referenced during a *Batson/Wheeler*[1] hearing by a prosecutor offering a neutral reason for exercising a peremptory strike, are discoverable by the defendant as part of postconviction writ of habeas corpus discovery. We conclude they are, and we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

In 1994, a jury convicted Bryan Maurice Jones of the first degree murders of JoAnn S. and Sophia G. (Pen. Code,[2] §§ 187, 189), attempted murder of Maria R. and Karen M. (§§ 664, 187), and the forcible rape, sodomy and oral copulation of Karen M. (§§ 261, subd. (a)(2), 286, subd. (c), 288a, subd. (c).) The jury also sustained an allegation that Jones used a deadly weapon in the attempt to murder Maria R. (§ 12022, subd. (b)), along with special circumstance allegations: Jones murdered JoAnn S. and Sophia G. during the commission or attempted commission of the crime of sodomy (§ 190.2, subd. (a)(17)), and he committed multiple murders (§ 190.2, subd. (a)(3)). The jury sentenced Jones to death (§ 190.1 et seq.), and the judgment was affirmed on appeal. (*People v. Jones* (2013) 57 Cal.4th 899.)

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

2 Further statutory references are to the Penal Code unless otherwise indicated.

During jury selection, the prosecution used peremptory challenges to excuse two African-American jurors, and defense counsel objected. (*People v. Jones, supra,* 57 Cal.4th at p. 916.) The court determined the defense attorney made a prima facie showing of racial bias. (*Id.* at p. 917.) The prosecutor offered race-neutral explanations for excusing the jurors, citing in part a numerical score for each prospective juror that the prosecution team had devised. (*Id.* at pp. 917-918.) The trial court found the explanations credible and permitted the strikes.

The defense attorney made a second *Batson/Wheeler* challenge after the prosecutor used a peremptory strike on a third African-American female. The prosecutor again referenced the numerical analysis, which had been conducted by three people in the office. The court offered its opinion of the juror, consistent with the reasoning provided by the prosecutor, and denied the *Batson/Wheeler* motion.

On appeal, Jones challenged the credibility and genuineness of the race-neutral explanations, and the Supreme Court deferred to the trial court's assessment. (*Id.* at p. 919.) Jones also argued a third juror was improperly excused based on race. (*Id.* at pp. 919-920.) The Supreme Court reviewed the record independently regarding the third African-American juror and determined there was ample evidence that no prima facie case of group bias had been made. (*Ibid.*)

Subsequently, in his amended petition for writ of habeas corpus, No. S217284, Jones alleged ineffective assistance of counsel because his trial counsel failed to raise a *Batson/Wheeler* error for the prosecutor's exercise of peremptory challenges against women, noting 13 of the prosecution's 17 peremptory strikes were against prospective

female jurors. Jones further alleged his trial counsel was ineffective for failing to raise a *Batson/Wheeler* error on the ground that four of those women were also African-American.

Following Jones's direct appeal, pursuant to section 1054.9, his habeas attorney sought postconviction discovery of the jury selection notes.[3] The trial court granted the request in April 2018. In May, the district attorney filed a writ of mandate and/or prohibition seeking a stay and requesting we vacate the trial court's order, which we denied. The district attorney appealed. The Supreme Court granted the petition for review and transferred the matter to this court. We vacated our order denying the writ of mandate and/or prohibition and issued an order to show cause returnable why petitioner is not entitled to the relief requested. Jones filed a formal return to the order to show cause.

DISCUSSION

A

Legal Principles

We review a trial court's ruling on discovery matters under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) An abuse of discretion is shown when the trial court applies the wrong legal standard. (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493.) The burden falls on the

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3 Jones also sought any policy memoranda regarding jury selection at the time of trial. The district attorney represented it has no records of any such policy memoranda to turn over.

complaining party to establish an abuse of discretion, and we do not substitute our own opinion for the trial court's, absent a showing that there has been a miscarriage of justice. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366 (*Kennedy*), citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

A defendant is entitled to materials to which he would have been entitled at trial, whether or not he possessed those materials at the time of trial. (*In re Steele* (2004) 32 Cal.4th 682, 693, 695-696 (*Steele*); § 1054.9, subd. (b).) This includes materials the prosecution did not provide at trial because there was no specific defense request but would have been obligated to provide had there been one. (*Steele*, at pp. 696-697.) The defendant bears the burden of demonstrating the materials requested are ones to which he would have been entitled to discovery at the time of trial. (See *Kennedy, supra,* 145 Cal.App.4th at p. 366.) In issuing the order to turn over the jury selection notes, the trial court necessarily concluded Jones met his burden of demonstrating he was entitled to them at the time of trial. Thus, to demonstrate an abuse of discretion in this case, the district attorney must demonstrate that at the time of trial, the defendant was not entitled to the jury selection notes. (Cf. *ibid.*)

