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Criminal Procedure—Peremptory Challenges in Felony Prosecutions

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CRIMINAL PROCEDURE—PEREMPTORY CHALLENGES IN FELONY PROSECUTIONS. *Chenowith v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987).

The state charged Phillip Tod Chenowith, Boyce Shaddon, Johnny Lee Tubbs, and Raymond Pierce, Jr., with the crime of theft of property.¹ The state alleged that the defendants took control of certain cattle belonging to John Childress with the intent to permanently deprive Childress of his property. The case came to trial in February of 1986. At the beginning of jury selection proceedings, defendant Shaddon requested that the court allow *voir dire* examination of each juror individually.² The state objected to this procedure on the grounds that it would cause undue delay in the proceedings.

The court ruled that the parties could *voir dire* panel members two at a time. Defendant Shaddon specifically objected to this procedure stating that it allowed the prosecution to choose the least desirable of two panel members before exercising peremptory challenges.³ Defendant Chenowith joined in the objection. Subsequently, the state exercised three peremptory challenges and the defendants, who shared a combined total of eight challenges, exercised all eight of their peremptory challenges.⁴ At the conclusion of the trial, the jury found defendants Chenowith and Shaddon guilty.⁵ Chenowith and Shaddon

1. ARK. STAT. ANN. § 41-2203 (1977).

2. Since the trial involved codefendants, the trial record is complex. Mr. Street, the counsel who made the objection, was the attorney for defendant Shaddon. Brief for Appellant Chenowith at 10, *Chenowith v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987) (No. 86-156) (quoting Record at 277).

3. Brief for Appellant Chenowith at 10, *Chenowith v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987) (No. 86-156).

4. The number of peremptory challenges permitted in a criminal felony case is governed by statute. ARK. STAT. ANN. § 43-1921 (Cum. Supp. 1985) provides the prosecution with 10 peremptory challenges in cases for capital murder, six peremptory challenges in all other felony cases, and three peremptory challenges in misdemeanor cases. Similarly, ARK. STAT. ANN. § 43-1922 (Cum. Supp. 1985) provides the defendant(s) with twelve peremptory challenges in capital murder cases, eight peremptory challenges in all other felony cases and three challenges for misdemeanors. Since the availability of peremptory challenges is limited, they must be exercised wisely. Defendant Shaddon alleged that allowing the prosecution to *voir dire* the panel members two at a time gave the prosecution an unfair advantage. Brief for Appellant Chenowith at 10, *Chenowith v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987). The prosecution could choose between two panel members as opposed to making the challenge decision one at a time. The procedure allowed the prosecution to reduce the risk that subsequent panel members would be less desirable than the one just challenged.

5. The jury found defendant Chenowith guilty of theft of property in violation of ARK.

appealed, designating as error the procedure used to *voir dire* and challenge the jurors.⁶

On appeal, the Arkansas Supreme Court found no prejudicial error in the procedure used by the lower court for selection of jurors and upheld the convictions. The court overruled the 1975 decision of *Clark v. State*⁷ and liberally construed Arkansas Statutes Annotated section 43-1903.⁸ The court held that the specific manner of conducting *voir dire* is within the discretion of the court so long as the state is required to exercise its challenges before the defendant. *Chenowith v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987).

The defendant's right to peremptory challenges in capital cases existed in England during the early days of jury trials.⁹ At common law, all felonies were punishable by death.¹⁰ Since the defendant's life

STAT. ANN. § 41-2203 (1977). He was sentenced to four years imprisonment. Brief for Appellant Chenowith at 1-2, *Chenowith v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987). The jury found defendant Shaddon guilty of the lesser included offense of theft by receiving and sentenced him to one year with a six month suspension. Brief for Appellant Shaddon at 1, *Chenowith v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987).

6. The appeal was initially taken to the Arkansas Court of Appeals. The court certified the case to the Arkansas Supreme Court because it involved construction of a state statute. See ARK. R. SUP. CT. 29(4)(a) (codified at ARK. STAT. ANN. app. tit. 27 (Supp. 1985)).

7. 258 Ark. 490, 527 S.W.2d 619 (1975).

