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# Does the Defendant Have a Right of Access to Prospective Jurors' Prior Voting Records?

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## DOES THE DEFENDANT HAVE A RIGHT OF ACCESS TO PROSPECTIVE JURORS' PRIOR VOTING RECORDS?

Defendant was indicted for distribution of heroin. Prior to the voir dire examination, defense counsel filed a motion requesting that the state furnish the defense with a list containing prospective jurors' voting records in previous criminal trials.[1] When the trial judge ordered the list to be given to the defendant, the state moved for a contradictory hearing. After the hearing the trial judge renewed his order and the state appealed. The Louisiana Supreme Court *held* that the state was not required to give the list to the defendant, but that the defendant should be entitled to elicit the information from the prospective jurors on voir dire. *State v. Holmes*, 347 So. 2d 221 (La. 1977).

The rationales for disallowing certain questions on voir dire have changed little over the years in Louisiana.[2] It is agreed, for example, that questions that seek to commit a venireman to a position on the law or facts to be presented at trial are impermissible.[3] For this reason many hypothetical questions bearing a similarity to the facts at issue are not allowed.[4] A line of questioning that is lengthy or repetitious may be denied as being unduly burdensome on the court's time.[5] Some questions may be forbidden because they are in an improper form—confusing,[6] "loaded",[7] too broadly phrased,[8] not in legal form,[9] or inflammatory.[10] Finally, certain

1. The State obtained the information contained in its "jury book" by polling jurors after criminal trials and sending the results to the secretary of the Trial Division who in turn distributed the information to the Sections of Court to be logged on each juror's venire. The polling of a jury is allowed by Louisiana Code of Criminal Procedure article 812. It is noteworthy that the statute provides for no other method of discovering a juror's vote in a criminal case. See text at note 52, *infra*.

2. Martin, *Voir Dire Examination As To Fundamental Rules of Law*, 33 LA. L. REV. 449, 451 (1973).

3. *See, e.g.*, State v. Clark, 325 So. 2d 802 (La. 1976); State v. Brumley, 320 So. 2d 129 (La. 1975).

4. *See, e.g.*, State v. Williams, 230 La. 1059, 89 So. 2d 898 (1956); State v. Smith, 216 La. 1041, 45 So. 2d 617 (1950).

5. *See, e.g.*, State v. Landry, 316 So. 2d 738 (La. 1975); State v. Bell, 263 La. 434, 268 So. 2d 610 (1972).

6. State v. Harris, 51 La. Ann. 1194, 25 So. 984 (1899).

7. State v. Knight, 296 So. 2d 800 (La. 1974).

8. State v. Johnson, 301 So. 2d 609 (La. 1974).

9. State v. Ward, 14 La. Ann. 673 (1859); State v. Bennett, 14 La. Ann. 651 (1859).

10. State v. Smith, 216 La. 1041, 45 So. 2d 617 (1950).

questions have not been permitted because they do not further the examination of a prospective juror's qualifications.[11] Questions concerning a venireman's knowledge of the law are not allowed because of this irrelevancy.[12]

In most instances, cases have been consistent in their rationales, but seemingly inconsistent in their results. Denying defense counsel the opportunity to question prospective jurors about the presumption of innocence was held to be reversible error in one case.[13] The same or similar questions in different circumstances, however, may be properly denied.[14] In part, this particular inconsistency is due to the courts' recognition that each prosecution has a life of its own and that questions, proper in one case, may be improper in another simply because different factors are present.[15] This case-by-case approach to the scope of voir dire must be kept in mind as tempering all generalizations in the area.

