University of Arkansas at Little Rock Law Review

Volume 15 | Issue 1 Article 2

1992

An Overview of the Law of Jury Selection for Arkansas Criminal Trial Lawyers

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AN OVERVIEW OF THE LAW OF JURY SELECTION FOR ARKANSAS CRIMINAL TRIAL LAWYERS

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Trial lawyers recognize voir dire as a critical element in both jury selection and development of the case because it represents the only opportunity during trial for counsel to engage in a dialogue with prospective jurors as a group and individually. While counsel may address the jury in both opening and closing argument and the testimony will necessarily be directed toward the jury during presentation of the case and defense, these situations neither permit direct response from jurors, nor do they allow counsel to communicate prior to the use of challenges or peremptory strikes in shaping the composition of the final body which will sit in judgment at trial.

Typically, voir dire serves a number of discrete functions for both sides in the criminal trial. First, it permits counsel for both the State and the defense to establish a personal presence in the courtroom and in the minds of individual jurors.[1] For the defense, it allows counsel to initiate the process of humanizing the accused to the jurors. This process is considered critical in major prosecutions in which the sensational or grotesque nature of the crime demand that all potentially favorable impressions of the accused be fully developed in order to offset the jury prejudice which might, unchecked, bring about an unfair conviction or overly harsh sentence.[2]

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1. However, in Van Cleave v. State, 268 Ark. 514, 518, 598 S.W.2d 65, 67 (1980), the Arkansas Supreme Court observed that voir dire is not an occasion for counsel to simply "get acquainted" with the jurors, nor are counsel free to conduct the examination "in any and all directions for as long as they desire." There, the court concluded that the defense strategy of relying on a plea of not guilty, rather than advancing a specific defense or affirmative defense, justified the trial court's limitation on defense counsel's questioning of the venire.

2. *See generally*, Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 356-57 (1979) (emphasizing need for counsel to develop strategy for "humanizing" capital defendants to jury); J. Thomas Sullivan, *Use of the "Zola Plea" in New Jersey*

Second, voir dire permits counsel to develop theories of the case and explain elements of offenses and defenses as a means of testing juror understanding of the nature of the jury function in evaluating evidence and reaching a decision during the guilt or innocence phase of trial. This is particularly important when prospective jurors are subject to challenge for cause because of prior exposure to facts or biases which effectively exclude them from serving as fair and impartial jurors.[3] Similarly, jurors categorically rejecting theories of either the offense or defense—such as the prospective juror who could not convict for mere possession of marijuana or who rejects any claim of self defense in a "battered women" case—can be challenged for cause.[4] Also, voir dire affords counsel an opportunity to identify jurors subject to disqualification as a matter of law, such as where the juror is disqualified by virtue of blood relationship or affinity to a party or counsel.[5]

Third, counsel are often able to use voir dire to successfully identify those jurors most likely to be receptive or hostile to counsel's position at trial and exercise peremptories intelligently as a result of the development of these perceptions.[6] For example, a juror too likely to

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Capital Prosecutions, 21 SETON HALL L. REV. 3 (1990) and J. Thomas Sullivan, *The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation*, 15 N.M. L. REV. 41 (1985) (both focusing on opportunity for capital defendant to address jury personally in sentencing phase to make plea for leniency).

3. For example, see Irvin v. Dowd, 366 U.S. 1717 (1961), where the Court reversed a conviction when eight of twelve prospective jurors ultimately selected to serve admitted to a predisposition to convict on extensive pre-trial publicity concerning the accused's confession to multiple murders and burglaries and his offer to plead guilty. The Court concluded that their representations that they could, nevertheless, serve as fair jurors and render an impartial verdict were insufficient to protect the defendant's right to a fair trial where this expression of sentiment indicated a "pattern of deep and bitter prejudice." However, in Murphy v. Florida, 421 U.S. 794 (1975), the Court apparently modified its earlier view in holding that no presumption of prejudice should be drawn from juror exposure to publicity concerning the accused or the crime, even when that exposure included disclosure of his prior convictions. *Murphy* demonstrates the need for counsel to carefully develop the record of predisposition, prejudgment, or bias on the part of prospective jurors in order to sustain a claim that failure to exclude such jurors for cause constitutes error.

4. For example, a juror who expects the defendant to testify in his own behalf despite the constitutional protection against compelled testimony may typically be subject to disqualification based on the juror's inability to follow the law and instructions of the trial court. *See* Bovee v. State, 19 Ark. App. 268, 275, 720 S.W.2d 322, 325 (1986). Similarly, a juror's inability to consider the complete range of possible penalties which may be imposed upon conviction will serve to disqualify a juror. Haynes v. State, 270 Ark. 685, 692-93, 606 S.W.2d 563, 566 (1980).

5. *See* Mitchell v. Goodall, 297 Ark. 332, 333-34, 761 S.W.2d 919, 920 (1988) for a discussion of disqualification based on familial relationship in the context of a civil trial pursuant to Arkansas Code Annotated section 16-31-102(b)(1).

6. The Arkansas Supreme Court has observed that the two purposes of voir dire are: (1) for discovery of grounds for challenges for cause and (2) to permit disclosure of information which

identify with the police may avoid being struck for cause by affirming his or her willingness to consider the testimony of an officer with an open mind.[7] However, the process itself will necessarily suggest that the juror be struck unless, of course, the accused is an officer, a situation presenting a more complex set of variables in the peremptory challenge decision.

Fourth, counsel are able to use preliminary questioning of prospective jurors to gain insight into juror thinking about issues even when an absolute matter of disqualification is not in issue.[8] Thus, in a case involving an elderly person, inquiry into the status of parents of individual jurors may be valuable in assisting counsel in ascertaining which jurors should be struck through exercise of peremptories and may also afford an understanding of which of several alternative approaches in the presentation of evidence and argument is more likely to be successful.

Fifth, experienced counsel use voir dire to identify those jurors who may be characterized as "strong" jurors, based on evidence of likely leadership or decisionmaking potential, as distinguished from jurors likely to be "weak," followers, or those more readily influenced. Once isolated, jurors deemed dangerous to the party's position for whatever reason may be subjected to exclusion by use of peremptories.

Finally, in a theatrical sense, experienced counsel use voir dire as the opening act of the play, designed both to lay the foundation for the

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will provide a basis for the exercise of peremptory challenges. Sanders v. State, 278 Ark. 420, 422, 646 S.W.2d 14, 15 (1983); *accord* Mu'Min v. Virginia, 111 S.Ct. 1899, 1908 (1991).

7. For example, in Holland v. State, 260 Ark. 617, 618, 542 S.W.2d 761, 762 (1976), defense counsel unsuccessfully sought to challenge a number of prospective jurors who had already served at trials in which the prosecution had relied on the testimony of an undercover narcotics officer who would be the State's key witness in the prosecution of the defendant for the sale of marijuana. Defense counsel argued that these jurors had already developed a bias or predisposition crediting the testimony of this officer based on their prior service in other cases resulting in conviction. The supreme court rejected the claim that the trial court erred in refusing to excuse these jurors who otherwise demonstrated themselves to be impartial and qualified to serve. Nevertheless, the development of information relating to this prior service would be of extreme importance in the determination of which jurors should be removed through exercise of peremptory strikes.

8. Identification of prospective jurors who have been or who identify themselves as victims of crime, particularly offenses similar in nature to that to be tried, is of significance in the assignment of peremptories because these jurors may be found qualified to serve despite their personal experiences. *See* Linell v. State, 283 Ark. 162, 164, 671 S.W.2d 741, 742 (1984) (prospective juror in capital case who disclosed that he had been victim of robbery and his family had been targeted for acts of violence deemed qualified to serve by trial court based on representation that he would disregard other exposure to criminal behavior because of serious nature of the case).

case and to build the momentum for ultimate persuasion. A credible voir dire—one which exposes and addresses biases of jurors honestly; discloses weaknesses in counsel's case not as flaws to be feared, but as simple components in a factually complex human situation; or serves to pierce common misconceptions—challenges jurors to remain receptive to evidence and fairminded in their assessments of witness credibility, ensuring the accused a trial by a fair and impartial jury.[9]

In order to properly use voir dire to achieve the goals set forth in the preceding paragraphs, counsel must understand first the legal framework in which this investigation is conducted. Counsel may divide on the issues of subjective bases for picking juries or the use of scientific jury selection methods, but regardless of the mode of investigation undertaken, counsel must conduct the examination within the acceptable parameters defined by caselaw, statutory provisions, and procedural rules. The purpose of this article is to present a simple legal framework for understanding those parameters for practitioners in circuit and federal district courts in Arkansas.

I. The Role of the United States Supreme Court

While most practitioners would likely view voir dire as a traditional aspect of trial procedure now controlled by state law and rules of practice, in fact, the United States Supreme Court has exercised dramatic influence on the shape of voir dire both in terms of its rule-making role in controlling federal trial procedure and in terms of discerning constitutional requirements for the proper conduct of jury selection.

A. The Court's Role in Regulating Voir Dire

Regarding the latter consideration, the simple rule is that the Court has authorized federal courts to exercise considerable discretion in controlling voir dire, flowing from its general statement of the rule in *Connors v. United States*, in which Justice Harlan wrote:

> It is quite true, as suggested by the accused, that he was entitled to be

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9. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." The corresponding guarantee afforded by the Arkansas Constitution, article 2, section 10, couches the right in similar language, substituting the phrase "the county in which the crime shall have been committed" for the "state and district" language of the national document. It also specifically permits the transfer of causes to any other county within the judicial district upon motion of the accused.

