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## People v. Jacobson, 46 Cal. Rptr. 515, 405 P.2d 555 (1965)

Larry Petersen

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the non-Indian to deal with the Indian at his peril. This would neither benefit the Indian nor serve the government's purpose to make the Indians responsible citizens of this society.

SIDNEY J. STRONG.

CRIMINAL LAW: EXTENSIVE PUBLICITY MAY PREVENT A FAIR TRIAL.—Defendant, convicted of the first degree murder of his daughter, contended he was denied a fair trial because of inflammatory news coverage of the crime. *Held*: Although the news coverage exhibited inflammatory qualities, it was possible to select an impartial jury because the circulation of the newspaper was limited. Therefore, defendant was not denied a fair trial. *People v. Jacobson*, 46 Cal. Rptr. 515, 405 P.2d 555 (1965).

The publicity surrounding a crime raises questions concerning the accused's right to a trial before an impartial jury. The Sixth Amendment to the United States Constitution guarantees the accused in federal courts the right to a speedy and public trial by an *impartial jury*. The Due Process clause of the Fourteenth Amendment guarantees the right to an impartial jury in state courts.<sup>1</sup> The guarantee of an impartial jury is also embodied in the constitutions of thirty nine states and can be implied from the guarantee of trial by jury in the other eleven states.<sup>2</sup> Montana is one of the thirty nine states that constitutionally guarantees an impartial jury.<sup>3</sup> The California courts have held that a fair trial requires an impartial jury.<sup>4</sup>

The news media publicize crimes, investigations, arrests, and trials. They also publish confessions or the fact of confessions, past criminal records, and other matter that may be inadmissible at trial. Such publicity may prejudice prospective jurors, destroy the presumption of innocence, subvert the court's control over the admissibility of evidence, and emphasize certain portions of the evidence. However, the public has a right to be informed about the activity of its servants and institutions. Publicizing criminal cases may act as a deterrent to further crime, and it may assist in the solution of crimes.<sup>5</sup> The conflict between these two

<sup>1</sup>*Rideau v. Louisiana*, 373 U.S. 723 (1963); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Estes v. Texas*, 381 U.S. 532 (1965); *Irvin v. Dowd*, 366 U.S. 717 (1961). Whether the impartial jury guaranteed by the Sixth Amendment and that guaranteed by due process are the same has never been decided by the Supreme Court. It is arguable that the impartial jury guaranteed by the Sixth Amendment espouses the more rigid requirements owing to the federal supervisory control over lower federal courts. See, Note, 60 COLUM. L. REV. 349 (1960).

<sup>2</sup>COLUMBIA UNIVERSITY LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 579 (1959).

<sup>3</sup>MONT. CONST. art. III, § 16. MONT. CONST. art. III, § 27 provides "No person shall be deprived of life, liberty, or property without due process of law." *State v. Dryman*, 127 Mont. 579, 269 P.2d 796.

<sup>4</sup>*Ex parte Wallace* 24 Cal. 2d 933, 152 P.2d 1 (1944); *Ex parte Winchester*, 53 Cal. 2d 528, 348 P.2d 904, cert. denied 363 U.S. 852 (1960).

<sup>5</sup>For a general discussion of this area see SWILLY, "TRIAL BY NEWSPAPER,"

positions presents this question: At what point does the publicity concerning a crime encroach upon the accused's right to an impartial jury?

Many federal cases have considered appeals from state court convictions involving the problem of pre-trial publicity and the defendant's right to an impartial jury. The issue is usually raised by the defendant's claim that he was denied an impartial jury by the state court's rejection of a motion for change of venue, motion for continuance, or challenge to a juror. The contention that adverse publicity denied the accused an impartial jury is rejected in most cases.<sup>6</sup> These cases rest on a combination of several factors: the publicity did not tend to arouse ill will;<sup>7</sup> the trial court did not abuse its discretion in ruling on motions for change of venue, continuances, or challenges to jurors;<sup>8</sup> the defendant did not avail himself of the legal means provided to avoid the effects of prejudicial publicity;<sup>9</sup> the effects of the publicity were dissipated prior to the trial;<sup>10</sup> the defendant's objection to the publicity was not timely;<sup>11</sup> and the defendant did not demonstrate the existence of actual prejudice.<sup>12</sup>

The last factor seems to incorporate most of the others, and it has

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(1961); Hambraugh, *Free Press versus Fair Trial: The Contribution of Mr. Justice Frankfurter*, 26 U. PITT. L. REV. 491 (1965); McCarthy, *Fair Trial and Prejudicial Publicity; A Need for Reform*, 17 HASTINGS L.J. 79 (1965); Note, 36 MISS. L.R. 369 (1965).

