

1967

Jean Sinclair v. John W. Turner, Warden, Utah State Prison : Brief of Respondent

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In The Supreme of the State

AN SINCLAIR

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FRANK

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In The Supreme Court of the State of Utah

JEAN SINCLAIR,	Petitioner-Appellant,	} Case No. 10768
vs.		
JOHN W. TURNER,	Respondent-Respondent.	
Warden, Utah State Prison,		

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Jean Sinclair, appeals from the denial of a writ of habeas corpus by the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

Hearing was held on appellant's petition for writ of habeas corpus on the 28th day of October, 1966, before the Honorable A. H. Ellett, District Judge of the Third Judicial District, Salt Lake County, following which the writ was denied and the appellant remanded back to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent submits that the judgment of the Third Judicial District Court denying the petition for writ of habeas corpus be affirmed.

STATEMENT OF FACTS

The respondent fundamentally agrees with the chronology of events as recited in the statement of facts submitted in appellant's brief, but disagrees with the remainder of the statement of facts as submitted by appellant. Accordingly, respondent offers the following as a more detailed and accurate statement of evidence and facts connected with this matter.

Appellant filed a petition for a writ of habeas corpus in the District Court of Salt Lake County on the 9th day of June, 1966, alleging: (1) publicity through the various news media published prior to and during the appellant's trial was prejudicial, depriving her of a right to a fair and impartial trial, (2) suppression of evidence by the State favorable to appellant, (3) the State knowingly employed false testimony during the trial, (4) failure of the jury to comply with the court's instructions, (5) appellant was denied the right to confront witnesses claiming the jury received information outside the courtroom, and (6) appellant was denied the right to fully cross-examine a witness of the State.

The appellant had previously been convicted of first degree murder in the death of Don L. Foster.

and upon the jury's recommendation of leniency, was sentenced to life imprisonment on May 4, 1963.

On October 28, 1966, a hearing was had in the Third District Court of Salt Lake County before the Honorable A. H. Ellett on appellant's petition for writ of habeas corpus.

Andrew F. Wahlquist appeared as the first witness for appellant and testified that during the period of arrest and trial of the appellant, he was employed by a local television station as its news editor. He testified that he did take some moving pictures of the appellant in a hallway at the courthouse while appellant was in custody (R-27). He stated that he took no pictures of the members of the jury (R-27) except at that time when the jury was visiting the scene of the crime (R-28). He testified he took no pictures of witness testifying at the trial (R-27) and specifically did not take any photographs of Carl Kuehne or a LaRae Peterson, both "key" witnesses at the trial (R-27). He stated further that before he took any pictures, he asked the trial judge for permission to do so and received permission to take pictures as long as the court was not in session (R-31, 32). He stated further that some of the film he took was later broadcast by the television station for which he was employed (R-33). When questioned about the number of news media representatives present during the course of the trial, Mr. Wahlquist stated that there were reporters from each of the two local newspapers and the three local television stations for a total of five.

James Warren Monroe testified for appellant that during the period in question he was employed by a local television and radio station (R-35), that he took moving pictures of the appellant on the day of her arrest when she was taken from a police vehicle into the police station (R-36), which film was shown that same evening by his employer. He stated that he photographed crowds outside the courtroom, that he assumed the jurors would be in the pictures of the crowds, but none of the jurors were identified (R-43). He stated that he did not photograph the witnesses Keuhne or Peterson (R-43, 44).

Art Kent, Jr., testified for appellant that he was the news manager of KUTV during the period in question, that at that time there were approximately twenty thousand homes in the metropolitan Salt Lake viewing area which would constitute the estimated television coverage of his station (R-46, 47). In response to a question concerning what particular aspect of the trial Mr. Kent commented on during his news casts, he replied:

If I may, Mr. Mitsunaga, may I say "comment" is not necessarily the correct term in this case. I think "report" would be a better term. . . .

