

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Petitioner,

v.

THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA IN AND  
FOR THE COUNTY OF SAN DIEGO,  
Respondent.

BRYAN MAURICE JONES,  
Real Party in Interest.

No. S255826

(Related to California Supreme  
Court Case No. S217284 [on  
Habeas Corpus]; No. S042336  
[on Direct Appeal])

**REPLY TO ANSWER TO PETITION FOR REVIEW**

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

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**TABLE OF CONTENTS**

	<b>Page</b>
I. Petition for Review Should Be Granted Because the Underlying Court of Appeal Decision Conflicts With Other Appellate Decisions, or Because an Important Question of Law Must Be Settled, or for Both Reasons (Cal. Rules of Court, Rule 8.500 (B)(1)).....	1
II. The Court of Appeal Improperly Found the Statutory Core Work Product Privilege Created by Code of Civil Procedure section 2018.030 Was Waived By the Prosecutor’s Verbal Reference to the Prosecutor’s Contemporary Notes of Court Proceedings; <i>Foster V. Chatman</i> (2016) __U.S.__, 136 S.Ct.1737, Does Not Support the Appellate Court’s Decision .....	4
Certificate of Word Count.....	7

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
<i>Albert Jones v. Superior Court</i> (Jan. 16, 2018, E067896) .....	1
<i>Batson v. Kentucky</i> (1986) 476 U.S. 79 .....	<i>passim</i>
<i>Foster V. Chatman</i> (2016) __U.S.__, 136 S.Ct.1737 .....	4, 5
<i>People v. Superior Court (Carey)</i> (Sept. 28, 2018, B290318) .....	1, 2
<i>People v. Superior Court (Jones)</i> (April 4, 2019) 34 Cal.App.5th 75 1, 2, 3 .....	2, 3, 4
<i>People v. Wheeler</i> (1978) 22 Cal.3d 258 .....	1, 2, 3, 4
<i>Salas v. Superior Court</i> (March 3, 2018, 0055165) .....	1
<b>Statutes</b>	
<b>Civil Code of Procedure</b>	
section 2018.030 .....	<i>passim</i>
section 2018.030, subdivision (a) .....	2
<b>Government Code</b>	
section 6254, subdivision (k) .....	2
<b>Penal Code</b>	
section 1054.9 .....	1, 2, 3, 5
<b>Other Authorities</b>	
<b>California Rules of Court</b>	
rule 8.500 (B)(1) .....	1

## I.

### **PETITION FOR REVIEW SHOULD BE GRANTED BECAUSE THE UNDERLYING COURT OF APPEAL DECISION CONFLICTS WITH OTHER APPELLATE DECISIONS, OR BECAUSE AN IMPORTANT QUESTION OF LAW MUST BE SETTLED, OR FOR BOTH REASONS (CAL. RULES OF COURT, RULE 8.500 (B)(1))**

Real Party in Interest Bryan Maurice Jones (hereafter “real party”) misconstrues petitioner’s justification for seeking this court’s review of the underlying appellate decision. As clearly set out in the petition, review should be granted because: 1) the underlying appellate decision is contrary to other appellate decisions; or 2) the petition presents an important question of law that must be settled; or 3) for both reasons. (Petrn. pp. 2-4.)

The issue presented here, whether a trial court has authority to compel a lawyer’s disclosure of jury selection notes that are core work product under Civil Code of Procedure section 2018.030 [writings and written documentation], and Penal Code section 1054.9 [reasonable access to discovery materials], has been the focus of controversy in more than the two unpublished court of appeal decisions petitioner cited in its footnote 7, of the petition. (See Petrn. p.4, fn. 7, citing (*Albert Jones v. Superior Court* (Jan. 16, 2018, E067896) [nonpub. opn.] pp. 2-3; *Salas v. Superior Court* (March 3, 2018, 0055165) [petition summarily denied, review den., May 11, 2018, S247515].) The issue was the primary focus of the unpublished decision *People v. Superior Court (Carey)* (Sept. 28, 2018, B290318) [nonpub. opn.], which found the prosecutor’s jury selection notes to be protected work product under Code Civil Procedure section 2018.030. (*Id.* at p. 5.) Notwithstanding the notes to be protected work product, the court here held the prosecutor’s voluntary partial release of jury selection notes in post-conviction discovery to defendant amounted to a waiver of the privilege as to all of those notes. (*Id.* at pp. 5-6.)

As petitioner did not invite this court's attention to the unpublished court of appeal decisions in its petition for the legal conclusions of those cases (see Petn. p. 5, fn. 7), so too, petitioner does not invite this court's attention to *People v. Superior Court (Carey)*, *supra*, for its legal conclusion. Rather, petitioner invites this court's attention to the preceding unpublished cases for the purpose of demonstrating that the issues of whether a trial court has authority to compel disclosure of a prosecutor's jury selection notes under Civil Code of Procedure section 2018.030 and Penal Code section 1054.9 are not being uniformly decided by this state's appellate courts. Over petitioner's objections at the habeas proceedings that jury selection notes are attorney core work product (Gov. Code, § 6254, subd. (k); Civ. Code, § 2018.030, subd. (a)) and privileged from disclosure, and that the prosecutor's verbal reference to his jury selection notes was not a waiver of privilege, the habeas court and appellate court in this case found the prosecutor's verbal reference to the notes waived privilege and the trial court had discretion to compel disclosure of those notes to real party within the court's third stage *Batson/Wheeler*<sup>1</sup> analysis. (*People v. Superior Court (Jones)* (April 4, 2019) 34 Cal.App.5th 75, 85-86.) The prosecutor's verbal reference to jury selection notes would not have been considered a waiver of privilege by appellate courts that accept that prosecutors' jury selection notes are protected work product generally not subject to discovery under Code of Civil Procedure section 2018.030. (See *People v. Superior Court (Carey)*, *supra*, (B290318) [nonpub. opn.] at p. 5.)