8. The exercise of peremptory challenges in a criminal felony prosecution is addressed by ARK. STAT. ANN. § 43-1903 (1977). The statute states:

In a prosecution for felony, the clerk, under the direction of the court, shall draw from the jury box the names of twelve [12] petit jurors, who shall be sworn to make true and perfect answers to such questions as may be asked them touching their qualifications as jurors in the case on trial, and each juror may be examined by the State and cross-examined by the defendant, touching his qualification. If the court decide [sic] he is competent, the State may challenge him peremptorily or accept him, then the defendant may peremptorily challenge or accept him. If not so challenged by either party, he shall stand as a juror in the case, and each of the twelve [12] jurors shall be examined and disposed of in like manner. If any of said jurors are disqualified or challenged, the clerk shall draw from the box as many more as may be required, and as often as may be required, until the jury shall be obtained, or the whole panel exhausted.

Id.

9. 4 W. BLACKSTONE, COMMENTARIES *353. See also *Lewis v. United States*, 146 U.S. 370, 376 (1892). For a succinct discussion of the history of peremptory challenges see 2 A. GINGER, JURY SELECTION IN CIVIL AND CRIMINAL TRIALS 2D § 20.40, at 1132-33 (1984).

10. 4 W. BLACKSTONE, *supra* note 9, at *98. See also 1 WHARTON'S CRIMINAL LAW § 19 (C. Torcia 14th ed. 1978); R. PERKINS, PERKINS ON CRIMINAL LAW § 1, at 10 (1969). The term felony originated in the feudal law and primarily referred to a breach of feudal engagement. M. RADIN, ANGLO-AMERICAN LEGAL HISTORY 234-38 (1936). By the time of the Assize of Northampton in 1176, the term was used to apply to acts of violence and breaches of the peace characterized as *turpis felonia* (shameful felony). *Id.* Punishment was often by mutilation. *Id.* During the twelfth century, the rule was established that all felonies were punishable by death. *Id.* See also G. CROSS & G. HALL, THE ENGLISH LEGAL SYSTEM 75 (1964).

was at risk, he had the right to be tried by a jury against whom the defendant harboured no prejudice.¹¹ To achieve such a jury, the defendant had the right to challenge jurors without showing cause.¹² These challenges became known as peremptory challenges.¹³

The English Crown enjoyed a right to peremptory challenges until Parliament eliminated this right by statute in 1305.¹⁴ Despite this fact, the English courts granted the Crown the courtesy of exercising peremptory challenges.¹⁵ Further, the Crown did not have to exercise peremptory challenges until after the defendant exercised all of his challenges.¹⁶

In the United States, an early statutory enactment secured the defendant's right to peremptory challenges in capital cases.¹⁷ The right has since been referred to as one of the defendant's most important rights¹⁸ and an essential part of the trial.¹⁹ While the right is given in an attempt to secure an impartial jury,²⁰ it is viewed as the right to reject jurors and not a right to select jurors.²¹ It was not until 1865 that Congress extended the same right to the prosecution for

11. 4 W. BLACKSTONE, *supra* note 9, at *353. Blackstone notes that because common law felonies were punishable by death, there existed an *in favorem vitae* (in favor of life) which allowed the defendant to challenge jurors without a showing of cause. *Id.* The law designated such challenges peremptory challenges. *Id.* As Blackstone describes it, the defendant "should have a good opinion of his jury" when the defendant is defending his/her life. *Id.* See also *Lewis v. United States*, 146 U.S. 370, 376 (1892); *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827); sources cited *supra* note 10.

12. 4 W. BLACKSTONE, *supra* note 9, at *353.

13. *Id.*

14. An Ordinance for Inquests, 33 Edw., st. 4 (1305). The statute provided: "He that challengeth a Jury or a Juror for the King shall shew the Cause." *Id.*

15. While the statute eliminated the Crown's right to peremptory challenges it did not affect the challenges for cause. The actual practice was to allow the Crown to set jurors aside without explanation until the entire panel had been exhausted. If a full panel could not be obtained without some of the jurors the Crown set aside, the defendant could challenge the Crown and force it to show cause for its challenges. The court then required the defendant, to explain his challenges prior to the explanation by the Crown. The practice effectively provided the Crown with peremptory challenges. *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 483 (1827).

