Washington and Lee Law Review

Volume 45 | Issue 2 Article 13

Spring 3-1-1988

IV. Criminal Procedure

IV. CRIMINAL PROCEDURE

The Fourth Circuit's New Limitations on Struck Jury Venires: United States v. Ricks

The sixth amendment of the United States Constitution guarantees every person accused of a crime the right to a trial by an impartial jury.[1] One means of insuring an impartial jury is the exercise of peremptory challenges against the trial venire.[2] The trial venire consists of the individuals that a

1. U.S. CONST. amend. VI. The sixth amendment right to a jury trial applies to federal and state courts. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The *Duncan* Court held that the right to a jury trial in serious criminal cases is a fundamental right guaranteed to an accused by the United States Constitution. *Id.* at 149. Accordingly, the *Duncan* Court held that for states to guarantee due process of law to a person accused of a serious crime, the states must recognize the right of an accused to a trial by jury. *Id.* An accused's right to a trial by jury, however, does not extend to every crime. *See* Cheff v. Schnackenberg, 384 U.S. 373, 379 (1966). The *Cheff* Court held that crimes which cannot carry a punishment of imprisonment for longer then six months and which qualify as petty offenses do not entitle an accused to a jury trial. *Id.* at 379-80. In *Baldwin v. New York* the United States Supreme Court found that the classification of an offense as a petty offense or a serious offense determine's whether a trial by jury is necessary. Baldwin v. New York, 399 U.S. 66, 68 (1970). The *Baldwin* Court concluded that courts cannot deny an accused the right to a jury trial if the possible punishment resulting from the accused's trial can exceed six months imprisonment. *Id.* at 69. Additional criteria such as the nature of the crime that a court charges an accused with violating and the size of the potential fine that the accused can receive, affect whether an accused must receive a jury trial. *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE, § 21.1(b) (1985) (discussing potential necessity for jury trials when prosecution charges accused with status crimes such as driving under the influence of alcohol, and shoplifting).

The common law mandates that a trial jury must be impartial. *See* Irvin v. Dowd, 366 U.S. 717, 722 (1947) (noting that jury trial is unfair automatically unless jury is impartial). Additionally, there are specific procedures in the American criminal justice system to protect the impartiality of juries. *See generally* LAFAVE & ISRAEL at §§ 21.1-.4. (explaining that one procedure courts employ to protect jury impartiality is allowing parties' to exercise peremptory challenges). *See* United States v. Marchant, 25 U.S. (12 Wheat.) 297, 298-99 (1827) (noting that peremptory challenges allow parties to remove individuals from jury venires when venire members are predjudiced against removing party). Another procedure is the right of both the defense and the prosecution to challenge any member of a trial venire for cause. *See* III A.B.A. STANDARDS FOR CRIM. JUST. § 15-2.5 (1982) (explaining that removal for cause is ability of parties to strike any individual from trial venire if individual is unfit for duty according to statutory requirements or individual is permanently biased). Another procedure courts use to protect jury impartiality is the right of the defendant and the prosecutor to challenge the entire venire of jurors. *See* Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 449 (1871) (allowing defendant to challenge successfully entire trial venire on procedural grounds). Finally, both sides of a criminal procedure may challenge the impartiality of a judge. *See* Tumey v. Ohio, 273 U.S. 510, 522-23 (1927) (noting that defendant may challenge bias of trial judge).

2. *See* Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 1720 (1986) (stating that American criminal procedure traditionally acknowledges peremptory challenges as one means of assuring unbiased jury); United States v. Swain, 380 U.S. 202, 220 (1965) (explaining function of peremptory challenges); Hayes v. Missouri, 120 U.S. 68, 71 (1887) (describing peremptory challenges as extremely effective means of excluding unfit men from jury-box); Meade v. State, 85 So.2d 613, 615 (Fla. 1956) (en banc) (explaining purpose of peremptory challenges).

court has assembled as potential jurors for an accused's trial.[3] A peremptory challenge is the traditional right of a party to strike any person from the trial venire for any reason.[4] The United States Supreme Court has declared that the right to exercise peremptory challenges against a trial venire is one of the most important rights of an accused individual.[5] One of the procedures that courts employ to enable a party to exercise peremptory challenges is the struck jury selection process.[6] In the struck jury selection process, a trial judge presents a list of the individuals in the trial venire to each side of a criminal action.[7] The trial judge then allows each side to peremptorily

---

3. BLACK'S LAW DICTIONARY 1395 (5th ed. 1979) (explaining that term "venire" referred to common law writ directing the local sherriff to assemble specific number of qualified men to serve as potential jurors for particular defendant's trial. *Id.*; State v. Frotten, 114 Vt. 410, 46 A.2d 921, 924 (1946) (discussing common-law origin of term "venire").

4. *See* Swain v. Alabama, 380 U.S. 202, 212 (1965). The United States Supreme Court's opinion in *Swain* began with an extensive analysis of the history and power of peremptory challenges. *Id.* at 212-22. The *Swain* Court granted much deference to the analyses of Blackstone. *Id.* at 212. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 353 (15th ed. 1809). Blackstone wrote that the peremptory challenge is an arbitrary and capricious right to challenge a juror for any cause. BLACKSTONE, *supra* at 353. The *Swain* Court noted further that according to Blackstone, parties must exercise peremptory challenges with full freedom or the purpose of the challenge fails completely. *Swain*, 380 U.S. at 219.; BLACKSTONE, *supra*, at 353. The *Swain* Court also relied upon the district court's discussion of peremptory challenges in *State v. Thompson*. *Swain*, 380 U.S. at 219. State v. Thompson, 68 Ariz. 386, 206 P.2d 1037, 1039-40 (Ariz. 1949). In *Thompson* the Arizona Supreme Copurt held that the essential charcteristic of a peremptory challenge is that parties may exercise the challenge without stating a reason, and without any inquiry by the courts as to why the party exercised the challenge in the way that the party did. *Thompson*, 206 P.2d at 1039. Recently, however, the Supreme Court has restricted a party's traditionally unfettered right to exercise peremptory challenges. *See* Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 1725 (1986). In *Batson* the Supreme Court held that a defendant can establish a prima facie case of prosecutorial discrimination on evidence that the prosecution used its peremptory challenges to exclude all members of a minority group from a jury. *Id.* at 1722-1723. The *Batson* exception, however, only applies to cases where the defendant alleges racial discrimination as a result of the prosecution's exercise of peremptory challenges. *See* LAFAVE & ISRAEL, *supra* note 1 at 849 (explaining Supreme Court's decision in *Batson* to place restrictions on exercise of peremptory challenges).

