

# STATE V. HICKMAN: REDEFINING THE ROLE OF PEREMPTORY CHALLENGES

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## I. BACKGROUND AND INTRODUCTION

Prosecutors brought Robert Dwight Hickman in front of the Maricopa County Superior Court, accusing him of downloading child pornography from the Internet.<sup>1</sup> During voir dire, Hickman asked the trial court to strike for cause two venirepersons who unambiguously asserted their reservations to serve as jurors.<sup>2</sup> The trial court denied Hickman's request; as such, Hickman used two of his peremptory challenges to remove the venirepersons from the jury panel.<sup>3</sup> The jury subsequently convicted Hickman on three counts of sexual exploitation of a minor.<sup>4</sup>

On appeal, among several other issues, Hickman argued that *State v. Huerta*<sup>5</sup> requires automatic reversal where a trial judge in a criminal trial erroneously denies a defendant's request to strike a venireperson for cause and the defendant subsequently uses a peremptory strike to remove that venireperson.<sup>6</sup> The Arizona Court of Appeals, following the holding of *Huerta*, reversed and remanded the case for a new trial.<sup>7</sup> The state subsequently appealed to the Arizona Supreme Court.

The specific issue that faced the Arizona Supreme Court in this case was whether it should continue to follow the automatic reversal rule in *Huerta* or, in the alternative, join those states that have adopted the principles of the United States Supreme Court cases *Ross v. Oklahoma*<sup>8</sup> and *United States v. Martinez-*

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1. State v. Hickman, 68 P.3d 418, 419 (Ariz. 2000). Aside from the physical evidence the prosecutors had, Hickman himself "admitted to investigators that he had images of child pornography on his computer at work, his home computer, and on computer diskettes he had at home." *Id.* at 426.

2. *Id.* at 419. One of the two objectionable venirepersons stated that she was "not quite sure [she could] be fair with the emotions involved," while the other stated that she "would not be able to render a fair verdict." *Id.*

3. *Id.*

4. *Id.*

5. 855 P.2d 776 (Ariz. 1993).

6. *Hickman*, 68 P.3d at 419.

7. *Id.*

8. 487 U.S. 81 (1988).

*Salazar*<sup>9</sup> in applying harmless error review to the defendant's curative use of a peremptory challenge by requiring a showing of prejudice before overturning a criminal conviction that is otherwise valid.<sup>10</sup> After a detailed analysis and the finding that Hickman was tried by a fair and impartial jury, the Arizona Supreme Court overruled *Huerta*'s automatic reversal rule, vacated the court of appeals opinion, and affirmed Hickman's conviction and sentence.<sup>11</sup> However, while the Arizona Supreme Court in *Hickman* selected the right rule when it adopted harmless error review, it undermined the strength of its opinion because it did not adequately acknowledge two crucial factors: a valid countervailing concern and the necessity to balance that concern with reasons why harmless error review is nevertheless the better rule.

## II. LEGAL LANDSCAPE PRIOR TO *STATE V. HICKMAN*

The Arizona Supreme Court examined *Huerta*'s automatic reversal rule against a legal landscape comprised of two United States Supreme Court cases, their impact on courts of other jurisdictions, and Arizona case law.

### A. United States Supreme Court Case Law

In *Ross*, the Supreme Court held that an Oklahoma law requiring a defendant to use a peremptory challenge to strike a venireperson that the trial court should have excused for cause did not violate the defendant's Sixth Amendment right to an impartial jury or the defendant's Fourteenth Amendment right to due process.<sup>12</sup> While recognizing peremptory challenges as "one of the most important rights secured to the accused,"<sup>13</sup> the Court pointed out that peremptory challenges are "a creature created by statute and are not required by the Constitution"<sup>14</sup> and are only "a means to achieve the end of an impartial jury."<sup>15</sup> Following *Ross*, most jurisdictions addressing this issue either rejected the automatic reversal rule or reaffirmed prior case law holding that, unless the criminal defendant has been prejudiced, the curative use of a peremptory challenge does not constitute reversible error.<sup>16</sup>

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9. 528 U.S. 304 (2000).

10. *Hickman*, 68 P.3d at 420, 422, 424.

11. *Id.* at 427.

12. 487 U.S. at 88–89.

13. *Id.* at 89 (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)).

14. *Id.*

15. *Id.* at 88.

