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Voir Dire Examination as to Fundamental Rules of Law

Byron F. Martin III

quently, when proximate cause is used in a jury trial, a jury can define the limits of a defendant's liability; under a duty-risk approach, however, the judge must assume this responsibility. If proximate cause were completely abandoned in favor of duty-risk, it appears that a jury would be precluded from participating in the process of defining the limits of a defendant's liability. However, there may be cases in which the judge desires jury participation in the process. This possibility seems to warrant the retention of proximate cause in negligence cases, and thereby affords a proper vehicle to present the issue to the jury.

Nevertheless, a duty-risk approach has its advantages. By openly resorting to judicial or legislative policy, it affords the court greater flexibility than the use of proximate cause in the decision-making process. Unlike the case with proximate cause, it also directs the readers of judicial decisions to the factors that motivated the court in making its decision.[24] It should be noted, however, that a movement toward a duty-risk approach does not guarantee a solution to the problems of liability, but merely poises it for solution.

Danny Lirette

VOIR DIRE EXAMINATION AS TO FUNDAMENTAL RULES OF LAW

On voir dire examination in a criminal prosecution, defense counsel sought to ask each prospective juror whether he could afford the defendant his legal presumption of innocence, and whether he would be affected by defendant's refusal to testify. The trial judge refused to allow the questions because he had previously instructed the entire panel as to these and other fundamental rules of law applicable in all criminal cases. He allowed only a general question as to whether the juror would apply the law as instructed by the court. The Louisiana supreme court reversed and *held*, since the preliminary instructions were

24. Ordinarily, courts do not openly rely on judicial or legislative policy as motivating factors in decisions under proximate cause. However, some writers have asserted that the underlying factors in most proximate cause decisions were judicial and/or legislative policy, thus making it difficult to determine the criteria which the court did use in making its decision. *See* L. GREEN, RATIONALE OF PROXIMATE CAUSE 122 (1927); Comment, 16 LA. L. REV. 391, 396 (1956).

not given in the presence of defense counsel,[1] the voir dire examination had been too severely restricted. *State v. Crittle*, 268 So.2d 604 (La. 1972).

The right to voir dire examination is an implementation of the defendant's right to an impartial jury,[2] and enables him to effectively exercise his constitutionally guaranteed peremptory challenges.[3] The Louisiana supreme court has held that the "defendant in a criminal prosecution is entitled to make reasonable and pertinent inquiries of the prospective juror so that he may exercise intelligently and wisely his right of peremptory challenge . . . ."[4] In addition, the Code of Criminal Procedure gives the accused the right to challenge a juror for cause.[5] Under the 1928 code, jurors could be challenged for cause because they (1) lacked a legal qualification, such as age or literacy; (2) were not impartial; (3) had some relationship with the accused or victim; or (4) served on a previous jury dealing with the case.[6] The 1966 code incorporates these grounds and adds that a juror may be challenged for cause if he "will not accept the law as given to him by the court . . . ."[7] The former code also provided that the purpose of voir dire examination was "to ascertain the qualifications of the juror . . . ." and that the examination was to be conducted "in the manner as . . . [then] provided by existing law."[8] However, there was no existing law.[9] The 1966 code remedied this oversight by providing that the examination should be within the discretion of the court.[10]

It is clearly established in all jurisdictions that the extent of voir dire examination is within the sound discretion of the

1. The trial judge's practice was to give the preliminary instruction as to fundamental rules of law to the entire panel of jurors on Monday morning, the jurors' first day in court. This case was tried three days later, and thus neither defendant nor his counsel were present during the instruction.

2. LA. CONST. art. I, § 9: "In all criminal prosecutions the accused shall have the right to a speedy trial by an impartial jury . . . ."

3. *Id.* § 10: "In all criminal prosecutions, the accused shall . . . have the right to challenge jurors peremptorily, the number of challenges to be fixed by law."

4. State v. Hills, 241 La. 345, 395, 129 So.2d 12, 31 (1961).

5. LA. CODE CRIM. P. art. 797.

6. La. Code Crim. P. arts 350, 351 (1928).

7. LA. CODE CRIM. P. art. 797. Note that article 798 gives the state the right to challenge for cause if the juror is biased against the enforcement of the statute in question, has scruples against capital punishment, or would not convict on circumstantial evidence.

8. La. Code Crim. P. arts. 349, 357 (1928).

9. *See* LA. CODE CRIM. P. art. 786, comment (a).

10. *Id.* art. 786.

trial court; rulings will not be reversed on appeal unless there has been clear abuse prejudicial to the defendant.[11] In this regard, the United States Supreme Court has held that the court has "broad discretion" on voir dire, restricted only by "essential demands of fairness."[12] The courts of the various jurisdictions disagree[13] on the specific issues involved in *Crittle*, the questioning of jurors concerning fundamental legal principles.

