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 Court of Appeal, Fourth District, Division One, No. D074028 San Diego County Superior Court, No. CR136371, Honorable Joan P. Weber (Related to Habeas Corpus Case No. S217284 and Automatic Appeal Case No. S042346 [closed])

ANSWER BRIEF ON THE MERITS

Shelley J. Sandusky (Bar No. 155857)
Cliona Plunkett (Bar No. 256648)
Rachel G. Schaefer (Bar No. 298354)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov

Attorneys for Real Party in Interest Bryan Maurice Jones

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 Court of Appeal, Fourth District, Division One, No. D074028 San Diego County Superior Court, No. CR136371, Honorable Joan P. Weber (Related to Habeas Corpus Case No. S217284 and Automatic Appeal Case No. S042346 [closed])

ANSWER BRIEF ON THE MERITS

Shelley J. Sandusky (Bar No. 155857)
Cliona Plunkett (Bar No. 256648)
Rachel G. Schaefer (Bar No. 298354)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov

Attorneys for Real Party in Interest Bryan Maurice Jones

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules of Court

Other Authorities

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** Court of Appeal, Fourth District, Division One, No. D074028 San Diego County Superior Court, No. CR136371, Honorable Joan P. Weber (Related to Habeas Corpus Case No. S217284 and Automatic Appeal Case No. S042346 [closed])

ANSWER BRIEF ON THE MERITS

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

Real Party in Interest Bryan Maurice Jones (Mr. Jones) hereby submits his Answer Brief on the Merits in response to petitioner's (District Attorney) Opening Brief on the Merits (OB), filed on October 23, 2019.

INTRODUCTION

Respondent court properly determined, based upon the facts of the *Batson* hs preceding Mr. Jones's capital trial, that discovery of the prosecutor's jury selection notes was appropriate under Penal Code section 1054.9. The Court of Appeal correctly affirmed the propriety of this ruling

and denied the District Attorney's request for a writ of mandate on April 9, 2019. (*People v. Superior Court* (*Jones*) (2019) 34 Cal.App.5th 75.)

This Court granted review on July 24, 2019, on two issues:

> 1. Did the Court of Appeal violate Civil Code of Procedure section 2018.030, Penal Code section 1054.9, and federal and state attorney core work product privilege cases by affirming the trial court's order [sic] the prosecutor's jury selection notes be disclosed to real party in interest at the third stage of a *Batson/Wheeler*[1] review?
>
> 2. Did the Court of Appeal err by concluding that a lawyer waives core work product privilege when, during a three stage Batson review, mere comments by a lawyer that the lawyer's contemporaneously made jury selection notes were consistent with the lawyer's stated reasons for exercising peremptory challenges of prospective jurors?[2]

(Petn. for Review at 2).

Background Germane to the Instant Case:

Mr. Jones was convicted and sentenced to death in 1994 in San Diego County. (*People v. Jones* (2013) 57 Cal.4th 899, 908.) During trial, Mr. Jones raised three claims of race-based *Batson* error, and the court found a prima facie showing of discrimination as to two of those claims. (*Id.* at p. 916.)

The prosecutor relied on his jury selection notes to respond to these claims. He reported using a system to score prospective jurors based solely

---

[1] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258. Mr. Jones cites to *Batson* throughout this pleading, but the claim raised at trial and pending before this court on habeas invokes *Batson* and *Wheeler.*

[2] The District Attorney recharacterizes these issues in her Opening Brief in contravention of this Court's pleading requirements. (See OB at 1; Cal. Rules of Court, rule 8.520(b)(2)(B).)

on their questionnaires "without knowing what they look like." (Ret. Ex.[3] at 11, 22.) He bolstered his assertion that the rationales for his strikes were race-neutral and not pretextual by reporting that two colleagues assisted with scoring prospective jurors, including a "two-time minority; female from a minority racial group." (*Id.* at 11, 23.) Then the prosecutor offered rationales for his strikes based on his notes. (*Id.* at 11-14, 23-25.) The trial court accepted these rationales and denied the *Batson* challenges, and this Court affirmed that determination on appeal. (*Jones*, *supra*, 57 Cal.4th at pp. 916-920.)

In his habeas proceedings, Mr. Jones filed a request for Penal Code section 1054.9 discovery on April 6, 2018.[4] (Return at 10.) After briefing (see generally Petn. Ex.[5] at 56-88), respondent court heard argument on April 27, 2018.

Respondent court granted Mr. Jones's discovery request for the prosecutor's jury selection notes, finding that such notes "can be very enlightening as to whether there was racial basis for exclusion of certain jurors from the venire." (*Id.* at 46.) The court further found that the prosecutor had waived any applicable work-product protection when he used the notes during the *Batson* hearings. (*Id.* at 47.)

Mr. Jones filed an Amended Petition for Writ of Habeas Corpus (Amended Petition) with this Court on May 21, 2018.[6] (*In re Jones*, No.

---

[3] Mr. Jones filed, as an exhibit to his Return in the Court of Appeal, the excerpt of the transcript of the *Batson* proceedings considered by respondent court. "Ret. Ex." denotes a citation thereto in this brief.

[4] Contrary to the District Attorney's assertions, this pleading was filed before Mr. Jones's Amended Petition. (See OB at 3.)

[5] "Petn. Ex." as used throughout this pleading denotes exhibits filed in the Court of Appeal in support of the District Attorney's pleadings below.

[6] By this reference, Mr. Jones incorporates those facts alleged in his pending Amended Petition and supporting exhibits filed in this Court, as well

S217284.) In his Amended Petition, Mr. Jones stated a prima facie case of additional *Batson* error, namely that the prosecutor impermissibly exercised strikes based on gender by removing thirteen of seventeen female prospective jurors, and that trial counsel was ineffective for failing to object to this *Batson* violation. (Amended Petn. at 302-328.)

The District Attorney filed a petition for writ of mandate in the Court of Appeal concerning respondent court's discovery order on May 24, 2018. The Court of Appeal summarily denied that petition on June 21, 2018.

The District Attorney thereafter filed a Petition for Review with this Court on July 2, 2018. (*People v. Superior Court* (*Jones*), No. S249705.) This Court granted review on September 12, 2018 and remanded the matter to the lower court with instructions that it issue an order to show cause, which it did on September 17, 2018.

Following further briefing and oral argument, the Court of Appeal denied the District Attorney's petition on April 9, 2019. (*Jones*, *supra*, 34 Cal.App.5th 75.) The District Attorney again sought review, which this Court granted on July 24, 2019.

SUMMARY OF ARGUMENT

Resolving questions of invidious discrimination at step three of a *Batson* challenge is a daunting task for any trial court. Informed by a juror's responses on the record, the prosecutor's statements and demeanor, and defense counsel's prima facie claim that strikes were exercised in a discriminatory manner, the trial court must determine whether the prosecutor

---

as the certified record on appeal, and all briefs, motions, orders, and other documents and material on file in *People v. Bryan Maurice Jones*, No. S042346. (See *In re Reno* (2012) 55 Cal.4th 428, 444 [holding habeas petitioner need not request judicial notice of documents from prior proceedings as Court routinely consults prior proceedings irrespective of formal request].)

actually harbored discriminatory intent. The importance of ferreting out discrimination in the criminal jury selection process does not leave trial courts free to treat this task lightly. How are courts to discern the prosecutor's actual intent? The United States Supreme Court has answered this question: by considering all relevant circumstances that may have bearing on the prosecutor's true motives.

During the *Batson* hearings in Mr. Jones's trial, the prosecutor not only relied on his notes to refresh his recollection as to the reasons for his strikes, but also used the existence of these notes to bolster the credibility of his proffered race-neutral reasons, claiming the scoring system in his notes was created before he had information about juror race and that a "two-time minority" from his office had similarly scored the jurors. The prosecutor's reliance on these notes as proof that he had not deliberately discriminated made them relevant to determining the veracity of the prosecutor's assertions and the bona fides of his proffered race-neutral rationales.

Respondent court reviewed the *Batson* hearing record and properly granted Mr. Jones's request for discovery of these notes. This finding contemplates that Mr. Jones would have been entitled to these materials at trial had they been requested, and the record of the *Batson* hearings supports this conclusion. Though the District Attorney claims core work-product protection shields these notes from disclosure, numerous constitutional and statutory principles demonstrate she is incorrect.

First, *Batson*'s clarion call to trial courts – "to be sensitive to the racially discriminatory use of peremptory challenges," and thereby "enforce[] the mandate of equal protection and further[] the ends of justice" (*Batson, supra,* 476 U.S. at p. 99) – requires statutory protections that might otherwise shield information from disclosure to yield to the constitutional necessity of ferreting out invidious discrimination. Thus, in determining whether the prosecutor engaged in discrimination, a trial court must consider "all relevant

circumstances." (*Id.* at p. 96; see also *Foster v. Chatman* (2016) __ U.S. __, __ [136 S.Ct. 1737, 1748] [examining prosecutor's jury selection notes in order to meet *Batson*'s mandate that "all of the circumstances that bear upon the issue of racial animosity must be consulted], citing *Snyder v. Louisiana* (2008) 552 U.S. 472, 478.) Because the prosecutor's invocation of, and reliance on, his notes during the *Batson* hearings made them relevant to the trial court's determination of whether the prosecutor's peremptory challenges were discriminatory, respondent court properly exercised its discretion to grant Mr. Jones' request for discovery of these notes as potential factual support for his claims alleging *Batson* violations at trial.

Second, although core work-product protection has some applicability in criminal proceedings, this protection only shields attorney opinions and impressions pertaining to case strategies. Where disclosure would neither prejudice counsel's ability to prepare his case for trial nor permit opposing counsel to take undue advantage of his opponent's efforts, work-product protection does not apply. Jury selection notes routinely include observations and judgments about prospective jurors, but rarely a window into case strategies, disclosure of which would either prejudice the prosecution or grant a defense windfall. Absent a showing that some portion of these notes contains case strategies, which the District Attorney has not attempted to make here, work-product protection does not apply to jury selection notes.