16. *Hickman*, 68 P.3d at 420. *See, e.g.*, *Pickens v. State*, 783 S.W.2d 341, 345 (Ark. 1993); *Dawson v. State*, 581 A.2d 1078, 1093–94 (Del. 1990), *vacated on other grounds by Dawson v. Delaware*, 503 U.S. 159 (1992); *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990); *State v. Graham*, 780 P.2d 1103, 1108 n.3 (Haw. 1989); *People v. Gleash*, 568 N.E.2d 348, 353 (Ill. App. Ct. 1991); *Vaughn v. State*, 559 N.E.2d 610, 614 (Ind. 1990); *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993); *Williams v. Commonwealth*, 829 S.W.2d 942, 943 (Ky. Ct. App. 1992); *Hunt v. State*, 583 A.2d 218, 233 (Md. 1990); *Mettetal v. State*, 602 So. 2d 864, 869 (Miss. 1992); *State v. DiFrisco*, 645 A.2d 734, 751–53 (N.J. 1994); *State v. Tranby*, 437 N.W.2d 817, 824 (N.D. 1989); *State v. Broom*, 533 N.E.2d 682, 695 (Ohio 1988); *State v. Green*, 392 S.E.2d 157, 160 (S.C. 1990); *State v.*

Twelve years later, in *Martinez-Salazar*, the Supreme Court held again that a federal criminal defendant is not deprived of any “rule-based or constitutional right” when the defendant chooses to use a peremptory challenge to strike a juror that the trial court should have dismissed for cause and is subsequently convicted by an impartial jury.<sup>17</sup> Like the *Ross* Court, the *Martinez-Salazar* Court, while recognizing the “common-law heritage” of the peremptory challenge and its role in “reinforcing a defendant’s right to trial by an impartial jury,” also emphasized that peremptory challenges are auxiliary and “not of federal constitutional dimension.”<sup>18</sup> Citing *Martinez-Salazar*, the high courts of South Carolina, South Dakota, Washington, and Wisconsin all adopted the rule that, if there is no showing of prejudice, a defendant’s state constitutional and statutory rights are not violated when the defendant uses a peremptory challenge to strike a juror the trial court erroneously failed to strike for cause.<sup>19</sup> It is important to point out that the high courts of Colorado and Kentucky and the Court of Appeals of Virginia have refused to apply *Martinez-Salazar* based on their finding of inherent prejudice in such situations; nevertheless, the majority of state courts that have addressed this issue still apply harmless error review and thus will only reverse a case where there is a showing of prejudice.<sup>20</sup>

#### **B. Arizona Case Law**

Examination of the inconsistent line of Arizona cases is critical to understanding the legal landscape. The first Arizona Supreme Court case to address the issue is *Encinas v. State*, decided in 1923.<sup>21</sup> The *Encinas* court, following the rule announced by the California courts,<sup>22</sup> held generally that “the order overruling challenge for cause must amount to prejudicial error in order to require reversal.”<sup>23</sup> It went on to state that such a rule is both constitutional and statutory in Arizona.<sup>24</sup> Specifically, it held that even if the trial court erred when it erroneously failed to strike some unfit jurors for cause, the record showed that after the defendant used peremptory challenges to remove these jurors, the jurors who actually served were fit, and therefore the error was not prejudicial and did

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Middlebrooks, 840 S.W.2d 317, 329 (Tenn. 1992); *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994); *State v. Traylor*, 489 N.W.2d 626, 629 (Wis. Ct. App. 1992).

17. *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000).

18. *Id.* at 311.

19. *See Hickman*, 68 P.3d at 421.

20. *Id.* at 422. See *supra* note 16 for examples of courts that apply harmless error review.

21. 221 P. 232 (Ariz. 1923).

22. Specifically, the case *People v. Johnson*, 207 P. 281 (Cal. Ct. App. 1922).

23. *Encinas*, 221 P. at 233.

24. *Id.* The court is referring to Arizona Constitution article VI, section 22, which was amended by Arizona Constitution article VI, section 27, and Arizona Revised Statutes Penal Code section 1170 (1913).

not warrant reversal.<sup>25</sup> The Arizona Supreme Court solidified this rule in two subsequent cases.<sup>26</sup>

In 1949, the Arizona Supreme Court decided *State v. Thompson*,<sup>27</sup> a case in which the scope of the holding is unclear. In *Thompson*, three jurors who the defendant had removed using peremptory challenges actually served on a jury due to the court's clerical error.<sup>28</sup> Even though the facts of this case involved an unlawfully constituted jury where stricken jurors sat on the jury panel, the *Thompson* court repeatedly emphasized that the right to peremptory challenges is a substantial right and not merely a procedural or technical right.<sup>29</sup> It is unclear whether the *Thompson* court viewed the right to peremptory challenges to be impaired only when juries are unlawfully constituted or also when a defendant has to use peremptory challenges to cure a trial court's erroneous failure to strike unfit jurors for cause.

