THE AVAILABILITY OF A MOTION FOR CONTINUANCE AS A PROTECTION AGAINST HOSTILE PUBLICITY

The increasing impact of mass communications media—resulting from the growth of modern television, coupled with wider newspaper circulation and the extended use of automobile radios—has added to the difficulty of a defendant in a criminal case obtaining a fair trial.[1] There has, in fact, been severe criticism of these communications media for their attempts to incline public opinion toward an accused's guilt or innocence prior to trial.[2] In many cases when reporting the arrest of a suspect the press gives immediate publicity to statements of the police, the suspect or accused, and persons claiming to be witnesses.[3] Alleged confessions appearing in the newspapers are often accepted by the community as final evidence of guilt.[4] The radio news commentator broadcasts his interpretation of rumored evidence and progress of the investigation.[5] That the courts permit any of the above evils to exist may be attributed to the constitutional right of freedom of the press,[6] and the feeling that a moderate amount of publicity will have a salutary effect on the administration of criminal justice, by insuring preservation of the rights of the accused and the public.[7]

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1. Goodhart, Newspaper and Contempt of Court in English Law, 48 Harv. L. Rev. 885 (1935); Note, Controlling Press and Radio Influence on Trials, 63 Harv. L. Rev. 840 (1950); Comment, 66 Harv. L. Rev. 532 (1953).

2. Ibid. See also Walton, Change Of Venue In Criminal Cases, 1 So. Texas L.J. 131 (1954). But see Harvey, Trial By Newspaper, 42 Mass. L.Q. 9 (1957) indicating the dangers of censoring the press.

3. See Hallam, Some Object Lessons On Publicity In Criminal Trials, 24 Minn. L. Rev. 453 (1940); Note, supra note 1.

4. See, e.g., Shepherd v. Florida, 341 U.S. 50 (1951). See also note 3 supra.

5. Walton, supra note 2.

The recent Kefauver crime investigation which held the attention of television viewers for many weeks is an example of the dilemma that improved methods of communication pose to the administration of justice. In News Week, March 12, 1951, p. 54, col. 3, it was stated that "the hottest new program in television is an amateur road show: the touring Senate committee investigating organized crime. . . . The Kefauver company opened its T.V. run late in January in New Orleans . . . . And when the committee left town, school children had the new habit of refusing to answer teachers' questions 'on the grounds that I might incriminate myself.'"

6. Adamson v. California, 332 U.S. 46 (1947). The Constitution protects the free dissemination of news. U.S. Const. amend. I. Gitlow v. New York, 268 U.S. 652 (1925) is cited for the proposition that the first amendment is included within the fourteenth.

7. See Hallam, supra note 3; Sullivan, Public's Legal Right to the News, 16 Shingle 248 (1953).

The criminal lawyer, although individually incapable of successfully preventing publicity hostile to his client-accused,[8] must seek some means to insure that his client will receive a fair trial. The procedural devices most often relied upon are the motion for change of venue and motion for continuance.[9] The former is available to the defendant in a criminal case when local prejudice and excitement prevents him from having a fair trial,[10] but may involve considerable expense and inconvenience in the preparation of his defense;[11] moreover, if the trial moves to a different locality, there is a good chance that radio and television stations, and nation-wide newspaper services will follow it.[12] Thus, a change of venue in many instances will prove to be unsatisfactory. It appears that a motion for continuance, to delay the trial until the effects of hostile publicity have diminished, will afford the defendant greater protection. The purpose of this note is to discuss and analyze the motion for continuance of a criminal trial by

8. In the past courts have protected their proceedings from the effects of hostile publicity by a free use of their summary contempt power. Nelles, Contempt By Publication In The United States (1928). In English courts the problem is still handled this way. Goodhart, supra note 1. However, recent United State Supreme Court decisions indicate that courts have little power to punish newspapers or other like media for dissemination of publicity concerning criminal trials. See Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941) (the "inherent tendency" of out-of-court publicity to interfere with the right of an accused to a fair trial, or to cause disrespect for the judiciary, is not sufficient to establish actionable contempt). But see Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) where the Court was careful to note that it was not taking any stand on the propriety of the court of appeals' refusal to allow a contempt charge. Is it possible that the Court is changing its attitude toward this problem? See also Delaney v. United States, 199 F.2d 107, 113 (1st Cir. 1952) where the court stated that "on this view there has been some fatalistic acceptance of 'trial by newspaper,' however unfortunate, 'as an unavoidable curse of metropolitan living . . . .'" The court further reasoned that "perhaps the Supreme Court has not spoken its last word upon this vexing subject."

9. See Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952); Note, supra note 1.

10. Walton, supra note 2; Note, Local Prejudice In Criminal Trials, 54 Harv. L. Rev. 679 (1941); Comment, 22 St. John's L. Rev. 261 (1947). For a comprehensive discussion of change of venue see Crocher v. Justices, 208 Mass. 163, 94 N.E. 369 (1911) where it was stated that the power to grant a change of venue is part of the common law and is inherent in the court, unless specifically changed by statutes. See also State v. Albee, 61 N.H. 423 (1881).

