IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, Respondent.	No. S255826 (Related to California Supreme Court Case No. S217284 [on Habeas Corpus]; No. S042346 [on Direct Appeal])
BRYAN MAURICE JONES, Real Party in Interest.	

OPENING BRIEF ON THE MERITS

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

SUMMER STEPHAN
District Attorney
MARK A. AMADOR
Deputy District Attorney
Chief, Appellate & Training Division
LINH LAM
Deputy District Attorney
Asst. Chief, Appellate & Training Division
SAMANTHA BEGOVICH, SBN 172225
Deputy District Attorney
330 W. Broadway, Suite 860
San Diego, CA 92101
Tel.: (619) 531-4457
Fax: (619) 515-8632
Email: Samantha.Begovich@sdcda.org

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Civil Code

Code of Civil Procedure

Evidence Code

Penal Code

Other Authorities

Rules

Rules of Pofessional Conduct

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

ISSUES PRESENTED

1. Are jury selection notes protected under the attorney work product privilege when sought in a post-conviction discovery proceeding?
2. Does an attorney impliedly waive the attorney work product privilege by simply referencing their notes during a *Batson/Wheeler* inquiry by the trial court?

INTRODUCTION

In a published opinion,[1] the Court of Appeal, Fourth Appellate District, Division One, held the trial court did not abuse its discretion when it ordered discovery of jury selection notes protected by the attorney work product privilege and held that the same privilege was impliedly waived when the prosecution allegedly made testimonial use of the work product material as a "witness."

This narrative, however, rests on a fallacy. The prosecution was never a witness in its presentation to the court as an advocate. Declaring the prosecutor as a witness, 25 years after the exchange with the trial court, in order to obtain the result of declaring testimonial use of the jury selection notes was an outcome-based holding resting on faulty legal analysis.

The Court of Appeal created the fiction of the prosecutor as a witness to contort its way into its ruling the prosecutor was a witness who "refreshed" his recollection by looking at his attorney notes and, thereby, impliedly waived work product protection by disclosure through testimonial use of protected materials. Waiver being the only recognized

---

[1] *People v. Superior Court of San Diego County* (*Jones*) (2019) 34 Cal.App.5th 75.

exception to the absolute protection of core work product privilege, the Court of Appeal's results-oriented holding is absurd.

The Court of Appeal treated an attorney giving reasons for challenging a juror as no different than a witness giving testimony under oath, which is a legally inadequate theory because it is contrary to law. An attorney has a duty of candor to the court, and this duty does not convert the attorney into a testifying witness – subject to all the rules and restrictions applicable to *true* witnesses. The Court of Appeal's decision cannot be squared with the critical principles set forth in the rules governing witnesses.

Under California law, an attorney mandated to provide explanations for challenges at a *Batson/Wheeler* hearing is not testifying as a witness. The argument that the mere review of notes by a lawyer to guide him as he advances an argument thereby waives his ability to claim core work product privilege over the document is flawed. A lawyer will frequently rely on his or her notes to guide his or her arguments before a court and to extrapolate the trial court's ruling that reference to such notes is a waiver of privilege has no basis in the law.

This Court should note the complete absence of holdings that overrule the assertion of work product privilege due to implied waiver when a lawyer refers to his or her notes. Jury selection notes are simply not "discovery material" that may be ordered disclosed pursuant to Penal Code section 1054.9, and, alternatively, the attorney work product privilege provides an absolute protection. The Court of Appeal's opinion must be overturned.

FACTUAL AND PROCEDURAL BACKGROUND

In 1994, a jury convicted defendant Bryan Maurice Jones (Jones) of the first-degree murders of JoAnn Sweets and Sophia Glover (Pen. Code, §§ 187, 189), attempted murder of Maria R. and Karen M. (Pen. Code, §§

664/187, subd. (a)), and forcible rape, sodomy, and oral copulation of Karen M. (Pen. Code, §§ 261, subd. (a)(2), 286, subd. (c), 288a, subd. (c)). The jury further sustained an allegation that Jones used a deadly weapon in attempting to murder Maria R. (Pen. Cod, § 12022, subd. (b)), and three special circumstance allegations rendering him eligible for the death penalty: that he murdered Sweets and Glover during the commission or attempted commission of the crime of sodomy (Pen. Code, § 190.2, subd. (a)(17)), and that he committed multiple murders (Pen. Code, § 190.2, subd. (a)(3)).

On April 6, 1994, following a penalty trial, the jury set the punishment at death under the 1978 death penalty law. (Pen. Code, § 190.1 et seq.) On August 26, 2013, this Court affirmed the judgment on appeal. (*People v. Jones* (2013) 57 Cal.4th 899.) In affirming the judgment, this Court rejected defendant's challenge to the race-neutral explanations provided by the prosecution as to two prospective jurors the prosecutor had dismissed, and further found that ample evidence supported the trial court's ruling that no prima facie case of group bias was established as to a third juror. (*People v. Jones, supra,* 57 Cal.4th at pp. 916-920.)

In a subsequent amended petition for writ of habeas corpus (case no. S217284), Jones, represented by the Habeas Corpus Resource Center, alleged that trial counsel had provided ineffective assistance by failing to claim *Batson/Wheeler* error based on gender bias after the prosecutor exercised peremptory challenges against 13 of 17 prospective female jurors, four of whom were African-American. (*People v. Jones, supra,* 34 Cal.5th at p. 78.) Habeas counsel accordingly sought postconviction discovery of the prosecutor's jury selection notes under Penal Code section 1054.9. (Exh. C[2] at pp. 10-11.)