In 1977, the Arizona Supreme Court, in the civil case of *Wasko v. Frankel*,<sup>30</sup> relied on the unclear holding of *Thompson* to hold, for the first time, that even without a showing of prejudice, "a party's use of a peremptory challenge to remove a juror the trial court should have removed for cause was reversible error."<sup>31</sup> In addition to *Thompson*, the *Wasko* court relied heavily on the Utah Supreme Court case *Crawford v. Manning*<sup>32</sup> in establishing a new rule in Arizona—switching Arizona from harmless error review to the automatic reversal rule.<sup>33</sup> Without citing any authorities, *Crawford* concluded that "[a] party is entitled to exercise . . . peremptory challenges upon impartial prospective jurors, and . . . should not be compelled to waste one in order to accomplish that which the trial judge should have done." Furthermore, the court observed that the juror who could have been removed may have been biased and subsequently imposed his will upon the remaining jurors.<sup>34</sup>

Next came *Huerta*, the controversial three-to-two decision where the Arizona Supreme Court applied the automatic reversal rule to criminal cases.<sup>35</sup> First, the *Huerta* court declined to follow *Ross*, explaining that *Ross* addressed federal constitutional provisions while earlier Arizona cases such as *Wasko* were

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25. *Encinas*, 221 P. at 233.

26. *See State v. Hickman*, 68 P.3d 418, 423 (Ariz. 2003). These two Arizona Supreme Court cases are *Kinsey v. State*, 65 P.2d 1141 (1937), and *Conner v. State*, 92 P.2d 524 (1939). *Hickman*, 68 P.3d at 423.

27. 206 P.2d 1037 (Ariz. 1949).

28. *Id.* at 1038–39.

29. *See id.* at 1039.

30. 569 P.2d 230 (Ariz. 1977). *Wasko* is a short opinion dealing with a medical malpractice claim, where the plaintiff used a peremptory challenge to remove a juror who the trial court should have removed for cause. *Id.* at 232.

31. *Hickman*, 68 P.3d at 423–24.

32. 542 P.2d 1091 (Utah 1975). *Crawford*, like *Wasko*, is a terse opinion; it dealt with a wrongful death claim where the plaintiff used a peremptory strike to remove a juror who the trial court should have removed for cause. *Id.* at 1092–93.

33. *See Wasko*, 569 P.2d 230.

34. *Crawford*, 542 P.2d at 1093.

35. *See State v. Huerta*, 855 P.2d 776, 776–77 (Ariz. 1993).

based on state procedural law.<sup>36</sup> In addition to relying on *Wasko*, the *Huerta* court proclaimed that a party will not receive a fair trial unless it is allowed every peremptory challenge it is entitled to.<sup>37</sup> Some of the main reasons *Huerta* rejected harmless error review included that it is almost always impossible for a party to show “what effect the trial judge’s error had upon the outcome of the trial” and that harmless error review will give judges carte blanche to erroneously deny peremptory challenges.<sup>38</sup> As such, *Huerta* concluded that “[r]eversal is the only feasible way to vindicate a party’s ‘substantial right’ to peremptory challenges, which right is clearly impinged when a trial judge erroneously denies a challenge for cause.”<sup>39</sup>

### III. STATE V. HICKMAN: READOPTING HARMLESS ERROR REVIEW

*Hickman* is a unanimous decision where the Arizona Supreme Court overruled *Huerta* and readopted harmless error review.<sup>40</sup> Before overruling *Huerta*, the court addressed stare decisis and recognized that precedent is to be respected and can be overruled only when compelling reasons exist justifying such departures.<sup>41</sup> Among several of *Hickman*’s substantive reasons for overruling *Huerta* are that *Ross*, *Martinez-Salazar*, and courts of numerous other jurisdictions all emphasize the auxiliary role of peremptory challenges and that most other trial errors are subject to harmless error review.<sup>42</sup> In addition, the *Hickman* court interpreted Arizona constitutional and statutory provisions to mandate choosing harmless error review over the automatic reversal rule.<sup>43</sup>

#### A. The Substantial Justice Provision and Harmless Error Statute

The Arizona Constitution article VI, section 27 states that “[n]o cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.”<sup>44</sup> This Substantial Justice provision has remained unchanged since 1960.<sup>45</sup> Similarly, Arizona’s Harmless Error Statute states in part that no “error . . . shall render the pleading or proceeding invalid, unless it actually has prejudiced, or tended to prejudice, the defendant in respect to a substantial right.”<sup>46</sup> This provision has

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36. *Id.* at 779.

