IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPLICATION OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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

The California District Attorneys Association (CDAA) acting through its Appellate Committee, and Jeff Rubin, acting on behalf of that committee, respectfully requests leave of this Court to file an *amicus curiae* brief in support of Petitioner.

CDAA was formed in 1910, and incorporated as a non-profit corporation in 1974. It is the statewide organization of prosecuting attorneys. CDAA created its Appellate Committee to utilize and coordinate the resources of District Attorneys' Offices throughout the State to present their views in cases which have major statewide impact upon the prosecution of criminal offenses.

After a review of the matter, the Committee has concluded the case at bench will have a substantial impact upon the administration of justice in criminal cases throughout California. The Committee believes that how this case is decided will potentially have a dramatic impact on the nature and scope of motions made pursuant to *Batson* v. *Kentucky* (1986) 476 U.S. 79 and *People* v. *Wheeler* (1978) 22 Cal.3d 258 at the trial level as well as on all other hearings where courts have traditionally relied upon the representation of counsel sans cross examination or oath.

CDAA, while recognizing the high quality of advocacy by both parties, believes neither has fully addressed how the interests of the petitioner in protecting jury selection notes subject to the work-product privilege and the interests of the Real Party in Interest (hereinafter "Real Party") in obtaining significant evidence bearing on the mental state of an

attorney facing a *Batson-Wheeler* motion can be reconciled – even assuming there has been no waiver of the work product privilege and that Evidence Code section 771 is inapplicable under the circumstances. The undersigned is familiar with the issues involved in the case and the scope of their presentation.

The Committee believes additional arguments and authorities on this issue will help provide this Court with a path that allows trial courts to investigate whether the constitutional rights of a criminal defendant to trial by a jury drawn from a representative cross-section of the community and to equal protection can be vindicated without unjustifiably constricting the scope of the work-product privilege, erroneously expanding the scope of what constitutes a waiver of that privilege, or unduly distorting the definition of what it means to be a testifying witness.

There are no interested entities or persons to list in this per California Rules of Court, Rule 8.208.

For the reason expressed above, CDAA requests permission to file the enclosed *amicus curiae* brief in support of Petitioner.

Date: March 5, 2020

Respectfully submitted on behalf of the Appellate Committee of the California District Attorneys Association

By:

Jeff H. Rubin, Deputy District Attorney
Santa Clara County District Attorney's Office
Attorney for *Amicus Curiae*

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AMICUS CURIAE BRIEF

I.
ANY RIGHT TO MATERIAL IN THE JURY SELECTION NOTES OF AN ATTORNEY CAN BE VINDICATED WITHOUT UNJUSTIFIABLY CONSTRICTING THE SCOPE OF THE WORK-PRODUCT PRIVILEGE, UNDULY ENLARGING THE CIRCUMSTANCES WHEN THE PRIVILEGE WILL BE DEEMED WAIVED, OR ODDLY DISTORTING WHAT IT MEANS TO BE A TESTIFYING WITNESS

Petitioner has more than adequately explained why an attorney asked to justify a challenge to a juror at a *Batson-Wheeler* motion is not testifying as a witness, why such an attorney is not subject to Evidence Code section 771, and why the work-product privilege in jury selection notes is not waived simply because an attorney provides reasons for challenging a juror.[1]

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[11] Although this amicus brief is not focused on the issue of whether an attorney who makes representations to the court should be deemed a testifying witness, this should not be taken as a lack of concern. Every day, hundreds of attorneys across this state, without being sworn or subject to examination, make representations to the court on any number of different matters, including routine offers of proof. All these attorneys are governed by Rule 5-200 of the Rules of Professional Conduct and Business and Professions Code section 6068(b) requiring them never to mislead a judicial officer by artifice or false statements. None have been treated as witnesses until the opinion of the Court of Appeal issued. A ruling that treats attorneys who make representations to the court as testifying witnesses threatens to upend long-standing and efficient practice, create a new layer of litigation involving additional attorneys every time a representation is made involving an attorney's credibility, and open up a myriad of new legal issues. Fortunately, it is wholly unnecessary to adopt the reasoning of the Court of Appeal in order to effectuate the constitutional rights described in the *Batson-Wheeler* line of cases. That goal can easily be met without causing such havoc if this Court opts to use the approach described in this brief at pp. 27-36.

However, assuming the Court of Appeal erred in upholding the trial court's order for *those* reasons, was the Court of Appeal's ruling *nevertheless* valid? To answer that question, it is important to identify some of the sub-questions raised by the first issue upon which review was granted:

First, are the written notes of an attorney[2] relating to jury selection generally protected by the work-product privilege?

Second, does the absolute work product privilege only protect an attorney's notes if they pertain to "case strategies?" And, if so, are notes regarding which persons in the venire would be the most receptive to the attorney's case part of such a strategy?

Third, when a *Batson-Wheeler* motion is made, does the desire to obtain all evidence that might have some bearing on the state of mind of an attorney regarding the reasons for challenging or accepting jurors justify overcome an *absolute* privilege such as the work product privilege of section 2018.030(a)?

Fourth, if the absolute work product privilege of section 2018.030 *may* potentially be pierced to vindicate the constitutional rights described in the *Batson-Wheeler* line of cases, should the party seeking disclosure of writings protected by the privilege have to make any sort of showing before the privilege is obliterated? And, if so, what is the requisite showing?

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[2] We use the term "attorney" rather than "prosecutor" to emphasize that any ruling by this Court on if, when, and how jury selection notes should be disclosed after a *Batson-Wheeler* challenge is made will also likely impact civil attorneys (see *J.E.B.* v. *Alabama ex rel. T.B.* (1994) 511 U.S. 127, *Edmonson* v. *Leesville Concrete Co., Inc.* (1991) 500 U.S. 614, 616; *Di Donato* v. *Santini* (1991) 232 Cal.App.3d 721, 731) and criminal defense attorneys (see *Georgia* v. *McCollum* (1992) 505 U.S. 42, 59; *People* v. *Wheeler* (1978) 22 Cal.3d 258, 280, 283, fn. 29; *People* v. *Williams* (1994) 26 Cal.App.4th Supp. 1, 9).

Fifth, if the requisite showing for overcoming the privilege has been made (whatever that showing is), should those notes be reviewed in camera by the court before they are ordered disclosed to the party seeking disclosure?

Sixth, which party has the burden of establishing the work product privilege applies when jury selection notes are requested pursuant to Penal Code section 1054.9?

