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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; DEWAYNE MICHAEL CAREY, Real Party in Interest.	B290318 (Los Angeles County Super. Ct. No. TA042208)

ORIGINAL PROCEEDING. Petition for writ of mandate. Michael Shultz, Judge. Petition denied.

Jackie Lacey, District Attorney, Felicia Shu and John Pomeroy, Deputy District Attorneys for Petitioner.

No appearance for Respondent.

Hilary Potashner, Federal Public Defender, Gary Rowe and Andrea A. Yamsuan, Deputy Federal Public Defenders, for Real Party in Interest.

Penal Code section 1054.9 enables a habeas corpus petitioner sentenced to death or life imprisonment without parole to obtain discovery of materials to which he or she "would have been entitled at time of trial." (Pen. Code, § 1054.9, subd. (b).)[1] This includes "materials that the prosecution would have been obligated to provide had there been a specific defense request at trial, but was not actually obligated to provide because no such request was made." (*In re Steele* (2004) 32 Cal.4th 682, 696 (*Steele*).)

Habeas petitioner and real party in interest Dewayne Michael Carey was convicted of first degree murder and sentenced to death in 1996; his conviction and sentence were affirmed on direct appeal in 2007. A habeas corpus petition is pending in the California Supreme Court, and he filed a motion in the trial court pursuant to section 1054.9 to obtain discovery of the prosecutor's notes taken during jury selection. He seeks the notes to support his claim that his trial and appellate counsel were ineffective for failing to raise an objection of racial bias during jury selection pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Wheeler/Batson*). The trial court ordered Petitioner the People to submit the notes for in camera review. The People seek a peremptory writ of mandate prohibiting the trial court from so proceeding. They argue Carey is not entitled to the notes because he would not have been entitled to them at trial upon request, given they were protected work product at the time.

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[1] All undesignated statutory citations are to the Penal Code unless noted.

We expressly do not decide whether a prima facie showing for a *Wheeler/Batson* claim would overcome a claim of work product protection and entitle a defendant to discover a prosecutor's voir dire notes. At this stage, there has been no finding by any court that Carey has presented a prima facie case of discriminatory purpose, the People do not concede the point, and we have not been called upon to consider the question. As a result, we do not address whether the defense has an independent right to the prosecutor's voir dire notes to address the prosecutor's stated reasons for the exercise of preemptory challenges.

We resolve the People's writ petition on a much narrower ground, holding the voluntary disclosure of a portion of the prosecutor's notes for the 16 seated jurors and alternates to Carey's habeas counsel in 2009 in response to a section 1054.9 discovery request waived work product protection over all the notes and precludes the People from using work product protection to bar current discovery of the rest of the notes pursuant to section 1054.9. Thus, we conclude the trial court may conduct an in camera review of the notes and deny the People's petition for a peremptory writ of mandate.

BACKGROUND

In 1996, Carey, who is African-American, was convicted of first degree murder with special circumstances and sentenced to death. His conviction and sentence were affirmed on direct appeal. (*People v. Carey* (2007) 41 Cal.4th 109.) He filed a first habeas corpus petition in the California Supreme Court on October 16, 2007, which was summarily denied on March 29, 2017. He did not raise a *Wheeler/Batson* claim at trial, on direct appeal, or in his first habeas petition.

The office of the Federal Public Defender was appointed to represent Carey and filed a second petition for habeas corpus in the California Supreme Court on September 12, 2017. In it, Carey claimed for the first time that a *Wheeler/Batson* error occurred during jury selection. He argued that his trial counsel rendered ineffective assistance by failing to object in the trial court and his appellate counsel was ineffective for not raising the issue on direct appeal. That habeas petition remains pending.

After seeking informal discovery, Carey filed a motion in the trial court seeking discovery of the prosecutor's voir dire notes pursuant to section 1054.9. Among other points, he argued any work product protection over the notes did not bar their discovery and the district attorney waived any work product protection by voluntarily disclosing some of the prosecutor's notes during informal discovery pursuant to section 1054.9 in 2009.