> tried by an impartial jury, that is, by jurors who had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence. It is equally true that a suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases.[10]

Following this principle, the Court has vested discretion in the district courts for the conduct of the examination of prospective jurors.[11] Qualifications of jurors for federal trials are set by statute.[12]

Federal trial judges may follow essentially three approaches in controlling the voir dire examination. First, the trial court may permit counsel to conduct the examination on behalf of their respective parties. Second, the court may simply conduct the entire examination. In the event the court does elect to conduct the examination, it may employ a third approach, permitting counsel to either supplement the court's examination or propound additional questions to prospective jurors specifically requested by counsel.[13]

While there may be merits to the system whereby the trial court either totally controls voir dire or permits supplementation of its presentation with inquiry suggested by counsel, the obvious drawback to any system of court-conducted voir dire is that counsel's exercise of important and often hard-won trial skills is subordinated to the oft-cited preference for judicial economy. Moreover, this may prove a sub-

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10. 158 U.S. 408, 413 (1895). Employing similar reasoning, the court in Murphy v. United States, 7 F.2d 85 (1st Cir. 1831) concluded that the accused had no right to have counsel personally conduct the voir dire examination, holding that the decision on the conduct of the examination itself is committed to the sound discretion of the trial court.

11. FED. R. CRIM. P. 24(a) provides:

> The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

12. 28 U.S.C. § 1865 (1989).

13. *See* WAYNE R. LAFAVE AND JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3, at 722, (1984) (citing a study reflecting that over one-half of federal trial judges surveyed conduct voir dire examination personally, while an additional one-third permit counsel to supplement the court's examination with personal questioning, and the remainder permit counsel to conduct the examination).

stantial disadvantage to defense counsel who may be forced to rely on the initial dialogue with jurors to create a positive impression on them, particularly when the credibility of the defense advanced, rather than weakness in the prosecution's case, forms the core of the defense trial theory and strategy. Nevertheless, the actual conduct of the examination remains vested in the trial court's discretion, even though defense counsel may have some qualified right to insist that certain questions be included in the examination.[14]

B. Jury Selection and Constitutional Considerations

The Supreme Court's decisions in the area of jury selection have focused on constitutional guarantees, as well as the Court's supervisory role in the conduct of federal litigation.[15] Three specific subjects have brought the Court into review of state jury selection practice: 1) exclusion of jurors unable to impose the death penalty in state capital prosecutions; 2) the problem of exclusion of classes of jurors through statutory means or exercise of peremptory challenges to produce petit juries substantially different in racial or ethnic composition than the community as a whole; and 3) the scope of voir dire afforded counsel in ensuring that the accused enjoys a trial before a fair and impartial jury. In each instance, the Court has looked to federal constitutional guarantees afforded to individual criminal defendants as a basis for reviewing state practice and procedure.[16] The Sixth Amendment specifically guarantees an accused in a federal criminal prosecution the right to trial before an impartial jury drawn from the state and district in which the prosecution is commenced,[17] and this provision has long been held ap-

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14. Presumably, as well, a federal prosecutor might argue successfully that a federal district judge could not properly voir dire a jury in a capital case in which the death penalty was sought without engaging in a proper examination relating to potential conscientious objection on the part of jurors to imposition of the death penalty, based on application of Witherspoon v. Illinois, 391 U.S. 510 (1968).

15. In matters of state practice, the Court has interpreted its role as "limited to enforcing the commands of the United States Constitution." Mu'Min v. Virginia, 111 S.Ct. 1899, 1903 (1991).

16. The Court has relied on the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment in finding that an accused, exercising his right to jury trial in a criminal prosecution, has a right to expect that the jury ultimately selected be fair and impartial in approaching its duties. Ristaino v. Ross, 424 U.S. 589 (1976); Fay v. New York, 332 U.S. 261 (1947).

17. U.S. CONST. amend. VI. Federal jurors are selected pursuant to the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1877, which excludes from service on grand and petit juries, among others, persons unable to read, write, understand or speak English; and those people

plicable to state prosecutions in the grand[18] and petit juries.[19] In addition, the Eighth Amendment protection against infliction of cruel and unusual punishments[20] has afforded an additional basis for review of state jury selection procedures in capital cases, a significant portion of the Court's caseload in recent years.

1. *Death Qualification of Jurors in State Capital Trials*

The leading case on death qualification, or the process of qualifying prospective jurors in capital murder prosecutions in which the sentence of death is sought by the state, is *Witherspoon v. Illinois*.[21] In *Witherspoon*, the Court effectively adopted a bright line rule limiting the state trial court's right to exclude from jury service those jurors who expressed general objections or concerns regarding imposition of the death penalty or capital punishment, holding that exclusion is proper only when the prospective juror would fail to follow the law or properly apply the law to the evidence in order to ensure that the death

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incapable, "by reason of mental or physical infirmity, to render satisfactory jury service." Id. § 1865(b)(2-4).

18. *E.g.*, Castaneda v. Partida, 430 U.S. 482, 492-93 & n.12 (1977) (tracing history of Court's holding that exclusion of ethnic minorities from grand jury service violates right to due process in criminal prosecution to Bush v. Kentucky, 107 U.S. 110 (1883) and applying holding to African and Hispanic Americans).

19. In Strauder v. West Virginia, 100 U.S. 303 (1879), the Court invalidated a West Virginia statute which restricted jury eligibility to whites, excluding service by otherwise qualified African-Americans. Similarly, in Taylor v. Louisiana, 419 U.S. 522 (1975), the Court held that a system of exclusion of female juries utilized in Louisiana effectively deprived criminal defendants of a fair cross-section of the community in the jury pool from which jury panels were drawn, applying the Sixth Amendment guarantee as a constitutional basis for invalidation of this procedure.

20. U.S. CONST. amend. VIII.

21. 391 U.S. 510 (1968). Arkansas follows the *Witherspoon* formulation in directing trial courts to exclude those prospective jurors from service in capital cases whose views on the death penalty would preclude them from fairly performing the fact-finding function on either the question of guilt or innocence or the determination of sentence. *See, e.g.*, Van Cleave v. State, 268 Ark. 514, 520, 598 S.W.2d 65, 68-69 (1980). *Witherspoon*, however, does not command express state compliance with the minimal constitutional standard imposed; a state could afford the accused greater protection as a matter of state law or procedure by declining to authorize exclusion of a juror based on his or her beliefs or opposition to the imposition of the death penalty, following the principle of application of alternative state constitutional, statutory, or procedural grounds recognized by the Court in Michigan v. Long, 463 U.S. 1032, 1039-42 (1983). States are generally free to provide a greater level of protection to criminal defendants than that mandated by the federal constitution, and the Supreme Court's death penalty jurisprudence reflects minimal standards for imposition of capital punishment, not maximum safeguards. California v. Ramos, 463 U.S. 992, 1013-14 (1983).

penalty would not be imposed.[22]

The Court affirmed its commitment to the principles enunciated in *Witherspoon* in *Adams v. Texas*.[23] There, the Court declined to uphold a Texas procedure construed as more restrictive than *Witherspoon*. *Adams* concerned the effect of certain juror responses to special issues and interrogatories propounded by the trial court during the punishment phase. The Texas procedure at issue in the case authorized the exclusion of jurors who would be "affected" in their deliberations by the possibility that their responses would result in imposition of the death penalty.[24]

Post-*Witherspoon* litigation in the Court has focused on implementation of the guarantee to a fair and impartial jury applied to capital cases. In subsequent decisions, the Court has notably held, without deviation, that improper exclusion of even a single *Witherspoon*-qualified juror requires that the death sentence eventually imposed be vacated without further showing of prejudice on the part of jurors ultimately serving in the capital trial.[25]

More recently, in *Gray v. Mississippi*[26] and *Ross v. Oklahoma*,[27] the Court considered the problem of preservation of error in the context of unused peremptories. In *Gray* the prosecution contended that since the state had unused peremptories that would have been used to remove a juror otherwise improperly excused by the trial judge in violation of *Witherspoon*, the error in the exclusion should be deemed harm-

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22. *Witherspoon*, 391 U.S. at 522 & n.12. The Court predicated its holding in *Witherspoon* on the accused's Sixth Amendment right to a jury fairly representative of divergent attitudes on the critical issue of capital punishment in the community. Thus, the ruling rests on a Sixth Amendment jury composition guarantee rather than upon a claim that imposition of the penalty would violate the Eighth Amendment proscription of cruel and unusual punishments.

23. 448 U.S. 38 (1980). The Texas statute at issue expressly provided for the exclusion of any juror who could not affirmatively swear on his or her oath that the fact that the punishment of death might be imposed as a result of responses given to the special issues posed during the punishment phase deliberations would not "affect" their deliberations. TEX. PENAL CODE ANN. § 12.31 (West 1974). The Court concluded that this oath would serve to unduly restrict jury service in excluding jurors who candidly admitted that the severity of the potential penalty would cause them to take their duties more seriously.

24. 448 U.S. at 45.

25. *E.g.*, Davis v. Georgia, 429 U.S. 122 (1976); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969) (holding that the test applied for review of *Witherspoon* error is whether or not a single member of the venire has been improperly excluded; if so, subsequent imposition of death penalty cannot stand).

26. 481 U.S. 648 (1987).

27. 487 U.S. 81 (1988).

less.[28] However, in *Ross* the Court declined to hold that the trial court's error in failing to excuse a juror properly challenged for cause required reversal where the defense counsel struck the juror peremptorily, but neither exhausted its allotment of peremptories nor demonstrated that it had been forced to accept an objectionable juror due to the trial court's refusal to exclude the tainted juror.[29]

In addition, another line of Supreme Court decisions has dealt with the deference to be accorded state trial judges in the implementation of *Witherspoon* in light of actual responses given by prospective jurors during voir dire. In *Wainwright v. Witt*,[30] the Court concluded that the trial court is afforded the most reliable perspective for determining whether or not views expressed by a juror generally troubled by potential imposition of the death penalty will compromise the juror's ability to sit fairly in judgment.[31] This posture was reaffirmed a year later in *Darden v. Wainwright*[32] where the trial court excluded a prospective juror whose religious values indicated an inability to serve as a fair and impartial juror despite failure to couch an excluding question in the correct language under *Witherspoon*.[33]

In perhaps the most interesting challenge to state death penalty prosecutions suggested by the holding in *Witherspoon*, the Court held in *Lockhart v. McCree*[34] that death qualification of a jury for service

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28. 481 U.S. at 664-66 & nn.14-16.