Finally, even if core work-product protection applied to some or all of his jury selection notes, the prosecutor's actions during the *Batson* hearings waived this protection. Unlike other proceedings in which he may speak, the prosecutor is a fact witness during a *Batson* hearing – only he can offer the rationales for his strikes. In this case, the prosecutor used his notes to refresh his recollection about the reasons for his strikes, and therefore the notes must now be disclosed to opposing counsel. Even if this Court determines that a prosecutor does not act as a witness during a *Batson* hearing, fundamental

fairness dictates applicable statutory protections are waived where the prosecutor places the contents of his notes at issue.

Under any of these rationales, respondent court properly exercised its discretion to grant Mr. Jones discovery of the prosecutor's jury selection notes, and the Court of Appeal properly denied the District Attorney's request to vacate this order.

ARGUMENT

I. MR. JONES WOULD HAVE BEEN ENTITLED TO DISCOVERY OF JURY SELECTION NOTES AT THE TIME OF TRIAL AND IS ENTITLED TO THEM NOW.[7]

A. A Postconviction Court Stands in the Shoes of the Trial Court When Determining the Scope of Discovery.

A postconviction litigant is entitled to discovery as an aid to preparing a habeas petition and substantiating claims therein. (*In re Steele* (2004) 32 Cal.4th 682, 691.) Penal Code section 1054.9, governing the scope of postconviction discovery, grants litigants access to not only those materials previously provided, but also those to which a litigant *would have been*

---

[7] Were this Court to determine that Mr. Jones is not entitled to discovery of jury selection notes because he would not have been entitled to them at trial, he nevertheless should receive them in this habeas context. Although section 1054.9 subsumes the scope of trial discovery, it is also broader and includes discovery of materials supporting a claim "establishing the invalidity of the underlying judgment." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 862.) The passage of time between the February 9, 1994 *Batson* hearings and Mr. Jones's pending habeas claims demonstrates the importance of notes to substantiating his entitlement to relief. (See *People v. Johnson* (2006) 38 Cal.4th 1096, 1101-1102 [noting upon remand for *Batson* hearing, given passage of time, prosecutor's notes are helpful evidence of reasons for strikes].) Discovery of this particularly probative *Batson* evidence on habeas furthers Proposition 66's goals to fully and fairly resolve state habeas claims in a single proceeding. (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 823-825.)

entitled at trial. (Pen. Code, § 1054.9, subd. (c);[8] *Steele*, *supra*, at p. 696-697; *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 898-899.) A postconviction court may grant discovery where it finds that "the defendant would have been entitled [to it] at the time of trial had the defendant specifically requested [it]." (*Steele*, *supra*, at p. 697.) Section 1054.9 requires a superior court to examine a petitioner's discovery entitlement as it existed at the time of trial.

As with pre-trial discovery, a court has discretion to determine the scope of postconviction discovery. (*Kennedy v. Superior Court.* (2006) 145 Cal.App.4th 359, 366, citing *People v. Ayala* (2000) 23 Cal.4th 225, 299.) Where a lower court's discovery order rests on sound legal reasoning or established law, it should not be disturbed. (*Carlson v. Superior Court* (1961) 56 Cal.2d 431, 440.) Similarly, in postconviction proceedings, as at trial, the lower court has discretion to determine the scope and application of any work-product protection. (*Jimenez v. Superior Court* (2019) 40 Cal.App.5th 824, 837, citing *Armenta v. Superior Court* (2002) 101 Cal.App.4th 525, 536.) A lower court's ruling "will be sustained on review unless it falls outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) An order granting discovery should not be disturbed on appeal where it is "correct in theory . . . even where the trial court's reasoning is erroneous." (*Kennedy*, *supra*, at p. 368.)

Respondent court assessed Mr. Jones's discovery request precisely as the law required – by evaluating whether it would have authorized such discovery at trial. (See Petn. Ex. at 47-48.) The District Attorney faults the

---

[8] When Mr. Jones filed his postconviction discovery motion, this provision was contained in section 1054.9, subdivision (b), but section 1054.9 was amended on January 1, 2019, and the scope of discovery language now appears in subdivision (c). This amendment did not alter the standard for obtaining capital postconviction discovery.

lower court for "declaring the prosecutor as a witness, 25 years after the exchange with the trial court." (OB at 1.) But section 1054.9 requires this backwards-glancing approach. A postconviction court must place itself in the shoes of the trial court and determine whether it would have granted discovery at the time of trial had it been requested.

B. Law at the Time of Mr. Jones's Trial Mandated that Courts Consider "All Relevant Circumstances" in Assessing Proffered Race-Neutral Reasons.

A *Batson* inquiry poses a unique challenge with a unique solution. During the first step of a *Batson* inquiry, the burden is plain and often demonstrated by the record – the prosecutor has struck one or more jurors of a protected class and this strike or strikes, along with other factors such as disparate questioning of jurors or a prosecutor's statements, support a prima facie claim that the prosecutor improperly discriminated in exercising his challenges. (*Batson, supra,* 476 U.S. at p. 97.) In response to this prima facie finding, the prosecutor may proffer race-neutral reasons for his strikes at step two. (*Ibid.*) At *Batson*'s third step, the trial court must determine whether the prosecutor in fact exercised strikes with "purposeful discrimination." (*Id.* at p. 98.) This third step requires the trial court to determine the prosecutor's actual reasons for his strikes. (E.g., *Johnson v. California* (2005) 545 U.S. 162, 172; *Purkett v. Elem* (1995) 514 U.S. 765, 768.) This inquiry is nearly unique in requiring the trial court to determine the "prosecutor's state of mind" and whether his proffered reasons are pretextual or false. (*Johnson, supra,* at p. 171; *Purkett, supra,* at p. 768; *Hernandez v. New York* (1991) 500 U.S. 352, 365.) At step three, "[i]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason [jurors] were stricken." (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090, original italics; see also *Williams v. Louisiana* (2016) __ U.S. __, __ [136 S.Ct. 2156, 2156-2157]

[rejecting state rule permitting trial court to supply race-neutral reasons apparent from record].) "If the [prosecutor's] stated reason does not hold up," the trial court is not free to "imagine a reason that might not have been shown up as false." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 252 (*Miller-El II*).)

The requirement that a court determine the prosecutor's actual intent during *Batson* step three creates "inherent uncertaint[ies]" that the trial court must endeavor to resolve (*Johnson*, *supra*, 545 U.S. at p. 172), and turns *Batson* analysis into an "awkward, sometime[s] hopeless task" (*Miller-El II*, *supra*, 545 U.S. at p. 257 (conc. opn. of Breyer, J.)). "The rub [of *Batson* proceedings] has been the practical difficulty of ferreting out [jury] discrimination in selections discretionary by nature." (*Id.* at p. 238.) And the trial court's reliance on "the particular reasons a prosecutor might give," creates a potential "weakness" in the inquiry that threatens *Batson*'s promise.[9] (*Id.* at pp. 239-240.)

A trial court is not without remedies to resolve these uncertainties. Even before *Batson*, the United States Supreme Court recognized the challenges inherent in identifying a prosecutor's discriminatory motives and found that resort to a wide array of evidence enabled a more accurate determination. (*Swain v. Alabama* (1965) 380 U.S. 202, 223-234.) This need to examine multiple sources of relevant evidence accords with the Supreme Court's equal-protection analysis in other contexts, which recognizes that although "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action, . . . such cases are rare . . . and the Court must look to other evidence." (*Village of Arlington Heights v.*

---

[9] Respondent court noted these inherent difficulties in determining the actual reasons for the prosecutor's strikes and concluded, based upon the record of Mr. Jones's *Batson* hearings, that the notes were potentially helpful to this determination. (Petn. Ex. at 42-43.)

Metropolitan Housing Dev. Corp. (1977) 429 U.S. 252, 266.) Thus, government documents authored roughly contemporaneously with the complained-of government action are "highly relevant" extra-record evidence of "whether racially discriminatory intent existed." (*Id.* at p. 268.)

Although *Batson* modified *Swain* by permitting litigants to demonstrate invidious discrimination within a single case (as opposed to *Swain*'s more onerous pattern-over-time showing), resort to multiple sources of evidence remained the post-*Batson* norm. (*Miller-El II*, *supra*, 545 U.S. at pp. 239-240.) *Swain*'s continuing mandate under *Batson* requires trial courts to cast a "wide net" by considering "all relevant circumstances" to identify instances of invidious discrimination. (*Id.*, citing *Batson*, *supra*, 476 U.S. at pp. 96-97; *Miller-El II*, *supra*, at p. 252 [holding *Batson* "requires the judge to assess the plausibility of [the prosecutor's stated] reason in light of all evidence with a bearing on it"]; see also *Flowers v. Mississippi* (2019) __ U.S. __, __ [139 S.Ct. 2228, 2245] [noting *Batson* did not abrogate *Swain*'s "'wide net' to gather 'relevant evidence'"].)

C. The Prosecutor's Jury Selection Notes Are a Relevant Source of Prosecutorial Intent.

The wide net prescribed by *Swain* includes both the prosecutor's actions during voir dire and those outside the "four corners" of the record. (*Miller-El II*, *supra*, 545 U.S. at p. 240.) The *Swain* Court examined evidence of petit jury composition in the county over the course of nearly a decade as well as the prosecutor's stated jury selection practices. (*Swain*, *supra*, 380 U.S. at pp. 205, 225, fn. 31.) The *Batson* Court noted that a defendant could support a showing of invidious discrimination with resort to a "'pattern' of strikes against [a particular group of] jurors," as well as "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges." (*Batson*, *supra*, 476 U.S. at p. 97.) But this list of evidence, the

Court admonished, was by no means exhaustive:

> These examples are merely illustrative. We have confidence that trial judges experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination.

(*Ibid.*) Trial courts thus are tasked with determining the scope of evidence necessary to their ultimate *Batson* determination.

The Supreme Court recognized and considered a wide swath of discriminatory-intent evidence when twice reviewing the record of a post-trial *Batson* hearing in *Miller-El I* and *Miller-El II*, before ultimately finding a *Batson* violation. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 327 (*Miller-El I*); *Miller-El II*, *supra*, 545 U.S. at pp.242-252.) The *Miller-El* Court examined circumstances adduced during a 1988 post-trial hearing, including comparative juror analysis, disparate prosecutorial questioning, the prosecutor's jury selection pattern and practice, and *the prosecutor's notes concerning juror race*. (*Miller-El I*, *supra*, at pp. 329-335, 347; *Miller-El II*, *supra*, at pp. 247-265.) The Court relied on the prosecutor's notes to find first that Mr. Miller-El was entitled to a certificate of appealability on his *Batson* claim:

> The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their jury cards.