In support of the waiver argument, Carey submitted an April 3, 2009 letter from Carey's habeas counsel to the district attorney seeking post-conviction discovery pursuant to section 1054.9 and *Steele*. The letter requested "all documents, evidence, reports, photographs, *notes*, test results, video and audio tapes, and any other material related to this case in the possession" of the district attorney or other named agencies. (Italics added.) In response, the district attorney sent Carey's habeas counsel a letter dated June 19, 2009 indicating the district attorney and a paralegal had "reviewed the contents of the above mentioned case. All material deemed exempt for review have [*sic*] been indicated as such and noted on the attached Log. In addition, enclosed please find a CD prepared from our archived files. Some redactions were made on RAP sheets as well as Special Circumstance memos." Sixteen pages of the prosecutor's jury

selection notes were included in the materials provided to Carey's counsel at that time. The notes were 16 one-page forms pertaining to the 16 jurors ultimately selected to serve on the jury and as alternates. Each form contained the prosecutor's handwritten notes regarding each juror, which included noting each juror's race. Three jurors were noted to be African-American or black.

After receiving these notes, Carey's counsel wrote to the district attorney on September 14, 2009, stating: "I also wanted to confirm that based on your review of the handwritten pages of DA notes printed from the CD of the DA's file (pages mailed to you on July 21, 2009), it is your determination that we can have access to those pages. If I am mistaken, please let me know as soon as possible." The district attorney did not respond to the letter.

At a hearing in the trial court on Carey's current section 1054.9 discovery motion, the court ordered the People to submit the remaining prosecutor's notes for in camera review so the court could "make a further determination about whether the defense is entitled to the discovery." The court found "the People really have waived any privilege that they would have had in terms of work product since they voluntarily disclosed it to the defense" in 2009. The court further explained: "I think under 1054.9 there comes a point where the due process clause would mandate disclosure of information that is not on the list of 1054, et seq. [¶] And that with the right record, a correct record during trial, I think it is inherently within the Court's power to review the prosecutor's notes. That right record has been made with the petitioner's moving papers. [¶] This is a death penalty case where the defendant received a death sentence. And I think

that balancing that with the need for discovery and the writ to prosecute the petition for writ of habeas corpus, it is a narrow order, an acceptable order, within the meaning of 1054.9 for the People to have to disclose that to the Court in camera."

The People filed a petition for a writ of prohibition or mandate in this court. We stayed the trial court's order and issued an Order to Show Cause requesting the parties address several issues, including whether work product protection was waived due to the district attorney's disclosure in 2009.

DISCUSSION

Section 1054.9, subdivision (a) provides: "Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c) [access to physical evidence not pertinent here], order that the defendant be provided reasonable access to any of the materials described in subdivision (b)." Subdivision (b) of section 1054.9 defines "discovery materials" as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial."

While section 1054.9 is not limited to reconstructing the file the defense once possessed, it does not permit " 'free-floating' discovery asking for virtually anything the prosecution possesses." (*Steele, supra,* 32 Cal.4th at p. 695.) Instead, a defendant may obtain discovery of four categories of material "currently in possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the

case." (*Id.* at p. 697.) We are concerned here with only one of those categories, namely material that "the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them." (*Ibid.*)

The People argue that the trial court may not conduct an in camera review of the prosecutor's voir dire notes. They contend that Carey is not entitled to discovery of them since they were protected work product at the time of trial, so he would not have been entitled to them upon request. As we will explain, the district attorney's voluntary disclosure of a significant part of the prosecutor's notes in 2009 in response to Carey's prior section 1054.9 discovery request waived work product protection over all the notes and precludes the People from raising work product protection to bar Carey's current discovery request pursuant to section 1054.9.

I. The People's Petition for a Writ of Mandate Was Timely

Before turning to the waiver issue, we address Carey's contention that the People's writ petition was untimely because it was filed 35 days after the court's order. He argues the outermost deadline to file the writ petition was 20 days based on the following footnote in *Steele*: "Section 1054.9 provides no time limits for making the discovery motion or complying with any discovery order. We believe the statute implies that the motion, any petition challenging the trial court's ruling, and compliance with a discovery order must all be done within a reasonable time period. We will consider any unreasonable delay in seeking discovery under this section in determining whether the

underlying habeas corpus petition is timely. [Citations.] *We would consider a petition for writ of mandate challenging the trial court's order filed within 20 days after that order to be filed within a reasonable time for these purposes.* Moreover, as we are directing in this case, any discovery order pursuant to section 1054.9 should be provided within a reasonable time, which might vary depending on the nature of the order. We will also consider the date of compliance with the order in considering the timeliness of any petition for writ of habeas corpus that might be filed in light of the discovery." (*Steele, supra,* 32 Cal.4th at pp. 692–693, fn. 2, italics added.)

