POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit Toward California Criminal Law Specialization: #172-- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guest	30 min
April. 22, 2019	**Discovery of Juror Selection Notes:** ***People v. Superior Court of San Diego County, Bryan Maurice Jones***	Abby Mulvihill	**Bias**

People v Superior Court of San Diego County, Bryan Maurice Jones (2019) __ Cal. 5th ___ 2019 WL 419062

The Court of Appeal holds that when a prosecutor's jury selection notes are referenced by a prosecutor during a *Batson/Wheeler* hearing when explaining his or her reasons for exercising a peremptory strike, those notes are discoverable by the defendant as part of a postconviction writ of habeas corpus discovery.

*** As this P&A discusses, prosecutors should expect that some defense counsel may argue this decision applies at trial as well.**

I. Factual and Procedural Background

1. Bryan Maurice Jones was convicted in San Diego County Superior Court of numerous crimes, including two first degree murders with special circumstances, two attempted murders, and sex offenses against one of the attempted murder victims. The jury sentenced Jones to death and the judgment was affirmed on appeal in the Supreme Court in *People v. Jones* (2013) 57 Cal.4th 899. (p.*1.)

2. During jury selection, the prosecution used peremptory challenges to excuse two African-American prospective jurors based on race, and defense counsel objected. Both were female, although the challenge was based only on race. After the trial court determined the defense attorney made a prima facie showing of racial bias, the prosecutor offered race-neutral explanations for excusing the jurors, citing in part a numerical score for each prospective juror that the prosecution team had devised. The trial court found the explanations proffered by the prosecutor credible and permitted the strikes. (p.*1, citing to the Supreme Court's opinion, *People v. Jones*, *supra,* 57 Cal.4th at pp. 916-918.)

3. The Supreme Court's opinion states the defendant renewed his *Batson/Wheeler* motion on the basis of race when another African American, who was a female, was excused by the prosecutor. However, the trial court declined to find that the defendant had demonstrated a prima facie showing of discrimination. Thus, no explanation was proffered by the prosecutor. The Supreme Court assessed

the record independently and concluded there was ample evidence to support the trial court's ruling that no prima facie case had been established. (*People v. Jones, supra*, 57 Cal.4th at pp. 919-920.)

4. In a footnote, the Supreme Court opinion also states that the prosecutor excused an African-American man, but the defendant did not renew that claim in the Supreme Court.

5. Jones filed an amended petition for writ of habeas corpus, 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 further alleged his trial counsel was ineffective for failing to raise a *Batson/Wheeler* error on the ground that four of those women were also African-American. (p.*2.)

6. After Jones's direct appeal, his habeas attorney sought postconviction discovery of the prosecutor's jury selection notes, pursuant to section Penal Code section 1054.9. The trial court granted the request in April 2018. In May, the district attorney filed a writ of mandate and/or prohibition seeking a stay and requesting the Court of Appeal vacate the trial court's order, which it denied. The district attorney appealed. The Supreme Court granted district attorney's petition for review and transferred the matter to the Court of Appeal. The Court of Appeal vacated its order denying the writ of mandate and/or prohibition and issued an order to show cause returnable why the petitioner (the People) is not entitled to the relief requested. Jones filed a formal return to the order to show cause. This Court of Appeal denied the district attorney's petition. The Court of Appeal's opinion is discussed below.

II. <u>The Issue and Applicable Legal Principles</u>

1. The Court of Appeal described the issue before it as follows: "The San Diego County District Attorney petitions for a writ of mandate and/or prohibition challenging the superior court's order directing the district attorney to turn over to defense habeas counsel the prosecution's jury selection notes, contending the materials are privileged work product not subject to discovery. We are called upon to determine whether these notes, when referenced during a *Batson/Wheeler* hearing by a prosecutor offering a neutral reason for exercising a peremptory strike, are discoverable by the defendant as part of postconviction writ of habeas corpus discovery." (p.*1.)