5. *See* Pointer v. United States, 151 U.S. 396, 408 (1894) (discussing traditional legal sanctity of defendant's right to peremptory challenges).

6. *See* State v. Brunson 101 N.J. 132, 141, 501 A.2d 145, 151-52 (1985). In *Brunson* the Supreme Court of New Jersey discussed a number of procedures that federal courts employ to allow parties to exercise peremptory challenges in criminal actions. *Id.* One of the procedures that the New Jersey court discussed as a valid jury selection process was the struck jury system. *Id.*; *see also* Swain v. Alabama 380 U.S. 202, 212-13 (1965) (noting that struck jury system is historically valid system for exercising peremptory challenges); Brown v. New Jersey, 175 U.S. 172, 177 (1899) (noting that struck jury system can vary in procedure within same state without affecting parties right to peremptory challenges); United States v. Pointer, 151 U.S. 396, 411-12 (1894) (recognizing for first time that struck jury system is legitimate way for parties to exercise peremptory challenges); United States v. Blouin, 666 F.2d 796, 798 (2d Cir. 1981) (stating that struck jury selection process is one of most effective ways that parties can exercise peremptory challenges).

7. *See e.g.*, *Pointer*, 151 U.S. at 396 (illustrating court's tender of venire list to prosecutor and counsel for defense).

challenge any person in the venire by striking the person's name from the venire list.[8] The United States Supreme Court has held that courts must condemn any system of jury selection that impairs the ability of a party to fully exercise the party's peremptory challenges.[9] In *United States v. Ricks*[10] the United States Court of Appeals for the Fourth Circuit addressed the question of whether a court that conducted a struck jury selection without limiting the size of the trial venire impaired the defendants' ability to fully exercise the defendants' peremptory challenges.[11]

In *Ricks* a grand jury indicted the defendants for engaging in a conspiracy to possess and distribute narcotics.[12] At the trial of the *Ricks* defendants, seventy-five veniremen reported for jury duty.[13] The district court for the Eastern District of Maryland designated sixty-six of the seventy-five veniremen as the group from which the district court would select the active jurors for the *Ricks* trial.[14] The district court noted that the Federal Rules of Criminal Procedure required the district court to permit the

---

8. *See generally*, III A.B.A. STANDARDS FOR CRIM. JUST. § 15-2.6(b) (1982) (explaining that in struck jury selection process courts allow each party to exercise peremptory challenges against individuals in venire by striking individuals names from venire list. *Id.*

Federal and state statutes explicitly control the number of peremptory challenges that each side may exercise. *See e.g.*, MD. RULES § 4-313(a). The Maryland Rules of Criminal Procedure provide that when a defendant faces a single charge carrying a punishment of life imprisonment or death, the defendant may exercise 20 peremptory challenges and the State may exercise 10. *Id.* If a defendant faces a single count which carries a punishment of possible imprisonment for more then 20 years, but less then life, the court must allow the defendant 10 peremptory challenges and the State 5. *Id.* All other crimes, except those for which the Maryland Rules do not provide a penalty, entitle each side to 4 peremptory challenges. *Id. Compare* MD. RULES *with* FED. R. CRIM. P. 24 (b). The Federal Rules of Criminal Procedure provide that if a defendant faces a punishment of death, both the defendant and the State receive 20 peremptory challenges. FED. R. CRIM. P. 24 (b). If the defendant faces a punishment of imprisonment for more than one year, then the Federal Rules allow the defendant 10 peremptory challenges, and the State 6. *Id.* For all other crimes, the Federal Rules allow a defendant to exercise 3 peremptory challenges and allow the State to exercise 3 peremptory challenges. *Id.*

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

10. 776 F.2d 455 (4th Cir. 1985), 802 F.2d 731 (4th Cir. 1986) (en banc), *cert. denied sub nom.* King v. United States, 107 S. Ct. 650.

11. United States v. Ricks, 776 F.2d 455, 458-61 (4th Cir. 1985), 802 F.2d 731 (4th Cir. 1986) (en banc), *cert. denied sub nom.* King v. United States, 107 S. Ct. 650.

12. *Id.* at 458. In *Ricks* the Fourth Circuit convicted defendants Ricks, Carter, Moffatt, Rogers, Lindsey, Frisby, Roberts, and King, of engaging in a conspiracy to possess and distribute heroin and cocaine in violation of section 846 of Title 21 of the United States Code. *Id. See* 21 U.S.C. § 846 (1982) (codifying federal penalty for attempting to or conspiring to comit violations of Chapter 13, subcapter 1, of United States Code). The prosecution also charged the individual defendants with racketeering and conducting continuous criminal enterprises. *Ricks*, 776 F.2d at 458. *See* 21 U.S.C. § 848 (1982) (codifying federal penalties for racketeering and conducting continuous criminal activities).

13. *Ricks*, 776 F.2d at 458. In *Ricks* the Fourth Circuit noted that the district court most likely called seventy-five people to form the initial trial venire because other trial judges planned to select jurors for their trials from the individuals that remained in the venire after the *Ricks* jury selection.*Id.* at 458-59.

