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. S255826 **CAPITAL CASE** Appeal from the Fourth Appellate District, Division One, Case No. D074028 (Related to California Supreme Court Case No. S042346 [on direct appeal]; No. S217284 [on habeas corpus]) San Diego Superior Court Case No. CR136371, The Honorable Joan P. Weber

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules of Court

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

INTRODUCTION

Real Party in Interest Bryan Maurice Jones (Mr. Jones) opposes petitioner's Petition for Review (Petition) of the Court of Appeal's decision in *People v. Superior Court (Jones)*,[1] filed before this Court on May 15, 2019.[2] The Court of Appeal issued a meticulously reasoned decision that

[1] 34 Cal. App. 5th 75 (2019).

[2] On the same date, petitioner filed a letter requesting depublication of the *Jones* decision (Request). Because petitioner in this letter similarly

comported with applicable statutory and decisional law. Based upon its careful application of that law to the facts in this case, the Court of Appeal properly determined that the trial court did not abuse its discretion by ordering discovery of the prosecutor's jury selection notes, where Mr. Jones made a prima facie showing that a *Batson*[3] violation had occurred, and where the trial court determined that the notes are relevant and would be helpful to its assessment of the actual reasons for the prosecutor's use of thirteen of his seventeen peremptory challenges to exclude women from the jury in Mr. Jones's capital trial.[4] The Petition before this Court fails to identify any

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attacks the merits of the Court of Appeal's decision, Mr. Jones briefly addresses the arguments raised in petitioner's Request, where appropriate, in this Answer.

[3] *Batson v. Kentucky*, 476 U.S. 79 (1986). This Court articulated a prohibition against invidious discrimination during jury selection in *People v. Wheeler*, 22 Cal. 3d 258 (1978). For purposes of these proceedings, where Mr. Jones describes proceedings under *Batson* he similarly invokes the protections against discrimination outlined by this Court in *Wheeler*.

[4] As the Court of Appeal articulated in its opinion, the *Batson* framework contemplates a three-step analysis to determine whether a prosecutor improperly exercised his peremptory challenges on the basis of discrimination. *See Jones*, 34 Cal. App. 5th at 80 (citing *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 328-29 (2003); *People v. Lenix*, 44 Cal. 4th 602, 612-13 (2008)). At the first step, the defendant must identify facts and circumstances that "raise an inference that the prosecutor used [his peremptory challenges] to exclude [jurors] on account of their race." *Batson*, 476 U.S. at 96. The prosecutor must then "articulate a neutral explanation" for his strikes at step two. *Id.* at 98. Finally, the trial court must determine, based upon all circumstances and evidence before it, whether the prosecutor acted with purposeful discrimination. *Id.*; *see also Jones*, 34 Cal. App. 5th at 80 (citing *Foster v. Chatman*, __ U.S. __, 136 S. Ct. 1737, 1748 (2016) (citing, in turn, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Snyder*, 552 U.S. at 478 (citing, in turn, *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 239 (2005))). The Court of Appeal found that the prosecutor's notes may be relevant to the trial court's step-three evaluation of the prosecutor's stated reasons for his strikes. *Jones*, 34 Cal. App. 5th at 82

legitimate rationale articulated in this Court's rules for granting review, mischaracterizes the reasoning and rationale of the lower court's decision, and does not point to any legal error in that well-reasoned decision warranting correction by this Court. Petitioner's request for review of the Court of Appeal's sound decision therefore should be denied.

ARGUMENT

I. PETITIONER FAILS TO IDENTIFY APPROPRIATE GROUNDS FOR REVIEW.

This Court's rules limit the types of cases that are appropriate for review. Where, as here, a petitioner requests review based on the merits of the lower court's ruling,[5] this Court limits review to instances where it is "necessary to secure uniformity of decision or to settle an important question of law."[6] This rule allows the Court to exercise its jurisdiction when necessary to "supervise and control the opinions of several District Courts of Appeal," while allowing novel issues and matters of first impression to percolate through and be resolved by the lower courts.[7]

(citing *People v. Winbush*, 2 Cal. 5th 402, 434 (2017); *People v. Gutierrez*, 2 Cal. 5th 1150, 1158 (2017)).

[5] Other rationales for granting review, including that the Court of Appeal lacked jurisdiction or "lacked the concurrence of sufficient qualified justices," do not implicate the merits of the Court of Appeal's decision here and are not at issue in petitioner's instant petition. *See* California Rules of Court, rule 8.500 (b)(2), (3).

[6] California Rules of Court, rule 8.500(b)(1); *see also Vergara v. State*, 246 Cal. App. 4th 619, 209 Cal. Rptr. 3d 532, 568 (2016) (Cuéllar, J., dissenting from denial of review) (noting importance of granting review to ensure uniformity of reasoned decisions from the Court of Appeal).

[7] *People v. Davis*, 147 Cal. 346, 348 (1905).

