IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent. BRYAN MAURICE JONES, Real Party in Interest.	Case No. 255826 **CAPITAL CASE** Appeal from the Court of Appeal, Fourth District, Division One, No. D074028 San Diego County Superior Court Case No. CR136371, Honorable Joan P. Weber, Judge Related to Habeas Corpus Case No. S217284 and Automatic Appeal Case No. S042346 [closed])

REAL PARTY IN INTEREST'S ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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

Real Party in Interest Bryan Maurice Jones (Mr. Jones) hereby submits his Answer to Brief of Amicus Curiae, the California District Attorneys Association (CDAA), filed on March 12, 2020.

INTRODUCTION

Respondent Court properly found, in light of the trial record of *Batson* proceedings before it, that Mr. Jones was entitled to discovery of the prosecutor's jury selection notes in accordance with Penal Code section 1054.9. The record of the *Batson* proceedings that Respondent Court examined before issuing its ruling contains evidence of the prosecutor's discriminatory intent, upon which the Court relied at trial to find a prima facie *Batson*[1] violation that the prosecutor discriminatorily exercised peremptory challenges. The record shows that the prosecutor refreshed his recollection by, and invoked the contents of, his notes in proffering race-neutral reasons at step two. Respondent Court relied on this record to conclude that discovery of the notes would have been appropriate had Mr. Jones's counsel requested it at the time of trial. Respondent Court thus acted within its discretion in ordering the sought discovery.

The record Respondent Court considered demonstrated numerous indicators that the Supreme Court as well as other courts have considered as red flags for potential prosecutorial bias. First, the record shows the prosecutor's hyper-focus on the race of prospective jurors, and possible strategic acceptance of

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79. Mr. Jones outlined the familiar framework for evaluating a *Batson* claim in his Answer Brief on the Merits. (Answer Brief at 22.) The claims raised at trial and those pending before this Court on habeas also invoke state constitutional grounds as identified in *People v. Wheeler* (1978) 22 Cal.3d 258.

some African-American prospective jurors to insulate him from criticism for rejecting other prospective jurors on the basis of race. (See *Foster v. Chatman* (2016) __ U.S. __ [136 S.Ct. 1737, 1755] [finding evidence of prosecutor focus on race underscores that race was a factor in jury selection]; *Miller-El v. Dretke* (2005) 545 U.S. 231, 250 [noting state may accept some Black jurors to obscure discriminatory pattern].) The first words the prosecutor uttered in response to Mr. Jones's initial *Batson* challenge revealed this possible strategy:

> The record should indicate that I passed leaving two Black men on the panel. . . . I don't think a prima facie case has been shown at this point, especially when I was willing to accept the panel as it was with the two Black men there.

(Ret. Ex.[2] at 9-10.)

Second, the prosecutor misrepresented his claimed lack of knowledge about the race of prospective jurors. (See *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252 [holding prosecutor's falsehoods at step two have "pretextual significance"].) Upon the Trial Court's finding of a prima facie *Batson* violation, the prosecutor claimed in his defense that he and two other members of his staff had evaluated the prospective jurors based on their questionnaires "without knowing what they look like." (Ret. Ex.

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[2] Mr. Jones uses "Ret. Ex." to refer to the exhibit filed in support of his Return Demonstrating that Petitioner Is Not Entitled to Relief and "Petn. Ex." to refer to those exhibits filed by the District Attorney in support of her Petition for Writ of Mandate before the Court of Appeal below.

at 11; see also Ret. Ex. at 22 [prosecutor asserts he challenged juror "before we even saw the jury in here"].) The prosecutor's assertion that he did not know the race of these struck jurors when reviewing the questionnaires was false – though the questionnaire did not affirmatively ask prospective jurors to identify their race, many jurors (including prosecutor-struck jurors Y.J., C.G., and C.Y.) volunteered this information in response to other questions about race relations and bias. (See 43 CT 8091 [C.G. questionnaire stating "I am African American"], 45 CT 8624 [Y.J. questionnaire identifying African American as "my race"], 48 CT 9249 [C.Y. states "being an African American myself . . ."], *People v. Jones*, No. S042346.)

Third, the prosecutor demonstrated racial stereotyping by invoking the race and gender of one member of his staff who helped him evaluate the juror questionnaires. (See *Castaneda v. Partida* (1977) 430 U.S. 482, 499 [finding "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group"].) The prosecutor defended his strikes by reporting that his co-worker was:

> a two-time minority; female from a minority racial group

(Ret. Ex. at 11), as though by virtue of her race and gender, strikes he made with her input should be beyond scrutiny. (See Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. at 28-30.)

Fourth, the prosecutor proffered inherently-suspect laundry

lists of race-neutral reasons for his strikes. (Ret. Ex. at 11-14, 23-25; see *Foster v. Chatman*, *supra*, 136 S.Ct. at pp. 1748-1749, 1751 [reviewing prosecutor's laundry list of reasons for strikes with skepticism]; *Johnson v. Finn* (9th Cir. 2011) 665 F.3d 1063, 1075, fn. 6 [finding prosecutor's credibility impaired by reliance on laundry list of reasons for strikes]; *People v. Armstrong* (2019) 6 Cal.5th 735, 804-805 [finding in some instances prosecutor's use of a laundry list may "fatally impair the prosecutor's credibility"]; *People v. Smith* (2018) 4 Cal.5th 1134, 1157 [noting "significant danger" that prosecutor's use of "laundry list approach" will prevent trial courts from identifying invidious discrimination].)

Separately and together, these facts support the Trial Court's finding that the prosecutor's strikes evidenced a pattern of discrimination. The prosecutor responded to the Trial Court's finding of a prima facie case of discrimination by both reviewing the contents of his notes to refresh his recollection *and* claiming that the notes' contents bolstered his rationales. Based on this record, Respondent Court properly determined that the Trial Court would have ordered discovery of the notes at trial had counsel so requested.

Amicus defers to the District Attorney's brief regarding Respondent Court's determination that the prosecutor in Mr. Jones's case waived any applicable statutory protections by resorting to his notes during the *Batson* hearings. (Amicus Brief at 12 & fn. 1.) In the gulf created by its omission of the question of waiver, Amicus urges this court to apply a blanket work-

product protection to these notes as a matter of law, regardless of whether the prosecution meets its burden to specifically demonstrate that this protection should apply. Yet Amicus fails to provide any authority showing wholesale discovery immunity on work-product grounds is proper or has ever been accorded to any category of materials by this Court, and does not show why jury selection notes – routinely tenuously if at all connected to the prosecutor's case strategy – are worthy of this novel categorical protection. Instead, Amicus's arguments bolster Mr. Jones's position that jury selection notes do not ordinarily contain core work product.