37. See Brian A. Cabianca, Case Note, *State v. Huerta: An Unwarranted Sanctuary for Peremptory Challenges*, 26 ARIZ. ST. L.J. 273, 275 (1994) (explaining *Huerta*, 855 P.2d at 779–80).

38. *Huerta*, 855 P.2d at 780.

39. *Id.*

40. See *State v. Hickman*, 68 P.3d 418, 420, 424 (Ariz. 2003).

41. *Id.* at 426. Here, the Arizona Supreme Court engaged in a thorough analysis of stare decisis that it has since cited to twice: in *State v. Rutledge*, 76 P.3d 443, 448 (Ariz. 2003), and in *Galloway v. Vanderpool*, 69 P.3d 23, 27 (Ariz. 2003).

42. See *Hickman*, 68 P.3d at 424–25, for a non-exhaustive list of instances where courts apply harmless error analysis to trial court constitutional violations.

43. See *id.* at 425–26.

44. ARIZ. CONST. art. VI, § 27.

45. As a matter of fact, the 1960 revision of this provision was merely a renumbering from section 22 to section 27. *Hickman*, 68 P.3d at 423 n.5.

46. ARIZ. REV. STAT. § 13-3987 (2003).

remained unchanged since 1977.<sup>47</sup> Whereas *Huerta* avoided the application of these provisions by viewing peremptory strikes as a substantial right,<sup>48</sup> *Hickman* found these provisions essential because it viewed the curative use of peremptory strikes as only serving an auxiliary role to the Sixth Amendment right to an impartial jury.<sup>49</sup>

***B. The Victim's Bill of Rights and Victim's Rights Implementation Act***

The Arizona Victim's Bill of Rights<sup>50</sup> is a 1990 amendment to the Arizona Constitution that assures a victim "a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence."<sup>51</sup> To support this amendment, the legislature enacted the Victim's Rights Implementation Act<sup>52</sup> to give crime victims the "basic rights of respect, protection, participation and healing of their ordeals."<sup>53</sup> Even though these provisions were already in effect at the time the Arizona Supreme Court decided *Huerta*, only Justice Corcoran discussed them in his dissenting opinion in *Huerta*.<sup>54</sup> Not wanting these provisions to slip through the cracks, *Hickman* echoed Justice Corcoran when it stated that the "automatic reversal rule of *Huerta* thwarts a victim's constitutional and statutory right to a speedy resolution and finality."<sup>55</sup>

**IV. CRITICISM OF *HICKMAN***

Although *Hickman* reached the right result in rejecting the automatic reversal rule and readopting harmless error review for such situations, the court's inadequate acknowledgement of two crucial factors undermined the strength of the opinion: the valid countervailing concern that it is extremely difficult, sometimes nearly impossible, for a defendant to show that he was prejudiced by a biased jury formed as a result of his curative use of a peremptory challenge and the need for the court to balance this concern supporting the automatic reversal rule with the various convincing reasons it articulated regarding why harmless error review is nevertheless the better rule.

In addition to the fact that harmless error review is the majority rule among the various United States jurisdictions, the Arizona Supreme Court set forth several other convincing reasons why harmless error review is the right rule where a criminal defendant used peremptory challenges curatively but was eventually tried by an impartial jury. Chief Justice Jones succinctly highlighted two of these reasons in his brief concurring opinion in *Hickman*.<sup>56</sup> First, the automatic reversal

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47. *Id.*

48. The *Huerta* court cited *State v. Thompson*, 206 P.2d 1037, 1039 (Ariz. 1949), for the proposition that even though there is no constitutional right to peremptory challenges in Arizona, it is still a substantive right. *State v. Huerta*, 855 P.2d 776, 778 (Ariz. 1993).

49. See *Hickman*, 68 P.3d at 420.

50. ARIZ. CONST. art. II, § 2.1(A)(10).

51. See *Hickman*, 68 P.3d at 426 (citing ARIZ. CONST. art. II, § 2.1(A)(10)).

52. ARIZ. REV. STAT. §§ 13-4401 to 13-4437 (2003).

53. *Huerta*, 855 P.2d at 783 (Corcoran, J., dissenting).

54. See *id.*

55. *Hickman*, 68 P.3d at 426.