"Comment" implies opinion, and there was no opinion expressed. As I recall, we covered the case from its inception to its conclusion with periodic and routine reports of facts as they happened and events as they happened. (R-49)

David John Parr, also an employee of KUTV, testified for appellant that he was a reporter for that

television station during the period in question. He stated that he took some moving picture film of the scene of the crime on the night of the crime, appellant's arrest and her arraignment (R-51). He stated he took pictures of the appellant when she was brought to the courthouse from the jail (R-57), that he photographed the jurors inspecting the scene of the crime (R-58), that he did not photograph the jury as they were entering or leaving the courtroom (R-58), and that, in his opinion, KUTV did not give more air time to the Sinclair matter than to other homicide trials (R-58). He stated that any pictures made inside the courtroom were with the consent of the defense counsel and the judge (R-51). In response to a question from the court, Mr. Parr stated that he had no knowledge of any community reputation for violence by the public toward people accused of crime (R-51), nor of any public animosity with respect or regard to homosexuality (R-62). He also stated that the homosexual overtones connected with the Sinclair case were not a factor in the amount of publicity connected with the case (R-65).

Testifying as to the causes for the publicity that did exist prior to and during the Sinclair trial, Art Kent stated that aside from the fact that Miss Sinclair was charged with first degree murder, other factors that might have been involved were that it was a slow news day when the crime took place, that crimes of violence attract more attention than other crimes, the manner by which the crime was committed, and the fact that the accused was a woman (R-66, 67).

Vard Stanley Jones testified for appellant that during the period in question he was a reporter for the **Salt Lake Tribune**, a local newspaper. He testified that during the course of the trial he attended each day (7-70), that the circulation of the **Salt Lake Tribune** was between 109,000 and 115,000 (R-73). He stated that the length of the trial had an effect on the amount of news coverage given to the particular case, that if it had elements of interest to the public, the interest increased; that this case had an element of sensation about it by reason of the way the murder was committed and the circumstances surrounding it, and that there were homosexual overtones as brought out by trial testimony (R-75). He stated further that there were no journalists or reporters of national reputation or stature (R-79), that the **Salt Lake Tribune** did not have a photographer stationed outside the courtroom, that there were no feature articles of any of the jurors, nor any photographs of any juror published in the **Salt Lake Tribune** (R-80).

Donald D. Beck testified that during the period in question he was a court and crime reporter for the **Deseret News**, a local newspaper. He stated that at the time copies of police reports were distributed by the Salt Lake City Police Department to members of the press corps assigned to the police beat, containing the nature of the crime, when the arrest was made, statistical information, location of the crime; that no confidential information was distributed to the press corps (R-84). He stated that he reported the testimony as it developed at trial (R-86, 87).

He stated a photograph of witnesses was taken after they had testified (R-91), that there were no photographs of the jury when it visited the scene of the crime (R-91), and that he did not project any testimony until it had been brought out in the trial (R-93).

Harry Clark was called to testify for appellant and stated that at the time in question he was the bailiff assigned to the trial judge. He described the location of the press table inside the bar, and the location of additional spectators' chairs that were placed inside the bar (R-95, 97). He stated that the spectators chairs inside the bar were only for attorneys, law students, journalists, and student journalists (R-97). He also stated that the courtroom was generally filled to capacity with spectators. He testified that he did not observe any representatives of the television media taking pictures inside the courtroom nor any photographs taken of the participants of the trial inside the courtroom (R-100). He stated that there was at least a space of three feet between the feet of the spectators inside the bar and the chairs located at the counsel table (R-101). He further stated that a loud speaker system was installed in the trial courtroom because a State's witness claimed to be suffering from a severe case of laryngitis (R-102).