Amicus advances other novel arguments throughout its briefing that defy statutory and precedential authority. First, Amicus's argument that a statutory protection can supplant constitutional requirements merely by describing the protection as absolute ignores established law requiring statutory protections to yield where a constitutional right is threatened. Amicus next crafts a proposed rule for jury-selection-note discovery that is virtually indistinguishable from the qualified work-product rule, notwithstanding that this qualified protection is inapplicable in criminal proceedings. Finally, Amicus proffers that trial courts must always conduct in camera review of jury selection notes, even where the prosecution has not demonstrated that such protections apply to any portion of the notes at issue. Amicus's arguments are not in accordance with statutory law or this Court's precedent and should be rejected.

ARGUMENT

I. A TRIAL COURT'S FINDING THAT A PROSECUTOR'S NOTES ARE RELEVANT TO A PARTICULAR *BATSON* PROCEEDING CONSTITUTIONALLY MANDATES COURT REVIEW AND/OR DISCLOSURE TO THE DEFENSE.

Trial courts "experienced with supervising *voir dire*," are tasked by *Batson* with "undertak[ing] a 'factual inquiry' that 'takes into account all possible explanatory factors' in a particular case," and must develop rules to implement *Batson*'s mandate. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 95, 97, citing *Alexander v. Louisiana* (1972) 405 U.S. 625, 630; see also *Powers v. Ohio* (1991) 499 U.S. 400, 416.) The trial court bears the responsibility to determine both the prosecutor's[3] credibility and the actual reasons for his strikes. (*Batson v. Kentucky*, *supra*, at pp. 96, 98, fn. 21; see also *Snyder v. Louisiana* (2008) 552 U.S. 472, 477 [noting trial court's "pivotal role in evaluating *Batson* claims"];

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[3] Amicus argues that any ruling by this Court that work-product protections must yield in the face of a *Batson* claim would apply equally to both civil attorneys and criminal defense attorneys. (Amicus Brief at 13, fn. 2.) Amicus is incorrect. Criminal defense attorneys operate under protections afforded by both the work-product rule and the attorney-client privilege, which may implicate constitutional protections as well. (E.g., *Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665, 682 [noting Sixth Amendment implications of attorney-client privilege]; *Clutchette v. Rushen* (9th Cir. 1985) 770 F.2d 1469, 1471 [same].) Whether and to what extent the disclosure of defense counsel's jury selection notes may implicate constitutional protections is outside the scope of the issues presently before this Court.

Tolbert v. Page (9th Cir. 1999) 182 F.3d 677, 684 [recognizing deference to trial court is appropriate as "[e]very *Batson* inquiry will have nuances and differences that essentially dictate the results of the case"]; *People v. Scott* (2015) 61 Cal.4th 363, 384, 388 [describing suggestions rather than mandates as to the scope of evidence trial courts may consider during *Batson* hearing].) Respondent Court's determination of the tools necessary to evaluate the prosecutor's proffered race-neutral reasons comports with the discretion afforded to lower courts under *Batson*. Amicus's argument that a defendant's constitutional rights under *Batson* should fade into the background because core work product receives absolute (rather than qualified) statutory protection (see Amicus Brief at 22-27), ignores existing case law. Because Respondent Court found that the prosecutor's jury selection notes were particularly relevant to the *Batson* inquiry in Mr. Jones's case, it properly ordered discovery of those notes, regardless of any applicable statutory protection.

A. Respondent Court's finding that the prosecutor's notes are relevant to the *Batson* inquiry in Mr. Jones's case overrides any statutory protections – qualified or absolute – shielding the notes from disclosure.

Respondent Court below examined the record of the *Batson* hearings held prior to Mr. Jones's capital trial. Based upon its review of that record – which demonstrated that the prosecutor relied on his notes at *Batson* step two to remind him of the reasons for his strikes, and to attempt to bolster the credibility of

his proffered race-neutral reasons with evidence that his notes contained "some kind of rating system for jurors" – Respondent Court determined that Mr. Jones was entitled to discovery of these notes. (Petn. Ex. at 46.) The lower court found discovery was proper because the prosecutor's notes were potentially "very enlightening as to whether there was a racial basis for the exclusion of certain jurors from the venire." (Petn. Ex. at 46.) "[I]f there are specific notes taken by [the prosecutor] that could impeach what he said on the record," Respondent Court noted, "[H]ow 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?" (Petn. Ex. at 48.) Under these circumstances, Respondent Court declined to turn a blind eye to relevant evidence of the actual reasons for the prosecutor's strikes.

Where a trial court, like Respondent Court below, determines that the prosecutor's notes are of particular relevance to its *Batson* inquiry, applicable statutory protections must give way. At *Batson* step three, the trial court has found a prima facie case of invidious discrimination. Coupled with the prosecutor's reliance on and invocation of his notes in response to the prima facie finding, the notes become of particular relevance to the trial court's efforts to resolve the *Batson* query. This relevance is of constitutional magnitude – the notes are the best evidence of whether the prosecutor's proffered race-neutral reasons are the actual reasons for the strikes. Applicable statutory protections cannot shield the notes from disclosure where the constitutional

protections against invidious discrimination are threatened.

Supreme Court case law demonstrates that statutory protections must be pierced where they impede an individual's ability to exercise a constitutional right. (E.g., *Pena-Rodriguez v. Colorado* (2017) __ U.S. __ [137 S.Ct. 855, 869] [finding where juror states he considered racial stereotypes "cast[ing] serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" no-impeachment rule must "give way"]; *Davis v. Alaska* (1974) 415 U.S. 308, 317-319 [finding evidence demonstrating bias of key witness must be admitted despite state interest in protecting anonymity of juvenile offenders].) This imperative compels disclosure of attorney impressions if necessary to protect an individual's exercise of constitutional rights, even where work-product protections may ordinarily apply. (*Holmgren v. State Farm Mut. Auto. Ins. Co.* (1992) 976 F.2d 573, 577 [finding "opinion work product may be discovered and admitted when mental impressions are *at issue* in a case and the need for the material is compelling"], italics original; *Doubleday v. Ruh* (E.D.Cal. 1993) 149 F.R.D. 601, 608 ["where an attorney's mental impressions are at issue and there is a compelling need for the material," the work-product doctrine must yield to the need for discovery].)