*State v. Hills*[16] is the leading Louisiana case on the permissible scope of voir dire. In *Hills*, defense counsel was denied the right to ask the question, "Do any of you gentlemen belong to any religious or segregation groups?"[17] The supreme court, on rehearing, reversed the defendant's conviction. Recognizing the necessarily close relationship between a full voir dire and the intelligent exercise of the right of peremptory challenge, the court in *Hills* held that a wide latitude should be allowed counsel in examining prospective jurors on voir dire.[18]

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11. See note 34, *infra*, on statute limiting voir dire to this purpose. See text at note 42, *infra*, on irrelevancy as it relates to the instant case. For cases on irrelevancy see, *e.g.*, State v. Clark, 325 So. 2d 802 (La. 1976) (whether fact that accused had served and been wounded in Viet Nam would influence juror); State v. Jones, 320 So. 2d 182 (La. 1975) ("What would your feelings be if your son started taking out a colored girl?").

12. State v. Nix, 327 So. 2d 301 (La. 1976); State v. Richey, 258 La. 1094, 249 So. 2d 143 (1971); State v. Dreher, 166 La. 924, 118 So. 85 (1928).

13. State v. Crittle, 263 La. 418, 268 So. 2d 604 (1972); ***but see*** State v. Conrad, 304 So. 2d 318 (La. 1974).

14. State v. Calloway, 324 So. 2d 801 (La. 1976); ***but see*** State v. Nero, 319 So. 2d 303 (La. 1975); State v. Richey, 258 La. 1094, 249 So. 2d 143 (1971).

15. *Compare* State v. Webb, 156 La. 952, 101 So. 338 (1924) and State v. Iverson, 136 La. 982, 68 So. 98 (1915), *with* State v. Morgan, 147 La. 205, 84 So. 589 (1920). On the need for individualization of cases generally, *see* Ham v. South Carolina, 409 U.S. 524 (1973); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972).

16. 241 La. 345, 129 So. 2d 12 (1961).

17. *Id.* at 356, 129 So. 2d at 17.

18. *Id.* at 396, 129 So. 2d at 31. *Hills* is not the first case to use such language, however; *see* State v. Shields, 33 La. Ann. 991, 994 (1881). *See generally* R. MARR, CRIMINAL JURISPRUDENCE IN LOUISIANA 691 (1923).

The earliest Louisiana case to reach a decision on the propriety of a question relating to a venireman's prior jury experience is *State v. Swain*.[19] Citing the former Louisiana Code of Criminal Procedure,[20] the court held that questions concerning a prospective juror's prior jury experience are beyond the proper scope of voir dire because they are unrelated to discovering his qualifications. A number of later cases relied on *Swain* to prohibit questions concerning prior jury experience.[21] However, the defense did not argue in any of these cases that the state possessed or intended to use such information.

In the recent case of *State v. Wright*[22] the Louisiana Supreme Court was first presented with the question whether the defense could ask questions on voir dire concerning a venireman's prior jury experience when it was alleged that the prosecution possessed such information. In *Wright* the trial court denied the defense attorney's request to pursue such a line of questioning.[23] Arguing that the defense was prejudiced by these limitations on questioning, defense counsel requested a reversal and access to the prospective jurors' prior voting records in the state's possession. The supreme court affirmed, holding that there was no showing of undue prejudice to the defendant or of the state's use of the information in

19. 180 La. 20, 156 So. 162 (1934). The question disallowed was, "What capital case did you serve on?"

20. Former Louisiana Code of Criminal Procedure article 357 read: "The purpose of the examination of jurors is to ascertain the qualifications of the juror in the trial of the case in which he had been tendered, and the examination shall be limited to that purpose." Former article 172 officially required that in order to qualify as a juror a person must: be a citizen of the state and resident of the parish in which the court is held, be at least twenty-one years old, be able to read and write English, not be under interdiction or charged with any offense or convicted of any felony, and have a good character. Present article 401 does not substantially alter these qualifications. See note 34, *infra*, for former article 357's present counterpart.

21. State v. Roquemore, 292 So. 2d 204 (La. 1974); State v. Spencer, 257 La. 672, 243 So. 2d 793 (1971); State v. Martin, 250 La. 705, 198 So. 2d 897 (1967). In *Roquemore*, the supreme court was asked to reconsider, in light of its expansive language in *Hills*, jurisprudence which denied counsel the right to ask questions concerning a prospective juror's prior jury experience. Despite the language used in *Hills* and its apparent approval in comment (d) to article 786 of the Louisiana Code of Criminal Procedure, the court in *Roquemore* distinguished the cases and refused the questions of defense counsel as irrelevant. 292 So. 2d at 206.