<sup>6</sup>Annot., 10 L. Ed. 2d 1243, 1251.

<sup>7</sup>The following cases found the publicity not to be prejudicial: In *Beck v. Washington*, 369 U.S. 541 (1962), newspapers reported a Senate Committee's investigation of a union of which the accused was president; and that accused had invoked the Fifth Amendment 270 times. The papers also reported the committee's statements that accused was guilty of many crimes, and that \$250,000 had been taken from union funds for his personal benefit. The accused's indictment before both a special grand jury and a federal grand jury received much news coverage. In *United States ex rel. Darcy v. Handy*, 351 U.S. 454 (1956), two days before petitioner's trial, the local paper reported a judge's commendation to a jury which had just rendered a verdict against petitioner's accomplice. In *Torrance v. Salzinger* 297 F.2d 902 (3rd Cir. 1962), cert. denied 369 U.S. 887 (1962), the governor made denunciatory statements over television about a recent turnpike scandal, but there was no mention of petitioner, who was being tried for conspiracy to defraud the turnpike commission. In *United States ex rel. Bongiorno v. Ragen*, 54 F. Supp. 973 (D. Ill. 1944), cert. denied 325 U.S. 865 (1945), stories of crimes in the area made no reference to petitioner's pending case.

<sup>8</sup>*Reynolds v. United States*, 98 U.S. 145 (1878); *Speis v. Illinois*, 123 U.S. 131 (1887).

<sup>9</sup>*Stroble v. California*, 343 U.S. 181 (1952); *United States ex rel. Darcy v. Handy*, supra note 7; *United States ex rel. Brown v. Smith*, 306 F.2d 596 (2d Cir. 1962), cert. denied. 372 U.S. 959 (1962); *Torrance v. Salzinger*, supra note 7; *United States ex rel. Bongiorno v. Ragen*, supra note 7; *Palakiko v. Harper*, 209 F.2d 75 (9th Cir. 1953), cert. denied 347 U.S. 956 (1954), rehearing denied 347 U.S. 979 (1954).

<sup>10</sup>*Stroble v. California*, supra note 9 (6 weeks); *United States ex rel. Brown v. Smith*, supra note 9 (3 months); *Torrance v. Salzinger*, supra note 7 (8 months).

<sup>11</sup>*United States ex rel. Darcy v. Handy*, supra note 7 (3 years after trial); *Stroble v. California*, supra note 9 (petitioner did not raise contention until after his conviction).

<sup>12</sup>In *Beck v. Washington*, supra note 7, all jurors who admitted bias or possible bias and all jurors challenged for cause were excused. In *United States ex rel. Darcy v. Handy*, supra note 7, petitioner failed to show the necessary amount of prejudice. A demonstration of circumstances indicating the opportunity for prejudice is not enough. In *Stroble v. California*, supra note 9, petitioner failed to demonstrate that the requisite amount of prejudice resulted from adverse publicity. There was no showing that the jurors had ever read the newspaper accounts of his crime. *Buchalter v. New York*, 319 U.S. 427 (1943); *Wolfe v. Nash*, 313 F.2d 393 (8th Cir. 1963), cert. denied 374 U.S. 817 (1963); *United States v. Schaffer*, 291 F.2d 689 (7th Cir. 1961), cert. denied 368 U.S. 915 (1961); rehearing denied 368 U.S. 962

received the most extensive discussion in the federal courts. Before a reversal will be granted, the courts require that the defendant show such clear and convincing evidence of prejudice as to necessarily prevent a fair trial.<sup>13</sup> This standard forces the defendant to prove that at least one juror was prejudiced when the verdict was rendered.<sup>14</sup> Even though a juror acknowledged that he had read accounts of a crime and formed an opinion, nevertheless, he was held competent if he stated that he could render a fair and impartial verdict.<sup>15</sup> The courts reason that in a notorious case it would be impossible to find jurors who had not read about the case and formed some opinion.