A. The Jury Selection Notes of an Attorney Relating to Which Jurors Would Be Most Receptive to the Attorney's Case Should Generally Be Protected by the Absolute Work Product Privilege

Subdivision (a) of the California Code of Civil Procedure section 2018.030 defines what is protected from disclosure by the work product privilege. It provides: "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (*Ibid.*) The ~~is~~ language of the ~~is~~ statute is plain and straightforward.

Taking the language of section 2018.030 on its face, jury selection notes revealing the "impressions, conclusions, opinions, or. . . theories" of an attorney about which jurors would (or would not) be most receptive to the attorney's case would seem to fall squarely within the definition of work product. (See *People* v. *Statum* (2002) 28 Cal.4th 682, 690 ["The plain language of the statute establishes what was intended by the Legislature."].)[3]

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[3] On its face, subdivision (a) only applies to protect "writings." However, at least one case has held that "*unwritten* opinion work product is entitled to the protection of the absolute work product privilege in California." (*Fireman's Fund Ins. Co.* v. *Superior Court* (2011) 196 Cal.App.4th 1263, 1281, emphasis added.)

As any attorney who has ever tried a case knows, jury selection notes will reflect, inter alia, an attorney's impressions, conclusions, and opinions on how particular jurors may respond or relate to the witnesses who will be testifying, on how particular jurors may respond to the specific conduct underlying the specific crime or civil wrong alleged, on how willing a particular juror may be to following pertinent standard or pinpoint jury instructions, and even background research on the jurors themselves. All these impressions, conclusions and opinions of the jurors will be formed in light of the attorney's impressions, conclusions, and opinions about the witnesses and the evidence the attorney has uncovered in preparing for the case, as well as the attorney's impressions, conclusions, and opinions about the theory of the case as developed by the attorney.

It is not even necessary that the notes *directly* reflect impressions, conclusions, opinions or legal theories for the notes to be protected by the privilege. (Cf., *Coito* v. *Superior Court* (2012) 54 Cal.4th 480, 495 [which witnesses are contacted and what the witnesses are asked or not asked by the attorney can "provide a window into the attorney's theory of the case or the attorney's evaluation of what issues are most important"].)

Thus, in evaluating whether jury selection notes relating to the reasons for challenging a juror in the context of a *Batson-Wheeler* motion are protected by the absolute work product privilege, the presumption should be that, like most jury selection notes, they are. (See *Patton* v. *State* (Fla. 2000) 784 So.2d 380, 389 [prosecutor notes containing "handwritten details of specific questions to ask during voir dire" and "notes on potential jurors" are "clearly work-product"]; *People* v. *Trujillo* (Colo. App. 2000) 15 P.3d 1104, 1107 [request for prosecution's voir dire notes at *Batson-Wheeler* hearing denied because

notes "are attorney work product and, therefore, undiscoverable"]; *Thorson* v. *State* (Miss. 1998) 721 So.2d 590, 596 ["The personal notes of the prosecutor made during voir dire almost certainly contain the prosecutor's opinions and theories."]; *Goode* v. *Shoukfeh* (Tex. 1997) 943 S.W.2d 441, 449 [work product privilege "applies to notes made by counsel during voir dire"]; *People* v. *Freeman* (Ill. App. Ct. 1991) 581 N.E.2d 293, 297 [prosecutor's notes from voir dire "are protected from disclosure under the work-product doctrine unless they contain material favorable to the defense under *Brady* v. *Maryland*"]; *People* v. *Mack* (Ill. 1989) 538 N.E.2d 1107, 1115 [finding jury selection notes of prosecutor would "clearly be an opinion, theory, or conclusion, and therefore would fall squarely within the protections of the work-product doctrine" even when sought at a *Batson* hearing]; *United States* v. *Santos-Cordero* (9th Cir. 2018) 747 Fed.Appx. 530, 531 ["Although courts have reviewed jury selection notes when adjudicating *Batson* challenges, no court has suggested that the prosecutor is compelled to disclose those notes, even for in camera inspection."].)

B. The Absolute Work Product Privilege is Not Limited to Protecting Impressions, Opinions, and Conclusions and Theories Relating to "Case Strategies", But Even If It is So Limited, Jury Selection Notes Should Still Be Considered Subject to the Privilege

Real Party (and to a lesser extent, the Court of Appeal) have sought to constrict the scope of the absolute work product privilege so that it only applies to protect attorney "opinions about the quality of the legal case or trial strategy" but not "thoughts and opinions about the adequacy of prospective jurors." (*People* v. *Superior Court (Jones)* (2019) 34 Cal.App.4th 75, 82 [hereinafter "*Jones*"].) Real Party believes

such a constriction is justified because section 2018.020 "*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 to 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."
>
> (Real Party in Interest's Answer Brief on the Merits [hereinafter Answer Brief], at p. 39.)

But section 2018.020 is a declaratory statute identifying the policy behind the privilege (see Code Civ. Proc., § 2018.020 ["It is the policy of the state to do both of the following: . . .]), not a restriction on the scope of the privilege. Such an interpretation would be inconsistent with the express language of section 2018.030(a). Indeed, if section 2018.020 were strictly viewed as defining the parameters of section 2018.030(a) in the manner suggested by Real Party, it is doubtful the privilege would even apply once the trial started since section 2018.020 specifies a policy to protect the ability to *investigate* and *prepare* for trial, not to conduct the trial. Yet cases make clear this privilege *does* apply at trial. (See *Jimenez* v. *Superior Court* (2019) 40 Cal.App.5th 824, 835; *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 718; *Rodriguez* v. *McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 648-649.)

In any event, even if section 2018.020 did lay out the limits of the privilege, the privilege would still protect jury selection notes. Notes that will provide insight into which jurors will be most receptive to an attorney's theory of the case will necessarily disclose *trial* strategy - for all the reasons stated in Petitioner's Opening Brief at pp. 12-16.

The policies identified in section 2018.020 will be *thwarted*, not furthered, by excluding jury selection notes from the work product privilege since jury selection is so intimately intertwined with trial preparation and strategy.