---

[2] All references to exhibits refer to the exhibits attached to

On April 27, 2018, the trial court held a hearing to address Jones's motion for post-conviction discovery. (Exh. B at p. 7.) With regard to the prosecution's jury selection notes, the trial court specifically stated, "I think *Foster* versus *Chapman* is a game changer in this area." (Exh. B at p. 46.) The trial court further stated it tentatively ruled in favor of disclosure, because *Foster* held that prosecutor notes can be enlightening as to whether there was a racial bias. (*Id.*) The People objected, asserting the core work product privilege and stating that the *Batson* issue had already been addressed in a prior appeal. (*Id.*) Jones responded that his brief discussing core work product and Evidence Code section 771 sufficiently stated his position. (Exh. B at p. 47.) The trial court noted that it agreed with Jones's reasoning. (*Id.*) The People objected, stating that simply because an attorney referenced his notes during an argument, it was not a waiver of the privilege. (*Id.*) The trial court stated:

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

(Exh. B at p. 48.)

Over the People's objection that the notes are attorney core work product and privileged from disclosure, the trial court granted the request. (Exh. A [The Honorable Joan P. Weber's Court Order]; Exh. B at pp. 41–

Petitioner's Writ Petition filed in the Fourth District Court of Appeal.

43; Exh. D at p. 18.) The trial court ordered disclosure of the prosecutor's jury selection notes with a protective order. (Exh. B at p. 48.)

On May 24, 2018, the People filed a petition for writ of mandate and/or prohibition in the Court of Appeal requesting the trial court's order be vacated and sought a stay of the order. On June 21, 2018, the Court of Appeal summarily denied the petition.

The People filed a first petition for review, which this Court granted before transferring the matter to the Court of Appeal to issue an order to show cause.

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

On May 16, 2019, the People filed a second petition for review.

In June of 2019, Jones filed an answer to the People's petition, and the People filed a reply to the answer.

On July 24, 2019, this Court granted the People's petition for review. Appellant's opening brief on the merits is due October 23, 2019.

ARGUMENT

I.

JURY SELECTION NOTES ARE NOT "DISCOVERY MATERIALS" AND ARE PROTECTED BY THE ATTORNEY WORK PRODUCT PRIVILEGE

The Court of Appeal erred when it affirmed the trial court's order for post-conviction discovery of the prosecutor's jury selection notes. The notes do not meet the post-conviction discovery requirements established by Penal Code section 1054.9 and, furthermore, are absolutely protected under the attorney work product privilege. The Court of Appeal's decision should be reversed.

A. Jury Selection Notes Are Not "Discovery Material" Under Penal Code Section 1054.9.

A court's jurisdiction to order post-conviction discovery is conveyed by Penal Code section 1054.9. Section 1054.9 regulates post-conviction discovery and provides rules that must be followed. Section 1054.9 states, in pertinent part:

> (a) Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b).
>
> (b) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.

(Pen. Code, § 1054.9.)

In re Steele identified four distinct categories of materials of permissible discovery:

> Accordingly, we interpret section 1054.9 to require the trial court, on a proper showing of a good faith effort to obtain the materials from trial counsel, to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show either (1) the prosecution did provide at time of trial but have since become lost to the defendant; (2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or (4) *the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them.*

(*In re Steele* (2004) 32 Cal.4th 682, 697, italics added; accord, *People v. Superior Court* (*Morales*) (2017) 2 Cal.5th 523, 529.)

In re Steele established that the statute "does not allow 'free-floating' discovery asking for virtually anything the prosecution possesses. [Citation.]" (*In re Steele*, *supra*, 32 Cal.4th at p. 695.) Discovery under section 1054.9 is limited to the materials the defendant would have been entitled to at the time of trial. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366.) And at the time of trial, Jones was not entitled to the prosecution's jury selection notes under the statutory rules governing criminal discovery. (See Pen. Code, § 1054 et seq.)

Penal Code section 1054 et seq., is the controlling (and nearly exclusive) authority on pre-trial criminal discovery obligations in California. Section 1054.5, subdivision (a) states ". . .This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties."

Section 1054.1 imposes upon the prosecution certain discovery obligations:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
> (b) Statements of all defendants.
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the

trial.
(e) Any exculpatory evidence.
(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

The prosecution's jury selection notes do not fit within this list.

In fact, the criminal discovery statutes specifically exclude attorney work product from disclosure. Penal Code section 1054.6 significantly states:

> Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

The prosecution's jury selection notes in the Jones matter do not fall within the enumerated discovery categories and are in fact specifically prohibited from disclosure as attorney work product. Because Jones was not entitled to the jury selection notes *pre*-trial, pursuant to the criminal discovery statutes, he is certainly not entitled to them *post*-trial, under rules that mandate the foundational requirement that he *first* be entitled to them *pre*-trial.

While some cases have recognized that the criminal discovery provisions may not be a good fit for petitions for writ of habeas corpus,[3] the instant motion for post-conviction discovery is not a habeas corpus petition,

---

[3] *See People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 572; *Jimenez v. Superior Court of Los Angeles County* (Oct. 2, 2019, B297595) __ Cal.App.5th __, fn. 4 [2019 WL 4854863].

but a separate motion. A court may have jurisdiction to fashion a fair discovery rule beyond the scope of the criminal discovery statutes once it has found that petitioner has established a prima facie case to support an order to show cause in the context of a habeas petition. (See *In re Scott* (2003) 29 Cal.4th 783, 814 [discovery is available once an order to show cause issues, and courts may look to criminal discovery statutes to fashion a fair discovery rule].)