B

Batson/Wheeler *Challenges*

Because Jones's request for postconviction discovery rests on potential allegations of a *Batson/Wheeler* violation, consideration of the three-step *Batson* framework is necessary. In the first stage of a *Batson/Wheeler* challenge, the defendant must make out a prima facie case that there is an inference of a discriminatory purpose from the

prosecutor's use of peremptory strikes. (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*).) The burden then shifts to the prosecution to offer race- or gender-neutral justifications for the strikes in the second stage. (*Ibid.*) At the third stage, the trial court evaluates whether the race- or gender-neutral explanations are credible. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477 (*Snyder*); *Miller-El v. Cockrell* (2003) 537 U.S. 322, 328-329.) "[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." (*Snyder,* at p. 478, citing *Miller-El v. Dretke* (2005) 545 U.S. 231, 239.) " 'Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available.' " (*Foster v. Chatman* (2016) 136 S.Ct. 1737, 1748 (*Foster*), citing *Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 266.)

C

Work Product

There is no constitutional basis for work product privilege; thus, "any protection in California . . . must be based on state common or statutory law." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 380.) The work product privilege is codified in the Code of Civil Procedure; it protects from discovery "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc., § 2018.030, subd. (a).) In the civil context, other work product is discoverable if the court determines its protection would unfairly prejudice the party seeking discovery. (Code Civ. Proc., § 2018.030, subd. (b).) However, "[t]hrough its reference to the Code

of Civil Procedure 2018.030, subdivision (a), Penal Code section 1054.6 ' "expressly limits the definition of 'work product' in criminal cases to 'core' work product, that is, any writing reflecting 'an attorney's impressions, conclusions, opinions, or legal research or theories.' " ' " (*People v. Zamudio* (2008) 43 Cal.4th 327, 355, italics omitted; *Izazaga,* at p. 407.) This includes materials compiled by investigators and other agents in preparation for trial. (*People v. Collie* (1981) 30 Cal.3d 43, 59 (*Collie*).)

California's work product protection exists to encourage attorneys to thoroughly prepare their cases for trial and to investigate the favorable and unfavorable aspects of their cases, as well as to prevent attorneys from "taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020, subds. (a) & (b).) " '[T]he work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.' " (*Collie, supra*, 30 Cal.3d at p. 59, quoting *United States v. Nobles* (1975) 422 U.S. 225, 238-239 (*Nobles*).)

We are tasked with determining whether the work product privilege remains absolute when a court has an obligation to evaluate the intent of the prosecution, and the written mental impressions themselves may reveal an effort to unlawfully exclude prospective jurors based on race or gender. *Foster, supra,* 136 S.Ct. 1737 is instructive on this point.

In *Foster,* the United States Supreme Court considered a *Batson/Wheeler* challenge based on jury selection notes collected by defense counsel through the Georgia Open Records Act. (*Foster, supra,* 136 S.Ct. at p. 1743.) This evidence included copies

of the venire list with highlights and notes that identified prospective African-American jurors; a draft affidavit that referenced a statement by prosecution investigator that referenced who to select if they "had to pick a black juror"; handwritten notes on three of the African-American prospective jurors, identifying them as "B # 1," "B # 2," and "B # 3"; and a typed list of the qualified jurors remaining after voir dire with the letter "N" next to 10 jurors' names, including all the qualified African-American jurors, to signify whom to strike. (*Id.* at p. 1744.) In offering its race-neutral explanations, the prosecutor referenced the voir dire notes, explaining that they had " 'listed' " one of the African-American jurors as " 'questionable,' " when they had not; the juror's name had been included among the prosecution's list of jurors to exclude. (*Id.* at pp. 1749-1750.) The court noted that "[t]he contents of the prosecution's file . . . plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." (*Id.* at p. 1755.)

Although *Foster* does not address whether the jury selection notes were protected work product, it makes clear the information contained within those notes is relevant to a determination of a prosecutor's credibility and genuineness. (*Foster, supra,* 136 S.Ct. at pp. 1743, 1755.) Thus, it is an example of the evidence of intent that a court should consider during the third stage of the *Batson/Wheeler* hearing. (*Id.* at p. 1748.)

Here there is no dispute that the prosecution's jury selection notes likely contain the prosecution's impressions, conclusion, or opinions; this is the reason Jones seeks their disclosure. It is less clear whether those notes will reveal impressions, conclusions, or opinions about the legal theory of the case. Jones contends the thoughts and impressions regarding prospective jurors are not germane to trial strategy.