11. See Neirbo Co. v. Bethlehem Corp., 308 U.S. 165, 168 (1939) where it was reasoned that venue statutes are for the convenience of the parties.

12. See United States v. Lattimore, 112 F. Supp. 507, 511 (D.C. Cir. 1953) (stating that there was no indication one district would be less prejudiced than another); United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952).

considering the various factors which move courts to grant or deny this relief to an accused who has received adverse publicity.[13]

CONTINUANCES

In General

It is well established that all courts have the "inherent" power to continue a pending action.[14] The grant or denial of a motion for continuance is within the discretion of the trial court.[15] Since appellate courts generally presume that the trial judge, as a resident of the area, has a better understanding of the true situation,[16] the decision of the trial judge will not be reversed unless the party complaining of the ruling[17] is able to carry the burden of showing strongly that this discretion was abused.[18]

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13. It should be noted that many courts consider the same factors in granting or denying a motion for change of venue as for a motion for continuance. State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471, aff'd., 165 Ohio 293, 135 N.E.2d 340 (1955). See also Collins v. State, 234 Ala. 197, 174 So. 296 (1937); Littlefield v. State, 36 Ala. App. 507, 63 So. 2d. 565, cert. denied, 258 Ala. 532, 63 So. 2d 573 (1952). For this reason, change of venue cases will subsequently be cited in support of certain propositions where the reasoning would apply to either.

14. Dietrich v. United States Shipping Board Emergency Fleet Corp., 9 F.2d 733, 746 (2d Cir.), cert. denied, 278 U.S. 647 (1925); State v. Slorah, 118 Me. 203, 106 Atl. 768 (1919) (other actions were not impliedly excluded where a statute reaffirmed this power in regard to specific actions).

In order to be certain that there is no misunderstanding of the type of continuance here considered, the following classification should be helpful. Continuances may be classified into two groups: (1) those which operate as a matter of law; (2) those which operate by virtue of a court order. The first group includes all cases which remain at the end of a court term. The undisputed rule is that they are continued automatically without the issuance of any court order. The second group may be further divided into sub-classes: (1) where a continuance is granted by the court on its own motion; (2) where a continuance is granted at the request of both parties; (3) where one or more interested parties ask, *for cause*, that the court grant a continuance. The third sub-class under group two is the type of continuance that will be the concern of this writing—where one or more interested parties asks, *for cause*, that the court grant a continuance—the cause being prejudice created by hostile publicity. The above classification may be found in greater detail at 12 Am. Jur., Continuances § 2 (1938). See also 17 C.J.S. §§ 1, 9-12 (1939).

15. United States v. Moran, 194 F.2d 623 (2d Cir. 1952); Shushan v. United States, 117 F.2d 110 (5th Cir. 1941); Pittman v. State, 51 Fla. 94, 41 So. 385 (1906); Carsons v. Commonwealth, 243 Ky. 1, 47 S.W.2d 997 (1931) (citing a long line of authority).

16. Carsons v. Commonwealth, supra note 15.

17. Shushan v. United States, 117 F.2d 110 (5th Cir. 1941).

18. Hysler v. State, 132 Fla. 209, 181 So. 354 (1938); Moore v. State, 59 Fla. 23, 52 So. 971 (1910).

General Availability for Protection Against Inflammatory Publicity

A frequent ground alleged for a continuance is that adverse publicity concerning the accused has been so widely distributed that an unbiased jury cannot be obtained.[19] The great weight of authority takes the position that inflammatory publicity as ground for a continuance is a discretionary matter for the trial court,[20] the facts of each case being carefully considered in determining whether or not the accused can receive a fair trial.[21]

A few courts, however, have categorically stated that such publicity is not an adequate ground for a continuance, even though its natural tendency is to excite public prejudice and arouse passions.[22] Many of these courts have grounded this conclusion on the rationale that it is the duty of the state to provide a prompt trial for the protection of society and that a change of venue is usually available to protect the accused from hostility.[23] Other reasons sometimes given for the refusal to grant a continuance to protect the accused against adverse publicity are that the courts in this country are continually under attack because they are behind on their criminal dockets, that extra expense is involved, and that there is a possibility of death or loss of memory of a vital witness.[24] A refusal to grant a continuance which is based on any of these rationale, however, would apparently be inconsistent with the constitutional principle entitling an accused to a fair trial.

Factors Which Appellate Courts Have Considered Important in Reviewing Trial Court's Failure to Grant a Continuance

At this point an investigation will be made of the various factors that courts consider when deciding whether to grant a continuance on the ground of hostile publicity. Since trial court opinions ruling on motions for continuance are rare, these factors must be found in the opinions of appellate courts reviewing the trial judge's *refusal* to

19. E.g., Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); United States v. Moran, 194 F.2d 623 (2d Cir. 1952). See also Harvey, Trial By Newspaper, 42 Mass. L.Q. 9 (1957).