Although it remains to be seen whether a court may order jury selection notes in contravention of the attorney *core* work product privilege, in which jury selection notes fall, even after an order to show cause has issued in a *Batson/Wheeler* inquiry, the Second District Court of Appeal in *Jimenez v. Superior Court of Los Angeles County* touched on a related issue of *qualified* attorney work product protection.

The Second District Court of Appeal recently addressed the issue of qualified attorney work-product protection in the context of a habeas matter where an order to show cause had issued. (*Jimenez v. Superior Court of Los Angeles County* (Oct. 2, 2019, B297595) __ Cal.App.5th __, fn. 4 [2019 WL 4854863].) The appellate court held that where "the discovery sought exceeds the scope of the criminal discovery scheme, the qualified work-product protection is available in habeas corpus proceedings following an order to show cause." Significantly, where even the *qualified* work-product protection is available in a habeas corpus proceeding following an order to show cause, surely the more protected and absolute *core* work product protection must be available. By extension, in a post-conviction discovery context, where no order to show cause like those in habeas litigation has yet been issued, logic supports that an even greater protection for core work product than the protections recognized in *Jimenez*, must prevail.

Moreover, here, *In re Steele*, *supra*, is clear that discovery under Penal Code section 1054.9 includes only "materials to which the defendant

would have been entitled at the time of trial." (*In re Steele*, *supra,* 32 Cal.4th at p. 697; *Jimenez v. Superior Court of Los Angeles County* (Oct. 2, 2019, B297595) __ Cal.App.5th __, fn. 4 [2019 WL 4854863].) Jones is at the post-conviction discovery stage and *In re Steele* applies. He is limited to materials to which he would have been entitled at the time of trial. Because Jones was not entitled to criminal discovery of the prosecution's jury selection notes at the time of trial, he is not entitled to post-conviction discovery of those same notes. Thus, in the context of a Penal Code section 1054.9 post-conviction discovery motion, the court erred in ordering production of the prosecution's jury selection notes.

B. Jury Selection Notes Are Absolutely Protected Under the Attorney Work Product Privilege

Jury selection notes are not disclosable because they are absolutely protected by the attorney work product privilege as writings reflecting an attorney's impressions, conclusions, or opinions. A prosecutor's notes relating to his or her thought processes during jury selection in a criminal trial are a prime example of attorney work product. (See *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 380–382.) Jury selection is a significant aspect of a criminal trial, and it is factually intensive with respect to an attorney's decisions to challenge jurors for cause or peremptorily in hopes of seating jurors potentially more favorable to the attorney's position.

The central justification for the work product doctrine is that it preserves the privacy of preparation that is essential to the attorney's adversary role. Any invasion of this privacy could distort or modify the attorney's function to the detriment of the adversary system. The function of work product privilege is to preserve the benefits of adverse representation without frustrating the goals of discovery. The core work product privilege

recognizes the need to protect the privacy of the attorney's mental processes.

The work product privilege in California is codified in Code of Civil Procedure section 2018.030. (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 485.) In criminal cases, the privilege is limited to circumstances that fall within subdivision (a) of Code of Civil Procedure section 2018.030. (See Pen. Code, § 1054.6 ["Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure . . ."]; *People v. Zamudio* (2008) 43 Cal.4th 327, 355.)

Subdivision (a) of Code of Civil Procedure section 2018.030 provides: "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is *not discoverable under any circumstances*." (Italics added.) The protection provided under subdivision (a) is "absolute." (*Coito v. Superior Court, supra*, 54 Cal.4th at p. 488.)

Despite this absolute protection of all attorney impressions, conclusions, and opinions not connected to legal theories, the Court of Appeal superimposed on the statutory requirements the additional requirement that those impressions conclusions, and opinions concern the legal theory of the case. It acknowledged that "there is no dispute that the prosecution's jury selection notes likely contain the prosecutor's impressions, conclusions, or opinions; this is the reason Jones seeks their disclosure. It is less clear whether those notes will reveal impressions, conclusions, or opinions *about the legal theory of the case*." (*People* v. *Superior Court* (*Jones*) (2019) 34 Cal.App.5th 75, 82, italics added.)

However, nowhere in the language of Civil Code of Procedure section 2018.030, subdivision (a), does it require that the attorney's impressions, conclusions, or opinions concern the legal theory of the case. Civil Code of Procedure section 2018.030, subdivision (a), is a disjunctive

statute. Section 2018.030 provides each protected category in the alternative, with the word "or" separating the categories protected by the privilege. (Code of Civ. Proc., § 2018.030, subd. (a) ["A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories..."].) Thus an attorney's "impressions, conclusions, opinions, or legal research or theories" are each standalone categories of protected attorney work product not subject to the Court of Appeal's additional requirement that those impressions, conclusions, and opinions concern the legal theory of the case.

The Court of Appeal further erroneously agreed with Jones's argument that "the thoughts and impressions regarding prospective jurors are not germane to trial strategy" and believed for purposes of the work product privilege, "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." (*People v. Superior Court* (*Jones*), *supra*, 34 Cal.App.5th at p. 82.) However, this argument is also flawed, legally and logically.