22. 344 So. 2d 1014 (La. 1977).

23. In response to questioning, the juror admitted having served on a jury before and disclosed the name of the judge, after which defense counsel asked, "During the course of the trial that you have previously served on, was there an issue of question of identification of the perpetrators?" *Id.* at 1017. The court disallowed this question.

jury selection and that, in any event, the defense attorney had not directly attempted to elicit the venireman's prior vote during voir dire.

A number of federal courts have been presented with the issue whether questions concerning a venireman's prior jury experience have been properly refused by trial judges in cases in which the state did not use a "jury book."[24] Without exception the courts have ruled that forbidding such questions was not an abuse of the trial court's discretion. It should be noted, however, that the Federal Rules of Criminal Procedure governed these holdings and that these rules arguably confer a greater degree of discretion upon the trial judge than do Louisiana's rules.[25]

One federal court has ruled on whether defendant may inquire in voir dire about a venireman's prior jury experience where it was alleged that the state had access to such information.[26] The court held that voir dire had not been improperly limited and that an unfair advantage was not given to the state because of its use of a jury book. The court, however, was careful to limit its holding to the facts in the case, stating that the judge exhibited a high degree of fairness.[27]

The jurisprudence discussed above indicates that appellate courts have not considered trial judges to have abused their discretion by forbidding questions on a venireman's prior jury experience. However, these same courts have indicated that trial judges possess a great deal of discretion either to limit or to expand the scope of voir dire, and it may be assumed that judges in the exercise of this discretion *may* allow such questioning. These decisions also indicate that while the state's access to such information is one factor to consider upon appeal, such access does not by itself make the denial of defendant's questions an abuse of the trial court's discretion.

In the instant case, the defense relied solely upon constitutional rationales to compel disclosure of the jury book.[28] Defense counsel argued

24. United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974); United States v. Ruggier, 472 F.2d 599 (2d Cir. 1973); Varamontes-Medina v. United States, 411 F.2d 981 (9th Cir. 1969); Deck v. United States, 395 F.2d 89 (9th Cir. 1968); Bellard v. United States, 356 F.2d 437 (5th Cir. 1966); Alvarez v. United States, 282 F.2d 435 (9th Cir. 1960); Spells v. United States, 263 F.2d 609 (5th Cir. 1959).

25. Federal Rules of Criminal Procedure article 24(a), for example, gives the judge alone the right to ask the jurors questions he thinks proper on voir dire after requesting that the parties submit to him the questions they would like asked. Louisiana Code of Criminal Procedure article 756 gives the court, the state and the defendant the right to examine prospective jurors. *See* note 34, *infra*.

26. Hamer v. United States, 259 F.2d 274 (9th Cir. 1958).

27. *Id.* at 281.

28. 347 So. 2d 221, 222 (La. 1977). The opinion is unclear on whether defendant relied upon the Louisiana or the federal constitution or both.

that the information's unavailability to the defendant[29] combined with the state's admitted use of the information to select jurors, would violate due process and the defendant's right to a fair and impartial jury drawn from a cross section of the community. The state responded that the list was privileged from discovery because it was the "work product" of the district attorney who had compiled it.