20. E.g., Paschen v. United States, 70 F.2d 491 (7th Cir. 1934); State v. Golden, 353 Mo. 585, 183 S.W.2d 109 (1944).

21. State v. Golden, supra note 20.

22. E.g., Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953); Littlefield v. State, 36 Ala. App. 507, 63 So. 2d 565, cert. denied, 258 Ala. 532, 63 So. 2d 575 (1952); State v. Rice, 7 Idaho 762, 6 Pac. 87 (1901); Hatfield v. Commonwealth, 287 Ky. 467, 153 S.W.2d 892 (1941); State v. Seyboldt, 65 Utah 204, 236 Pac. 225 (1925).

23. E.g., State v. Seyboldt, supra note 22 at 217, 236 Pac. at 231.

24. See Annot., 39 A.L.R.2d 1314, 1317 n.6 (1955). Cf. Vanderbilt, Impasses In Justice, 1956 Wash. U.L.Q. 287-300.

allow the motion. However, trial courts undoubtedly grant many continuances on the ground of hostile publicity.[25]

1. *Source*

The source of information may determine whether a postponement will be granted. If the information which created the hostile publicity was given to the press by the prosecuting attorney, there is a good chance a court will find a continuance should have been ordered.[26] Similarly, publicity from a legislative source may weigh heavily in favor of a continuance. In *Delaney v. United States*,[27] defendant, Collector of Internal Revenue, was indicted for accepting bribes. In the interval between the indictment and the trial, congressional subcommittee hearings were held in the vicinity of the trial. Witnesses who were to appear later at the trial were examined but not cross-examined, and the salient aspects of their testimony were published by the newspapers in colorful feature stories.[28] The trial court refused to grant a continuance, and on appeal it was held that if the United States chooses to hold legislative hearings which result in prejudice to a person awaiting trial, the trial must be postponed; the alternative would be to delay the hearings until the trial is completed. It should be noted that the Department of Justice and legislature in the *Delaney* case were both federal agencies. But the *Delaney* doctrine has been extended to include a situation which involved a federal prosecution and a state crime commission hearing.[29]

United States v. Hoffa,[30] on the other hand, apparently limited the

25. Documentation of these propositions is difficult. No case has been found in which an appellate court reviewed an order granting a motion for continuance. In addition, experienced trial judges have indicated in interviews that motions for continuance are often granted because of hostile publicity.

26. In Delaney v. United States, 199 F.2d 107, 113 (1st Cir. 1952) the court stated: "If all this material had been fed to the press by the prosecuting officials of the Department of Justice, we think that an appellate court would have had to say that the denial of a longer continuance was an abuse of discretion." See also Allen v. United States, 4 F.2d 688 (7th Cir. 1924), cert. denied, Hunter v. United States, 267 U.S. 597 (1925) where a continuance was not allowed because the court believed the jury was not prejudiced, but the prosecuting attorney was severely criticized for certain press releases. Contra, United States v. Leviton, 193 F.2d 848 (2d Cir. 1951).

27. 199 F.2d 107 (1st Cir. 1952).

28. The publicity was carried by Life magazine with a 5,000,000 circulation. This was supplemented by radio and television broadcasts. Id. at 111.

29. United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952) (a venue case which indicated that the same principle would apply to a continuance).

30. 156 F. Supp. 495 (S.D.N.Y. 1958). Also compare Delaney with United States v. Moran, 194 F.2d 623 (2d Cir. 1952); United States v. Stein, 140 F. Supp. 761 (S.D.N.Y. 1956); United States v. Mesarosh, 116 F. Supp. 345 (W.D. Pa. 1953); Green v. Maine, 113 F. Supp. 253 (S.D. Me. 1953); United States v. Carper, 13 F.R.D. 483 (D.C.D.C. 1953) (venue case).

doctrine of the *Delaney* case to its facts. The *Hoffa* case was similar to the *Delaney* case in that publicity was widespread and referred extensively to congressional hearing testimony concerning defendant. However, the court distinguished the nature of the publicity engendered by the hearings in the two cases when it stated that in *Hoffa* the committee made a conscious effort to avoid questions directly related to the pending indictment; that defendant was represented by counsel who was permitted to and did interpose objections; and that the committee promptly withdrew questions on objection of counsel that they concerned a pending indictment.[31] It is submitted, that if the *Hoffa* court accepted the *Delaney* doctrine, there was no adequate reason for distinguishing the type of testimony at the hearing. The basic consideration should have been whether publicity engendered by the hearing was sufficiently prejudicial to the defendant; if it was, defendant's trial should have been postponed.

Of course, if the accused is the source of publicity, there will be little ground for a continuance.[32]

2. *Nature, Scope, and Style of Publicity*

The exact nature, scope, and style of the publicity are often used as balancing factors by the courts. If publicity is disseminated on a nation-wide basis, courts will be more inclined to grant a continuance than a change of venue because a change of venue would provide little protection.[33] In one case where the evidence showed that inflammatory publicity was purely local, the court would not reverse the trial court's refusal to allow a continuance.[34] A like result was reached where the motion was based on a vituperative letter to the editor which appeared in a local newspaper and urged the death sentence for the defendant.[35] Even though publicity is widespread, the largest percentage must be hostile to the accused, because the reviewing court will be hesitant to disturb the trial judge's ruling when the publicity is partly favorable and partly hostile.[36]

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31. United States v. Hoffa, supra note 30 at 502.

