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CRIMINAL PROCEDURE

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PRE-TRIAL PROCEDURE

Preliminary Examinations

Article 292 of the Code of Criminal Procedure provides that the court, on request, prior to the finding of an indictment or the filing of an information "shall immediately order" a preliminary examination in felony cases. Although recent Louisiana cases¹ have upheld the refusal of lower courts to order a preliminary examination after the defendant has been indicted, and one case² has held that this provision does not abolish the judge's right to grant a continuance of a preliminary examination, *State v. Raymond*³ presents an unusual twist. In this case an application for a preliminary examination was presented to the judge on or before October 16, 1969, and an appropriate order for the examination was signed by the judge and left undated. On October 31, the court fixed the preliminary examination for November 10, but prior to this hearing date an indictment was returned by the grand jury. As a result, the court refused to hold the preliminary examination as scheduled. The supreme court denied an application for writs of certiorari, mandamus and prohibition. Mr. Justice Barham dissented, however, pointing out that to hold the request for preliminary examination in abeyance for almost a month constituted a "palpable abuse" of the mandatory provision contained in the first paragraph of article 292. The action of a judge in delaying a preliminary examination until the grand jury returns an indictment effectively writes the provisions of article 292 out of the Code of Criminal Procedure. The opportunity to face at least some of the prosecution's witnesses in open court at a preliminary examination is clearly a substantial advantage to a defendant, one which he is denied because of the in camera nature of grand jury proceedings. To consider the preliminary examination as simply an alternative method of determining the existence of probable cause to hold an accused to answer for a crime is to ignore the modern view of the preliminary examination as a valuable and almost exclusive dis-

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1. *State v. Manuel*, 253 La. 195, 217 So.2d 369 (1968); *State v. Singleton*, 253 La. 18, 215 So.2d 838 (1968).

2. *State v. Hudson*, 253 La. 992, 221 So.2d 484 (1969).

3. 254 La. 911, 228 So.2d 312 (1969).

covery device.⁴ Perhaps it is time for more attention to be paid to the spirit of the law rather than merely to the letter. In this connection serious attention might well be paid to Justice Barham's words: "The application before us reflects what may not but could well be a design to contravene positive law and deny relators' rights."⁵

Suppression of Evidence Before the Grand Jury

If the law refuses to allow the presentation of illegally obtained evidence before a trial jury, should the law allow the presentation of such evidence before a grand jury in order to obtain an indictment? This is a matter of great dispute today, and one that presents very serious policy considerations. The answer, however, is now clear in Louisiana. In *State v. Anderson*⁶ the supreme court pointed out that no authority exists in Louisiana for suppressing evidence presented before a grand jury. Indicating their unwillingness to intervene in grand jury matters *via* a motion to suppress, the court apparently deferred to the directory provisions of article 442 of the Code of Criminal Procedure to the effect that a grand jury should receive only legal evidence. This article also provides that "no indictment shall be quashed or conviction reversed on the ground that indictment was based, in whole or in part, on illegal evidence. . . ." The result in this case is based upon the view that the grand jury is an accusatory body only and that any attempt to monitor the evidence considered by the grand jury "would destroy the veil of secrecy and impede the operations of the Grand Jury."⁷ Considering the adverse effects on an accused produced by the return of an indictment by the grand jury, one is led to question the validity of allowing the commencement of a criminal proceeding based upon evidence which will be inadmissible at the trial on the issue of guilt. Perhaps the best solution to this difficulty is the exercise of both sound discretion and good faith on the part of the district attorneys in their choice of evidence to be presented before a grand jury. This is a partial solution only, however, since where a reasonable doubt exists as to the ultimate

4. See, e.g., *United States ex rel. Wheeler v. Flood*, 269 F. Supp. 194 (E.D.N.Y. 1967).

5. *State v. Raymond*, 254 La. 911, 228 So.2d 312 (1969).

6. 254 La. 1107, 229 So.2d 329 (1969).

7. *Id.* at 1118, 229 So.2d at 333.

admissibility of evidence, only a decision by a court can prove to be a completely satisfactory answer.⁸

Jury Selection

The problem of the exclusion for cause of prospective jurors in capital cases in the light of the decision of the United States Supreme Court in *Witherspoon v. Illinois*⁹ has been presented to the Supreme Court of Louisiana in two cases. In *State v. Williams*¹⁰ the court held that the *Witherspoon* decision does not bar voir dire examination of prospective jurors concerning their attitude toward capital punishment nor does it bar the state's challenge of prospective jurors who state that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. Justice Sanders, speaking for the court, pointed out that the state has good cause to challenge jurors who disclose that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them. It would seem that the court in upholding the dismissal of certain jurors for cause was influenced to a substantial extent by the prosecutor's use of such phrases as "under no circumstances," "irrespective of what the facts show," and "in no case whatsoever" during the voir dire examination. The test formulated by the court for the exercise of such challenges was whether a juror "can consider the imposition of the death penalty in the case before them."¹¹ This test was applied to uphold the exclusion of two jurors who stated under examination that even though they could never approve the death penalty in a prosecution for rape, they could in a murder prosecution such as the one before them. In *State v. Poland*,¹² another murder case, the prosecuting attorney informed the jury that they had an option to find the accused guilty as charged which would require the imposition of a death sentence or to return a verdict of guilty without capital punishment. He then inquired of each juror whether "knowing the law does not require you to return a verdict carrying the death penalty, could you, under

8. See *West v. United States*, 359 F.2d 50 (8th Cir. 1966); *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964); Note, 43 N.Y.U. L. REV. 578 (1968); Note, 72 YALE L.J. 590 (1963).