Some federal authority has recognized the psychological improbability of this approach and held that where the publicity is particularly ubiquitous and intense, the court should disregard the jurors' assurances of impartiality.<sup>16</sup> In *Irvin v. Dowd*<sup>17</sup> six murders received extensive publicity in local papers.<sup>18</sup> The Supreme Court held that defendant was denied the impartial jury guaranteed by the Fourteenth Amendment. Statements made by jurors during *voir dire* indicated an almost unanimous opinion that the defendant was guilty.<sup>19</sup> In light of these statements and the extensive publicity, the Supreme Court ruled that the jurors' assurances of impartiality should carry little weight.

In *Rideau v. Louisiana*<sup>20</sup> a moving picture showing an interview in

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(1961); *Torrance v. Salzinger*, *supra* note 7; *United States ex rel. Brown v. Smith*, *supra* note 9.

<sup>13</sup>*Irvin v. Dowd*, *supra* note 1, at 725; *Stroble v. California*, *supra* note 9, at 193. Basically, the same test has been stated in other cases but in different terms. In *Shepherd v. Florida*, 341 U.S. 50, 51, 52-53 (1951), the court held that prejudicial influences outside the courtroom must be brought to bear on the jury with such force that the conclusion is inescapable that defendant was prejudged. In *United States ex rel. Darcy v. Handy*, *supra* note 7, the court said the defendant must show the essential unfairness necessary for a violation of due process. In *Rideau v. Louisiana*, *supra* note 1, it was held that pre-trial publicity must be such as to render a trial a hollow formality.

<sup>14</sup>To show that a juror is prejudiced, defendant must show that the juror was not able to render a verdict based solely on the evidence produced at trial. *In re Oliver*, 333 U.S. 257 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955). In *Patterson v. Colorado*, 205 U.S. 454, 462 (1907), the court said, "The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside information . . ."

<sup>15</sup>*Reynolds v. United States*, *supra* note 8; *Hopt v. Utah*, 120 U.S. 430 (1887); *Thiede v. Utah*, 159 U.S. 510 (1895); *Holt v. United States*, 218 U.S. 245 (1910); *Irvin v. Dowd*, *supra* note 1. Before a juror becomes incompetent his opinion must be more than a mere impression or hypothetical. *Reynolds v. United States*, *supra* note 8.

<sup>16</sup>*E.g.*, *Rideau v. Louisiana*, *supra* note 1; *Irvin v. Dowd*, *supra* note 1; *Shepherd v. Florida*, *supra* note 13; *United States ex rel. Sheffield v. Waller*, 126 F. Supp. (D. La. 1954), *cert. denied* 350 U.S. 922 (1955); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1962), *cert. denied* 372 U.S. 978 (1963).

<sup>17</sup>*Supra* note 1.

<sup>18</sup>News releases stated that defendant had confessed to all the murders and had offered to plead guilty in exchange for a ninety year sentence. Defendant's juvenile record, dishonorable discharge and confession to twenty four burglaries were also printed. The paper continually referred to defendant as "the confessed slayer of six."

<sup>19</sup>Of the panel of 430 jurors, 260 were excused for harboring fixed opinions, 90% of the entire panel entertained opinions of guilt, and eight of the twelve jurors finally selected thought the defendant guilty.

which defendant admitted robbery, kidnapping, and murder was telecast on three occasions. The Supreme Court held that defendant was not accorded due process of law when the trial court denied a motion for change of venue. Contrary to *Irvin v. Dowd*, the court stated that it need not examine the *voir dire* to decide that due process had been violated. Thus, *Rideau v. Louisiana* represents the first pre-trial publicity case in which a state court conviction was reversed without a demonstration of actual prejudice.<sup>21</sup>

The federal cases do not present a concise test for determining whether pre-trial publicity denied the accused his constitutional rights. The problem is one of evaluating a number of factors in the light of the circumstances of each case. Before the federal courts will presume prejudice and reverse a state court conviction because of adverse publicity each of these components seem to be necessary:

- (1) A particularly reprehensible or spectacular crime.
- (2) Timely publicity which is in its nature and content vehement and extensive.
- (3) The publicity either directly or by innuendo lays blame for the crime upon the accused.