16. *Id.*

17. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 112, 119 (1790). The statute, enacted by the Second Session of the First Congress, gave the accused 35 peremptory challenges for charges of treason and 20 challenges for all other capital crimes. See also *United States v. Marchant*, 25 U.S. (12 Wheat.) 480 (1827); *infra* note 22.

18. *Pointer v. United States*, 151 U.S. 396, 408 (1894).

19. *Lewis v. United States*, 146 U.S. 370, 376 (1892).

20. *Frazier v. United States*, 335 U.S. 497, 505 (1948).

21. *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827).

criminal cases tried in federal court.²²

In the late 1800s, the United States Supreme Court addressed the procedures required for the exercise of peremptory challenges in federal courts. In *Lewis v. United States*²³ the Court held that the defendant had a right to be present when jurors were challenged,²⁴ but placed the procedures for exercising peremptory challenges in the discretion of the court.²⁵ Similarly, in *Pointer v. United States*,²⁶ the Court held that congressional enactment and settled principles of criminal law governed the procedures for empanelling a jury.²⁷ Since neither source suggested a particular procedure for the exercise of peremptory challenges, the Court ruled that the specific procedures are within the discretion of the court.²⁸ This rule remains unchanged

22. An Act regulating the Proceedings in criminal Cases, ch. 86, § 2, 13 Stat. 500 (1865). The act gave the government five peremptory challenges and the defendant twenty in cases of treason or capital offenses. It also limited the defendant to ten peremptory challenges and gave the government two peremptory challenges for any other offense to which peremptory challenges were attached at the time of the act. *Id.*

23. 146 U.S. 370 (1892).

24. *Id.* at 376. In *Lewis* the trial court required the defendant and the prosecution to challenge jurors by striking names from a list of prospective jurors. Each side exercised their challenges independent of the other side and without any knowledge of the others' strikes until the final jury had been selected. The defendant objected to this procedure because it resulted in the defendant challenging some of the same jurors challenged by the prosecution. *Id.* at 371-72. The Supreme Court held that while it might be convenient or even beneficial for the federal district court to adopt the procedures of the locus state, the court is under no obligation to adopt any particular procedure. *Id.* at 376-77. Furthermore, the court is under no obligation to establish a court policy for the exercise of peremptory challenges. However, the defendant does have a right to be present when the jurors are examined. *Id.* at 376. Therefore, the Court in *Lewis* reversed and remanded the conviction because the lower court required the exercise of "secret" challenges outside the presence of the defendant. *Id.* at 379-80.

25. *Id.* at 379.

26. 151 U.S. 396 (1894).

27. *Id.* at 408. At the time of the *Pointer* decision, there was no federal statute addressing the procedures for the exercise of peremptory challenges. *Id.* at 409. While it was permissible for the federal court to adopt the procedures of the locus state, it was under no requirement to do so. *Id.* at 407. The trial court in *Pointer* qualified 37 jurors and then required the defendant and the prosecution to exercise challenges by striking names from a list of 37 jurors. The defendant objected to the procedure because it did not conform to the procedures required by Arkansas law. *Id.* at 398-99. The Court noted that making peremptory challenges was an essential part of the trial. *Id.* at 405. Further, state law controlled the qualifications and exemptions of jurors. However, procedures for empanelling jurors and exercising peremptory challenges were within the discretion of the court. *Id.* at 407-08. *See also* *Lewis v. United States*, 146 U.S. 370, 379 (1892).

28. 151 U.S. at 410. In federal courts the jury selection procedure used today is very similar to the procedure described by the Court in *Pointer*. *Id.* at 398-99. Generally, in federal court 32 panel members are drawn. The panel members are questioned as a group by the judge in order to determine basic qualifications. After the court qualifies the panel, *voir dire* begins. If panel members are struck for cause, they are replaced with new panel members who are also questioned by the judge to determine qualifications. After *voir dire*, each side is given a list of

at the present time.²⁹

Both *Lewis* and *Pointer* originated in the Federal Court for the Western District of Arkansas. In both cases, the defendants objected to the court procedures for exercising peremptory challenges.³⁰ As the Court noted in *Pointer*, Arkansas law required that peremptory challenges be exercised first by the prosecution and then by the defendant.³¹