The work product privilege gives as much protection to the reasons an attorney challenges a juror as it does to any other aspect of trial strategy. An attorney's jury selection strategy is integral to the attorney's overall trial strategy. (*People v. Manning* (2011) 241 Ill.2d 319, 342–343 ["An attorney's actions during voir dire are considered to be matters of trial strategy."]; *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 457 [same]; *Nguyen v. Reynolds* (10th Cir. 1997) 131 F.3d 1340, 1349 [same]; *Teague v. Scott* (5th Cir. 1995) 60 F.3d 1167, 1172 [same]; *People v. Jones* (Ill. App. Ct. 2012) 982 N.E.2d 202, 215 ["In general, counsel's actions during jury selection are considered a matter of trial strategy . ."]; *Shockley v. State* (Mo. 2019) 579 S.W.3d 881, 896, reh'g denied (Sept. 3, 2019) [noting trial counsels' questioning of juror regarding his son being a police

officer and his knowledge of guns "were crucial parts of their trial strategy in selecting jurors and in presenting their theory of the case"]; *Harvey v. Warden, Union Correctional Institution* (11th Cir. 2011) 629 F.3d 1228, 1246 [selecting jurors is part of overall attorney trial strategy to avoid death penalty]; *Patton v. State* (Fla. 2000) 784 So.2d 380, 389 [prosecutor notes containing "handwritten details of specific questions to ask during voir dire" and "notes on potential jurors" are "clearly work product"]; *People v. Trujillo* (Colo. App. 2000) 15 P.3d 1104, 1107 [request for prosecution's voir dire notes at *Batson/Wheeler* hearing denied because notes "are attorney work product and, therefore, undiscoverable"]; *Thorson v. State* (Miss. 1998) 721 So.2d 590, 596 ["The personal notes of the prosecutor made during voir dire almost certainly contain the prosecutor's opinions and theories."]; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1259 [finding ex parte hearings on the reasons for challenging a juror should not be made in camera but recognizing that "[i]t is certainly possible that in a particular case the prosecution's motive for excluding potential jurors will grow out of its case strategy, and divulging those reasons to opposing counsel could cause it severe prejudice."].)

Indeed, this Court has repeatedly recognized that the reasons why an attorney challenges a juror is an aspect of the attorney's trial strategy. (See *People v. Armstrong* (2019) 6 Cal.5th 735, 767 [in assessing whether a prosecutor's race-neutral explanations are credible, court can consider, inter alia, "whether the proffered rationale has some basis in accepted *trial strategy*." (italics added)]; *People v. Smith* (2018) 4 Cal.5th 1134, 1147 [same]; *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1159 [same]; *People v. Lenix* (2008) 44 Cal.4th 602, 613 [same]; see also *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 [same].)[4]

---

[4] The question of whether the work product privilege protects jury

These jury selection notes often reflect important annotations that may provide insight into what witnesses will be called and/or how much reliance the attorney plans to place on that witness's testimony. For example, a notation highlighting a juror's experience, may disclose the attorney's plan to emphasize more complicated expert testimony as opposed to other evidence. A notation of "trusts police" next to a juror's name may reveal the attorney will place heavier emphasis on police testimony rather than non-police testimony. The notes may provide insight into an attorney's general propensities, thus disclosing *future* trial strategies by revealing the kind of jurors the attorney will be prone to keep in later juries and allowing defense to tailor its own challenges in anticipation.

An attorney's jury selection notes can provide a wealth of information about an attorney's mental impressions, opinions, conclusions, or theories of the case, and they fall within the protections of the attorney

---

selection notes is a *different* question than whether an attorney is entitled to disclose the reasons for challenging a juror in camera and ex parte at a *Batson/Wheeler* motion. In *People v. Ayala* (2000) 24 Cal.4th 243, a trial court had allowed a prosecutor responding to a *Batson/Wheeler* motion to disclose the reasons for challenging a juror in camera and ex parte on the ground that, otherwise, matters of strategy would be disclosed. This Court disapproved of such an ex parte proceeding in general, finding that a defendant was entitled to hear the reasons for why a juror was challenged and that, "in the main, it is error to conduct" in camera hearing where those reasons are given. (*Id.* at p. 262 [albeit also quoting *Georgia v. McCollum* (1992) 505 U.S. 42, 58 for the proposition that "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an in camera discussion can be arranged . . ."]. *Ayala,* however, did not consider the scope of the core work product privilege as described in section 2018.030, which protects *writings* not reasons, and which protects "an attorney's impressions, conclusions, opinions, *or* legal research *or* theories . . ." (Code Civ. Proc., § 2018.030(a), emphasis added.) Thus, *Ayala* supports the notion that a court should not order disclosure of notes an attorney is claiming are protected by the work product privilege.

work product privilege. (Cf., *Coito* v. *Superior Court* (2012) 54 Cal.4th 480, 495 [recognizing that sometimes even "the questions an attorney has chosen to ask (or not ask) provide a window into the attorney's theory of the case or the attorney's evaluation of what issues are most important" and that "in some cases, the very fact that the attorney has chosen to interview a particular witness may disclose important tactical or evaluative information"].)

And while the People recognize the tension between the protection afforded attorney core work product set forth in the United States Supreme Court in *Hickman v. Taylor* (1947) 329 U.S. 495, 511 (*Hickman*) and the Constitutional prohibition against discriminatory jury selection addressed in *Foster v. Chatman* (2016) 136 S.Ct. 1737 (*Foster*), the *Foster* case does not stand for the proposition that jury selection notes may be ordered disclosed in contravention of the attorney work product privilege.