Amicus attempts to recast this constitutional mandate as a question of absolute versus qualified protections by claiming that various holdings would have resolved differently had the statutory protections at issue been absolute. This is not so. Each of the cases Amicus cites turn not on the absolute versus

qualified nature of the protection, but on its statutory (rather than constitutional) origins. (E.g., Amicus Brief at p. 27, citing *United States v. Edwards* (E.D.N.C. 2011) 777 F.Supp.2d 985, 995 ["This is because *Brady* is a constitutional right that overrides statutorily created work-product privilege"]; *United States v. Goldman* (S.D.N.Y. 1977) 439 F.Supp. 337, 350 [holding evidence must be disclosed where it is material in accordance with *Brady*, regardless of statutory protections]; *Castleberry v. Crisp* (N.D.Okla. 1976) 414 F.Supp. 945, 953 ["the 'work product' discovery rules cannot, of course, be applied in a manner which derogates a defendant's constitutional rights"]; *Bunch v. State* (Ind. 2012) 964 N.E.2d 274, 301 ["[T]he defendant's right to fundamental due process outweighs the State's interest in nondisclosure"], citing *Sewell v. State* (Ind.Ct.App. 1992) 592 N.E.2d 705, 707, fn. 4; *Ex Parte Miles* (Tex.Crim.App. 2012) 359 S.W.3d 647, 670 [finding due process clause mandates that "the trial court must permit discovery if 'the evidence sought is material to the [d]efense of the accused'"], citing Tex. Code Crim. Proc. art. 39.14, alteration in the original; *Waldrip v. Head* (Ga. 2005) 620 S.E.2d 829, 832 ["much of a prosecutor's work product will not fit the definition of exculpatory evidence subject to disclosure under *Brady*, but were the work product doctrine and the constitutional right to exculpatory evidence to be in conflict, the former obviously would have to yield to the latter"].)

The solitary footnote in *Washington v. Texas* (1967) 388 U.S. 14, cited by Amicus (see Amicus Brief at 23), similarly does not demonstrate that a statutory protection can trump the

vindication of a constitutional right. The *Washington* Court examined whether a Texas statute prohibiting accomplice testimony on behalf of the accused violated a defendant's Sixth Amendment right to compulsory process. The Court found that this accomplice disqualification rule was "absurd[]" and "arbitrar[y]" and expounded at length as to the ways in which this rule defied common sense. (*Washington*, *supra*, at pp. 22-23.) The footnote Amicus cites, which occurs within the Court's denigration of Texas's rule, merely reaffirms that the Court is not similarly disparaging other testimonial privileges. The Court is not suggesting, as Amicus claims, that any of these privileges (the list of which, notably, *does not include the work-product protection*) should be favored over a defendant's constitutional rights. (See also *United States v. Scheffer* (1998) 523 U.S. 303, 316 [characterizing *Washington v. Texas*, *supra*, at pp. 16-17, as focusing on the arbitrariness of the state statute in the face of a defendant's constitutional rights].)

Amicus's heavy reliance on dicta in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 (see Amicus Brief at 22-23) does not alter this analysis. The *Ritchie* Court recognized that a statutory protection for youth services records could not "prevent[] disclosure in all circumstances," but noted that "[t]his is not a case where a state statute grants [an agency] the absolute authority to shield its files from all eyes." (*Ritchie*, *supra*, at p. 57.) But the court's forbearance from expressing an opinion on a matter not before it – whether it might rule differently were the statutory protection at issue made absolute – is an exercise of

judicial restraint, not an affirmation that its opinion *would be* different under such an inquiry. (See *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 450 [noting "fundamental principle of judicial restraint" requires that courts not "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'"], citing *Ashwander v. TVA* (1936) 297 U.S. 288, 346-347 (conc. opn. of Brandeis, J.), citing in turn *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration* (1885) 113 U.S. 33, 39.) Furthermore, *Ritchie* applied a *Brady*-materiality analysis to the undisclosed evidence – an analysis that turns on whether the material evidence at issue was in possession of the prosecution or law enforcement. (*Pennsylvania v. Ritchie*, *supra*, at p. 57, citing *Brady v. Maryland* (1963) 373 U.S. 83, 87 [holding "suppression *by the prosecution* of evidence favorable to an accused upon request violates due process"], italics added.) The Court's citation to *Brady* indicates that the language Amicus cites is more appropriately interpreted as the Court's abstention from contemplating a scenario where neither law enforcement nor the prosecution have access to the files at issue due to an absolute statutory protection. (*Ritchie*, *supra*, at p. 57, fn. 14 ["We express no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to *anyone*, including law-enforcement and judicial personnel"]; see also *People v. Webb* (1993) 6 Cal.4th 494, 518 [citing *Ritchie* and finding no violation where "[t]he records [at issue] were not generated or obtained by the People in the course

of a criminal investigation, and the People have had no greater access to them than defendant"].) *Ritchie* thus does not stand for the illogical proposition that a statutory protection can ever supplant a constitutional right.

Amicus's reliance on this Court's opinion in *People v. Hammon* (1997) 15 Cal.4th 1117, 1127 (see Amicus Brief at 26-27), is even more inapt. *Hammon* instead supports Respondent Court's decision, by demonstrating that when a trial court finds particular materials relevant to an inquiry of constitutional magnitude, this relevancy determination weighs *in favor of disclosure*. The *Hammon* Court found an insufficient constitutional basis to compel disclosure of an alleged victim's psychotherapy records prior to trial. (*Hammon*, at pp. 1126-1127.) In this pre-trial posture, the trial court did not have sufficient information to determine whether the defendant's constitutional rights would be infringed were he not given access to the alleged victim's records. With this paucity of information about whether the records would be relevant to the alleged victim's credibility at trial, there was no showing that the defendant's due process rights were being threatened. Disclosure under those circumstances presented a grave risk that the alleged victim's privacy would be "unnecessarily" invaded. (*Ibid.*) *Hammon* demonstrates that the constitutional question – that is, whether the statutory protection must yield to protect a constitutional right – does not come into existence until there are sufficient indications that continued application of statutory protections is likely to impede the vindication of a constitutional

right. By contrast, Respondent Court below had sufficient facts to determine the relevancy of the prosecutor's notes to the *Batson* proceedings and recognized the necessity of disclosure to protect Mr. Jones's rights.

This Court's decision in *Hammon* highlights yet another distinction between the records at issue in *Ritchie* and *Hammon* as compared to those awarded in discovery in the instant case. Both *Ritchie* and *Hammon* examined discovery requests implicating a third party's privacy rights. (*Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 43 [reviewing defendant's discovery request for Children and Youth Service records of child victim]; *People v. Hammon*, *supra*, 15 Cal.4th at p. 1122 [examining defendant's subpoena of victim psychological records].) However, where *Ritchie* examined discovery requested from the prosecution, the defendant in *Hammon* subpoenaed records from the third party whose privacy interests were at stake. (*Id.* at p. 1120.) *Hammon* affirmed the trial court's discovery denial because the victim had both a statutory protection and a *constitutional privilege* shielding the psychological records from disclosure. (*Id.* at p. 1127-1128; see also *People v. Stritzinger* (1983) 34 Cal.3d 505, 511 ["The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy."].) By contrast, the District Attorney does not have a constitutionally-protected right to privacy like that at issue in *Hammon*. (See *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 122-123, abrogated on other grounds by *People v. Holloway* (2004) 33 Cal.4th 96, 131.) Where a statutory

protection is the sole consideration weighed against a defendant's need for withheld information to vindicate a constitutional right, the balance is clear – the information must be disclosed.