In 1900 *Lackey v. State*³² provided the Arkansas Supreme Court with an opportunity to interpret the jury selection statute.³³ *Lackey* held that the statute required the state to accept a juror before the defendant was required to exercise peremptory challenges.³⁴ In the years following *Lackey*, the Arkansas Supreme Court addressed the issue of whether a deviation from procedures would constitute reversible error.³⁵

all the panel members. Independently and simultaneously, each side exercises its peremptory challenges by striking names from the list. The clerk then tallies the results. The first 12 names on the list that "survive" being struck by either side constitute the final jury. See FED. R. CRIM. P. 24(a), (b); 3 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, § 15-2.6 commentary at 69-70 (1986).

29. *E.g.*, United States v. Bryant, 671 F.2d 450 (11th Cir. 1982); United States v. Morris, 623 F.2d 145 (10th Cir.), *cert. denied*, 449 U.S. 1065 (1980); United States v. Durham, 587 F.2d 799 (5th Cir. 1979); United States v. Mayes, 512 F.2d 637 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975); United States v. Mackey, 345 F.2d 499 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965); Holmes v. United States, 134 F.2d 125 (8th Cir. 1943).

30. *Pointer*, 151 U.S. at 405. *Accord Lewis*, 146 U.S. at 372. See *supra* notes 24 & 27.

31. 151 U.S. at 409. At the time of the 1894 *Pointer* decision, jury selection procedures for criminal felony prosecutions in Arkansas state courts were governed by statute. SAND. & H. DIG. § 2193 (1894). Ten years earlier in 1884, the applicable statute stated: "The challenge to the juror shall first be made by the state, and then by the defendant; and the state must exhaust her challenges to each particular juror before such juror is passed to the defendant for challenge or acceptance." MANS. DIG. § 2242 (1884). The statute as it existed in 1894 contained the same wording as the present day statute. ARK. STAT. ANN. § 43-1903 (1977). See *supra* note 8 and *infra* note 33. See also CRIM. CODE § 193; C. & M. DIG. § 3144 (1921); POPE'S DIG. § 3979 (1937). As recently as 1959, the Arkansas Supreme Court held that the right of peremptory challenges was a creature of statute. Hogan v. Hill, 229 Ark. 758, 318 S.W.2d 580 (1958).

32. 67 Ark. 416, 55 S.W. 213 (1900).

33. SAND. & H. DIG. § 2193 (1900) (codified as amended at ARK. STAT. ANN. § 43-1903 (1977)). From the time of the 1894 *Pointer* decision to the present day, the statute has undergone only slight changes in semantics. See *supra* notes 8 & 31.

34. 67 Ark. at 419, 55 S.W. at 214. The court interpreted the statute as requiring:

[T]he state must exhaust her challenges for cause before passing the juror to the defendant for that purpose, and that, when the court has decided the juror to be competent, the state must first be called upon to accept or challenge the juror, and must accept before the defendant can be called on for that purpose.

Id. The court also stated that the court's determination of competency would depend on the state's and defendant's examination of the jurors. *Id.* at 418, 419, 55 S.W. at 214.

35. See, *e.g.*, Camp v. State, 249 Ark. 1075, 467 S.W.2d 707 (1971) (allowing the state and

By 1975, the law in Arkansas could be summarized as follows: (1) As long as the defendant was allowed to "face" the jurors before exercising any challenges, the specific procedures to be followed were to be governed by statute and subject to judicial discretion;³⁶ (2) the controlling statute for challenges in criminal felony prosecutions was Arkansas Statutes Annotated section 43-1903;³⁷ and (3) the state must exercise peremptory challenges prior to the defendant exercising peremptory challenges.³⁸

In 1975, the issue of peremptory challenge procedures again came to the attention of the Arkansas Supreme Court. In *Clark v. State*³⁹ appellant Clark contended that the trial court violated the jury selection statute⁴⁰ because the court did not require the state to accept or peremptorily challenge jurors one at a time.⁴¹ The court held that section 43-1903 required the state to first accept or reject an individual juror before the defendant accepted or rejected the individual juror.⁴² Furthermore, the court ruled that prejudice would be presumed from an error unless affirmatively shown otherwise.⁴³ The court reversed the conviction and remanded the case for a new trial.