29. 487 U.S. at 88-89. The Court relied on Oklahoma law for the proposition that the defense must demonstrate that it was deprived of a fair trial by an impartial jury because the use of a peremptory to remove a juror who should have been excused by the trial court upon challenge ultimately forced the defendant to accept another objectionable juror who could not be excluded because all peremptory challenges had been exhausted. *Id.* at 89. Arkansas applies a similar rule for preservation of error in instances of trial court abuse of discretion for failing to excuse an objectionable juror. *E.g.*, Conley v. State, 270 Ark. 886, 888-89, 607 S.W.2d 328, 329-30 (1980).

30. 469 U.S. 412 (1985).

31. *Id.* at 430. Determinations by state judges as to potential juror performance in such circumstances were deemed to constitute "findings of fact" entitled to deference by federal habeas courts in applications for habeas relief brought pursuant to 28 U.S.C. § 2254(d). *Id.* at 426-31. *See also* O'Bryan v. Estelle, 714 F.2d 365, 392-93 (5th Cir. 1983) (Higgonbotham, J., concurring specially) (setting forth factors which favor deference to trial court determinations on juror qualification for service in capital cases when *Witherspoon* issues raised).

32. 477 U.S. 168 (1986).

33. *Id.* at 175-78. Moreover, defense counsel did not expressly object to the exclusion of the prospective juror following the trial court's questioning of the juror, which disclosed that he had religious convictions that would impair his ability to consider the option of imposition of the death penalty as a punishment in the case. *Id.* at 178.

34. 476 U.S. 162 (1986). Originally, the respondent in the case had been another defendant, Grigsby, who was murdered in his cell prior to the case being argued before the Supreme Court. McCree was substituted as a party, having prevailed on a similar claim in the consolidated

during the punishment phase of a capital trial did not result in the impanelment of a jury not representing a fair cross-section of the community for purposes of determining the guilt or innocence of the accused. Significantly, the Court concluded that the Sixth Amendment guarantee to a "fair cross-section" of the community as the standard for jury composition does not apply to petit juries, as opposed to jury panels or the venire.[35] Perhaps more significantly, the Court noted that the "cross-section requirement" related to inclusion or exclusion of distinctive groups of persons within the community rather than sentiment as to any particular political, religious, or social belief shared by persons.[36]

Finally, in *Morgan v. Illinois*,[37] the petitioner argued successfully that he was improperly denied the right to make a specific inquiry of a prospective juror as to whether he would "automatically" impose the death penalty upon conviction for capital murder.[38] Morgan relied on the Court's prior decision in *Ross v. Oklahoma*,[39] in which the Court addressed the issue of whether a party must exhaust all peremptories in order to preserve error. The complained-of error in *Ross* consisted of the trial court's refusal to exclude an unqualified juror. The juror involved in *Ross* was arguably unqualified under *Witherspoon* because he affirmed that he would vote to impose the death penalty automatically upon conviction.[40] The *Ross* Court observed that had the juror "sat on

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case below. Robert M. Berry, *Remedies to the Dilemma of Death-Qualified Juries*, 8 U. ARK. LITTLE ROCK L.J. 479, 479 n.1 (1985-86). *See also* Robert S. Irving & David Schoen, Survey, *Criminal Procedure*, 9 U. ARK. LITTLE ROCK L.J. 129, 134-36 (1986-87) (commenting on Lockhart v. McCree).

35. 467 U.S. at 173-74. In so holding, the Court essentially recognized that random selection of jurors, followed by the selection process and including exercise of peremptories by the parties, would almost necessarily result in a jury ultimately seated that does not reflect a cross-section of the population of the community.

36. *Id.* at 174-77.

37. 112 S. Ct. 2222 (1992).

38. 112 S. Ct. at 2226, 2228-30. Justice White, writing for the majority, observed that four distinct issues were presented for resolution of the petitioner's due process claim:

> whether a jury provided to a capital defendant at the sentencing phase must be impartial; whether such defendant is entitled to challenge for cause and have removed on the ground of bias a prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions of law; whether on *voir dire* the court must, on defendant's request, inquire into the prospective jurors' views on capital punishment; and whether the *voir dire* in this case was constitutionally sufficient.

Id. at 2228. The majority answered the first three inquiries in the affirmative before addressing the adequacy of voir dire in petitioner Morgan's case. *Id.* at 2229-30.

39. *Supra* notes 26-28, and accompanying text.

40. 108 S. Ct. at 2276.

the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned."[41] The majority in *Morgan* observed that *Ross* had implicitly recognized a right of capital defendants to inquire as to the predisposition of prospective jurors in imposition of the death penalty as a punishment and that a denial of specific examination on this point constituted reversible error, foreshadowing its reversal of the Illinois Supreme Court in Morgan's case.[42]

This term, the Court's docket includes another interesting post-*Witherspoon/Adams* challenge to death qualification of capital juries. In State v. Sullivan, 596 So. 2d177 (La.1990), *cert granted*, 61 U.S.L.W. 3301 (U.S.)(Oct. 19, 1992)(No. 92-5129), the petitioner argues that exclusion of jurors expressing reservations about capital punishment, but who affirm their ability to sit impartially in the guilt/innocence phase of a bifurcated trial violates his Sixth Amendment rights. *See* Sullivan, 596 So.2d at 187 (La. 1992). The grant of *certiorari* does not necessarily mean that the Court will change its approach to death qualification and impose new rules favoring capital defendants. Nevertheless, review of this contention could lead to modification of the Court's previous holding that so-called "death qualified" juries are not inherently prone to conviction. *See* Lockhart v. McCree, 476 U.S. 162, 177-84 (1986); State v. Ward, 483 So.2d 578 (La1986), *cert. denied*, 479 U.S. 871 (1986).

2. *Exclusion of Minority Jurors Through use of Peremptories*

The most active area of Supreme Court decision-making in the

41. *Id.* at 2277.

42. 112 S. Ct. at 2232 n.8. *See also*, Jackson v. Illinois, 113 S.Ct. 32 (1992) (remanded to the Supreme Court of Illinois for further consideration in light of Morgan v. Illinois, 112 S.Ct. 1222 (1992).

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area of jury composition in recent years has been in the eventual recognition of the potential for abuse in jury selection inherent in the unfettered exercise of peremptory challenges to exclude all members of distinctive groups from jury service. In *Swain v. Alabama*,[43] the Court expressly concluded that exclusion of minority jurors through the exercise of peremptory challenges resulted in a violation of equal protection under the Fourteenth Amendment, while also concluding that in order to establish such a violation, the defendant must show that such exclusion by the state followed a pattern of discriminatory use of peremptory challenges.[44] While recognizing that access to peremptory challenges is not a matter of constitutional dimension,[45] the Court, nevertheless, recognized that certain uses of peremptories, such as in a patently discriminatory fashion, would raise constitutional issues.[46]

The requirement that the defense demonstrate a pattern of discriminatory use of peremptory challenges proved functionally unworkable, however, as the Court ultimately recognized in *Batson v. Kentucky*.[47] The *Batson* Court concluded that an accused could demonstrate a prima facie case of discriminatory use of peremptory challenges by the State through the prosecutor's exclusion of members of the defendant's "cognizable racial group," in addition to any facts or circumstances indicating purposeful discrimination on the part of the State.[48] Once the defendant makes the prima facie showing, the burden

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43. 380 U.S. 202 (1965).

44. *Id.* at 223-26. The Court reasoned, "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." *Id.* at 221. Instead, the defendant must demonstrate systematic exclusion of minority jurors. *Id.* at 227-28.

45. *Id.* at 219; *See also* Ross v. Oklahoma, 108 S. Ct. 2273, 2278 (1988).

46. 380 U.S. at 219. In Strauder v. West Virginia, 100 U.S. 303 (1880) the Court struck a state statute qualifying only white persons for jury service. *Swain*, 380 U.S. at 203. The *Swain* Court adhered to the principle underlying this earlier decision when Justice White, writing for the majority, observed: "Although a Negro defendant is not entitled to a jury containing members of his race, a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Id.* at 203-04. This approach recognizes the violation of the Fourteenth Amendment, however, as one functionally implicating the civil rights of prospective jurors struck on the basis of race rather than defendants asserting a right to fair and impartial jurors as a component either of the Sixth Amendment guarantee or due process.

47. 476 U.S. 79, 92-95 & n.17 (1986) (holding that the defendant could establish a prima facie case of equal protection violation based on the prosecutor's exercise of peremptories to exclude members of the defendant's race from the jury in defendant's case without reference to pattern of discriminatory use of peremptories). *See generally* Thomas N. Carpenter, *A Justifiable Peremptory: The Oxymoron of Jury Selection*, ARK. LAW., Fall 1992, at 24-27.

48. *Id.* at 96-97. For a discussion of the implementation of *Batson* see Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v. Kentucky, 25 WILLAMETTE

then shifts to the prosecution to demonstrate a "neutral" explanation for the exercise of peremptory strikes against minority jurors.[49]

Batson does not address the proper action to be taken by the trial court upon its finding that the prosecution has not effectively rebutted the charge once the burden has shifted,[50] but presumably, the declaration of a mistrial would be a proper remedy. Such a mistrial declaration, however, would appear to raise serious questions about the "manifest necessity" required for retrial without violation of the double jeopardy protections afforded by the federal constitution[51] since the prosecution could always avoid an unfavorably constituted jury drawn from a randomly selected panel simply by violating *Batson* and forcing the defense counsel to move for mistrial.[52] The Arkansas Supreme Court, in *Pacee v. State*,[53] resolved this problem in favor of holding struck panelists until such time as the jury had been sworn. If the *Batson* challenge proves successful, the improperly excluded venirepersons can then be seated, eliminating the need for mistrial.