Petitioner's arguments fail to support the applicability of any of this Court's rationales for granting review of the Court of Appeal's decision below. To the contrary, the Petition makes clear that there is no need for this Court to review the Court of Appeal's decision in order to secure uniformity or settle an important question amongst the lower courts that have examined the issue of the discoverability of a prosecutor's jury selection notes.[8] Petitioner cites two unpublished Court of Appeal decisions – one a summary denial of a writ petition,[9] and the other *affirming* the trial court's *granting* of a request for discovery of the prosecution's jury selection notes.[10] The mere

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[8] The United States Supreme Court uses a similar rule to determine whether a grant of certiorari is appropriate. Sup. Ct. R. 10(a). Under this rule, it is not enough that the question presented has been considered and ruled upon by other courts – there must be a split of authority amongst courts in resolving the question. *E.g.*, *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (noting likelihood court will grant certiorari given split amongst lower courts); *see also City & Cty. San Francisco, Calif. v. Sheehan*, __ U.S. __, 135 S. Ct. 1765, 1779 (2015) (noting petitioner likely included argument concerning split amongst circuits to induce court to grant certiorari). Petitioner here has not demonstrated any disagreement amongst Courts of Appeal that have examined the question of the discoverability of the prosecution's jury selection notes (nor even amongst the Court of Appeal panel that decided this case and the panels that generated the unpublished opinions petitioner cites). Correspondingly, Petitioner has not demonstrated the need for intervention by this Court to settle any questions of law or ensure uniformity.

[9] *Salas v. Super. Ct.* (Mar. 3, 2018, G055165) [nonpub. opn.]. Since this was a summary denial of a petition for writ of mandate, it is not clear on what grounds the petition was denied. *See Kowis v. Howard*, 3 Cal. 4th 888, 895-99 (1992) (rejecting efforts to glean grounds for summary denial). However, the Court of Appeal's denial order, in which one concurring justice noted that the prosecution should preserve its jury selection notes for future litigation, at least contemplates that jury selection notes are potentially discoverable in that case. In light of this concurrence and the summary nature of the court's decision, petitioner cannot in good faith argue that this case demonstrates a split in the courts of appeal on this issue.

[10] *Jones v. Super. Ct.* (Jan. 16, 2018, No. E067896) [nonpub. opn.]. Pursuant to California Rules of Court, rule 8.1115(a), Mr. Jones cites to *Salas*

fact that the question of jury selection note discovery "has presented itself elsewhere in California," Petition at 4 n.7,[11] does not demonstrate the need for intervention by this Court. Neither case cited by petitioner created precedent – both decisions are unpublished and may not be cited to or relied upon by another court in granting or denying a discovery request.[12] The only published and therefore citable case evaluating the application of state discovery principles to a postconviction request for jury selection notes is the Court of Appeal's decision in this case. Furthermore, of the two unpublished cases cited by Petitioner, the sole reasoned decision is consistent with the *Jones* decision and affirms that discovery of the prosecutor's jury selection notes is appropriate in particular cases.[13] Thus, there is no lack of uniformity or concomitant need for this Court to intervene.

Instead, Petitioner (although mis-citing to this Court's rules describing the need to secure uniformity) argues that the Court of Appeal's decision should be reviewed by this Court because it "presents an issue of first

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and this unpublished opinion only for purposes of responding to Petitioner's arguments.

[11] Although petitioner's use of Roman followed by Arabic numerals in the pagination of its Petition does not comply with this Court's rules requiring consecutive and Arabic-numeral-only pagination, *see* California Rules of Court, rule 8.74 (3); Supreme Court Rules Regarding Electronic Filing, rule 10(2), in this brief, to avoid confusion, Mr. Jones cites to the page numbers that appear in the footer of petitioner's pleading.

[12] California Rules of Court, rule 8.1115(a).

[13] *See Jones*, No. E067896 (Jan. 16, 2018). Petitioner further claims "*Jones* is at odds with virtually every case that has failed to require that a prosecutor's jury selection notes in the context of a *Batson/Wheeler* challenge are discoverable." Request at 3. Though petitioner's counsel, through this language, invokes a host of additional cases supporting her position, she fails to cite a single reasoned decision holding that all or even any particular discovery requests for a prosecutor's jury selection notes must be rejected.

impression." Petition at 4. The fact that the lower court's decision extends established state and federal law to a novel circumstance, however, does not meet this Court's exacting standard for granting a petition for review. If the application of existing precedent to new questions or circumstances were sufficient to trigger this Court's discretionary review in every instance, the Court would be taxed to examine every single non-res-judicata-barred decision rendered by every Court of Appeal in California. This Court's precedents, for good reason, do not require as much, and petitioner's over-reaching effort to invoke this Court's jurisdiction should be denied.

II. THE COURT OF APPEAL'S DECISION PROPERLY AFFIRMED THE TRIAL COURT'S DISCRETION TO ORDER DISCOVERY OF JURY SELECTION NOTES.