Seven years after *Clark*, the Arkansas Court of Appeals fully implemented the *Clark* holding in *Vowell v. State*.⁴⁴ The court held that

the defendant to *voir dire* jurors before exercising peremptory challenges is not error); *Green v. State*, 223 Ark. 761, 270 S.W.2d 895 (1954) (nonprejudicial error in jury selection is not reversible error); *Lee v. State*, 73 Ark. 148, 83 S.W. 916 (1904) (conviction will be reversed for prejudicial error only). In *Stroud v. State*, 169 Ark. 348, 275 S.W. 669 (1925) the defendant requested that the court first qualify the jury panel before exercising challenges. The trial court interpreted the request as meaning that the defendant wanted to exercise peremptory challenges by striking names from a list. *Id.* at 350, 275 S.W. at 670. On appeal, the Arkansas Supreme Court found the procedure violated ARK. STAT. ANN. § 43-1903 (1921). 169 Ark. at 352, 275 S.W. at 670. The court stated that it would have reversed the conviction for that reason alone but for the fact that the defendant requested the procedure and made no showing that an undesired juror was permitted to serve on the jury. *Id.*

36. *Pointer v. United States*, 151 U.S. 396 (1894). *Accord Hogan v. Hill*, 229 Ark. 758, 318 S.W.2d 580 (1958).

37. *Crutchfield v. State*, 251 Ark. 137, 471 S.W.2d 361 (1971).

38. *Lackey v. State*, 67 Ark. 416, 55 S.W. 213 (1900).

39. 258 Ark. 490, 527 S.W.2d 619 (1975).

40. ARK. STAT. ANN. § 43-1903 (1977).

41. *Clark v. State*, 258 Ark. 490, 493, 527 S.W.2d 619, 621 (1975). At Clark's trial, the court drew a panel of 12 jurors. Each juror was examined first by the state and then by the defendant. The trial court required the examination of all 12 jurors before allowing any peremptory challenges. *Id.* at 492, 527 S.W.2d at 620.

42. *Id.* at 493, 527 S.W.2d at 621.

43. *Id.* The court's ruling, that failure to follow procedures would give rise to a presumption of prejudice, appeared to be in direct conflict with the court's earlier holdings in *Green v. State*, 223 Ark. 761, 270 S.W.2d 895 (1954); *Stroud v. State*, 169 Ark. 348, 275 S.W. 669 (1925); and *Lee v. State*, 73 Ark. 148, 83 S.W. 916 (1904).

44. 4 Ark. App. 175, 628 S.W.2d 599, *rev'd on other grounds*, 276 Ark. 258, 634 S.W.2d

“upon a timely request, *voir dire* of jurors in felony cases must be conducted one at a time, followed by a peremptory challenge as to that juror by the State, and then if that juror is accepted by the State, a peremptory challenge by the defendant.”⁴⁵ Chief Judge Mayfield dissented in the case urging that section 43-1903 did not require examination of jurors one at a time.⁴⁶

In *Berna v. State*,⁴⁷ the Arkansas Supreme Court addressed the question of whether procedural error constituted prejudicial error.⁴⁸ Though disapproving of the procedures used,⁴⁹ the court flatly stated that prejudice would no longer be presumed from the commission of a

118 (1982). In *Vowell* the defendant made a timely request to *voir dire* and challenge jurors one at a time. *Id.* at 181, 628 S.W.2d at 602. Although the defendant's request was granted, the trial court did not impose the same requirement on the state. The trial court allowed the state to choose the number of jurors to examine at one time and permitted the defendant to examine jurors one at a time. The state chose to examine jurors three at a time. *Id.* at 177-78, 628 S.W.2d at 601. Basing its decision on *Clark*, the Arkansas Court of Appeals held that a defendant could not be required to challenge jurors before the state exercises peremptory challenges. *Id.* at 181, 628 S.W.2d at 602. The court analogized the “unfair advantage” that the state receives when the state is allowed to choose the number of jurors it wishes to *voir dire* at one time to allowing only the state to *voir dire* jurors—a procedure which the court had previously condemned in *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981). *See also* *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3 (1982); *Malone v. State*, No. 76-187 (Ark. Jan. 24, 1977) (WESTLAW) (holding that *Clark* required individual questioning); *Franks v. Kyle*, No. 81-73 (Ark. Ct. App. Sept. 23, 1981) (WESTLAW) (holding that *Clark* controlled and reversed a conviction obtained after the trial court required the defendants to examine all the jurors drawn from the jury panel before the state was required to accept or reject a juror).