Hickman recognized that "the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." (*Hickman, supra*, 329 U.S. at p. 512.)

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

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

Thus, the work product privilege affords greater protection to opinion work product, which reveals the mental impressions, conclusions, opinions, or legal theories of a party's attorney — often collectively called the "attorney core work product privilege." These are exactly the type of documents the Court of Appeal ruled has zero protection. Such an order is erroneous.

While the Court of Appeal relied on the *Foster* case to support its discovery order, *Foster* does not require disclosure of records protected by the attorney core work product privilege during a *Batson* inquiry nor does it stand for the proposition that a prosecution claim of core work product privilege is overruled upon a defendant's assertion of *Batson* error.

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

However, as an initial matter, *Foster* in no way involved whether or not a prosecutor's claim of attorney work product privilege on jury

selection documents is meaningless during *Batson* inquiries. Significantly, *Foster* never addressed the attorney work product privilege because the jury selection records were obtained through State of Georgia's Open Records statutes. (*Foster*, *supra*, 136 S.Ct. at pp. 1743–1744, 1747.) Because of the State's Open Records statutes, the jury selection notes were not privileged but made available to the public.

The lesson from *Foster* is that a court should review all evidence available to it when determining whether *Batson* error occurred. (*Foster*, *supra*, 136 S.Ct. at pp. 1743 ["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"].) But jury selection notes are not "available" in California because they are privileged work product documents. And *Foster* does not hold that a court may or should violate the attorney work product privilege in order to require the prosecution to disclose privileged material.

In *Foster*, defendant Timothy Foster claimed that the prosecution used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury in his trial for capital murder, in violation of *Batson*. (*Foster*, *supra*, 136 S.Ct. at p. 1742.) The trial court denied his claim, and the Georgia Supreme Court affirmed. (*Ibid.*) Foster renewed his *Batson* claim in a state habeas proceeding. (*Ibid.*) The state habeas court considered the prosecution's jury selection file but denied relief. (*Id.* at p. 1745.) The Georgia Supreme Court likewise denied relief, concluding that Foster's *Batson* claim was without merit because he had failed to demonstrate purposeful discrimination. (*Id.* at p. 1745.) The Supreme Court granted certiorari. (*Ibid.*)

Foster obtained copies of the file used by the prosecution during his trial through the Georgia Open Records Act. (*Foster*, *supra*, 136 S.Ct. at pp. 1743–44.) The prosecution's jury selection file was replete with

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

The Supreme Court reemphasized the principle that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." (*Foster*, *supra*, 136 S.Ct. at p. 1747.) The Supreme Court also reaffirmed the well settled, three-part process established in *Batson* for determining when a strike is discriminatory: First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. (*Ibid.*)

Despite uncertainty about who within the prosecutor's office wrote the notes obtained by Foster, the Supreme Court relied upon their existence. (*Foster v. Chapman*, *supra*, 136 S.Ct. at p. 1748.) The Supreme Court

"made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." (*Ibid.*) "[D]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available." (*Ibid.*)

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

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

The Supreme Court concluded that the "prosecutors were motivated in substantial part by race[.]" (*Ibid.*) The court reversed the judgment and remanded the case for further proceedings because "[t]wo peremptory strikes on the basis of race are two more than the Constitution allows." (*Ibid.*)

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

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

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

And in 2019, the United States Supreme Court had another opportunity in *Flowers v. Mississippi* to rule that in *Batson* inquiries the defendant's right to know the prosecutor's thought processes supersede any core work product privileges, but it did not do so. In *Flowers v. Mississippi* (2019) 139 S.Ct. 2228 (*Flowers*), defendant Flowers was tried for murder six times over the course of 22 years while he remained on Mississippi's death row without ever receiving a final conviction. (*Id.* at pp. 2234-35.) Flowers' first conviction was reversed for prosecutorial misconduct, his second for a *Batson* violation, and his third for additional prosecutorial misconduct, all by Mississippi state courts. (*Id.)* His fourth and fifth trials resulted in hung juries. (*Id.)* The Supreme Court found yet another *Batson* violation, noting the prosecution had used peremptory strikes on 41 of 42 black prospective jurors across his six trials, as well as the dramatically disparate questioning and treatment of black and white prospective jurors. (*Id.* at p. 2235.)

Like *Foster*, the Supreme Court ruled in *Flowers* that once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its peremptory strikes. The trial judge must determine whether the prosecutor's stated reasons were the actual reasons

or instead were a pretext for discrimination. (*Ibid.*) However, the Supreme Court failed to discuss a prosecutor's jury selection notes as probative, discoverable evidence in support of a defendant's *Batson* motion. (*Ibid.*) Yet, again, the Supreme Court stopped short of ordering mandatory disclosure of the prosecutor's jury selection notes during a *Batson* inquiry. (*Ibid.*)

For all of these reasons, the Court of Appeal erred when it ordered disclosure of jury selection notes that were absolutely protected by the attorney work product privilege. Appellate courts across the nation have found jury selection notes to be protected attorney work product. Even California has recognized that jury selection notes may reflect an attorney's trial strategy. The prosecution's jury selection notes are absolutely protected by the attorney work product privilege and may not be ordered disclosed. The use of *Foster* as a basis to achieve the Court of Appeal's goal of overruling work product privilege and forcing disclosure of the prosecution's jury selection notes is erroneous and cannot stand.

II.