Amicus's citations are also at odds with this Court's commitment to ensuring that protections against invidious discrimination in jury selection "not be reduced to a hollow form of words, but remain a vital and effective safeguard of the liberties of California citizens."[4] (*People v. Wheeler, supra*, 22 Cal.3d at p. 272.) In *People v. Lenix* (2008) 44 Cal.4th 602, 623, this Court overruled its prior decisional law that had foreclosed consideration of comparative juror analysis where first presented on direct appeal. *Lenix* recognizes that, regardless of precedent, courts cannot ignore key evidence of prosecutorial intent because *Batson* requires that *"all* of the circumstances that bear upon the issue of racial animosity *must* be consulted." (*Id.* at p. 622, citing *Snyder v. Louisiana*, *supra*, 552 U.S. at p. 478, italics original.) This Court has similarly rejected the precedent upon which Amicus's cited opinions turn, finding that ordinarily permitting the prosecutor to proceed ex parte at step two is contrary to the goals of *Batson* and the defendant's rights described therein. (Compare Amicus Brief at 15-16, citing *People v. Trujillo* (Colo.App. 2000) 15 P.3d 1104, 1107, and *People v. Freeman* (Ill.App. 1991) 581 N.E.2d 293, 297, both citing at length *People*

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[4] Most recently, this Court acted "to better ensure that juries represent a cross-section of their communities" and fulfill *Batson*'s mandate by forming the California Jury Selection Work Group. (Press Release, California Supreme Court (Jan. 29, 2020) *Supreme Court Announces Jury Selection Work Group*.)

v. Mack (Ill. 1989) 538 N.E.2d 1107, citing in turn *United States v. Tucker* (7th Cir. 1988) 836 F.2d 334, 338-340 with *People v. Ayala* (2000) 24 Cal.4th 243, 262 [rejecting as "poor procedure" the ex parte *Batson* proceedings permitted in *United States v. Tucker*, *supra*, at p. 340].) Affirming the trial court's discretion to consider existing relevant evidence – namely the prosecutor's jury selection notes – that is likely to elucidate the bona fides of a prosecutor's proffered race-neutral reasons for striking prospective jurors of protected classes furthers this Court's duty under *Batson* to ensure that all relevant circumstances are considered in determining whether invidious discrimination occurred during jury selection. (See, e.g., *Flowers v. Mississippi* (2019) __ U.S. __ [139 S.Ct. 2228, 2248] [finding "[a] court confronting [historical pattern of discrimination] cannot ignore it"]; *Foster v. Chatman*, *supra*, 136 S.Ct. at p. 1748 [finding "[d]espite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. We have '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'"], citing *Snyder v. Louisiana*, *supra*, at p. 478.)

B. Amicus's proposed rule would allow prosecutors to advance their notes when favorable and withhold them when they demonstrate invidious discriminatory intent.

The rule proposed by the District Attorney and seconded by Amicus suggests that courts may never compel the disclosure of

jury selection notes, even when the prosecutor invokes their contents to bolster his claim that his proffered race-neutral reasons are not pretextual. This rule would make the prosecutor rather than the court the arbiter of whether and when to disclose jury selection notes, allowing him to provide the notes when they support the bona fides of his proffered reasons, but shield the notes from disclosure when they would undercut his veracity. The Federal Court's analysis in *Crittenden* provides a telling example of how Amicus's "absolute-means-absolute" rule would play out in the *Batson* context. (*Crittenden v. Calderon* (E.D.Cal. Sept. 30, 2013, Civ. A. Nos. S-95-1957 & S-97-0602) 2013 WL 12338615.) In *Crittenden*, the prosecutor at step two asserted that, as demonstrated by his notes, he struck a prospective juror based on her views of the death penalty. (*Id.* at p. 9.) Were the prosecutor's jury selection notes beyond the reach of the court, the *Batson* query would end there. But the *Crittenden* Court had the benefit of comparative juror analysis using the prosecutor's notes, which indicated his failure to similarly score non-minority prospective jurors. Overall, the Court found, this analysis demonstrated that the prosecutor's strikes were "motivated in substantial part" by race. (*Id.* at p. 4.)

Other courts have similarly declined to allow the prosecutor to withhold jury selection notes in the face of a compelling need for such evidence at *Batson* step three. (E.g., *United States v. Houston*, (11th Cir. 2006) 456 F.3d 1328, 1337 [defense counsel permitted to examine prosecutor's notes in the midst of *Batson* challenge]; *United States v. Garrison* (4th Cir. 1988) 849 F.2d

103, 106-107 [counseling that ordinarily where court reviews prosecutor's jury selection notes, it should do so in adversarial rather than ex parte proceeding]; *Simmons v. Simpson* (W.D.Ky. Feb. 12, 2009, Civ. A. No. 07-CV-313-S) 2009 WL 4927679 [rejecting assertion of work-product protections and ordering discovery of prosecutor's voir dire notes]; *Johnson v. Finn* (E.D.Cal. Oct. 31, 2007, Civ. A. Nos. S-03-2063 & S-04-2208) 2007 WL 3232253, *2 [finding prosecutor's jury selection notes are only qualified work product and may be subject to discovery]; *Lisle v. McDaniel* (D.Nev. Nov. 8, 2006, Civ. A. No. 03-CV-1005) 2006 WL 3253488, *4 [same]; *Marshall v. Beard* (E.D.Pa. Aug. 27, 2004, Civ. A. No. 03-3308) 2004 WL 1925141, *5 [compelling disclosure of prosecutor voir dire notes after prima facie *Batson* challenge made]; *State v. Gates* (Ga. 2020) __ S.E.2d __ [2020 WL 1227513, *7] [noting trial court "ordered the district attorney's office to locate and produce [] all of its materials and information concerning jury selection in [petitioner's] trial and six other capital cases," including voir dire notes]; *Hall v. Madison* (Ga. 1993) 428 S.E.2d 345, 346 [finding petitioner retains right to obtain prosecutor's voir dire notes in postconviction discovery]; *State v. Ornelas* (Idaho 2015) 360 P.3d 1075, 1077 [finding where defense demonstrates prima facie *Batson* violation, prosecutor's notes are relevant evidence]; *Commonwealth v. Dennis* (Pa. 2004) 859 A.2d 1270, 1278 [noting importance of work-product protections, but finding paramount "the right of a defendant to discovery of a prosecutor's pre-trial and trial notes, in order to establish a claim of misconduct"]; *Salazar v. State*

(Tex.Crim.App. 1990) 795 S.W.2d 187, 192-193 [finding disclosure of notes proper where prosecutor looked at notes during *Batson* hearing and where notes necessary to conduct comparative juror analysis]; see also *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1105, fn. 16 [noting that although prosecutor's notes no longer existed, such notes "are likely to reveal actual concerns the prosecutor had at trial. Prosecutors who do not retain notes from voir dire run the risk that . . . they will not be able to produce circumstantial evidence of their actual reasons for exercising a strike"]; accord *Harris v. Haeberlin* (W.D.Ky. June 30, 2009 Civ. A. No. 03-CV-P754) 2009 WL 1883934, *7.) Amicus's assertion that the prosecutor may assert the contents of his notes to bolster his proffered reasons at step two and the court should conduct no further inquiry cannot be squared with the requirements of *Batson* and the Fourteenth Amendment rights of due process and equal protection.