If one of these components is absent, the defendant may still secure a reversal by showing actual prejudice. In the federal cases affirming state court convictions, one or more of these components were missing and the defendant failed to show actual prejudice.<sup>22</sup>

The holding in the instant case conforms with decisions in the federal cases. The application of the federal rule would not require a reversal because there was no extensive publicity. The newspaper accounts were of limited circulation; and no members of the jury could remember reading about the crime. The trial court properly held that there was no showing of actual prejudice.

There are only two pre-trial publicity cases in which the Montana Supreme Court overruled the trial courts denial of the defendant's motion for a change of venue.<sup>23</sup> In *State v. Spotted Hawk* an Indian was accused of murder.<sup>24</sup> The court held that a fair trial was impossible since the local papers inflamed the inhabitants' passions by heatedly discussing the disappearance of the victim and attributing it to Indians. In *State v. Dryman* a newspaper circulated an "extra" which contained the details of the crime, a picture of the defendant, captioned "killer," together with his confession, juvenile record, and a statement of his dishonorable discharge from the service.<sup>25</sup> The Supreme Court, overruling a denial of a motion for change of venue, reasoned that the article went

<sup>21</sup>The most recent case, *Estes v. Texas*, *supra* note 1, held there was a denial of due process without a showing of actual prejudice. The decision was based on the televising of defendant's trial.

<sup>22</sup>See cases cited *supra* note 10 in which the publicity was not timely. For cases in which there was no demonstration of prejudice see *supra* note 12.

<sup>23</sup>*State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026 (1899); *State v. Dryman*, *supra* note 3.

<sup>24</sup>*Supra* note 23.

<sup>25</sup>*Supra* note 3.

beyond the mere printing and dissemination of news. It tended to create strong feelings against the defendant. These two cases exhibited all of the factors required for a federal reversal of a state court conviction.<sup>26</sup>

The majority of Montana cases have rejected the contention that adverse publicity denied the defendant his right to an impartial jury. The cases generally refuse to reverse a conviction because the requisite prejudice has not resulted from the adverse publicity. The courts have based this conclusion on a number of factors: prejudice did not result from the mere printing of the story of a crime,<sup>27</sup> even though it intimidated the defendant's guilt;<sup>28</sup> the affidavits supporting a motion for change of venue did not recite facts demonstrating the existence of prejudice;<sup>29</sup> the allegedly prejudicial news articles were not submitted with the record on appeal;<sup>30</sup> a juror was competent to serve even though he had read accounts of the crime and formed an opinion thereon;<sup>31</sup> and the impaneling of the jury did not require the examination of an inordinate number of talesmen.<sup>32</sup>

With one exception, at least one of the factors common to the fed-

<sup>26</sup>Both cases involved murders. Newspapers of general circulation condemned each defendant, fastening the blame for the crimes on them. The courts in both cases detailed circumstances indicating a prejudiced community. In the *Spotted Hawk* case the inhabitants of the region had ordered arms and ammunition; a number of families had moved from the Indian agency; and a group of inhabitants had appeared at the agency demanding the guilty party. In *Dryman* the court referred to the sheriff's request to move the defendant from the county pending appeal because of the high feeling against him.

<sup>27</sup>*State v. Bess*, 60 Mont. 558, 199 Pac. 426 (1921); See, *State v. Board*, 135 Mont. 139, 337 P.2d 924 (1959); *State ex rel. Hanrahan v. District Court*, 145 Mont. 501, 401 P.2d 770 (1965).

<sup>28</sup>*State v. Bess*, *supra* note 27.