45. 4 Ark. App. at 181, 628 S.W.2d at 602. After questioning an individual juror the state had the opportunity to exercise a peremptory challenge. If the state accepted the juror, the defendant then had the opportunity to challenge the juror. *Id.*

46. *Id.* at 196, 628 S.W.2d at 609 (Mayfield, C.J., dissenting).

Ark. Stat. Ann. § 43-1903 (Repl. 1977), certainly does not say that prospective jurors must be examined in such a one-at-the-time manner *Clark* and *Roleson* . . . should not be extended

In both *Clark* and *Roleson* the state was allowed to exercise all its peremptory challenges at one time against a group of prospective jurors which the state had examined. This, the court held, gave the state the advantage of being able to exercise its challenges against the group and excuse those considered least desirable instead of having to reject them one at a time and perhaps use all its challenges before discovering those least desirable. Now it is easy to see how this would be beneficial to the state but it is difficult to understand why the defendant could not be given the same opportunity to enjoy an equal benefit.

Id. *Vowell* was later reversed on other grounds. *State v. Vowell*, 276 Ark. 258, 634 S.W.2d 118 (1982).

47. 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985).

48. 282 Ark. at 567, 670 S.W.2d at 437.

49. *Id.* at 567, 670 S.W.2d at 437. Even though the questioned procedure had nothing to do with the exercise of peremptory challenges, *Berna* is significant because it requires an affirmative showing of prejudice. The procedure allegedly violated in *Berna* consisted of summoning jurors by ordinary mail instead of certified mail as required by ARK. STAT. ANN. § 39-210 (Supp. 1985). *Id.* at 565, 670 S.W.2d at 436.

procedural error.⁵⁰ The court's decision in *Berna* appeared to conflict with the "presumed prejudice" holding in *Clark*.⁵¹ The Arkansas Court of Appeals applied *Berna* in holding that a trial court would not be reversed on discretionary matters without a clear showing of abuse of discretion that resulted in prejudice.⁵²

*Chenowith v. State*⁵³ presented the Arkansas Supreme Court with the opportunity to squarely address the discrepancy between the "presumed prejudice" holding of *Clark*, and *Berna*'s required showing of prejudice. Justice Newbern delivered the opinion of the court and summarized the *Chenowith* issue. The court considered whether Arkansas Statutes Annotated section 43-1903⁵⁴ or general principles of fairness required that, in felony cases, jurors should be subjected to *voir dire* and challenges one at a time.⁵⁵ In rejecting the requirement, the court based its conclusion on three factors: an analysis of the statute; a review of prior cases; and a comparison of Arkansas procedures with recommended American Bar Association standards for jury selection procedures.

Analyzing the statute which outlines the procedures for jury selection in Arkansas criminal felony prosecutions,⁵⁶ the court noted that the statute specifically uses the terms "each" and "may." The court summarily concluded that the language of the statute did not prohibit the examination of all twelve, in a single group or in groups of any number prior to the exercise of challenges.⁵⁷ It held that section 43-1903 only requires the state to exercise its peremptory challenges before the defendant exercises his challenges.⁵⁸ The court also concluded that the trial judge possesses discretion in the manner of conducting *voir dire*.⁵⁹ In other words, it is the order in which challenges are exercised and not the number of jurors upon which the challenges are exercised, that will determine whether a violation of

50. *Id.* at 565, 670 S.W.2d at 436. *See id.* at 565-66, 670 S.W.2d at 436 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (harmless error rules are founded on the principle that courts should reverse only for errors that affect the essential fairness of the trial)).