(*Miller-El I*, *supra*, at p. 347), and later to determine that he was entitled to relief:

> The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

(*Miller-El II*, *supra*, at p. 266.)

The Court again relied on wide-ranging evidence in *Foster*, *supra*, 136 S.Ct. at p. 1744,[10] including the prosecutor's notes, lists of qualified jurors with notations, and juror questionnaires containing notations. In considering these notes as evidence of prosecutorial discriminatory intent, the *Foster* Court repeated: "[w]e have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'" (*Id.* at p. 1748, citing *Snyder*, *supra*, 552 U.S. at p. 478.) The *Foster* Court recognized the probative value of the prosecutor's notes to the question of discriminatory intent and refused "the State's invitation to blind ourselves to [the notes'] existence," despite questions about their provenance. (*Foster*, *supra*, at p. 1748.)

Notably, the *Foster* Court found that the contemporaneous notes were the best evidence of the prosecutor's intent. Repeatedly, the Court relied on these notes to rebut the prosecutor's stated race-neutral reasons for the strikes and find that the lower court's decision denying relief had "no grounding in fact." (*Foster*, *supra*, 136 S.Ct. at p. 1749; see also *id.* at pp. 1749-1750 [noting prosecutor's assertion he considered allowing one Black prospective juror to serve was "belie[d]" by "the 'definite NO's' list in the prosecution's file"], at p. 1750 ["The first five names on the 'definite NO's' list . . . . [a]ll

---

[10] The District Attorney urges that "*Foster* never addressed the attorney work product privilege because the jury selection records were obtained through [sic] State of Georgia's Open Records statutes." (OB at 17, internal citations omitted.) Although the question of jury selection note discovery was not before the *Foster* Court (because the notes were already evidence in the record below), Georgia's Public Records Act exempts from disclosure "confidential attorney work product." (Ga. § 50-18-71, subd. (a)(42).) That jury selection notes were provided and the Attorney General did not object to use of the records on work-product grounds indicate this protection did not apply.

were black"], at p. 1754 [noting that "[t]he prosecution's file fortifies our conclusion that any reliance on [the juror's] religion was pretextual," and that the file records the prospective juror's church affiliation as "'*NO*. NO *Black* Church'"].) Overall, the *Foster* Court noted "[t]he contents of the prosecution's file [] plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner. . . . The sheer number of references to race in that file is arresting." (*Id.* at p. 1755.) *Foster* thus underscores the probative value in a *Batson* inquiry of prosecutor notes as evidence of discriminatory intent.

Foster is not an isolated case – at trial and in habeas proceedings, many California courts conducting *Batson* inquiries have relied on contemporaneous jury selection notes to ascertain the prosecutor's intent and determine the veracity of any proffered race-neutral reasons for the strikes:

- This Court affirmed denial of a *Batson* claim in *People v. Williams* (2013) 56 Cal.4th 630, 651, relying on the prosecutor's assertion that he struck prospective jurors based on apparent demeanor as recorded in his notes. The prosecutor stated he had given one juror a low rating "on his reluctance scale" after reviewing her questionnaire and listening to her voir dire responses and had "reviewed his notes, and had seen that he had rated [another struck juror] as very reluctant to impose the death penalty." (*Ibid.*) On habeas, the prosecutor voluntarily provided his voir dire notes to Mr. Williams.[11] (RJN Ex.[12] D: Excerpts from Petn. for Writ of Habeas Corpus, *In re George Brett Williams* (Sept. 27, 2007, S156682) at 264.)

---

[11] The prosecution also voluntarily provided the petitioner with voir dire notes pertaining to seated jurors in *People v. Carey*. (See RJN Ex. A.)

[12] Contemporaneous with this Answer Brief, Mr. Jones requests this Court take judicial notice of other cases wherein jury selection notes have been used to support a *Batson* claim. He cites to the materials filed with that request as RJN Ex. herein and uses the pagination designated therein.

These notes reveal that the prosecutor only recorded race and gender for Black female prospective jurors – all of whom he struck. (*Id.* at 264-265.) This Court recognized that the notes changed the *Batson* claim before it on habeas and issued an order to show cause. (RJN Ex. E: Order to Show Cause, *In re George Brett Williams* (March 28, 2018, S156682).)

- This Court similarly affirmed denial of a pre-trial *Wheeler* challenge in *People v. Crittenden* (1994) 9 Cal.4th 83, 119, finding the defendant had not demonstrated a prima facie case of discrimination. The federal habeas court subsequently ordered a *Batson* hearing wherein the prosecutor produced his trial juror questionnaires, including notations and ratings of prospective jurors. (*Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 953-954.) Using comparative juror analysis, the federal court found a *Batson* violation because the prosecutor's notes disclosed that he rated jurors of color less favorably than "demographically similar" white jurors. (*Id.* at p. 956; see also *Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998, 1012 [finding prosecutor's notes "provide a useful basis for a comparative juror analysis"].)

- In *People v. Stanley* (2006) 39 Cal.4th 913, 937, 945, this Court affirmed denial of a *Batson* challenge where the prosecutor reported that he struck four Black female jurors based upon his notation that the prospective jurors harbored apparent "'sympathy for the defendant.'" In 2013, the federal habeas court ordered the State to produce the prosecutor's "entire case file[]," which included jury selection notes. (*Stanley v. Martel* (N.D.Cal. May 10, 2013, No. C-07-4727) 2013 WL 1964924, *2.) The federal court found that the notes "do not include the phrase 'sympathy for the defendant," but instead "include words such as 'Black,' 'B,' or 'Dark,' in the notations regarding black prospective jurors." (*Stanley v. Ayers* (N.D.Cal. June 1, 2018, No. 07-cv-04727) 2018 WL 2463383, *3.)

- In *People v. Jones* (1997) 15 Cal.4th 119, 163, this Court, examining another *Batson* challenge, determined that "the trial court properly could find that the reasons advanced by the prosecutor for exercising a peremptory challenge against [the juror] were not mere pretexts intended to conceal a motive of racial bias." (*Ibid.*) The Attorney General voluntarily provided the prosecutor's voir dire notes in federal habeas. (RJN Ex. C: Excerpts from Petn. for Writ of Habeas Corpus, *In re Jeffrey Jones* (Sept. 18, 2015, S230239) at 47-188.) These notes demonstrated that the prosecutor recorded race only for Black prospective jurors on the master jury list and elsewhere denoted juror race and derogatory comments about prospective jurors of color. (*Id.* at 35-38.)

Numerous other courts have considered the prosecutor's jury selection notes as evidence of invidious discrimination supporting *Batson* claims. (E.g., *Lee v. Commissioner, Alabama Dept. of Corrections* (11th Cir. 2013) 726 F.3d 1172, 1222, fn. 34 [noting prosecutor's notes "explicitly noted the race of every black venire member, and only black venire members"]; *Mitcham v. Davis* (N.D.Cal. 2015) 103 F.Supp.3d 1091, 1097 [finding prosecutor's notes "make[] clear that the prosecutor was keeping track of the race of the African American prospective jurors . . . . He did not keep track of the race of any other jurors"]; RJN Ex. F: Order on Defendant's Ex. Motion for New Trial, *Georgia v. Gates* (Jan. 10, 2019, Super. Ct. Muscogee Cty. SU-75-CR-38335) at 296-297 [finding "both prosecutors from Gates's case wrote notes that reflect intentional discrimination"]; RJN Ex. G: Excerpts from Brief of Amicus Curiae North Carolina State Conference of the NAACP, *North Carolina v. Robinson et al*, (July 11, 2018, N.C.411A94-6), at 332 [denoting prosecutor's notes include "capital 'B' or writing the words 'GOOD BLACK' next to [juror] names"]; RJN Ex. H: Order Granting Motions for Appropriate Relief, *North Carolina v. Golphin et al* (Dec. 13,

2012, Super. Ct. Cumberland Cty. 97 CRS 47324-15) at 357 [finding prosecutor's "notes are irrefutable evidence that race, and racial stereotypes, played a role in the jury selection process in [petitioner's] case"]; see also *Majid v. Portundo* (2d Cir. 2005) 428 F.3d 112, 129 [noting defendants had opportunity "to examine the prosecutors' contemporaneous notes relating to jury selection" prior to *Batson* hearing]; *Simmons v. Simpson* (W.D.Ky. Feb. 12, 2009, No. 3:07-CV-313) 2009 WL 4927679, *21-*23 [relying on established "broad-based approach when considering claims of racial discrimination in jury selection arising under *Batson*," and ordering discovery of prosecutor's notes]; Order (E.D.Pa. Apr. 10, 2018) *Roney v. Wetzel*, No. 14-2083 [ordering prosecution to disclose jury selection notes to petitioner].)

These notes are not just a tool for the defense – where they corroborate the prosecutor's proffered race-neutral reasons, such notes are evidence that the strikes were exercised in a non-discriminatory manner:

- This Court considered the prosecutor's notes[13] in evaluating a habeas *Batson* claim that a prosecutor exercised strikes on the basis of religion. (*In re Freeman* (2006) 38 Cal.4th 630, 636.) Although the prosecutor testified he had so-improperly exercised his strikes, both the lower court and this Court reviewed the prosecutor's contemporaneous notes and found they refuted these allegations. (*Id.* at pp. 642-643.)

