

# Court Control over the Voir Dire Examination of Prospective Jurors

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# COMMENTS

## COURT CONTROL OVER THE VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS

The inherent power of state courts to make rules governing practice and procedure has long been recognized, its exercise subject only to the qualification that they be reasonable, and, of course, constitutional. It is the purpose of this comment to determine whether Illinois Supreme Court Rule 24-1<sup>1</sup> meets this test. Promulgated in 1958, the laudable objective of the drafters was to remove the scandalous delay in jury trials.<sup>2</sup> Specifically, the rule was aimed at accelerating the selection of the jury by giving the court unprecedented control over the *voir dire* examination of prospective jurors.

In the course of this comment, attention will be directed to whether this unprecedented control conflicts with those dictates of reasonableness and constitutionality. In regard to the latter, the *voir dire* rule will be squared against the guarantees of the right to trial by jury set forth in the Illinois Constitution,<sup>3</sup> and the right to counsel guaranteed by both our state<sup>4</sup> and federal constitutions.<sup>5</sup> The scope of this inquiry will be limited to the field of criminal law. It is felt that such inquiry is timely in view of the increasing supervision by the United States Supreme Court over procedural due process in state prosecutions.

### BACKGROUND

The *voir dire* examination is a pre-trial procedure of great importance. It means literally, "to speak the truth,"<sup>6</sup> and is generally viewed as having the two-fold purpose of enabling counsel to challenge for cause, if cause

<sup>1</sup> ILL. REV. STAT. ch. 110, § 101.24-1 (1963): "The judge shall initiate the *voir dire* examination of jurors in civil and criminal cases by identifying the parties and their respective counsel and he shall briefly outline the nature of the case. The judge shall then put to the jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination, but shall not directly or indirectly examine jurors concerning matters of law or instructions." Adopted Sept. 17, 1958.

<sup>2</sup> REPORT OF THE COMMITTEE ON LIMITATION OF VOIR DIRE EXAMINATION, FIFTH ANNUAL ILLINOIS JUDICIAL CONFERENCE, June 12, 1958. The members of the drafting committee were: Judge Alan E. Ashcraft, Chairman; Judge Robert E. English; Judge Henry J. Ingram; Judge Thomas E. Kluczynski; Judge Wm. C. Radliff; and Judge Roy J. Solfisburg.

<sup>3</sup> ILL. CONST. art. 2, §§ 5, 9.

<sup>5</sup> U.S. CONST. amend. VI.

<sup>4</sup> ILL. CONST. art. 2, § 9.

<sup>6</sup> 44 WORDS AND PHRASES 598 (1962).

exists, or to exercise the right of peremptory challenge when it is deemed advisable.<sup>7</sup> The ultimate aim is the selection of a juror who is both fair and impartial,<sup>8</sup> a "liber homo . . . that hath such freedom of mind as he stands indifferent as he stands unsworn."<sup>9</sup>

The right of challenge is an ancient right having evolved from the common law with the institution of the jury itself.<sup>10</sup> Although the origin of trial by jury be buried deep in antiquity,<sup>11</sup> there is evidence suggesting that it was used in England in the day of the Conqueror.<sup>12</sup> Understandably, these early juries bore little resemblance to the institution as it came to be known,<sup>13</sup> but by the twelfth century, Glanville tells of that practice whereby jurors were "excepted against by the same means by which Witnesses in the Court Christian are justly rejected."<sup>14</sup> Early statutory reference to challenges appear during the reign of Edward I,<sup>15</sup> in a period characterized by an abundance of legislation, and similar mention is made in the reign of his grandson.<sup>16</sup>

Sir Edward Coke told of those two general types of challenges cognizable at common law.<sup>17</sup> They were either to the array, that is to the entire panel; or to the polls, meaning objections to particular jurors. It is to this latter group that our attention is directed. By the reign of Henry VI,<sup>18</sup> challenges to the polls were divided into peremptory challenges, which could be exercised in capital cases at the discretion of the accused,<sup>19</sup> and

<sup>7</sup> *Donovan v. People*, 139 Ill. 412, 28 N.E. 964 (1891).