14. *Id.* at 458. The district court designated the remaining nine veniremen as the group from which the court would select the alternate jurors. *Id.*

defendants to exercise a minimum of ten peremptory challenges against the individuals in the *Ricks* trial venire.[15] An Assistant United States Attorney asked the district court to explain from which part of the active juror venire list the court would select the names of the twelve active jurors.[16] The district court responded that, although the court could not give a definite answer at that time, the court's general policy of selecting names from a venire list was to start near the top of the list and work down.[17]

The district court conducted voir dire and excused nine people from the active juror venire for cause.[18] After voir dire, the district court gave a list of the fifty-seven individuals remaining in the active juror venire to each side, instructing each side to exercise its peremptory challenges against the names on the list.[19] The defendants concentrated their peremptory challenges at the top of the active juror venire list, exercising all of their challenges within the first twenty-seven names on the list.[20] The government exercised its peremptory challenges throughout the list, exercising only three

---

15. *Id.* FED. R. CRIM. P. 24(b). *See supra* note 8 (explaining that if criminal defendant faces punishment of imprisonment for more than one year, Federal Rules of Criminal Procedure allow defendant 10 peremptory challenges, and allow State six). The crime of conspiring to possess and distribute narcotics is punishable by imprisonment for more than one year. 21 U.S.C. § 846. (1982). A conviction under § 846 can result in the maximum penalty or fine allowed for a conviction of the crime that was the object of the attempt. *Id.* The predicate crimes of possessing or distributing cocaine or heroin carry maximum sentences of life imprisonment, and substantial fines. 21 U.S.C. § 841 (1982). Rule 24(b) of the Federal Rules of Criminal Procedure further provides that when a criminal trial contains more than one defendant, the court may grant the defendants additional peremptory challenges and permit the defendants to exercise the additional challenges seperately or jointly. FED. R. CRIM. P. 24(b). In *Ricks*, the district court allowed the defendants to exercise jointly a total of twelve peremptory challenges against the active juror venire. *Ricks* at 458. Finally, Rule 24(b) states that a court must allow the defendants and the government additional peremptory challenges if the court uses alternate jurors; one challenge for up to two alternate jurors, and two challenges for up to four alternate jurors.*Id.* The district court in *Ricks* conducted the alternate juror selection by informing both sides that the alternate jurors would come from the last eight names on the venire list. *Id.* The district court allowed each side to challenge two individuals in the alternate venire, which left four individuals to act as the alternate jurors. *Id.*

16. *Ricks*, 776 F.2d at 459. The Fourth Circuit in *Ricks* noted that the prosecuting attorney probably asked the district court about the order of selection due to the large size of the venire. *Id.* The Fourth Circuit, however, did not cite any example of a standard venire size that the district court normally employed before *Ricks*. *Id.*

17. *Id.* The actual discussion between the Assistant Attorney General and the judge was:

> [Prosecution]: Your Honor, may I assume that we'll be—or the Court will be picking from the top of the list?
>
> The Court: Well, of course I can't tell at this point, as far as strikes and so forth, but ordinarily I start from the top, not any rigid number, counting from the top, so I think it would be reasonably fair to say, if you want to exercise your strikes mostly at the top, and if you're satisfied with the top, don't strike there. *Id.*

18. *Id.* The district court in *Ricks* also excused one individual from the alternate juror venire. *Id.* After the exercise of all excusals for cause, the active juror venire contained fifty-seven individuals and the alternate juror venire contained eight individuals. *Id.*

19. *Id.*

20. *Id.*

challenges within the first twenty-nine names on the list.[21] The district court then selected the active jurors from the original list of veniremen, which the clerk had marked with absences, strikes for cause, and peremptory challenges.[22] The district court selected all twelve of the active jurors from below the point on the list where the defendants had executed their last peremptory challenge.[23] The defendants objected to the district court's selection process, claiming that the district court misled the defendants by stating that the selection of the jurors would start from the top of the venire list.[24] The defendants argued that if the district court had explained that the court intended to select the active jurors from all parts of the venire list, the defendants would not have concentrated the use of their peremptory strikes at the top of the list.[25] The court replied that the defendants were not told that the selection of active jurors would begin at the top of the list.[26] Instead, the court said that the defendants were told that the selection of active jurors might begin at the top of the list.[27] Accordingly, the district court overruled the defendants' objections, and swore in the jury.[28] Following the trial, the jury found the defendants guilty of the narcotics charges.[29] The defendants appealed the convictions to the United States Court of Appeals for the Fourth Circuit.[30] On appeal, a panel

---

21. *Id.*

22. *Id.*

23. *Id.* The district court in *Ricks* selected as foreman the fifteenth individual named on the master venire list whom the district court had not struck for cause, and whom neither side had peremptorily challenged. *Id.* The district court then selected the remaining eleven active jurors from individuals whose names were below the foreman's name on the venire list. *Id.*

24. *Id.* In *Ricks* the defense argued that, relying on the words of the district court judge, the defense started at the first name on the venire list and proceeded to strike the twelve most potentially hostile individuals in order from the top to the bottom, rather then strike the most hostile twelve individuals on the list. *Id.*

25. *Id.* at 460. In *Ricks* the counsel for the defense stated that the defense decided not to strike the individual who became the jury foreman from the venire list because the defense believed that the court would start selecting jurors from the top of the list and, therefore, the district court would not reach the foreman's name. *Id.* According to the defense, even if the government took six strikes and the defense took twelve, the district court would not have reached the foreman's name if the court had started selecting from the top of the list. *Id.*

26. *Id.*

27. *Id.* The district court in *Ricks* responded to the defendants' objection to the jury selection by saying that although the trial court suggested that the defendants should exercise strikes near the top, the trial court never stated a rigid formula of selection. *Id.* The defendants replied that it was not coincidence that all nine of the defense attorneys thought that the trial judge said that jury selection would begin at the top of the list and work down. *Id.* The prosecution responded that although the defense counsel did not understand the court's statements, the prosecution had understood the court's statements. *Id.*

28. *Id.*

29. *Id.* at 458. The district court in *Ricks* convicted Ricks, Carter, Moffatt, Rogers, Lindsey, Frisby, Roberts, and King of engaging in a conspiracy to possess and distribute heroin and cocaine. *Id.*; *see supra* note 15 (discussing specific crimes with which prosecution charged defendants).