The court avoided the arguments by holding that the defendant, while not having a right to obtain the records, should be allowed access to the information contained in the records. The court stated that this could be accomplished on voir dire by allowing defense counsel to ask the prospective jurors the questions necessary to elicit the information. In light of this, the court held that the defendant's claims were premature.[30] Since the defendant would have access to the information on remand, no constitutional or statutory rule required the state to disclose the list, and the court therefore held that the trial judge had improperly ordered its disclosure.[31]

In reaching this decision, the court specifically overruled three prior decisions which had denied defense counsel the right to ask veniremen on voir dire questions relating to their previous experience on a jury.[32] The court distinguished one of the overruled cases, *State v. Martin*,[33] as having been decided under article 357 of Louisiana's former Code of Criminal Procedure, and noted that article 786 of the 1966 Code of Criminal Procedure omits the restrictive provisions of the former code.[34] However, the court could not distinguish the other cases it overruled, particularly the 1974 case of *State v. Roquemore*,[35] in which defense counsel had specifically urged the court to take a position similar to the one it eventually took in the instant case.[36] The basis for overruling the cases was found in the expansive language of *Hills*[37] and the 1974

29. Defendant contended that a similar system of vote recordation by defense attorneys would be prohibitively expensive and logistically impossible. *But see* Campbell, *The Multiple Functions of the Criminal Defense Voir Dire in Texas*, 1 AM. J. CRIM. L. 255, 258 (1972).

30. 347 So. 2d 221, 223 (La. 1977).

31. *Id.* at 224.

32. See note 21, *supra*.

33. 250 La. 705, 198 So. 2d 897 (1967).

34. 347 So. 2d at 223. LA. CODE CRIM. P. art. 786: "The court, the state, and the defendant shall have the right to examine prospective jurors. The scope of the examination shall be within the discretion of the court. A prospective juror, before being examined shall be sworn to answer truthfully questions asked him relative to his qualifications to serve as a juror in the case."

35. 292 So. 2d 204 (La. 1974).

36. See note 21, *supra*.

37. See text at note 18, *supra*.

Louisiana Constitution.[38]

The court in the instant case reaffirmed *State v. Wright*, in which it had stated that "once defendant demonstrates that the information concerning past jury experience is inaccessible to him and that the State intends to use this information, he would have shown that the information was necessary to prevent undue prejudice to his case, hardship or injustice."[39] In *Wright*, defendant failed in a number of ways to meet the requisite showing that would mandate discovery;[40] defendant made the proper showing in the instant case but was premature in his contention of unavailability.[41]

Louisiana courts have not been consistent in delineating the proper scope of voir dire, although some inconsistencies are merely the result of the court's case-by-case approach in this area.[42] However, inconsistent holdings on the right of the defendant to question veniremen on their previous jury experience have resulted from the court's attempts to balance two policies which are sometimes irreconcilable. Many courts have favored a wide scope of voir dire so as to facilitate the effective use of challenges for cause and peremptory challenges.[43] However, Louisiana's

38. LA. CONST. art. I, § 17: "The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily." La. Const. of 1921, art. I, § 10: "[W]hen tried by jury [the defendant] shall have the right to challenge jurors peremptorily, the number of challenges to be fixed by law." The change was not intended to expand the existing scope of voir dire but was rather meant to constitutionalize it, as the delegates were merely recognizing the interdependence of the rights of peremptory challenge and full voir dire. *See* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 57 (1974); Proceedings of the Constitutional Convention of 1973, vol. XIV (44th Day) 15; State v. Gomez, 319 So. 2d 424 (La. 1975).

39. 347 So. 2d 221, 223 (La. 1977).

40. See text at notes 22-24, *supra*.

41. Justice Tate dissented from the majority's holding that the trial judge lacked the authority to order the state to relinquish the information in the absence of a statute expressly providing for its disclosure. He argued that the supreme court had always recognized the trial judge's authority, in the absence of *contrary* statute, to regulate proceedings before him as an exercise of the court's power in aid of its jurisdiction. The judge clearly should have the power in this case, Justice Tate reasoned, because all members of the court agreed that the defendants had a right to receive the information but only differed on the timing of its availability. Moreover, obtaining the information through voir dire questioning does not equalize the position of the parties, as it may prejudice the defendant if prospective jurors react negatively to counsel's questions. *Id.* at 225.