The Court of Appeal's opinion recognized the constitutional imperative to ferret out invidious discrimination in the jury selection process. In deference to this imperative, the Court of Appeal, after considering the applicability of the statutorily-created work product rule, held that: 1) jury selection notes containing the prosecutor's observations and thoughts concerning prospective jurors are not core work product; 2) to the extent that such notes benefit from any statutory protection limiting their disclosure, that protection must yield where non-disclosure would frustrate efforts to identify and preclude or ameliorate instances of unconstitutional invidious discrimination; and 3) even assuming such notes include some attorney thoughts and impressions that meet the definition of core work product – and also assuming that the prosecution's interest in non-disclosure of this material is not overridden by defendant's, the Court's, and society's interest in thwarting the exercise of invidious discrimination during jury selection – the prosecution in this case waived any statutory protection when he referred to the contents of the notes in the course of the *Batson* hearing.

At step three of a trial court's *Batson* analysis (after the defendant has established a prima facie case of discrimination),[14] the trial court may determine that jury selection notes are one relevant source of information it should consider to determine the actual reasons for the prosecutor's strikes.[15] Where the trial court finds that the notes are relevant to its step-three determination, the notes must be disclosed to the defendant.[16] Each of the

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[14] Petitioner argues that this Court on direct appeal "affirmed the trial court's decision not to find a prima facie case of group bias." Petition at 3 (citing *People v. Jones*, 57 Cal. 4th 899, 916-20 (2013)). This assertion blatantly mischaracterizes the record. As noted by this Court on direct appeal, "[t]he trial court found defendant had made a prima facie showing of group bias." *Jones*, 57 Cal. 4th at 917; *see also id.* ("Here no dispute exists that defendant made a prima facie case with regard to jurors Y.J. and C.G.").

[15] Although petitioner claims that the Court of Appeal's decision granted Mr. Jones access to materials beyond the narrow scope of post-conviction discovery permitted by statute and this Court's decisions, the Court of Appeal specifically found that "the trial court necessarily concluded Jones met his burden of demonstrating he was entitled to [discovery of jury selection notes] at the time of trial." *Jones*, 34 Cal. App. 5th at 79. Because Mr. Jones was entitled to discovery of those notes at the time of trial, he was also entitled to their discovery in post-conviction proceedings pursuant to Penal Code section 1054.9, which authorizes discovery of materials "to which the same defendant would have been entitled at time of trial." Cal. Penal Code § 1054.9 (c).

[16] A trial court is vested with discretion to fashion the scope of a discovery order. *See Jones*, 34 Cal. App. 5th at 79 (citing *People v. Ayala*, 23 Cal. 4th 225, 299 (2000)); *see also Williams v. Super. Ct.*, 3 Cal. 5th 531, 540 (2017) (noting California's statutory scheme "vests trial courts with 'wide discretion' to allow or prohibit discovery" (citing *Emerson Electric Co. v. Super. Ct.*, 16 Cal. 4th 1101, 1107 (1997)); *Hill v. Super. Ct.*, 10 Cal. 3d 812, 816 (1974) ("A motion for discovery . . . is addressed to the sound discretion of the trial court, which has inherent power to order discovery in the interests of justice.") (citing *People v. Terry*, 57 Cal. 2d 538, 560-61 (1962); *Powell v. Super. Ct.*, 48 Cal. 2d 704, 708 (1957); *Vetter v. Super. Ct.*, 189 Cal. App. 2d 132, 134 (1961)). Petitioner complains that the Court of Appeal has established a rule likely to lead to confusion and chaos among trial and appellate courts. Request at 3. This dire warning ignores the fact that trial courts are already tasked with determining the proper scope of

Court of Appeal's findings are supported by statutory and decisional law. Petitioner's arguments to the contrary attempt to blur the clear lines of the lower court's decision and ignore the trial court's longstanding and often-exercised authority to fashion discovery orders.

A. THE LOWER COURT RECOGNIZED THAT *BATSON* CHALLENGES PRESENT A UNIQUE CIRCUMSTANCE IN WHICH THE PROSECUTOR'S ACTUAL THOUGHTS AND INTENT ARE AT ISSUE.

No other constitutionally-mandated proceeding requires the trial court to delve into the prosecutor's mind to determine his actual thought processes while exercising his peremptory challenges.[17] *Batson* challenges present a unique context in which the trial court is tasked with assessing the credibility of the prosecutor's stated justifications for striking prospective jurors, determining their plausibility, and discerning the actual reasons for the strikes.[18] The lower court recognized the significance of this imperative in its analysis:

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discovery in countless cases, including those in which protections against disclosure may be asserted by one or both parties, and appellate courts (including this Court) frequently review the grant or denial of discovery on appeal.