30. United States v. Ricks, 776 F.2d 455 (4th Cir. 1985), 802 F.2d 731 (4th Cir. 1986) (en banc), *cert. denied sub nom.* King v. United States, 107 S. Ct. 650.

of the Fourth Circuit found that the district court's misleading explanation of the *Ricks* struck jury selection process impaired the defendants' ability to fully exercise their peremptory challenges.[31] The panel held that the impairment of the defendants' ability to exercise their peremptory challenges was reversible error.[32] The United States appealed the Fourth Circuit's panel decision, and the Fourth Circuit granted a rehearing *en banc*.[33]

On rehearing, the Fourth Circuit in *Ricks* noted that the history of the struck jury selection process requires a struck jury venire to contain no more individuals than the sum of the minimum number of people necessary to form a petit jury with alternate jurors, plus the number of peremptory challenges allowed to each side.[34] Consequently, the Fourth Circuit decided that the district court's decision in *Ricks*, to employ a struck jury venire that contained more individuals than the necessary minimum, was without precedent.[35] The Fourth Circuit found additionally that the Supreme Court

---

31. *Id.* at 461. The Fourth Circuit in *Ricks* found that the ambiguity of the district court's explanation of the struck jury selection process made the defendants' peremptory challenges worthless because all of the defendants' challenges were against individuals whom the trial court never considered for selection. *Id.*

32. *Id.* In *Ricks* the Fourth Circuit noted that the Supreme Court declared in *United States v. Pointer* that a denial or impairment of a party's right to peremptory challenges is per se reversible error. *Id.*; United States v. Pointer, 151 U.S. 396, 408 (1894). Accordingly, the panel of the Fourth Circuit reversed the defendants' convictions. *Ricks*, 776 F.2d at 461. While the Fourth Circuit did not find any precedent that was precisely on point with the *Ricks* decision, the Fourth Circuit noted that the *Ricks* decision was in accord with other federal court decisions. *Ricks*, 776 F.2d at 461 n. 9.; *see e.g.* United States v. Turner, 558 F.2d 535, 538 (9th Cir. 1977) (holding that ambiguous exchange resulting in misunderstanding between court and counsel concerning court's own jury selection process was automatic reversible error when court did not give defendant adequate notice of which jury selection process court would employ and misunderstanding resulted in impairment of defendant's peremptory challenges); United States v. Sams, 470 F.2d 751, 755 (5th Cir. 1972) (noting that clerk impaired defendant's ability to fully exercise peremptory challenges when clerk misled defense counsel concerning which jury selection system court would employ).

33. United States v. Ricks, 784 F.2d 594 (4th Cir. 1986).

34. United States v. Ricks, 802 F.2d 731, 734 (4th Cir. 1986) (en banc), *cert. denied sub nom.* King v. United States, 107 S. Ct. 650. In *Ricks* the Fourth Circuit, sitting *en banc*, relied on the Supreme Court's opinion in *Pointer v. U.S. Ricks*, 802 F.2d at 733, 735; *see* Pointer v. United States, 151 U.S. 396, 405-13 (1894). In *Pointer* the trial court restricted the size of the trial venire to the number of people in the petit jury (12), plus the total number of peremptory challenges (15), that each side could exercise under state statute. *Pointer*, 151 U.S. at 399. The Fourth Circuit found that other circuit courts have limited struck jury venires to the sum of the petit jurors plus the total number of peremptory strikes. *Ricks*, 802 F.2d at 736. The Fourth Circuit concluded, therefore, that the decision by the *Pointer* trial court, to use a venire containing no more then the necessary minimum number of individuals, was not accidental, but rather a reflection of the custom of conducting struck jury selection from a venire which contains only the minimium number of names necessary to cover the petit jury and the peremptory challenges. *Id.*

35. *Ricks*, 802 F.2d at 736. The Fourth Circuit in *Ricks* concluded that because every case which explained the struck jury process in numerical terms limited the venire to the sum of the jurors, plus the peremptory challenges, the district court in *Ricks* was without precedent in deciding to tender a longer list without designating an area on the list equal to the necessary

has condemned every system of jury selection that impairs a party's right to full unrestricted exercise of the party's peremptory challenges.[36] According to the Fourth Circuit, a struck jury venire that contains more individuals than the necessary minimum automatically impairs the effectiveness of a party's peremptory challenges.[37] The Fourth Circuit, therefore, reversed the defendants' convictions in *Ricks* and remanded the case for a new trial.[38]

In remanding *Ricks*, the Fourth Circuit enunciated two rules that future courts must follow when employing the struck jury selection process.[39] The Fourth Circuit stated that courts must limit the number of people in a struck jury venire to the necessary mimimum.[40] The Fourth Circuit also stated, that if a court fails to limit the size of a struck jury venire to the necessary minimum, the court must designate an area on the struck jury venire list that contains a number of names equal to the necessary minimum and select the jurors from that part of the list.[41] According to the Fourth

---

minimum. *Id.* Additionally, the *Ricks* panel had reasoned previously that the *Ricks* venire only needed thirty-eight individuals, instead of the fifty-seven individuals that actually comprised the *Ricks* venire. *Ricks*, 776 F.2d at 459. The *Ricks* panel had calculated this number by adding together the number of jurors in the petit jury (12), plus the number of alternate jurors (4), plus the number of peremptory challenges allowed to the defendants (12), plus the number of peremptory challenges allowed to the government (6), plus the total number of peremptory challenges against the alternate jury venire (4): a total of 38 individuals. *Ricks*, 776 F.2d at 459.

36. *Ricks*, 802 F.2d at 734. The Fourth Circuit based its reversal in *Ricks* on the Supreme Court's opinion in *Pointer v. United States*. *Ricks*, 802 F.2d at 734; *see* United States v. Pointer, 151 U.S. 396, 408. The *Pointer* Court stated unequivocally that courts must condemn any system of jury selection that prevents or embarrasses the full unrestricted exercise by an accused of his peremptory challenges. *Pointer*, 151 U.S. at 408.

37. *Ricks*, 802 F.2d at 733. According to the *en banc* panel in *Ricks*, the effectivenness of the right to exercise peremptory challenges decreases as the size of the venire list increases.*Id.* The Fourth Circuit reached this decision by concluding that if a court employs a struck jury venire list that contains more names than the necessary minimum and the judge selects the jury in a way that differs from the manner that the judge previously disclosed, the defendant could waste strikes on veniremen whom the judge ultimately would decide to exclude from the jury. *Id.* The Fourth Circuit concluded, therefore, that the district court's use of an excessively large venire diluted the defendants' ability to fully exercise their peremptory challenges. *Id.* at 736.

38. *Id.* at 737.

39. *See infra* notes 40-41 and accompanying text (discussing Fourth Circuit's new rules in *Ricks* limiting number of individuals allowed in struck jury venires).