Petitioner's invitation that this court consider unpublished appellate decisions in demonstrating the need for the court to provide uniformity of appellate decisions is not improper. Common sense dictates that

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<sup>1</sup> *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Wheeler/Batson*).

demonstration of need for uniformity of a significant legal issue, i.e., whether a trial court has authority to compel a lawyer to disclose core work product to opposing counsel, should not be exclusively limited to published appellate decisions; unpublished appellate decisions containing conflicting analysis, although not citable as legal precedent but reported by legal publishers of court decisions and available for consideration by trial courts, clearly foretell differences among the courts of appeal.

Moreover, whether a trial court has authority to compel a lawyer to disclose core work product to opposing counsel notwithstanding a lawyer's core work product being statutorily privileged from being disclosed to opposing counsel is a significant issue that arises in most litigated civil and criminal cases. While the context of the proffered issues to this court are initially framed by the three-part *Batson/Wheeler* analysis protocol, the rationale and conclusions of the underlying *Jones* decision that overrides statutory core work product privilege on a lawyer's verbal reference to contemporaneous written notes of court proceedings may find root in civil and criminal litigated proceedings.

Consequently, the issue, whether a trial court has authority to compel a lawyer's disclosure to opposing counsel of jury selection notes that are core work product under Civil Code of Procedure section 2018.030, and Penal Code section 1054.9, is ripe for consideration by this court.

## II.

**THE COURT OF APPEAL IMPROPERLY FOUND THE STATUTORY CORE WORK PRODUCT PRIVILEGE CREATED BY CODE OF CIVIL PROCEDURE SECTION 2018.030 WAS WAIVED BY THE PROSECUTOR'S VERBAL REFERENCE TO THE PROSECUTOR'S CONTEMPORARY NOTES OF COURT PROCEEDINGS; *FOSTER V. CHATMAN* (2016) \_\_U.S.\_\_, 136 S.CT.1737, DOES NOT SUPPORT THE APPELLATE COURT'S DECISION**

The underlying Court of Appeal improperly relied on its reading of *Foster v. Chatman*, *supra*, 136 S.Ct. 1737 (*Foster*), which it found to be “instructive” despite the decision not addressing whether an attorney’s “jury selection notes were protected work product” in the context of resolving a *Batson/Wheeler* three step analysis, to conclude disclosure of those notes may be compelled to opposing counsel as part of a court’s determination of the prosecutor’s reasoning (e.g., stage three *Batson/Wheeler* analysis). (*People v. Superior Court (Jones)*, *supra*, 34 Cal.App.5th at pp. 81-82.) Just as the trial court erred by finding *Foster* justified its order compelling the prosecutor’s jury selection notes be turned over to real party as the court’s resolution of a third stage *Batson/Wheeler* determination (see Exh. B, at p. 48)<sup>2</sup>, so too the appellate court erred by relying on *Foster* when it affirmed the trial court’s order.

As petitioner presents in the underlying petition, *Foster* does not support the trial and appellate courts’ conclusion that a trial court’s resolution of the third stage of a *Batson/Wheeler* analysis includes compelling disclosure of the prosecutor’s jury selection notes to opposing counsel. (Petn. at pp. 8-12.) Unlike the circumstances of this case, the

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<sup>2</sup> Reference to exhibits are the exhibits that accompanied the People's Petition for Writ of Mandate filed in Court of Appeal, case number D074028, and which should be contained in the records this court requests from the Court of Appeal.

defendant in *Foster* obtained copies of the prosecutor's jury selection notes by making application for those documents through the Georgia Open Records Act. (*Foster v. Chapman, supra*, 136 S.Ct. at pp. 1743-1744.)

Consequently, in deciding *Foster*, the high court did not weigh a lawyer's claim of core work product privilege to the possibility of that work product being disclosed to opposing counsel. Nor did the *Foster* court have opportunity to require a trial court's in camera review of a lawyer's core work product to assess the relevancy of the substance of the work product, or redacted work product, before compelling its disclosure to opposing counsel.

Significantly, the *Foster* court had no opportunity or reason to define whether trial court inquiry, in a third stage *Batson/Wheeler* determination of the prosecutor's reasoning, includes overruling a lawyer's claim of core work product privilege. Nor were circumstances by which a lawyer's claim is waived considered by the high court.

Summarily, because *Foster* is factually distinguishable from this case, the trial and appellate courts erred by relying on it to justify their respective orders in this case. On this basis, whether a trial court has authority to compel a lawyer's disclosure to opposing counsel of jury selection notes that are core work product under Civil Code of Procedure section 2018.030, and Penal Code section 1054.9, is ripe for consideration by this court.



For the preceding reasons, and reasons presented in the Petition for Review, petitioner respectfully requests that Petition for Review be granted.

Dated: June 17, 2019

Respectfully Submitted,

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A handwritten signature in cursive script, appearing to read "Samantha Begovich".

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**CERTIFICATE OF WORD COUNT**

I certify that this, REPLY TO ANSWER TO PETITION FOR REVIEW, including footnotes, and excluding tables and this certificate, contains 1,369 words according to the computer program used to prepare it.



SAMANTHA BEGOVICH  
Deputy District Attorney

**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
Supreme Court of California

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**(JONES)**

Case Number: **S255826**

Lower Court Case Number: **D074028**

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