32. Cf. Honda v. People, 111 Colo. 279, 141 P.2d 178 (1943).

33. See text supported by note 12 supra; Green v. Maine, 113 F. Supp. 253, 255 (S.D. Me. 1953) the court reasoning: "[A]nd finally . . . it does not appear that the publicity . . . was so widespread as in *Delaney*." Cf. United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952); Collins v. State, 234 Ala. 197, 174 So. 296 (1937); Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951).

34. Collins v. State, supra note 33.

35. Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951).

36. United States v. Lattimore, 112 F. Supp. 507, 511 (D.C.D.C. 1953). Compare with cases in note 99 infra, which show that appellate courts will be hesitant to upset a trial court's decision when affidavits are controverted. See also Murphy and Newcomb, Experimental Social Psychology 962-63 (2d ed. 1937) stating: "The effectiveness of 'propaganda' is thus seen to depend upon how clear a field

If the matters publicized are ultimately proved at the trial, there is likewise less chance of reversal.[37] At least one court held that it would not reverse the denial of a continuance if a voluntary confession which appeared in newspaper accounts was actually proven at the trial.[38] Although the court did not expressly state its reasoning, it apparently applied the doctrine of harmless error, i.e., the introduction of the confession gave the jurors *present* justification for their *past* prejudices, so that the trial court's refusal to grant the continuance, even if erroneous, produced no harm. A similar position has been taken where evidence showed that the jury could not have justifiably returned a different verdict.[39] However, newspaper publications of a confession which is never introduced at the trial may strongly influence an appellate court to find that a continuance should have been granted.[40]

Several courts have held that a continuance should have been granted when newspaper publicity concerning the forthcoming trial of one defendant was interwoven with the published accounts of the preceding trial of a co-defendant.[41] The courts feel that publicity, based upon sworn testimony, would prejudice jurors more than pub-

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it had. . . . When . . . opposition is met, individuals will be diversely affected . . . in accordance with other predetermining influences . . . ."

37. Allen v. United States, 4 F.2d 688 (7th Cir. 1924), cert. denied, Hunter v. United States, 267 U.S. 597 (1925) where the court said: "So far as they told of Monte's murder, nothing was related that was not proved upon the trial." Allen v. United States, supra at 697. Commonwealth v. Spallone, 154 Pa. Super. 282, 35 A.2d 727 (1944). But see Owens v. State, 215 Ala. 42, 109 So. 109 (1926); State v. Harris, 126 Kan. 710, 271 Pac. 316 (1928).

38. Stroble v. California, 343 U.S. 181, 191 (1952).

39. State v. Gordon, 32 N.D. 31, 155 N.W. 59 (1915). Cf. State v. Loveless, 139 W. Va. 454, 80 S.E.2d 442 (1954).

40. See Shepherd v. Florida, 341 U.S. 50 (1951) (where a false confession was printed and never entered in evidence, the Court held that continuance should have been granted); Note, Controlling Press and Radio Influence on Trials, 63 Harv. L. Rev. 840, 843 (1950), stating that: "[I]t would seem that newspaper publications of evidence never introduced at the trial would be more persuasive than if the evidence had been introduced and subjected to cross-examination." But see Owens v. State, 215 Ala. 42, 109 So. 109 (1926) (a different result in a similar situation where a coerced confession was published and properly excluded from evidence).

It should be noted that these cases are decided by appellate courts which glance retrospectively at what transpired prior to *and* during the trial in the lower court. The result of these decisions is to perplex a trial judge who does not have the benefit of hindsight which appellate courts have, i.e., the trial judge does not know whether to deny the motion for continuance because he does not have a crystal ball to predict whether the prosecution will attempt to introduce the publicized confession in evidence.

41. E.g., United States v. Dioguardi, 147 F. Supp. 421 (S.D.N.Y. 1956). But see Sims v. State, 177 Ga. 266, 170 S.E. 58 (1933).

licity based upon speculation or an investigator's suspicion.[42] Similarly a continuance was granted where a defendant was convicted in a preceding trial, and inflammatory publicity appeared prior to a trial in which he was charged with a different crime.[43] However, where an accused was allowed a new trial and there had been substantial publicity concerning the first trial, one court stated that if truthful publicity of a former trial can be seriously considered grounds for continuance, no second trial would be possible in any case.[44]

It has been held that the publicity must refer specifically to the accused and the specific charge for which he is to be tried.[45] Thus, where an accused was indicted under the Smith Act but publicity concerned only an investigation of the tax difficulties of publishers of a communist paper, postponement was denied;[46] nor was the publication of another's confession to ten or more similar offenses considered sufficient ground for continuance of accused's trial.[47]

If newspaper accounts are written in purely narrative form[48] and are essentially objective,[49] a continuance will not be favored because the inflammatory elements will normally be missing.