40. *Ricks*, 802 F.2d at 736-37. In deciding that a court must limit the size of a struck jury venire to the necessary minimum, the *en banc* panel in *Ricks* based its decision on the history of the struck jury selection process. *See supra* note 34 (discussing traditional size of struck jury venires).

41. *Ricks*, 802 F.2d at 737. The Fourth Circuit found the authority for requiring courts to designate expressly an area on an overly large venire equal in size to the necessary minimum number of people needed for trial in *Pointer v. United States*. *Ricks*, 802 F.2d at 735-36; *see Pointer*, 151 U.S. at 409-11. The Fourth Circuit noted that although the *Pointer* decision did not state that a trial court must inform the defendant and the prosecutor that the first twelve unchallenged names will become the jury, the *Pointer* Court had approved of a struck jury system in which the trial court had informed both sides of the selection order. *Ricks*, 802 F.2d

Circuit, the failure of a court to follow the venire restrictions established in *Ricks* is reversible error.[42]

The dissent in *Ricks* noted that the United States Supreme Court has held that a party's right to peremptory challenges is a right to reject jurors but not a right to select jurors.[43] The dissent argued that the majority's new venire rules allow a party to exercise more control over the selection of a jury than the Supreme Court allows.[44] The dissent also argued that the majority's new venire rules usurp control of the jury empanelling process that the Supreme Court traditionally has left to the discretion of the individual courts.[45] Finally, the dissent feared that the majority's rules would decrease the ability of a court to empanel impartial juries and decrease the likelihood that a jury contains adequate minority representation.[46]

---

at 735-36; *see Pointer*, 151 U.S. at 409-11. The Fourth Circuit found that the explanation of the selection order by the *Pointer* trial court was a significant factor in the Supreme Court's decision to validate the jury selection process in *Pointer*. *Ricks*, 802 F.2d at 736. The Fourth Circuit concluded that if a struck jury venire contains more names than the necessary minimum, the only way to protect the parties' rights to fully exercise their peremptory challenges is to provide the functional equivalent of a limited venire by requiring courts to designate the portion of the oversized venire from which the courts will select the jurors. *Id.*at 736-37.

42. *Ricks*, 802 F.2d at 737.

43. *Id.* at 738 (Wilkinson, J., dissenting). The dissent in *Ricks* relied on the Supreme Court's decision in *United States v. Marchant* for the proposition that the right to peremptorily challenge persons in a venire is not a right to select jurors, but rather is only the right to reject jurors. *Id.*; *see* United States v. Marchant, 25 U.S. (12 Wheat.) 480, 482 (1827) (stating that defendant's common law right to peremptorily challenge jurors does not extend so far as to grant defendant right to control actual make-up of final trial venire).

44. *Ricks*, 802 F.2d at 739 (Wilkinson, J., dissenting). The dissent in *Ricks* stated that a substantial number of courts have held that a party cannot successfully claim that a court impaired the party's peremptory challenges simply by showing that the party could have exercised its peremptory challenges in a more effective manner. *Id.* The dissent concluded, therefore, that the majority's decision in *Ricks* ignores this precedent by allowing the defendants to challenge the size of the *Ricks* venire. *Id.*

45. *Id.* at 739 (Wilkinson, J., dissenting). The dissent in *Ricks* noted that the Supreme Court encouraged experimentation with the jury selection process by intentionally leaving control of the process in the hands of the district courts. *Id.* at 738. The dissent noted additionally that Rule 24 of the Federal Rules of Criminal Procedure says nothing about venire size, nor does Rule 24 address any relationship between the size of the venire and the number of peremptory challenges. *Id.*; *see* FED. R. CRIM. P. 24 (b) (revealing absence of language in Federal Rules concerning venire size). According to the dissent, the majority did not acknowledge the flexibility in empanelling juries that the Supreme Court traditionally has entrusted to the district courts. *Ricks*, 802 F.2d at 739. The dissent stated further that appellate courts should not impose their own preferences for specific jury selection procedures on the lower courts. *Id.* According to the dissent, the result of the *Ricks* venire rules is the substitution of appellate fiat for trial court flexibility. *Id.*

46. 802 F.2d at 739-40 (Wilkinson, J., dissenting). The dissent in *Ricks* relied on the Supreme Court's decision in *Taylor v. Louisiana*. *Id*; *see* Taylor v. Louisiana, 419 U.S. 522, 527 (1975). In *Taylor*, the Supreme Court held that the selection of a petit jury from a representative cross-section of the court's community is an essential component of the sixth amendment right to a jury trial. *Taylor*, 419 U.S. at 527. According to the *Ricks* dissent, a large venire enhances the likelihood that the jury will include a fair cross-section of the community. *Ricks*, 802 F.2d at 739. Thus, the *Ricks* dissent feared that the majority's decision

The Fourth Circuit's decision to reverse the *Ricks* district court because the district court impaired the defendants' ability to exercise the defendants' peremptory challenges is in accord with the Supreme Court's protection of peremptory challenges.[47] The Supreme Court has held that a denial or impairment of a party's ability to exercise peremptory challenges is reversible error without a showing of prejudice.[48] In *Ricks*, the district court misled the defense counsel by stating that the jury selection would begin near the top of the venire list.[49] By misleading the defense counsel, the district court impaired the ability of the defense counsel to exercise its peremptory challenges.[50] Thus, based on the facts in *Ricks*, the Fourth Circuit's decision to reverse the *Ricks* district court is in accord with the Supreme Court's protection of an accused's right to peremptory challenges.[51]

The Fourth Circuit's reversal of the *Ricks* district court also accords with the State Code and common law of Maryland.[52] The Supreme Court has left the process of jury empanellment to the complete discretion of the individual district courts so long as the district courts do not impair the

---

to restrict the size of struck jury venires underestimates the value of an impartial jury and decreases the possibility that a struck jury will contain minority members. *Id.*

47. *See infra* notes 48-50 and accompanying text (discussing accord between Fourth Circuit's decision in *Ricks* and Supreme Court's protection of accused's rights to peremptory challenges).

48. Swain v. Alabama, 380 U.S. 202, 209 (1964) (holding that any impairment of peremptory challenges necessitates reversal); *see also* Lewis v. United States, 146 U.S. 370, 376 (1892) (same).