<sup>8</sup> *People v. Cravens*, 375 Ill. 495, 31 N.E.2d 938 (1941); *Coughlin v. People*, 144 Ill. 140, 33 N.E. 1 (1893). See also, Riave, *Fair and Impartial Trial by Jury in the United States and in England*, 50 A.B.A. J. 232 (1964).

<sup>9</sup> Co. Litt. 155a (Thomas ed. 1836).

<sup>10</sup> *Lewis v. United States*, 146 U.S. 370 (1892).

<sup>11</sup> A learned controversy exists among respected authorities as to whether trial by jury antedates the Conquest. In support of the view that it was employed by the Saxons as early as the days of Ethelred, see 2 HALLAM, *MIDDLE AGES* ch. 7; 3 BLACKSTONE, *COMMENTARIES* 349 (12th Ed. 1794). *But cf.*, 1 POLLOCK AND MAITLAND, *HISTORY OF THE ENGLISH LAW* 119-120 (1895); FORSYTH, *HISTORY OF TRIAL BY JURY* 44 (1875); HOLMES, *THE COMMON LAW* 207 (Howe ed. 1963).

<sup>12</sup> FORTESQUE, *DE LAUDIBUS LEGUM ANGLIAE* 66 (Gregor trans. 1874), where it is said that the first true instance of trial by jury occurred in the reign of the Conqueror, "in a cause in which Gundulph, Bishop of Rochester, was a party, and was tried before the Bishop of Baicux."

<sup>13</sup> 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 317-320 (3rd ed. 1922).

<sup>14</sup> GLANVILLE, *A TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND* 50 (Beames and Beale Ed. 1900).

<sup>15</sup> 33 EDW. 1 STAT. 4 (1305).

<sup>17</sup> Co. Litt. 156a (Thomas ed. 1836).

<sup>16</sup> 25 EDW. 3 STAT. 5, c. 3 (1350).

<sup>18</sup> 1422-1461.

<sup>19</sup> *Supra* note 12 at 253, where it appears that "in favour of life, he may challenge five and thirty such as he most feareth and suspecteth, who, upon such challenge shall

challenges for cause. This latter group likewise had two subdivisions. There were principal challenges which were tried by the court and for which there were four recognized grounds,<sup>20</sup> and challenges to the favour which included the most infinite of conceivable objections to the venireman.<sup>21</sup> These were decided by triors who were summoned from the vicinage for this purpose alone.<sup>22</sup>

Though the evolutionary trends of the common law have, in effect, eliminated the divisions of challenge for cause, the influence of Coke is still apparent. The statutory grounds contained in our Jurors Act<sup>23</sup> strike a similar note to those which disqualified as a matter of law in Stuart England;<sup>24</sup> and though Illinois never accepted the practice whereby triors were summoned to determine challenges "to the favour,"<sup>25</sup> that infinite host of common law grounds remains with us today.<sup>26</sup> It is still a proper ground of challenge that the venireman was a member of the grand jury returning the indictment,<sup>27</sup> has a pecuniary interest in the outcome of the case,<sup>28</sup> refuses to convict upon circumstantial evidence,<sup>29</sup> maintains conscientious scruples against capital punishment,<sup>30</sup> or has a fixed and definite opinion touching the merits of the case.<sup>31</sup>

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be struck out of the Panel . . ." Though the Crown originally exercised the right of peremptory challenge, this practice ceased with the Ordinance for Inquests, *supra* note 16. Today, the right is afforded either party, *infra* note 71.

<sup>20</sup> Co. Lrrr. 156-158 (Thomas ed. 1836). These were: (1) *Propter honoris respectum*, where the exalted position of the party summoned rendered him above the task of jury duty; (2) *Propter defectum*, which included mental incompetence, alienage, and non-age; (3) *Propter affectum*, where the relation of the parties was such that a suspicion of bias arose as a matter of law; and (4) *Propter delictum*, which was invoked when the prospective juror had been convicted of treason or a felony.

<sup>21</sup> *Id.* at 157a.

<sup>22</sup> United States v. Watkins, 28 Fed. Cas. 419 (No. 16, 649) (1829).