3. *Time Element*

Whether or not the accused is under indictment when adverse newspaper publicity appears is of prime importance, for this factor is usually linked to the lapse of time between the appearance of publicity and the trial.[50] In the *Delaney* case, where the defendant was under indictment when adverse publicity appeared, the court expressly refused to rule on what would have happened had defendant not been under indictment, but recognized that if a legislative investigation resulted in the indictment, the time lag between publicity and trial would be greater than in the case before it.[51] Many cases have refused to follow the *Delaney* decision when the defendant was

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42. United States v. Dioguardi, supra note 41 at 422.

43. See note 25 supra.

44. State v. Hume, 146 Me. 129, 78 A.2d 496 (1951).

45. See, e.g., Robinson v. United States, 128 F.2d 322 (D.C. Cir. 1942); United States v. Stein, 140 F. Supp. 761 (S.D.N.Y. 1956).

46. United States v. Stein, supra note 45.

47. Robinson v. United States, 128 F.2d 322 (D.C. Cir. 1942). In this case the court said: "A general indignation toward those who commit [a certain offense] is not regarded by our society as bias or prejudice." Id. at 323.

48. Collins v. State, 234 Ala. 197, 174 So. 296 (1937); State v. Harris, 126 Kan. 710, 271 Pac. 316 (1928).

49. Kitts v. State, 153 Neb. 784, 46 N.W.2d 158 (1951).

50. See text supported by notes 55-59 infra.

51. Delaney v. United States, 199 F.2d 107, 115 (1st Cir. 1952). The court also reasoned that committee investigations have their greatest utility before the indictment of a person.

not under indictment at the time of the damaging publicity and there was a difference in time elapsed.[52] Thus, where a defendant was not under indictment until six months after the publication of committee reports, a motion for change of venue was denied.[53]

The time element also becomes important when determining whether or not a continuance will be futile. Many courts have held that denial of a continuance was justified when there were indications that the accused would continue to be a "controversial, publicity-invoking figure" and that the passage of time would result in little, if any, abatement of hostile reports.[54] Other factors which courts have considered to determine whether a delay will afford the accused greater protection include the duration of publicity,[55] the national importance of the accused,[56] and the nature of the crime.[57] It is submitted that courts should not be concerned with the state of public excitement in the future, and that they should only consider whether the accused can presently obtain a fair trial.[58]

In considering whether to grant a continuance, courts have thus raised the following questions: Do jurors remember what they have read? How many can remember the headlines in the morning paper?[59]

Modern psychologists have said that the effects of highly publicized

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52. See note 53 infra, and text supported thereby.

53. United States v. Carper, 13 F.R.D. 483, 487 (D.C.D.C. 1953) (venue case). In the Delaney case there were three months intervening between the first publication of the committee reports and the trial. See also United States v. Hoffa, 156 F. Supp. 495 (S.D.N.Y. 1957); United States v. Stein, 140 F. Supp. 761 (S.D. N.Y. 1956).

54. E.g., United States v. Hoffa, supra note 53 at 500; State v. Orecchio, 27 N.J. Super. 484, 99 A.2d 595, aff'd, 16 N.J. 125, 106 A.2d 541 (1953).

55. State v. Orecchio, supra note 54.

56. See, e.g., United States v. Hoffa, 156 F. Supp. 495 (S.D.N.Y. 1957).

57. Bryant v. State, 20 Md. 565, 115 A.2d 502 (1955) where the court stated: "In this case we have not found that the articles in the newspapers gave any indication of intense public resentment such as there sometimes exists when a woman or child is atrociously raped, or when there is a racial problem." Id. at 581, 115 A.2d at 509. The publicity in this case concerned a jail break. It is interesting to note that this is the only case uncovered which expressly considers the nature of the crime in regard to whether a continuance should be allowed because of hostile publicity.

58. At first glance it would appear that adoption of this view would result in indefinite postponement of the trial of an accused who is a public figure because hostile publicity is likely to resume at the time he is finally tried. However, it is felt that after "heads have had time to cool," the inflammatory effect of resumed publicity will be diminished. In addition, although general publicity, hostile or not, always accompanies a public figure, it appears that specific and detailed references aimed at the particular offense he is charged with will diminish with time. Thus, an accused will have a greater opportunity to obtain a fair trial.

59. Harvey, Trial By Newspaper, 42 Mass. L.Q. 8 (1957).

information may linger in the sub-conscious long after the information has been forgotten by the conscious, unknowingly affecting our decisions.[60] Most courts have not recognized such scientific data and have generally felt that the defense over-estimates the duration of the effects of hostile publicity;[61] that the startling headlines of today are overshadowed by the startling headlines of tomorrow;[62] and that most people only scan the headlines and soon forget matters which do not directly concern them.[63] It is probable that as the scientific data becomes more acceptable to and accepted by the courts, a motion for continuance based upon hostile publicity will receive increasingly more favorable consideration.