49. *See supra* note 19 and accompanying text (discussing *Ricks* court's statements to Assisstant United States Attorney). The Assisstant United States Attorney expressly asked the trial court if the jury selection would start from the top of the list. *Ricks*, 776 F.2d at 459. The trial court answered that ordinarily the court starts at the top. *Id.* The court also suggested that the parties should exercise their strikes at the top of the list. *Id.* Thus, the defense counsel's assumption that the court would conduct the selection from the top to the bottom was reasonable. *Id.*

50. *Id.* When the trial court in *Ricks* selected the jurors from the master venire list, the court did not select a single juror from the first fourteen un—challenged individuals. *Id.* If the defendants had known that the court would not select even one juror from the first fourteen eligible individuals, the defendants would not have concentrated all of their peremptory challenges at the top of the list. *Id* at 460 & n. 7. Thus, by relying on the court's comments that selection would begin at the top of the list, the defendants used all of their challenges in an area from which the court ultimately selected no jurors. *Id.* The Fourth Circuit's reversal of the defendants' convictions on the factual basis that the trial court's ambiguous comments about the selection process impaired the defendant's use of peremptory challenges accords with the decisions of other courts. *See* Spencer v. State, 20 Md.App. 201, 314 A.2d 727, 729-732 (Md.App. 1974) (finding that denial of due process of law occurred when clerk of court skipped down venire list instead of following pre-arranged order of selection from top to bottom).

51. *See supra* notes 48-50 and accompanying text (discussing how *Ricks* decision accords with Supreme Court's decisions enforcing defendant's rights to unrestricted exercise of peremptory challenges).

52. *See infra* notes 53-57 (explaining that *Ricks* decision accords with Maryland Rules of Criminal Procedure and Maryland judicial precedent that found reversible error when trial courts deviated from previously announced venire selection orders).

rights of the criminally accused.[53] The Supreme Court has suggested, however, that the best method of jury empanellment that a district court could adopt may be the empanellment method of the state in which the district court sits.[54] Consequently, there appears to be no reason why the district court in *Ricks*, and thereafter the Fourth Circuit in *Ricks*, could not have looked to the state statutes of Maryland for authority concerning the struck jury selection process, and the exercise of peremptory challenges.[55] The Maryland Rules of Criminal Procedure state that a trial court must explain to both sides of a criminal proceeding the order that the court will follow when selecting jurors from a trial venire.[56] In response to this requirement, the Maryland courts have held that a trial court which departs from an announced venire selection order automatically commits reversible error.[57] Accordingly, the Fourth Circuit's decision to reverse the *Ricks* district court, on the grounds that the district court impaired the defendants' peremptory challenges by departing from an announced jury selection order, accords with the state statutes and common law of Maryland.[58] Based on the facts in *Ricks*, therefore, the Fourth Circuit's reversal of the *Ricks* district court accords with both the Supreme Court's protection and Maryland's protection of a defendant's right to exercise peremptory challenges without impairment.[59]

The Fourth Circuit's decision in *Ricks* to pronounce new struck jury venire rules, however, does not accord with Supreme Court precedent.[60] The

---

53. *See infra* note 61 and accompanying text (discussing Supreme Court's decision to leave control of jury empanellment in hands of individual district courts).

54. *See* Lewis v. United States, 146 U.S. 370, 379 (1892). The Supreme Court in *Lewis* suggested that a district court could adopt the method of jury empanellment prescribed by the statutes of the state in which the court sits because such methods are familiar to the bar and the people of the state. *Id.*

55. *See supra* note 54 and accompanying text (noting that Supreme Court has suggested that district courts can adopt jury empanellment statutes of states in which district courts sit). The district court in *Ricks*, sat in Baltimore, Maryland. United States v. Ricks, 776 F.2d 455 (4th Cir. 1985), 802 F.2d 731 (4th Cir. 1986) (en banc), *cert. denied sub nom.* King v. United States, 107 S. Ct. 650.

56. *See* MD. RULES 4-312(g) (directing courts to prescribe order that courts will follow in selecting jurors from venire list before defense or prosecution exercises peremptory challenges).

57. *See* Spencer v. State, 20 Md. App. 201, 314 A.2d 727, 729-732 (Md. App. 1974) (holding that trial court's departure from previously explained venire selection procedure impaired right of accused to fully exercise accused's peremptory challenges); *see also* Burkett v. State, 21 Md.App. 438, 319 A.2d 845 (Md. App. 1974) (finding that trial court's impairment of party's peremptory challenges was reversible error without a showing of prejudice).

58. *See supra* notes 56-57 and accompanying text (explaining that Maryland courts interpreting Maryland Rules of Criminal Procedure found reversible error in same circumstances that confronted Fourth Circuit in *Ricks*).

59. *See supra* notes 47-58 and accompanying text (explaining that Fourth Circuit's decision to reverse *Ricks* trial court was correct in light of the facts in *Ricks*); *but see infra* notes 60-77 and accompanying text (discussing incorrectness of Fourth Circuit's decision in *Ricks* to pronounce new limitations on struck jury venires).

60. *See infra* notes 61-66 and accompanying text (analyzing consequences of *Ricks* decision).

Supreme Court has given the federal courts complete discretion to control the empanelling and designating of criminal venires so long as the federal courts do not impair a party's ability to fully exercise its peremptory challenges.[61] According to the Supreme Court, a party alleging that a court acted improperly with respect to the party's peremptory challenges must prove that the court actually impaired the party's right to full exercise of its peremptory challenges.[62] The *Ricks* venire rules, however, do not require a party alleging an impairment of peremptory challenges to prove that a court actually impaired the party's exercise of peremptory challenges.[63] Instead, the *Ricks* venire rules dictate that a court has committed reversible error simply by employing a struck jury venire that contains more individuals than the necessary minimum, or by failing to designate an area equal to the necessary minimum on an overly large struck jury venire list.[64] As a result of the *Ricks* venire rules, a defendant may successfully attack an overly large struck jury venire, without proving the impairment on which the defendant bases his attack.[65] Consequently, if courts accept the *Ricks* venire rules as binding rules of law, a criminal defendant may demand the reversal of a criminal conviction on procedural grounds that the Supreme Court previously has left to the discretion of the individual federal courts.[66]

---

61. *See* Pointer v. U.S., 151 U.S. 396, 408 (stating that authority of Circuit Courts to control jury empanelling process is subject only to rule that selection process may not violate rights of the accused).