<sup>29</sup>See, REVISED CODES OF MONTANA, 1947, § 94-1906. *Territory v. Corbett*, 3 Mont. 50 (1877); *State ex rel. Hanrahan v. District Court*, *supra* note 27. *State v. Barick*, 143 Mont. 273, 389 P.2d 170 (1964): It is not sufficient for the affiant to allege that defendant could not have a fair and impartial trial because people of the place of trial had fixed opinions as to his guilt. *State v. Davis*, 60 Mont. 426, 199 Pac. 421 (1921): The court held it was a mere conclusion that defendant would be denied a fair trial because the story of the crime was printed and generally read by the inhabitants. *Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847 (1885): Affiant stated that defendant was prejudiced because a prior civil verdict had been returned against him and had received extensive coverage in local papers. *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387 (1888): Affiant stated only that he had heard defendant's case discussed in a manner prejudicial to him. *Cf. State v. Spotted Hawk*, *supra* note 23; *State v. Dryman*, *supra* note 3.

<sup>30</sup>*State v. London*, 131 Mont. 410, 310 P.2d 571 (1957); *State v. Barick*, *supra* note 29; *State v. Davis*, *supra* note 29.

<sup>31</sup>*State v. Sheerin*, 12 Mont. 539, 31 Pac. 543 (1892); *State v. Howard*, 30 Mont. 518, 77 Pac. 50 (1904); *State v. Juhrey*, 61 Mont. 413, 202 Pac. 762 (1921).

<sup>32</sup>*State v. Bess*, *supra* note 27 (40 jurors called, 10 peremptory challenges used and only 14 excused for having an opinion on the case); *State v. London*, *supra* note 30 (the court stated the number of jurors examined was an important determinate of whether or not there had been an abuse of discretion); *State v. Board*, *supra* note 27 (one of the factors to be considered); *Territory v. Corbett*, *supra* note 29 (a jury was obtained after the examination of only 56 talesmen); *State v. Hoffman*, 94 Mont. 573, 23 P.2d 972 (1933) (34 talesmen were examined). *But see, State v. Spotted Hawk*, *supra* note 23; *Kennon v. Gilmer*, *supra* note 29, at 264: "This is not the test to be applied to the question, for such a jury might be found when the public sentiment was in a blaze of excitement and passion against one of the parties to the action; and the presence of this public sentiment might make itself felt during the trial in very many ways, upon the jury, upon the witnesses, and officers of the court, and upon the court itself."

eral cases reversing state court convictions is absent from the majority of Montana cases. Two cases involved minor burglaries which are neither particularly reprehensible nor spectacular crimes.<sup>33</sup> And in many cases the defendant failed to show such prejudice existed in the community that an impartial jury could not be secured.<sup>34</sup> Thus, regardless of the scope or the content of the publicity, the Montana cases require a showing of actual prejudice. To the extent that these cases will act as a precedent in future determinations, they do not conform with the rule posited by the *Rideau* case. The *Rideau* case reached the conclusion that when the publicity is extensive and permeated with prejudicial matter, there is inherent prejudice and no need to prove actual prejudice. In Montana only *State v. Hoffman* exhibited the extensive prejudicial publicity necessary to come within the *Rideau* rule.<sup>35</sup> Because the Montana court in the *Hoffman* case required a showing of actual prejudice, it is inconsistent with the *Rideau* rule. However, the *Hoffman* case was decided thirty years before *Rideau*, and at a time the federal courts required a showing of actual prejudice. The recent case of *State ex rel. Hanrahan*, however, reached a result consistent with the *Rideau* rule because the publicity was neither as extensive nor of such interest as the publicity implicitly required by *Rideau*.<sup>36</sup> Therefore, the court's requirement that actual prejudice be shown was justified.

Neither the federal rule nor the Montana rule delineate guidelines for determining the necessary quantum of actual or inherent prejudice that denies the defendant a fair trial. No guidelines are provided for separating the heavily publicized case from one requiring a showing of actual prejudice. Consequently, both the federal and Montana rule are unduly vague.