4. *Instruction and Examination of the Jury*

Many times instructions to the jury to disregard any hostile publicity have been deemed sufficient to ground a denial of a motion for continuance which is based on charges of pre-existing bias against the accused.[64] Thus, a refusal to grant a continuance, requested because defamatory articles were published in two newspapers which were held in contempt of court, was upheld because the trial judge had warned the jurors not to read the newspapers or listen to the radio.[65] One court has taken a stronger position, upholding a trial court's denial of a continuance, because the judge warned the jury

60. Murphy and Newcomb, Experimental Social Psychology 962 (1937) which states: "Opinion can be induced by means of judiciously selected selections in as short a time as seven issues of a newspaper *even when* the person, institution, or question may be quite unknown . . . ."

61. See United States v. Moran, 194 F.2d 623 (2d Cir. 1952); United States v. Connelly, 129 F. Supp. 786 (D. Minn. 1955); State v. Woods, 189 S.C. 281, 299, 1 S.E.2d 190, 198 (1939) (dissenting opinion) (stating that "zealous attorneys often become imbued with the feeling that their clients are being unjustly treated . . . .").

62. United States v. Connelly, supra note 61, at 792. See also State v. Martinez, 220 La. 899, 57 So. 2d 888, cert. denied, 344 U.S. 843 (1952).

63. United States v. Connelly, 129 F. Supp. 786, 791 (D. Minn. 1955).

64. E.g., Shushan v. United States, 117 F.2d 110 (5th Cir. 1941); Hart v. United States, 112 F.2d 128 (5th Cir. 1940); Kitts v. State, 153 Neb. 784, 46 N.W.2d 158 (1951) where the court reasoned that: "[T]he jurors were sworn, and thereafter from adjournment to adjournment of the trial, the court continuously, meticulously, and at great length, with unusual clarity and emphasis, admonished the jury to keep an open and impartial mind, and not talk with each other or with any other person about the case, and not to read anything published in the newspapers . . . ." Id. at 795, 46 N.W.2d at 165. But see Krulewitch v. United States, 336 U.S. 440, 453 (1949) where it is stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

65. Shushan v. United States, supra note 64.

not to read certain articles, referring to the page and date of the allegedly prejudicial matter.[66]

It has been urged that if publicity is sufficiently inflammatory, the court should presume the jurors to be prejudiced.[67] This contention may have some weight where there are no facts showing an absence of prejudice,[68] but in most instances the court is able to review the voir dire examination. Regardless of the prejudicial nature and the extent of coverage of the publicity, the reviewing court will be hesitant to interfere with the trial judge's denial of a continuance when jurors were examined *carefully* on voir dire.[69] Although there is no uniform rule regarding what is deemed "careful," it is felt that courts have not been very strict in their requirements.[70] Many courts have considered the voir dire examination sufficient to show lack of prejudice where the jurors simply stated that regardless of their preconceived opinions based on newspaper reports, they could render a fair verdict.[71] If there is no examination of the jurors by the defense, most courts presume the jury is not prejudiced.[72] This presumption was held to arise in one case where only a few of the jurors were questioned.[73] At the conclusion of voir dire, if the defense counsel announces that he is satisfied with the jury,[74] or if the jury is selected from a special venire and the order for the venire was consented to by the accused,[75] courts have regularly refused to upset the trial court's denial of a continuance.

Special weight has been given to the fact that the defense did not

66. See Centoni v. United States, 69 F.2d 624 (9th Cir. 1934).

67. United States v. Mesarosh, 116 F. Supp. 345 (W.D. Penn. 1953).

68. Ibid. The court stated that in the Delaney case the court presumed prejudice because there was no evidence showing otherwise; here the questioning of the jury showed lack of prejudice. Id. at 353.

69. E.g., United States v. Carper, 13 F.R.D. 483 (D.C.D.C. 1953) (venue case); United States v. Hoffa, 156 F. Supp. 495 (S.D.N.Y. 1957).

70. See, e.g., Irvin v. Dowd, 153 F. Supp. 531 (N.D. Ind. 1957); People v. Schneider, 309 Mich. 158, 14 N.W.2d 819 (1944).

71. Ibid. In the Dowd case the following answer by a juror was deemed sufficient although he had admitted his preconceived opinions formed from newspaper articles: "Q. Supposing that he, the defendant, were sitting up there in the jury box instead of you and you were sitting down there as the defendant, would you be willing for him to sit on your jury if you knew he had in his mind the same thought, the same opinions, and the same attitudes toward you as you toward him? A. Yes, I would." Id. at 537.

72. E.g., People v. Fitzsimmons, 320 Mich. 116, 30 N.W.2d 801 (1948); Commonwealth v. Collins, 169 Pa. Super. 197, 82 A.2d 569 (1951).