For example, consider the scenario where an attorney doing research learns about the background of a scientific expert who will be called by the opposing party. As a result of the research, the attorney determines that a juror with a scientific background is likely to give more credence to the experts from the opposing party than the attorney's own scientific expert. This knowledge would be reflected in the attorney's jury selection notes by the low marks given to jurors with scientific backgrounds. This information may not be revealed by the attorney's oral response to a *Batson-Wheeler* motion based on challenging other kinds of jurors. However, if those jury selection notes are not deemed work product and must be disclosed upon request, this information *would* be revealed to the opposing counsel. Because the opposing counsel would not likely have made the assumption that the attorney accused of discriminatory use of challenges would shy away from jurors with scientific backgrounds (i.e., because the opposing party would be aware both attorneys are relying on scientific experts), the notes could alert the opposing party to this anomaly and provide insight into which jurors the accused attorney will be looking to challenge, how the accused attorney views his own expert, and how much emphasis the accused attorney is likely to place on the expert testimony. At the very least, this would allow the opposing party to take "undue advantage" of the attorney's "industry and efforts" in researching the background of the respective experts. (Code Civ. Proc., § 2018.020(b).) This Court, no doubt, could conceive of many more examples.

Real Party asserts that this Court's holding in *People* v. *Ayala* (2000) 24 Cal.4th 243 supports the conclusion that the jury selection notes in the instant case are not core work product. (Answer Brief at p. 45.) But *Ayala* was not interpreting the scope of the work product privilege. The prosecutor in *Ayala voluntarily disclosed* his reasons *orally* (albeit in camera) without asserting the privilege.[4]

Real Party asserts that the myriad of cases in which courts have treated an attorney's conduct during voir dire as an aspect of *trial strategy* are inapposite. (Answer Brief, at p. 45.) But why? Those cases, like the cases specifically finding jury selection notes are protected by the work product privilege (see Petitioner's Opening Brief, at pp. 12-13), are all premised on the same rationale: jury selection is intertwined with trial strategy.

Notably, Real Party cites to *not a single* case (aside from the Court of Appeal decision) finding jury selection notes are outside the scope of the work product privilege. But here are a few more cases to add to the pile of cases already cited in this brief and Petitioner's Opening Brief that jury selection notes *are* protected by the work product privilege: *Bush* v. *State* (Ala. Crim. App. 2009) 92 So.3d 121, 166 ["prosecutor's personal notes compiled during voir dire examination are work-product and are not discoverable by the defense"]; *State* v. *Stallworth* (Ala. Crim. App. 2006) 941 So.2d 327, 341 [same]; *Ex parte Perkins* (Ala. Crim. App. 2005) 920 So.2d 599, 607 [same]; *Guilder* v. *State* (Tex. App. 1990) 794 S.W.2d 765, 767 ["prosecutor's trial notes taken during voir dire were work product and, therefore, privileged"]; *State* v. *Antwine* (Mo. 1987) 743 S.W.2d 51, 67

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[4] We also agree with the other reasons for why *Ayala* does not govern the issue in this case as described in Petitioner's Opening Brief on the Merits (hereinafter Petitioner's Opening Brief") at pp. 13-14, fn. 4.

[finding "impressions formed by a prosecuting attorney during voir dire constitute his opinions" for purposes of work product privilege protecting an "attorney's opinions, theories and conclusions"].[5]

Real Party also complains that 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." (Answer Brief, at p. 47.) There is nothing illogical about it at all. (See *People* v. *Mack* (Ill. 1989) 538 N.E.2d 1107, 1115 [finding jury selection notes of prosecutor would "clearly be an opinion, theory, or conclusion, and therefore would fall squarely within the protections of the work-product doctrine" *notwithstanding* the fact that "the prosecutor's opinions, theories, and conclusions were the matter at issue" at the *Batson* hearing].) Attorneys may provide reasons for striking jurors in order to prevent the granting of the *Batson-Wheeler* motion. This may or may not constitute a waiver of the work product privilege as to written notes relating to the same reasons. But regardless of whether the privilege is waived, this does not mean that the notes relating to those reasons are outside the definition of what constitutes work product.

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[5] Interestingly, in the case of *Foster* v. *State* (Ga. 1988) 374 S.E.2d 188, the state court decision that eventually resulted in the decision in *Foster* v. *Chatman* (2017) 136 S.Ct. 1737, the Georgia Supreme Court also held jury selection notes were *within* the scope of the work product privilege - at least as it existed at the time of trial. (*Id.* at p. 192.)

C. The Desire to Obtain All Evidence That Might Have Some Bearing on the State of Mind of an Attorney Accused of Using His or Her Challenges for a Discriminatory Purpose by Way of a *Batson-Wheeler* Motion *So Far* Has Not Justified Overcoming the *Absolute* Work Product Privilege of Section 2018.030(a)

Real Party has argued that "where a prima facie *Batson* claim is made, the prosecutor's notes *must* be disclosed if relevant." (Answer Brief, at pp. 36-37, emphasis added.)

That is not currently the law and neither the High Court nor this Court has so held. Indeed, courts in other states have held directly to the contrary. (See *Guilder* v. *State* (Tex. App. 1990) 794 S.W.2d 765, 767 ["any notes prepared by the prosecutor in preparation for a *Batson* (or *Williams*) hearing also constitute his work product"]; *State* v. *Antwine* (Mo. 1987) 743 S.W.2d 51, 67 ["*Batson* does not create an exception to the work product privilege."]; but see *People* v. *Freeman* (Ill. App. Ct. 1991) 581 N.E.2d 293, 297 [indicating prosecutor's notes from voir dire are protected under the work-product doctrine unless they contain evidence favorable to a defense *Batson* motion – albeit characterizing the jury selection notes as potential *Brady* evidence].)

Code of Civil Procedure section 2018.030(a) unequivocally states: "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories ***is not discoverable under any circumstances***. (Emphasis added; see also *Coito* v. *Superior Court* (2012) 54 Cal.4th 480, 488; *Izazaga* v. *Superior Court* (1991) 54 Cal.3d 356, 381–382 ["Penal Code section 1054.6 . . . expressly provides that attorney work product is nondiscoverable."].)[6]

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[6] The privilege is deemed "absolute" even though it may be waived. (See *Ardon* v. *City of Los Angeles* (2016) 62 Cal.4th 1176, 1186; *Wells Fargo Bank* v. *Superior Court* (2000) 22 Cal.4th 201, 214.)