<sup>23</sup> ILL. REV. STAT. ch. 78, sec. 12 (1874) stipulates that jurors may be challenged if they: (1) lack any of the statutory qualifications such as age, capacity, character, knowledge of the English language, etc.; (2) have served as a petit juror within one year in any court of record in the county; (3) are party to a suit pending in that court.

<sup>24</sup> *Supra* note 20.

<sup>25</sup> O'Fallon Coal Co. v. Laquet, 198 Ill. 125, 64 N.E. 767 (1902).

<sup>26</sup> 1 THOMPSON, TRIALS ch. 3 (Early, 2nd ed. 1918).

<sup>27</sup> People v. Mooney, 303 Ill. 469, 135 N.E. 776 (1922).

<sup>28</sup> Moore v. Edmunds, 384 Ill. 535, 52 N.E.2d 216 (1943).

<sup>29</sup> Gates v. People, 14 Ill. 433 (1853).

<sup>30</sup> People v. Carpenter, 13 Ill. 2d 470, 150 N.E.2d 100 (1958).

<sup>31</sup> Spies v. People, 122 Ill. 1, 12 N.E. 865 (1887) where the court adopted the rule established by Justice Marshall in the trial of Aaron Burr. In order to be disqualifying, the opinion must ". . . close the mind against the testimony, combat that testimony and resist its force." United States v. Burr, 25 Fed. Cas. 51 (No. 14,692g) (1807).

As the right to challenge became more firmly entrenched, it was natural that implicit in its exercise was the right to examine prospective jurors upon the *voir dire*.<sup>32</sup> In England, counsel was required to make his challenge before propounding interrogatories to the venireman,<sup>33</sup> and though the English rule was originally followed on this side of the Atlantic, it was subsequently replaced by the more logical practice of permitting some type of pre-challenge examination.<sup>34</sup>

Prior to the adoption of Rule 24-1 in Illinois, the permissible scope of inquiry on the *voir dire*, by both the People and the accused, was extensive.<sup>35</sup> Although the conduct of the examination lay within the sound judicial discretion of the court, and was subject to reasonable limitation, it was early recognized in *Donovan v. People*<sup>36</sup> that the right of challenge was so highly cherished that the courts were not authorized to prescribe rules which rendered it unavailing. Furthermore, in *Donovan*, the court adopted the Michigan rule set forth in *Stephens v. People*,<sup>37</sup> recognizing that the right to examine was personal to counsel. Though other jurisdictions permitted no direct examination by counsel,<sup>38</sup> in Illinois, this was long deemed a valuable and substantial right.<sup>39</sup>

#### RULE 24-1

What then, were the changes wrought by the advent of our present Supreme Court Rule. Basically, there were two. First, as noted earlier, the degree of control vested in the court was marked. The mandate was clear: "The judge shall initiate the *voir dire* . . . briefly outline the nature of the case . . . then put to the jurors any questions which he thinks necessary."<sup>40</sup> Recalling that the primary aim sought in the adoption of Rule 24-1 was the expediting of jury trials, it is evident that the specific evil to be remedied was the alleged "interminable examination of jurors."<sup>41</sup>

<sup>32</sup> *Lavin v. People*, 69 Ill. 303 (1873).

<sup>33</sup> Moore, *Voir Dire Examination of Jurors: The English Practice*, 16 GEO. L.J. 438 (1928).

<sup>34</sup> Tone, *New Supreme Court Rule 24-1: How It Works*, 47 ILL. B.J. 140 (1958).

<sup>35</sup> *People v. Murawski*, 2 Ill. 2d 143, 117 N.E.2d 88 (1954).

<sup>36</sup> 139 Ill. 412, 28 N.E. 964 (1891).

<sup>37</sup> 38 Mich. 739 (1878).

<sup>38</sup> *Burns v. State*, 226 Ala. 117, 145 So. 436 (1933); *Cross v. State*, 89 Fla. 212, 103 So. 636 (1925); *McGee v. State*, 219 Md. 53, 146 A.2d 194 (1959); *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930). In the federal courts, the granting of such examination is discretionary with the judge. See, FED. R. CRIM. P. 24(a).

<sup>39</sup> *American Bridge Works v. Pereira*, 79 Ill. App. 90 (1898).