II. AMICUS'S ARGUMENTS SUPPORT MR. JONES'S POSITION THAT JURY SELECTION NOTES DO NOT ORDINARILY CONTAIN CORE WORK PRODUCT.

Most rationales a prosecutor offers at *Batson* step two (and concordantly the information most likely to be contained in his notes) are unlikely to "divulg[e] strategic information that defendant could use to his advantage at trial," and therefore this information is not subject to work-product protections. (*People v. Ayala*, *supra*, 24 Cal.4th at p. 261.) In a particular instance where disclosure of reasons at step two would "provide a window into the attorney's theory of the case or the attorney's evaluation

of what issues are most important," it is incumbent on the prosecutor to assert that a core work-product protection applies to this specific information. (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 495; *People v. Ayala*, *supra*, at pp. 263-264.) The District Attorney has not met this burden and instead repeatedly urged before each of the lower courts that core work-product protection should be applied wholesale to the prosecutor's notes. (E.g., Petn. Ex. at 46 ["I would just assert the core work product privilege"], 84 ["Such notes, if they exist, are core work product"]; Petn. for Writ of Mandate at 17 ["The prosecutor's jury selection notes are privileged"].)

Amicus attempts to bolster the District Attorney's sparse showing below by urging that jury selection notes should be protected from disclosure as a matter of law and attempts to divorce work-product protection from its moorings by arguing that Code of Civil Procedure section 2018.020, which identifies the "policy" behind the protection, does not "restrict[] the scope of the privilege." (Amicus Brief at 17.) It is hard to see what purpose defining the policy behind section 2018.020 could have were it not to instruct how and when the work-product protection should apply – a process that will necessarily limit the scope of the protection in some instances. Indeed, California courts determining whether to apply the work-product protection have relied on section 2018.020 in support of their decisions. (E.g., *Coito v. Superior Court*, *supra*, 54 Cal.4th at p. 499 [determining whether witness interview notes should receive core work-product protection in some instances in light of section 2018.020,

subdivision (a)]; *Jimenez v. Superior Court* (2019) 40 Cal.App.5th 824, 835 [determining whether qualified work-product protections may apply to post-order-to-show-cause habeas proceedings in light of section 2018.020, subdivision (b)]; *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 133 [finding section 2018.030 applies to pro per litigants as application furthers chief purpose of preventing "the stupid or lazy practitioner [from taking] undue advantage of his adversary's efforts"], citing Code Civ. Proc. § 2018, subd. (a),[5] and Pruitt, *Lawyers' Work Product* (1962) 37 State Bar J. 228, 235-236.) Thus, the lower court's reliance on section 2018.020 to determine whether the work-product protection should be applied as a matter of course to the prosecutor's jury selection notes was sound and in accord with existing law.

In contrast, the hypotheticals Amicus advances demonstrate the inadequacy of the prosecutor's pro forma work-product protection assertion. Amicus proffers examples of the types of things that *may* be contained within a prosecutor's jury selection notes that could be protected as core work-product. (See Amicus Brief at 15, 18.) The fact that the prosecutor's notes *may* contain assessments of "how particular jurors may respond or relate to the witnesses who will be testifying [or] how particular jurors may respond to the specific conduct underlying the specific crime . . . alleged" (Amicus Brief at 15) does not mean the notes *do* contain these assessments. Furthermore, Amicus's selection of

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[5] This section was later recodified as Code Civ. Proc. § 2018.020.

one or two types of things that may be contained within the notes does not convert the entirety of these notes into core work product – the prosecutor must still make a specific showing that the protection applies to the specific portion of the notes containing the core work product Amicus imagines. Amicus's claim that in certain instances a prosecutor may make a particular showing that some portion of his notes are entitled to core work-product protection does not support his contention that all jury selection notes constitute core work product.

Furthermore, Amicus concedes that a prosecutor may waive any applicable work-product protection by orally proffering rationales at *Batson* step two that include a window into case-specific strategies, particularly where the prosecutor invokes his notes as bolstering the bona fides of these proffered rationales. (See Amicus Brief at 20 [noting prosecutor's assertions at step two "may or may not constitute a waiver of the work product privilege as to written notes relating to the same reasons"].) As Amicus admits, both oral responses and writings are protected by the work-product rule; therefore, an oral disclosure at *Batson* step two may waive protections ordinarily applicable to the corresponding written notes. (See Amicus Brief at 14, citing *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1281.) But Amicus's assertion goes further than merely entitling a defendant to just the section of the prosecutor's notes from which he recites. The prosecutor's voluntary disclosure of some portion of the information contained within those notes is inconsistent with continued assertion of the work-product

protection and may constitute a waiver to the entirety of the notes. (See *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1033, citing *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 890-891; see also *Johnson v. California* (2005) 545 U.S. 162, 171, fn. 6 [outlining *Batson* framework in instances where prosecutor declines to proffer step-two reasons]; *Wilson v. City of Philadelphia* (E.D.Pa. March 26, 2014, Civ. A. No. 04-5396) 2014 WL 1244011, *3 [finding disclosure of step-two reasons is a waiver of any applicable work-product protections], citing *United States v. Nobles* (1975) 422 U.S. 225, 239, *United States v. Purcell* (E.D.Pa. 2009) 667 F.Supp.2d 498, 521, and *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.* (3d Cir. 1994) 32 F.3d 851, 863; *State v. Peterson* (Kan.App. 2018) 427 P.3d 1015 [2018 WL 4840468, *7] [same].) Under Amicus's analysis (wherein the work-product doctrine draws no distinction between written and oral information), the prosecutor's step-two proffer in Mr. Jones's case – particularly because he expressly spoke to the contents of his notes and relied on them as proof that the race-neutral reasons he claimed for his strikes were not pretextual – waived any protections applicable to those notes. A contrary rule would permit a prosecutor to shield from disclosure notes containing evidence of discriminatory intent and reward in-court prosecutorial fabrication of race-neutral reasons.