There can be little doubt that the High Court believes evidence found in the jury selection notes of attorneys can provide relevant evidence of discriminatory use of peremptory challenges. (See *Foster* v. *Chatman* (2016) 136 S.Ct. 1737, 1748; *Miller-El* v. *Dretke* (2005) 545 U.S. 231, 266.) But the High Court has *never* addressed whether such notes are discoverable over an objection that the notes are protected from disclosure by an *absolute* work product privilege such as the privilege embodied in Code of Civil Procedure section 2018.030(a).[7]

For example, in *Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39, the issue before the Court broadly paralleled the issue in the instant case - because it involved the question of how to balance the interest in protecting a privilege against the need for discovery to vindicate a constitutional right, i.e., the right to due process. The High Court ultimately held defendant was entitled to judicial in camera review of a confidential juvenile file to vindicate the right to *Brady* evidence. (*Id.* at pp. 57-58.) Significantly, however, "[i]n reaching this conclusion on the basis of the particular statutory scheme there involved, the *Ritchie* court left open the possibility that the result under the due process principles of *Brady* might have been different if the applicable statute had granted the children and youth services agency '***absolute***' authority to prevent the disclosure of its confidential files." (*People* v. *Hammon* (1997) 15 Cal.4th 1117, 1125 [citing to *Ritchie*, at p. 57 & fn. 14], emphasis in original; see also *Swidler & Berlin* v. *United States*

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[7] In federal court, the privilege derived from the work-product doctrine is "a *qualified* privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'" (*United States* v. *Nobles* (1975) 422 U.S. 225, 238, emphasis added.) It is not absolute. (*Id.* at p. 239; see also *BP Alaska Exploration, Inc.* v. *Superior Court* (1988) 199 Cal.App.3d 1240, 1250.)

(1998) 524 U.S. 399, 408, fn. 3 [declining to opine on whether "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching" the common law attorney client privilege].)

Indeed, the High Court has at least suggested that vindication of federal constitutional rights will not necessarily trump absolute privileges. In *Washington* v. *Texas* (1967) 388 U.S. 14, the High Court held that a state statute precluding certain witness from testifying violated the defendant's Sixth Amendment right to compulsory process. However, the Court took care to note: "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges which are based on entirely different considerations from those underlying the common-law disqualifications for interest." (*Id.* at p. 23, fn. 21.)[8]

On the other hand, *this* Court has refused to breach absolute privileges - even to vindicate a constitutional right. (See *People* v. *Bell* (2019) 7 Cal.5th 70, 96 ["a criminal defendant's right to due process does not entitle him to invade the attorney-client privilege of another."];

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[8] Citing a passing reference in *United States* v. *Armstrong* (1996) 517 U.S. 456 to the fact that discriminatory prosecution claims "may disclose the Government's prosecutorial strategy" made during a discussion in *Armstrong* as to why the defense is required to make a threshold showing before a court can order discovery (*id.* at p. 468), Real Party claims the High Court has "held that work product protection cannot hinder a defendant's ability to demonstrate a discriminatory-charging equal protection violation." (Answer Brief at p. 35.) But this reference does not qualify as a holding. It does not necessarily refer to a work product privilege. And if it does refer to a work product privilege, it is a qualified work product privilege, not an absolute privilege like section 2018.030(a). (See this brief, *supra*, at p. 22, fn. 7.)

People v. *Gurule* (2002) 28 Cal.4th 557, 594 [same]; *People* v. *Johnson* (1989) 47 Cal.3d 1194, 1228 [similar]; *People* v. *Anderson* (2001) 25 Cal.4th 543, 577 ["Due process may require the state to disclose exculpatory evidence, including psychiatric records of a witness, when such material is already in the state's possession and ***is not made absolutely privileged by state law.***" (Emphasis removed and added)]; *People* v. *Webb* (1993) 6 Cal.4th 494, 518 ["the due process clause requires the 'government' to give the accused all 'material' exculpatory evidence 'in its possession,' even where the evidence is otherwise subject to a state privacy privilege, ***at least where no clear state policy of "absolute" confidentiality exists.***" (Emphasis added)].)

Our legislature could, if it chose to do so, easily alter the scope of the work product privilege by adding in language that recognizes that the privilege does not apply when disclosure of the privileged information is necessary to ensure that jury challenges are not being used in a discriminatory fashion. (Cf., *United States ex rel. Patosky* v. *Kozakiewicz* (W.D. Pa. 1997) 960 F.Supp. 905, 917 [noting that after Pennsylvania supreme court held defendant's rights to confrontation and compulsory process under the state constitution trumped privilege protecting confidential communications between a psychiatrist and client, legislature amended privilege to be absolute and finding privilege as amended could not be breached].) Our legislature has not done so.[9]

That said, if this Court decides to treat the absolute work product privilege differently than it does the attorney-client privilege (the interests protected overlap but are distinct), it may not be beyond the purview of this Court to decide that even an absolute statutory privilege

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[9] We express no opinion on whether this would be a good idea. It might be.

must give way when ***necessary*** to effectuate the equal protection clause of the Fourteenth Amendment and the right to trial by jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution.

This Court, in other circumstances, has held or left open the possibility that statutes limiting disclosure of information, including privileges (albeit not necessarily *absolute* privileges) can be trumped by constitutional imperatives.

For example, in *People* v. *Wheeler* (1978) 22 Cal.3d 258 itself, this Court held that a statute, described as a "statutory privilege" and which provided that "no reason need be given" for a peremptory challenge (former Pen. Code, § 1069), "must give way to the constitutional imperative: the statute is not invalid on its face, but in these limited circumstances it would be invalid as applied if it were to insulate from inquiry a presumptive denial of the right to an impartial jury." (*Wheeler, supra,* at p. 251, fn. 28.)

In *People* v. *Collie* (1981) 30 Cal.3d 43, this Court held that the defense could not be forced to disclose witness statements to the prosecution absent explicit legislative authorization. (*Id.* at p. 48.) This aspect of the holding in *Collie* has long since been superseded. (See *People* v. *Champion* (1995) 9 Cal.4th 879, 913, fn. 9.)[10] But, there is *dictum* in *Collie* suggesting that the constitutional obligation under *Brady* would trump the California work-product privilege: "Manifestly, [the privilege] cannot be invoked by the prosecution to preclude discovery by the defense of material evidence, or to lessen the state's

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[10] "In 1990, the electorate amended the California Constitution by initiative to permit prosecutorial discovery." (See *Champion, supra,* at p. 913, fn. 9 [citing to Cal. Const., art. I, § 30, subd. (c) and *Izazaga* v. *Superior Court* (1991) 54 Cal.3d 356].)

obligation to reveal material evidence even in the absence of a request therefor." (*Collie*, at p. 59, fn. 12.)[11] This dictum has never been repudiated.

