POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Surveillance of Criminal Law Approved for Credit Toward California Criminal Law Specialization: C437 -- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guest	
June 29 2015	**CA Supreme Court clarifies its *Batson/Wheeler* practice (*Peo. v. Scott*) – Part I; and U.S. Supreme Court reverses Ninth Circuit on *Batson/Wheeler* (*Davis v.Ayala*)**	**John Brouhard**	**Elim. of Bias** **30 min**

I. *People v. Scott* (2015) 61 Cal.4th 691

The California Supreme Court clarifies the *Batson/Wheeler* procedure on appellate review: a) when trial court finds no prima facie case of discrimination, b) after which prosecution offers or is asked to state its reasons for the strikes, c) and the trial court rules on those reasons, appellate courts must begin their analysis of the trial court's denial of the *Batson/Wheeler* motion at the first step (finding of no prima facie case.).

A. Introduction

The defendant was convicted of first degree murder with felony murder special circumstances, and was sentenced to death. The majority opinion is a per curiam opinion, signed by five justices, meaning it is a decision rendered by the majority of the court acting collectively, without identifying any particular judge as the author of the opinion. The majority affirmed the judgment in its entirety, including rejecting the defendant's claim of a *Batson/Wheeler* violation. Justice Liu, joined by Justice Krueger, wrote separately, concurring in the result on the merits and agreeing that no *Batson/Wheeler* error occurred. But Justice Liu disagreed with the majority's recommended procedure for appellate review of *Batson/Wheeler* claims when the trial court finds no prima facie case of discrimination, after which the trial court invites or receives the prosecutor's reasons for striking the challenged jurors and rules on reasons.

B. Factual Background of *Batson/Wheeler* Motion

1. The defendant, who is African American, based his *Batson/Wheeler* claim on the prosecutor's peremptory challenges of two African American prospective jurors, identified in the opinion as "R.C." and "H.R."

2. R.C. stated in her questionnaire that the deputy district attorney assigned to *this* case had also prosecuted her son. R.C. visited her son in prison as often as possible, and believed that her son had not been treated fairly by law enforcement or the district attorney's office. Before voir dire, the defense stipulated to R. C.'s excusal, but the trial court did not accept the stipulation, believing it was to inquire into R.C.'s ability to be fair.

3. When asked in voir dire whether there was anything that would affect her ability to be fair to both sides in this case, R.C. reiterated that the assigned deputy district attorney had successfully prosecuted her son and sent him to prison a year or two earlier, and reiterated her belief that her son was not treated fairly by the district attorney's office. Additionally, the same police department and the same lead investigator from her son's case were involved in this case. Although R.C. admitted having been very upset at the time of her son's trial, she said could be fair in this case, but said she did not know whether the district attorney would want someone like her on the jury.

4. Prospective juror H.R. stated in his questionnaire that he would consider all the aggravating and mitigating evidence presented before deciding the question of penalty and could vote for death in an appropriate case. However, in response to question 75, which asked jurors to read five options that described views about imposing the death penalty and to "check the one that best describes" their views, H.R. put a checkmark next to three different boxes: group five, which stated, "I oppose the death penalty. I will never vote for the death of another person"; group four, which stated, "I have doubts about the death penalty, but I would not vote against it in every case,"; and group three, which stated, "I neither favor nor oppose the death penalty."

5. During questioning by the trial court, H.R. said he could return a death verdict, but when asked by the court which of the three groups he checked off in the questionnaire best represented his view about imposing a death sentence, H.R. said he had to think about it. He finally replied that "I think group four would be more the way I feel." Under questioning by the prosecutor, H.R. e said made a mistake when looking at question 75, and was leaning toward group 4. When asked if he could imagine a crime warranting the death penalty, H.C. said, "I guess that's possible," "I guess I could," and "I think I can."