<sup>40</sup> *Supra* note 1.

<sup>41</sup> *Mithin v. Jeffery*, 259 Ill. 372, 376, 102 N.E. 778, 780 (1913). It is possible that the court was referring to the Spies case, *supra* note 31, in which eight defendants were

That there was any basis for this charge, at least in regard to the criminal practitioner, has not been made certain. The conduct if the *voir dire* has always been subject to the sound judicial discretion of the court,<sup>42</sup> and the trial judge was never required to watch idly while counsel engaged in useless fishing expeditions. Furthermore, it was generally understood by counsel that a prolonged and tedious examination usually worked to the detriment of their client's interest.<sup>43</sup>

The second change occasioned by the adoption of the rule pertains to the scope of permissible inquiry by counsel. Though counsel was given the opportunity of "supplementing such examination," an express prohibition was placed upon examining jurors in regard to "matters of law or instruction."<sup>44</sup> The impact of this prohibition was keenly felt, for prior to the adoption of Rule 24-1, wide latitude had been afforded counsel in his examination. It had long been recognized that counsel had the right to advise the prospective jurors generally concerning the law of the case, and to conduct a reasonable examination of them on this subject.<sup>45</sup> Inquiry might well be made as to whether the venireman understood and accepted the law, including the facts that the grand jury was only an accusatory body,<sup>46</sup> that the indictment it returned was merely a formal charge necessary to place the defendant upon trial,<sup>47</sup> that the defendant was presumed to be innocent of this charge, and that this presumption remained throughout the trial until the juror was convinced of the defendant's guilt beyond all reasonable doubt,<sup>48</sup> that the burden of proving this guilt was on the State, and the defendant need not prove his innocence,<sup>49</sup> and finally, that should the defendant choose not to testify, his cause could not be prejudiced, but should he elect to take the stand, he was entitled to a hearing as well.<sup>50</sup>

This is not to suggest that the right to examine as to matters of law was limited to the accused alone. On the contrary, it was truly a double-edged sword, available to the People as well. Certainly the public interest demanded this much, for a jury composed of individuals who would refuse

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convicted of the murders resulting from the riot in Haymarket Square. In this case, 981 jurors were called to the box; 757 were excused for cause, and 212 were challenged peremptorily.

<sup>42</sup> *People v. Moretti*, 6 Ill. 2d 494, 129 N.E.2d 709 (1955).

<sup>43</sup> Wildman, *Selection and Examination of Jurors*, 5 DE PAUL L. REV. 32, 33 (1955).

<sup>44</sup> *Supra* note 1.

<sup>45</sup> *People v. Kestian*, 335 Ill. 596, 167 N.E. 786 (1929).

<sup>46</sup> *People v. Looney*, 314 Ill. 150, 145 N.E. 365 (1924).

<sup>47</sup> *Coughlin v. People*, 144 Ill. 140, 33 N.E. 1 (1893).

<sup>48</sup> *People v. Redola*, 300 Ill. 392, 133 N.E. 292 (1921).

<sup>49</sup> *Supra* note 47.

<sup>50</sup> *Ibid.*

to convict upon circumstantial evidence,<sup>51</sup> or because the punishment was too severe,<sup>52</sup> would be a mockery. A trial conducted under these conditions would be a fraud upon the People.

Though the practice of propounding interrogatories based upon matters of law was widely accepted and regularly employed prior to 1958, it was regarded by those who drafted Rule 24-1, as "one of the most pernicious practices engaged in by many attorneys."<sup>53</sup> Such questions, they reasoned, tended only to confuse the jury, and were of no aid in "arriving at the legitimate purpose of the voir dire . . ."<sup>54</sup> The validity of this contention shall be examined shortly.