Amicus cites to cases from other states finding that a prosecutor's jury selection notes are protected work product. (Amicus Brief at 15-16, 19-20.) As Mr. Jones demonstrated in

response to many of the same citations in the District Attorney's Opening Brief, these cases merely demonstrate how other states apply their own statutory protections.[6] (Answer Brief at 46.) The bulk of these cases also concern work-product statutes that closely, if not verbatim, track the federal work-product rule. (Compare Ala. St. Rules Civ. Proc., rule, 26(b)(4), Fla. Rules Civ. Proc., rule 1.280(b)(3), Miss. Rules Civ. Proc., rule 26(3), Mo. Rules Civ. Proc., rule 56.01(b)(3), and Tex. Rules Civ. Proc., rule 192.5[7] with Fed. Rules Civ. Proc., rule 26.) Federal law (and these state law corollaries) adopts a work-product sliding scale that provides greater and lesser protections to attorney-created materials driven by the degree to which legal thought or case-related strategy would be revealed by disclosure.[8] (See *Hickman*

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[6] Moreover, none of these cases examine facts and circumstances like those at issue in Mr. Jones's case, wherein the prosecutor directly placed the contents of his notes at issue by refreshing his recollection from the notes and using their existence to bolster the credibility of his proffered race-neutral reasons at step two. (See Answer Brief at 32-34.)

[7] Amicus cites Texas case law for the proposition that jury selection notes should be classified as work product, but fails to disclose that the same case identifies the prosecutor as a witness in the course of a *Batson* hearing and requires disclosure of a prosecutor's notes when he refreshes his recollection from the notes prior to or in the course of the hearing. (See Amicus Brief at 12, fn. 1 [asserting the prosecutor is not a witness in the course of a *Batson* hearing], 16 [citing *Goode v. Shoukfeh* (Tex. 1997) 943 S.W.2d 441, 449, which finds that a party "has the right to examine the voir dire notes of the opponent's attorney when the attorney relies upon these notes while giving sworn or unsworn testimony in the [*Batson*] hearing"].)

[8] California has twice declined to adopt this sliding-scale work-product rule and instead divides work-product into either

v. Taylor (1947) 329 U.S. 495, 511-512.) "[A]s the work product of the attorney becomes less a matter of creative legal thought and more a mere recognition of observed fact, the work product becomes increasingly susceptible to discovery." (*Duplan Corp. v. Deering-Milliken* (D.S.C. 1974) 397 F.Supp. 1146, 1200.) Under this sliding scale, the cases Amicus cites do not distinguish between core and qualified work product and therefore do not, as Amicus contends, demonstrate that jury selection notes are per se core work product.

Significantly, in many of these cases the trial court conducted in camera review of the prosecutor's jury selection notes. (E.g., *People v. Mack*, *supra*, 538 N.E.2d at p. 1116; *People v. Freeman*, *supra* 581 N.E.2d at p. 297; *State v. Antwine* (1987) 743 S.W.2d 51, 67.) This demonstrates these courts' recognition that jury selection notes are not subject to blanket core work-product protections. Were such protections broadly applicable, the courts would have no need to examine the contents of the notes. Thus, the courts in these cases recognized that the notes they were reviewing contain what would be characterized under California law as a mix of core work product (to which absolute statutory protections may apply) and qualified work product (discoverable upon a good cause showing). As qualified work-product protections do not apply in California criminal proceedings, the cases Amicus cites instead demonstrate that at least some portion of the prosecutor's jury selection notes, which

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core or qualified material. (Code Civ. Proc § 2018.030; *Coito v. Superior Court*, *supra*, 54 Cal.4th at pp. 490-492.)

would be classified as qualified work product were such a rule applicable, does not receive any statutory protection in criminal proceedings and should ordinarily be disclosed where relevant to a *Batson* inquiry. (See Pen. Code § 1054.6; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 381-382 & fn.19.)

III. BOTH RESPONDENT COURT AND THE COURT OF APPEAL PROPERLY BASED THEIR DECISIONS ON EXISTING LAW AND THE *BATSON* FRAMEWORK.

The existing *Batson* framework sufficiently guides a trial court's determination of when jury selection note discovery may be appropriate. Only after the trial court determines at step one that the defendant has shown "facts and any other relevant circumstances . . . rais[ing] an inference" that the prosecutor exercised his strikes on the basis of race, and the prosecutor has proffered race-neutral reasons at step two, should the trial court determine whether access to notes at step three is necessary. (See *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97.) The finding of a prima facie *Batson* violation and the prosecutor's reliance on and invocation of the contents of his notes at step two[9] is a sufficient factual pattern within which Respondent Court properly exercised its discretion to grant discovery.

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[9] Mr. Jones demonstrated in detail in his Answer Brief that *Batson* requires a trial court to examine "all relevant circumstances" at step three and that the prosecutor's notes in this case became relevant when he relied on and invoked the existence of his notes at step two; Mr. Jones incorporates those arguments as though raised fully herein. (See Answer Brief at 22-38.)

Both Amicus and Mr. Jones agree that the *Armstrong* "some evidence" standard should apply to discovery requests seeking information relevant to a potential equal protection violation – a standard met by the prima facie *Batson* claims made at Mr. Jones's trial. (See *United States v. Armstrong* (1996) 517 U.S. 456, 469.) The *Armstrong* Court found that a defendant is entitled to discovery of evidence in support of his equal protection claim where he provides "some evidence tending to show the existence" of discrimination. (*Ibid.*) *Armstrong* recognized that in the context of *Batson*, where the trial court witnesses the complained-of prosecutor actions in the course of jury selection, the defendant's prima facie showing at step one meets this "some evidence" requirement and thereby appropriately limits when discovery is available in support of an equal protection violation claim. (See *id.* at pp. 467-468.)

The District Attorney claims, contrary to her Amicus, that *Armstrong* requires a "clear evidence" standard. (Reply Brief at 11, citing *United States v. Armstrong*, *supra*, 517 U.S. at p. 464.) But the language the District Attorney cites is the standard for proving entitlement to relief on a claim of discriminatory prosecution, not that for obtaining discovery in furtherance of such a claim. (Compare *United States v. Armstrong*, *supra*, at p. 464 [finding petitioner must provide "clear evidence" prosecutor has not "properly discharged their official duties" in order to demonstrate discriminatory charging] with *id.* at pp. 468-470 [applying "some evidence" standard to request for discovery in furtherance of discriminatory prosecution claim].) Amicus's

citation to *People v. Montes* (2014) 58 Cal.4th 809, 829, in which this Court applied the *Armstrong* "some evidence" standard (described as "plausible justification") to a discovery request for evidence supporting a discriminatory charging claim demonstrates Amicus agrees that the "some evidence" (and therefore prima facie *Batson*) standard is appropriate. (Amicus Brief at 32.)