62. *Id.* at 408.

63. *See* United States v. Ricks, 776 F.2d 455, 458-61 (4th Cir. 1985), 802 F.2d 731 (4th Cir. 1986) (en banc), *cert. denied sub nom.* King v. United States, 107 S. Ct. 650 (revealing failure of Fourth Circuit in *Ricks* to require party alleging impairment of peremptory challenges to actually prove impairment).

64. *Id.* at 736-37. As the *Ricks* decision now stands, in the absence of an unequivocal designation by a trial court of the area on an overly large venire list from which the court will select the jurors, the Fourth Circuit has declared every overly large struck jury venire invalid. *Id.*

65. *See supra* notes 63-64 and accompanying text (explaining that strict nature of new *Ricks* venire rules grants defendants ability to attack struck jury venires without requiring defendant to prove actual impairment of peremptory challenges).

66. *See supra* notes 60-65 and accompanying text (explaining that new venire limits pronounced by Fourth Circuit in *Ricks* usurp control over jury empanelling process that Supreme Court traditionally left to discretion of individual federal courts).

The United States Supreme Court in *United States v. Marchant* held that an individual's right to peremptory challenges is only a right to reject jurors, not a right to select jurors. United States v. Marchant, 25 U.S. (12 Wheat.) 297, 298-99. Additionally, the Second Circuit in *United States v. Blouin* has stated that a defendant cannot claim that a court impaired his right to peremptory challenges, simply by alleging that there was some other procedure available to the court, that would have increased the effectiveness of the defendant's peremptory challenges. United States v. Blouin, 666 F.2d 796, 798 (2nd Cir. 1981). Thus, the Supreme Court, and the Second Circuit have refused to invade the right of a federal court to control the exercise of peremptory challenges without a showing that a court actually impaired a party's right to peremptory challenges. *See also* Lewis v. United States, 146 U.S. 370, 377-79 (1892). The United States Supreme Court in *Lewis* left the control of the jury empanelling process to the individual circuit courts, subject only to the condition that a court could not

The *Ricks* venire rules conflict additionally with a defendant's sixth amendment right to a trial by an impartial jury.[67] The Supreme Court has held that an essential part of a defendant's right to an impartial jury is that courts must conduct jury selection from a trial venire that represents a cross-section of the community.[68] According to the *Ricks* venire rules, however, a court cannot employ a large struck jury venire to ensure an adequate cross-section of individuals from the local community.[69] Moreover,

---

violate the rights of an accused. *Id.*

Less then ten months after the Fourth Circuit decided *Ricks*, the Second Circuit in *United States v. Resto* addressed the *Ricks* venire rules. United States v. Resto, 824 F.2d 210, 213 n. 1. (2nd Cir. 1987). In *Resto* the trial court conducted two jury selections from a single master venire. *Id.* The master venire contained fifty people. *Id.* After the trial court completed the drawing of jurors for the first trial, twenty-nine people remained in the master venire which then became the *Resto* trial venire. *Id.* The trial court in *Resto* granted the defendant ten peremptory challenges and the government six peremptory challeneges. *Id.* The petit jury in *Resto* contained twelve individuals. *Id.* According to the Fourth Circuit in *Ricks*, the *Resto* venire should have contained no more then twenty-eight individuals. *See supra* note 35 and accompanying text (explaining that under *Ricks* venire rules, *Resto* venire should contain twelve individuals to equal twelve petit jurors, plus ten individuals to equal defendant's ten peremptory challenges, plus six individuals to equal government's six peremptory challenges for a total of twenty-eight individuals). The trial court in *Resto*, however, used all twenty-nine individuals in the *Resto* venire. *Resto*, 824 F.2d at 213. According to the *Ricks* venire rules, the *Resto* venire contained more individuals than the necessary minimum, and consequently, the *Resto* trial court commited reversible error. *See supra* notes 39-42 and accompanying text (explaining that under *Ricks* venire rules courts commit reversible error when struck jury venires contain more individuals than necessary minimum). The *Resto* court, however, held that despite the existence of *Ricks*, the defendant could make no argument that the number of jurors in the *Resto* venire was so large as to dilute the defendant's ability to exercise peremptory challenges. *Resto*, 824 F.2d at 213. Thus, the conclusion of the Second Circuit in *Resto* appears to be that a party cannot claim an impairment of peremptory challenges simply because a venire contains more individuals than are necessary to try the case. *Id.* Although there was one alternate juror in *Resto*, thereby making the size of the venire equal to the sum of the petit jury with the alternates plus the number of peremptory challenges, the district court's decision to designate one alternate juror appears to have been a simple response to having one more venireman than actually was necessary. *Id.*

67. *See infra* notes 68-71 and accompanying text (discussing possible threat that *Ricks* venire rules impose on defendant's right to impartial jury)

68. *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (holding that defendant's sixth amendment right to trial by jury requires that courts conduct jury selection from venire containing adequate representation of cross-sections of community).

69. *See supra* notes 35 & 40-41 and accompanying text (explaining technical requirements of *Ricks* venire rules). Under the *Ricks* venire rules, a court never can conduct a struck jury selection from a venire that contains more individuals than the necessary minimum, because when a struck jury venire contains more individuals than the necessary minimum the court must restrict the selection to a part of the venire that does not contain more individuals than the necessary minimum. *Id. See also* United States v. Ricks, 802 F.2d 731, 739 (Wilkinson, J., dissenting) (4th Cir. 1986) (en banc), *cert. denied sub nom.* King v. United States, 107 S. Ct. 650. In his dissent, Judge Wilkinson stated that the United States Supreme Court in *Ballew v. Georgia*, noted that a small jury panel is unlikely to allow adequate minority participation. *Ricks*, 802 F.2d at 739 (Wilkinson, J., dissenting); *see* Ballew v. Georgia, 435 U.S. 223, 236-37 (1978) (noting minority representation decreases as size of jury panel decreases). According to the dissent in *Ricks*, the same decrease in minority representation occurs when the size of a trial venire decreases. *Ricks*, 802 F.2d at 740 (Wilkinson, J., dissenting).