Since *Steele* was decided, the California Supreme Court has held that, notwithstanding this footnote from *Steele*, section 1054.9 does not impose *any* time limit on filing the initial discovery motion in the trial court. (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 305 (*Catlin*).) It held that no language in section 1054.9 allows a trial court to deny a discovery motion as untimely, and the statute's legislative history showed the Legislature specifically chose not to impose a time limitation. (*Id.* at pp. 302–303.) It interpreted the reference to the "reasonable time" in the *Steele* footnote for filing a motion as "merely stat[ing] that discovery must be sought 'within a reasonable time' and that when a petitioner files an *untimely* discovery motion, the court in which the inmate files a habeas corpus petition based on the information obtained through discovery should consider the delay 'in determining whether the underlying habeas corpus petition is timely.' " (*Id.* at pp. 306–307.)

Thus, "[t]he *Steele* footnote's observation simply reflects our well-established rule that habeas corpus petitions must be prepared and filed 'without substantial delay.' [Citation.] Otherwise stated, *Steele*'s footnote 2 simply explains that when, because of delay in seeking postconviction discovery, an inmate does not file a habeas corpus petition within a reasonable time, *the petition* may be denied as untimely, assuming no exception to the habeas corpus timeliness requirement applies." (*Catlin, supra,* 51 Cal.4th at p. 307.)

Catlin did not address the *Steele* footnote's reference to the 20-day timeframe for filing a petition for a writ of mandate. Nonetheless, *Catlin*'s reasoning compels us to conclude that the 20-day timeline is not a *deadline* to file a petition for a writ of mandate challenging a discovery order. As in *Catlin*, section 1054.9 is silent on the deadline to file a writ petition challenging a discovery order. Also as in *Catlin*, the 20-day timeline in the *Steele* footnote appears to be a guideline on how to consider the delayed filing of a petition for writ of mandate when determining the timeliness of a later habeas petition. This is consistent with the language in the *Steele* footnote that the 20-day limit should be considered "a reasonable time *for these purposes*." (*Steele, supra,* 32 Cal.4th at p. 692, fn. 2, italics added.) "[T]hese purposes" were set forth in the immediately preceding sentence, i.e., "determining whether the underlying habeas corpus petition is timely." (*Ibid.*)

Instead, we will apply the general 60-day deadline for filing most writ petitions. (*Labor & Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 24 (*Labor & Workforce*) ["Generally, 'a writ petition should be filed within the 60-day period that applies to appeals.' "]; *People v. Superior Court*

(Brent) (1992) 2 Cal.App.4th 675, 682.) The People's writ petition was filed within that time, so we find it timely for appellate purposes.[2]

II. Work Product Protection Over All of the Prosecutor's Jury Selection Notes Has Been Waived

"Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States." (§ 1054.6.) Code of Civil Procedure section 2018.030, subdivision (a) provides that "[a] writing that reflects an attorney's impressions, conclusion, opinions, or legal research or theories is not discoverable under any circumstances."

We accept the People's contention that the prosecutor's jury selection notes are protected work product generally not subject to discovery. " ' "The sole exception to the literal wording of [Code of Civil Procedure section 2018.030, subdivision (a)] which the cases have recognized is under the waiver doctrine[,] which has been held applicable to the work product rule as well as attorney-client privilege." ' " (*McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239 (*McKesson HBOC*).)

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[2] Carey's habeas petition was already pending before he filed his discovery motion under section 1054.9, so the People's delay in filing the petition for writ of mandate beyond the 20-day timeline would appear to have no impact on the timeliness of his habeas petition.

Waiver of work product protection is "generally found under the same set of circumstances as waiver of the attorney-client privilege—by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection. [Citations.] Waiver also occurs by an attorney's 'voluntary disclosure or consent to disclosure of the writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing.' " (*McKesson HBOC, supra,* 115 Cal.App.4th at p. 1239; see *Labor & Workforce, supra,* 19 Cal.App.5th at p. 35.) "Thus, work product protection 'is not waived except by a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation. [Citations.]' " (*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 891 (*OXY Resources*).)