56. See *id.* at 427.

rule is too rigid in that it requires a retrial even in situations where substantial justice has been done by a constitutionally impartial jury.<sup>57</sup> And second, *Martinez-Salazar* supported harmless error review under similar facts and identical constitutional language, emphasizing the auxiliary role of peremptory challenges in a criminal defendant's constitutional right to an impartial jury.<sup>58</sup> Other convincing reasons *Hickman* articulated include judicial economy,<sup>59</sup> lack of a strong line of precedents supporting the automatic reversal rule,<sup>60</sup> and Arizona constitutional and statutory provisions that mandate such a result.<sup>61</sup>

Regardless of the rightness of the result, the Arizona Supreme Court failed to adequately acknowledge a valid countervailing concern and that a balancing of this concern with the convincing reasons it articulated regarding why harmless error review is the better rule is ultimately necessary in achieving that right result. In analyzing *Huerta*, the *Hickman* court recognized that one of the main reasons the *Huerta* majority rejected harmless error review is because "in most cases a defendant is unable to show the effect of the judge's erroneous ruling for cause."<sup>62</sup> But, *Hickman* then declares that this concern does not withstand scrutiny because "when a defendant secures an impartial jury, even through the curative use of a peremptory challenge, a conviction by that jury will not have prejudiced that defendant."<sup>63</sup>

This reasoning is unpersuasive because a logical extension of the *Huerta* majority's concern is that in most situations, it is difficult for a defendant to show that a trial court's erroneous failure to strike a juror for cause *resulted in the empanelling of a jury with jurors who are biased in subtle ways*. This concern is crucial because it calls into question a major premise of harmless error review: that the defendant, after wasting peremptory challenges, is nevertheless tried by an impartial jury. Instead of presuming an impartial jury and by silence implying the ease with which the partiality of a jury can be determined, the court should have recognized this inevitable problem.

After acknowledging this problem, the court could go on to balance it against all of the convincing reasons why harmless error review is superior to the automatic reversal rule and consequently come out on the side of harmless error review. Subsequently, the court could reiterate the fact that most other trial court constitutional violations are also subject to harmless error review when some of these violations are likewise difficult for the claimant of error to prove.<sup>64</sup> Such an

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57. *Id.*

58. *See id.* at 427–28.

59. *Id.* at 426.

60. *Id.* at 424.

61. *Id.* at 425–26. As discussed earlier, these provisions include the Arizona Constitution's Substantial Justice provision and the Victim's Bill of Rights, ARIZ. CONST. art. VI, § 27, ARIZ. CONST. art. II, § 2.1(A)(10), respectively, and Arizona's Harmless Error statute and Victim's Rights Implementation Act, ARIZ. REV. STAT. § 13-3987 (2003), ARIZ. REV. STAT. § 13-4401 to 13-4437 (2003), respectively.

62. *Hickman*, 68 P.3d at 425.

63. *Id.*

64. For example, while it is almost impossible to determine and prove prejudicial effects caused by an erroneous admission into evidence of a defendant's silence after

analysis would not only strengthen the opinion, it would decrease the potential of “public cynicism and disrespect for the judicial system” that could be caused by inadequate acknowledgement of these crucial factors.<sup>65</sup>

## V. CONCLUSION

*Hickman* laid out many convincing reasons why harmless error review is the right rule where a defendant has wasted peremptory challenges to remove jurors who the trial court erroneously failed to remove for cause and where that defendant was eventually tried by a jury he cannot show to be biased; some of the convincing reasons for readopting harmless error review include the holdings of the United States Supreme Court and courts of other jurisdictions, the lack of a strong line of Arizona cases supporting the automatic reversal rule, interpretations of Arizona constitutional and statutory provisions mandating such a result, the rigidity of the automatic reversal rule, and judicial economy.<sup>66</sup> However, the Arizona Supreme Court undermined the strength of its own opinion because it inadequately acknowledged the countervailing concern that it is difficult for a defendant to show that he was tried by a biased jury as a result of his curative use of a peremptory challenge and because it inadequately acknowledged the need to balance this concern with the convincing reasons why harmless error review is the better rule in achieving the right result—rejecting the automatic reversal rule in favor of harmless error review.

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*Miranda* warnings, this constitutional violation is nevertheless only subject to harmless error review. *See id.* at 424–25.

65. The *Hickman* court cited this as one of the public policy concerns generated by *Huerta*’s automatic reversal rule. *Id.* at 426.

66. *See Hickman*, 68 P.3d at 426.