JERRY I. WILKINS, Appellant, *v.* REPUBLIC OF LIBERIA and His Honor, RODERICK N. LEWIS, Presiding Judge of the Circuit Court of the First Judicial Circuit, Montserrado County, Appellees.

APPEAL FROM RULING IN CHAMBERS ON APPLICATION FOR CERTIORARI TO THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued March 30, 1960. Decided May 6, 1960.

1. Certiorari will not be granted to correct alleged errors in the procedure of empanelling a jury where the petitioner had a remedy for such errors by way of objection and appeal.
2. Certiorari will not be granted to correct an allegedly erroneous denial of a motion for continuance where the record shows that no prejudice was occasioned by such denial.

On appeal from a ruling of the Justice presiding in Chambers denying certiorari, *ruling affirmed.*

Lawrence A. Morgan for appellant. *Solicitor General Joseph F. Chesson* for respondent.

MR. JUSTICE WARDSWORTH delivered the opinion of the Court.

The above-entitled cause is before this Court, *en banc,* for final determination on appeal from a ruling of the Justice presiding in Chambers.

Petitioner's petition for the issuance of a writ of certiorari contains two counts which, for the benefit of this opinion, we quote word for word as follows:

"1. The above-entitled cause was assigned for hearing on March 7, 1960, at the Circuit Court of the First Judicial Circuit, Criminal Assizes, Montserrado County, with His Honor, R. N. Lewis, presiding. At the call of the case your petitioner, for the reasons set forth therein, made the following application:

"'At this stage Counsellor Lawrence A. Morgan appeared in court and gave notice that he had just been informed of the assignment of this case for trial; that at the opening of the present term of court there was no notice given of the prosecution readiness to enter into trial of this case; and so far as defendant knows, that condition which led to the continuance of this matter from the last term of court upon application of the prosecution still exists. However, since it is apparent that the prosecution now desires to waive the grounds on which they had requested a continuance and proceed with the case, the defendant respectfully requests the court to grant a period of 48 hours within which to properly prepare for the trial of this case.'

"Notwithstanding there was no objection from the prosecution to the application of the defendant, the respondent judge, being over-anxious, denied the application of your petitioner, *sua sponte,* and refused to allow him even one hour to consult his counsel or to prepare for the subpoena of his witnesses or otherwise make ready himself for his defense in this case. On the contrary the said respondent judge most prejudicially commanded that the case be proceeded with, in the following ruling:

"'The Court observes that on February 29, 1960, Counsellor Lawrence A. Morgan, being in the Sanniquellie District, addressed a letter to the judge, which I quote hereunder, word for word:

"'"Dear Judge Lewis, I have been delayed out of the City because of circumstances beyond my control, and do not see it possible to return before next-week. Will you be so good as to

continue all cases in which I am representing parties until next week Monday when I hope to be back to resume work."

" 'This request having been granted, the court has no alternative but to hold Counsellor Morgan to the terms of his letter. We shall therefore continue with the trial of this case. And it is hereby so ordered.'

which ruling your petitioner respectfully submits is illegal and prejudicial to his interest.

"2. And petitioner further complains that the respondent judge, further denied petitioner his rights and subjected him to harsh and unusual treatment on March 7, 1960, when defendant recorded the following objections to the illegal and irregular manner of selection of the jury by the court and prosecution as follows:

" 'Defendant objects to the empanelling and qualifications of not only the three jurors now before the court, but the entire number just drawn, on the grounds that they have been illegally drawn. To swear and empanel them to try this cause, aside from being prejudicial, would be in violation of the statute controlling the empanelling of jurors. That is to say, under the law controlling objections to jurors, a party may exercise only three peremptory challenges or objections; yet, in the drawing up of this jury the prosecution has exercised four. Besides, the grounds on which the several jurors have been excluded from the panel do not fall within the grounds laid down by our statute for the disqualification of jurors. Defendant, considering this procedure and action on part of the prosecution unsupported by law, and against his best interest, requests this court not to em-

panel the jury thus drawn, but to disband them and have a new set of jurors regularly drawn to try and determine the issue of this cause.'

"This objection was resisted as follows:

" 'The prosecution, resisting the objection of the defense, asks the court to take judicial notice of its records with respect to the peremptory challenges already employed by the prosecution, they being only three. With respect to the matter of the said peremptory challenges, the court allows three challenges to criminal causes, and the prosecution has not violated any aspect of the law with respect to empanelling of this jury. The prosecution further submits that the law provides challenges for cause, and the causes which have been listed are good and sufficient causes. Our colleague, the counsel for the defense, has misconstrued what is meant by disqualification of jurors under the law he has referred in counterdistinction to challenge for causes. These are two separate aspects of the law, and in our opinion the jurors now in panel do not suffer from any of the disabilities which are couched in the law upon which he desires to rely. The prosecution therefore requests this court to overrule the objections of the defense and proceed with the trial.'