#### TRIAL BY JURY

It is with this general understanding of Rule 24-1, that we begin our inquiry into its constitutional ramifications, turning first to that ancient right of trial by jury. In anticipation of any possible misunderstanding, it should be made clear at the outset that the right to which reference is made is that which is specified in the Illinois Constitution.<sup>55</sup> Since Justice Cardozo spoke in *Palko v. Connecticut*,<sup>56</sup> it has been settled that the federal guarantees of jury trial<sup>57</sup> have no bearing upon the states. One might well conjecture that in this day of the Warren Court, should the position be re-examined, a different result would obtain. But, as it is not our purpose here to rely upon conjecture, it is to the states we must turn, for through their respective constitutions the right of jury trial extends universally to these bodies.<sup>58</sup>

In Illinois, the command is strong and certain: "The right of trial by jury as heretofore enjoyed, shall remain inviolate . . ."<sup>59</sup> This right is of a fundamental nature,<sup>60</sup> and one that is highly favored by the law.<sup>61</sup> Our difficulty arises not with the command, but in the interpretation of those controversial words, *heretofore enjoyed*. To which point in time did the framers refer? Or, to phrase the question differently; to which of the concomitants of jury trial does the inviolate command attach? In *People v. George*,<sup>62</sup> it was determined that the only rights of jury trial which were

<sup>51</sup> *Supra* note 29.

<sup>54</sup> *Id.* at 8.

<sup>52</sup> *Supra* note 30.

<sup>55</sup> ILL. CONST. art. 2, §§ 5, 9.

<sup>53</sup> *Supra* note 2 at 7.

<sup>56</sup> 302 U.S. 319 (1937).

<sup>57</sup> U.S. CONST. art. 3, § 2; amend. VI.

<sup>58</sup> *Patton v. United States*, 281 U.S. 276, 297 (1929).

<sup>59</sup> ILL. CONST. art. 2, § 5.

<sup>60</sup> *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

<sup>61</sup> *People v. Jameson*, 387 Ill. 367, 56 N.E.2d 790 (1944).

<sup>62</sup> 167 Ill. 447, 47 N.E. 741 (1897).

rendered inviolate were those known at common law. Clearly, the right of challenge was thus known, and since the right to examine prospective jurors was implicit in its intelligent exercise,<sup>63</sup> both would logically be entitled to that inviolate status set forth in our bill of rights.

However, when the constitutionality of the Voir Dire Rule was raised in *People v. Lobb*,<sup>64</sup> a new interpretation was forthcoming. The court concluded that the guarantee of jury trial was "not so inelastic as to render unchangeable every characteristic and specification of the common-law jury system."<sup>65</sup> True, there were certain essentials which had to be met: the facts must be determined by twelve impartial jurors who are qualified and selected in a manner prescribed by law, the verdict must be unanimous, and the proceeding must be conducted under the superintendence of a judge.<sup>66</sup> But, the court could view nothing in the constitutional guarantee that prevented "reasonable regulation of the manner in which jurors shall be selected."<sup>67</sup>

Though it could hardly be expected that the body responsible for the promulgation of the rule would strike it down the following year, the contradiction in the *Lobb* case is at once apparent. In one breath the requirement of twelve impartial jurors is held to be inviolate, while in the next, the manner of selection is deemed relatively unimportant. Are not they one of the same, entitled to equal rank? Is it possible to achieve such noble ends without utmost concern for the means? Or, did the court imagine that like Minerva, these twelve impartial jurors would leap forth from the brain of Jupiter, mature and in complete armor. Whatever the intent might be, the result is the same. Without constitutional guarantee of a fair and impartial mode of selection, the command of an impartial jury is rendered illusory.

This obviously cannot be allowed, for the right to trial by an impartial jury is not a mere formality, but is a substantial part of the law of the land.<sup>68</sup> It is a right that is guaranteed the accused in all criminal prosecutions,<sup>69</sup> and, prior to 1930, could not be waived, even at his insistence.<sup>70</sup>

<sup>63</sup> *Supra* note 32.

<sup>64</sup> 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

<sup>65</sup> *Id.* at 299.

<sup>66</sup> *Id.* at 298.

<sup>67</sup> *Id.* at 302.

<sup>68</sup> *People v. Hoffman*, 379 Ill. 318, 40 N.E.2d 515 (1942).

<sup>69</sup> ILL. CONST. art. 2, § 9: "In all criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury . . ."