- Upon remand for a post-trial *Batson* hearing, the prosecutor provided his contemporaneous jury selection notes as evidence of the race-neutral reasons for his strikes in *People v. Placencia.* (RJN Ex. B: *People v. Placencia* (Nov. 23, 2010, C062700) [nonpub. opn.], at 20-22.) The trial

[13] The *Freeman* Court noted that petitioner supplied the jury selection notes during the evidentiary hearing, but did not detail how petitioner obtained these notes. (See *Freeman, supra*, 38 Cal.4th at p. 636.)

court determined, based on these notes, that the strikes were exercised in a non-discriminatory manner. (*Id.* at 21-22)

(See also *Adkins v. Warden, Holman CF* (11th Cir. 2013) 710 F.3d 1241, 1245 [detailing prosecution's assertion that notes demonstrate erroneous information, not invidious discrimination, led to juror strike]; *United States v. Stephens* (7th Cir. 2008) 514 F.3d 703, 715 [reversing lower court's *Batson*-error finding: "[t]he government's notes substantiate that the government examined a variety of individual permissible factors related to each juror"]; *Holder v. Welborn* (7th Cir. 1995) 60 F.3d 383, 386 [recounting prosecutors' reliance on notes that "did not reflect the race of any venireperson" as evidence of race-neutral strikes]; RJN Ex. I: Order *Tennessee v. Abu-Ali Abdur'rahman* (Apr. 5, 2002, Tenn. M1988-00026-SC-DPE-PD) at 367 [finding prosecutor's notes "reflect numerous valid race-neutral reasons" for strikes].) The Ninth Circuit has gone so far as to admonish prosecutors who do not retain their notes because such notes provide "circumstantial evidence of their actual reasons for exercising a strike." (*Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1106, fn. 16.) The notes may demonstrate that the proffered race-neutral reasons are not pretextual where the notes "fully support the explanations given by government counsel for exercising these peremptory strikes." (*United States v. Tindle* (4th Cir. 1988) 860 F.2d 125, 131.)

Additionally, because counsel remain advocates at *Batson*'s step three, it is imperative that both parties have access to all relevant circumstances the court considers – including, where applicable, the prosecutor's notes. Production of these notes to the defense affords the court "the opportunity to consider arguments in an adversarial context," to determine the actual reasons for the prosecutor's strikes. (*People v. Hardy* (2018) 5 Cal.5th 56, 80; see also *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1258-

1259 [noting importance of adversarial proceeding at *Batson* step three]; Brett M. Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings* (1989) 99 Yale L.J. 187, 189-190 ["the defense should have an opportunity to rebut the prosecutor's reasons before the trial judge decides whether to allow the prosecutor's peremptories"].) At *Batson* step three, "[j]udges rely on the arguments of counsel," the prosecutor should be given "the opportunity to defend herself against defendant's claims that her reasons were pretextual," and "[t]he defendant has the ultimate burden of persuasion regarding the prosecutor's motivation." (*Hardy*, *supra*, at p. 81.) Allowing both parties to examine the notes and argue their significance provides the trial court with the best opportunity to make an accurate step-three determination.

Courts and parties alike recognize the value of jury selection notes in resolving a *Batson* inquiry. *Batson*'s requirement that courts case a wide net and examine "all relevant circumstances" to determine the actual reasons for a prosecutor's strikes may necessitate examination of these notes in some cases. The number of opinions considering and relying upon prosecutor notes demonstrates their relevance and probative value.

D. The Prosecutor's Actions in Mr. Jones's Case Demonstrate the Relevance of the Notes to the *Batson* Inquiry.

Faced with a pre-trial *Batson* challenge, a trial court is vested with discretion to determine how best to proceed. (*Batson*, *supra*, 476 U.S. at p. 97; *Williams*, *supra*, 56 Cal.4th at p. 650.) The court has similar discretion to determine both the discovery it will grant and whether work-product protection applies to sought materials. (*Jimenez*, *supra*, 40 Cal.App.5th at p. 837; *Kennedy*, *supra*, 145 Cal.App.4th at p. 366.) Respondent court properly exercised this discretion in determining that Mr. Jones was entitled to discovery of the prosecution's jury selection notes.

The trial court found that Mr. Jones presented a prima facie *Batson* claim. This determination required the court to examine a "combination of factors" such as the pattern of the prosecutor's strikes and his disparate questioning or statements during voir dire. (*Batson, supra*, 476 U.S. at pp. 96-97.) The trial court's finding is based on an "inference that the prosecutor used [his strikes] to exclude the veniremen from the petit jury on account of their race." (*Id.* at p. 96.) Once it finds a prima facie claim, the court must conduct further inquiry.

The prosecutor's reliance on his notes and a purported rating system contained therein supports respondent court's finding that the notes are relevant to the *Batson* inquiry. During step two, the prosecutor stated:[14]

> We developed a rating system, if you will, where we numerically evaluate jurors based upon the questionnaires without knowing what they look like.[15]
>
> [Y.J.] we had rated 13th lowest of the whole group. She was rated the level for she – where she was going to be kicked based upon her answers on the questionnaire.

(Ret. Ex. at 10-11.) He attempted to bolster his proffer with the assertion that a "two-time minority" in his office had similarly given Prospective Juror Y.J. a low rating:

> [A]nd I might indicate that assisting me in the evaluation of the questionnaire was one person who is a two-time minority;

---

[14] The prosecutor also provided a laundry list of reasons for striking each Black juror, rather than focused and specific criteria (Ret. Ex. at 11-14, 22-25) – further evidence that the strikes were discriminatorily exercised. (*Johnson v. Finn* (9th Cir. 2011) 655 F.3d 1063, 1075, fn. 6, citing *Purkett, supra*, 514 U.S. at p. 768.)

[15] Although the prosecutor repeatedly professed his inability to discern juror race based solely on the questionnaires, some juror responses did imply or expressly provide information regarding juror race. (E.g., Ret. Ex. at 25.)

> female from a minority racial group. She also had [Y.J.] rated even lower than I.

(Ret. Ex. at 11.) As to Prospective Juror C.G., the prosecutor presented a similar rating-scale-reliant proffer:

> I had [C.G] rated the same way as [Y.J.], below the acceptable level, based upon the entirety of her questionnaire. There were too many people that are better than her.

(Ret. Ex. at 13.) And again with Prospective Juror J.Y.:

> Our evaluation of [J.Y.] placed her in the unacceptable range, clearly. She was what we consider the fifth from the bottom of the group that came in here today, based upon our numerical analysis by three people who independently read the questionnaire.

(Ret. Ex. at 23.)

The prosecutor's repeated references to his notes and scoring system contained therein made them "relevant" to the inquiry required by *Batson*. (See *Batson*, *supra*, 476 U.S. at p. 96.) Contents of notes regarding these struck jurors, as well as a comparison between these notes and notations concerning jurors allowed to remain has the "tendency in reason to prove or disprove" the prosecutor's proffered reasons for his strikes and identify whether discriminatory motives were at play. (See Evid. Code, § 210.) Respondent court found that the notes "can be very enlightening as to whether there was a racial basis for exclusion of certain jurors from the venire." (Petn. Ex. at 46.) Because the prosecutor specifically referenced and relied on his notes at step two, respondent court found:

> [I]f there are specific notes taken by the attorney that could possibly impeach what he said on the record . . . . [H]ow can counsel ever investigate whether there was a legitimate Batson with regard to the exercise of challenges against minority jurors unless she has access to that material? So I think she's

> entitled to it under Foster versus Cha[t]man which I think indicates that – that these materials can be relevant.

(*Id.*at 48.) Having found that the notes were a relevant circumstance to consider following the prosecutor's reliance on them, respondent court properly exercised its discretion to order discovery of these notes.

E. The Probative Value of Notes to a *Batson* Determination Demonstrates Why Statutory Protections Must Yield.

Where a court identifies the prosecutor's notes as relevant to its *Batson* determination, statutory protections – work-product or otherwise – cannot stymie probing equal protection analysis. This analysis is unique and requires courts to "engage[] in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 309, citing *Batson*, *supra*, 476 U.S. at p. 85.) It "demands a sensitive inquiry" into evidence elucidating government intent. (*Village of Arlington Heights*, *supra*, 429 U.S. at p. 266.) Courts have an important role to play in ferreting out such prejudices – "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" (*Pena-Rodriguez v. Colorado* (2017) __ U.S. __, __ [137 S.Ct. 855, 868].) This Court need not decide whether and to what extent work-product protection may be applicable to the prosecutor's jury selection notes – such protection is necessarily subordinate to a trial court's determination of whether invidious discrimination played a role in the prosecutor's jury selection efforts.

Analogously, the United States Supreme Court, relying in part on *Batson* case law, has held that work-product protection cannot hinder a defendant's ability to demonstrate a discriminatory-charging equal protection violation. (*United States v. Armstrong* (1996) 517 U.S. 456, 467-469.) Like a *Batson* challenge, these claims require courts to determine

actual prosecutor intent based on circumstantial evidence, and the prosecution responds once a prima facie case of discriminatory charging is established. (*Id.* at pp. 465-466, 468.) The *Armstrong* Court explained the reasons for the existence of a rigorous discovery standard once a litigant demonstrates a prima facie claim of discriminatory prosecution:

> If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and *may disclose the Government's prosecutorial strategy.*[16]

(*Id.* at p. 468, italics added.) The Court held that, in light of these factors, requiring a defendant to demonstrate a prima facie claim before ordering discovery that may include prosecutorial strategy information properly balanced the rights and interests of both parties. (*Ibid.*)[17] Similarly, where a prima facie *Batson* claim is made, the prosecutor's notes must be disclosed

---

[16] In *People v. Superior Court* (*Baez*) (2000) 79 Cal.App.4th 1177, 1196, the court affirmed a discovery order following defendant's demonstration of a prima facie discriminatory charging claim. This discovery included "information pertaining to discussions or memorandum concerning the charging of the Defendant [and] information contained in discussions or memorandum concerning the charging of the Defendant," without regard to any statutory protections that may have been applicable to any portion of these documents. (*Id.* at p. 1181, fn. 3.)

[17] California courts recognize that discovery of information supporting a discriminatory-charging claim is constitutionally mandated and must be provided even if not expressly contemplated by statute. (*People v. Montes* (2014) 58 Cal.4th 809, 828; *Baez*, *supra*, 79 Cal.App.4th at p. 1190.) Similarly, any question of whether the prosecutor's jury selection notes falls under the scope of section 1054.9 should be resolved in favor of granting constitutionally-appropriate discovery. (See *Izazaga v. Superior Court.* (1991) 54 Cal.3d 356, 377-378 [finding constitutionally compelled disclosures exist regardless of statutory discovery requirements].)

if relevant.