C. The Motion to Dismiss the Panel

1. After the jurors were sworn, but before the alternate jurors were selected, the defendant moved to dismiss the panel, claiming the prosecutor's decisions to strike R.C. and H.R. were racially motivated. Defense counsel relied in particular on R.C.'s statements that she could put aside the "situation" with her son and decide the case solely on the evidence, and on H.R.'s statements that he could be a fair and impartial juror and would be able to vote for death in an appropriate case.

2. The trial court ruled that the defendant's motion appeared to be untimely and therefore

forfeited because he had not objected to the strikes until after the jurors had been sworn, but nonetheless the trial court went on to address the merits.

[**Note**: As the Supreme Court explained, the trial judge erred when it ruled the defendant's motion was untimely because the defendant did not object until the 12 jurors were sworn. A *Batson/Wheeler* motion is timely if it is made before jury impanelment is completed, which does not occur until the alternates are selected and sworn. The defendant properly objected before the alternate jurors were selected and sworn so his motion was not untimely. In any event, the trial court ruled on the merits of the motion.]

3. As to R.C., the trial court doubted that any prosecutor would have kept her on the jury, and concluded that "no prima facie case could be made" as to R.C. Later as to R.C., the trial court stated: "if anyone who reads this transcript thinks that Miss [C.] would be a fair juror to the People, then I give up making decisions." Turning to H.R., the trial court said it "suspected there may well be a neutral race explanation," but added, "I believe that it could be argued that a prima facie case could be made."

4. The trial court then asked the prosecutor, "You feel that you want to respond, or do you want to rest on the Court's ruling on the {legally incorrect} waiver? I'll leave that to you, sir."

5. The prosecutor replied, "I don't want to say anything until I'm required to by the Court," and the prosecutor asked whether the court had ruled that there was no prima facie case as to both jurors. The court said as to R.C., it was obvious there was no prima facie case, and as to H.R., the court said, "There would probably be a legitimate basis" based on his answers and reluctance to the death penalty in the questionnaire. The prosecutor responded, "Okay. And if you are saying that you have not found a prima facie case, then I will state my reasons as to H.R. for the record. But I am not agreeing that there has been a prima facie showing. But I will say it out of an abundance of caution to preserve the record, but I am not agreeing, and I want it clear whether or not the Court has made the ruling that there is a prima facie case." As the Supreme Court summarized here, "The prosecutor continued to resist offering any statement of reasons until he was satisfied the record 'clearly reflected' the trial court's finding that the defendant had failed to make a prima facie case of discrimination." [1]

6. The prosecutor then accepted the court's invitation to discuss his reasons as to H.R., stating that based on H.R.'s inconsistent answers and explanations, the prosecutor did not know where H.R. stood on the death penalty and that was the reason for excusing him. The trial court then agreed that that a challenge based on reluctance to impose the death penalty is an

---

[1] The trial judge was not very clear, but apparently he was clear enough that the prosecutor was willing to go forward with his statement of reasons and the Supreme Court was willing to conclude that the trial court found no prima facie case. Part II of this P&A (next week) will discuss the "takeaways" from this opinion, and one of those recommendations will be to get an unequivocal, unambiguous finding from the trial court that the defendant has failed to make a prima facie showing of discrimination.

appropriate basis for the exercise of a challenge.

D. The Supreme Court's Analysis

1. "The now familiar *Batson/Wheeler* inquiry consists of three distinct steps. First, the opponent of the strike must make out a prima face case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges. Second, if the prima facie case has been made, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications. Third, if the party has offered a nondiscriminatory reason, the trial court must decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination."

2. Although the question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made, the Supreme Court noted that certain types of evidence may prove particularly relevant. Such evidence includes the fact that a party has struck most or all of the members of the identified group from the venire; that a party has used a disproportionate number of strikes against the group; that the party has failed to engage these jurors in more than desultory voir dire; that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record and that necessarily dispel any inference of bias.