[17] Petitioner characterizes the Court of Appeal's decision as one step on a "slippery slope" that may lead to courts granting criminal defendants access to attorney emails, social media accounts, or professional and personal affiliations. Petition at 12 & n. 9. This attempt to draw floodgate-inspired panic from the Court of Appeal's carefully articulated holding ignores the unique inquiry into the prosecutor's mindset required by *Batson*.

[18] *Miller-El II*, 545 U.S. at 252; *Johnson v. California*, 545 U.S. 162, 171-73 (2005) ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."); *Miller-El I*, 537 U.S. at 338-39; *Batson v*, 476 U.S. at 98 & n.21.

> The second step of the *Batson/Wheeler* hearing requires the prosecutor to disclose his or her thinking regarding the prospective jurors by offering race- or gender-neutral justification for exercising the challenged peremptory strikes. Moreover, the purpose of the third step is to evaluate the prosecutor's reasoning.[19]

These unique requirements in the *Batson/Wheeler* context are, the lower court found, "inconsistent with the notion that circumstantial evidence of [the prosecutor's] thoughts is absolutely protected."[20] The Court of Appeal recognized the unique obligation of a trial court during a *Batson* hearing to "evaluate the intent of the prosecution."[21]

Petitioner complains that the lower court misunderstood *Batson* and that nowhere in the *Batson* decision or its progeny[22] is it established "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."[23] This description of the issue presented here, however, mischaracterizes the lower court's holding. The

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[19] Jones, 34 Cal. App. 5th at 82, (citing *Gutierrez*, 2 Cal. 5th at 1158; *Winbush*, 2 Cal. 5th at 434; *Lenix*, 44 Cal. 4th at 612-13).

[20] *Jones*, 34 Cal. App. 5th at 82.

[21] *Jones*, 34 Cal. App. 5th at 81; *see also Jones*, 34 Cal. App. 5th at 83 (noting "constitutional concerns are at odds with the alleged statutory protections of an attorney's work product").

[22] Petitioner claims the Court of Appeal's decision was based on its belief that *Foster*, 136 S. Ct. 1737, mandated disclosure. Belying petitioner's claim, the Court of Appeal recognized that "*Foster* does not address whether the jury selection notes were protected work product." *Jones*, 34 Cal. App. 5th at 81.

[23] Petition at 11. *See also* Petition at 8 (incorrectly suggesting that the Court of Appeal believed *Foster* "stand[s] for the proposition that a prosecution claim of core work product privilege is overruled upon a defendant's assertion of *Batson* error").

Court of Appeal found that because *Batson* requires inquiry into the prosecutor's state of mind, and "[g]iven the unique context of the situation and the importance of avoiding discrimination in jury selection," trial courts have discretion to order discovery of jury selection notes.[24] The unique constitutional mandate to determine the prosecutor's actual intent in the context of a *Batson* proceeding – not a belief that this mandate always compels disclosure – formed the basis of the lower court's opinion.

B. THE COURT OF APPEAL PROPERLY DETERMINED THAT UNITED STATES SUPREME COURT PRECEDENT IDENTIFIES THE PROSECUTOR'S NOTES AS ONE RELEVANT SOURCE OF INFORMATION FOR THE COURT TO CONSIDER IN DECIDING THE MERITS OF A *BATSON* CHALLENGE.

When conducting the constitutionally-mandated analysis during step three of a *Batson* hearing, a trial court must consider "all relevant circumstances" to determine whether the prosecutor has acted with invidious discrimination.[25] These relevant circumstances should be considered cumulatively by the trial court to create a total picture of the motivations behind the prosecutor's strikes.[26] The Court of Appeal, in issuing its decision echoed the trial court's burden to examine all relevant circumstances:

> [*Foster*] makes clear the information contained within [the prosecutor's] notes is relevant to a determination of a prosecutor's credibility and genuineness. Thus, it is *an example*

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[24] *Jones*, 34 Cal. App. 5th at 83.

[25] *Miller-El II*, 545 U.S. at 240 (citing *Batson*, 476 U.S. at 96-97); *Snyder*, 552 U.S. at 477 (citing *Miller-El II*, 545 U.S. at 239).

[26] *Miller-El II*, 545 U.S. at 265.

> of the evidence of intent that a court should consider during the third stage of the *Batson/Wheeler* hearing.[27]

Petitioner complains that the Court of Appeal went too far and that trial courts during a *Batson* hearing should not consider evidence outside the "static record" but need only consider the "plausibility of [the prosecutor's] rationale" as stated on the record. Petition at 13. Petitioner further argues that the mandate to consider "all relevant circumstances" contemplates only consideration of a record-based comparative juror analysis on appeal. Petition at 13-14 & n.11. Although petitioner cites to *Miller-El II* and *People v. Johnson*,[28] in support of these propositions, both cases reject such a record-bound step three examination. In the course of its *Batson* analysis, the *Miller-El II* Court examined the extent and nature of the prosecutor's questioning of particular jurors and comparative juror analysis (both contained in the record) as well as the prosecutor's office policies, practices, and history of invidious discrimination in jury selection and jury selection notes (both added to the record in the course of *Batson* proceedings).[29] Similarly, *Johnson* examined comparative juror analysis and affirmed the trial court's denial of a *Batson* claim,[30] but the United States Supreme Court reversed *Johnson* and remanded for subsequent proceedings.[31] When this

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[27] *Jones*, 34 Cal. App. 5th at 81(citing *Foster*, 136 S. Ct. at 1743, 1748, 1755) (emphasis added).