The need to identify discrimination in the jury selection process is all the more important given the jury's sacrosanct role in the criminal justice system. "[R]acial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" (*Pena-Rodriguez*, *supra*, 137 S.Ct. at p. 868, citing *Powers v. Ohio* (1991) 499 U.S. 400, 411.) This is because trial by jury is "a vital principle, underlying the whole administration of criminal justice." *McCleskey*, *supra*, 481 U.S. at p. 310. The jury serves as "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' Specifically, a capital sentencing jury *representative* of a criminal defendant's community assures a 'diffused impartiality,' in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death.'" (*Ibid.*, citing *Taylor v. Louisiana* (1975) 419 U.S. 522, 530, *Witherspoon v. Illinois* (1968) 391 U.S. 510, 519, and *Strauder v. West Virginia* (1880) 100 U.S. 303, 309, original italics.)

In this context, the Supreme Court recognized that the federal statute preventing litigants from challenging a jury's verdict with evidence of juror thoughts and biases must "give way" to permit the Court to consider evidence of juror racial bias. (*Pena-Rodriguez*, *supra*, 137 S.Ct. at p. 869.) *Pena-Rodriguez*, like *Armstrong*, recognized that a required threshold showing of discriminatory actions before setting aside a statutory protection (in this case the federal no-impeachment rule) to permit further inquiry into the claim of discrimination served to balance the interests of both parties. (See *ibid.* ["[f]or the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict"].) The *Pena-Rodriguez* Court recognized the judiciary's overarching responsibility to identify discrimination in the criminal jury process, and

imposed "[a] constitutional rule that racial bias in the justice system must be addressed." (*Ibid.*) Courts have a similar responsibility to identify racial discrimination where it occurs in the jury selection process, and *Batson*'s prima facie case requirements, like the threshold showings required in *Pena-Rodriguez* and *Armstrong*, limit the number of cases wherein need to identify prosecutorial discrimination may require disclosure of materials otherwise potentially subject to statutory protections.

II. JURY SELECTION NOTES ARE NOT CORE WORK PRODUCT AS DEFINED IN CODE OF CIVIL PROCEDURE SECTION 2018.030.

A. The Core Work-Product Rule Protects Opinions and Impressions Pertaining to Case Strategies.

Core work-product[18] protection applies to writings "that reflect an attorney's impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc., § 2018.030, subd. (a).) This statute does not mean that any writing labeled as counsel's thoughts or opinions is automatically protected from disclosure. Were subdivision (a) to be so mechanistically applied, the legislature would not have crafted section 2018.020, outlining the overall purpose for work-product protection and guiding interpretation of the ensuing section. (See *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 133 [finding need to interpret scope of work-product protections in light of stated statutory purpose]; accord *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1619.) The District Attorney's arguments disregard the context and overall purpose underlying the work-product statute. She asserts that the statute protects "all attorney impressions, conclusions, and opinions

---

[18] Only core work-product protection applies in criminal matters or pre-order-to-show-cause habeas matters. (*Izazaga*, *supra*, 54 Cal.3d at p. 382, fn. 19; *Jimenez*, *supra*, 40 Cal.App.5th at p. 835.)

not connected to legal theories," and complains that the lower court "superimposed" a requirement that work-product protection concern the legal theory of the case. (OB at 11.) These arguments ignore the statutory moorings defined by section 2018.020, which limits the scope of work-product protection to those materials which will:

> (a) Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their *cases* thoroughly and investigate not only the favorable but the unfavorable aspects of those *cases.*
>
> [and]
>
> (b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts.

(Code Civ. Proc., §2018.020, italics added.) This scope must "be strictly construed," so as to not "suppress otherwise relevant facts" from discovery. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 396, superseded in part by Code Civ. Proc., § 2018.030.)

Section 2018.020 links the scope of core work-product protection to that necessary to prepare a case for trial – covering those materials that if disclosed would reveal counsel's game plan. The protection is designed to "encourage attorneys to honestly and objectively evaluate cases." (*Tucker Ellis LLP v. Superior Court. (Nelson)* (2017) 12 Cal.App.5th 1233, 1245.) Accordingly, work product is only that which is "the product of an attorney's 'effort, research, and thought in the preparation *of his client's case.* It includes the results . . . [of] investigating both the favorable and unfavorable aspects *of the case*, the information thus assembled, and the legal theories and plan of strategy developed by the attorney." (*Meza v. H. Muehlstein & Co., Inc.* (2009) 176 Cal.App.4th 969, 977, citing *BP Alaska Exploration, Inc. v. Superior Court.* (1988) 199 Cal.App.3d 1240, 1253-1254, fn. 4, italics added.) An attorney's opinions, impressions, or conclusions not related to

the theory of the case are not work product because disclosure of such information does not threaten the sanctity of counsel's preparation.

The District Attorney relies at length on *Hickman v. Taylor* (1947) 329 U.S. 495, 511 – a federal case examining federal work-product protection. (See OB at 15.) Although not dispositive of the scope of California's work-product protection, *Hickman* also instructs that work product protects only those impressions and opinions relating to counsel's legal theory of the case:

> Proper preparation of a client's case demands that [counsel] assemble information, sift what he considers to be the relevant from the irrelevant facts, *prepare his legal theories and plan his strategy* without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.

(*Hickman*, *supra*, at p. 511, italics added.) The *Hickman* decision thus tied the scope of protection applicable to interviews, statements, etcetera, to those germane to counsel's assembly of information for the case. This Court's precedent interpreting *Hickman* (and again, as cited by the District Attorney), links work-product protection with those materials that would provide opposing counsel with a glimpse of "the attorney's *theory of the case*." (*Coito v. Superior Court* (2012) 54 Cal. 4th 480, 495, italics added; see also OB at 15.)

The District Attorney's argument that work-product protection applies to "all attorney impressions, conclusions, and opinions not connected to legal theories" (OB at 11) improperly expands work-product protection beyond its intended boundaries. Under her formulation, a prosecutor's note made during jury selection that said "Keep Juror 112 – saw her and bailiff exchange thumbs up to each other as she exited the courtroom," would not be discoverable – despite the fact that it reveals potential misconduct by

multiple trial participants, including the prosecutor herself – because it evidences the prosecutor's "conclusion" to keep this juror on the panel and her "impression" that this juror would be helpful to the prosecution.

Contrary to the District Attorney's contention, however, case law makes clear that work-product protection is available only where the selected information recorded "provide[s] a window into the attorney's theory of the case," or where the choice of what to record is "especially revealing" and threatens to "disclose important tactical or evaluative information." (*Coito*, *supra*, 54 Cal.4th at p. 495.) This requires a more particularized showing by the party protesting disclosure. (*Ibid.*; see also *People v. Hunter* (2017) 15 Cal.App.5th 163, 181 [noting *Coito* rejected party's blanket assertion that attorney-recorded witness statement "always will reveal the attorney's thought process"].) Where counsel's written impression, or opinion does not encompass the ultimate issues in the pending matter, it is not protected by the work-product rule.

B. Jury Selection Notes Do Not Routinely Contain Details Evincing Case Strategies.

Ordinarily, a prosecutor's reasons for his strikes – whether articulated at step two or contained in his notes – do not reveal anything about case strategy. (*Georgia v. McCollum* (1992) 505 U.S. 42, 58 ["Counsel can ordinarily explain the reasons for peremptory challenges without revealing anything about trial strategy[19] or any confidential client communications"].) A review of seminal *Batson* case law demonstrates the sheer breadth of non-case-strategy-related rationales offered by prosecutors:

- Demeanor, including nervousness, staring at the ground, eye-rolling

---

[19] "Trial strategy" here connotes case-specific strategy rather than the jury-selection strategies courts routinely examine in *Batson* proceedings. (See *Miller-El I*, *supra*, 537 U.S. at p. 339.)

during questioning, smiling at the defense, or providing short answers during voir dire (*Foster*, *supra*, 136 S.Ct. at p. 1748; *Snyder*, *supra*, 552 U.S. at p. 478; *Rice v. Collins* (2006) 546 U.S. 333, 336; *People v. Armstrong* (2019) 6 Cal.5th 735, 774; *People v. Hardy* (2018) 5 Cal.5th 56, 79; *People v. Mata* (2013) 57 Cal.4th 178, 187; see also *Snyder*, *supra*, at p. 477 [noting prosecutor will "often invoke a juror's demeanor" at step two]);

- Juror age (*Rice*, *supra*, 546 U.S. at p. 336; *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1165; *People v. Mai* (2013) 57 Cal.4th 986, 1047), marital status (*Rice*, *supra*, at p. 336; *Mai*, *supra*, at p. 1047), casual dress (*People v. Smith* (2018) 4 Cal.5th 1134, 1153), or physical features (*Purkett*, *supra*, 514 U.S. at p. 766);

- A lack of apparent "strong decisionmaking skills" based on a juror's lack of "significant life experiences" (*People v. Chism* (2014) 58 Cal.4th 1266, 1311; see also *Smith*, *supra*, 4 Cal.5th at p. 1148; *Gutierrez*, *supra*, 2 Cal.5th at pp. 1162-1163);

- Seeming reluctance to impose the death penalty (*Davis v. Ayala* (2015) __ U.S.__, __ [135 S.Ct. 2187, 2200]; *Thaler v. Haynes* (2010) 599 U.S. 43, 44; *Miller-El II*, *supra*, 545 U.S. at p. 243; *Armstrong*, *supra*, 6 Cal.5th at pp. 769-770, 776; *Smith*, *supra*, 4 Cal.5th at p. 1148; *People v. Winbush* (2017) 2 Cal.5th 402, 435; *People v. Elliott* (2012) 53 Cal.4th 535, 560; see also *Armstrong*, *supra*, at p. 770 ["A juror's reservations about imposing the death penalty are an acceptable race-neutral basis for exercising a peremptory."];

- A friend or family member who has been accused or convicted of a crime (*Foster*, *supra*, 136 S.Ct. at pp. 1748, 1751; *Miller-El I*, *supra*, 537 U.S. at p. 343; *Smith*, *supra*, 4 Cal.5th at p. 1150; *People v. Jones* (2011) 51

Cal.4th 346, 358);

- Views regarding law enforcement (*Felkner v. Jackson* (2011) 562 U.S. 594, 595-596; *Hardy*, *supra*, 5 Cal.5th at p. 79; *Winbush*, *supra*, 2 Cal.5th at pp. 435-436);
- Careers leading the prosecution to believe a prospective juror is predisposed towards the defense (*Felkner*, *supra*, 562 U.S. at p. 595 [striking juror with master's degree in social work]; *Mai*, *supra*, 57 Cal.4th at p. 1047 [prosecutor noting he "generally will use a peremptory on social workers"]; *People v. Thompson* (2010) 49 Cal.4th 79, 107 [prosecutor expressing concern that correctional officer prospective juror had "built-in 'affinity towards prisoners'"]);
- Familiarity with the area involved in the crime alleged (*Foster*, *supra*, 136 S.Ct. at p. 1748; *Gutierrez*, *supra*, 2 Cal.5th at p. 1160; *Jones*, *supra*, 51 Cal.4th at p. 358), or the defendant. (*Flowers*, *supra*, 139 S.Ct. at p. 2249-2250; *Thompson*, *supra*, 49 Cal.4th at p. 107.)