51. *Clark v. State*, 258 Ark. 490, 527 S.W.2d 619 (1975).

52. *Robinson v. State*, No. 85-214 (Ark. Ct. App. Apr. 23, 1986) (WESTLAW). In *Robinson* the issue concerned whether a peremptory challenge could be made after the jury is selected but before it is sworn.

53. 291 Ark. 372, 724 S.W.2d 488 (1987).

54. ARK. STAT. ANN. § 43-1903 (1977).

55. 291 Ark. at 373, 724 S.W.2d at 489.

56. ARK. STAT. ANN. § 43-1903 (1977). *See supra* note 8.

57. 291 Ark. at 374, 724 S.W.2d at 489.

58. *Id.* at 378, 724 S.W.2d at 491-92.

59. *Id.*

the statute exists.⁶⁰

Reviewing the prior cases, the Arkansas Supreme Court concluded that the cases did not support the construction it accorded section 43-1903 in *Chenowith*.⁶¹ Prior cases required that upon a timely request, the trial court was bound to grant a request for individual *voir dire*.⁶² Furthermore, the *Clark* decision specifically required individual acceptance of a juror by the state before the defendant was required to exercise a challenge.⁶³

Finally, the court considered the absence of any uniform standard or procedure for the exercise of peremptory challenges in either state⁶⁴ or federal courts.⁶⁵ The court reviewed the holding of the

60. *Id.* at 375, 724 S.W.2d at 490.

61. *Id.* at 374, 724 S.W.2d at 489 (citing *Clark v. State*, 258 Ark. 490, 527 S.W.2d 619 (1975)); *id.* at 376, 724 S.W.2d at 490 (citing *Vowell v. State*, 4 Ark. App. 175, 628 S.W.2d 599, *rev'd on other grounds*, 276 Ark. 258, 634 S.W.2d 118 (1982); *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981)). See also *Malone v. State*, No. 76-187 (Ark. Jan. 24, 1977) (WESTLAW); *Franks v. Kyle*, No. 81-73 (Ark. Ct. App. Sept. 23, 1981) (WESTLAW).

62. 291 Ark. at 374, 724 S.W.2d at 489 (referring to *Vowell v. State*, 4 Ark. App. 175, 628 S.W.2d 599, *rev'd on other grounds*, 276 Ark. 258, 634 S.W.2d 118 (1982)).

63. *Id.* at 375, 724 S.W.2d at 490. The court stated that *Clark* stood for the proposition that failure to comply with this specific procedure is advantageous to the state and, therefore, prejudicial to the defendant. *Id.* (quoting *Clark v. State*, 258 Ark. at 493-94, 527 S.W.2d at 621). However, *Clark* had not shown how the defendant had been prejudiced. *Id.* at 375, 724 S.W.2d at 490. The court further stated that *Clark* had been correctly applied in *Vowell v. State*, 4 Ark. App. 175, 628 S.W.2d 599 (1982). The court minimized a subsequent reversal of *Vowell* as based on a failure of the record and not on any conclusion as to the state of the law. *Chenowith*, 291 Ark. at 376, 724 S.W.2d at 490.

64. In the states surrounding Arkansas there is no uniformity in the statutory provisions governing the exercise of peremptory challenges in criminal felony prosecutions.

Louisiana makes the right to *voir dire* and peremptory challenges part of the state's constitution, LA. CONST., art. 1, § 17; and requires the state to accept or challenge a panel member before passing the question to the defendant. LA. CODE CRIM. PROC. ANN. art. 788 (West Cum. Supp. 1987) (individual panel member is immediately sworn as a juror when accepted by both sides).

Oklahoma requires the exercise of peremptory challenges prior to challenges for cause. OKLA. STAT. ANN. tit. 22, § 655 (West Supp. 1987) (no distinction in the number of challenges allowed each side; in first degree murder cases, each side is allowed nine challenges; five challenges are allowed in cases involving other felonies; and three challenges are allowed in all other criminal cases).

Mississippi requires the state to exercise all of its challenges prior to the defendant exercising challenges. MISS. CODE ANN. § 99-17-3 (1972) (requires that the full panel be presented to the defendant before the defendant exercises any challenges; each side allowed twelve challenges in capital offenses and six challenges in noncapital cases).