3. On appeal, the defendant here argued that the prosecutor struck two of the three African who made it into the jury box, that he is African American, and that the victim was white. He urged the court to find a prima facie case of discrimination on those facts alone. The Supreme Court said it is required to consider the totality of the relevant facts in determining whether an inference of discrimination exists. It concluded that viewed as a whole, the record in this case clearly established nondiscriminatory reasons for excusing R.C. and H.R. that dispel any inference of bias.

E. The Supreme Court's Clarification of its Practice in Reviewing *Batson/Wheeler*

1. The Supreme Court summarized the procedural events in the hearing on the *Baston/Wheeler* motion as follows: "In this case, the trial court determined first that the defendant had failed to raise an inference of discrimination in connection with the strikes of R.C. and H.R. It then granted the prosecutor an opportunity to state his reasons for excusing those jurors. After being assured that the trial court had found no prima facie case of discrimination, the prosecutor made a record of his reasons for excusing H.R. The prosecutor did not offer reasons for excusing R.C., presumably because of the trial court's statement that the reasons for

excusing her were obvious. The trial court, as an alternative holding, then credited the prosecutor's reasons and determined that the strike of H.R. did not constitute purposeful discrimination."

2. Thus, the Supreme Court concluded the trial court found no prima facie case of discrimination (first stage *Batson/Wheeler*) and also made an alternative finding that the reasons offered by the prosecutor were not purposeful discrimination (third stage *Batson/Wheeler*).

So where does appellate review begin? Does the appellate court start with the first stage and review whether there was no prima facie case? Or does the appellate court bypass stage one and go directly to the third stage finding that there was no purposeful discrimination? This was the question to be resolved in *Scott*. The United States Supreme Court has not weighed in on this question, and has given some flexibility to state and federal appellate courts to implement *Batson* procedures. The California Supreme Court majority, after noting its own cases have been inconsistent on this issue, said it would use *Scott* as an opportunity to clarify its practice.

3. The Supreme Court majority noted that Justice Liu agrees that an appellate court properly reviews a trial court's first stage ruling of no prima facie case when the court makes that ruling, then allows or invites the prosecutor to state reasons for excusing the juror, but then refrains from ruling on the validity of those reasons.

4. There is no agreement, however, between the majority and Justice Liu as to "whether the same procedure applies when the trial court, having determined that no prima facie case was established and having heard the proffered justifications, goes ahead and makes an alternative holding that those reasons were genuine." In other words, the Supreme Court justices disagree on the review procedure in circumstances where the trial judge has made a first stage ruling *and*, alternatively, a third stage ruling.

5. The Supreme Court majority reviewed the concerns that informed its decision making on this question. The *Batson/Wheeler* framework is designed to enforce the constitutional prohibition on exclusion of persons from jury service on account of their membership in a cognizable group. On the other hand, it is also designed to preserve the historical privilege of peremptory challenges free of judicial control. The majority said its formulation must harmonize these two aspects of *Batson/Wheeler*. "A balancing of these competing interests explains why the 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."

6. In addition, the Supreme Court said its approach to *Batson/Wheeler* motions has also been shaped by practical considerations. A peremptory challenge is designed to be used "for any reason, or no reason at all," and a party exercising a strike thus has no obligation to articulate a reason until an inference of discrimination has been raised. But the Supreme Court said it has

nonetheless repeatedly encouraged trial courts to offer prosecutors the opportunity to state their reasons in order to create an adequate record for an appellate court, in the event the appellate court disagrees with the first-stage ruling and must then go onto the third stage to determine whether any constitutional violation has been established.

Allowing the prosecutors to state their reasons gives the reviewing court in this circumstance a complete record to look at the question of pretext. "After all, when a trial court erroneously fails to discern an inference of discrimination and terminates the inquiry at that point, an appellate court is generally required to order a remand to allow the parties and the trial court to continue the three-step *Batson/Wheeler* inquiry. An investigation into the prosecutor's motives many years after the fact, when memories have faded and the parties' written notes can no longer be found, is an inferior substitute for a contemporaneous record of the prosecutor's justification and the defendant's response."