[28] 30 Cal. 4th 1302 (2003).

[29] *Miller-El II*, 545 U.S. at 240-64; *see also Foster*, 136 S. Ct. at 1754 (examining comparative juror analysis, the prosecutor's "shifting explanations [for his strikes], the misrepresentations of the record, and the persistent focus on race in the prosecution's file" as evidence that the strikes were "'motivated in substantial part by discriminatory intent'") (citing *Snyder v. Louisiana*, 552 U.S. 472, 478, 485 (2008)).

[30] *Johnson*, 30 Cal. 4th 1302.

[31] *Johnson*, 545 U.S. 162 (reversing *Johnson*, 30 Cal. 4th 1302 on grounds that "more likely than not" standard for establishing prima facie

Court again examined the claim in *Johnson*, now remanded for a retrospective *Batson* determination, it noted that in addition to information contained in the trial record, the prosecutor's jury selection notes were one type of potentially useful evidence to determine the actual reasons for the prosecutor's strikes.[32] The case law cited by petitioner demonstrates that the trial court is not confined to the record of jury selection proceedings or the prosecutor's statements therein. Trial courts "cannot accept . . . [an] invitation to blind" themselves to potentially relevant extra-record evidence demonstrating the prosecutor's intent where it exists, including the prosecutor's jury selection notes.[33] The Court of Appeal properly determined that jury selection notes are one such relevant circumstance that may be considered by the trial court in determining the bona fides of a *Batson* challenge.

C. THIS COURT'S PRECEDENT SUPPORTS THE LOWER COURT'S DETERMINATION THAT THE PROSECUTOR'S OBSERVATIONS AND NOTES ABOUT JURORS ARE NOT CORE WORK PRODUCT.

California's work product protections were created to "encourage [attorneys] to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases," and also to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts."[34] Core work product protections only apply to prevent inquiries that

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Batson claim for relief imposed greater burden than that established by *Batson*).

[32] *People v. Johnson*, 38 Cal. 4th 1096, 1102 (2006)

[33] *Foster*, 136 S. Ct. at 1748.

[34] Cal. Code Civ. Proc. § 2018.020; *see also Jones*, 34 Cal. App. 5th at 81. Petitioner claims the Court of Appeal's finding "discourages note-taking by attorneys during jury selection, if those attorneys . . . know those notes containing thoughts, impressions, or strategies are discoverable to the

would "reveal[] the theory of the case," not to prevent disclosure of every single thing counsel memorializes.[35] As the Court of Appeal found, after examining the scope of statutory work product protections, "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."[36] Because jury selection notes do not ordinarily relate to the prosecutor's theory of the case, the Court of Appeal properly determined that petitioner's jury selection notes are not entitled to work product protection.[37]

The Court of Appeal agreed with Mr. Jones that the prosecution's jury selection notes contain "thoughts and impressions regarding prospective

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opposing party." Request at 2. This complaint is unfounded. Where work product protections are not waived, they continue to shield notes detailing counsel's trial strategy. The prosecutor's non-discriminatory reasons for his strikes will not reveal information about his overall trial planning. The only potentially damning notes to be revealed under the Court of Appeal's ruling are those demonstrating that strikes were improperly exercised on the basis of race, gender, or other protected characteristic.

[35] *Jones*, 34 Cal. App. 5th at (citing *Coito v. Super. Ct.*, 54 Cal. 4th 480, 495 (2012)).

[36] *Jones*, 34 Cal. App. 5th at 82.

[37] In this case petitioner waived any core work product protections by virtue of the prosecutor's reliance on his notes in the course of the *Batson* hearing. *See* Section D, *infra*. However, in other *Batson* proceedings petitioner may assert that core work product protections apply to a trial-strategy-related portion of their jury selection notes. *See Jones*, 34 Cal. App. 5th at 83 n.4. In such instances, petitioner must specifically identify those portions subject to core work product protections and request in camera review of the claimed-protected portion of the notes. *Jones*, 34 Cal. App. 5th at n.4; *see also League of California Cities v. Super. Ct.*, 241 Cal. App. 4th 976, 993 (2015) (citing *Dowden v. Super. Ct.*, 73 Cal. App. 4th 126, 135 (1999); *Wellpoint Health Networks, Inc. v. Super. Ct.*, 59 Cal. App. 4th 110, 121 (1997)).