In *People* v. *Hammon* (1997) 15 Cal.4th 1117, the defendant sought disclosure of documents protected by the psychotherapist-patient privilege before trial. (*Id.* at p. 1123.) This Court observed that the High Court in *Davis* v. *Alaska* (1974) 415 U.S. 308 had held "that a criminal defendant's right to confront adverse witnesses sometimes requires the witness to answer questions that call for information protected by state-created evidentiary privileges." (*Hammon* at pp. 1123-1124.) However, after noting *Davis* did not speak to pre-trial disclosure and after reviewing the decision in *Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39 [discussed in this brief, *supra*, at p. 22], this Court declined to find that the Sixth Amendment right to confrontation required a court to review the privileged documents prior to trial. (*Id.* at pp. 1123-1128.) This Court observed: "Pretrial disclosure under these circumstances, therefore, would have represented not only a serious, but an *unnecessary*, invasion of the patient's statutory privilege (Evid. Code, § 1014) and constitutional right of privacy . . ." (*Hammon* at p. 1127 [citing to Cal. Const., art. I, § 1].) Nevertheless, this Court left open the possibility that when a defendant proposes to impeach a critical prosecution witness *at trial* "with questions that call for privileged

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[11] We cite this dictum was one caveat. It was prefaced by the following comment: "Even in civil cases the work-product doctrine is not an absolute bar to discovery (Code Civ. Proc., § 2016, subd. (b));" (*Collie* at p. 59, fn. 12.) Thus, the dictum might only have been referring to the qualified privilege not the absolute work product privilege - even though subdivision (b) of section 2016 incorporated both the qualified privilege and the absolute privilege given to writings now found in subdivision (a) of Code of Civil Procedure section 2018.030.

information, the trial court may be called upon, as in *Davis*, *supra*, to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve." (*Hammon* at p. 1127.)

More recently, in *Association for Los Angeles Deputy Sheriffs* v. *Superior Court* (2019) 8 Cal.5th 28, in order to effectuate a due process obligation, this Court permitted law enforcement agencies to provide *Brady* alerts to prosecutors notwithstanding the general confidentiality given to peace officer records "because construing the *Pitchess* statutes to permit *Brady* alerts best 'harmonize[s]' *Brady* and *Pitchess*." (*Id.* at p. 51.)

Courts in other jurisdictions have also held or stated in dictum that the due process right described in *Brady* v. *Maryland* trumps statutorily created work-product privileges (albeit with one exception, none of the privileges considered were absolute). (See e.g., *United States* v. *Edwards* (E.D. N. Carolina 2011) 777 F.Supp.2d 985, 995; *Castleberry* v. *Crisp* (N.D. Okla. 1976) 414 F. Supp. 945, 953; *United States* v. *Goldman* (S.D.N.Y. 1977) 439 F. Supp. 337, 350; *Bunch* v. *State* (Ind. 2012) 964 N.E.2d 274, 301; *Ex Parte Miles* (Tex. Crim. App. 2012) 359 S.W.3d 647, 670; *Waldrip* v. *Head* (Ga. 2005) 620 S.E.2d 829, 832.) And at least one court appears to have characterized evidence that would favorable to a defendant making a *Batson* motion as constituting *Brady* evidence such that the work product privilege could be overcome. (See *People* v. *Freeman* (Ill. App. Ct. 1991) 581 N.E.2d 293, 297.)[12]

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[12] In *Freeman*, the appellate court characterized *People* v. *Mack* (Ill. 1989) 538 N.E.2d 1107 as standing for the proposition that the work product privilege in jury selection notes could not be breached except if the information in the notes qualified as *Brady* evidence. (*Freeman* at p. 830.) However, that characterization was extrapolated from what the *trial* court in *Mack* said. The *Mack* court

If this Court chooses to find that the absolute work product privilege of section 2018.030(a) can be overcome when necessary to effectuate the *Batson-Wheeler* rights, it may moot the need to decide whether mere reference to jury selection notes waives the privilege as to all notes or whether an attorney giving reasons for challenging jurors is testifying as a "witness." However, it will be necessary to provide some guidance as to what sort of showing would be required to overcome the work product privilege and what procedures should be followed when the privilege is asserted. The next two portions of the brief address those concerns.

D. Assuming the Absolute Work Product Privilege Can Potentially be Pierced to Vindicate the Constitutional Rights Described in the *Batson-Wheeler* Line of Cases, the Party Seeking Disclosure Should Be Required to Show that Nondisclosure will Unfairly Prejudice the Party in Preparing Its Claim or Result in an Injustice

Assuming this Court holds the absolute work product privilege (which, inter alia, would protect jury selection notes) can, in some circumstances, be overcome in order to vindicate the constitutional rights described in the *Batson-Wheeler* line of cases, and assuming the privilege has not otherwise been waived, this Court will have to determine what showing will be required to overcome the privilege.

In settling on the requisite showing, it must be kept in mind that there is a strong interest in maintaining the privilege. As pointed out by the High Court in *Hickman* v. *Taylor* (1947) 329 U.S. 495 at pp. 510-

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itself was somewhat ambiguous in this regard, appearing to condone the trial court's reasoning for going in camera to review the prosecutor's privileged jury selection notes but also holding the work product privilege was absolute. (*Id.* at p. 1115.)

512 and by this Court in *Coito* v. *Superior Court* (2012) 54 Cal.4th 480 at pp. 489-490:

> In performing his various duties, ... it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he 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. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.
>
> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached

> only with difficulty. ... But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order."

Accordingly, we respectfully recommend that before the privilege is obliterated, the showing required should be *at least* as burdensome as the showing required to overcome the *qualified* privilege protecting attorney work product. This is because the legislature has already determined that the interests protected by the absolute privilege of section 2018.030(a) (i.e., the "attorney's impressions, conclusions, opinions, or legal research or theories") are greater and more deserving of protection than the other "non-opinion" forms of work product covered by subdivision (b). Otherwise, the non-opinion form of the privilege would also be absolute.

Under the standard for overcoming the qualified privilege, "[t]he work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Code Civ. Proc., § 2018.030(b).)