2. With regard to a defendant seeking post-conviction habeas discovery the Court of Appeal states: "A defendant is entitled to materials to which he would have been entitled at trial, whether or not he possessed those materials at the time of trial. (*In re Steele* (2004) 32 Cal.4th 682, 693, 695-696); Pen. Code § 1054.9, subd. (b).) This includes materials the prosecution did not provide at trial because there was no specific defense request but would have been obligated to provide had there been one. [Citation]. 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. [Citation]." (p.*2.)

3 The Court of Appeal states: "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. Thus, to demonstrate an abuse of discretion in this case, the district attorney must demonstrate that at the time of trial, the defendant was not entitled to the jury selection notes." (p.*2.)

III. Work Product

1. The work product privilege is codified in the Code of Civil Procedure. It protects from discovery "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc., § 2018.030, subd. (a).) In the civil context, other work product is discoverable if the court determines its protection would unfairly prejudice the party seeking discovery. (Code Civ. Proc., § 2018.030, subd. (b).) (p.*3.)

2. However, in the criminal context, work product is more limited. As the California Supreme Court has stated, Penal Code section 1054.6 expressly limits the definition of "work product" in criminal cases to "core" work product," which is "any writing reflecting 'an attorney's impressions, conclusions, opinions, or legal research or theories.' " (*People v. Zamudio* (2008) 43 Cal.4th 327, 355) (p.*3.)

3. The work product doctrine " 'shelters the mental processes of the attorney, providing a privileged area in which he can analyze and prepare his client's case.' " (*People v. Collie* (1981) 30 Cal.3d 43, 59.) But the Court of Appeal here says it is "tasked with determining whether the work product privilege remains absolute when a court has an obligation to evaluate *the intent* of the prosecution, and the written mental impressions themselves may reveal an effort to unlawfully exclude prospective jurors based on race or gender." (p.*3, italics added.)

4. The Court of Appeal refers to the United States Supreme Court case of *Foster v. Chatman* (2016) __ U.S.__, 136 S.Ct. 1737, in which the Supreme Court considered a *Batson/Wheeler* challenge based on jury selection notes obtained by defense counsel through the Georgia Open Records Act. The prosecution's jury selection file was replete with documents referencing race. The Supreme Court concluded that "[t]he contents of the prosecution's file . . . plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." (*Foster*, at p. 1755.) (p.*3.)

5. The Court of Appeal states that although the Supreme Court in *Foster* did not address whether the jury selection notes were protected work privilege, "it makes clear the information contained within those notes is relevant to a determination of a prosecutor's credibility and genuineness." (p.*3, citing *Foster* at pp. 1743, 1755.)) Relying on *Foster*, the Court of Appeal here describes jury selection notes as "an example of the evidence of intent that a court should consider during the third stage of the *Batson/Wheeler* hearing." (p.*3.)

6. The Court of Appeal states that while the jury selection notes will likely contain the prosecution's impressions, conclusions, or opinions, there is a difference between a prosecutor's thoughts and opinions about the quality of the legal case or trial strategy and the thoughts and opinions about the adequacy of prospective jurors. The opinion emphasizes that the second step of the *Batson/Wheeler*

hearing requires the prosecutor to disclose his or her thinking regarding the prospective jurors by offering a race- or gender-neutral justification for exercising the challenged peremptory strikes. "Moreover, the purpose of the third step is to evaluate the prosecutor's reasoning. This is inconsistent with the notion that circumstantial evidence of those thoughts is absolutely protected." (p.*4.)

7. The Court of Appeal states the significant civil cases on work product do not apply here because the situation before it "focuses on the conflict between protecting an attorney's mental impressions and ensuring the attorney's jury selection decisions are not based on discriminatory intent. Here, constitutional concerns are at odds with the alleged statutory protections of an attorney's work product; "[t]he 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.' " (*Foster*, *supra*, 136 S.Ct. at p. 1747.) Thus, the Court of Appeal stated that given the importance of avoiding discrimination in jury selection, it could not conclude the trial court abused its discretion in ordering disclosure of the prosecutor's jury selection notes. (p.*4.)