F. <u>The Supreme Court's Solution</u>

1. The Supreme Court next considered the nature of the procedure to devise. It realized that if the trial court ruled that the defense failed to establish a prima facie case of discrimination, prosecutors would be reluctant to state their reasons for the record if doing so would jeopardize this favorable ruling. The Supreme Court pointed to the prosecutor's reluctance to state his reasons in this *Scott* case as illustrating the dilemma. Prosecutors want an assurance that when a trial court has concluded that a prima facie case has not been made, the trial court's request for a statement of reasons will not convert a first-stage *Batson/Wheeler* case into a third-stage case.

2. The defendant and Justice Liu proposed that whenever the trial court – as here in *Scott* – determines *both* that no prima facie case of discrimination exists *and* that no purposeful discrimination occurred, then the first stage should be considered moot and the reviewing court should proceed directly to the third stage.

3. The Supreme Court majority disagreed, concluding the appellate court should begin its review with the first-stage *Batson/Wheeler* ruling. It stated the following procedure:

"In sum, where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling."

"If the appellate court agrees with the trial court's first-stage ruling, the claim is resolved."

4. Practical translation: The trial court, after finding no prima facie case of discrimination (first stage) asks or allows the prosecutor to state his or her reasons for the strikes (second stage) and rules that the reasons proffered by the prosecutor were nondiscriminatory and genuine (third stage.) Thus in the trial court, the prosecutor has been taken through the *entire Batson/Wheeler* procedure, but the appellate court will STOP its review at the first step if the record supports the trial courts finding of no prima facie case.

The appellate court will go on to the third stage *only* if it disagrees with the trial court's conclusion as to the prima facie case. If the appellate court disagrees, it can proceed directly to review of the third-stage ruling, aided by a full record of reasons and the trial court's evaluation of their plausibility.

5. However, if the prosecutor is asked or volunteers his reasons for the strikes and there is discriminatory intent inherent in the explanation offered by the prosecutor, then "[r]eviewing courts should not blind themselves to the record in the 'rare' circumstance that a prosecutor volunteers a justification that is discriminatory on its face. The facially discriminatory justification must be weighed with the relevant facts to determine if they give rise to an inference of discrimination, and thus compel the reviewing court to continue on with the subsequent steps in the *Batson/Wheeler* framework."

6. So there is another formula to follow when the prosecutor *does* give a discriminatory reason for the strike. "In the circumstance where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror on the record, (3) *the prosecutor provides a reason that is discriminatory on its face,* and (4) the trial court nonetheless finds no purposeful discrimination, the appellate court should likewise begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling. In that (likely rare) situation, though, the relevant circumstances, including the facially discriminatory justification advanced by the prosecutor, would almost certainly raise an inference of discrimination and therefore trigger review of the next step of the *Batson/Wheeler* analysis."

7**. Note**: The Supreme Court while not *requiring* this procedure of doing the full three-stage *Batson/Wheeler* analysis in the trial court, the court is making it clear that this procedure is its preferred practice. The Supreme Court is recommending this practice in order to create a full record in the event the appellate court disagrees that no prima facie case was shown. If the appellate court *agrees* that no prima facie case was made, nothing has been lost by the prosecutor for stating his or her reasons and getting a ruling by the trial court on those reasons. In the event the appellate court *disagrees* on the prima facie finding and proceeds to the third stage, it is far better to have a statement of reasons by the prosecutor and conclusions and observations from the trial judge than to have an appellate court research attorney analyze a cold record for the first time on appeal.

8. An important footnote in the opinion: If the trial court solicits the prosecutor's reasons for his or her strikes *before* the trial court has ruled whether the defendant made a prima facie showing, then appellate courts will infer an "implied prima facie finding" and proceed directly to

the third stage to review the ultimate question of purposeful discrimination. (Fn. 1, slip opn.) Therefore prosecutors should not volunteer their reasons for their strikes or accept the court's invitation to do so until the trial court has clearly stated that the defense has not made a prima showing. (More on this point in next week's P&A, Part II.).