Although Louisiana cases have been unclear in this area, the Louisiana supreme court has consistently found no abuse in the trial judge disallowing certain categories of questions. Those categories include confusing or ambiguous questions;[14] questions tending to commit jurors in advance[15] or concerning evidence which may be introduced at trial;[16] those containing lengthy statements of particular areas of the law;[17] and those concerning a juror's knowledge or opinion of the law.[18]

State v. Hills[19] is the leading case establishing broad guide-

11. 5 R. ANDERSON, WHARTON'S CRIMINAL LAW & PROCEDURE 1996 (1957); *see* cases cited in note 13 *infra*. For a more complete listing of cases, *see generally* Annot., 54 A.L.R.2d 1204, 1207 n.15 (1957).

12. Aldridge v. United States, 283 U.S. 308, 310 (1931).

13. Federal courts of appeal find no abuse of the trial court's discretion in a refusal to allow such questions. United States v. Gillette, 383 F.2d 843 (2d Cir. 1967); Grandsinger v. United States, 332 F.2d 80 (10th Cir. 1964); Stone v. United States, 324 F.2d 804 (5th Cir. 1963). The Maryland court of appeals finds it "inappropriate" to question jurors on the principles of burden of proof and presumption of innocence. Twining v. State, 234 Md. 97, 100, 198 A.2d 291, 293 (1964). The Idaho supreme court uses a broader prohibition, holding that the accused has no right to question the jurors concerning their willingness to follow the law as given by the court. State v. Bitz, 93 Idaho 239, 460 P.2d 374 (1969). On the other hand, the California supreme court has stated in dictum that refusal to allow questions relating to willingness to apply principles of law might constitute a denial of "reasonable examination" guaranteed by California law. People v. Love, 53 Cal. 2d 843, 852, 350 P.2d 705, 710 (1960). The Texas court of criminal appeals found no abuse when a trial judge limited questioning to these issues, because the same questions had already been allowed. Grizzell v. State, 164 Tex. Crim. 362, 298 S.W.2d 816 (1956). In Illinois the defendant has the right in voir dire examinations to advise jurors on the presumption of innocence and to determine whether they will give the defendant that presumption. People v. Redola, 300 Ill. 392, 133 N.E. 292 (1921).

14. State v. Peltier, 229 La. 745, 86 So.2d 693 (1956); State v. Sanford, 218 La. 38, 48 So.2d 272 (1950).

15. State v. Harper, 260 La. 715, 257 So.2d 381 (1972); State v. Smith, 216 La. 1041, 45 So.2d 617 (1950).

16. State v. Square, 257 La. 743, 244 So.2d 200 (1971); State v. Bickham, 236 La. 244, 107 So.2d 458 (1958).

17. State v. Schoonover, 252 La. 311, 211 So.2d 273 (1968); State v. Bickham, 236 La. 244, 107 So.2d 458 (1958).

18. State v. Dreher, 166 La. 924, 118 So. 85 (1928); State v. Webb, 156 La. 952, 101 So. 338 (1924); State v. Willie, 130 La. 454, 58 So. 147 (1912).

19. 241 La. 345, 129 So.2d 12 (1960) (questions concerning racial prejudices).

lines on the extent of voir dire examination. The supreme court held that in order to secure the constitutional right of an impartial jury and intelligent use of peremptory challenges, as well as to establish grounds to challenge for cause, the trial judge should allow counsel "a wide latitude . . . in examining jurors on their voir dire."[20] The court added that

> "the scope of the inquiry is best governed by a liberal discretion on the part of the Court so that if there is any likelihood that some prejudice is in the juror's mind which will even subconsciously affect his decision, this may be uncovered."[21]

While this may be a valid general rule, there is inconsistency in the few Louisiana cases dealing directly with the issue in *Crittle*. As early as 1902, the supreme court held that questions as to a juror's willingness to give the defendant a reasonable doubt "might" be allowed, but only with a proper explanation of the term by counsel or the court.[22] In a more recent case, *State v. Peltier*,[23] the supreme court affirmed a trial judge's disallowal of this type question, finding the specific question propounded ambiguous and confusing. The court added, however, that assuming the questions were clearly phrased, the defendant could show no prejudice since other similar questions were allowed. Furthermore, the trial judge had stated that "the court has permitted and will permit counsel to examine the prospective jurors on the law of burden of proof, reasonable doubt and presumption of innocence."[24] In *State v. Green*,[25] the court upheld the right of the prosecutor to define reasonable doubt and to ask a juror whether he could accept and apply this definition if so instructed by the court. Similarly, the court has upheld counsel's right to determine the attitudes of prospective jurors as to the plea of self-defense,[26] imposition of capital punishment,[27] and the returning of qualified verdicts in capital cases.[28]

