CASE NOTE:

WAIVER OF PEREMPTORY STRIKES AS A *BATSON* VIOLATION: *STATE V. PALEO*

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I. *BATSON* AND ITS PROGENY

In *Batson v. Kentucky*,[1] the Supreme Court of the United States made a landmark decision forbidding prosecutors from using peremptory challenges to strike potential jurors solely because of their race.[2] The Court held that under the Fourteenth Amendment Equal Protection Clause, a prosecutor could not use his peremptory strikes to strike black potential jurors during voir dire simply because of their race; although a defendant has the right to a fair and impartial jury, potential jurors have the right to serve on a jury regardless of their race.[3] The defendant "has no right to a 'petit jury composed in whole or in part of persons of his own race,'" but he does "have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria,"[4] because "[a] person's race simply 'is unrelated to his fitness as a juror.'"[5] To challenge a strike, a party must

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1. 476 U.S. 79 (1986).

2. In doing so, the Court overturned a contrary holding in *Swain v. Alabama*, 380 U.S. 202 (1965). *Swain* held that, although the State may not exclude citizens from the jury pool on account of their race, the long and storied tradition of peremptory challenges was such that a lawyer could strike a juror for any reason. *See id.* The *Swain* Court held that this exercise of peremptory challenges was such an essential part of a fair trial by an impartial jury that a defendant may not challenge individual strikes. *See id.* However, a defendant may challenge a jury venire by proving that "the prosecutor...in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes." *Id.* at 223.

3. *Batson*, 476 U.S. at 87 (citing Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).

4. *Id.* at 85–86 (quoting *Strauder*, 100 U.S. at 305, and citing Martin v. Texas, 200 U.S. 316, 321 (1906)).

5. *Id.* at 87 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

show that "the totality of the relevant facts gives rise to an inference of discriminatory purpose."[6] The other party must then give a valid race-neutral reason for the strike.[7] Throughout this process, the burden of persuasion rests on the party alleging discrimination.[8] This holding has been extended to other groups, including women[9] and Hispanics,[10] and has been applied to defense attorneys.[11] It also applies in situations where the defendant is of a different race than the stricken juror.[12]

II. BACKGROUND OF *STATE V. PALEO*

The recent decision in *State v. Paleo*[13] marks an important interpretation of *Batson* because it addresses whether a person may challenge the waiver of peremptory strikes under *Batson*. The defendant Paleo was a Hispanic man who was charged with Aggravated D.U.I. During jury selection, the prosecutor used only four of his six peremptory strikes. As a result, the court clerk struck the last two potential jurors in the venire from the list as required by rule.[14] One of the two jurors was the only remaining Hispanic on the panel. Paleo challenged the prosecutor's waiver of his last peremptory strikes and the subsequent striking of the juror. He argued that the prosecutor discriminated by waiving his last peremptory strikes so that the rule would operate to remove the Hispanic juror. The prosecutor countered that he had no reason to strike any of the remaining jurors, and so waived his strikes.[15] The trial court denied Paleo's challenge and in the subsequent trial, Paleo was convicted.

The Arizona Court of Appeals unanimously reversed the conviction.[16] That court held that the non-use of peremptory strikes may constitute purposeful discrimination under *Batson* and that the prosecutor's explanation for waiving his strikes was insufficient to rebut the accusation of discrimination.[17] The court relied on an earlier Court of Appeals decision in *State v. Scholl*,[18] which stated that "[t]here is no reason to differentiate between use and nonuse of peremptory challenges in determining whether the State is engaging in purposeful discrimination in its selection of jurors."[19] The *Scholl* court held that the limited

6. *Id.* at 93–94.
7. *See id.*
8. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).
9. *See* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).
10. *See* Hernandez v. New York, 500 U.S. 352 (1991).
11. *See* Georgia v. McCollum, 505 U.S. 42 (1992).
12. *See* Powers v. Ohio, 499 U.S. 400 (1991).
13. 22 P.3d 35 (Ariz. 2001).
14. *See* ARIZ. R. CRIM. P. 18(g)
15. *See Paleo*, 22 P.3d at 36.
16. *See* State v. Paleo, 5 P.3d 276 (Ariz. Ct. App. 2000).
17. *See id.* at 279 (citing Batson v. Kentucky, 476 U.S. 79, 98 (1986)).
18. 743 P.2d 406 (Ariz. Ct. App. 1987). In this case, the trial judge instructed the prosecutor to strike a non-minority juror so that a black juror could serve. The prosecutor declined, saying that he did not always use all of his strikes and he had no reason to strike any of the remaining jurors. The judge then declared a mistrial.
19. *Id.* at 409.