<sup>70</sup> *People ex rel Swanson v. Fisher*, 340 Ill. 250, 172 N.E. 722 (1930). In this landmark case, the defendant appeared before Judge Harry M. Fisher under an indictment for rape, and waived a jury trial. When he was found not guilty, the People sought a writ of mandamus commanding Judge Fisher to expunge from the records of the criminal court, the proceedings resulting in the defendant's discharge. On appeal, the court held that a jury trial was not mandatory, reasoning, that since an accused could plead guilty and waive any trial, the waiver of any trial included the waiver of a jury trial.

To further insure that an impartial jury would, in fact, be selected, the legislature provided a statutory right of preemptory challenge to be exercised by the People, as well as by the accused.<sup>71</sup>

How was it possible then, for the court to recognize in *Lobb* the dictate of impartiality, and yet fail to see that the limitations imposed by Rule 24-1 could only minimize its observance? Counsel could not be expected effectively to utilize his challenges where *he* is denied the opportunity to probe for that bias which *he* regards most unfavorable to his case. Though the prohibition as to matters of law applied only to counsel, allowing such questions to be asked by the judge<sup>72</sup> did not remove the conflict. Since the court exercises no challenges,<sup>73</sup> it should not probe for bias. Such would appear to be more properly the function and prerogative of counsel, an essential ingredient of that right to counsel to which the criminally accused is entitled.

#### RIGHT TO COUNSEL

Turning now to an area marked by change and ferment, one soon perceives that in contrast to that ancient right of jury trial, the right to counsel is clearly a modern innovation. Though unknown to the common law, at least in felony cases,<sup>74</sup> it was recognized in America in at least twelve of the original colonies,<sup>75</sup> and considered to be of sufficient value to be embodied within the Constitution.<sup>76</sup> However, the sixth amendment gave slight aid to state litigants. The classical theory, as expounded by Justice Marshall in *Barron v. Baltimore*,<sup>77</sup> viewed the Bill of Rights as a limitation upon the federal establishment only, and was held to be inapplicable to the states.

With the adoption of the fourteenth amendment, new vistas were opened, and though Marshall's interpretation gave no quarter, the advance could not be halted. In 1932, in the celebrated *Scottsboro* cases,<sup>78</sup> the right to counsel in capital cases was made obligatory upon the states

<sup>71</sup> ILL. REV. STAT. ch. 38, § 115-4(e) provides that the number of preemptory challenges allowed each party shall be: twenty in capital cases; ten in those cases in which punishment may be by imprisonment in the penitentiary; and five in all others.

<sup>72</sup> *Supra* note 1.

<sup>73</sup> *Von Blaricum v. People*, 16 Ill. 364 (1855).

<sup>74</sup> 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 326 (3rd ed. 1922). It was, however, recognized in both civil cases and misdemeanors, though Blackstone did not himself understand why "assistance be denied to have the life of a man, which yet (is) allowed him in prosecutions for every petty trespass." 4 BLACKSTONE, COMMENTARIES 355 (12th ed. 1794).

<sup>75</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>76</sup> U.S. CONST. amend. VI.

<sup>77</sup> 32 U.S. (7 Pet.) 242 (1833).

<sup>78</sup> *Supra* note 75.

through the due process clause. The Court reasoned that of those essential elements of due process—jurisdiction, notice, and hearing—the latter would be “of little avail if it did not comprehend the right to be heard by counsel.”<sup>79</sup> Though in the years that followed numerous attempts were made to extend this holding to all state prosecutions, they were all unavailing until the Court obliterated the distinction between capital and noncapital felonies in *Gideon v. Wainwright*.<sup>80</sup>

Though Illinois had long recognized the right to counsel in all criminal prosecutions,<sup>81</sup> the effect of *Gideon* cannot be minimized. Its implications were two-fold. First, it brought to bear upon our state tribunals that entire body of federal constitutional law encompassing the right to counsel. Secondly, by making the United States Supreme Court the ultimate arbiter of whether the right had been respected, it gave the accused, in those cases where deprivation had resulted, an added court of review.

