

POINTS AND AUTHORITIES

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Week Of	Topic	Guest	
July 6 2015	CA Supreme Court clarifies its <i>Batson/Wheeler</i> practice (<i>Peo. v. Scott</i>) – Part II	John Brouhard	Elim. of Bias 30 min

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

In *People v. Scott*, issued by the California Supreme Court on June 8, 2015, the high court addressed the review procedure in *Batson/Wheeler* claims, the topic of this P&A, parts I and II.

Part I (June 29, 2015) discussed the Supreme Court's analysis of the issue, and explains how prosecutors should approach each of the three *Batson/Wheeler* steps in light of *Scott*.

Part II, the focus of this P&A segment, discusses the practical implications for prosecutors and trial judges of the Supreme Court's decision, and offers suggestions for making the *Batson/Wheeler* record in light of *People v. Scott*.

A. Summary of Points and Authorities, Part I

1. The three-step *Batson/Wheeler* inquiry: The first step requires the defendant to make a prima facie showing of prohibited group bias; in the second step, if the prima facie case has been made, the burden shifts to the prosecutor to offer permissible, nondiscriminatory reasons for the strikes; in the third step, if the prosecutor offers such reasons, the trial court must decide whether the defendant has proved purposeful discrimination.

2. The Supreme Court in *Scott* described the *Batson/Wheeler* event in the trial court. It said the trial court determined, first, that the defendant had failed to raise an inference of discrimination in connection with the prosecutor's peremptory strike of the juror.¹ The trial court

¹ A second prospective juror ("R.C.") was also the subject of the defendant's *Batson/Wheeler* motion, but the trial court said that the prosecutor's reasons for striking R.C. were "obvious." R.C.'s son had been prosecuted by the same

then granted the prosecutor an opportunity to state his reasons for excusing the juror. 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 the juror. The trial court, as an alternative holding, then credited the prosecutor's reasons and determined that the strike did not constitute purposeful discrimination."

3. In other words, the trial court proceeded through all three steps of the *Batson/Wheeler* analysis, even though it determined that the defendant had not made a prima facie showing of discrimination.

4. As the Supreme Court here stated, the trial court "determined both that no prima facie case of discrimination existed *and* that no purposeful discrimination occurred." The trial court made a *Batson/Wheeler* first step ruling and an alternative third step ruling.

5. Although the Supreme Court in *Scott* did not state that it is *requiring* trial courts to make these alternative rulings, the court is strongly indicating that this is its preferred practice. The Supreme Court said that it has "repeatedly encouraged trial courts to offer prosecutors the opportunity to state their reasons so as to enable creation of an adequate record for an appellate court, should the appellate court disagree with the first-stage ruling, to determine whether any constitutional violation has been established."

6. Moreover, the Supreme Court makes clear that the trial court should rule on the reasons offered by the prosecutor. "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."

7. The issue for the Supreme Court to resolve was this: when a trial court makes a first-stage *Batson/Wheeler* ruling *and* an alternative third-stage *Batson/Wheeler* ruling, does the appellate court begin its review at the first-stage ruling or the third-stage ruling? The United States Supreme Court has not ruled on this question.

8. The *Scott* court majority said the reviewing court should begin its review at the first stage. If the appellate court agrees with the trial court's first stage ruling, the claim is resolved. If the appellate court disagrees, the appellate court proceeds directly to review the third stage, relying on the prosecutor's reasons and the trial court's observations and conclusions.

9. The Supreme Court majority summarized the procedure as follows: "Where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or

deputy district attorney assigned to *this* case, and R.C. claimed her son had been treated unfairly by the district attorney's office.

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.

10. However, the Supreme Court majority said if the prosecutor, in stating his or her reasons, volunteers a justification that is discriminatory on its face, the following procedure should apply: "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."

B. The Takeaways for Prosecutors (Conversation with Assistant DA John Brouhard)

1. As a prosecutor, take charge of the proceedings surrounding the motion. Know the law that governs *Batson/Wheeler*. For example, the trial court in *Scott* incorrectly determined that the defendant's motion was untimely. If the trial court had terminated the *Batson/Wheeler* motion on this legally incorrect ground, the reasons for the prosecutor's strikes would not have been explored, and the trial court's ruling could have been grounds for reversal.
2. Guide the court to the rulings it needs to make in order to complete the *Batson/Wheeler* process as explained in *Scott*. Be certain that the trial court a) makes a clear ruling that it has found no prima facie showing of discrimination; b) invites the prosecutor to state his or her reasons for the strikes or allows that prosecutor to do so upon the prosecutor's request; c) rules that the prosecutor's reasons for the challenged strikes were genuine and that the defendant did not prove purposeful discrimination.
3. If the trial court hurries the *Batson/Wheeler* process, the prosecutor may need to slow it down ensure the steps are being done correctly. For example, in *Scott*, the trial judge invited the prosecutor to state his reasons before the trial judge himself had clearly articulated whether he found a prima facie case had been shown. [Keep in mind that if the prosecutor states his or her reasons *before* the trial court has stated its finding on the prima facie showing, appellate courts will conclude there's been an "implied" finding of discrimination and go immediately to a third-stage *Batson/Wheeler* analysis. Be firm, as was the prosecutor in *Scott*, and get a clear ruling from the trial court that it finds no prima facie case before stating the reasons for your strikes.]