AN ATTORNEY DOES NOT IMPLIEDLY WAIVE THE ATTORNEY WORK PRODUCT PRIVILEGE BY SIMPLY REFERENCING THEIR NOTES DURING A COURT'S BATSON/WHEELER INQUIRY

The Court of Appeal created a legal fiction when it found that the prosecutor is a witness in order to justify its ruling that the prosecutor "refreshed" his recollection by looking at his jury selection notes and, thereby, impliedly waived work product protection by disclosure through testimonial use of privileged materials. Because waiver is the only recognized exception to the absolute protection of the core work product privilege, the Court of Appeal tortured the meaning of "witness" to reach its absurd holding.

Evidence Code section 912 identifies when various privileges may be waived but does not mention any waiver of the work product privilege. (Evid. Code, § 912.) However, caselaw has held that the "waiver doctrine" is applicable to work product privilege and has looked to Evidence Code section 912 for guidance in explaining when the privilege is waived. (See *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1186; *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 214.)

Pursuant to Evidence Code section 912, a privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, *without coercion*, has disclosed a significant part of the communication or has consented to disclosure made by anyone." (Evid. Code, § 912, subd. (a); see also *Ardon v. City of Los Angeles*, *supra*, 62 Cal.4th at p. 1186, italics added.) "Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege." (Evid. Code, § 912, subd. (a); *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239 ["Waiver of work product protection . . . is generally found under the same set of circumstances as waiver of the attorney-client privilege—by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection."].)

At a *Batson/Wheeler* hearing, an attorney who is "asked to explain his conduct *must provide* a ' "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' " (*People v. Lenix* (2008) 44 Cal.4th 602, 613, italics added.) Thus, an attorney is forced to orally *disclose what would ordinarily be privileged information* regarding the reasons for challenging or keeping jurors. (See *People v. Jones*, *supra*, 57 Cal.4th at p. 917 ["If the defendant succeeds in establishing a prima

facie case, the burden shifts to the prosecutor to justify the challenges."].) However, this required disclosure does not waive the privilege.

In light of a defendant's constitutional right to a jury selected in a manner free from invidious discrimination, the United States Supreme Court created a limited exception to the attorney core work product privilege, through the *Batson* and *Wheeler* cases, by requiring the prosecutor to justify his challenge of a juror with neutral reasons. But that limited exception to the attorney work product privilege does not waive the privilege altogether. If an attorney provides neutral reasons for challenging a juror, he does so within the limited exception to the core work product privilege created by the high court in *Batson* and *Wheeler*. No waiver has occurred, and the Court of Appeal may not manifest waiver simply by forcing the prosecutor into the role of "witness" under Evidence Code section 771.

Creating a legal fiction, the Court of Appeal asserted that Evidence Code section 771 mandated disclosure of the prosecutor's jury selection notes because the prosecutor acted as a witness who "referenced details from the jury selection notes throughout the *Batson/Wheeler* hearing." (*People v. Superior Court* (*Jones*), *supra*, 34 Cal.App.5th at p. 84.) The Court of Appeal equated an attorney giving reasons for challenging a juror with a witness giving testimony under oath. (*Id.* at pp. 83-85.) The Court of Appeal also wrongly decided that Evidence Code section 771 expressly requires the production of a writing used to refresh a prosecutor's recollection in the course of a hearing. (*Ibid.*) Because the court found that the prosecutor was a witness under Evidence Code 771, the court subsequently found that the prosecutor waived the work product privilege. (*Ibid.*)

Evidence Code section 771, in pertinent part, provides:

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

(Italics added.)

However, section 771 does not apply because the prosecutor is neither a witness nor is he testifying. The attorney was not under oath and therefore should not have been found to have been a witness under Evidence Code 771. While an attorney has a duty of candor to the court (see Rules of Prof. Conduct, Rule 5-200), this does not convert the attorney into a testifying witness – subject to all the rules and restrictions applicable to a *true* witness.

In *People v. Belton* (1979) 23 Cal.3d 516, this Court explained what it means to testify:

> "Testimony" is generally described in both statutory and decisional law as oral statements made by a person *under oath* in a court proceeding. The term "testify" is referred to in identical language in the Penal Code, the Code of Civil Procedure, and the Civil Code: "... every mode of oral statement, *under oath or affirmation*, is embraced by the term 'testify,' ..." (Pen. Code, § 7; Code Civ. Proc., § 17; Civ. Code, § 14; see also Evid. Code, § 710 [oath or affirmation required before witness may testify].) Decisional law of this state has interpreted the word "testimony" in similar fashion. Testimony, "strictly speaking, means only that evidence which comes from living witnesses who testify orally." (*Mann* v. *Higgins* (1890) 83 Cal. 66, 69 [23 P. 206].) "All evidence is not testimony. Testimony is limited to that sort of evidence which is given by witnesses speaking under oath or affirmation [citation] ...." (*Stern* v. *Superior Court* (1947) 78 Cal.App.2d 9, 13 [177 P.2d 308]; see also *People* v. *Gilbert* (1963) 217 Cal.App.2d 662, 666 [31 Cal.Rptr. 920].)

(*Belton* at p. 524, emphasis added; see also Black's Law Dictionary (10th ed. 2014), p. 1704 ["To 'testify means '[t]o give evidence as a witness.'"].)

(Italics added.)

California law dictates that an attorney providing explanations for challenges at a *Batson/Wheeler* hearing is not testifying as a witness. The California Code of Civil Procedures defines a witness as "a person whose *declaration under oath* is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." (Code Civ. Proc., § 1878, italics added.) Penal Code section 1102 provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." Therefore, California Code of Civil Procedure section 1878 should have been applied to this case.