The *Batson* decision left other questions open that are being answered in post-*Batson* litigation. Perhaps most interestingly, the Court's posture in the case necessarily raises the issue of other circumstances in which prohibition against racially discriminatory use of peremptory challenges might apply. Since *Batson* was decided on equal protection grounds[54] instead of the fair trial or fair cross-section guarantees of the Sixth Amendment, and the discrimination was directed at a member of the venire rather than the accused, the opinion suggests that discriminatory use of peremptories in any context is constitutionally forbidden.

In fact, the prohibited state action actually lies in the trial court's exclusion of minority jurors as a result of counsel's determination of

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L. REV. 293 (1989), *cited with approval in* Pacee v. State, 306 Ark. 563, 567, 816 S.W.2d 856, 859 (1991).

49. 476 U.S. at 97-98 (observing that denial of discriminatory motivation alone is insufficient to rebut the prima facie case made by the accused).

50. In fact, the Court expressly declined to address the issue of appropriate remedies to be employed by state courts confronted by *Batson*-based objections to the prosecution's use of peremptory challenges in discriminatory fashion. 476 U.S. at 99 & n.24.

51. U.S. CONST. amend. V.

52. *See supra* note 46. In Oregon v. Kennedy, 456 U.S. 667 (1982), for instance, the Court held that prosecutor misconduct requiring defense counsel to move for mistrial—presumably waiving double jeopardy bar—could itself bar retrial if the prosecutor intended to goad the defendant into moving for a mistrial. *Id.* at 679.

53. Pacee v. State, 306 Ark. 563, 567, 816 S.W.2d. 856, 859 (1991).

54. 476 U.S. at 93 (involving a claim that arises under the Equal Protection Clause).

prospective jurors to be peremptorily removed from the panel. Thus, in two 1991 decisions, *Powers v. Ohio*[55] and *Edmonson v. Leesville Concrete Co.*,[56] the Court extended the underlying principles of the *Batson* holding. In the former case, the Court concluded that a *Batson* challenge should be sustained regardless of the race of the accused and that the rule of *Batson* relates to the discriminatory removal of minority jurors.[57] In *Edmonson*, it held that civil litigants were precluded from racially discriminatory use of peremptory challenges.[58]

Because the subjects of the discriminatory intent are excluded minority jurors, those jurors so excluded would logically have standing themselves to challenge the actions of the trial court[59] since they have actually suffered the complained-of injury. The important question left unresolved—whether or not the State may challenge an apparent violation of *Batson* by defense counsel in a criminal matter—was addressed recently by the Court in *Georgia v. McCollum*.[60] Since the *Batson* rationale permitted the unusual situation of vicarious assertion of federally protected rights, that is, the accused claiming injury to the excluded juror, the Court's resolution of this issue was certain to prove most interesting. Essentially, the Court was faced with the prospect of breaking with its post-*Batson* pattern of condemning discriminatory use of strikes or maintaining consistency in holding that a criminal defendant's use of peremptory challenges may, in fact, constitute state action. Eventually, the majority elected consistency over Justice O'Connor's spirited dissent in which she objected to the characterization of an accused's use of peremptories as state action.[61] Justice Thomas' thoughtful concurrence predicted an ultimate end to the use of peremptories, a

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55. 111 S. Ct. 1364 (1991).

56. 111 S. Ct. 2077 (1991).

57. 111 S. Ct. at 1366 (affirming that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and integrity of the court.").

58. 111 S. Ct. at 2087. A private litigant becomes a "state actor" when exercising a peremptory challenge, and consequently, a discriminatory intent in the decision to strike violates the Constitution. *Id.* at 2086-87.

59. Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970); *see also* Holland v. Illinois, 110 S. Ct. 803, 812 (1990) (Kennedy, J., concurring) (stating that the private litigant exercising peremptories in a discriminatory fashion might also be the subject of an action predicated on a conspiracy-to-violate-civil-rights theory brought by the excluded juror(s) as plaintiffs).

60. 112 S. Ct. 2348 (1992). *See also* Georgia v. Carr, 113 S.Ct. 30 (1992) (remanded to the Supreme Court of Georgia for further consideration in light of Georgia v. McCollumn, 112 S.Ct. 2348(1992)).

61. *Id.* at 2361 (O'Connor, J., dissenting).

prospect he noted as particularly unsatisfactory for black defendants.[62]

The difficulty posed by *Georgia v. McCollum* lies in the fact that the Court has persistently concluded that discriminatory exercise of peremptory challenges raises equal protection[63] rather than Sixth Amendment problems. Had the theory of prejudice been predicated on violation of fair cross-section requirements, then clearly the protection afforded by *Batson* would not have extended to vicarious assertion of the rights of excluded jurors by civil litigants or by the prosecution in attacking defense strategy in jury selection. Because the Sixth Amendment protection is limited to criminal prosecutions and extends only to the accused, the scope of asserting the rights of excluded minority jurors would not come into play. Rather, excluded jurors would retain their equal protection rights in asserting claims directly, as in *Carter v. Jury Commission of Greene County*,[64] and claims based upon the discriminatory use of peremptories affecting the fairness of trial would be reserved to the defense in criminal prosecutions.

However, in *Holland v. Illinois*,[65] the Court rejected a Sixth Amendment-based claim attacking discriminatory use of peremptories by the prosecution. Instead, it held that Sixth Amendment challenges are limited to state statutory schemes or procedures which limit service on the panel or venire, rather than on factors influencing the composition of individual petit juries, such that cognizable groups within the community are excluded from service. Thus, a state statute qualifying only white persons as jurors[66] or which unduly excludes females from jury service[67] frustrates a defendant's Sixth Amendment right discerned in *Holland* "to object to a venire that is not designed to re-

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62. *Id.* at 2359-60 (Thomas, J., concurring). Justice Thomas argued that the Court's *Batson* jurisprudence resulted in distorted priorities, elevating the rights of prospective jurors to sit on trial juries over the interest of criminal defendants in seeking to avoid prejudice-influenced verdicts. He noted that without admission of racial prejudice by prospective jurors during voir dire, there was a likelihood that a defendant could never fully develop a record sufficient to justify exclusion. Consequently, the accused would run the risk of prejudice contributing to conviction. *Id.* at 2360. Justice Thomas also observed: "Next will come the question whether defendants may exercise peremptories on the basis of sex. *See, e.g., United States v. DeGross*, 960 F.2d 1463 (9th Cir. 1992)." *Id.* at 2361.

63. *See Swain*, 380 U.S. at 203-04. *See also supra* notes 43-46 and accompanying text.

64. 396 U.S. 320 (1970).

65. 110 S. Ct. 803, 811 (1990) (holding that the petitioner "does not have a valid constitutional challenge *based on the Sixth Amendment*—which no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics.")

66. Strauder v. West Virginia, 100 U.S. 303 (1879).

67. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

present a fair cross-section of the community, whether or not the systematically excluded groups are groups to which he himself belongs."[68]

Once the issue focuses on the composition of the jury actually selected—pared by random selection, excusals of jurors for statutory disqualification, or by submission for cause by counsel, and by exercise of peremptories by the parties—the accused no longer enjoys a right to a fair cross-section of the community either in terms of race, gender representation, or community attitudes.[69] Instead, Justice Scalia's majority opinion in *Holland* recognizes that the source of constitutional violation in nonrepresentation of minorities on the jury ultimately selected flows from the discriminatory exercise of peremptories in violation of the Fourteenth Amendment[70] if the prosecution has used its peremptories to exclude jurors based on their race.[71]

One additional problem posed by *Batson* involved its application to cases finalized before the effective date of the decision.[72] In *Allen v. Hardy*[73] the Court rejected petitioner's reliance on *Batson* in a collateral attack upon his state court conviction, having lost his direct appeal in which he relied on the Court's prior holding in *Swain v. Alabama*.[74] The Court declined to apply *Batson* retroactively to cases already finalized in terms of direct appeal because it essentially announced a new rule of procedure, despite the fact that the substantive claim of discriminatory use of peremptories was properly advanced by the defend-

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68. 110 S. Ct. at 805.

69. Lockhart v. McCree, 476 U.S. 162 (1986) (stating the defendant is not entitled to a petit jury which includes jurors whose attitudes toward the death penalty are otherwise such as to disqualify them from service as fair and impartial jurors).

70. 110 S. Ct. at 806. Interestingly, Justice Scalia filed a strong dissent in *McCollum*, supporting the reasoning of Justice O'Connor in her dissent and pointedly observing the perverse logic necessitated by the prior decision in *Edmonson v. Leesville Concrete Co.*: "Barely a year later, we witness its reduction to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state." 112 S. Ct. at 2364.

71. 110 S. Ct. at 811 & n.3. (observing that the equal protection claim was not before the Court because defendant expressly relied on Sixth Amendment fair-trial theory and impliedly holding that equal protection claim might, nevertheless, have merit on facts of case).

72. Cases in which *Batson*-type claims had been raised prior to the decision and which had not been decided at the time of the decision were apparently accorded a window of opportunity by the Court in Ford v. Georgia, 111 S. Ct. 850 (1991) where it recognized that a litigant asserting a claim of discriminatory use of peremptories could rely on the new holding and the lowered threshhold of proof set forth in *Batson*.

73. 478 U.S. 255 (1986).