IV. Waiver of Work Product

1. The Court of Appeal alternatively concludes that even assuming the jury selection notes are undiscoverable core work product, the prosecution's reference to their contents waived the protection. (p.*5.)

2. The only recognized exception to the absolute protection of core work product is the waiver doctrine. The Court of Appeal cites authority that the core work product privilege is waived when a witness testifies as to the work product's content. The Court of Appeal says additionally, Evidence Code section 771 requires the production of a writing used to refresh a witness's memory while testifying if requested by the adverse party. (Evid. Code, § 771, subd. (a).) The adverse party may cross-examine the witness concerning the writing and introduce portions of it that are pertinent to the testimony. (Evid. Code, § 771, subd. (b).) (p.*5.)

3. The district attorney urged the Court of Appeal to adopt for purpose of its analysis the definition of "witness" from the Code of Civil Procedure. The Code of Civil Procedure defines a "witness" as "a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." (Code Civ. Proc., § 1878.)

4. But the Court of Appeal responded that the issue before it is a discovery matter that regards *criminal* law. The Court of Appeal looked at the definition of "witness" in other statutes, including Evidence Code section 240 which treats the word "witness" as synonymous with "declarant." In turn, Evidence Code section 135 defines a "declarant" as a "person who makes a statement." The Court of Appeals stated, "These definitions are broader than the one offered by the district attorney and suggest more flexibility in who constitutes a witness in a criminal matter." (p.*5.)

5. The Court of Appeal states: "In a *Batson/Wheeler* hearing, resolution of the issues depends entirely on the reasons the prosecutor provides for exercising a peremptory challenge. Moreover, the prosecutor is the only source of information regarding his motivations, other than the jury selection

notes. Thus, in this context, the prosecutor effectively serves as a witness as the term is used in Evidence Code section 771. Moreover, when the prosecutor references jury selection notes to refresh his recollection and offers details from those notes, he waives any work product protection. (See Evid. Code, § 771.)" (p.*5.)

6. As to the case before it, the Court of Appeal explained: "Here, the prosecutor referenced details from the jury selection notes throughout the *Batson/Wheeler* hearing. He explained the prosecution had numerically evaluated jurors based on their questionnaires, and he shared the specific numeric ratings with the court, in addition to other details and observations regarding the challenged prospective jurors. *These references to the jury selection notes waived any work product privilege*." (p.*6, italics added.)

7. The Court of Appeal additionally stated that it was not persuaded that "the prosecutor could not have waived the work product privilege because he was not under oath and therefore was not a witness. Although the prosecutor was not under oath, '[a]n attorney is an officer of the court, and in presenting matters to the court may employ only such means as are consistent with the truth[ ] and may not mislead the court in any fashion.' " (p.*6.) "This obligation requires an attorney to render a candid disclosure. In a *Batson/Wheeler* hearing, the prosecutor—whose credibility and genuineness will be assessed by the trial court—is expected to testify honestly regarding his rationale for exercising a peremptory challenge." (p.*6.)

8. The Court of Appeal concludes: "Thus, we conclude that when a prosecutor relies on jury selection notes to refresh his recollection and shares the details of jury selection notes with the court during a *Batson/Wheeler* hearing, upon request, the defense is entitled to review those notes. Accordingly, the court did not abuse its discretion in determining Jones was entitled to the jury selection notes pursuant to section 1054.9." (p.*6.)

V. <u>Observations</u>

1. At the outset, keep in mind the issue the Court of Appeal was addressing in this case: "We are called upon to determine whether [the prosecution's jury selection] notes, when referenced during a *Batson/Wheeler* hearing by a prosecutor offering a neutral reason for exercising a peremptory strike, ***are discoverable as part of postconviction writ of habeas corpus***."