use of peremptory challenges combined with the operation of Rule 18.5(g) established a prima facie case of discrimination.[20] The Court of Appeals in *Paleo* found that *Scholl* was consistent with *Batson* and its progeny because "[t]he Constitution prohibits *all forms* of purposeful racial discrimination in selection of jurors."[21]

The Arizona Supreme Court unanimously reversed the decision of the Court of Appeals.[22] It held that the waiver of peremptory strikes alone was not sufficient evidence of discrimination to establish a prima facie case and thus require the prosecutor to provide a race-neutral reason for the waiver.[23]

To date, Arizona is only the second jurisdiction to have addressed the exact issue of whether waiver of peremptory strikes is the type of discrimination prohibited by *Batson*. The first was Texas.[24] However, neither of the two Texas cases contain persuasive analysis and simply state that no authority supports the "novel" assertion that waiver could be discriminatory.[25] Because of its careful analysis, the Arizona decision is perhaps the most important of the three. In addition, because it is the first state supreme court to decide this issue, and because of the sharp disagreement between the Arizona Court of Appeals and the Arizona Supreme Court, it is important to analyze the decision and its implications in detail.

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20. *See id.* The court then held that the prosecutor's explanation that he did not use his last strikes because he had no objection to any of the jurors was sufficient to rebut the accusation of discrimination. One wonders why the court would bother ruling that the defendant made out a prima facie case of discrimination if the prosecutor can overcome it simply by stating that he has no objection to any juror. The decision allows a lawyer to challenge the non-use of peremptory strikes but then makes it exceedingly difficult to win the challenge.

21. *Paleo*, 5 P.3d at 278–79 (quoting *Batson*, 476 U.S. at 88) (emphasis in original).

22. *See Paleo*, 22 P.3d at 38.

23. *See id.* at 37.

24. The Texas Court of Appeals decided the issue the same way as the Arizona Supreme Court. *See* Mayes v. State, 870 S.W.2d 695, 699 (Tex.App. 1994); Russell v. State, 804 S.W.2d 287, 291 (Tex.App. 1991).

25. In *Russell*, there were five blacks in the forty-two person venire. Two were excused for cause and one was seated as a juror. The prosecutor used only six of his ten peremptory strikes, which caused one of the black potential jurors to be totally outside the range of possible jury service. The court held that there had been no showing that the prosecutor used his peremptory challenges in a discriminatory manner and that *Batson* does not require the State to furnish reason for its non-use of peremptory challenges. *See Russell*, 804 S.W.2d at 290–91.

In *Mayes*, four of the thirty-two potential jurors were black. Two of them were struck for cause and the others were numbered thirty-one and thirty-two on the panel. The state used only three of its ten peremptory strikes. One of those was against a black man who had been convicted of driving while intoxicated. Because the state did not use any more peremptories, the last two jurors were excluded from service. The Court of Appeals held that there was no authority to support the defendant's claim that non-use of strikes is a *Batson* violation. *See Mayes*, 870 S.W.2d at 699.

III. APPLICATION OF *BATSON* TO WAIVER OF PEREMPTORY STRIKES

In an opinion by Justice Martone, the Arizona Supreme Court began by analyzing *Scholl*, specifically the portion on which the Court of Appeals relied. That portion held that non-use of strikes is the same as use and it establishes a prima facie case of discrimination.[26] The Supreme Court held that *Scholl* was not consistent with *Batson* and its progeny because there is a difference between use and non-use of peremptory strikes.[27] That difference is the fact that "[t]he law does not presume wrongdoing without action of some kind or omission of a legally required act."[28] Criminal liability does not attach until a person either does something forbidden by law or fails to perform a required act.[29] Under tort law, a person has no affirmative duty to act to protect others.[30] The jury is no place for affirmative action. As Justice Martone put it, "[o]ur justice system cannot support a racial or gender 'ranking' system, which favors seating one group over another."[31] This is precisely what happened in *Scholl*, where the judge ordered the prosecutor to use his last peremptory strike so that a minority juror could be seated.[32]

After overruling that portion of *Scholl*, the Court held that, standing alone, a lawyer's waiver of peremptory strikes is not sufficient evidence of discrimination.[33] This ruling is consistent with *Batson*, which specifically stated that a person has no right to a jury composed of members of his own ethnic group because race is not related to a person's fitness as a juror.[34] It is also consistent with other Equal Protection jurisprudence that disfavors affirmative action.[35] In addition, the Equal Protection Clause does not give persons a right to serve on juries but merely to be free from discrimination in the jury selection process.[36]

While this ruling may make it possible for lawyers to insulate strikes from the scrutiny of the court by waiving strikes when members of minority groups are at the bottom of the list, the window for discrimination left open is very