All of this, of course, is rather elementary, but when viewed in relation to our Voir Dire Rule, it takes on added significance. Recognizing the natural reluctance of any court to strike down its own rules of procedure, in light of *Gideon*, it is possible that the Illinois Supreme Court may wish to reconsider its earlier position before the matter is brought before the ultimate arbiter in Washington. It should be recalled that in *People v. Lobb*,<sup>82</sup> the rule was considered only in connection with the guarantee of jury trial, and the holding did not touch upon the right to counsel. It is hoped that the court will now avail itself of the opportunity to re-examine the rule along this line.

The provisions guaranteeing the right to counsel cannot be viewed as “mere empty formalities.”<sup>83</sup> Effective representation is contemplated as well, and at every stage of the proceeding where such assistance is essential.<sup>84</sup> That the impaneling of the jury falls within this rule can hardly be denied. If this were not so, the accused would not be able to secure that fair and impartial jury guaranteed by our constitution.

In *Chandler v. Fretag*,<sup>85</sup> the Court set forth the general proposition that the right to counsel included the right to be heard through the mouth of counsel. This command cannot be obeyed in an impaneling procedure which restricts the scope of inquiry to those questions which

<sup>79</sup> *Id.* at 69.

<sup>81</sup> ILL. CONST. art. 2, § 9.

<sup>80</sup> 372 U.S. 335 (1963).

<sup>82</sup> *Supra* note 64.

<sup>83</sup> *People v. Nitti*, 312 Ill. 73, 143 N.E. 448 (1924).

<sup>84</sup> *Moore v. Michigan*, 355 U.S. 155 (1957); *Reece v. Georgia*, 350 U.S. 85 (1955); *People v. Moore*, 405 Ill. 220, 89 N.E.2d 731 (1950). The time of attachment was, of course, extended in *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964), to that point where “. . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . .” See Note, 14 DE PAUL L. REV. 187 (1964).

<sup>85</sup> 348 U.S. 3 (1954)

the court thinks necessary. There can be no degree of effectiveness on behalf of counsel when he is denied the opportunity to elicit that information which will enable him to exercise his challenges intelligently. It would be a delusion of grand proportion to conclude, under such circumstances, that the accused could possibly avail himself of the right to be heard through the mouth of counsel.

A further point warrants mention. It is a maxim of the law, that whenever a right exists in one person, a corresponding duty rests upon another person or group of persons. Applying this rule to the subject at hand, it becomes apparent that devolving upon counsel is the duty to secure for his client that type of juror so highly regarded. As this duty rests not with the court, but upon counsel alone, it is uppermost that these jurors conform to *his* test of fairness and impartiality.<sup>86</sup> Clearly, this is not likely under the present *voir dire* procedure, and where the discharge of this duty is unreasonably hampered, the right to counsel is obviously abridged.<sup>87</sup>

This is not to suggest that the right to effective assistance by counsel knows no bounds. Its exercise, like the exercise of any right, must be tempered with the interests of society. We do not speak in absolutes. It is a balance which must be struck. Though the deep-seated power of our courts to adopt reasonable rules of procedure cannot be denied,<sup>88</sup> their enforcement must not abuse the time-honored rights of the accused.<sup>89</sup> Supreme Court Rule 24-1 appears to meet neither test. On the contrary, it offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>90</sup>

#### CONCLUSION

What then, is proposed to take its place? At the risk of being saddled with the label of "reactionary," it is suggested that the *Donovan* rule<sup>91</sup> be raised from its slumber to occupy the position to which it is entitled. It is in the *Donovan* case that the proper balance may best be restored, for it affords counsel the widest of latitude in his examination, subject only to the sound judgement and judicial discretion of the presiding judge.

It was noted early in this comment that the present rule regulating the *voir dire* was the product of understandable concern over scandalous delays. Though one could hardly deny the existence of this problem in

<sup>86</sup> Busch, *Selecting the Jury*, 47 ILL. B.J. 238 (1958).

<sup>87</sup> 1 THOMPSON, TRIALS 106 (Early, 2nd ed. 1918).

<sup>88</sup> *Prindeville v. People*, 42 Ill. 217 (1866).

<sup>89</sup> *People v. Jennings*, 312 Ill. 606, 144 N.E. 316 (1924).

<sup>90</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1933).

<sup>91</sup> *Supra* notes 7 and 36.