"The respondent judge made the following ruling:

" 'The court, in passing upon the objections of Counsellor Morgan against the entire panel, observes that his grounds of objection are predicated upon the said jury having been illegally empanelled as such, it became necessary to take recourse to our statutes and to the records of court in the instant cause to see whether, in the

first instance, a jury panel was selected prior to the raising of such objection, and if not, could such an objection be raised prior thereto. The statute controlling the trial jury provides that, when a case is called for trial, the judge shall ask for a trial jury, and the sheriff shall thereupon call off the names of the prospective jurors four at a time; that the parties shall thereupon be entitled to examine them and to raise objections as to any or all of such persons; that the first fifteen not challenged or objected to, or as to whom objections have been overruled, shall comprise the jury; and that the judge shall name three of the fifteen as alternate jurors. It is also provided that either party may object to the entire list on the ground that it was illegally drawn. (See 1956 Code, tit. 6, §§ 532, 533.) When Counsellor Morgan interposed an objection to the entire panel the said panel had not been fully selected; only ten jurors had been selected; and there were then before the court four jurors to be objected to or not by either side. This court is of the opinion that, even if the panel had been fully selected when Counsellor Morgan for the defendant raised objections, there is not a scintilla of evidence to show that the prosecution did use four peremptory challenges in the instant cause. The court is therefore of the opinion that our learned counsellor's objection is untenable in law, and will therefore proceed to complete the empanelling of this jury; and if, at such completion, he should discover grounds sufficient in law to warrant objection to the entire panel, he will then do so. And it is hereby so ordered.'

"Which ruling your petitioner most respectfully

submits is illegal, irregular and materially prejudicial to his interest. All of which petitioner is ready to prove."

The respondents in these certiorari proceedings, having been served with the alternative writ of certiorari, filed returns comprising eight counts which we quote:

"1. Although petitioner's counsel, Lawrence A. Morgan, knew that he was the legal representative of Jerry I. Wilkins, petitioner in these proceedings, and that application had been made by the Assistant Attorney General for the speedy trial of all revenue cases, including the Wilkins case, he nevertheless went to Sanniquellie without informing the court of his going. Instead, he addressed a letter to the court asking for a postponement of causes in which he was interested until the following Monday. His request was granted, and his client, Jerry I. Wilkins, who was then in court, was informed by the court that the hearing of his case would come up on the following Monday. He, the said Jerry I. Wilkins, assured the court that his counsel, Mr. Morgan, would appear at that time. Consequently, when the case came up for trial on the following Monday, it was surprising to note that Counsellor Morgan had placed on record a representation of his just having been informed of the assignment, and asked the court for 48 hours within which to properly prepare himself for the trial of the case; which request the court was compelled to deny.

"2. And also because respondents submit that, as to Count '1' of petitioner's petition, there is no record in the instant case to show that, at a previous term of court, the respondent filed a motion for continuance and the same was granted. But even if such an application had been made at the last term of court, it does not necessarily follow that a con-

tinuance would have been granted for the ensuing term of court which is the February, 1960, term of court.

"3. Respondents further submit that as to Count '1' of petitioner's petition, said petition is fatally defective and bad, and should not be sustained, because the petitioner has failed to make profert of the motion for continuance, which he has alleged respondents made, so as to enable this Court to determine whether same was prejudicial to the interest of the petitioner, and whether the condition which led to the continuance of the matter for the last term of court upon the application of the prosecution still exists. For this fatal blunder and misleading statement, respondents pray the denial of the petition of petitioner.

"4. Respondents further submit that the entire petition is void of any legal or equitable grounds upon which it can be sustained by this Court, and that it is calculated ostensibly to baffle, delay and unduly protract the trial of the case and defeat the ends of justice; that is to say, the petition does not state any legal acts of the trial judge which are shown to be materially prejudicial to petitioner's rights and interest, because the purported petition is nothing less than a crafty scheme to interrupt the proper and orderly trial of the case which had already begun and over which the trial judge had jurisdiction.

"5. And also because respondents submit that Count '2' of petitioner's petition is misleading because the empanelled petty jury now sitting to hear and determine the instant case has been legally selected and empanelled; for there is not a scintilla of evidence in the records to show that the prosecution made more than three peremptory challenges.

"6. Respondents further submit, as to Count '2' of

petitioner's petition, that objections to the entire panel can be made by either party to the entire list of jurors on the ground that it was illegally drawn. But could such objections be made prior to the selection of the entire list; that is to say, before fifteen jurors had been selected? From the records it is apparent that petitioner's counsel interposed objections to the entire panel when said panel had not been fully selected. And it is also apparent upon the records that defendant, through his counsel, made no objections to any of the individual jurors until after the selection of the ten, when he interposed objections not only to the three jurors then before the court, but to the entire panel, which indicates that he elected to object to an entire panel before it could be selected, which procedure is untenable in law.