In Missouri, defendants are entitled to *voir dire* the entire panel before exercising any challenges. MO. ANN. STAT. § 546.210, 546.180 (Vernon 1987) (entitled to view the entire panel; panel consists of twelve plus the total number of peremptory challenges that are available; challenges are conducted by striking from a list passed first to the state and then to the defense; no distinction between the number of challenges provided the defense and the prose-

United States Supreme Court in *Pointer v. United States*⁶⁶ which contained a discussion of the general principles controlling the peremptory challenge process as well as the procedures required by the Arkansas statute.⁶⁷ The court also reviewed the American Bar Association Standards for Criminal Justice⁶⁸ and the comments following the standards.⁶⁹ The comments recognize two primary methods of exercising peremptory challenges.⁷⁰ The first is to challenge jurors one at a time. The second method is generally used in federal court and entails exercising challenges upon a group of jurors by striking names from a list.⁷¹ The comments tend to praise the striking method as being the superior method.⁷² Upon considering the principles of *Pointer* and the differences between the Arkansas statutory proce-

cedure; entitled to nine if the crime is punishable by death, six if the sentence is imprisonment and two in all other criminal cases).

Tennessee provides for the simultaneous submission of written challenges, one juror at a time. TENN. R. CRIM. PROC. 24(c), (d) (after twelve jurors have been passed for cause, both sides are required to submit peremptory challenges to jurors in writing, one at a time; in prosecutions for murder, the state is allowed eight challenges per defendant and the defendants have fifteen challenges each; in all other felonies, each defendant is allowed eight challenges and the prosecution four for each defendant; each side is allowed three challenges for misdemeanors).

Texas requires individual and separate examination of each panel member in capital cases. TEX. CODE CRIM. PROC. ANN. art. 35.17, .25, .26 (Vernon 1966) (in all other felony cases *voir dire* may be conducted in the presence of the entire panel; challenges are accomplished by striking names from a list; the first twelve names that survive the striking process compose the jury; the number of peremptory challenges that each side is allowed varies according to type of case and type of penalty sought).

65. 291 Ark. at 376-77, 724 S.W.2d at 490-91.

66. 151 U.S. 396 (1894).

67. 291 Ark. at 376-77, 724 S.W.2d at 490-91 (quoting *Pointer v. United States*, 151 U.S. 396 (1894)). The *Pointer* Court had concluded that it was not essential that Arkansas procedures be adopted by the federal district court. 151 U.S. at 409.

68. 291 Ark. at 377, 724 S.W.2d at 491 (quoting 3 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, 15-2.6 (1986)). The standards state:

(a) Peremptory challenges should be limited to a number no larger than ordinarily necessary to provide reasonable assurance of obtaining an unbiased jury, but the trial judge should be authorized to allow additional peremptory challenges when special circumstances justify doing so.

(b) The procedure for exercise of peremptory challenges should permit challenge to any of the persons who have been passed for cause.

(c) The number of peremptory challenges and the procedure for their exercise should be governed by rule or statute.

3 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, 15-2.6 (1986).

69. 291 Ark. at 377-78, 724 S.W.2d at 491.

70. *Id.* at 377, 724 S.W.2d at 491.

71. *Id.*

72. *Id.* at 377-78, 724 S.W.2d at 491 (the comments discuss *Swain v. Alabama*, 380 U.S. 202 (1965), and conclude that the federal court procedures for peremptory challenges in felony prosecutions is a "fairer system to the defendant" and an efficient way to obtain an impartial jury).

dures and those discussed in the Standards, the court concluded that the *Clark* rule of presumed prejudice was incorrect⁷³ and overruled *Clark*.⁷⁴

Chenowith construes section 43-1903 to require the state to examine jurors before the defendant examines jurors. Similarly, the state must exercise its challenges before the defendant exercises challenges. Procedures beyond this broad guideline, however, are within the discretion of the court. By overruling *Clark*, *Chenowith* further establishes that prejudice is no longer to be presumed from a procedural error but must be affirmatively proven.

Pamela J. Bryan

73. *Id.* at 378, 724 S.W.2d at 491.

74. *Id.*