In contrast is *State v. Richey*,[29] an earlier case appealed from

20. *Id.* at 396, 129 So.2d at 31.
21. *Id.*
22. State v. Perioux, 107 La. 601, 604, 31 So. 1016, 1017 (1902).
23. 229 La. 745, 86 So.2d 693 (1956).
24. *Id.* at 752, 86 So.2d at 696.
25. 244 La. 80, 150 So.2d 571 (1963).
26. State v. Caldwell, 251 La. 780, 783, 206 So.2d 492, 494 (1968).
27. State v. Crook, 253 La. 961, 221 So.2d 473 (1969).
28. State v. Newton, 241 La. 261, 128 So.2d 651 (1961).
29. 258 La. 1094, 249 So.2d 143 (1971).

the same court as *Crittle*. The supreme court found no abuse in *Richey* of the trial court's discretion in refusing to allow any questions relating to presumption of innocence, reasonable doubt, or any other question concerning rules of law. In his per curiam, quoted at length by the supreme court, the trial judge complained of the general abuse of voir dire examinations in his court by attorneys who questioned jurors extensively as to their knowledge of pertinent law and attempted to commit the jurors in advance. Emphasizing the wide discretion of the trial court, the supreme court found this a reasonable basis for the limitation imposed. The court noted that the trial judge later instructed the jury as to all applicable law, and that the defendant could not show that he was forced to accept an undesirable juror nor that he had suffered any prejudice by the ruling. In a significant limitation on the ruling, however, the court added that "[w]hether the questions propounded would be improper in every criminal case, we are not called upon to say."[30]

Finding distinguishable facts and circumstances, the court relied upon this limitation in deciding the instant case. Defendant's counsel pointed out that neither he nor the defendant were present during the judge's preliminary instruction to all prospective jurors given three days before the voir dire examination. The supreme court quoted from *State v. Hills*[31] to establish that the judge should be liberal in his discretion so that any prejudice may be discovered and challenges used effectively. After distinguishing *Richey*[32] from the instant case, the court held:

> "Under the present facts and circumstances surrounding defense counsel's questioning of prospective jurors, we find that the trial judge restricted him too severely and too narrowly. Counsel was not present in court on the Monday prior to the instant trial when the prospective jury panel was instructed; there was no requirement that he be present. The jury panel was not reinstructed in counsel's presence. Counsel was interrupted at the inception of these proceedings; he was not allowed to try this case to the best of his ability. The trial judge misinterpreted our ruling in Richey;

30. *Id.* at 1118, 249 So.2d at 152.
31. 241 La. 345, 129 So.2d 12 (1960). *See* text accompanying notes 19-21 *supra*.
32. 258 La. 1094, 249 So.2d 143 (1971).

> he should have permitted defense counsel to pursue the questioning quoted supra, or questioned and/or instructed the jurors himself."[33]

While *Crittle* seems correct in light of earlier decisions, it is difficult to reconcile it with *Richey*, the most recent case on point. The court distinguished *Richey* by the fact that counsel was not present during the preliminary instruction. Yet in *Richey*, there is no reference to a preliminary instruction having been given. In a similar case[34] the trial judge who decided both *Richey* and *Crittle* stated that he adopted the procedure of giving preliminary instructions subsequent to *Richey*. Thus, since no preliminary instruction was given, *Richey* would seem to indicate that no preliminary instruction is needed in order to uphold the trial judge's disallowal of this line of questioning. If this instruction is not needed, then how can it be relevant that counsel was not present during this instruction in *Crittle*?[35] Under the procedure adopted in *Crittle*, the defendant is given the added protection of having the jury instructed in these preliminary rules of law prior to trial; yet by adding this protection the trial judge subjects himself to reversal if defense counsel is not present.

To compound the confusion, in two other cases also from the same judicial district decided the same day as *Crittle*, the supreme court upheld the practice which was the subject of reversal in *Crittle*. In *State v. Shepherd*,[36] counsel made no issue of being absent during the preliminary instruction, the court simply assuming he was present. In *State v. Bell*,[37] there was no mention of a preliminary instruction having been given, and the court relied on the fact that the judge's ultimate charge to the jury was adequate.

Crittle seems to be a more correct interpretation of the Code

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33. State v. Crittle, 268 So.2d 604, 608 (La. 1972).
34. State v. Sheppard, 268 So.2d 590 (La. 1972).
35. Justice Barham, in a dissenting opinion in *Sheppard*, 268 So.2d 590, 599 (La. 1972), argues that this preliminary instruction is part of the jury selection process and that Louisiana Code of Criminal Procedure article 831 requires the presence of the accused. However, the majority opinion does not discuss the point.
36. 268 So.2d 590 (La. 1972).
37. 268 So.2d 610 (La. 1972).

of Criminal Procedure.[38] The redactors intended to liberalize voir dire examinations and to establish a new ground for challenges for cause. Yet under *Richey* the court's interpretation of the new provisions is even more restrictive than its earlier interpretations of the old code.[39] Thus the new ground for challenge becomes useless.