"7. And also because further, to Counts '1' and '2' of the said petition, respondent submits that, although the petition of petitioner avers that the ruling of the trial judge was prejudicial and illegal to his interest, he has failed to show in what respect the said ruling prejudiced his rights, thereby rendering said counts both defective and bad; and therefore they should be overruled by this Court.

"8. Respondents further state that certiorari will not lie in cases where there are appeals or writs of error available to the petitioner. Respondents submit that for petitioner to have tried to utilize the machinery of this Court to baffle and delay the smooth operation of the trial court and to stifle the ends of justice is dishonorable, unethical and unprofessional; and that such acts of petitioning for remedial processes merely for the purpose of delay should be frowned upon, discouraged and highly censured by this Court, as they tend to reflect unfavorably upon the administration of justice in this

Republic. And all this the respondents are ready to prove."

This cause hinges on two major issues concerning whether certiorari will lie to correct (1) the denial of an application for continuance; and (2) the alleged illegal procedure adopted by the trial judge in the empanelling of a trial jury.

We shall consider these two issues in reverse order; that is, we shall first pass upon the merits of the defendant's contention in respect to the alleged illegal conduct of the respondent judge in empanelling the jury to try the case of smuggling in which defendant stands indicted, which the defendant considers as being materially prejudicial to his rights and interest.

In the empanelling of the trial jury in question, the minutes of court show that the prosecution did exercise more than three peremptory challenges as the law directs. But would this warrant the issuance of the writ of certiorari? The minutes also show that the defendant made no objection to the selection of the individual jurors until the ten had been selected when he interposed objection which we quote as follows from the minutes of February 7, 1960:

"Defendant objects to the empanelling and qualifications not only of the three jurors now before the court, but of the entire number just gone, on the ground that they have been illegally drawn; and that, aside from being prejudicial this would be in violation of the statute controlling the empanelling of jurors. That is to say, under the law controlling objections to jurors, a party may exercise only three peremptory challenges. In this case, in the drawing up of this jury, the prosecution has exercised four. Besides, the grounds on which the several jurors have been excluded from the panel do not fall within the grounds laid down by our statutes for the disqualification of jurors. Defendant, considering this procedure and action on the part of

the prosecution as unsupported by law and against his best interests, requests this court not to empanel the jury drawn, but to disband them and have a set of jurors regularly drawn to try and determine the issue of this cause."

Let us examine the law controlling the selection, objections to, and challenges to a trial jury with a view to satisfying ourselves as to the position taken by petitioner in these certiorari proceedings. In the first place our statutes provide mandatorily the manner in which trial jury shall be chosen:

"When a case is called for trial, the judge shall ask for a trial jury. The sheriff shall thereupon call off the names of the twenty-seven prospective trial jurors four at a time, and the parties shall thereupon be entitled to examine them and to raise objection as to any or all of such persons." 1956 Code, tit. 6, § 532.

"Either party may object to the entire list of jurors on the ground that it was illegally drawn; if the court sustains the objection, it shall order the sheriff to sum-

"Each party may examine each prospective juror to determine whether he is qualified as required in section 301 of the Judiciary Law, whether he is disqualified by interest or bias, as those disqualifications are set forth mon a new panel forthwith.
therein, and whether he is disqualified on any other ground. . . .

"Any objection to a prospective juror shall be decided by the court subject to the right of the objecting party to take an exception of which he may avail himself if he takes an appeal from the judgment of the court." 1956 Code, tit. 6, § 533.

Under the statutory provisions quoted, *supra,* petitioner had every legal means at his disposal to cause his objections to the alleged illegal procedure employed by the respondent in empanelling the trial jury in question to be

reviewed by the appellate court and corrected at the appropriate time.

Next is the question of the alleged denial by the respondent judge of petitioner's motion for continuance in the court below. In this connection, Mr. Justice Tubman, speaking for this Court in *Bryant* v. *Republic,* 6 L.L.R. 128, 146 (1937), in holding that the trial court had erred in denying a motion for continuance, quoted with approval the following passage from *Corpus Juris:*

> "Although it is well settled that an application for a continuance made at the first term of court after defendant's arrest or indictment is addressed to the discretion of the trial judge, it has nevertheless been held that motions for a continuance made at such time stand upon a different footing from a motion made at a subsequent term, and as to such motions the discretion of the court should be exercised liberally to the end that defendant may have a reasonable opportunity to prepare for trial and that every facility may be afforded for presenting his defense as fully as if the case were tried at a subsequent term." 16 C.J. 452 *Criminal Law* § 821.

It is to be observed that, unlike the motion for continuance mentioned, *supra,* the instant petitioner's motion for continuance for 48 hours to prepare his defense was made at the term of court following or subsequent to the term at which he was indicted and arrested. Under such circumstances, where the defendant had at least three calendar months to prepare for his defense, the respondent judge did not err in denying the motion for continuance. It is therefore our opinion that the ruling under review denying petitioner's petition should be affirmed; and it is hereby so ordered.

Affirmed.