II. ***Davis v. Ayala*** **(June 18, 2015, No. 13-1428) __ U.S. __ [2015 WL 2473373]**

Although the California trial court erred in the procedure by which it ruled on the defendant's *Batson* claims, the U.S. Supreme Court majority concludes that the Ninth Circuit's decision granting habeas relief was a "misapplication of basic rules of harmless error."

A. California Trial Court Background

1. The defendant was convicted of three counts of murder and sentenced to death. As part of the jury selection process, more than 200 potential jurors completed a questionnaire and were questioned in court. Jurors who were not dismissed for cause were called back in groups for voir dire, and the parties exercised their peremptory challenges. Each side was allowed 20 peremptories, and the prosecution used 18 of its allotment. It used seven peremptories to strike all of the African–Americans and Hispanics who were available for service. The defendant, who is Hispanic, raised *Batson* objections to those challenges.

2. It was the unusual manner in which the *Batson* motion unfolded that gave rise to the appeal in state court and the federal habeas. After the prosecutor peremptorily challenged two African-American jurors, the trial judge stated these two strikes failed to establish a prima facie case of racial discrimination, but he nevertheless required the prosecution to state the reasons for the strikes in order to make a recrod. The prosecutor asked to do this outside the presence of the defense so as not to disclose trial strategy. Over the defendant's objection, the judge granted the request. After hearing and evaluating the prosecutor's explanations, the judge concluded that the prosecution had valid, race-neutral reasons for these strikes.

3. The defendant next made a *Batson* objection when the prosecutor challenged two Hispanic jurors. The trial court again found no prima facie case, but again ordered the prosecutor to state his reasons for striking the jurors, which was again done ex parte. The trial court, after hearing the prosecutor's reasons, concluded there were race neutral reasons for the strikes.

4. The third time the defendant raised *Batson* challenges, the trial court determined that a prima facie case of discrimination had been shown, and the trial court said it would hear the prosecutor's response outside the presence of the jury. The prosecutor offered his reasons in this ex parte hearing and the trial concluded for a third time that the prosecutor had offered

race-neutral explanations

5. On appeal to the California Supreme Court, the defendant contended the trial court committed reversible error by excluding the defense from part of the *Batson* hearing.

6. The California Supreme Court, after noting that the prosecution had not offered matters of trial strategy in these ex parte hearings, concluded it was error under state law to bar defendant's attorney from these hearings.

7. Turning to the question of prejudice, the Supreme Court (5-2 ruling) noted that the error was harmless under state law, and that if federal due process error occurred, this error too was harmless under the federal harmless error standard (*Chapman v. California*.)

8. The California Supreme Court reviewed the prosecutor's reasons for striking the seven prospective jurors. The majority concluded "on this well-developed record, we are confident that defense counsel could not have argued anything substantial that would have changed the court's rulings. Accordingly, the error was harmless." The court concluded that the record supported the trial judge's implicit determination that the prosecution's justifications were not fabricated and were instead grounded in fact. The court emphasized that the " 'trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered.'"

B. Federal Habeas

1. The defendant filed a petition for habeas corpus in the federal district court, based on the ex parte hearings as violating federal constitutional rights. The federal district court denied his petition.

2. However, a divided panel of the Ninth Circuit granted federal habeas corpus relief, based on the dismissal of three potential jurors. The Ninth Circuit required California either to release the defendant or retry him. The Ninth Circuit held that the California Supreme Court's harmlessness decision was not an adjudication on the merits under the Antiterrorism & Effective Death Penalty Act (AEDPA), and therefore de novo review should apply to the defendant's claim. The Ninth Circuit applied the federal test for harmlessness (defendant must show actual prejudice) "without regard for the state court's harmless error determination."