74. *Id.* at 257-58. The Court noted that the standard employed in *Swain* required proof of a systematic exclusion of minority jurors through exercise of peremptories, while *Batson* had altered the procedure involved to facilitate claims based only on a showing that minority jurors had been removed through exercise of peremptories in the accused's case alone. *Id.* at 258-60.

ant in his direct appeal.[75] Consequently, the petitioner lost because he could not rely on the beneficial changes in procedural law adopted by the Court in *Batson* and could not meet the more rigorous standard of proof under *Batson*'s predecessor, *Swain*.[76]

If there is a way around the non-retroactivity of *Batson* for future litigants who were convicted by unconstitutionally-constituted petit juries, that way appears to have been successfully pursued by at least one federal habeas petitioner. The Eleventh Circuit affirmed habeas relief granted in *Hollis v. Davis*[77] and reversed the trial court's denial of relief in *Horton v. Zant*[78] based on application of the *Swain* standard in pre-*Batson* cases not entitled to reliance on the new rule announced there. In *Hollis*, moreover, the court recognized a claim of ineffective assistance resulting from the trial counsel's failure to challenge the improper exclusion of minority jurors as "cause" for the defendant's procedural default on this issue in his direct appeal in state proceedings.[79]

In *Horton*, a capital case in which the death penalty had been imposed, the Court did not rely on ineffective assistance to excuse state procedural default, but held that on application of the *Swain* standard, the petitioner had demonstrated a racially discriminatory pattern in the exercise of peremptories by the prosecution.[80]

Hollis and *Horton* demonstrate that the non-retroactivity of *Batson*, while proving a problem in terms of proof, does not foreclose successful claims relating to the discriminatory use of peremptory challenges, even in cases pre-dating both *Swain* and *Batson*, particularly since the complaint in *Hollis* focused on his 1959 burglary conviction. Here, the Court's long-held position on racial discrimination in jury selection serves to demonstrate counsel's failure to properly protect the

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75. *Id.* at 258-60. The "new rule" language of *Allen* is consistent with the general approach to retroactivity later announced in Teague v. Lane, 489 U.S. 288 (1989).

76. One might note the text of the majority's concluding footnote in *Batson*: "To the extent that anything in *Swain v. Alabama* is contrary to the principles we articulate today, that decision is overruled." 476 U.S. at 100 n.25 (citation omitted).

77. 941 F.2d 1471 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1478 (1992).

78. 941 F.2d 1449 (11th Cir. 1991).

79. 941 F.2d at 1476-77. The court relied on Murray v. Carrier, 477 U.S. 478, 488 (1986) in holding that an ineffective assistance claim may afford an alternative route to federal review of constitutional claims defaulted in the state trial and appellate process, especially where the State conceded that further efforts to litigate those claims in state court would be futile. 941 F.2d at 1476 n.4.

80. 941 F.2d at 1453-60. In an appendix to the *Horton* opinion, the Court set forth the evidence of a discriminatory pattern in the use of peremptories by the trial prosecutor which supported Horton's *Swain* claim. *Id.* at 1468-70 app.

client's right to a non-discriminatorily drawn venire and jury. Assuming that counsel should have been aware of this history, dating at least from the 1879 decision in *Strauder*, failure to timely object to the discriminatory use of peremptories may serve as a basis for a claim of deficient representation cognizable under *Strickland v. Washington*.[81]

The possibility for successful litigation in pre-*Batson* discrimination claims based on ineffective assistance claims no doubt will be applauded by many inmates and prove a source of despair for their counsel, now considered—retroactively—ineffective for failing to press claims of discrimination in use of peremptory challenges by state prosecutors.

3. *Scope of Voir Dire Examination*

Although the scope of voir dire is generally committed to the discretion of the trial court and raises few constitutional questions, at least one fairly recent decision of the Court demonstrates that some limitation on voir dire may constitute a constitutional violation. In *Turner v. Murray*,[82] the Court held that in an interracial capital case, the trial court's refusal to permit inquiry concerning racial prejudice of prospective jurors and the potential impact of juror prejudice on fact-finding violated the accused's constitutional right to an impartial jury.[83] The Court distinguished the case from its prior holding in *Ristaino v. Ross*,[84] in which the Court had rejected a constitutionally-mandated right to such questioning of prospective jurors in a non-capital case.[85] That decision had distinguished prior holdings of the Court, suggesting that inquiry into racially prejudicial attitudes of prospective jurors

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81. 466 U.S. 668 (1984). In fact, trial counsel in *Hollis* apparently contended that he did not believe that in 1959 it was illegal to exclude African-Americans from jury service in Alabama. It is clear, however, that the Supreme Court thought that it was, based upon Strauder v. West Virginia, 100 U.S. 303 (1879) and Ex parte Virginia, 100 U.S. 339 (1880). Counsel's misperception indicated a deficiency in his understanding of constitutional law affecting the competence of his representation. This is particularly so since the Court had also, in Norris v. Alabama, 294 U.S. 587 (1935), expressly considered the question of exclusion of minority jurors in counsel's own jurisdiction and held that systematic exclusion was unconstitutional. *See Hollis*, 941 F.2d at 1477 & nn.5-7.

82. 476 U.S. 28 (1986).

83. *Id.* at 36 & n.9. The Court expressly refers to both the Sixth Amendment guarantee to impartial jury and the Fourteenth Amendment guarantee of due process.

84. 424 U.S. 589 (1976).

85. In *Ristaino*, the Court had concluded that the facts that the accused is black and the victim white would not demonstrate a "constitutionally significant likelihood that, absent questioning about racial prejudice" a fair and impartial jury would not be selected. 424 U.S. at 596.

would be essential to the seating of a fair jury in some instances.[86]

Assuming that the Court's decision in *Turner v. Murray* reflects heightened concern for the accused's right to examine prospective jurors because of the potential for infliction of the death penalty,[87] the later holding in *Morgan v. Illinois*[88] likely can be understood as reflecting that same enhanced concern, unless *Turner* simply represents a particular sensitivity to matters of racial discrimination on the part of the Court.[89]

Clearly, the Court's subsequent decision in *Mu'Min v. Virginia*[90] suggests that *Turner v. Murray* is limited to the inquiry of potential racially discriminatory attitudes on the part of prospective jurors in capital cases. *Mu'Min* arose in the context of a capital prosecution in which the death penalty was imposed following substantial pre-trial publicity concerning the crime. While the majority adhered to the traditional view of voir dire as "serv[ing] the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges,"[91] it, nevertheless, held that trial counsel was not impaired by the trial court's limitation on voir dire concerning prejudgment or bias resulting from pre-trial publicity. The trial court had conducted an examination into potential prejudgment by asking the panel, and then subpanels of four venirepersons, whether or not they were influenced by the publicity, accepting silence on the part of pro-

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86. *E.g.*, Ham v. South Carolina, 409 U.S. 524 (1973) (involving issues relating to possible retaliatory basis for prosecution of black civil rights worker charged with possession of marijuana, as well as civil rights activities, which might have resulted in unfair jury selection process in absence of specific questioning); Aldridge v. United States, 283 U.S. 308 (1931). *But see* Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981) (finding no constitutional "presumption" of juror bias based on disparate races of jurors, defendants, and victims).

87. *See Turner*, 476 U.S. at 36-37. The Court, relying on its prior decision in *Ham*, limited application of this rule to capital cases and other prosecutions in which special circumstances of the case suggest the potential infection of the jury trial process as a result of racially discriminatory attitudes held by jurors.

88. *Supra* notes 37-42 and accompanying text.

89. This suggestion is hardly supported by significant recent evidence apart from *Batson* and its progeny. For instance, when confronted with the specific claim that the death penalty has been imposed in a racially disparate fashion, the Court denied relief despite empirical support for the proposition that black defendants were more likely to suffer the death penalty in cases involving white victims than in other categories of cases. McCleskey v. Kemp, 481 U.S. 279 (1987) (explaining that in order to prevail on a claim of discriminatory application of penalty, individual accused must demonstrate that the penalty imposed was with discriminatory intent in his case).

90. 111 S. Ct. 1899 (1991).

91. *Id.* at 1908. Similarly, in *Rosales-Lopez*, Justice White had observed that "lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts." 451 U.S. at 188.

spective jurors as an affirmation of impartiality. The Court did conclude that evidence of extensive public outcry or passion might require more extensive examination than that conducted at Mu'Min's state trial.[92]

One conclusion to be drawn from *Mu'Min* is that apart from inquiry about racial attitudes of jurors in capital cases involving potential race-based decision-making in the punishment phase,[93] few areas of potential inquiry suggest constitutional issues absent a showing of some actual prejudice resulting from curtailment of voir dire or the likelihood of a constitutionally impermissible potential for prejudice—such as a wholly inadequate inquiry in potential prejudice resulting from pre-trial publicity in a notorious case.

II. ARKANSAS LAW RELATING TO VOIR DIRE AND JURY SELECTION

Analysis of Arkansas law governing the jury selection process may be undertaken by evaluating four different areas of court decisions and applicable statutory and rules provisions. These include: a) delegation of supervision of the jury selection process to the trial court; b) compliance with constitutionally-based decisions of the United States Supreme Court; c) exercise of discretion by the trial court in exclusion of prospective jurors upon submission for cause; and d) compliance with procedural requirements for preservation of error in the jury selection process.

A. Trial Court Responsibility for Jury Selection

Provisions of the Arkansas Code define qualifications of jurors;[94] determine exemption of certain persons from service;[95] provide for the

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92. 111 S. Ct. at 1907. The test applied by the *Mu'Min* Court to determine if voir dire is constitutionally inadequate is whether manifest error in the conduct of voir dire is demonstrated by a showing that jurors had "fixed opinions" on the issue of guilt such that they could not sit as fair and impartial jurors. *Id.* at 1899. Justice Kennedy, in his dissent, found the trial court's acceptance of silence as an affirmative response on the issue of impartiality to be inadequate and urged individual inquiry of jurors exposed to such potentially damaging pretrial publicity. *Id.* at 1919 (Kennedy, J., dissenting).