None of these rationales implicate counsel's case strategies and therefore do not warrant core work-product protection.

The purportedly race-neutral reasons the prosecutor provided in Mr. Jones's case demonstrate that disclosure of notations mirroring these rationales would not violate core work-product protection.[20] As to Prospective Juror Y.J., the prosecutor asserted that she "work[ed] at the Job Corps. The defendant went to Job Corps." (Ret. Ex. at 11.) This information

[20] At a minimum, the District Attorney has waived any applicable protection to notations detailing those rationales he expressly provided to the trial court during step two of the *Batson* hearing, assuming they exist. (See *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1033 [finding work-product protection waived where information is disclosed to someone not within protection].)

was not a secret, in fact the prosecutor mentioned this because he anticipated the defense would present Job-Corps-related information at trial. (*Ibid.*) The prosecutor went on: "[s]he is twice divorced. Both her kids are divorced and/or separated. That shows me some instability[21] that I am not comfortable with." (*Ibid.*) Nothing about this assertion alludes to case strategy. He added: "[s]he wants to be a counselor, a helping person, someone to get everyone better. I see that as an opposition or at least contrary views towards what I will be asking them to do; that is, to kill this defendant. I think that is a conflict." (*Ibid.*) The fact that the prosecutor was seeking the death penalty was hardly a confidential tactic. Whether the prosecutor actually recorded these rationales as to Prospective Juror Y.J. or failed to make note of similar demographic information pertaining to non-Black jurors is equally unlikely to reveal information related to counsel's case strategy.

This Court examined a *Batson* hearing in *People v. Ayala* (2000) 24 Cal.4th 243, 259-264, wherein the trial court had permitted the prosecutor to proffer his race-neutral reasons ex parte. Like the prosecutor in Mr. Jones's case, the *Ayala* prosecutor relied on a rating system as a critical part of the rationale for his strikes. (*Id.* at pp. 264-266.) This Court reversed the trial court's finding that an ex-parte hearing was appropriate because disclosure of information about this rating system would implicate "prosecution strategy in terms of jury selection." (*Id.* at p. 261.) Instead, this Court found, disclosure of information about the prosecutor's rating system to the defense was appropriate and necessary during a *Batson* hearing. (*Id.* at pp. 262-264.) Information about the prosecutor's jury-rating system was not "strategic information that defendant could use to his advantage at trial," but "merely

---

[21] Vague characteristics such as a prospective juror's "instability" may serve as a pretext for discriminatory intent where the prosecutor does not so-characterize similarly situated non-minority prospective jurors. (See *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 356-357, 367.)

describe[d] the prosecution's system of jury selection, a process to which defendant was a passive bystander." (*Id.* at pp. 261-262.) This Court's findings in *Ayala* both support the conclusion that information about the rating system at issue in Mr. Jones's case is not core work product and counter the District Attorney's claim that disclosure of jury selection notes will necessarily "disclos[e] *future* trial strategies." (OB at 14, original italics.)

Indeed, the District Attorney's arguments only bolster the conclusion that, as Mr. Jones contends, ordinarily a *Batson* inquiry does not implicate work-product-protected information. She first cites to a number of out-of-state cases[22] that purportedly demonstrate that "[a]n attorney's jury selection strategy is integral to the attorney's overall trial strategy." (OB at 12.) But most of these cases, in addition to being non-binding on this Court, pertain to the non-analogous legal context of ineffective assistance of counsel claims based on counsel's failure to strike a particular juror or voir dire on a particular topic.[23] Though a lawyer's decisions in these regards may be –

---

[22] The District Attorney failed to raise or rely on precedents from other states in support of her argument that work-product protection applies to jury selection notes, either below or in her request for review by this Court, and therefore waived this argument. (See Cal. Rules of Court, rules 8.500(c)(1) & 8.520(b)(3).)

[23] (OB at 12-13, citing *Harvey v. Warden, Union Correctional Institution* (11th Cir. 2011) 629 F.3d 1228, 1243-1244 [analyzing claim of ineffective assistance for failure to strike juror]; *Hughes v. United States* (6th Cir. 2001) 258 F.3d 458, 456-457 [same]; *Nguyen v. Reynolds* (10th Cir. 1997) 131 F.3d 1340, 1349 [examining claim of ineffective assistance for failure to ask particular question on voir dire]; *Teague v. Scott* (5th Cir. 1995) 60 F.3d 1167, 1172 [evaluating ineffective assistance for failure to remove juror claim]; *People v. Jones* (Ill. 2012) 982 N.E.2d 202, 215 [same]; *People v. Manning* (Ill. 2011) 948 N.E.2d 542, 555 [dissenting opinion examining trial counsel's ineffectiveness for failing to strike juror]; and *Shockley v. State* (Mo. 2019) 579 S.W.3d 881, 896 [examining ineffective assistance for failure to ask certain questions of prospective juror claim].)

and hopefully are – "strategic," the strategy to remove or question prospective jurors, without more, does not implicate confidential case theory or strategy and the accompanying need for core work-product protection. (Cf. *Coito*, *supra*, 54 Cal.4th at p. 495 [noting counsel's recorded witness interviews "*may, in some instances*, reveal the 'impressions, conclusions, opinions, or legal research and or theories' of the attorney and thus be entitled to absolute protection," but declining to provide work-product protection as a matter of course absent case-specific inquiry], italics added.) The District Attorney's citation to out-of-state case law stating the unremarkable principle that counsel's decision to peremptorily challenge or not question a particular prospective juror is generally made with the intent to increase that lawyer's odds of winning her client's case – and is in that sense strategic – does not support her contention that counsel's notes about how to exercise such strikes or conduct such questioning will necessarily reveal case strategies.

The two remaining out-of-state cases the District Attorney cites do concern other states' work-product protections as applied to counsel's jury selection notes, but these cases merely recognize the trial court's discretion to grant discovery and affirm the denial of a defense request for prosecutor notes under the facts of a particular case. (See *People v. Trujilio* (Colo. Ct. App. 2000) 15 P.3d 1104, 1107;[24] *Thorson v. State* (Miss. 1998) 721 So.2d 590, 595-596.) Neither compels nor even suggests the wholesale and impenetrable protection for jury selection notes that the District Attorney

---

[24] The *Trujilio* Court relied at length on *People v. Mack* (Ill. 1989) 538 N.E.2d 1107, 1116, which also concerned discovery of the prosecutor's jury selection notes, but in which the trial court had examined the notes in camera during step three. The *Mack* Court noted that a judge's review of the notes in camera did not "automatically necessitate disclosure of them to the defense." (*Ibid.*) This language and *Trujilio*'s reliance on it demonstrate only that the trial courts wield discretion to determine whether such notes should be disclosed in a particular case.

advocates, and, notably, none involves facts akin to those identified by respondent court in Mr. Jones's case, wherein the prosecutor during a *Batson* hearing relied on his notes in order to proffer and validate the reasons for his strikes.

The District Attorney's further recitation of case law noting that at *Batson*'s third step a court may consider "whether the proffered rationale has some basis in accepted trial strategy" underscores that notations detailing reasons for juror strikes are ordinarily not considered to be core work product. (See OB at 13, citing *Armstrong*, *supra*, 6 Cal.5th at p. 767; *Smith*, *supra*, 4 Cal.5th at p. 1147; *Gutierrez*, *supra*, 2 Cal.5th at 1159; and *People v. Lenix* (2008) 44 Cal.4th 602, 613.) It is illogical to say that work-product protection applies to the very information the court is required to consider during *Batson*'s third step. Rather, these cases demonstrate the difference between a *jury-selection* strategy (which is often at issue and therefore on the record at *Batson* step three) and a *case* strategy, the disclosure of which would prejudice the proffering party and which therefore receives core work-product protection.

The District Attorney next imagines scenarios in which counsel's rationales for a strike *may* provide information about case strategy. She speculates: a "notation highlighting a juror's experience, *may* disclose the attorney's plan to emphasize more complicated expert testimony as opposed to other evidence," or that "[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." (OB at 14, italics added.) Even at face value, these rationales for removing a prospective juror do not implicate core work-product protection. (See Code Civ. Proc., § 2018.020, subd. (a).) Prior to jury selection, opposing counsel already has a list of prosecution witnesses, their prior statements, and any "reports or statements of experts made in conjunction with the case." (Pen. Code, § 1054.1.) This

disclosure would include notice of the very information for which the District Attorney claims protection. These examples further support Mr. Jones's argument that without a specified showing as to how a notation will provide insight into counsel's case theory, it cannot be considered core work product. The District Attorney concedes as much – she claims the notes "*may* provide insight into what witnesses will be called and/or how much reliance the attorney plans to place on that witness's testimony." (OB at 14, italics added.) But counsel cannot ignore her burden to demonstrate that the notations she seeks to withhold *will* provide that insight to opposing counsel.

The Ninth Circuit similarly recognized that although some rationales for excusing jurors may implicate "confidential information, prejudicing the prosecution's ability to conduct its case," without a showing that release of specific information triggers such concerns, statutory protections are inappropriate. (*Thompson*, *supra*, 827 F.2d at p. 1259.) Generic concern about the release of potentially-prejudicial information, the *Thompson* Court found, could not

> be considered in the abstract, nor is it necessarily relevant in all cases. It 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.[25] However, the prosecution's reasons may be much more mundane, as they were in this case: the potential juror's profession, attitude, dress, address and the fact that one had acquitted in a prior case. Disclosure of these reasons to opposing counsel could not conceivably have prejudiced the prosecution.