Sumner Hatch, defense counsel for appellant at trial, testified as to incidents of movie cameras photographing Mr. Hatch and the appellant at the reading of the verdict or sentence (R-115). A motion for mistrial was made (R-116). He stated also that a

magazine was found on the floor under a spectator's chair inside the bar, and that the cover of the magazine was in plain view (R-117). He stated further that while the jury was entering or leaving the courtroom he overheard conversation with regard to homosexuality involving the defendant (R-119), but that he could not say whether the jurors were close enough to hear the conversation (R-120). Mr. Hatch testified that he did not move for a mistrial because of crowded courtroom conditions, that he made no motion for a mistrial because of television pictures being taken, that he did not protest each time pictures were taken (R-120). He did protest picture taking initially on the first day, did make a motion for a mistrial when moving pictures were being taken for television at the time of sentence (R-120, 121).

Officer Glen Cahoon of the Salt Lake City Police Department testified for appellant that certain police reports may have been disseminated to the press corps, but that no statement of witnesses were shown to the press regarding the Sinclair case (R-127). He stated further that the magazine story appearing in the national publication (P-7) was distorted (R-128).

Counsel stipulated as to the existence of the magazine articles appearing in three nationally distributed magazines, which articles carried stories involving the Don Foster murder. The magazines were offered into evidence as proposed petitioner's Exhibits 7, 8, and 9, but were not admitted into evidence. Counsel further stipulated as to the circulation in the Salt Lake area of proposed Exhibits P-7

at 675-700, P-8 at 250, and P-9 at 490. In refusing to admit proposed Exhibits 7, 8, and 9, the trial court indicated that they would be made available to the Utah Supreme Court (R-131, 132).

Robert E. Nielsen testified for appellant. He stated that he was a juror during the Sinclair trial (R-133). He stated that going to and from the jury box he did not overhear any of the conversation of the spectators concerning the case or of personalities involved in the case (R-134). With respect to proposed Exhibit P-7, he testified that the first time he had seen that magazine was at 1:30 p.m. that particular day (October 28, 1966) (R-135). The witness further testified that he did not hear any conversation regarding homosexuality from any of the spectators during the course of the trial (R-136).

Appellant's next witness was Elroy Nielsen. He testified that he was a spectator at the Sinclair trial (R-138). He stated that during the course of the trial he did not see a copy of the magazine designated as P-7 (R-138), nor did he overhear any conversation regarding homosexuality made in the presence of the jurors (R-138).

Other witnesses were called by appellant, including Eunice Carpenter, a matron of the Salt Lake County Sheriff's Office, and Richard C. Dibblee, the chief criminal deputy, Salt Lake County Attorney at the time the homicide complaint was filed against Miss Sinclair. Their testimony will not be referred to by the respondent.

It should be pointed out that most of the witnesses for the appellant testified to the conditions of the courtroom, the large number of spectators, and the existence of a table inside the bar for personnel of the news media.

Counsel stipulated that reporters for the various news media covered the trial, that they took some pictures, and they wrote stories about the trial for their papers or news accounts for their television stations. The stipulation was broadened to include the time of arrest, the preliminary hearing, and the trial (R-45). It should be pointed out, however, that the press were excluded in the preliminary hearing (R-86).

Films shown over local television stations were shown to the court during the hearing on appellant's petition for writ of habeas corpus. Admitted into evidence were newscast scripts, news accounts published in the **Salt Lake Tribune** and news accounts published in the **Deseret News**.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS BY CONCLUDING THAT APPELLANT WAS NOT DENIED A FAIR TRIAL OR DUE PROCESS OF LAW.

Appellant seeks her release and discharge from the Utah State Prison primarily on the ground that publicity prior to and during her trial deprived her

of a fair and impartial trial. Appellant also claims that certain influences in the courtroom were disruptive, thereby depriving her of a fair trial. Respondent will first examine the appellant's claim with regard to prejudicial publicity.