Furthermore, *Crittle* seems to provide a more realistic policy. Can a judge's questioning of an entire panel of jurors be meaningful in determining prejudice? What juror would step forward and say that he could not give the defendant the legal rights he is entitled to have? This kind of prejudice is often hidden, even to the juror himself, and can only be determined by a probing examination. The supreme court recognized this in *State v. Oliphant*,[40] where it found that the trial court erred in not dismissing a juror for cause when the juror demonstrated predispositions against the presumption of innocence under examination, even though the juror told the judge he would afford the defendant that presumption.

It is suggested that the abuses complained of in *Richey* can be prevented; at the same time, a reasonable and pertinent examination of jurors can be held in order to determine their attitude with regard to fundamental rules of law. *Crittle* appears to be a correct interpretation of the law and jurisprudence and properly implements the defendant's right to an impartial jury. In its further consideration of this point, the supreme court

38. It is significant to note that Louisiana Code of Criminal Procedure article 786, comment (d) (examination of jurors) cites *State v. Hills*, 241 La. 345, 129 So.2d 12 (1961), as authority for a court allowing a wide scope of examination on voir dire. Article 797, comment (d), referring to article 797 (4) (juror can be challenged for cause for refusing to accept the law as given by the court), states that this new ground for challenge for cause is a codification of the jurisprudence, citing *State v. Oliphant*, 220 La. 489, 56 So.2d 846 (1952), as authority. In that case extensive examination of jurors was allowed by the trial court as to jurors' willingness to apply the law as given on presumption of innocence, reasonable doubt, and burden or proof. Significant also is comment (b), article 799 (giving number of peremptory challenges), where *State v. Hills*, 241 La. 345, 129 So.2d 12 (1961), and *State v. Henry*, 196 La. 217, 198 So. 910 (1940), are cited as authority for the state and the defendant having the right to cross-examine jurors to determine grounds for challenge for cause and to use peremptory challenges effectively. In *Henry*, the supreme court reversed a trial judge's refusal to allow defense counsel to ask a prospective juror whether he could return a qualified verdict in a capital case.

39. *See* text accompanying notes 19-25, 28 *supra*.

40. 220 La. 489, 56 So.2d 846 (1952).

hopefully will abandon *Richey* and its progeny[41] and adopt the position set forth in *Crittle*.

Byron F. Martin III

PRETRIAL MENTAL COMMITMENT OF THE ACCUSED

Defendant, a twenty-seven year old, mentally deficient deaf mute, blind in one eye and unable to read, write or otherwise communicate, was charged with two separate robberies.[1] Upon receipt of not-guilty pleas, the trial court initiated competency procedures.[2] At a subsequent hearing, the court found the accused incapable of standing trial and ordered commitment to a state mental institution until he attained competency. Defendant moved for new trial, challenging Indiana's commitment criteria as violating due process and equal protection of the law and subjecting him to cruel and unusual punishment. The trial court denied the motion, and the Indiana supreme court affirmed.[3] The United States Supreme Court granted certiorari, reversed and unanimously *held* that by subjecting the accused to more liberal commitment standards and more stringent criteria for release than applied in civil commitment proceedings, the state had deprived defendant of equal protection of the law; and that the indefinite commitment of an accused solely because of his incapacity to stand trial violated due process of law. *Jackson v. Indiana*, 92 S. Ct. 1845 (1972).

The concept of mental capacity to stand trial was of early common law origin,[4] where a sound mind was said to be needed

41. Specifically, State v. Bell, 268 So.2d 610 (La. 1972); State v. Sheppard, 268 So.2d 590 (La. 1972).

1. "The first involved property (a purse and its contents) of the value of four dollars. The second concerned five dollars in money." Jackson v. State, 92 S. Ct. 1845, 1848 (1972).

2. The procedures were pursuant to BURNS' IND. STAT. ANN. § 9-1706a (now IND. CODE § 35-5-3-2 (Supp. 1971)).

3. Jackson v. State, 253 Ind. 487, 255 N.E.2d 515 (1970).

4. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1723-78, at 24 (Dawsons ed. 1966): "Al[s]o, if a man in his [s]ound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; becau[s]e he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the pri[s]oner becomes mad, he shall not be tried; for how can he make his defense?" For an early history of incompetency proceedings, see Youtsey v. United States, 97 F. 937 (6th Cir. 1899). *See generally* the *Foreword* to T. SZASZ, THE MANUFACTURE OF MADNESS at xix (1970).