A more definitive standard which avoids this defect of the federal rule is utilized by the Supreme Court of the United States through its powers of supervisory control over the federal courts.<sup>37</sup> This standard was crystallized in *Marshall v. United States*.<sup>38</sup> The court held, as a matter of law, that jurors were prejudiced if exposed through the news media to evidence inadmissible at trial.<sup>39</sup> This rule is not determinative in all

<sup>33</sup>*State v. Board*, *supra* note 27; *State ex rel. Hanrahan v. District Court*, *supra* note 27.

<sup>34</sup>See cases cited notes 29 and 32.

<sup>35</sup>*Supra* note 32. Defendant was charged with murder under brutal circumstances. Although the case involved a reprehensible crime, a published confession, and extensive and vehement publicity, the court refused to reverse the conviction.

<sup>36</sup>*Supra* note 27. In this case defendant had confessed to a \$580 burglary. This fact was printed, and the sheriff related it on a local news broadcast.

<sup>37</sup>The nature of supervisory control was stated in *McNabb v. United States*, 318 U.S. 332, 340 (1943): "Judicial supervision of the administration of criminal justice in the federal courts implied the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as 'due process of law' . . . ."

<sup>38</sup>360 U.S. 310 (1959).

<sup>39</sup>See also, *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952): A congressional committee engendered extensive prejudicial publicity against defendant, most of it going beyond the scope of the indictment in defendant's pending case. *Janko v. United States*, 381 F.2d 450 (8th Cir. 1960), *rev'd per curiam* 366 U.S. 716 (1961) 6

cases because the defendant might be denied a fair trial even though the news media disseminates nothing that would be inadmissible at trial. Unfortunately, it is necessary to wait until the trial has begun before the test can be applied because the court must ascertain whether or not the jurors have been exposed to inadmissible evidence. In that respect, it might cause delay and added expense. The *Marshall* rule would give effect to the fundamental premise that guilt or innocence should be determined solely on the evidence produced in a court of law.<sup>40</sup> A literal application of this premise in connection with the *Marshall* rule would seem to declare that a juror becomes incompetent if he has learned of *any* evidence through pre-trial publicity. This, of course, would be an unsatisfactory extension of the *Marshall* rule. In the sensational case it would be impossible to find a juror who does not have some acquaintance with the facts. Therefore, the *Marshall* rule should be limited to inadmissible evidence and perhaps to the pre-trial publication of confessions.<sup>41</sup>

Because of the defects inherent in the Montana and federal rules it is submitted that the Montana court should adopt the rule of the *Marshall* case. In addition, the federal courts should impose the rule of the *Marshall* case upon the states as an essential element of the Fourteenth Amendment's Due Process clause. Two recent federal cases have applied reasoning similar to that used in *Marshall* in their review of state convictions.<sup>42</sup> "Fundamental fairness" requires that a judge's verdict be based solely on evidence that is admissible at trial.

LARRY PETERSEN.

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WATER LAW: A STATE CANNOT "APPROPRIATE" A MINIMUM FLOW OF WATER IN A NATURAL STREAM FOR PRESERVATION OF FISH.—A water conservation district, acting under a Colorado statute empowering it to "file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to

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*Briggs v. United States*, 221 F.2d 636 (6th Cir. 1955); *Marson v. United States*, 203 F.2d 904 (6th Cir. 1953); *Krogman v. United States*, 225 F.2d 220 (6th Cir. 1955): an unfavorable, incorrect report of evidence against defendant which comes to the attention of jurors, raises a rebuttal presumption that the rights of the defendant have been prejudiced.

<sup>40</sup>*Patterson v. Colorado*, *supra* note 14.

<sup>41</sup>A confession has a natural tendency to prejudice any community. Yet the news media proffers confessions without the tempering effects of cross-examinations, contrary evidence, or instructions. Disqualifying a juror who learned of defendant's confession before trial seems to be in accord with *Jackson v. Denno*, 378 U.S. 368 (1964). The Supreme Court held that a jury determination of voluntariness of a confession denied the defendant due process of law. One reason advanced by the Court was that a confession, even if determined to be involuntary, would affect the jury's consideration of other evidence. A confession read by a juror before trial would seem to fall within the proscription of this ruling.

<sup>42</sup>*Shepherd v. Florida*, *supra* note 13; *Shepherd v. Maxwell*, 346 F.2d 707 (6th Cir. 1965).