93. The *Turner* majority concluded that the error in depriving the accused of full inquiry into racially discriminatory attitudes of prospective jurors would not infect the integrity of the decision to convict ultimately reached by the jury, as seated, because the jury in the guilt phase "had no greater discretion than it would have had if the crime charged had been noncapital murder." 476 U.S. at 37-38.

94. ARK. CODE ANN. §§ 16-31-101 to-102 (Michie 1987).

95. ARK. CODE ANN. § 16-31-103 (Michie Supp. 1991).

means of selection and summoning of petit jurors for service in criminal trials;[96] provide for the examination of jurors;[97] and provide for the challenge of jurors in criminal trials.[98]

In addition, two provisions of the *Arkansas Rules of Criminal Procedure* specifically govern the process of jury selection in criminal trials. Rule 32.1 provides for the use of jury questionnaires to elicit basic information concerning prospective jurors.[99] Rule 32.2 provides a framework for the commencement of voir dire and directs certain inquiries to be made by the trial court.[100]

Within the framework provided by the applicable statutory and rules provisions, Arkansas law commits the supervision of the jury selection process to the trial court. Generally, the determination of the extent and scope of voir dire examination is committed to the trial court's sound exercise of discretion.[101] The parameters of the exercise of discretion in limiting voir dire may to some extent be discerned from the decisions of the Arkansas appellate courts.

In *Van Cleave v. State*[102] the state supreme court discussed certain principles for the conduct of voir dire by counsel. The court advised that voir dire does not simply serve to permit counsel to "get acquainted" with the jury,[103] and the trial court's restriction on voir dire by defense counsel was upheld as a proper exercise of discretion. The decision rests in part on defense counsel's strategy in relying only on a general plea of not guilty, rather than developing an affirmative defense or other specific defense which might compel greater latitude in counsel's discussions with jurors.[104] In this sense the case was distinguishable from *Fauna v. State*,[105] a reversal of the same trial court achieved

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96. ARK. CODE ANN. §§ 16-32-202 to-203 (Michie 1987).

97. ARK.. CODE. ANN. § 16-33-101 (Michie 1987).

98. ARK. CODE ANN. §§ 16-33-302 to-308 (Michie 1987).

99. ARK. R. CRIM. P. 32.1 requires juror disclosure prior to the commencement of the selection process of the following information about each prospective juror: age; marital status; extent of education; occupation of juror and spouse; and prior jury service.

100. ARK. R. CRIM. P. 32.2(a) requires the trial court to "initiate the voir dire examination by: (i) identifying the parties; and (ii) identifying the respective counsel; and (iii) revealing the names of those witnesses whose names have been made known to the court by the parties; and (iv) briefly outlining the nature of the case." The court is then accorded discretion to conduct further investigation or permit additional examination by the parties or counsel. ARK.. R. CRIM. P. 32.2(b).

101. Bryant v. State, 304 Ark. 514, 803 S.W.2d 546 (1991) (applying Rule 32.2).

102. 268 Ark. 514, 598 S.W.2d 65 (1980).

103. *Id.* at 518, 598 S.W.2d at 67.

104. *Id.*

105. 265 Ark. 934, 582 S.W.2d 18 (1979).

by the same defense counsel who represented Van Cleave the preceding year in which a defense of insanity had been interposed, and the trial court's abrupt limitation on questioning to the juror's ability to follow the law was deemed inadequate to permit counsel to fully explain the defensive theory.[106]

The supreme court explained the trial court's discretion in controlling voir dire in *Johnson v. State*[107] as follows: "[t]he extent and scope of voir dire examination is largely a matter of judicial discretion and boundaries of that discretion are rather wide. The restriction of voir dire examination will not be reversed on appeal unless that discretion is clearly abused."[108] The difficulty in defining precisely the parameters of voir dire in all cases had previously been noted by the court in *Jones v. State:* "[T]he range of permissible inquiries and the diversity of legitimate questions are so great as to make it impossible to lay down rigid rules governing counsel's examination of jurors."[109]

The breadth and duration of voir dire, therefore, rest within the peculiar exercise of the trial court's discretion, and limits imposed by the court will likely reflect prior experience and perception of counsel's understanding of the process and skill in conducting examination as an important element of the trial process.

What is clear is that absent an abuse of discretion in limiting trial counsel's examination of the prospective jurors, the trial court's action will not result in reversal. For example, in *Novak v. State*,[110] the court held that defense counsel's attempt to bind prospective jurors to vote for acquittal if the State failed to prove all elements of its case was improper and that the trial court did not abuse its discretion in denying the questioning.[111] Similarly, when counsel then tried to explore the jury's response to a failure of proof on the predicate felony in the capital case in which the murder rested on proof of that underlying felony, the trial court sustained the prosecutor's objection to the form of the question. Because counsel did not attempt to rephrase the question and moved on to other matters, the court held that no error attended the

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106. *Id.* at 936, 582 S.W.2d at 19.

107. 298 Ark. 617, 770 S.W.2d 128 (1989).

108. *Id.* at 623, 770 S.W.2d at 131.

109. 283 Ark. 308, 312, 675 S.W.2d 825, 827 (1984). The court held that no abuse of discretion was committed by the trial court in permitting the prosecutor to inquire as to whether or not a juror might "block out" the testimony of the State's key witness, an accomplice who had already been convicted of the offense.

110. 287 Ark. 271, 698 S.W.2d 499 (1985).

111. *Id.* at 274-75, 698 S.W.2d at 502.

trial court's exercise of discretion in sustaining the objection.[112] This holding suggests the importance of pursuing legitimate lines of examination—here, the jurors' understanding of the allocation of the burden of proof as to each element of the capital offense charged—in order to preserve error in the trial court's limitation of defense counsel's examination.

Some limitations on the exercise of discretion apart from abuse in terms of improper limitation on explanation of the theory of case are clearly imposed by case law. For instance, while the conduct of the examination rests within the trial court's supervisory role over the trial process, certain requirements imposed by statute or rule cannot be disregarded by a trial court without incurring reversal. For example, in *Chenowith v. State*,[113] a leading case on conduct of the jury selection process, the court addressed two important aspects of the process. First, while the accused is accorded a right of individual voir dire examination of prospective jurors, the court noted that the trial court retains discretion to permit more than one juror to be subjected to examination at the same time.[114] Second, the court affirmed the defendant's statutory right to exercise his peremptory challenge discretion following the prosecutor's decision not to exercise a strike as to the particular juror,[115] a procedure which precludes the accused from having to exercise a peremptory against a prospective juror who would otherwise be struck by the State and avoiding the intellectually interesting phenomena of "double strikes."

Consequently, while the trial court retains considerable control over both the selection process and the content and duration of voir dire examination, this control is not without limitations. Undue restriction of examination or violation of statutorily-prescribed rights accorded to the accused may prove grounds for reversal of the exercise of discretion by the trial judge.

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112. *Id.* at 275, 698 S.W.2d at 502.

113. 291 Ark. 372, 724 S.W.2d 488 (1987). *See* Pamela J. Bryan, Note, *Peremptory Challenges in Felony Prosecutions*, 10 U. ARK. LITTLE ROCK L.J. 415 (1988) (commenting on *Chenowith*).

114. 291 Ark. at 378, 724 S.W.2d at 491-92. *See also* Ford v. State, 276 Ark. 98, 104, 633 S.W.2d 3, 7 (1982) (holding right to individual voir dire in capital case may be waived by defendant who acquiesces in different procedure imposed by trial court).

115. 291 Ark. at 375, 378, 724 S.W.2d at 490-92. This procedure is prescribed by statute. ARK. CODE ANN. § 16-33-303(c) (Michie 1987).

B. Application of Federal Constitutional Jury Selection Law

Arkansas has expressly either followed Supreme Court precedent or applied similar approaches with respect to death qualification of juries, redress of discriminatory use of peremptory challenges by the prosecution, and inclusion of questioning regarding racial attitudes of jurors in the examination process when applicable.

1. *Death Qualification in Capital Cases*

Arkansas has clearly adopted Supreme Court holdings requiring proper death qualification of jurors who will serve in capital trials. In *Van Cleave v. State*,[116] however, the court observed, while expressly recognizing the applicability of the holding in *Witherspoon* to Arkansas capital prosecutions, that imposition of a life sentence rather than death by an improperly constituted capital jury moots any issue related to a *Witherspoon* violation since the defendant apparently suffered no prejudice given the lesser sentence imposed.[117]

Moreover, in *Coulter v. State*,[118] the court affirmed application of *Witherspoon*, but applied *Wainwright v. Witt*[119] in deferring to the trial court's determination that a juror's equivocal responses to questioning and negative attitudes toward the death penalty justified his exclusion from a capital jury considering a case involving the rape and murder of a five year old child.[120] In *Witt*, the Supreme Court had noted the superior position of the trial court in evaluation of juror attitudes and responses in making the determination of whether or not the juror could be expected to serve fairly and follow the law.[121]

2. *Discriminatory Use of Peremptory Challenges*

Arkansas has traditionally given deference to the constitutional prohibition on exclusion of minority jurors from service on account of race. For instance, in *Williams v. State*[122] the court held that the accused had successfully demonstrated error in the process of selection of the venire in a since-discarded system of selection by jury commission-

116. 268 Ark. 514, 520, 598 S.W.2d 65, 69 (1980).
117. *Id.* (citing Tanner v. State, 259 Ark. 243, 532 S.W.2d 168 (1976)).
118. 304 Ark. 527, 804 S.W.2d 348 (1991).
119. 469 U.S. 412 (1985).
120. 304 Ark. at 531-32, 804 S.W.2d at 350-51.
121. 469 U.S. at 424-26.
122. 254 Ark. 799, 496 S.W.2d 395 (1973).

ers, adopting the reasoning of the United States Supreme Court in *Swain v. Alabama*.[123]

In *Mitchell v. State*,[124] the court recognized that the constitutional right to a jury not tainted by discriminatory exclusion of minority jurors was fundamental, and error in the improper exclusion of even a single minority juror could not be subjected to harmless error analysis.[125]

The proper mode for preservation of *Batson* error was set forth by the state supreme court in *Colbert v. State*.[126] Following the prosecution's exercise of its peremptory challenges, defense counsel should interpose in timely fashion a *Batson* objection to exclusion of minority jurors on account of race.[127] If the defendant makes a showing that the circumstances raise an inference of racially discriminatory intent in the exercise of the peremptory challenge process, the burden shifts to the State to provide a racially neutral explanation for its exercise of its strikes. The trial court must then conduct a "sensitive inquiry" into the adequacy of any explanation offered by the State if it only superficially justifies the action.[128] The trial court's determination must include a statement of findings on the record to facilitate appellate review.[129] In *Colbert*, the prosecution struck two black jurors without conducting any examination of them personally, and later, its basis for exercising peremptory challenges against them was shown to be inadequate. In such a case of inadequate explanation, the trial court's exercise of discretion in accepting the prosecutor's response is subject to reversal.[130]

In three significant post-*Colbert* decisions, the Arkansas supreme court has more fully developed the parameters of the rights available under *Batson*. The prosecutor struck five minority jurors in *Pacee v.*

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123. *Id.* at 801, 496 S.W.2d at 397.