Prejudicial news reporting is a very vague and fluid concept, but since it is the standard currently used by the courts, an attempt must be made to define it. Since all news concerning the investigation of a crime and the trial of criminal cases is not to be criticized or suppressed, the courts have been concerned with that which is prejudicial to the rights of the defendant to have a fair trial. Recent cases in point determining that the right of the accused were violated are **Estes v. Texas**, 381 U. S. 352, 14 L.Ed 2d 543, 85 S.Ct. 1628 (1965), **Sheppard v. Maxwell**, 384 U. S. 333, 16 L.Ed. 2d 600 (1966), **Marshall v. United States**, 360 U. S. 310, 3 L.Ed. 2d 1250, 79 S.Ct. 1171, (1959), and **Irwin v. Dowd**, 366 U. S. 717, 6 L.Ed. 2d 751, 81 S.Ct. 1639 (1961). In each of these cases the United States Supreme Court found fundamental error of such gravity as to set aside the conviction of the persons involved on the grounds of prejudicial news publicity and improper jury conduct.

However, neither the United States Supreme Court, nor this court, has been willing to place any direct limitation on the freedom traditionally exercised by the news media upon the theory that "what transpires in the courtroom is public property." See **Craig v. Harney**, 331 U.S. 367, 374, 91 L.Ed. 1546, 1551, 67 S.Ct. 1249 (1947). Indeed, there is nothing

that proscribes the press from reporting events that transpire in the courtroom. **Sheppard v. Maxwell**, op. cit. 16 L.Ed. 2d at 620.

The question then becomes, and the issue squarely before this court is, in what way did the reporting of the Sinclair trial (Don Foster's murder) endanger the proper functioning of the criminal process and, in particular, jeopardize the right of Miss Sinclair to a fair and impartial trial?

An examination must be made of the publicity in the Sinclair case on the basis of pre-trial publicity and on the basis of publicity during the trial.

As to pre-trial publicity, the record reveals the **Salt Lake Tribune**, January 20, 1963, printed a story involving the arrest and jailing of Miss Sinclair for first degree murder. The article relates that Miss Sinclair was arrested in connection with the "ambush shotgun slaying" of a Salt Lake service station operator. The article further relates that evidence was presented to the County Attorney's office and a complaint issued. The article carried a photograph of Miss Sinclair in custody of two Salt Lake police officers. The articles states that Captain Fillis, plainclothes division commander, declined to make any comment on the evidence "other than that it was sufficient to obtain a first degree murder complaint." The article further quotes Captain Fillis as stating that the Foster murder is "... the most bizarre murder case that I have ever been involved in." (P-5)

Pre-trial publicity over local television stations

include the first account on January 5, 1962, wherein the murder of Don Foster was described.

Subsequent television coverage includes a statement that Miss Sinclair had been charged with first degree murder on the afternoon of January 19, 1963. The news account includes a film of Miss Sinclair, an account of the murder of Don Foster, and the statement that "Captain Fillis had no comment on any points of evidence gathered by the police department. Miss Sinclair will be arraigned on the murder charges Monday morning, before City Judge J. Patton Neeley. She is being held without bail."

On January 20, 1963, the television script indicated:

A forty-five year old woman will be arraigned on murder charges tomorrow morning in city court. Jean Sinclair was charged yesterday in connection with an ambush shot gun slaying of Don Leroy Foster on January 5. The woman was arrested by City detectives in her home in South Salt Lake.

Television news coverage on January 21, 1963, includes a recitation that Miss Sinclair was arraigned in Salt Lake City Court on charges of first degree murder. It recites the fact that she was arrested on the previous Saturday for the "shotgun slaying of a thirty-three year old Don Leroy Foster while he was getting out of his car in front of the Susan Kay Apartments here in Salt Lake." The story further recounts the fact that,

Although Miss Sinclair, a nursing home operator had been held without bail since her arrest on Sat-

urday, Judge Stewart M. Hansen of the Third District Court, today set bail at \$20,000. Later today Miss Sinclair was released from the county jail after bail had been posted for her.

Mrs. LaRay Peterson, of Kearns, the companion of the shotgun victim, Don Leroy Foster, had told Sergeant Glen Cahoon, of the Salt Lake City Police Department, that she did not see the attacker the night of the shooting.

However, Mrs. Peterson does admit to an acquaintance with the suspect Miss Sinclair. . . .