Further, Evidence Code section 710, in pertinent part, states "Every *witness before testifying shall take an oath* or make an affirmation or declaration in the form provided by law . . ." (Evid. Code, § 710, italics added.) California's Evidence Code applies to both criminal and civil cases and dictates that an attorney giving reasons at a *Batson/Wheeler* hearing is not a witness.

Additionally, a witness must also be subject to direct and cross-examination. Evidence Code 711 provides: "[a]t the trial of an action, a *witness* can be heard only in the presence and *subject to the examination of all the parties to the action*, if they choose to attend and examine." (Evid. Code, § 711, italics added.) Evidence Code section 772, subdivision (a) provides "[t]he *examination of a witness* shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination and continuing thereafter by redirect and recross-examination." (Evid. Code, § 772, subd. (a), italics added; see also *Fost* v.

Superior Court (2000) 80 Cal.App.4th 724, 733, fn. 4 ["Cross-examination—defined as 'the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness' (Evid.Code, § 761)—is required under Evidence Code section 711"].)

Just as a trial prosecutor is not considered a witness during trial as he advocates her case before judge and jury, a trial prosecutor that provides reasons for challenging a juror during a *Batson-Wheeler* inquiry is not a witness. The attorney cannot be considered a witness, because he did not take an oath, he did not testify or make a declaration under oath, and he was not subject to direct or cross-examination. And his disclosures were mandated.

The Court of Appeal, in this case, defined a witness as "a person who makes a statement" which is the definition of a declarant under Evidence Code section 135. (*People v. Superior Court* (*Jones*), *supra*, 34 Cal.App.5th at p. 84.) The Court of Appeal used this definition to claim that Evidence Code section 240 "treats the word 'witness' as synonymous with 'declarant.' " (*Ibid.*) However, Evidence Code section 240 does not define a witness as being synonymous with a declarant. Instead, it describes what constitutes unavailability for a witness.

Furthermore, the Court of Appeal seems to have overlooked the Law Revision Commission Comment to Evidence Code section 135 which states: "[o]rdinarily, the word 'declarant' is used in the Evidence Code to refer to a person who makes a hearsay statement *as distinguished from the witness* who testifies to the content of the statement." (Italics added.)[5]

---

[5] The Court of Appeal had to search far afield for a suitable definition because it likely recognized that *if* the prosecutor was *not* a "witness" as contemplated by the Evidence Code, its footing for finding disclosure of the notes as required by Evidence Code section 771

Therefore, the Court of Appeal improperly defined a witness as being synonymous with a declarant

Further, for practical reasons, an attorney providing reasons for a challenge at a *Batson/Wheeler* hearing should not be considered a "witness" as contemplated in the Evidence Code, because then it would be necessary to have the attorney testify under oath and be subject to direct and cross-examination. This, in turn, would require additional attorneys to conduct the examinations and expand what should be a relatively nondisruptive proceeding into a full-blown hearing on the attorney's state of mind. Indeed, "[i]t is generally prohibited for a prosecutor to act as both an advocate and a witness." (*People v. Linton* (2013) 56 Cal.4th 1146, 1185 [citing to former Rules Prof. Conduct, rule 5–210, now Rule 3.7].)[6] As stated by the court in *People v. Young* (Ill. 1989) 538 N.E.2d 453 (*Young*) when explaining why the prosecutor facing a *Batson/Wheeler* motion should not be called as a witness:

> If the prosecutor were to be a witness, it might be necessary to permit the bringing in of additional counsel to represent the prosecutor and to serve as advocate in the hearing. It seems predictable, too, that there would be instances in which defense counsel would ask that others who were present at the voir dire, such as second counsel and police officers at the counsel table, be called to testify. There may also be other situations in which the testimony of defense counsel would be sought by the prosecution regarding, for example, conversations between counsel and other happenings during the voir dire. We do not consider that the Supreme Court contemplated that there would be a proceeding that the defendant's request here might involve.

---

disappears.

[6] Although the language of the appellate court opinion does not draw a distinction between attorneys testifying at trial and at other hearings, the Comment to Rule 3.7 notes it only applies to trials, not other adversarial proceedings.

(*Young*, *supra*, at pp. 459-460 [noting, "[t]oo, a serious question would arise as to whether the attorney could properly be both a witness and an advocate. (See ABA Model Rules of Professional Conduct Rule 3.7 (1980).)"]; see also *State v. Jackson* (N.C. 1988) 368 S.E.2d 838, 842.)

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

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

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

An attorney providing reasons for challenging a juror at a *Batson/Wheeler* motion is neither a witness nor testifying so Evidence Code section 771 does not apply in the instant case and does not require disclosure of information protected by the work product privilege. The Court of Appeal's ruling to the contrary will have an adverse impact on the complexity of not only *Batson/Wheeler* hearings but *all* other hearings where courts have traditionally relied, in part or whole, upon the representations of counsel without cross-examination. Therefore, this court should reverse the Court of Appeal's ruling.

III.

ASSUMING, *ARGUENDO*, THAT THE ATTORNEY WORK PRODUCT PRIVILEGE DOES NOT APPLY, THE LOWER COURT'S DECISION MUST BE LIMITED

For the sake of argument, assuming the attorney work product privilege does not apply to a prosecutor's jury selection notes during a *Batson/Wheeler* inquiry, the Court of Appeal's decision is still too broad and must be limited. The Court of Appeal failed to consider such attendant issues as whether an in camera review was necessary prior to disclosure and whether the disclosure includes all notes or only notes concerning the challenged juror.