124. 295 Ark. 341, 750 S.W.2d 936 (1988). *See* Joe Marcum, Note, Mitchell v. State: *Continuing Erosion of the Peremptory Challenge in Equal Protection Litigation*, 42 ARK. L. REV. 1093 (1989) and C. Michael White, Survey, *Criminal Procedure, Discriminatory Use of Peremptory Challenges*, 12 U. ARK. LITTLE ROCK L.J. 193, 200 (1989) (both commenting on holding in *Mitchell*).

125. 295 Ark. at 351, 750 S.W.2d at 941.

126. 304 Ark. 250, 801 S.W.2d 643 (1990) (modifying "sensitive inquiry" requirement of *Mitchell*).

127. 304 Ark. at 254, 801 S.W.2d at 645.

128. *Id.* at 255, 801 S.W.2d at 646.

129. *Id.*

130. The *Colbert* court held that the proper standard for review of the trial court's ruling in response to the prosecution's explanation for its use of peremptory challenges to remove minority jurors is whether the trial court's findings are clearly against a preponderance of the evidence. *Id.*

State,[131] but did not remove all minority jurors from the panel. Thus, the accused was not tried before an all-white jury, while the State was left with unused strikes.[132] Nevertheless, defense counsel argued on appeal that the five struck jurors were excluded without having been interrogated by the prosecutor during voir dire, demonstrating that the grounds for exclusion must have been racially discriminatory. The supreme court rejected the argument.[133] Significantly, the court also rejected the State's argument on appeal that defense counsel had failed to make a timely objection to the exclusion of the jurors in waiting until after the jury had been selected. Instead, the court held that a *Batson* objection is timely if made prior to the jury being sworn.[134]

The supreme court ordered reversal in *Watson v. State*[135] based on the trial court's error in compelling defense counsel to argue his claim of *Batson* error before the jury rather than permitting the potentially inflammatory argument over racial discrimination to be made outside the jurors' presence.[136] Clearly, defense counsel should pursue the *Batson* objection outside the presence of the jury in order to avoid potential prejudice to the client flowing not only from the prosecution's exercise of peremptories, but also from the assertion of the *Batson* claim itself.

Finally, in *Walker v. State*,[137] the supreme court considered the claim of a *Batson* violation in the context of a capital prosecution in which the State had excluded some, but not all, minority jurors from the jury.[138] The court rejected defense counsel's argument that exclusion of minority jurors was improperly predicated on the prosecutor's perception that these jurors had reservations about imposition of the death penalty. In the absence of any record showing improper examination of the jurors during voir dire that would suggest racial animus, the supreme court concluded that exclusion of these jurors was clearly justified because the prosecutor was entitled to consider their attitudes toward imposition of the death penalty as bearing on their suitability for

131. 306 Ark. 563, 816 S.W.2d 856 (1991).
132. *Id.* at 565-66, 816 S.W.2d at 857-58.
133. *Id.* at 567, 816 S.W.2d at 859.
134. *Id.*
135. 308 Ark. 444, 825 S.W.2d 569 (1992).
136. *Id.* at 448-51, 825 S.W.2d at 571-73.
137. 308 Ark. 498, 825 S.W.2d 822 (1992).
138. *Id.* at 505, 825 S.W.2d at 826. In fact, the record demonstrated that four black jurors were seated, giving the jury a greater percentage of minority jurors than reflected in the population breakdown for the county.

service on a capital jury.[139]

3. *Inquiry into Racial Biases of Prospective Jurors*

In *Smith v. State*[140] the Arkansas Court of Appeals applied what appears to be an even broader right to defense investigation of racial attitudes held by jurors during voir dire than that contemplated by the Supreme Court in *Turner v. Murray*. The court held that restriction on voir dire as to racial bias of prospective jurors requires reversal, rejecting simple qualification by the trial court as to whether or not jurors would be unfairly influenced in reaching their verdict as a result of the fact that the accused was black.[141] However, the court also observed that its ruling afforded counsel only a reasonable opportunity for inquiry, not a right to have all questions which might be asked propounded to the jurors.[142]

C. Exercise of Discretion in Excusing Jurors for Cause

Perhaps the most important discretion accorded the trial court lies in its decision to qualify or disqualify individual jurors during the selection process, usually as a result of responses given to questions propounded by the court or trial counsel. Here, the proper understanding of trial court discretion must accompany evaluation of exclusion decisions. Under Arkansas law, a juror disqualified from service by statute suffers from *implied bias*, and the trial court's failure to sustain a timely challenge to the qualification of the juror by the court constitutes reversible error.[143]

However, in cases of *actual bias* where the prospective juror is challenged based upon attitudes toward the applicable law,[144] attitudes

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139. *Id.* In fact, one might question whether any more significant cause for exclusion of a juror through peremptory challenge might be found than that a juror, otherwise qualified for service, would, nevertheless, have reservations about imposing a death sentence in a capital prosecution. Interestingly, the jury ultimately selected did not sentence the defendant to death, perhaps leading to the speculation that the four minority jurors serving did, in fact, influence a sentencing decision favorable to the defense.

140. 33 Ark. App. 52, 800 S.W.2d 440 (1990).

141. *Id.* at 53, 800 S.W.2d at 441 (following Cochran v. State, 256 Ark. 99, 100, 505 S.W.2d 520, 521 (1974)).

142. *Id.*

143. Beed v. State, 271 Ark. 526, 534, 609 S.W.2d 898, 905 (1980).

144. For instance, a juror must be able to fairly consider the range of penalties which might be imposed upon conviction in order to be qualified to serve. Haynes v. State, 270 Ark. 685, 692-93, 606 S.W.2d 563, 566 (1980) (holding that the State may not prequalify the jury by commit-

toward the accused because of his status as a defendant,[145] bias against the accused personally,[146] or prejudgment due to extra-trial information about the case,[147] a reversal of the trial court's decision in qualifying the jury requires a showing of abuse of discretion.[148]

"Actual bias" is defined as that predisposition which would mean that the juror cannot try the case impartially or without prejudice to the rights of the parties.[149] Despite obvious suggestions of bias on the part of prospective jurors in many instances, these will not necessarily translate into the requisite showing of bias sufficient to reverse a trial court's ruling that the juror is qualified. For instance, in *Linell v. State*[150] the prospective juror stated that he could disregard the fact that he had previously been robbed and his family had been subjected to acts of violence and could sit impartially; the trial court's decision to hold the juror qualified was not reversible because of its more favorable position to observe the demeanor of the juror in this capital prosecution. If a juror's answers to questioning are tentative or equivocal such that he cannot consider the full range of punishment or follow the court's instructions, the trial court is deemed to be in a more favorable

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ting the juror to imposition of the maximum punishment).

145. In Conley v. State, 270 Ark. 886, 888, 607 S.W.2d 328, 329 (1980), for instance, the prospective juror demonstrated a prejudice against the accused, although not personal, due to the acquittal of another defendant accused of a similar crime. The juror was not subject to rehabilitation on the basis of the responses given.

146. Dillard v. State, 20 Ark. App. 35, 39-40, 723 S.W.2d 373, 375 (1987) (involving a juror who stated that he had had a previous "personal confrontation with" the defendant which would bias him).

147. Walton v. State, 279 Ark. 193, 196-99, 650 S.W.2d 231, 233 (1983). Here, a juror who had heard part of the trial testimony during a previous trial which had ended in mistrial failed to disclose knowledge of this fact due to her intense interest in serving as a juror. The court concluded that her deception indicated she was unqualified to sit as an impartial juror. *Compare* McFarland v. State, 284 Ark. 533, 547, 684 S.W.2d 233, 242 (1985), in which the juror's tardy disclosure that she knew the victim of another crime allegedly committed by defendant did not require exclusion since defense counsel made no inquiry as to her failure to disclose the fact in response to questioning and the trial court had excluded a number of jurors who had admitted knowing the victim of the crime being tried and a juror who admitted speaking with the victim at the courthouse prior to the trial.

148. Henslee v. State, 251 Ark. 125, 471 S.W.2d 352 (1971); Fleming v. State, 284 Ark. 307, 681 S.W.2d 390 (1984). The burden of proof is placed on the party claiming *actual bias* by a prospective juror. Bovee v. State, 19 Ark. App. 268, 276, 720 S.W.2d 322, 326 (1986); Linell v. State, 283 Ark. 162, 164, 671 S.W.2d 741, 743 (1984).