jurors [and] are not germane to trial strategy."[38] The reasons often given by prosecutors in response to prima facie *Batson* challenges demonstrate the correctness of the Court of Appeal's finding – prosecutors frequently cite to such factors as the prospective juror's physical appearance, apparent inability to listen to the evidence or follow the law, or relationship to law enforcement.[39] In Mr. Jones's case, the prosecutor recited similarly trial-strategy-neutral reasons for his strikes, claiming he struck one prospective female African American juror because she was divorced and demonstrated familial instability, wanted to be a counselor and help others, had no club memberships or affiliations, felt police officers were too quick to fire their weapons, and had been to see a psychiatrist.[40] The question of whether the prosecutor's notes bear out the validity of these rationales for his strikes – or whether this laundry list[41] is merely a pre-text meant to cloak unconstitutional rationales – demonstrates both the importance of disclosure and the lack of any basis for continuing to recognize work product protections in the face of *Batson*'s constitutional mandate. Beyond such

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[38] *Jones*, 34 Cal. App. 5th at 82.

[39] *E.g.*, *Miller-El II*, 545 U.S. at 243 (noting prosecutor claimed jury strike on basis of juror's stated religious beliefs); *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (noting prosecutor struck juror because "he had long, unkempt hair, a mustache, and a beard"); *Hernandez v. New York*, 500 U.S. 352, 356 (1991) (noting prosecutor asserted he struck jurors because he was "uncertain that they would be able to listen and follow the interpreter"); *People v. Scott*, 61 Cal. 4th 363, 382-83 (2015) (noting prosecutor struck juror because of "inconsistent answers on the death penalty"); *Lenix*, 44 Cal. 4th at 610-11 (noting prosecutor discussed prospective juror's description of police interactions and brother's involvement in gang-related homicide as reason for strike).

[40] 22 RT 1643-44.

[41] Such a laundry list demonstrates the likelihood that the prosecutor is merely *post hoc* attempting to justify an unconstitutionally-exercised strike. *Foster*, 136 S. Ct. at 1748-49.

strategically-neutral rationales, the only other reason to withhold jury selection notes is to shield from review those notes that would demonstrate strikes were wholly or in part based on racial considerations. Race-based notations and evidence of invidious discrimination cannot be protected on any basis.

Petitioner claims that the Court of Appeal "carved out a heretofore unrecognized division between what is protected core work product and what is not," and asserts that the Court of Appeal did not provide "logical justification" for this distinction. Petition at 23. Contrary to petitioner's contention, however, the Court of Appeal provided a thoughtful analysis of existing statutory and decisional law in issuing its opinion.[42] In contrast to the relevant sources cited by the Court of Appeal in its analysis, the case law cited by petitioner in an attempt to demonstrate errors in the Court of Appeal's opinion is distinguishable and unpersuasive; it does not specifically discuss the scope of work product protections in jury selection proceedings and, in some instances, is not binding precedent on this Court.

Petitioner first claims that *Izazaga*[43] is contrary to the Court of Appeal's holding and demonstrates that "[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." Petition at 20. But *Izazaga* does not discuss or even mention *Batson* proceedings, let alone discovery of the

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[42] In addition to Code of Civil Procedure section 2018.020 and *Coito*, 54 Cal. 4th 480, the Court of Appeal examined and relied upon *People v. Zamudio*, 43 Cal. 4th 327, 355 (2008); *Izazaga v. Super. Ct.*, 54 Cal. 3d 356, 380 (1991); and *People v. Collie*, 30 Cal. 3d 43, 59 (1981), as well as Code of Civil Procedure section 2018.030 and Penal Code section 1054.6 to interpret the scope and application of California's work product rule.

[43] *Izazaga*, 54 Cal. 3d at 380-82.

prosecutor's notes in the wake of such a challenge.[44] Though it does not support petitioner's arguments, *Izazaga* bolsters the Court of Appeal's opinion in that it rejects the idea that work product protections are inviolable and finds that discovery should be ordered where it is "a 'legitimate demand' of the criminal justice system aimed at avoiding testimonial 'half-truths' by promoting . . . 'the orderly ascertainment of the truth.'"[45]

Next, petitioner cites at length to *Hickman v. Taylor*,[46] and claims that this decision "affords greater protection to opinion work product, which reveals the mental impressions, conclusions, opinions, or legal theories of a party's attorney."[47] Petition at 22. Petitioner claims the Court of Appeal's decision contravenes established law by affirming discovery of "exactly the type of documents" protected by *Hickman.* Petition at 23. Petitioner's reliance on *Hickman* is inapt for a number of reasons. First, *Hickman* does not describe the scope of California work product protections. It is a *federal* case, describing the *federal* work product rule as outlined under the *Federal*