42. See text at note 15, *supra*.

43. Aldridge v. United States, 282 U.S. 308 (1931); Pointer v. United States, 151 U.S. 396 (1893); Babcock, *Voir dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975); Gutman, *The Attorney-Conducted Voir Dire of Jurors: A*

Code of Criminal Procedure restricts the scope of voir dire to questions concerning the juror's "qualifications."[44] Therefore, if a question is irrelevant to whether a venireman is qualified to serve, a judge may properly deny it, even though the question may be relevant to the educated use of an attorney's peremptory challenges. The supreme court has sometimes demonstrated the tension between these policies by reversing itself after a rehearing on the issue of a question's relevancy.[45] The leading case on the scope of voir dire, *Hills*, was itself the product of such a reconsideration of a question's relevancy.

If the decision is not limited to its facts, *Holmes* may portend a more liberal attitude on the part of the court toward other lines of questioning that have been deemed irrelevant. Its overruling of prior jurisprudence tends to rebut the suggestion that the court allowed the questioning merely to avoid giving the defendant access to the state's records. Furthermore, the court referred to the overruled cases as having been "supported by neither statute nor reason."[46] These factors indicate that the state's possession and use of the records was not dispositive, and suggest that the instant decision may have application to other factual situations.

Certainly, there is adequate evidence that a juror's verdict may be influenced by any prior jury service he may have had. One study, although the result of limited data drawn mainly from civil trials, concluded that such a relationship did exist.[47] The study found that prior jury experience serves as a point of reference for jurors, increases their feelings of competence, and possibly plays a role in the selection of foremen. A more extensive study of jurors[48] found that jurors with no previous jury service were more likely to vote for acquittal than jurors with previous jury experience.[49] Attorneys across the country have recognized the relevance

*Constitutional Right*, 39 BROOKLYN L. REV. 290 (1972); Spears, *Voir Dire: Establishing Minimum Standards To Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493 (1975). See text at note 18, *supra*.

44. See notes 21 and 34, *supra*.

45. *See, e.g.*, State v. Jones, 282 So. 2d 422 (La. 1973).

46. 347 So. 2d at 223.

47. Broeder, *Previous Jury Trial Service Affecting Juror Behavior*, 1965 INS. L.J. 138.

48. Reed, *Jury Deliberations, Voting, and Verdict Trends*, 45 S.W. SOC. SCI. Q. 361 (1965).

49. *Id.* at 365: "Among responding petit jurors, associations between birthplace, previous jury service, socioeconomic class, and a vote of guilty or not guilty were significant at levels ranging from .001 to .02 per cent. Individually, previous jury service and a birthplace in the Anglo-Saxon northern part of Louisiana produced proportionately a greater number of guilty votes than 'fresh jurors' (no previous jury service) and a birthplace in the French southern part of the state."

of such information to a juror's verdict in a subsequent case,[50] and it may be inferred that prosecutors who collect such data also appreciate its use. In some cases, courts have taken it upon themselves to include voting records with other information on prospective jurors supplied to counsel.[51]

Certainly some difficulty exists in trying to determine the exact degree to which defendant may inquire into a prospective juror's prior jury experience. The instant case will permit defendants "to ask prospective jurors during voir dire questions such as: (1) Have you ever served on a criminal jury before? (2) What was the charge in that case? (3) What was the verdict in the case?, etc."[52] Significantly, however, the court never stated that the defendant should be allowed to inquire into a specific venireman's vote in a prior case, even though this was the precise information the defendant wanted. If he is unable to make such an inquiry on remand, the decision in the instant case will not have decided the issue presented to the court. In holding that the defendant was premature with his request of disclosure, the court certainly implied that he should be able to elicit the information on remand.