The fact that the preliminary examination had commenced was also reported by the television media. February 20, 1963, it was reported that the exclusion rule barring press and spectators from the courtroom had been invoked by the defense counsel, that the State presented three witnesses for the prosecution, and the defense presented three witnesses.

February 28, 1963, Miss Sinclair was bound over to the District Court to stand trial for first degree murder. This was reported by local television. Along with the report that Miss Sinclair had been bound over was the fact that Mrs. LaRae Peterson, a previous witness during the preliminary examination, was being recalled to the witness stand. The script states:

. . . and she felt she was entitled to legal counsel.

An exclusion rule had been invoked at the request of the defense, only those directly concerned with the hearing were admitted.

Nevertheless, Mrs. Peterson's attorney, Jim Mit-

sunaga, appeared in city court and was promptly ordered out by Judge Neeley.

Mr. Mitsunaga petitioned District Judge Steward Hanson for a writ of mandamus, to force Judge Neeley to admit him.

Judge Stewart (Hanson) issued a temporary writ, and an order to Judge Neeley to show cause why the writ should not be made permanent.

Judge Neeley responded rapidly . . . he recessed the court, and went up to the third floor to show cause to Judge Hanson.

After hearing Judge Neeley, and after the defense refused to waive the exclusion rule, the writ was denied by Judge Hanson.

And attorney Mitsunaga remained outside. . . .

Late this afternoon, Judge Marcellus K. Snow ordered Miss Sinclair held without bail in the county jail, until her district court trial was completed. After long arguments before the judge, Miss Sinclair was booked into the jail and her \$20,000 bail revoked.

The 10 o'clock news on the same day, February 28, was essentially a recap of the previous story. On March 4, television media carried the following story:

Forty-five year old Jean Sinclair was to have been arraigned in District Court on charges of first degree murder.

Salt Lake City Judge J. Patton Neeley had suggested last Thursday that Miss Sinclair be arraigned today and she was bound over to the District Court. Upon the request of Attorney Jay Banks, arraignment was set for next Monday at 10 o'clock in the morning.

Miss Sinclair was charged with the January 5 shotgun slaying of Don Leroy Foster in Salt Lake City. Judge Marcellus K. Snow allowed the continuation and will handle the arraignment next Monday.

Although the record reflects there was some publicity connected with the murder of Don Foster, the arrest of appellant, her arraignment and preliminary examination, respondent submits that in no instance was any of the pretrial publicity in any way prejudicial to the rights of the accused.

Respondent submits that at any time there is a shotgun assassination in the parking lot of a public apartment complex, that such murder will be considered newsworthy by the news media and will command substantial news coverage. Once a crime of violence of this type occurs in a community, the public demands to know what is being done by its local law enforcement agencies. As was pointed out by the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York in its **Final Report with Recommendations on Freedom of the Press and Fair Trial**, Judge Harold R. Medina, chairman, at page 28:

. . . The police are required by the community to demonstrate constantly and concretely their capacity to fulfill their responsibilities, among which the protection of society from criminal conduct ranks foremost. Specifically, when crimes of violence occur, in particular those of murder, assault, rape, and robbery, creating widespread apprehension and at times holding the community in a grip of terror, the public demands to know what is being done to apprehend the perpetrator.

Respondent submits that the pretrial publicity given to the Foster murder and the subsequent arrest and preliminary examination of Jean Sinclair was the result of the public's demand to know that the local law enforcement agency was hard at work to maintain peace and order in the community. The publication by the press and other news media of the arrest of Miss Sinclair, that a complaint had been filed charging her with first degree murder, and the subsequent reporting by the news media of the results of the preliminary examination were the only items reported by the press during the pre-trial period. The account in the **Salt Lake Tribune** was quick to point out that Captain Fillis refused to comment on any of the evidence (P-5). In none of the television reports was there any comment upon any of the evidence but merely recaps of the fact that Foster had been killed by a shotgun, that Sinclair had been charged, a brief background of Sinclair to effect that she was a nursing home operator, the location of the murder, and related items of background material which in no way could be considered prejudicial to the appellant.