73. United States v. Moran, 194 F.2d 623 (2d Cir. 1952) (only 27 talesmen questioned by both sides).

74. People v. Schneider, 309 Mich. 158, 14 N.W.2d 819 (1944).

75. Penny v. Commonwealth, 292 Ky. 192, 166 S.W.2d 18 (1942).

take full advantage of its peremptory challenges.[76] Courts have reasoned that if the accused thought jurors were prejudiced, he should have used all available means to secure an impartial jury, and if all means are not used, he will be estopped from complaining.[77] In one case this proposition was given greater weight where it appeared that some jurors who had not read the hostile newspaper publicity were struck peremptorily, and others who had read it were accepted.[78] The *Delaney* court apparently took a more realistic view of this problem:

> Nor do we think it significant that the defendant failed to exhaust his peremptory challenges . . . Since he was obliged to stand trial in the hostile atmosphere engendered by extra courtroom publicity, he had little or no reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions . . .[79]

Refusal of a trial judge to permit the defendant to ask jurors whether they had read an article which was unrelated to the charge against him was held to be insufficient grounds for reversal.[80] Most courts hold that before jurors will be found to be prejudiced, they must have read the specific material relating to the accused.[81] Even if this specific material appears in headlines, one who reads headlines only normally scans them without lasting perception of their full idea and content. Therefore, courts are loath to grant continuances where the accused shows only that jurors have read inflammatory headlines.[82] Many of these courts are unwilling to allow the defense to test jurors during voir dire by reading specific articles to them.[83] Thus, one case held that it was not error when a trial judge refused to permit the accused's counsel to read an article to a juror after the juror had testified that he did not remember reading the article.[84] Similarly,

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76. E.g., Shushan v. United States, 117 F.2d 110 (5th Cir. 1941); Allen v. United States, 4 F.2d 688 (7th Cir. 1924), cert. denied, Hunter v. United States, 267 U.S. 597 (1925).

77. Ibid.

78. Allen v. United States, 4 F.2d 688 (7th Cir. 1924), cert. denied, Hunter v. United States, 267 U.S. 597. (1925).

79. Delaney v. United States, 199 F.2d 107, 116 (1st Cir. 1952).

80. State v. Martinez, 220 La. 899, 57 So. 2d 888, cert. denied, 344 U.S. 843 (1952).

81. E.g., ibid.; Commonwealth v. Spallone, 154 Pa. Super. 282, 35 A.2d 727 (1944).

82. United States v. Connelly, 129 F. Supp. 786 (D. Minn. 1955); State v. Martinez, 220 La. 899, 57 So. 2d 888, cert. denied, 344 U.S. 843 (1952).

83. E.g., Biggers v. State, 171 Ga. 596, 156 S.E. 201 (1930); State v. Martinez, supra note 82.

84. State v. Martinez, 220 La. 899, 57 So. 2d 888, cert. denied, 344 U.S. 843 (1952).

it was found proper to deny a request by counsel that he be allowed the "privilege" of reading an article to the jury, and to inquire whether it affected their minds in any way.[85] It is submitted that these latter cases were correctly decided; it would be unreasonable to subject jurors to a reading of prejudicial material which previously may not have come to their attention.

5. *Affidavits*

It is well established that a motion for continuance must be supported by an affidavit,[86] and a trial court's refusal to allow oral testimony instead of an affidavit has been upheld.[87] Extreme care should be exercised in preparing the affidavit in order to give the appellate court an adequate basis for determining whether the trial court was in error,[88] particularly in criminal cases, for it has been held that the great temptation to delay criminal proceedings requires that a motion for continuance be scrutinized more carefully than in civil cases.[89]

An application for a continuance grounded on prejudice engendered by publicity must contain many affidavits from diverse persons in the community, alleging that this prejudice prevents the defendant from receiving a fair trial at that time.[90] A continuance was refused, however, when the defense, anticipating that prejudice would result from a newspaper article, asked for time to investigate and secure the necessary affidavits.[91] And if the accused's attorney bases an affidavit solely on his opinion, there is little chance that a court will upset the trial judge's decision.[92] This rule has been applied even when there were strong grounds for the attorney's opinion, i.e., the failure of many citizens to sign affidavits that the accused could not have a fair trial, although they privately would admit that they thought he could not; the court did indicate, however, that the affidavit might have been sufficient if the names of these citizens had been supplied.[93]

It is essential that affidavits be supported by accompanying exhibits, particularly when the motion for continuance is based on adverse

85. Biggers v. State, 171 Ga. 596, 156 S.E. 201 (1930).

86. E.g., State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); Clark, Criminal Procedure 483 (2d ed. 1918).

87. State v. Taylor, supra note 86.

88. Clark, op. cit. supra note 86. See United States v. Moran, 194 F.2d 623 (2d Cir. 1952).

89. Pittman v. State, 51 Fla. 94, 41 So. 385 (1906); Hysler v. State, 132 Fla. 209, 181 So. 354 (1938).

90. Moore v. State, 59 Fla. 23, 52 So. 971 (1910).

91. Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951).