---

[25] The District Attorney cites this language from *Thompson* in support of her assertion that divulgence of reasons for a strike would disclose prosecution case strategy. (OB at 13.) This ignores *Thompson*'s holding that ordinarily a prosecutor's motive for exercising strikes does not implicate case strategies and therefore disclosure is appropriate.

(*Ibid.*) Although *Thompson* reversed the lower court's grant of the prosecution's request to proffer step-two reasons ex parte, its rationale is equally instructive to the question raised herein: where the contents of the notes do not routinely contain information the disclosure of which is likely to prejudice the prosecution, those notes similarly are not worthy of blanket statutory protection. Absent a specific showing, the policy underlying core work-product protection is not implicated, and the statutory protection does not apply.

C. Counsel May Avail Herself of In Camera Review Where Disclosure Implicates Case Strategies, But Did Not Even Attempt to Do So Here.

For the first time the District Attorney asserts in her Opening Brief that respondent court's order "must be limited" and requests in camera review of the notes before they are disclosed. (OB at 29-31.) She further complains that "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." (*Ibid.*) She also faults the Court of Appeal for "fail[ing] 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." (OB at 29.) But the District Attorney failed to request limitation of the discovery order or in camera review before respondent court, or raise these arguments either before the Court of Appeal or in her Petition for Review in this Court. She faults the lower courts for failing to sua sponte grant relief she never requested and still fails to specifically identify the portions of notes or information contained therein implicating case strategies and thereby entitled to statutory protection. By repeatedly failing to specifically identify notations worthy of core work-product protection, or request either limitation of the scope of respondent court's order or in camera review below, the District Attorney has waived

these arguments and improperly raises them for the first time in this Court. (See *Mize v. Atchinson, T. & S.F. Ry. Co.* (1975) 46 Cal.App.3d 436, 447 [finding work-product protection claim waived where only broadly asserted to trial court: "It is not enough that he merely state that something is either work product or within the lawyer-client privilege. The burden is upon him to prove the preliminary facts to show that the privilege applies"], citing *Tanzola v. DeRita* (1955) 45 Cal.2d 1, 6, and *Collette v. Sarrasin* (1920) 184 Cal. 283; see Cal. Rules of Court, rule 8.500(c)(1) ["As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal"]; see also Cal. Rules of Court, rule 8.520(b) [noting parties limited to "statement of issues in the petition for review, "and any issues fairly included in them"].)

Where counsel raises a timely and proper objection to disclosure, a trial court can determine when to apply work-product protection to some portion of a prosecutor's notes, in the same way a trial court may elect to conduct in camera *Batson* proceedings in those "rare cases" where disclosure would "entail confidential communications or reveal trial strategy." (*McCollum*, *supra*, 505 U.S. at p. 58.) As in other discovery contexts, applying this statutory protection requires the trial court to examine in camera specific documents as to which the prosecutor asserts the protection. (*Coito*, *supra*, 54 Cal.4th at p. 496; *League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 993, citing *Dowden*, *supra*, 73 Cal.App.4th at p. 135, and *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 121.) But invoking this review procedure requires a party to specifically identify the material it seeks to withhold. (*Dowden*, *supra*, 73 Cal.App.4th at p. 135 [finding in camera review appropriate for evaluating "specific items"]; *Travelers Ins. Companies v. Superior Court* (1983) 143 Cal.App.3d 436, 453 [holding determination of work-product protection "should be made on an item-by-item basis"].) The party asserting the protection bears the

burden of demonstrating that the material is core work product and must establish preliminary facts demonstrating the protection's application "to each of the documents" sought to be withheld. (*BP Alaska Exploration, Inc.*, *supra*, 199 Cal.App.3d at p. 1261; *Mize*, *supra*, 46 Cal.App.3d at p. 447.) The District Attorney's blanket assertions to respondent court that "[s]uch notes, if they exist, are core work product," (Petn. Ex. at 84; see also *id.* at 46) was insufficient to meet this burden.[26]

The District Attorney's new assertion that disclosure should be limited only to those notes pertaining to the "challenged juror" (OB at 29) further ignores the significant role comparative juror analysis plays in determining the actual reasons for a prosecutor's strikes (*Miller-El II*, *supra*, 545 U.S. at p. 241), and the way comparative analysis of the prosecutor's notes and scoring system of prospective jurors contained therein may assist the court in ferreting out invidious discrimination. (See *Crittenden*, *supra*, 804 F.3d at p. 1012; *Crittenden*, *supra*, 624 F.3d at p. 956; see also Evid. Code, § 356 ["Where part of a[] . . . writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party . . . and when a detached act . . or writing is given in evidence, any other . . . writing which is necessary to make it understood may also be given in evidence"].) A comparative analysis of notations and ratings of prospective jurors as contained in a prosecutor's notes may demonstrate that the prosecutor's

---

[26] As a practical matter, counsel's notes concerning prospective jurors are routinely at least partially written on copies of juror questionnaires. (E.g., *Foster*, *supra*, 136 S.Ct. at p. 1744.) The prosecutor's resort to contents of specific jurors' questionnaires in the *Batson* hearing in Mr. Jones's case demonstrates the likelihood that at least some notes are contained on juror questionnaires. (Ret. Ex. at 11, 13 [referencing reasons for strikes based on questionnaires].) At a minimum, these juror questionnaires would not be subject to work-product protection, but the District Attorney's blanket assertion fails to parse out these clearly-discloseable items.

strikes "cannot be explained by a [prospective juror's] death penalty views or other race-neutral factors." (Crittenden, *supra*, 804 F.3d at p. 1012; see also *id.* at p. 1015 ["[t]he wide difference in ratings provides strong additional support for the . . . finding that the prosecutor was substantially motivated by race"].) Evidence of other disparate treatment in notations between jurors of a particular race or gender and the rest of the pool similarly is evidence of invidious discrimination. (E.g., *Foster*, *supra*, 136 S.Ct. at p. 1744 [noting only race of Black prospective jurors highlighted]; accord *Mitcham*, *supra*, 103 F.Supp.3d at p. 1097.) This belatedly-added argument that the discovery order should be limited to only the struck Black jurors would defeat the purpose of *Batson*'s requirement that all relevant evidence must be considered in determining the prosecutor's actual reasons for exercising peremptory challenges in a facially-biased manner.

III. CORE WORK-PRODUCT PROTECTION, EVEN IF BROADLY APPLICABLE TO JURY SELECTION NOTES, WAS WAIVED BY THE PROSECUTOR'S ACTIONS IN MR. JONES'S CASE.

A. Fundamental Fairness Dictates that Any Applicable Protections Were Waived.

General principles of due process and fundamental fairness mandate that the prosecutor's use of and reliance on his notes during the *Batson* hearing waived any applicable statutory protections. Tendering the contents of his notes during his proffer was wholly inconsistent with continuing to claim work product and thereby waived the protection. (*DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 688 [holding work-product protection may be waived by "tendering certain issues"], citing *Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 222; see also *Transamerica Title Ins. Co. v. Superior Court.* (1987) 188 Cal.App.3d 1047, 1053 [finding party waives attorney-client privilege where he "places into issue a matter

that is normally privileged"].) Disclosing some shielded information waives work-product protection where such disclosure is "inconsistent with claiming the protection." (*Roush, supra*, at p. 222.)

In responding to the *Batson* claim in Mr. Jones's case, the prosecutor placed the contents of his notes directly at issue. He relied on the fact that his notes and the rating system contained therein had been created "without knowing what [the prospective jurors] look like" as evidence that his proffered rationales were not pretextual. (Ret. Ex. at 11; see also *id.* at 13 [asserting his rating of Prospective Juror C.G. was "based upon the entirety of her questionnaire"].) He further sought to bolster his proffered rationales with evidence that his notes contained not only his evaluation of prospective jurors, but also evaluations by two other members of staff, including "a two-time minority; female from a minority racial group." (*Id.* at 11, 23.) His reliance on the actual contents of his notes to bolster his proffer at step two directly tendered the question of the contents of his notes as an issue for the court's consideration and was entirely inconsistent with continuing to assert work-product protection.

At its core, a work-product waiver is rooted in fundamental fairness – a party cannot present some otherwise-protected information, then cry foul when opposing counsel seeks to ascertain the truth of that assertion by reviewing the material placed at issue. (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 604 [agreeing that "'fundamental fairness' may require disclosure of otherwise privileged information or communications where plaintiff has placed in issue a communication which goes to the heart of the claim in controversy"].) This Court has found equitable waiver of constitutional protections[27] against disclosure where failure to do so would

---

[27] The Fourth and Fifth Amendment protections at issue in *Boyer* are more sacrosanct by virtue of their constitutional origins than those at issue in the instant case. (See *Izazaga, supra*, 54 Cal.3d at p. 381 [noting work-

"undermine the truth-seeking process" of the proceeding. (*People v. Boyer* (2006) 38 Cal.4th 412, 464.) The work-product protection is subject to similar equitable limitations: "The attorney cannot reveal his work product . . . and then claim work product privilege to prevent the opposing party from viewing the document from which [the witness] testified." (*Kerns v. Superior Court* (1968) 266 Cal.App.2d 405, 411.) The United States Supreme Court relied on these same principles to find that work-product protection as to a report was waived after an investigator testified to the report's contents:

> Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.

(*United States v. Nobles* (1975) 422 U.S. 225, 239-240.) California courts have construed similar equitable waivers in a variety of contexts. (E.g., *In re Scott* (2003) 29 Cal.4th 783, 814 [finding ineffective assistance of counsel claim "waived the attorney-client privilege to the extent relevant to the claim"]; *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 727 ["The defense of advice of counsel generally waives the attorney-client privilege as to communications and documents relating to the advice"]; *Wilson v. Superior Court* (1976) 63 Cal.App.3d 825, 830 [finding taxpayer privilege waived where complaint "has placed in issue the existence and the content of [] tax returns"]; *Merritt v. Superior Court* (1970) 9 Cal.App.3d 721, 728 [finding attorney-client privilege waived where counsel deposed as to thought processes regarding settlement negotiations].)

---

product doctrine is "not constitutionally founded"].)

An equitable waiver is similarly appropriate in the instant case.