2. Nevertheless, a defense counsel may attempt to rely on this case to argue that a defendant is entitled, under the same reasoning, to the prosecutor's jury selection notes at trial in the third stage of a *Baston/Wheeler* hearing, if the prosecutor relied on those notes in proffering his or her reasons for the peremptory challenge. The argument likely to be made by defense counsel is that if Penal Code section 1054.9, the statute governing discovery in the context of a postconviction writ of habeas corpus, provides that "discovery material means materials in the possession of the prosecution . . . to which the same defendant would have been entitled at time of trial," then the defendant is necessarily entitled to the jury selection notes "at the time of trial." The Court of Appeal did not address this argument of course, because it was not asked to decide the question in that context. It was addressing

only habeas corpus discovery.

3. The larger question, however, is whether the Court of Appeal is correct that 1) the prosecutor's jury selection notes are discoverable work product, and 2) even if notes are *not* discoverable work product, the prosecutor's reference to the notes in explaining his reasons for his peremptory challenge waived the work product protection.

It is anticipated that the San Diego District Attorney's Office will seek further relief in this case. This case was issued by the Fourth District Court of Appeal and certified for publication on April 9th. A California Court of Appeal case can be cited or relied upon as soon as it is certified for publication. (California Rules of Court, rule 8.1115(d.) After an opinion is issued, the appellate decision becomes final in 30 days unless one of the parties (in this case the San Diego District Attorney's Office) seeks review of the decision in the California Supreme Court. The party can also seek depublication of the Court of Appeal decision.

A petition for review in the Supreme Court has to be filed within 10 calendar days after the decision becomes final. If the Supreme Court grants review, the case stays on the books since it's already published, but it has no binding or precedential effect and may be cited for PERSUASIVE value only. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court. (California Rules of Court, rule 8.115(e)). A request for depublication must be filed within 30 days after the decision is final in the Court of Appeal. (California Rule of Court, Rule 8.1125(a)(4).

4. In the meantime, should a prosecutor encounter a request by the defense attorney for the prosecutor's jury selection notes (which can occur only at the third stage of the *Batson/Wheeler* hearing, i.e., where the trial court must evaluate the credibility of the prosecutor's proffered reasons) the prosecutor may choose to object and distinguish the factual and procedural posture of this Court of Appeal case, *People v. Superior Court* (*Bryan Maurice Jones*). The Court of Appeal did not address application of its reasoning in the context of trial, nor has any other Court of Appeal decision held that jury selection notes, relied on by the prosecutor in stating his or her reasons for the peremptory challenge, must be turned over to the defense at trial upon request.

5. Nevertheless, until more is known as to whether the Supreme Court will act in this case, prosecutors should be prepared for the possibility that a trial court – in response to a request by defense counsel relying on this Court of Appeal case -- will require the prosecutor to turn over his or her jury selection notes to the defense, if the prosecutor referenced those notes in proffering reasons for the peremptory challenge.

6. At the outset, to state the obvious, as prosecutors we must act with the highest ethical obligation, thus it is expected that our jury selection notes will be free from any comments, notations, etc. that reflect a discriminatory intent.

7. If jury selection notes include *trial strategy reasons* for striking the prospective juror, a

prosecutor should be prepared to argue these particular notes are core work product that remain protected. The Court of Appeal here in this *Jones* case acknowledges that "there is a difference between a prosecutor's thoughts and opinions about the quality of . . . *trial strategy* and the thoughts an opinions about the adequacy of prospective jurors." (p.*4.)

8. Since the Court of Appeal states that the only discoverable notes are those used by the prosecutor "to refresh his recollection" in stating the reasons for the peremptory challenge, then it follows that *only* those notes used to refresh recollection should be turned over. If the prosecutor did not need to rely on notes to state some (or all) of his reasons, he did not refresh his recollection with those particular notes.