149. *Bovee*, 19 Ark. App. at 276, 720 S.W.2d at 326; *accord*, Fleming v. State, 284 Ark. 307, 309, 681 S.W.2d 390, 392 (1984) (stating that actual bias must be demonstrated in order to reverse a trial court for abuse of discretion in qualifying juror to serve).

150. 283 Ark. 162, 164, 671 S.W.2d 741, 742 (1984).

position to determine qualification of the juror,[151] and once that decision has been made, the court may limit further questioning of the prospective juror.[152]

In *Holland v. State*[153] defense counsel made an innovative argument that jurors who had previously sat on other juries involving the testimony of the State's key witness, an undercover narcotics officer, had prejudged his credibility and, thus, were biased on a key issue in the case.[154] The court held that *implied bias* results only when a juror has already served in a case involving another person charged with the same offense and that disqualification is not required when the prior service merely involves similar charge.[155] Here, because no juror would admit bias based on prior service in cases involving the witness, the trial court did not abuse its discretion in qualifying these jurors over counsel's objection that they had predetermined the witness' credibility.[156]

However, an admission of actual bias on the part of the juror is not required for disqualification, as demonstrated in *Fleming v. State*[157] where the prospective juror had been cross-examined by the prosecutor in another trial, had negative feelings about the treatment accorded the defendant/boyfriend, and whose sister was involved with the accused. The juror had testified she had no negative feelings about the prosecutor.

As is often typical in matters of criminal procedure, Arkansas decisions concerning the trial court's exercise of discretion in qualification of jurors do not necessarily reflect mechanical application of uniform rules. Rather, the trial court's decision appears to rest in part on the obvious nature of disqualification, such as in *Glover v. State*,[158] in which the trial court seated four jurors who stated that they could set aside previous opinions of the defendant's guilt (or the quantum of proof available at trial). In another example, *Novak v. State*,[159] the

151. Webster v. State, 284 Ark. 206, 208-09, 680 S.W.2d 906, 907 (1984).

152. Perry v. State, 277 Ark. 357, 377-78, 642 S.W.2d 865, 876 (1982).

153. 260 Ark. 617, 542 S.W.2d 761 (1976).

154. *Id.* at 618, 542 S.W.2d at 762.

155. *Id.* (relying on Sorrentino v. State, 214 Ark. 115, 214 S.W.2d 517 (1948)).

156. *Id.* at 619-20, 542 S.W.2d at 703.

157. 284 Ark. 307, 309-10, 681 S.W.2d 390, 392 (1984). The court based its holding on Conley v. State, 270 Ark. 886, 607 S.W.2d 328 (1980) which held that a juror's candid admission of bias was sufficient for disqualification despite his affirmation of belief that he could be a fair and impartial juror.

158. 248 Ark. 1260, 455 S.W.2d 670 (1970).

159. 287 Ark. 271, 278, 698 S.W.2d 499, 503-04 (1985).

Arkansas Supreme Court addressed a trial court's denial of a mistrial after a prospective juror, a police officer, stated before the entire panel that he was acquainted with the accused from having arrested him several times in the past. In upholding the decision, the court noted the defendant's unchallenged confessions to the crime.

D. Preservation of Error in Jury Selection

As is the case with most types of claims of trial error in criminal appeals, defense counsel's failure to preserve error through timely objection dooms many claims of abuse of discretion in the jury selection process. For instance, in *Sanders v. State*[160] the prosecutor attempted to use voir dire to make statements typical of opening or closing argument, but counsel's failure to timely move for mistrial or request an admonition resulted in the issue not being preserved for appellate review.[161] Similarly, in *Novak v. State* defense counsel's failure to request a timely admonition resulted in waiver of a potentially prejudicial error. In that case, a police officer serving as a prospective juror gratuitously advised the court in the presence of the panel that he was acquainted with the defendant as a result of having previously arrested him. The Arkansas Supreme Court observed that defense counsel would doubtlessly have been entitled to an instruction to disregard the comment had he requested it.[162] His not doing so, however, resulted in waiver of the error. Furthermore, Arkansas case law indicates that in order to preserve error, an objection in this context must be specific rather than general.[163]

Moreover, any necessary objection to a prejudicial remark made before the panel must be made in a timely fashion. For example, in *Dillard v. State*[164] the defense counsel failed to preserve error because he did not object to a juror's comment that he had a previous confrontation with the accused until after twenty-four jurors had been examined, waiving the issue as a result of the untimeliness of the action. Similarly, in *Sims v. State*,[165] a case which involved a juror who had served in a previous case involving the defendant, the defendant did not object to the juror until almost two weeks after conviction, when he

160. 278 Ark. 420, 646 S.W.2d 14 (1983).
161. *Id.* at 422, 646 S.W.2d at 15.
162. 287 Ark. at 278, 698 S.W.2d at 503-04.
163. Webster v. State, 284 Ark. 206, 209, 680 S.W.2d 906, 908 (1984).
164. 20 Ark. App. 35, 40, 723 S.W.2d 373, 376 (1987).
165. 266 Ark. 922, 924-25, 587 S.W.2d 604, 605 (1979).

filed a *pro se* petition requesting that the trial court set aside his conviction. The Arkansas Supreme Court said the elderly juror may not have properly understood the context of the word "know"; each prospective juror should have been asked if he or she knew facts about the case or had observed the accused. The juror testified that he could not see well enough to recognize the defendant and that when he finally realized he did know him, he did not know who to inform about the omission.[166] The complaint was not timely in light of lack of definitive evidence of prejudice to the accused's right to a fair trial.

The most important preservation rule in terms of juror qualification is that failure of the trial court to exclude an objectionable juror constitutes reversible error only if defense counsel exhausts the available peremptories and then objects to being forced to accept an otherwise unacceptable juror because a strike had to be used when the trial court failed to excuse a juror challenged for cause.[167] If the defense fails to exhaust its peremptories or fails to object to the seating of an unacceptable juror after peremptories have been exhausted, the trial court's error in refusing to excuse a juror challenged for cause has not been preserved because the defendant cannot establish that the jury seated was, in any sense, unfair.[168]

Where, however, the trial court has improperly refused to excuse jurors who were obviously disqualified despite the trial court's attempt at rehabilitation, and counsel objects to seating of a juror following exhaustion of peremptories, the issue of the trial court's abuse of discretion has been properly preserved for appellate review.[169]

CONCLUSION

It is fairly clear that control of the jury selection process in both federal and state trial courts in Arkansas rests within the exercise of sound discretion of the trial court. Although certain matters are fixed by operation of statute[170] or rule relating to the qualifications of a jury

166. *Id.* at 924, 587 S.W.2d at 605.

167. Miller v. State, 8 Ark. App. 165, 166, 649 S.W.2d 407, 407-08 (1983).

168. Conley v. State, 270 Ark. 886, 888-89, 607 S.W.2d 328, 329 (1980).

169. Bovee v. State, 19 Ark. App. 268, 276, 720 S.W.2d 322, 326 (1986).

170. For example, vision and hearing impaired persons are disqualified from jury service under a state statute. Ark. Code Ann. § 16-31-102 (Michie 1987). This exclusion was unsuccessfully challenged by a deaf person summoned for jury service in Pulaski County who was accompanied to court by a qualified court interpreter. After being excluded from service following an evidentiary hearing, the excluded juror brought an action claiming violation of her rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Eckstein v. Kirby,

and the framework of the presentation, the trial court still determines the manner in which questioning is to be presented and, most importantly, the scope and duration of voir dire examination to be accorded the attorney at trial. Consequently, counsel approaching the criminal trial should bear in mind the need to maintain the trial court's respect, if not favor, so as to avoid undue curtailment of examination as an arbitrary response to lengthy or probing voir dire by an irritated trial judge.

Additionally, counsel must be acquainted with both the limits of discretion accorded the trial court and the proper mode of preserving error in jury selection matters in order to deal with those situations in which the trial court's interest in expediting the proceedings interferes with a thorough and necessary examination of prospective jurors, their biases, and attitudes.

Finally, quite apart from the legal aspects of the conduct of the examination and selection process, counsel must develop a strategy for the wise use of time allotted both to identify potential sources of bias requiring exclusion of jurors upon challenge and in discerning information or attitudes which will guide counsel in the exercise of peremptory challenge. In this latter respect, both prosecutors and defense counsel should bear in mind the observation of the Arkansas Supreme Court in *Cochran v. State*[171] in which the court pointed out that an attorney decides: " 'whether to use a peremptory challenge not so much on what a venireman may say, but on how he says it.' "[172] The court's insight suggests the difference between the conduct of voir dire as a matter of

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452 F. Supp. 1235 (E.D. Ark. 1978). Although she lost this challenge, recent adoption of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 (Title II, addressing public services), suggests that her claim might fare far better in the future. *See* Michael B. Goldas, *Due Process, The Deaf and Blind as Jurors*, 17 NEW ENG. L. REV. 119, 134-44 (1981) (discussing the *Eckstein* decision at length).

The diverse nature of litigation focusing on jury selection and exclusion is demonstrated by *Eckstein* and decisions involving challenges brought by convicted defendants involving service of hearing-impaired jurors. In State v. Spivey, 700 S.W.2d 812, 813-14 (Mo. 1985)(en banc), for instance, the court rejected the claim made by the defense that exclusion of a hearing-impaired juror violated his right to a jury drawn from a fair cross-section of the community. On the other hand, in United States v. Dempsey, 830 F.2d 1084 (10th Cir. 1987), the court rejected the claim that the trial court's refusal to exclude a hearing-impaired juror who required assistance of an interpreter during deliberations constituted a violation of the defendant's right to a fair trial.

171. 256 Ark. 99, 505 S.W.2d 520 (1974).

172. *Id.* at 100A, 505 S.W.2d at 521, *quoted with approval in* Smith v. State, 33 Ark. App. 52, 53, 800 S.W.2d 440, 441 (1990).

form and elevation of the process into an element in the art of lawyering.