C. The United State Supreme Court: Standard of Review

1. The Supreme Court decision was a 5-4 majority written by Justice Alito, reversing the Ninth Circuit.

2. The majority said it would assume for sake of argument that the defendant's federal rights

were violated when the defense was excluded from the ex parte hearings, but this does not necessarily mean the defendant is entitled to habeas relief.

3. Unlike the Ninth Circuit, the U.S. Supreme Court majority concluded that the California Supreme Court *did* adjudicate the defendant's claim on the merits by holding that any federal error was harmless beyond a reasonable doubt. Under the AEDPA, high deference must be given to the state court's adjudication. As the U.S. Supreme Court majority stated here, under this highly deferential standard, "we may not overturn the California Supreme Court decision unless the court applied the *Chapman* harmless error standard in an objectively unreasonable manner."

D. The United State Supreme Court: Review on the Merits

1. The Supreme Court majority stated: "The question is whether the defendant was harmed by the trial court's decision to receive the prosecution's explanation for its challenged strikes without the defense present. In order for this argument to succeed, the defendant must show that he was actually prejudiced by this procedure, a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the California Supreme Court's decision that this procedure met the *Chapman* standard of harmlessness."

2. The Supreme Court majority then proceeded, in significant detail, to analyze the reasons given by the prosecutor for the seven peremptory challenges at issue, devoting most of its analysis to the three potential jurors who were the focus of the Ninth Circuit.

3. The Supreme Court majority ultimately determined Ninth Circuit erred and the exclusion of defendant's attorney from the ex parte hearings was harmless as to all seven strikes. Without detailing the conclusions as to each juror, below are some of the statements made by the Supreme Court majority reflecting general principles in the voir dire process:

a. "In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor.

We have previously recognized that peremptory challenges 'are often the subjects of instinct,' and that 'race-neutral reasons for peremptory challenges often invoke a juror's demeanor.' A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, 'these determinations of credibility and demeanor lie peculiarly within a trial judge's province,' and 'in the absence of exceptional circumstances, we will defer to the trial court.' 'Appellate judges cannot on the basis of a cold record easily second-guess a

trial judge's decision about likely motivation.' " (internal citations omitted.)

b. "In ordering federal habeas relief based on their assessment of the responsiveness and completeness of [the juror's] answers, the members of the Ninth Circuit majority misunderstood the role of a federal court in a habeas case. The role of a federal habeas court is to 'guard against extreme malfunctions in the state criminal justice systems,' not to apply de novo review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judge." (internal citations omitted.)

E. The United State Supreme Court: Majority's Conclusion

In reversing the Ninth Circuit, the United States Supreme Court majority had strong words for the Ninth Circuit in its concluding remarks:

"In *Batson*, this Court adopted a procedure for ferreting out discrimination in the exercise of peremptory challenges, and this procedure places great responsibility in the hands of the trial judge, who is in the best position to determine whether a peremptory challenge is based on an impermissible factor. This is a difficult determination because of the nature of peremptory challenges: They are often based on subtle impressions and intangible factors. In this case, the conscientious trial judge determined that the strikes at issue were not based on race, and his judgment was entitled to great weight. On appeal, five justices of the California Supreme Court carefully evaluated the record and found no basis to reverse. A federal district Judge denied federal habeas relief, but a divided panel of the Ninth Circuit reversed the District Court and found that the California Supreme Court had rendered a decision with which no fairminded jurist could agree. [¶] For the reasons explained above, it was the Ninth Circuit that erred. The exclusion of the defendant's attorney from part of the *Batson* hearing was harmless error. There is no basis for finding that the defendant suffered actual prejudice, and the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent. [¶] The judgment of the Ninth Circuit is reversed."

NEXT WEEK: We continue with Part II in our discussion of the California Supreme Court's decision in *People v. Scott* with advice on what to do generally when you are the subject of a *Batson/Wheeler* motion, and how to make this three-stage *Batson/Wheeler* record that is discussed in *Scott*.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249. 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.