This was the standard adopted by the court in *People* v. *Hunter* (2017) 15 Cal.App.5th 163, which had to decide what showing would be required in order for one co-defendant to be able to pierce the *qualified* work product privilege of the other co-defendant in a criminal case. (*Id.* at pp. 180-181.)[13] In landing on this standard, the *Hunter* court took

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[13] In *Hunter*, the defendants seeking to pierce the privilege did not assert they would be entitled to the contents of interview conducted by the co-defendant's attorney if the *absolute* work product privilege

into account this Court's statement in *People* v. *Thompson* (2016) 1 Cal.5th 1043 that while "criminal discovery procedures do not provide for codefendant discovery, a defendant's constitutional right to a fair trial may require such discovery." (*Hunter* at pp. 180-181, citing to *Thompson* at p. 1095.)

The *Hunter* court rejected the notion that a defendant's interest in a fair trial allowed disclosure upon "[a] bare showing of 'good cause'". Instead, "[a] court will order disclosure of such materials only if the party seeking discovery can demonstrate injustice or unfair prejudice, a much heavier burden." (*Id.* at p. 182.) "Declarations are generally used to establish the requisite good cause, and specific facts must be alleged; a bare 'desire to review documents for "context" is "a patently insufficient ground.'" (*Ibid.*)

The benefit of utilizing this standard is that there already exists case law that can provide guidance as to how it may be practically applied.

The burden justifying disclosure (or at least in camera review – see this brief, *infra*, at pp. 33-37) of jury selection notes should not be met simply because a prima facie case has been made requiring the attorney accused of discriminatory acts to provide reasons at the second stage of the *Batson-Wheeler* motion.[14] That standard is sufficient to

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applied. (*Id.* at p. 181.) Thus, the analysis in *Hunter* would likely support an *even greater* showing in order to pierce the absolute privilege.

[14] "[T]he party exercising a peremptory challenge has the burden to come forward with nondiscriminatory reasons only when the moving party has first made out a prima facie case of discrimination." (*People* v. *Scott* (2015) 61 Cal.4th 363, 387 citing to *J.E.B.* v. *Alabama ex rel. T.B.* (1994) 511 U.S. 127, 145.) A prima facie case is made "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Johnson* v. *California*

require reasons to be given by an attorney. However, if it were *also*, by itself, adequate to require disclosure of jury selection notes, then the interests protected by the absolute work product privilege would be given no weight and ignored.

Applying the proposed standard in the context of whether the absolute work product privilege in jury selection notes should be pierced to protect a defendant's rights, there would have to be, at a minimum, an *initial* showing by the party seeking to pierce the privilege the following: (i) a prima facie finding of discriminatory use of one or more peremptory challenges; (ii) good cause to believe that the attorney's oral justifications presented at the second stage of the *Batson-Wheeler* hearing are untruthful; and (iii) good cause to believe that the notes of the attorney would contradict the attorney's oral justifications. (Cf., *Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39, 58 [a defendant "may not require the trial court to search through the CYS file without first establishing a basis for his claim that it contains material evidence"]; *People* v. *Montes* (2014) 58 Cal.4th 809, 829 [identifying the standard of "plausible justification" for discovery relating to a discriminatory prosecution claim as requiring "a defendant to 'show by direct or circumstantial evidence that prosecutorial discretion was exercised with intentional and invidious discrimination in his case"]; *People* v. *Prince* (2007) 40 Cal.4th 1179, 1232 ["motion for discovery must describe the information sought with some specificity and provide a plausible justification for disclosure"].)

This initial showing would allow for an in camera review of the purportedly absolutely privileged notes to determine whether the

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(2005) 545 U.S. 162, 168; *People* v. *Clark* (2012) 52 Cal.4th 856, 906.)

privilege should be overcome by the interest in disclosure. (See this brief, infra, at pp. 33-37.)

In the unpublished federal district court case of *United States* v. *Santos-Cordero* (9th Cir. 2018) 747 Fed.Appx. 530, the court provided some idea of what kind of showing might be required before a prosecutor could be ordered to disclose notes at an in camera hearing. The *Santos-Cordero* court speculated there might be some instances where a prosecutor could be compelled to disclose jury selection notes while noting that "no court has suggested that the prosecutor is compelled to disclose those notes, even for in camera inspection." (*Id.* at p. 531.) The court then went on to hold the defendant in the case before it had "not shown the need for such an unprecedented holding" because "the evidentiary hearing on remand was only two years after voir dire, the original prosecutor participated in the hearing and had a clear memory of voir dire, and *there are no inconsistencies or questionable representations* by the prosecutor that might suggest a discriminatory purpose." (*Ibid*, emphasis added.)

Had the defendant in *Santos-Cordero* been able to show the attorney accused of exercising challenges in a discriminatory fashion was inconsistent in his or her answers or made or questionable representations, this would likely provide the good cause necessary to meet the second element of the proposed standard.

E. If the Requisite Showing for Overcoming the Absolute Work Product Privilege in Jury Selection Notes Has Been Met, the Notes Should Be Reviewed In Camera Before They Are Ordered Disclosed to the Party Seeking to Breach the Privilege

If this Court sees fit to allow the absolute work product privilege to be breached when the party seeking to pierce the privilege makes the

requisite showing (whatever that showing is), the trial court should not (as the trial court did in the instant case) order disclosure without reviewing the material in camera first.

The usual procedure when a litigant seeks discovery of allegedly privileged or confidential information in order to vindicate a constitutional right is for the court to review the information in camera and balance the interest in maintaining the privilege against the interest in disclosure. (See *Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39, 58 [*requiring* trial court to review child protective service records to determine whether due process required disclosure]; *People* v. *Hammon* (1997) 15 Cal.4th 1117, 1124-1125 [describing process in *Ritchie*]; *People* v. *Marshall* (1996) 13 Cal.4th 799, 842 [same]; *People* v. *Webb* (1993) 6 Cal.4th 494, 518 [When a state seeks to protect material, exculpatory but privileged evidence (i.e., psychiatric records) from disclosure, "the court *must* examine them *in camera* to determine whether they are 'material' to guilt or innocence." (emphasis added); *People* v. *Collie* (1981) 30 Cal.3d 43, 57 ["even the cases least solicitous of defendant's rights validated [prosecutorial] discovery [of defense witness statements] only after the judge had screened the documents to exclude nonimpeaching evidence."]; *J.E.* v. *Superior Court* (2014) 223 Cal.App.4th 1329, 1336 ["Subsequent to *Ritchie*'s selection of the *in camera* review procedure, courts have recognized that in camera inspection is appropriate when there is a 'special interest in secrecy' afforded to the files."]; *Rubio* v. *Superior Court* (1988) 202 Cal.App.3d 1343, 1349-1351 [requiring in camera review of videotape of sexual relations between a married couple to determine whether criminal defendant's right to due process outweighs couple's constitutional rights of privacy and their statutory privilege not to disclose confidential marital communications]; *Roland* v. *Superior Court*