92. State v. Woods, 189 S.C. 281, 1 S.E.2d 190 (1939); State v. Rasor, 168 S.C. 221, 167 S.E. 396 (1933).

93. State v. Woods, supra note 92.

newspaper reports.[94] For example, in *Schino v. United States*[95] neither the newspaper reports nor committee reports appeared in the record, even though they were the basis of apprehension. The court refused to follow the *Delaney* decision, where affidavits for continuance were supported by detailed exhibits showing hostile newspaper comments, because in *Schino* it could not be determined whether the defendant was justified in his concern over the publicity. It should be noted that many courts which follow the above rule state that all presumptions will be in favor of the lower court's ruling when the record is silent or uncertain on any point.[96] The courts will not take judicial notice[97] of allegedly prejudicial publicity, and it has been held error for a trial judge to consider evidence acquired through his private investigation.[98]

Counter-affidavits are always the proper method for the prosecution to controvert the accused's affidavits,[99] and are essential when the defendant's affidavits and exhibits establish a prima facie case of prejudice. When the prosecution's counter-affidavits directly contradict those of the accused, the reviewing court will be reluctant to say that the trial judge abused his discretion by denying a continuance.[100] But the prosecution's affidavits stating that it is "thought" the accused can secure a fair trial have been held insufficient unless they in addition affirmatively show either that public opinion is split or that the accused is not the center of public discussion.[101]

6. *Failure to Ask for a Change of Venue*

A change of venue has generally been considered adequate protection against hostile publicity, resulting in the conclusion that failure of an accused to request a change of venue in the trial court will weigh heavily against reversal of the lower court's denial of a

94. See United States v. Moran, 194 F.2d 623, 625 (2d Cir. 1952) where the court stated that "neither the committee's report nor the newspapers' comments on it, are in the record, so that we cannot judge whether they supplied any basis for counsel's apprehension." See also United States v. District Director of Immigration & Naturalization, 222 F.2d 537 (2d Cir. 1955); Schino v. United States, 209 F.2d 67 (9th Cir. 1953); Hoover v. State, 48 Neb. 184, 66 N.W. 1117 (1896).

95. Schino v. United States, supra note 94.

96. E.g., Robinson v. United States, 128 F.2d 322 (D.C. Cir. 1942); Moore v. State, 59 Fla. 23, 52 So. 971 (1910).

97. Schino v. United States, 209 F.2d 67 (9th Cir. 1953).

98. Caldwell v. State, 164 Tenn. 325, 48 S.W.2d 1087 (1932).

99. Adkins v. State, 42 Ariz. 534, 28 P.2d 612 (1934); State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); Clark, Criminal Procedure 483 (2d ed. 1918).

100. Adkins v. State, supra note 99; State v. Anselmo, 46 Utah 137, 148 Pac. 1071 (1915). Compare note 36 supra.

101. See Caldwell v. State, 164 Tenn. 325, 48 S.W.2d 1087 (1932).

continuance.[102] However, the court in the *Delaney* case rejected this reasoning:

> Under the Sixth Amendment the accused enjoys the constitutional right to a speedy and public trial, "by an impartial jury of the State and district" wherein the alleged crimes are charged to have been committed. . . . The right to apply for a change of venue is given for the defendant's benefit and at his option. He is not obliged to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed; and under the circumstances of this case we do not think that the defendant's appeal stands any worse for failure on his part to apply for a change of venue.[103]

It is submitted that the position taken by this court is more consistent with the ultimate purpose of criminal procedure in this country—a fair trial.

7. Failure of Other Defendants to Act

In a few cases it has been considered important that other defendants who were tried for the same criminal act did not also move for a continuance,[104] on the rationale that if other defendants thought they could secure a fair trial then publicity must not have been hostile enough to deprive the movant-defendant of a fair trial.[105] It is submitted that one defendant should not be prejudiced by the actions of others, and that the court's only concern should be whether the movant-defendant received a fair trial by an impartial jury.

CONCLUSION

At present an accused has little protection against hostile publicity. Courts are hesitant to use their summary contempt power as a deterrent to this publicity because of the potential conflict with the first amendment right of a free press.[106] In addition, a secret trial without the consent of the accused would violate due process.[107] Publicity is

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102. E.g., Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953); People v. Fitzsimmons, 320 Mich. 116, 30 N.W.2d 801 (1948); State v. Loveless, 139 W. Va. 454, 80 S.E.2d 442 (1954).

103. 199 F.2d at 116. See also State v. Rasor, 168 S.C. 221, 227, 167 S.E. 396, 399 (1933) where it was shown that the first trial did not come up for four months and defendant had no reason to ask for a change of venue because he had no reason to expect that he would not get a fair trial, and thus he was not precluded from then asking for a continuance at a later trial.

104. Allen v. United States, 4 F.2d 688 (7th Cir. 1924), cert. denied, Hunter v. United States, 267 U.S. 597 (1925); United States v. District Director of Immigration & Naturalization, 222 F.2d 537 (2d Cir. 1955).

105. See note 104 supra.

106. See note 8 supra.

107. In re Oliver, 333 U.S. 257 (1948).

often widespread so that a change of venue will afford little protection. Courts have not been liberal in granting continuances, probably because this creates grave administrative problems. A more generous allowance of continuances, although accompanied by some difficulty, appears to be the most effective means of relief without encroaching on constitutional rights.