We agree there is a difference between a prosecutor's thoughts and opinions about the quality of the legal case or trial strategy and the thoughts and opinions about the adequacy of prospective jurors. The second step of the *Batson/Wheeler* hearing requires the prosecutor to disclose his or her thinking regarding the prospective jurors by offering a race- or gender-neutral justification for exercising the challenged peremptory strikes. (*Lenix, supra,* 44 Cal.4th at pp. 612-613.) Moreover, the purpose of the third step is to evaluate the prosecutor's reasoning. (See *People v. Winbush* (2017) 2 Cal.5th 402, 434 (*Winbush*); *People v. Gutierrez* (2017) 2 Cal. 5th 1150, 1158 (*Gutierrez*) [focus is on subjective genuineness of prosecutor's reasons].) This is inconsistent with the notion that circumstantial evidence of those thoughts is absolutely protected.

The district attorney's reliance on *Hickman v. Taylor* (1947) 329 U.S. 495 (*Hickman*) does not persuade us otherwise. In *Hickman,* a tug boat company and its underwriters hired an attorney to defend against claims from a boating accident. (*Id.* at p. 498.) The attorney documented his interviews of survivors and refused to turn over the notes when ordered to do so. (*Id.* at pp. 499-500.) The United States Supreme Court, relying on federal work product doctrine, explained: "[W]ritten statements, private memoranda and personal recollections prepared for or formed by an adverse party's counsel in the course of his legal duties. . . . fall[ ] outside the arena of discovery and contravene[ ] the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." (*Id.* at p. 510.) Thus, "the general policy against invading the privacy of an attorney's course of preparation"

requires the party seeking to invade it "to establish adequate reasons to justify production . . . ." (*Id.* at p. 512.)

The California Supreme Court has similarly held in the civil context that a witness statement is protected from disclosure as long as the attorney's impressions, conclusions, opinions, or legal research are inextricably intertwined with the witness statements, either because there are explicit comments stating those impressions or because the line of inquiry reveals the theory of the case.[4] (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 495 (*Coito*).)

However, neither *Hickman, supra,* 329 U.S. 495 nor *Coito, supra,* 54 Cal.4th 480 addresses the situation before us, which does not pertain to witness statements and instead focuses on the conflict between protecting an attorney's mental impressions and ensuring the attorney's jury selection decisions are not based on discriminatory intent. Here, constitutional concerns are at odds with the alleged statutory protections of an attorney's work product; "[t]he 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.' " (*Foster, supra,* 136 S.Ct. at p. 1747, quoting *Snyder, supra,* 552 U.S. at p. 478.) "The jury is to be 'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." ' [Citations.] Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's

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4 In *Coito*, the Supreme Court directs trial courts, "[u]pon an adequate showing," to "determine, by making an in camera inspection if necessary, whether absolute work product protection applies to some or all of the material." (*Coito, supra,* 54 Cal.4th at p. 496.)

role as 'a vital check against the wrongful exercise of power by the State.' " (*Pena-Rodriguez v. Colorado* (2017) 137 S.Ct. 855, 868.) Given the unique context of the situation and the importance of avoiding discrimination in jury selection, we cannot conclude the trial court abused its discretion.

D

Waiver of Work Product Protection

Jones contends he was entitled to the notes at the time of trial because the prosecutor waived the claim of privilege by referencing details from his jury selection notes during the *Batson/Wheeler* hearing. The district attorney argues there was no waiver of privilege because the prosecutor was not a witness when referencing the jury selection notes. We agree with Jones. Even assuming the jury selection notes are undiscoverable core work product, the prosecution's reference to their contents waived the protection.

The only recognized exception to the absolute protection of core work product is the waiver doctrine. (*Wellpoint Health Networks v. Superior Court* (1997) 59 Cal.App.4th 110, 120.) The core work product privilege is waived when a witness testifies as to the work product's content. (See *Nobles, supra,* 422 U.S. at p. 239 [investigator who testified waived privilege as to any matters about which he testified].) Additionally, Evidence Code section 771 requires the production of a writing used to refresh a witness's memory while testifying if requested by the adverse party. (Evid. Code, § 771, subd. (a).) The adverse party may cross-examine the witness concerning the

writing and introduce portions of it that are pertinent to the testimony. (Evid. Code, § 771, subd. (b).)

The district attorney encourages us to adopt the definition of "witness" from the Code of Civil Procedure in conducting our analysis. The Code of Civil Procedure defines a "witness" as "a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." (Code Civ. Proc., § 1878.) However, the issue before us is a discovery matter that regards criminal law. Other, arguably more relevant code sections also offer definitions for "witness."