(2004) 124 Cal.App.4th 154, 169 [if discoverable material in possession of defense is potentially protected by the work product privilege, the attorney "can seek a protective order to that effect . . . or *an in camera review* in which the privileged material can be excised"]; see also Evid. Code, § 915(b) [procedure for in camera review when work product or official information privilege is asserted]; *People* v. *Bryant* (2014) 60 Cal.4th 335, 466 ["In general, a court 'has inherent discretion to conduct in camera hearings to determine objections to disclosure based on privileges.'"]; *People* v. *Thompson* (2016) 1 Cal.5th 1043, 1098 ["as a general rule, a trial court has discretion to conduct a proceeding in a defendant's absence 'to protect an overriding interest that favors confidentiality.'"]; *People* v. *Carasi* (2008) 44 Cal.4th 1263, 1299 ["the trial court retains discretion to conduct in camera ex parte proceedings to protect an overriding interest that favors confidentiality" and cases cited therein].)

This Court has approved use of the in camera procedure even when the question before the court was not whether a defendant's constitutional right should trump a statutory privilege, but whether "a *witness* statement, or portion thereof, is absolutely protected because it 'reflects an attorney's impressions, conclusions, opinions, or legal research or theories' or just "qualified work product protection." (*Coito* v. *Superior Court* (2012) 54 Cal.4th 480, 499-500, emphasis added.)

And appellate courts have used in camera review when it comes to deciding whether the attorney work product doctrine applies to specific documents and whether each document should be given qualified or absolute protection. (See *League of California Cities* v. *Superior Court* (2015) 241 Cal.App.4th 976, 993; *Dowden* v. *Superior Court* (1999) 73 Cal.App.4th 126, 135 [citing to *Wellpoint Health Networks, Inc.* v. *Superior Court* (1997) 59 Cal.App.4th 110, 119 and *BP*

Alaska Exploration, Inc. v. *Superior Court* (1988) 199 Cal.App.3d 1240, 1261].)

Evidence Code section 915 prohibits disclosure of information claimed to be privileged as attorney work product under subdivision (a) of Section 2018.030 in order to rule on the claim of privilege, but allows the court to "require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present." (Evid. Code, § 915, subd. (b).)

The in camera procedure should be utilized to determine whether some or all of the jury selection notes claimed to be privileged should be disclosed in order to effectuate a defendant's constitutional rights as defined in *Batson* and *Wheeler*.

And because nothing in *Batson* or *Wheeler* suggests a trial court *must* order disclosure of jury selection notes, using an in camera procedure has an added benefit. While a trial court may initially decide that an attorney's jury selection notes would be sufficiently helpful to the defense such that disclosure should be required, *upon in camera review*, the trial court may learn that the notes are not sufficiently probative on the issues at the *Batson-Wheeler* hearing so that disclosure is not warranted. (See *People* v. *Freeman* (Ill. App. Ct. 1991) 581 N.E.2d 293, 297 [determining no discovery of prosecutor's jury selection notes required after reviewing notes in camera pursuant to *Batson* motion in jurisdiction where a prosecutor's jury selection notes are protected from disclosure under the work-product doctrine unless they contain material favorable to the defense under *Brady* v. *Maryland* (1963), 373 U.S. 83]; *People* v.

Mack (Ill. 1989) 538 N.E.2d 1107, 1116 [even if judge looked at notes of prosecutor in camera, this "would not have automatically necessitated disclosure of them to the defense" where judge found notes did not contain material that could benefit the defendant]; cf., *United States* v. *Barnette* (4th Cir. 2011) 644 F.3d 192, 209-213 [finding no reversible error in camera review and citing to cases allowing in camera review, but indicating in camera review of notes should only be done in compelling circumstances].)

Indeed, even Real Party agrees that "[w]hen 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" and that in camera review might be warranted if "disclosure would 'entail confidential communications or reveal trial strategy.'" (Answer Brief, at p. 50 [albeit also claiming that since Petitioner did not ask for an in camera review after asserting the privilege, the Petitioner should not now be able to claim the trial court erred in not granting in camera review – see this brief, *infra*, at p. 38].)

The trial court in the instant case, however, simply ordered disclosure of all the notes without deciding whether the notes were relevant, whether the privilege applied to just specific aspects of an attorney's jury selection notes, or whether disclosure was actually necessary to vindicate the right to trial "by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution" or the "right to equal protection under the Fourteenth Amendment to the United States Constitution." (*People* v. *Hamilton* (2009) 45 Cal.4th 863, 898 [citing to *People* v. *Wheeler* (1978) 22 Cal.3d 258 and *Batson* v. *Kentucky* (1986) 476 U.S. 79.) This was an abuse of the trial court's discretion.

F. Although a Party Asserting the Work Product Privilege Might Have the Burden of Making a Preliminary Showing that Disclosure Would Reveal Absolutely Privileged Material, there is No Such Burden When Jury Selection Notes Are Requested Pursuant to Penal Code section 1054.9 and the Trial Court's Order of Disclosure is Premised on a New Theory of Disclosure and an Alleged Waiver of the Privilege

Real Party contends that Petitioner cannot now suggest that the trial court erred in failing to review the documents in camera because no request for such a hearing was made at the discovery hearing. (Answer Brief, at p. 51.)

This brief discusses the use of the in camera procedure out of a concern that *if* this Court were to hold the absolute work product privilege in jury selection notes *can* be overcome (even when there is no waiver of the privilege) without discussing the availability of the in camera procedure, practitioners will be left with the impression such an in camera hearing is not available to protect those aspects of the notes that are irrelevant to the *Batson-Wheeler* issues.

But considering the nature of the discovery request, it is also fair for Petitioner to complain that the trial court hearing the section 1054.9 motion did not review the notes in camera to determine whether the *original trial court* would have ordered the notes disclosed.

The request for jury selection notes in the instant case arose in the context of a section 1054.9 motion. The motion under section 1054.9 is tied to Real Party's amended petition for writ of habeas corpus, No. S217284 alleging "ineffective assistance of counsel because his trial counsel failed to raise a *Batson/Wheeler* error for the prosecutor's exercise of peremptory challenges against women, noting 13 of the prosecution's 17 peremptory strikes were against prospective female jurors." (*Jones* at pp. 78-79.)