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[44] The pages cited by petitioner reject the defendant's argument that Penal Code section 1054.3 requires disclosure on the basis of a waiver theory, but nevertheless hold constitutional the requirement that statements pursuant to section 1054.3 must be disclosed. *Izazaga*, 54 Cal. 3d at 380. It further rejects the defendant's challenge that statements of testifying witnesses subject to section 1054.3's disclosure provisions remain protected under the attorney-client privilege. *Izazaga*, 54 Cal. 3d at 381-82. Thus, it is difficult to determine for what purpose petitioner cites to *Izazaga*, other than its verbatim quote of Code of Civil Procedure section 2018.030, which provides no additional analysis for their position beyond that conducted by the Court of Appeal. *See Izazaga*, 54 Cal 3d at 381 (quoting Cal. Code Civ. Proc. § 2018.030).

[45] *Izazaga*, 54 Cal. 3d at 379.

[46] 329 U.S. 495 (1947).

[47] Petitioner further claims that the Court of Appeals decision "unmoors *Hickman v. Taylor* . . . from its purpose." Request at 2. As described above, because *Hickman* is not California case law, the Court of Appeal's decision can have no bearing upon it.

Rules of *Civil* Procedure.[48] It is merely instructive – not dispositive – on the scope of California's work product protections.[49] Secondly, contrary to petitioner's assertion, the Court of Appeal expressly examined the scope of work product protections defined in *Hickman* and found disclosure of jury selection notes at step three of a *Batson* analysis were consistent with the scope of the privilege identified in *Hickman*, enacted in California law, and described in *Coito*.[50] Finally, to the extent that *Hickman* contemplates that work product protections may be pierced with sufficient justification, the Court of Appeal noted that the mandate to guard against invidious discrimination in jury selection procedures amply provided such a justification.[51]

D. STATUTORY AND DECISIONAL LAW SUPPORT THE LOWER COURT'S APPLICATION OF EVIDENCE CODE SECTION 771 TO THE *BATSON* CONTEXT.

When a witness relies upon a writing to refresh his recollection prior to or in the course of testimony, the opposing party is entitled to a copy of that writing.[52] Work product protections otherwise applicable to the writing at issue are waived when a witness uses it to refresh his recollection.[53] The Court of Appeal relied on section 771 to find that "the prosecution's reference to [the] contents [of their jury selection notes] waived [work

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[48] *Hickman*, 329 U.S. at 509-512; *see also Izazaga*, 54 Cal.3d at 381 (rejecting petitioner's arguments based on *Hickman* because it is a "federally created" protection based on federal policy and statute).

[49] *See Coito*, 54 Cal. 4th at 490-93.

[50] *See Jones*, 34 Cal. App. 5th at 82-83.

[51] *Jones*, 34 Cal. App. 5th at 83.

[52] Cal. Evid. Code § 771.

[53] *E.g.*, *People v. Smith*¸ 40 Cal. 4th 483, 508-09 (2007); *Pasadena Police Officers Ass'n v. Super. Ct.*, 240 Cal. App. 4th 268, 293 & 293 n.13 (2015); *Kerns Const. Co. v. Super. Ct.*, 266 Cal. App. 2d 405, 413-14 (1968).

product] protection."[54] Under section 771, the prosecutor becomes a witness in the course of step two of a *Batson* hearing because he or she "makes a statement" or otherwise "submit[s] a declaration under oath."[55] This holding aligns with California law defining who is a witness and the limitations of statutory work product protections under section 771.

Petitioner claims *Sullivan*[56] demonstrates that "[i]n some cases, Evidence Code section 771 does not pierce applicable privileges." Petition at 18. First, *Sullivan* focuses on the "unique nature" of the constitutionally-protected attorney-client privilege.[57] By contrast, the instant case focuses on the far less sacrosanct statutorily-created work product protections.[58] Second, the *Sullivan* decision turned not just on the constitutional nature of the protection at issue, but on the plain language of section 771 – the witness in *Sullivan* refreshed her recollection by listening to an audiotape, not a

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[54] *Jones*, 34 Cal. App. 5th at 83. The Court of Appeal found that, beyond the requirements of section 771, core work product protections are waived when a witness testifies as to a document's contents. *Id.* (citing *United States v. Nobles*, 422 U.S. 225, 239 (1975)).

[55] *Jones*, 34 Cal. App. 5th at 84-85(citing Cal. Penal Code § 136; Cal. Evid. Code §§ 2, 135, 240). The Court of Appeal expressly rejected petitioner's narrow definition of a "witness" based on the Code of Civil Procedure. *Jones*, 34 Cal. App. 5th at 84.

[56] *Sullivan v. Super. Ct.*, 29 Cal. App. 3d 64, 73 (1972).

[57] The *Sullivan* Court "noted the age and sanctity of the lawyer-client privilege." 29 Cal. App. 3d at 74.