Thus, the Trial Court's conclusion that Mr. Jones had stated a prima facie case that the prosecutor exercised his strikes in a discriminatory manner as to three jurors demonstrates that the Trial Court found "some evidence" of discriminatory intent – a sufficient basis upon which to order discovery. Moreover, the fact that the Trial Court found three prima facie showings of prosecutorial discrimination under the more demanding "strong likelihood" standard articulated in *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280, rather than the inference standard articulated in *Batson* (and examined as correlative of "some evidence" in *Armstrong*), underscores the strength of the evidence before the Trial Court. (Ret. Ex. at 10 [prosecutor's unrebutted assertion that prima facie case requires "substantial showing that the challenges are being exercised for race and race alone"]; but see *Johnson v. California*, *supra*, 545 U.S. at pp. 170-172 [rejecting *Wheeler's* heightened standard for a prima facie case]; see also *Snyder v. Louisiana*, *supra*, 552 U.S. at p. 485 [holding strike need only "have been motivated *in substantial part* by discriminatory intent"], italics added.)

Though not required for Mr. Jones to obtain the discovery he

seeks, in this case there was more than merely "some evidence" of the prosecutor's discriminatory intent. The prosecutor's response to the prima facie *Batson* claims added further indications that his strikes were discriminatorily motivated. First, he claimed that his strikes were not motivated by discrimination because he "le[ft] two Black men on the panel" and "was willing to accept the panel" with these two Black jurors. (Ret. Ex. at 9-10.) The prosecutor then relied on disproven racial- and gender-related stereotyping to defend himself, claiming that the fact that "a two-time minority" colleague assisted him in rating the prospective juror refuted any possibility that the race of the prospective jurors motivated his strikes. (Ret. Ex. at 9, 11.) His immediate recall that he had accepted a jury with precisely two African-American jurors and his invocation of inaccurate "minorities-don't-discriminate-against-their-own" stereotyping in response to the *Batson* claims highlights the prosecutor's misguided, racially-focused views and suggests that his selective minority strikes may have been an effort to obscure his actual discrimination. (See *Foster v. Chatman*, *supra*, 136 S.Ct. at p. 1755 [finding prosecutor focus on race is evidence it was a factor in jury selection]; *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 250 [noting state may accept some Black jurors to obscure discriminatory pattern]; *Castaneda v. Partida*, *supra*, 430 U.S. at p. 499 [finding improper presumption that members of one racial group will not "discriminate against other members of their group"].)

Additionally, the prosecutor's false claim that he was unaware of the race of struck minority jurors at the time he rated

them (compare Ret. Ex. at 11, 22 with 43 CT 8091 [C.G. questionnaire stating "I am African-American"], 45 CT 8624 [Y.J. questionnaire identifying African-American as "my race"], 48 CT 9249 [C.Y. states "being an African American myself . . ."], *People v. Jones*, No. S042346), raises yet another inference that his strikes were racially motivated (see *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252 [finding "pretextual significance" where prosecutor proffers information refuted by the record].) And the prosecutor's laundry list of rationales for his strikes (Ret. Ex. at 11-14, 23-25) raises suspicion that this litany of – rather than focused and specific – rationales was an effort to shield his true, racially-motivated reasons from review. (See *Foster v. Chatman*, *supra*, 136 S.Ct. at pp. 1748-1755 [reviewing laundry list of rationales with skepticism]; *Johnson v. Finn*, *supra*, 665 F.3d at p. 1075, fn. 6 [finding prosecutor's credibility impaired by provision of laundry list of reasons for strikes]; *People v. Armstrong*, *supra*, 6 Cal.5th at pp. 804-805 [finding use of a laundry list may "fatally impair the prosecutor's credibility"]; *People v. Smith*, *supra*, 4 Cal.5th at p. 1157 [noting "significant danger" that "'laundry list' approach" will prevent trial courts from identifying invidious discrimination].)

The trial court's prima facie finding that the prosecutor's challenges were race-based, followed by other indicators bolstering that finding, and coupled with the prosecutor's reliance on his notes at step two – thereby demonstrating the relevance of the notes to the ultimate *Batson* inquiry – cabined Respondent Court's discretion such that its order granting discovery was

entirely appropriate.

Amicus's argument that *Armstrong*'s reference to material that "'may disclose the Government's prosecutorial strategy' . . . . does not necessarily refer to a work product privilege" ignores the plain language of the Court's decision. (See Amicus Brief at p. 23, fn. 8, citing *United States v. Armstrong*, *supra*, 517 U.S. at p. 468.) The *Armstrong* Court examined defendant's request to examine "all Government work product" and found that the federal work-product rule could not limit available discovery in light of defendant's equal protection claim; instead, "no fact should be omitted" from a court's review. (*United States v. Armstrong*, *supra*, at pp. 462-466, citing Fed. Rules Crim. Proc., rule 16(a)(1)(C); *United States v. Armstrong*, *supra*, at pp. 466, 468, citing *Ah Sin v. Wittman* (1905) 198 U.S. 500, 508.) As in *Armstrong*, Respondent Court recognized that Mr. Jones was entitled to rebut the prosecutor's proffered reasons at step three in order to advance his claim that his rights to equal protection of law had been violated and therefore discovery of the prosecutor's jury selection notes was proper. (See, e.g., *Flowers v. Mississippi*, *supra*, 139 S.Ct. at p. 2243 ["The trial court must consider the prosecutor's race-neutral explanations in light of all the relevant facts and circumstances, and in light of the *arguments of the parties*"], italics added; *Morgan v. City of Chicago* (7th Cir. 2016) 822 F.3d 317, 328 ["At *Batson* step three, the opponent of a peremptory strike is permitted to 'offer additional evidence to demonstrate that the proffered justification was pretextual'"].)

IV. AMICUS'S PROPOSED THREE-PRONGED TEST AND MANDATORY IN CAMERA REVIEW CONTRAVENE EXISTING LAW AND ARE INCONSISTENT WITH CONSERVING JUDICIAL RESOURCES.

Amicus's arguments that an additional fabricated tri-partite test and sua sponte in camera review (despite the District Attorney's failure to either request it or properly demonstrate the application of core work-product protection to some portion of the notes) are contrary to existing law, unprecedented, and would unnecessarily tax judicial resources.

A. The test Amicus proffers includes provisions rejected by the voters and this Court in fashioning criminal discovery principles.

California voters, enacting Proposition 115 in 1990, incorporated core – but not qualified – work-product protection into the criminal discovery rules. (See Pen. Code § 1054.6.) Amicus nevertheless proposes a "good cause" requirement for discovery of the prosecutor's jury selection notes that looks strikingly like that applied to discovery of qualified work-product. (Compare Amicus Brief at 32 with Code Civ. Proc. § 2018.030, subd. (b); see also *Hunter v. Gastelo* (C.D.Cal. Dec. 3, 2018, Civ. A. No. 18-00310) 2018 WL 7507886, *5 [defining Code Civ. Proc. § 2018.030, subd. (b) as requiring "good cause" showing]; *Fireman's Fund Ins. Co. v. Superior Court*, *supra*, 196 Cal.App.4th at p. 1279 [same]; *DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 688 [same], citing *Kizer v. Sulnick* (1988) 202 Cal.App.3d 431, 440.)