Despite the People's objection that the trial prosecutor's jury selection notes were protected by the work product privilege, the trial court nonetheless ordered the prosecution to disclose the prosecutor's notes without reviewing the notes in camera to determine what portion, if any, was privileged. The trial court's order for discovery of the prosecution's jury selection notes in this case is without limit, allowing the Jones to dive into areas far beyond that which may be relevant to his claim of bias. The Court of Appeal upheld this order. (*People v. Superior Court* (2019) 34 Cal.App.5th 75, 85.)

At a minimum, the trial court hearing the Penal Code section 1054.9 motion should have reviewed the prosecutor's notes in camera before ordering disclosure of all jury notes. Because the Court of Appeal approved a blanket order requiring the prosecution to disclose all jury selection notes without even scrutinizing the notes (*People v. Superior Court* (*Jones*), *supra*, 34 Cal.App.5th at pp. 77, 79), its ruling violated the work product privilege of the trial prosecutor and should not be upheld.

Even assuming the work product privilege was waived as to the jury selection notes *relevant* to the *Batson/Wheeler* challenge, the judge

presiding at the post-conviction section 1054.9 discovery hearing should have looked at those notes to determine whether the privilege was waived in part or in full. Any potential waiver should be limited to *those portions* of an attorney's notes relating to what was expressed orally and are relevant to the *Batson/Wheeler* challenge. Any potential waiver does not mean the privilege is waived as to *all* the attorney's jury selection notes.

As this Court has explained:

> If the party resisting discovery alleges that a witness statement, or portion thereof, is absolutely protected because it "reflects an attorney's impressions, conclusions, opinions, or legal research or theories" (§ 2018.030, subd. (a)), that party must make a preliminary or foundational showing in support of its claim. The trial court should *then make an in camera inspection to determine whether absolute work product protection applies to* ***some or all*** *of the material.*

(*Coito v. Superior Court* (2012) 54 Cal.4th 480, 499–500, emphasis added; *People v. Bryant* (2014) 60 Cal.4th 335, 466 ["In general, a court 'has inherent discretion to conduct in camera hearings to determine objections to disclosure based on asserted privileges.'"]; *People v. Thompson* (2016) 1 Cal.5th 1043, 1098 ["as a general rule, a trial court has discretion to conduct a proceeding in a defendant's absence 'to protect an overriding interest that favors confidentiality.'"]; but see Evid. Code, § 915 and *People v. Hunter* (2017) 15 Cal.App.5th 163, 180, fn. 4.)

There is an added benefit to mandating the trial court to review the notes in camera before ordering disclosure. While a trial court may decide an attorney's jury selection notes would be sufficiently helpful to the defense thereby requiring disclosure, the trial court may also determine that the notes are *not* sufficiently probative on the issues at the *Batson/Wheeler* hearing after its in camera review. (See *People v. Freeman* (Ill. App. Ct. 1991) 581 N.E.2d 293, 297 [determining no discovery of prosecutor's jury selection notes required after reviewing notes in camera pursuant to *Batson*

motion in jurisdiction where a prosecutor's jury selection notes are protected from disclosure under the work product doctrine unless they contain material favorable to the defense under *Brady v. Maryland* (1963) 373 U.S. 83];]; *People v. Mack* (Ill. 1989) 538 N.E.2d 1107, 1116 [even if judge looked at prosecutor's notes in camera, this "would not have automatically necessitated disclosure of them to the defense" where judge found notes did not contain material that could benefit the defendant].

If this Court finds the privilege was waived as to relevant jury selection notes referred to by the prosecutor at the *Batson/Wheeler* hearing, the People asks this Court to require in camera review to determine if the notes are probative of the disputed issues and to determine which portions of the notes remain privileged.

CONCLUSION

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

Date: October 22, 2019

Respectfully Submitted,

SUMMER STEPHAN
District Attorney
MARK A. AMADOR
Deputy District Attorney
Chief, Appellate & Training Division
LINH LAM
Deputy District Attorney
Asst. Chief, Appellate & Training Division

SAMANTHA BEGOVICH, SBN 172225
Deputy District Attorney

Attorneys for Petitioner

CERTIFICATE OF WORD COUNT

I certify that this, OPENING BRIEF ON THE MERITS, including footnotes, and excluding tables and this certificate, contains 9,492 words according to the computer program used to prepare it.

SAMANTHA BEGOVICH
Deputy District Attorney

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, Respondent.	For Court Use Only
BRYAN MAURICE JONES, Real Party In Interest.	Supreme Court No.: S255826 Court of Appeal No.: D074028 Superior Court No.: CR136371

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On October 22, 2019, a member of our office served a copy of the within **OPENING BRIEF ON THE MERITS** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Mail, addressed as follows:

Rachel Schaefer
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

I also electronically served the same referenced above document to the following entities via Truefiling:

Rachel Schaefer: rschaefer@hcrc.ca.gov / docketing@hcrc.ca.gov
Shelley Sandusky: ssandusky@hcrc.ca.gov
Habeas Corpus Resource Center: docketing@hcrc.ca.gov
DA Appellate: da.appellate@sdcda.org
Attorney General Office: sdag.docketing@doj.ca.gov
Superior Court of San Diego County: appeals.central@sdcourt.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 22, 2019 at 330 West Broadway, San Diego, CA 92101.

Gabriela A. Gonzalez