if a court employs a large struck jury venire to protect a defendant's right to an impartial jury, and the venire does not impair the defendant's full exercise of peremptory challenges, the *Ricks* decision would require a reversal of the defendant's conviction.[70] Thus, by proscribing overly large struck jury venires, without requiring proof of impairment, the *Ricks* venire rules impede the ability of a court to protect a defendant's sixth amendment right to an impartial jury.[71]

Despite the strict nature and plenary force of the *Ricks* venire rules, the Fourth Circuit's decision to pronounce new limitations on struck jury venires was without authority.[72] The Supreme Court has stated expressly that the authority to control the method of jury selection is in the individual federal courts.[73] Additionally, unless a rule or statute specifically governs the exercise of peremptory challenges, the right to control the exercise of peremptory challenges appears to rest in the hands of the individual courts.[74] The Federal Rules of Criminal Procedure do not prohibit a trial court from employing a struck jury venire that contains more people than the necessary minimum.[75] Moreover, the Maryland Rules of Criminal Procedure not only fail to prohibit a court's use of an overly large struck jury venire, but appear to allow a court to employ an overly large struck jury venire, so long as the venire does not impair a party's exercise of peremptory challenges.[76] The *Ricks* venire rules, therefore, usurp control over the size of

---

70. *Ricks*, 802 F.2d at 737. The Fourth Circuit in *Ricks* held that a struck jury selection process which employs a venire that contains more people than the necessary minimum is not a valid struck jury system. *Id.*

71. *See supra* notes 67-70 and accompanying text (discussing effect of *Ricks* venire rules on defendant's sixth amendment right to impartial jury).

72. *See infra* notes 73-76 and accompanying text (discussing absence of authority in Supreme Court precedent, federal rules, and state rules, for Fourth Circuit's new venire rules).

73. Pointer v. United States, 151 U.S. 397, 411 (1893). *See supra* notes 61-62 and accompanying text (discussing Supreme Court's decision to give individual federal courts control over jury selection process so long as courts do not impair rights of accused).

74. *See* III A.B.A. STANDARDS FOR CRIM. JUST. § 15-2.6(c) (1982) (stating that although there is a need for uniformity in jury selection systems, in absence of statutes or rules controlling exercise of jury selection process, individual courts have authority to control selection process).

75. *See* FED R. CRIM. P. (24)(b). Although Rule 24 (b) of the Federal Rules of Criminal Procedure permits both sides in criminal proceedings to exercise peremptory challenges, and dictates the number of challenges that each side may exercise, Rule 24 does not limit the size of venires. *Id.* The dissent in *Ricks* noted this point and stated that no rule or statute addressed or conferred the power to control venire size that the Fourth Circuit exercised in *Ricks*. *Ricks*, 802 F.2d at 738 (Wilkinson, J., dissenting).

76. *See* MD. RULES 4-312(g). The Maryland Rules state that after strikes for cause, and after both sides have exercised their peremptory challenges against the names on a venire list, the number of jurors in the venire list must be sufficent to provide the number of jurors and alternates needed to try the case *Id.* Thus, although the Maryland rules state that a venire must contain a minimum number of people, the Maryland rules do not impose a requirement that a venire cannot contain more than the minimum number of people necessary for a trial. *Id.*

struck jury venires from the individual federal courts without any authority for exercising such control.[77]

In *United States v. Ricks*, the Fourth Circuit found that the district court's use of an overly large venire impermissibly diluted the defendants' right to fully exercise their peremptory challenges.[78] The *Ricks* Court held that courts employing the struck jury selection process must limit the size of a struck jury venire to the sum of the number of individuals needed for a petit jury with alternates, plus the total number of peremptory challenges allowed in the case.[79] The *Ricks* court additionally held that a court that does not limit the size of a struck jury venire to the necessary minimum must designate an area on the venire list equal in size to the necessary minimum and confine the selection of jurors to that area.[80] The Fourth Circuit's decision to reverse the district court is sound under the facts in *Ricks*.[81] The venire rules that the Fourth Circuit's pronounces in *Ricks*, however, establish new requirements for courts to follow in areas of the law that the Supreme Court traditionally has left to the discretion of the individual federal courts.[82] The *Ricks* venire rules also impede the ability of a trial court to protect a defendant's right to a trial by an impartial jury.[83] Moreover, despite the strict nature and plenary force of the *Ricks* venire rules, the *Ricks* venire rules lack precedential authority.[84] Consequently, the *Ricks* court's decision to establish new limitations on struck jury venires in the Fourth Circuit, stands on tenuous authority and in conflict with the express precedent of the United States Supreme Court.[85]

EDWARD SKINNER MADARA, III

---

77. *See supra* notes 72-76 and accompanying text (explaining that *Ricks* venire rules remove control of jury empanelling process from individual courts without authority for removing control).

78. *See supra* notes 34-38 and accompanying text (explaining Fourth Circuit's decision to reverse defendants' convictions in *Ricks*).

79. *See supra* notes 34 & 40 and accompanying text (explaining Fourth Circuit's limitations on size of struck jury venires).

80. *See supra* note 41 and accompanying text (explaining Fourth Circuit's requirement for courts to follow if struck jury venires contain more people than necessary minimum).

81. *See supra* notes 47-51 and accompanying text (noting that, based on facts in *Ricks*, Fourth Circuit's decision agrees with Supreme Court's protection of accused's right to fully exercise accused's peremptory challenges).

82. *See supra* notes 60-66 and accompanying text (explaining that *Ricks* venire rules usurp control over jury empanelling process traditionally left to discretion of individual district courts by United States Supreme Court).

83. *See supra* notes 67-71 and accompanying text (discussing that, because *Ricks* venire rules prohibit courts from employing struck jury venires with more people than necessary minimum, *Ricks* venire rules conflict with sixth amendment right to impartial jury).

84. *See supra* notes 72-77 and accompanying text (discussing absence of statutory or precedential authority in Maryland law, Federal Rules, or Supreme Court precedent for *Ricks* venire rules).

85. *See supra* notes 60-66 & 72-77 and accompanying text (noting lack of authority behind *Ricks* venire rules, and potential conflict with individual federal court's jury empanelment discretion if courts accept *Ricks* venire rules as binding law).