Future cases may also arise which question the propriety of limiting voir dire in other areas in which the state possesses information. In *Wright* the state admitted that it had made notations of a juror's characteristics and responses on voir dire in previous cases, in addition to keeping voting records.[53] If the court is presented with a similar situation involving other types of information in the future, it has a number of options. It may find that the defendant failed to make a proper showing of the state's actual use or possession of the information, or of prejudice or unfairness to the defendant's case.[54] It may ban the use of all juror investigations, although this would be difficult to police and may be unconstitutional.[55] The court may decide to expand the scope of voir dire as it did in the instant case. Furthermore, if the court is unwilling to require the state to divulge these records in their entirety, or if the state asserts that some of the information

50. See note 29, *supra*. *See also* A. GINGER, JURY SELECTION IN CRIMINAL TRIALS 359 (1975); C. Stephan, *Selective Characteristics of Jurors and Litigants: Their Influence On Juries' Verdicts* in THE JURY SYSTEM IN AMERICA 97 (R. Simon ed. 1975); Katz, *The Twelve Man Jury*, 1968-1969 TRIAL 39 (1968).

51. A. GINGER, *supra* note 50, at 358; Katz, *supra* note 50, at 39; Mitchell, *Voir Dire and Opening Statement— the Defense Takes the Offense*, 26 FED. INS. CNSL. 135, 142 (1976).

52. 347 So. 2d at 223.

53. State v. Wright, 344 So. 2d at 1015.

54. *Id.*

55. Moskitis, *The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies*, 49 SO. CAL. L. REV. 597, 625-26 (1976).

in the records may be subject to the work product privilege, the court has the alternative of requiring partial disclosure after an *in camera* inspection of the records to delete non-discoverable items.[56]

An additional option available to the court is the mutual pre-voir dire disclosure of jury books. It has been argued that such a course, far from being optional, is required by due process, and this reasoning has apparently been adopted by at least two state courts.[57] The fourteenth amendment's guaranty of due process of law may be a proper ground for such a decision in that it seeks to protect the reliability of the guilt determining process and the dignity of the individual,[58] and also enhances the *appearance* of justice.[59] Four federal courts and a District of Columbia appellate court, however, denied the same request after an examination of the same constitutional considerations.[60]

Another constitutional ground supporting the mutual pre-voir dire discovery of such records may be the sixth amendment's guarantee of an impartial jury drawn from a cross section of the community.[61] To the extent that the state can obtain "prosecution minded" jurors and exclude those favorably inclined toward the defendant, it can subvert a number of policies that the sixth amendment is designed to implement. In any event, it may become increasingly difficult to justify protecting the district attorney's jury books as the use of them becomes more widespread and the information in them increases.

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56. People v. Aldridge, 47 Mich. App. 639, 209 N.W.2d 796 (Ct. App. 1973); *see also* LA. CODE CRIM. P. 729.4(2).

57. People v. Aldridge, 47 Mich. App. 639, 209 N.W.2d 796 (Ct. App. 1973); Losavio v. Mayber, 178 Colo. 184, 496 P.2d 1032 (1972). *See* Moskitis, *supra* note 55, at 624-34. Neither opinion explicitly examined either state or federal constitutional provisions and both were extremely vague in enunciating the basis for their decisions. *Cf.* Gregory v. United States, 369 F.2d 185 (1st Cir. 1966) (equal access to state witness outside of court mandated by due process); State v. Hammler, 312 So. 2d 306 (La. 1975) (equal access to certain state witness mandated on right to counsel grounds).

58. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346-47 (1957).

59. Taylor v. Louisiana, 419 U.S. 522 (1975); Turner v. Louisiana, 379 U.S. 466, 474 (1965); *In re* Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 272 U.S. 510, 523 (1927).

60. United States v. Payseur, 501 F.2d 966 (9th Cir. 1974); United States v. Costello, 255 F.2d 876 (2d Cir. 1958); Best v. United States, 184 F.2d 131 (1st Cir. 1950); Christoffel v. United States, 171 F.2d 1004 (1st Cir. 1948); Terrell v. United States, 361 A.2d 207 (D.C. App. 1976).

61. Irvin v. Dowd, 366 U.S. 717, 723 (1961); Moskitis, *supra* note 55, at 633; *but see* Hamer v. United States, 259 F.2d 274, 276 (9th Cir. 1958).