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26. *See Paleo*, 5 P.3d at 278.
27. *See Paleo*, 22 P.3d at 37.
28. *Id.*
29. *See id.* at 37 n.2 (citing ARIZ. REV. STAT. § 13-201 and RESTATEMENT (SECOND) OF TORTS § 314 (1964)).
30. *See id.*
31. *Id.*
32. *See Scholl*, 743 P.2d at 408.
33. *See Paleo*, 22 P.3d at 37.
34. *See* Batson v. Kentucky, 476 U.S. 79, 85–86 (1986).
35. Affirmative action may be permissible to remedy past discrimination against a racial minority, however the state must make a showing of specific past de jure discrimination. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
36. *See* Powers v. Ohio, 499 U.S. 400, 404–09 (1991). "Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise." *Id.* at 408 (quoting Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 330 (1970)).

small indeed. It is hardly a return to *Swain* and the "good old days" of peremptory strikes. Indeed, the court next held that "waiver plus," that is a waiver accompanied by some other indicia of discrimination, would be relevant in a *Batson* challenge.[37] Other indicia may include: "(1) when discriminatory statements are made by a waiving party; (2) when a pattern of strikes removing a specific group is shown and waiver results in removal of other members of that group; or (3) where waiver bears on use."[38]

Here it is useful to clarify exactly what the holding of *Paleo* is. A broad cursory view of the holding is that a lawyer need never justify his non-use of peremptory strikes.[39] However, that is much broader than the actual decision of the court. The court, while holding very narrowly that Paleo did not establish a prima facie case of discrimination, acknowledged that a lawyer may indeed violate *Batson* through waiver of peremptory challenges. The holding is a technical one dealing with quantum of proof. The court accepted that waiver may be discriminatory but required some greater showing of discriminatory intent, not a mere accusation. In that regard, the decision may simply be seen as an extension of *Reeves*, as the court is unwilling to shift the burden of proof to the party waiving the strikes.[40] If one feels constrained to interpret the court's decision as simply disagreeing with *Batson* and is attempting to return to the good old days of *Swain* and discriminatory strikes, the fact that the court leaves the door open for future challenges when the proof may be stronger refutes this view.

IV. PRACTICAL IMPLICATIONS

In reality, the Court reached the only solution possible. Without emasculating the protections of *Batson* by completely insulating the waiver of strikes from challenge, it avoided introducing affirmative action into the jury box. As the United States Supreme Court has held, race is totally unrelated to a person's fitness to serve[41] and a defendant has no right to a "petit jury composed in whole or in part of persons of his own race."[42] As the Court noted in *Allen v. Hardy*,[43] *Batson* "was designed to serve multiple ends," the protection of defendants from discrimination being only one of them. It protects potential jurors as well. Jurors have a right to serve without regard to race because the jury is fundamental to our system of government.[44]

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37. *See Paleo*, 22 P.3d at 37.

38. *Id.* For more on waiver bearing use, see *Ford v. Norris*, 67 F.3d 162, 169 (8th Cir. 1995) and *Bousquet v. State*, 953 S.W.2d 894, 899 (Ark. Ct. App. 1997).

39. This is also the result of the holding in the Texas cases, *supra* note 24.

40. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

41. *See* Batson v. Kentucky, 476 U.S. 79, 85–87 (1986); *see also supra* notes 4–5 and accompanying text.

42. Strauder v. West Virginia, 100 U.S. 303, 305 (1880).

43. 478 U.S. 255, 259 (1986) (per curiam) (citing Brown v. Louisiana, 447 U.S. 323, 329 (1980)).

44. *See* Duncan v. Louisiana, 391 U.S. 145, 147–58 (1968); *see also* Balzac v. Porto Rico, 258 U.S. 298, 310 (1922).

The decision of the Arizona Supreme Court reaffirms those principles and prevents the shield from being used as a sword to force minorities onto juries. Otherwise, a court could force a lawyer to strike jurors because they do not belong to a minority group. If, as the prosecutor in *Paleo* claimed, a lawyer had no objections to any of the remaining jurors in the venire, then he would be in quite a quandary. If he used his last peremptory strikes to strike minorities he would be subject to a *Batson* challenge. If he did not use his strikes he would be subject to a *Batson* challenge. And if he struck non-minority jurors to satisfy the court, he would infringe the non-minority jurors' constitutional right to not be excluded from jury service on the basis of race.

V. CONCLUSION

The only practical solution is the one that the *Paleo* Court adopted—to raise the quantum of proof necessary before a lawyer is subject to a *Batson* challenge for waiver of peremptory strikes. To rule otherwise could, in practice, support a right that the Supreme Court has explicitly stated does not exist, namely the right for a defendant to have a jury composed partly of jurors of his or her own race. It would also infringe on the rights of the non-minority jurors by excluding them from jury service solely on the basis of their race.