9. Should the prosecutor rely at all on jury selection notes in explaining his or her reasons for the peremptory challenge? Under the analysis of this Court of Appeal case, if the notes were not used to refresh recollection, they do not need to be turned over to the defense upon request. But in many cases, it might be impractical and counterproductive to refrain from relying on notes. Each situation will have to be evaluated individually. Here is a thoughtful comment from an attorney in the Alameda County District Attorney's Office: "Give all of your reasons for excusing a prospective juror, even if you have to refer to your notes. Making a good record that establishes a valid, non-discriminatory reason for excusing a prospective juror is more important to you personally and professionally and to the case itself, than any question about whether you have to turn over your stickie note to the court or defense counsel."

10. Also, if the defense raises a comparative juror analysis, the prosecutor must be prepared to give a thorough and careful explanation of why he or she exercised a peremptory challenge against one prospective juror and not another. Reliance on notes is imperative in this circumstance. [Read a Supreme Court cases that conducts a comparative jury analysis; it will convince you.]

11. Another suggestion offered by one of our prosecutors is to be certain to state all the reasons for your challenge, beyond what is stated in your written notes. Obviously, there is a transcript of the prosecutor's stated reasons for exercising a peremptory challenge, and these transcripts are part of the trial record that will be relied upon by a defendant in post-conviction habeas corpus. The trial court, in evaluating the credibility of the prosecutor's proffered reasons, is listening to the prosecutor's explanation in court. As another prosecutor in our office stated, prosecutors are not court reporters and cannot be expected to capture every word, thought or impression on paper as answers by the prospective juror are being given. Almost everything the prosecutor is writing down is necessarily summarized and incomplete. So all your reasons for striking a prospective juror should be stated and made part of the record, not just those reasons the prosecutor had time to write down on a piece of paper or stickie.

12. **Excerpt from June 13, 2016 P&A on *Foster v. Chatman*, with Jeff Rubin as guest, *applicable to this current P&A*:**

"As a result of the *Foster* decision, should prosecutors refrain from taking notes on the race or ethnicity of jurors?

As Jeff explains, such a conclusion would be an erroneous take-away from *Foster*. The *Foster* court did *not* dispute that identifying jurors by race would be proper if done for the purpose of responding to a *Batson-Wheeler* motion, either at the time the challenge is made, or years later at a *Batson-Wheeler* remand hearing. The Supreme Court in *Foster* rejected the State's belated argument that the prosecutors' notes were made for such a legitimate purpose. It did not find credible this claim, which had never before been asserted. The Supreme Court instead concluded that the notes reflected a concerted effort to keep blacks off the jury.

In *People v. Lenix* (2008) 44 Cal.4th 602, the California Supreme Court emphasized that "post-*Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge." (*Id*. at p. 617, fn. 2.)

Indeed, it is impossible to make a comparative juror analysis without a full record of the race, gender, ethnicity of each juror.

A suggestion from Jeff: As to the identification of the juror's race, gender or ethnicity, the prosecutor can make a notation in his or her file that such identifying factors were recorded solely for the purpose of responding to a *Batson-Wheeler* motion, or put that information on the record if necessary.

Additionally, make notes of the reasons for choosing or not choosing each juror, including the juror's demeanor, attitude, and other intangibles - not just those who seem like they might be adverse to the prosecution. This is especially important when the judge allows limited or no voir dire and the notes will help the judge see beneath superficial similarities between jurors who were kept and those whom the prosecutor challenged. As mentioned in *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202, "[i]t is obviously a desirable and correct practice for a prosecutor to have notes of reasons for a peremptory strike if a challenge is raised requiring a race-neutral explanation at step two of *Batson*." (*Brown* at p. 1209, fn. 5.) Keep such notes as they may save a prosecution down the road if a prosecutor needs to refresh his or her recollection if the prosecutor at a post-conviction proceeding. (See *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1105, fn. 16.)"

13. There is likely more to come on this Court of Appeal opinion, and if so, P&A will follow it.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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