The record demonstrates that, in response to a prior specific request made by Carey's counsel in 2009 pursuant to section 1054.9, the district attorney voluntarily disclosed the prosecutor's notes on the 16 empaneled jurors and alternates, thereby waiving work product protection over those notes. When the notes were produced, the district attorney sent a letter affirming that he and a paralegal had reviewed the material, and any documents deemed exempt from review were contained in a privilege log (and presumably withheld). Notwithstanding, the notes were produced to Carey. Carey's habeas counsel later wrote to the district attorney specifically asking if Carey could have access to the notes contained in the disclosure. The district attorney did not respond to the letter, and the People have provided no evidence that he did not receive it. (Cf. Evid. Code, § 641 ["A letter correctly addressed and properly mailed is

presumed to have been received in the ordinary course of mail."].) From this, we can infer the district attorney voluntarily granted Carey access to the notes.

With regard to the scope of waiver, the attorney-client privilege over an *entire* communication may be waived through voluntary disclosure of "a significant part of the communication." (Evid. Code, § 912, subd. (a) [attorney-client privilege waived "with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication"]; see *Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal.App.3d 1047, 1052 (*Transamerica*).) Courts have expressed the same rule with regard to the voluntary disclosure of a "significant part" of attorney work product. (See *Labor & Workforce, supra,* 19 Cal.App.5th at p. 35 [" 'The work product protection may be waived "by the attorney's disclosure or consent to disclosure to a person, *other than the client*, who has no interest in maintaining the confidentiality . . . of a significant part of the work product." ' "]; *OXY Resources, supra,* 115 Cal.App.4th at p. 891 [same]; see also *Newark Unified School Dist. v. Superior Court* (2016) 245 Cal.App.4th 887, 903–904 ["Evidence Code section 912 finds a waiver of attorney-client and attorney work product privileges 'if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.' "]; *Kaiser Foundation Hospitals v. Superior Court* (1998) 66 Cal.App.4th 1217, 1227 ["neither the attorney-client privilege nor the work product doctrine has been waived unless it is established through other discovery that a significant part of any particular communication has already been disclosed to third parties"].)

"What constitutes a significant part of the communication is a matter of judicial interpretation; however, the scope of the waiver should be determined primarily by reference to the purpose of the privilege." (*Transamerica, supra,* 188 Cal.App.3d at p. 1052.) "The scope of either a statutory or implied waiver is narrowly defined and the information required to be disclosed must fit strictly within the confines of the waiver." (*Ibid.*)

The People concede that the disclosure of the prosecutor's notes for 16 seated jurors and alternates "may" have waived work product protection over all of the notes. We hold that it did. According to Carey, the jury pool consisted of 80 potential jurors after some jurors were excused for hardship. Carey asserts that the prosecutor used a total of eight peremptory strikes, six of which struck black jurors. Using these numbers as a baseline, the disclosure of the prosecutor's notes for an entire category of jurors—the 16 jurors and alternates actually empaneled—was a "significant part" of the prosecutor's jury selection notes.

Moreover, the district attorney's voluntary partial disclosure undermined the purposes for withholding the remaining notes as work product. The Legislature declared two purposes for protecting attorney work product: (1) "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 (2) "Prevent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020.) The selective disclosure of part of the prosecutor's notes 13 years after Carey was convicted and two years after his conviction was final demonstrates that the district attorney no longer had concerns about preserving the

prosecutor's ability to prepare the case for trial or preventing Carey from taking advantage of the prosecutor's trial preparation. The same reasoning applies to the undisclosed notes. Thus, the district attorney's waiver extends to all of the prosecutor's notes.

Having concluded that the disclosure in 2009 in response to Carey's prior section 1054.9 request waived work product protection over the prosecutor's notes, we reject the People's reliance on the language of section 1054.9 to bar Carey's current section 1054.9 discovery request. The People argue that, notwithstanding any later waiver, the prosecutor's notes were protected as work product at trial, and section 1054.9, subdivision (b) only allows discovery of materials Carey "would have been entitled at time of trial." Yet, by disclosing a significant portion of the prosecutor's notes in 2009 *specifically in response to Carey's section 1054.9 discovery request*, the district attorney implicitly concluded that neither work product nor section 1054.9 barred discovery of the notes. The People cannot now take the opposite position and withhold the rest of the notes for those reasons.

Thus, under the narrow circumstances here, we find the trial court's may conduct an in camera review of the prosecutor's voir dire notes. The People have not presented any other reason why Carey would not have been entitled to the notes had he requested them at trial, so they fall within section 1054.9.

DISPOSITION

The People's petition for a peremptory writ of mandate is denied. Having served its function, the order to show cause is discharged.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.