[58] 29 Cal. App. 3d at 72-74. Indeed, *Sullivan* examines the opposite scenario from that examined by the Court of Appeal in the instant case. In *Sullivan*, the party seeking disclosure claimed that section 771 (a state statute) supplanted attorney-client privilege (a constitutional protection) – a holding the *Sullivan* Court rejected. The Court of Appeal in *Jones* found that a constitutional principle (Mr. Jones's right to a full and fair *Batson* determination and a jury selected without the influence of invidious discrimination) supplanted state work product protections.

"writing" as required section 771.[59] Again, this stands in sharp contrast with Mr. Jones's request for the prosecutor's *written* jury selection notes. *Sullivan* does not stand for the proposition for which it is cited by petitioner. In fact, its recognition that state statutory rule (section 771) and constitutional protections (attorney-client privilege) do not stand in equipoise is consistent with the Court of Appeal's finding that statutory work product protections must yield to the constitutional guard against invidious discrimination.

Petitioner further attempts to minimize the District Attorney's resort to his notes during the second stage of the *Batson* hearing. Below, petitioner claimed that the District Attorney "relie[d] on his notes in order to thoroughly respond to a claim of *Batson* error." Petition for Writ of Mandate, *People v. Super. Ct. (Jones)*, No. D075028, at 8; *see also id.* (noting the District Attorney "relied" on his jury selection notes at *Batson* stage two proceedings). Again, before this Court, petitioner reaffirmed that the District Attorney "relie[d] on a document to guide him" at the second stage of *Batson* proceedings. Petition for Review, *People v. Super. Ct. (Jones)*, No. S249705, at 15-16.[60] Petitioner now claims that the District Attorney conducted a "mere review" of his jury selection notes and made "mere comments . . . that [his] contemporaneously made notes were consistent with [his] stated reasons for [] exercising peremptory challenges of prospective jurors."[61] Petition at 2, 18. Petitioner's ever-narrowing and shifting description of the

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[59] 29 Cal. App. 3d at 73-74.

[60] Petitioner previously filed a Petition for Review from the Court of Appeal's summary denial of their initial Petition for Writ of Mandate concerning the trial court's order authorizing discovery of jury selection notes. On September 12, 2018, this Court granted review and ordered the matter transferred to the Court of Appeal with instructions that it issue an order to show cause.

[61] Petitioner also claims the District Attorney "rel[ied] on his notes to guide his arguments." Petition at 2.

District Attorney's use of his notes during the *Batson* hearing is at odds with the record. As the Court of Appeal noted, the District Attorney's reference to his notes was more significant than the fleeting glance petitioner now claims it to be:

> Here, the prosecutor reference[d] details from 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 numerical 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.[62]

The Court of Appeal correctly examined and defined the scope of the District Attorney's resort to his notes in the course of the *Batson* hearing. Petitioner's attempt to re-characterize these facts at this belated stage does not merit this Court's review.

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[62] *Jones*, 34 Cal. App. 5th at 84-85.

CONCLUSION

Petitioner has failed to meet the requirements of, or offered sufficient reason to invoke, this Court's discretionary jurisdiction. The Petition for Review ignores the clear language of the Court of Appeal's well-reasoned decision and rehashes the unsound arguments considered and rejected by the Court of Appeal. Petitioner has failed to show any reason why review should be granted and instead attempts to re-plod the same ground argued below in hopes of obtaining a different opinion. The weight of constitutional imperatives and California's statutory and decisional law underscore the soundness of the lower court's decision. Petitioner's request should be denied.

Dated: June 5, 2019

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: /S/
Shelley J. Sandusky

By: /S/
Rachel G. Schaefer

CERTIFICATE OF WORD COUNT

Cal. Rules of Court, rule 8.204(c)(1)

I certify that the attached brief contains 6,343 words, as tabulated by the word processing program used to prepare it.

/S/
Rachel G. Schaefer

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Case Name: People v. Super. Ct. (Jones)
Case No.: S255826

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4. I served the document(s) by enclosing them in a package or envelope, which I then:

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Brendon Marshall, Deputy Attorney General
Attorney General- San Diego Office
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619-738-9000
Counsel for Respondent on Habeas

The Honorable Judge Joan P. Weber
Central Courthouse, Division 1804
1100 Union Street
San Diego, CA 92101
619-844-2184
Respondent Court

6. As permitted by the California Rules of Court, counsel will use electronic service to serve the **Answer to Petition for Review** on Petitioner.

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As permitted by Policy 4 of the California Supreme Court's *Policies Regarding Cases Arising from Judgments of Death*, counsel intends to complete service on Petitioner by hand-delivering the document(s) within thirty calendar days, after which counsel will notify the Court in writing that service is complete.

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

Date: June 5, 2019

/s/
Gina Judd

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. S.C. (JONES)**
Case Number: **S255826**
Lower Court Case Number: **D074028**

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Schaefer, Rachel (298354)
Last Name, First Name (PNum)

Habeas Corpus Resource Center
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