Section 1054.9 limits the specific materials that the prosecution is required to disclose pursuant to a section 1054.9 motion to: "(1) materials the prosecutor provided at time of trial but have since become lost to the defendant, (2) materials the prosecution should have provided at time of trial, or (3) materials the defendant would have been entitled to at time of trial had the defendant specifically requested them." (*In re Steele* (2004) 32 Cal.4th 682, 688.) Although the Court of Appeal skipped over any analysis of which category the jury selection notes fell under (*Jones* at p. 79), the only category that the jury selection notes could potentially fall under in the instant case is the third category.

The *defendant bears the burden* of demonstrating the materials requested are ones to which he would have been entitled to discovery at the time of trial. (See *Kennedy* v. *Superior Court* (2006) 145 Cal.App.4th 359, 366.)

It is at least questionable whether the "discovery" this Court had in mind in *Steele* included information that did not fall within the type of materials described in Penal Code section 1054.1 - let alone the type of materials a defendant did not request but would have requested *if only his attorney been competent.* But assuming a defendant is potentially entitled to materials not listed in section 1054.1 (such as jury selection notes) under the theory that a competent attorney would have requested them back during the original trial, a defendant pursuing materials under section 1054.9 still bears the burden of establishing he would have been entitled to the notes in the first instance. What the trial court hearing the section 1054.9 discovery request was being asked to constructively determine was whether the *original trial judge would* have found

Real Party was entitled to the jury selection had the original trial attorney been competent and asked for them.

This placed the burden on Real Party to establish at the discovery motion that the jury selection notes would have been provided to Real Party if his original defense counsel had not acted incompetently. Real Party did not meet this burden.

To show make this showing, *Real Party* was obliged to establish, inter alia, not only that a competent defense attorney would have requested and been entitled to information in the jury selection notes, but that the trial court would have ordered them disclosed. Even assuming that the original trial court would have agreed with the court hearing the discovery motion that any confidentiality in jury selection notes would be overcome by the need for evidence relevant to a *Batson-Wheeler* motion, Real Party must still show that the trial court would have found *all* the jury selection notes relevant. This determination could not honestly be made without in camera review of those notes. Thus, it is fair to point out that the court hearing the discovery motion abused its discretion when it neglected to review the notes in camera. And also to point out that the Court of Appeal essentially glossed over this failure to review the notes in camera by stating: "In issuing the order to turn over the jury selection notes, the trial court necessarily concluded Jones met his burden of demonstrating he was entitled to them at the time of trial." (*Jones* at p. 79.)

There was no showing that the trial court presiding at the section 1054.9 hearing even knew it had to go through this process of figuring out whether some or all the notes would be relevant. To the contrary, the trial court's ruling was based solely on two dubious beliefs: (i) that *Foster* v. *Chatman* (2017) 136 S.Ct. 1737 dictated that

the notes of a prosecutor on jury selection are always relevant (because they "could possibly impeach" a prosecutor) and thus are discoverable evidence relating to a *Batson-Wheeler* hearing and (ii) that any work-product privilege in the notes was waived pursuant to Evidence Code section 771. (See Exhibit B to Petition for Writ of Mandate And/Or Prohibition filed in *Jones* [transcript of hearing on April 27, 2018], at pp. 46-48.)

The order of discovery, *on its face*, was an abuse of discretion because no determination was made of the notes' relevance (which should only be made after an in camera hearing) and Petitioner may properly argue this point. Moreover, given the basis of the ruling of the court hearing the discovery motion, any request for an in camera hearing would have been futile. This is another reason why it is proper to claim the trial court erred in not holding an in camera hearing regardless of whether a request for an in camera hearing was made at the time of the section 1054.9 discovery motion. (Cf., *People* v. *Hill* (1998) 17 Cal.4th 800, 820 ["A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile."].)

II.
CONCLUSION

There are good reasons for keeping jury selection notes protected by the absolute privilege. However, assuming that the absolute work product privilege in jury selection notes can be overcome in order to vindicate a defendant's constitutional rights, the Court of Appeal should not have approved of the trial court ordering Petitioner to directly disclose to Real Party all jury selection notes once the work product privilege was asserted. This is

especially true given the paucity of factual findings by the trial court to support the conclusion that Real Party was entitled to the notes under Penal Code section 1054.9. Rather, the Court of Appeal should have ordered the trial court to review the notes in camera to assess whether *all* or any aspects of the notes were subject to the work product privilege, subject to waiver, and/or constituted relevant evidence.

For all the reasons discussed above, and the reasons asserted in Petitioner's Opening and Reply brief, the California District Attorneys Association respectfully requests that this Court reverse the holding of the Court of Appeal; issue an opinion clarifying when, if ever, the absolute work product privilege protecting jury selection notes can be overcome at a *Batson-Wheeler* motion; and, if necessary, order the trial court overseeing the section 1054.9 discovery motion to review the jury selection notes in camera to determine if any of the notes contain evidence sufficiently relevant that disclosure is required to vindicate the constitutional rights at stake in a *Batson-Wheeler* motion.

Dated: March 5, 2020

Respectfully submitted,

Appellate Committee of the
California District Attorneys
Association

By:
Jeff Rubin
Deputy District Attorney
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rules 8.486(a)(6) and 8.204(c), I certify that this brief has been prepared using 13 point Georgia font and contains 9212 words, inclusive of footnotes, but excluding table, covers, this certificate, and declaration of proof of service. I have relied on the word count feature and other features of Microsoft Word, the computer program used to author this brief, for certification.

March 5, 2020 Jeff H. Rubin

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare: I am a resident of or employed in the County Sacramento. I am over the age of 18 years and not a party to the within action. My business address is 2495 Natomas Park Drive, Suite 575, Sacramento, CA 95833. On March 5, 2020, I served a copy of the within:

APPLICATION OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

on the following, by placing a copy of same in postage prepaid envelopes addressed as follows:

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I also electronically served the same referenced above document to the following entities via e-mail:

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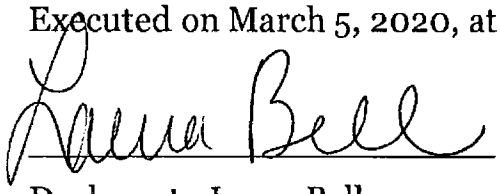
I declare the foregoing to be true and correct under penalty of perjury.

Executed on March 5, 2020, at Sacramento, California



Declarant: Laura Bell

The original copy will be filed within 5 days per rule 8.77(a).