The Penal Code defines "witness" as a natural person who has knowledge of the existence or nonexistence of facts related to the crime, has submitted a declaration under oath, has reported a crime, has been served with a subpoena, or who others would perceive to fit one of the aforementioned categories. (§ 136, subd. (2).) The Evidence Code, which is "to be liberally construed with a view to effecting its objects and promoting justice" (Evid. Code, § 2), does not independently define "witness." However, in the definition of the term " 'unavailable as a witness,' " it treats the word "witness" as synonymous with "declarant." (Evid. Code, § 240.) It defines a "declarant" as a "person who makes a statement." (Evid. Code, § 135.) These definitions are broader than the one offered by the district attorney and suggest more flexibility in who constitutes a witness in a criminal matter.

In a *Batson/Wheeler* hearing, resolution of the issues depends entirely on the reasons the prosecutor provides for exercising a peremptory challenge. Moreover, the

prosecutor is the only source of information regarding his motivations, other than the jury selection notes. Thus, in this context, the prosecutor effectively serves as a witness as the term is used in Evidence Code section 771. (See also § 136, subd. (2) [witness includes natural persons others would perceive to be a witness]; Evid. Code, §§ 135, 140 [witness is a person who makes a statement].) Moreover, when the prosecutor references jury selection notes to refresh his recollection and offers details from those notes, he waives any work product protection. (See Evid. Code, § 771.)

Here, the prosecutor referenced details from the jury selection notes throughout the *Batson/Wheeler* hearing. He explained the prosecution had numerically evaluated jurors based on their questionnaires, and he shared the specific numeric ratings with the court, in addition to other details and observations regarding the challenged prospective jurors. These references to the jury selection notes waived any work product privilege.

Additionally, while we generally defer to the trial court's factual findings regarding the credibility of a prosecutor's stated rationale (*Winbush, supra,* 2 Cal.5th at p. 434; see *Gutierrez, supra,* 2 Cal.5th at p. 1159), here the court made no finding regarding the gender and gender-and-race-based claims the defense is considering as part of the habeas petition. Thus, justice is best served by allowing Jones to view the jury selection notes.

Finally, we are not persuaded by the district attorney's argument that the prosecutor could not have waived the work product privilege because he was not under oath and therefore was not a witness. Although the prosecutor was not under oath, "[a]n attorney is an officer of the court, and in presenting matters to the court may employ only

such means as are consistent with the truth[ ] and may not mislead the court in any fashion." (*Bellm v. Ballia* (1984) 150 Cal.App.3d 1036, 1039; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 98-99; Bus. & Prof. Code, § 6068, subd. (d); Rules of Prof. Conduct, Rule 5-200.[5]) This obligation requires an attorney to render a candid disclosure. In a *Batson/Wheeler* hearing, the prosecutor—whose credibility and genuineness will be assessed by the trial court—is expected to testify honestly regarding his rationale for exercising a peremptory challenge.

Thus, we conclude that when a prosecutor relies on jury selection notes to refresh his recollection and shares the details of jury selection notes with the court during a *Batson/Wheeler* hearing, upon request, the defense is entitled to review those notes. Accordingly, the court did not abuse its discretion in determining Jones was entitled to the jury selection notes pursuant to section 1054.9. (See *Steele, supra,* 32 Cal.4th at pp. 693, 695-696.)

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5 Rule 5-200 of the Rules of Professional Conduct provides in relevant part: "In presenting a matter to a tribunal, a member: [¶] (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth; [¶] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."

Business and Professions Code section 6068 provides in relevant part: "It is the duty of an attorney to do all of the following: [¶] . . . [¶] (b) To maintain the respect due to the courts of justice and judicial officers. [¶] . . . [¶] (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or judicial officer by an artifice or false statement of fact or law."

DISPOSITION

The petition for writ of mandate and/or prohibition is denied.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

AARON, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office

WITNESS, my hand and the Seal of this Court

04/09/2019

KEVIN J. LANE, CLERK

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Supreme Court of California

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Case Number: **TEMP-XSJZERO7**
Lower Court Case Number:

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San Diego Superior Court Division Additional Service Recipients	appeals.central@sdcourt.ca.gov	e-Service	5/16/2019 11:28:18 AM
Shelley Sandusky Additional Service Recipients	ssandusky@hcrc.ca.gov	e-Service	5/16/2019 11:28:18 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

5/16/2019
Date

/s/Samantha Begovich
Signature

Begovich, Samantha (172225)

Last Name, First Name (PNum)

San Diego County District Attorney

Law Firm