The scope of an equitable waiver is determined by the extent to which disclosure is "essential to the fair resolution" of the matter before the court (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 859.) Information "directly relevant" to the pending matter must be disclosed. (*In re Lifschutz* (1970) 2 Cal.3d 415, 435.) The prosecutor's assertions during the *Batson* hearings in Mr. Jones's case relied on the contents of his notes and the juror-rating system contained therein. He claimed that not only did his notes contain the race-neutral reasons he proffered for his strikes, but that these rationales and scores obtained therefrom were ascribed to prospective jurors without knowledge of their race. Having disclosed this much of the notes' contents as a sword to defeat the pending *Batson* inquiry, the District Attorney cannot now assert that statutory protections should shield the notes from disclosure.

B. The Prosecutor Acts as a Witness During a *Batson* Hearing.

A prosecutor responding to a prima facie *Batson* claim is a witness for purposes of Evidence Code section 771. Where a witness uses a writing to refresh his memory either in the course of his testimony or prior to it, this section requires that the writing be disclosed to the adverse party. (Evid. Code, § 771, subd. (a).) At step two of a *Batson* challenge, the prosecutor acts as a fact witness by providing race-neutral reasons for his strikes. At step three the court must determine the veracity of the proffered reasons by assessing the prosecutor's credibility. (*Miller-El I, supra*, 537 U.S. at p. 339; *Lenix, supra*, 44 Cal.4th at p. 613.) The court makes this credibility determination by examining factors including "the prosecutor's demeanor: by how reasonable, or how improbable, the explanations are." (*Lenix, supra*, at p. 613, citing *Miller-El I, supra*, at p. 339; see also *Hernandez, supra*, 500 U.S. at p. 369.) Factfinders use these same factors in other contexts to assess witness credibility. (Evid. Code, § 780.) The need for and scope of this

credibility determination is the same for the prosecutor offering his race-neutral reasons from counsel's table as for another fact witness testifying from the stand. In either situation, section 771 provides another tool for testing witness credibility where that witness relies on a document to refresh his recollection. (E.g., *People v. Smith* (2007) 40 Cal.4th 483, 509; *Boyer*, *supra*, 38 Cal.4th at p. 462.) Although the District Attorney complains that a prosecutor does not act as a witness during a *Batson* hearing because he does not stand behind the witness stand, does not take an oath to tell the truth,[28] and is not subject to cross-examination, (OB at 24-26) these distinctions pale next to the critical role the court's credibility determination plays in its ultimate *Batson* determination. (See *Batson*, *supra*, 476 U.S. at p. 98, fn. 21 [finding judge's *Batson* determination "largely will turn on evaluation of [prosecutor] credibility"].) The import of this determination, and the requirement that section 771 be "liberally construed" with an eye towards "promoting justice," mandate that this section be applied to a prosecutor who refreshes his recollection during a *Batson* hearing. (See Evid. Code, § 2.)

Texas's Rules of Evidence contain a statutory provision nearly identical to California's section 771. Both rules require production of a writing used

---

[28] The District Attorney cites counsel's duty of candor, but claims that this does not "convert the attorney into a testifying witness." (OB at 24, citing Rules of Prof. Conduct, rule 5-200.) The rule the District Attorney cites was re-codified on November 1, 2018, as rule 3.3, and prohibits an attorney from "knowingly mak[ing] a false statement of law of fact or law to a tribunal" or "offer[ing] evidence that the lawyer knows to be false." (Rules of Prof. Conduct, rule 3.3.) This rule draws no distinction between counsel testifying from the witness stand or providing facts to the tribunal from counsel table – in either event the duty to tell the truth is the same. A witness testifying from the witness stand makes precisely the same promise – to tell "the truth, the whole truth, and nothing but the truth." (Code Civ. Proc., § 2094, subd. (a)(1).)

by a witness prior to or in the course of his testimony to refresh his recollection and allow the adverse party to inspect the document, cross-examine a witness about its contents, and enter the document into evidence. (Evid. Code, § 771; Tex. R. Evid. 612.) Texas recognizes that this statute requires that a prosecutor provide his voir dire notes to opposing counsel when he relies on them to refresh his recollection during a *Batson* hearing. (*Goode v. Shoukfeh* (Tex. 1997) 943 S.W.2d 441, 449; *Salazar v. State* (Tex. Crim. App. 1990) 795 S.W.2d 187, 193.) This holding recognizes the unique role a prosecutor plays during a *Batson* hearing and the court's responsibility to balance the parties' interests while shouldering its burden to identify invidious discrimination. (*Goode*, *supra*, at pp. 449-450 ["[p]rocedures for resolution of *Edmonson*[29] challenges must adequately safeguard the constitutional rights arising under the Equal Protection Clause. However, those procedures should disrupt the trial of the case as little as reasonably possible"].) So too, application of section 771 to *Batson* hearings in which a prosecutor relies on his notes at step two would strike the balance the Equal Protection Clause requires.

People v. Belton (1979) 23 Cal.3d 516, 524, which the District Attorney relies upon at length (see OB at 24-25.), demonstrates that section 771's application should not be narrowly construed. *Belton* examined whether Penal Code section 1111 barred witness testimony relaying out-of-court statements from a third-party accomplice. The *Belton* Court recognized, as the District Attorney recites, that section 1111 uses the word "testimony" and looked at a formalistic application of the term requiring an oath or affirmation. (OB at 24-25, citing *Belton*, *supra*, at p. 524.) Absent from the District Attorney's description of the opinion in *Belton*, however, is this

---

[29] *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614, applies *Batson* to civil proceedings.

Court's conclusion that a formalistic application of "testimony" in that case would ignore the section's underlying rationale and purpose. (*Belton, supra,* at p. 525.) The Court found itself "called upon to construe the term [] so as to give full effect to the legislative intent of [the section], thereby avoiding the anomalous situation that would be created by a literal reading of that term." (*Id.* at p. 526.) Similarly, the Court of Appeal declined to read "oath" or "evidence" narrowly when construing Penal Code section 977, but instead determined that an unsworn bailiff testified despite the lack of the same procedural formalities the District Attorney herein identifies. (*People v. Johnson* (2013) 221 Cal.App.4th 943, 955.) So, too, a formalistic construction requiring an oath and cross-examination before one who gives evidence can be considered a witness under section 771 would thwart the statute's overall purpose to provide a tool by which credibility may be tested.

The disclosure mandated by section 771 waives otherwise-applicable statutory protections. (E.g., *Smith, supra,* 40 Cal.4th at p. 509; *Pasadena Police Officers Assn. v. Superior Court* (2015) 240 Cal.App.4th 268, 293; *Mize, supra,* 46 Cal.App.3d at p. 449.) The District Attorney argues against the application of section 771 and any ensuing waiver based on an assertion that the prosecutor at step two "*must provide*" reasons for his strikes. (OB at 22, original italics.) She claims that this requirement amounts to coercion that cannot be construed as a waiver. (*Ibid.*) The Supreme Court's *Batson* case law refutes this assertion by providing guidance to courts assessing a claim of invidious discrimination where "the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike," thus demonstrating that a prosecutor need not give any response at step two. (*Johnson, supra,* 545 U.S. at p. 171, fn. 6.) Furthermore, even where the prosecution chooses to respond to the court's inquiry at step two, nothing mandates that he use notes to refresh his recollection. The prosecutor's reliance on his notes during the *Batson* hearing requires that such notes now

be provided to Mr. Jones.

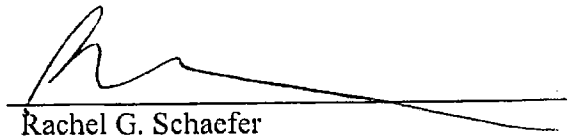
IV. CONCLUSION

The constitutional imperative to unearth invidious discrimination wherever it lurks in the criminal jury process cannot be ignored, and the trial court's responsibility to this end cannot be lessened. Where the prosecutor relies on his notes, proffers their contents, and relies on their existence to bolster the bona fides of the rationales he provides during step two of a *Batson* hearing, a trial court should not turn a blind eye to the existence of these notes at step three. They are relevant evidence, and the court bears a responsibility to consider them. Respondent court properly bore this responsibility and appropriately exercised its discretion to determine the scope of discovery and potentially-applicable statutory protections.

Multiple rationales support the propriety of respondent court's order granting discovery. This Court should affirm the Court of Appeal's denial of the District Attorney's request for relief.

Dated: December 20, 2019 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 

Rachel G. Schaefer
Attorneys for Real Party in Interest
Bryan Maurice Jones

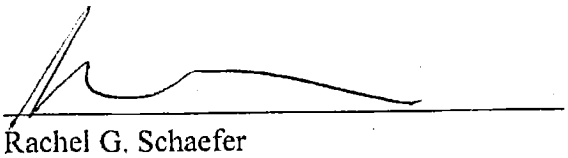
CERTIFICATE AS TO LENGTH

I certify that this answer brief on the merits contains 13,948 words, verified through the use of the word processing program used to prepare this document.

Dated: December 20, 2019

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 

Rachel G. Schaefer

PROOF OF SERVICE

Case Name: *People v. Superior Court (Bryan Maurice Jones)*
Case No.: S255826

I am over 18 years of age and not a party to this action. I am a resident of or employed in the county from which the document was served. My business address is: Habeas Corpus Resource Center, 303 Second Street, Suite 400 South, San Francisco, California 94107. My electronic address is docketing@hcrc.ca.gov.

I served by mail the following document(s): Answer Brief on the Merits. See attached service list.

[X] By U.S. Mail - Deposited with the United States Postal Service, postage fully prepaid.

[ ] By U.S. Mail - Deposited for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed package or envelope with postage fully prepaid.

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

Date: December 20, 2019

Max Friend

SERVICE LIST

Samantha Begovich, Deputy District Attorney
330 W. Broadway, Suite 860
San Diego, CA 92101
619-531-4457
Samantha.Begovich@sdcda.org
Petitioner

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

Bryan Maurice Jones, D-50899
4-EY-37
C.S.P. San Quentin
San Quentin, CA 94974
Real Party in Interest

Brendon Marshall, Deputy Attorney General
Attorney General- San Diego Office
P.O. Box 85266
San Diego, CA 95266
619-738-9000
Counsel for Respondent on Habeas