Amicus's proposed rule – what is in essence a qualified work-product rule – would contravene Proposition 115's directive that "[n]o order requiring discovery shall be made in criminal cases except as provided [in Chapter 10]." (Pen. Code § 1054.5, subd. (a).) *People v. Hunter* (2017) 15 Cal.App.5th 163, and *People v. Thompson* (2016) 1 Cal.5th 1043, to which Amicus cites in support of its proposed rule (see Amicus Brief at 30-31), are inapposite. Both cases concern criminal discovery from third-party co-defendants and formulate a rule for this discovery because it is not governed by Chapter 10. (*People v. Hunter*, *supra*, at p. 181; *People v. Thompson*, *supra*, at p. 1095). By contrast, prosecution-originating discovery is expressly governed by this Chapter, and therefore section 1054.5 precludes formulation of additional discovery rules beyond those required by the Constitution or other statutory schemes. (See Pen. Code §§ 1054.1, 1054.5.) Amicus's attempt to repackage the inapplicable qualified work-product rule as a requirement for criminal discovery should be rejected.

Similarly, this Court has rejected any requirement under section 1054.9 that a postconviction litigant "establish materiality [of sought discovery] before he even sees the evidence." (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901-902.) Instead, the *Barnett* Court reaffirmed that all a postconviction-discovery litigant must show is "a reasonable basis for believing a specific item of exculpatory evidence exists." (*Ibid.*; see also *id.* at p. 899 [finding section 1054.9's "reasonable basis" requirement emanates from the "Legislature's evident

intent to make section 1054.9 an efficient method of discovery"].) Amicus's proposed test requiring a postconviction litigant seeking discovery of jury selection notes to demonstrate "good cause to believe that the notes of the attorney would contradict the attorney's oral justifications" (see Amicus Brief at 32) would be in excess of section 1054.9's required showing.[10]

B. Amicus's unprecedented sua sponte in camera review requirement would waste judicial resources.

Lastly, Amicus's proposed tri-partite test would require trial courts to automatically conduct in camera review, even where the prosecutor fails to request or demonstrate particularized need for such review. (Amicus Brief at 32-34.) The sua sponte in camera process Amicus proposes appears to be a belated effort to save the District Attorney from her failure to properly invoke any applicable statutory protections or request in camera review below (see Answer Brief at pp. 49-52), but it ignores this court's admonition that the application of the work-product protection to specific items "must be resolved on a case-by-case basis." (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 993, citing *Dowden v. Superior Court*, *supra*, 73 Cal.App.4th at p.

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[10] Amicus also proposes that a petitioner seeking postconviction jury selection note discovery must demonstrate that "a competent defense attorney would have requested . . . the jury selection notes." (Amicus Brief at 40.) This argument conflates a petitioner's burden of proof for habeas corpus *relief* with the "reasonable belief" standard required to obtain *discovery* in preparation for filing a habeas petition.

135.) Counsel must demonstrate that core work-product protection should apply to specific material based upon a case-specific "preliminary or foundational showing that disclosure would reveal his or her 'impressions, conclusions, opinions, or legal research theories.'" (*Coito v. Superior Court*, *supra*, 54 Cal.4th at pp. 495-496, citing Code Civ. Proc. § 2018.030, subd. (a); see also *Mize v. Atchison, T. & S.F. Ry. Co.* (1975) 46 Cal.App.3d 436, 447 [holding counsel seeking to withhold discovery carries "[t]he burden . . . to prove the preliminary facts" to show a protection applies], citing *Tansola v. De Rita* (1955) 45 Cal.2d 1, 6).) Placing the onus on the withholding party makes sense – she is in the best position to know whether and to what extent the withheld materials (materials that neither the seeking party nor the trial court have yet seen) may disclose or plainly allude to case-specific strategy. (See *Coito v. Superior Court*, *supra*, at p. 501.) In the absence of the withholding party's showing that a statutory protection clearly applies to specific materials at issue, discovery should be liberally granted. (See *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 378, abrogated in part by Code Civ. Proc. § 2018.030.)

In the instant case, the District Attorney's broad assertion that the jury selection notes at issue are core work product is insufficient to meet her burden and invoke statutory protections. (See Petn. Ex. at 46, 84; *Mize v. Atchinson, T. & S.F. Ry. Co.*, *supra*, 46 Cal.App.3d at p. 447 [holding party cannot invoke work-product protections by "merely stat[ing] that something is [] work product"].) The District Attorney has identified 2,033 pages

of jury selection notes within the prosecutor's files. (Petn. Ex. 164 at ¶ 28 in Support of Amended Petn. for Writ of Habeas Corpus, *In re Bryan Maurice Jones*, No. S042336.) Given this sheer volume and prosecutorial practice, many of these are likely juror questionnaires with notations, highlights, and other markings. (See *Foster v. Chatman*, *supra*, 136 S.Ct. at p. 1744 [examining notations and highlights on jury venire list]; *Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998, 1003 [reviewing ratings written by prosecutor on juror's questionnaire].) But under Amicus's theory, Respondent Court should have nevertheless combed through these voluminous materials without guidance or specificity from the District Attorney as to which portions of these documents she sought to withhold and upon what basis. Amicus's proposed rule contravenes existing discovery case law and would mire trial courts in unnecessary and taxing review without a showing of need.

CONCLUSION

Respondent Court acted within its discretion to determine, in light of the evidence of a prima facie *Batson* claim before it and the prosecutor's reliance on and invocation of his notes in responding thereto, that Mr. Jones was entitled to discover those notes. Far from disputing Respondent Court's findings that any applicable work-product protections were waived by the prosecutor's actions, Amicus's arguments do not refute and indeed in multiple instances further support Mr. Jones's entitlement to discovery and the propriety of both Respondent

Court's ruling and the Court of Appeal's decision denying the District Attorney's request for a writ of mandate. This Court should affirm the Court of Appeal's decision.

Dated: May 13, 2020

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: /S/

Rachel G. Schaefer
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CERTIFICATE AS TO LENGTH

I certify that this Answer to Amicus Curiae Brief contains 9,178 words, verified through the use of the word processing program used to prepare this document.

Dated: May 13, 2020

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

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Rachel G. Schaefer

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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.

5/13/2020

Date

/s/Rachel Schaefer

Signature

Schaefer, Rachel (298354)

Last Name, First Name (PNum)

Habeas Corpus Resource Center

Law Firm