4. Even if the trial court rules that no prima facie case has been shown, the prosecutor needs to state the reasons for the strike as thoroughly and seriously as if the trial court did find a prima facie case. There's much at stake ultimately if the appellate court finds a *Batson/Wheeler* violation, including the integrity of the conviction, and -- for the prosecutor personally -- reputation and status in the state bar.
5. As to thoroughness, take the time necessary to appropriately and professionally respond. A natural reaction at the time of *Batson/Wheeler* motion is to feel personally attacked, resulting in an emotional reaction. But the prosecutor needs to be able to respond professionally and thoroughly, which means getting control of the emotions.
6. [Words of advice from a former judge: In essence prosecutors should say with their attitude, "We have the opportunity to show the system is fair. So without apology, I'll explain my reasons." The onus is on the prosecutor to be prepared and to make his or her best case. Do not be defensive.]
7. Often *Batson/Wheeler* motions will be made at the end of a long and tiring jury selection. The trial judge's plan may have been to timely move forward to opening statements. But there's too much at stake for the prosecution to be rushed. This is not a process that anyone -- the court, prosecution or defense -- should take lightly. When the motion is brought, the prosecutor needs to review his or her notes and organize materials before responding. Ask the court for time to do so. For example, ask the court to address the motion after lunch or after a break. Alert the court that you want to be clear and thorough in order to assist the court with its ruling (which may include comparative analysis.) Make sure you have the citation to *Scott* with you, just in case the trial court is resistant to allowing you the time needed to prepare. *Scott* refers to the prosecutor making a "full record of reasons" for the strikes.
8. In its statement of reasons, the prosecution will need to make a record of "statistical" information. This information is critical to the reviewing court, which is relying on a cold record. The appellate court has no means of knowing the racial/gender/ etc. composition of the jury unless it is described for the record. So when the *Batson/Wheeler* motion is made, describe what has occurred in jury selection to that point. Put on the record, for example, the composition of the jury in the box, whether members of the identified class remain in the box, a description of the challenges that have been exercised by both sides (e.g. race/gender or whatever is the identified class.) You need to do this statistical "portrait" separately for each juror who has been challenged in the *Batson/Wheeler* motion.
9. Prosecutors need to give a full explanation of the reasons for their challenges. This explanation cannot be abbreviated. One of the reasons for this thoroughness is comparative juror analysis. On appeal of the trial court's ruling on *Batson/Wheeler*, the defense may challenge the prosecutor's justifications by showing there were other jurors, not members of the identified class, who were similarly situated but not struck by the prosecutor, and therefore the prosecutor's

reasons are pretextual. So at the trial level, the prosecutor needs to be thinking about members of the jury that he or she did not strike, and if these jurors bear similarities to those who are the subject of the *Batson/Wheeler* motion, and address this disparity.

10. Intangible reasons for challenging a juror, such as saying the juror gave you a “bad vibe,” is of no assistance on appeal. The reason is too vague to assess. Challenge yourself to articulate what you are relying on. Make as good a record as you can. For example, did you see a physical reaction that concerned you? Was there lack of eye contact? Was there something about the manner in which the juror was dressed? If possible, get the trial court to confirm that you are accurately stating what occurred.

11. Once the prosecutor has made a complete record, a good practice is to ask the defense to respond to the prosecutor’s justifications. Get permission from the judge of course. For example, “Your Honor, I would invite defense counsel to comment on what I’ve just said and point out any area where he disagrees. And if defense counsel believes there’s a comparative analysis of a juror whom I did not strike, but who counsel believes is similarly situated, I will be happy to respond to that as well.”

12. Along those same lines, the prosecutor should encourage the trial judge to ask questions and make comments. Should the appellate court need to make a third stage *Batson/Wheeler* ruling, this kind of exchange between the prosecutor and the court will demonstrate that the court was attentive and evaluated the prosecutor’s reasons.

13. Finally, after all the above has occurred, the prosecutor must get a ruling from the trial court that the prosecutor’s reasons were genuine. Pay close attention to the language of the court. If the court states that the prosecutor provided race-neutral reasons for the strikes, this is not the standard of review at the *Batson/Wheeler* third stage. The trial court must say it has evaluated the prosecutor’s reasons and found them genuine. A prosecutor wants to avoid a situation where the California appellate court or the Ninth Circuit determines the trial court failed to evaluate the prosecutor’s reasons under the proper standard and therefore the reviewing court must engage in its own independent analysis. As the United States Supreme Court stated recently in *Davis v. Ayala*, “A trial judge [not an appellate justice] 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.”

Miscellaneous: Accessing Past P&A videos

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