9. 391 U.S. 510 (1968).

10. 255 La. 79, 229 So.2d 706 (1969).

11. *Id.* at 82, 229 So.2d at 707.

12. 255 La. 746, 232 So.2d 499 (1970).

such circumstances, return a verdict that would carry the death penalty?"¹³ If the answer of the juror was that he could not under such circumstances return a verdict of guilty as charged because he did not believe in the death penalty or for other reasons, the juror was challenged for cause. The trial judge then undertook a personal examination of the challenged juror in an attempt to ascertain his ability to return a guilty verdict as charged despite his scruples against capital punishment. The supreme court approved questioning by the judge along this line: "Say, for the sake of argument, that, after you hear all of the evidence in the case, argument of counsel for the state and the defendant, and the law as given by the court, you are convinced beyond a reasonable doubt of the guilt of the accused as to the crime of murder, could you, because of your scruples, of the conscientious scruples you entertain, bring in a verdict of guilty as charged, knowing that if you did that, and the other jurors agreed with you, because it has to be unanimous, the only sentence the court could impose upon the accused would be the sentence of death. [sic]"¹⁴ Since it was only when a juror stated that under no circumstances could he ever return a verdict of guilty as charged, regardless of the evidence and the law, and his conviction as to the guilt of the accused, that the trial judge finally excused the juror for cause, the supreme court found this to be an appropriate implementation of the *Witherspoon* rule. This seems to be a most reasonable and well-reasoned approach to the solution of what can be a most difficult problem, and if the techniques approved by the court in these two cases are followed there would appear to be little cause for complaint.

Guilty Pleas

As a result of the decision of the United States Supreme Court in *Boykin v. Alabama*,¹⁵ the record in a case must show that a guilty plea was voluntarily and intelligently made by a defendant. In the course of *Boykin* the Supreme Court stated that a guilty plea constituted a waiver of three federal constitutional rights: the privilege against self-incrimination, the right to trial by jury, and the right to confrontation. The Court specifically held: "We cannot presume a waiver of these three im-

13. *Id.* at 765, 232 So.2d at 506.

14. *Id.* at 766, 232 So.2d at 506.

15. 395 U.S. 238 (1969).

portant federal rights from a silent record."¹⁶ In *State ex rel. French v. Henderson*,¹⁷ the relator entered a guilty plea to a charge of simple burglary on June 17, 1969 (*Boykin* became effective June 2, 1969). The minute entry by the court stated simply: "The accused, being in open Court with his counsel, Samuel P. Love, Jr., was arraigned and plead [sic] guilty. Sentence was deferred by the Court until Friday, June 20, 1969 and the accused was ordered remanded to jail to await sentence."¹⁸ An application for writ of habeas corpus was denied by a memorandum decision of the supreme court with Justice Barham dissenting.¹⁹ The minute entry seems clearly inadequate as an affirmative showing that the guilty plea was intelligent and voluntary as required by *Boykin*. It seems equally clear that in the future a clear record consisting of an interrogation of the accused by the trial judge will be necessary to sustain a guilty plea against a constitutional attack in a federal habeas corpus proceeding. It is difficult to understand the basis for the Supreme Court of Louisiana's denial of the application for writ of habeas corpus in this case, unless it is based upon material attached to the return of the trial judge to which brief reference only is made in the dissent. The record itself is insufficient to support the finding of the court. Such action can only result in recourse to federal remedies to the serious damage of the prestige and status of the supreme court of this state. It should be pointed out that article 556 of the Code of Criminal Procedure provides that where a defendant is not represented by counsel in a felony case, the court shall not accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge. The reporters' comments contain the following statement: "It may logically be assumed that a defendant who is represented by counsel is informed as to the nature and consequences of his plea of guilty, and that his plea is voluntarily entered."²⁰ This assumption is no longer valid as a result of the *Boykin* decision, and an appropriate amendment to the Code of Criminal Procedure setting out in detail the requirements which must appear in the record prior to accepting any plea of guilty would be highly desirable.

16. *Id.* at 243.

17. 255 La. 792, 232 So.2d 517 (1970).

18. *Id.* at 793, 232 So.2d at 517.

19. *Id.*

20. LA. CODE CRIM. P. art. 556, comment (b).