Examining the publicity that occurred during the course of the appellant's trial, television coverage commenced April 15, 1963, with the comment that, "Another first degree murder trial opened in Third District Court today, this time involving a Salt Lake nursing home operator." The television script reports the charge, and that the court action of that first day was primarily confined to the selection of a jury. It opined that the trial would be lengthy,

with "38 witnesses subpoenaed by the State alone." The script indicates that the public would not be excluded from the trial as they were during the preliminary hearing.

On April 16, television script reports the second day of the murder trial of appellant. The opening statement of the District Attorney was reported:

District Attorney Banks said Miss Sinclair and Mrs. LaRae Peterson had carried on an intimate relationship . . . and that this was threatened by Mr. Foster.

He said the State's evidence will show that the defendant had planned for some time to murder Foster, and that she had admitted the killing less than an hour after it had occurred the night of January 5.

Defense counsel Sumner J. Hatch challenged the State to prove his client guilty . . . and said he would produce evidence that would convict the State's star witness of the shotgun killing. He said his client has an alibi for the time the killing took place.

On April 17, local television reported the examination by the jury of the scene of the crime and recapped the opening statements of the District Attorney and defense counsel.

On April 18, the coverage continued with the recap of the testimony of Carl Kuehne. In the script, Kuehne testified he,

. . . bought the alleged murder weapon, and had talked to Miss Sinclair about killing 33 year old Donald Leroy Foster.

On April 19, the television coverage was limited to 25 seconds with the following script, no film:

Witnesses for the prosecution continued to testify today in the first degree murder trial of Jean Sinclair. The Salt Lake resident Vaughn Humphreys testified he broke off his friendship with the defendant after learning of the plot to kill Don Leroy Foster.

Mrs. LaRae Peterson, a divorcee, who was with Foster the night he was shotgunned to death, testified she was acquainted with the defendant prior to the slaying.

Subsequent to April 19, through the end of the trial, local television gave the trial continued coverage on the following dates, for the following times, and in some instances showing film as indicated, generally restating the charges against Miss Sinclair and recapping testimony as it was admitted during the trial:

April 22 (film)	1 minute 5 seconds	6 o'clock news
April 22 "	" " " "	10 " "
April 23 "	52 seconds	6 " "
April 23 "	" "	10 " "
April 24 "	1 minute	6 " "
April 24 "	58 seconds	10 " "
April 29 "	53 seconds	6 " "
April 29 "	" "	10 " "
April 30 (no film)	30 seconds	6 " "
May 1 (film)	45 seconds	10 " "
May 2 "	1 minute 15 seconds	10 " "
May 3 "	1 minute	10 " "
May 4 "	2 minutes 10 seconds	10 " "

May 6 (no film)	25 seconds	6	"	"
May 13 (no film)	50 seconds	10	"	"
May 29 (film)	1 minute 30 seconds	6	"	"

Closing arguments were reported on the 10 o'clock news on May 2, showing a film, the coverage lasting one minute fifteen seconds. Both sides rested May 2. On May 3, television reported the jury still out, showing film coverage lasting one minute. Coverage on May 4, reported the jury verdict of first degree murder, showing film, coverage lasting two minutes ten seconds. On May 6, television reported that sentence would be delayed for Miss Sinclair for a period of one week. No film was shown. Coverage lasting twenty-five seconds. On May 13, film coverage showed Miss Sinclair's sentencing postponed again, coverage lasting fifty seconds. May 29, 6 o'clock news reported Sinclair and her counsel arguing motion for new trial. Film shown, coverage lasting one minute thirty seconds. On June 5, film coverage on the 6 o'clock news lasting one minute reported the sentencing of Miss Sinclair; 10 o'clock news had one minute ten seconds coverage with film.

Newspaper coverage commenced the first day of the trial. Both the **Salt Lake Tribune** and the **Deseret News** reported day-by-day the testimony presented during the trial. Coverage was also given to the jury verdict and the sentence of the court.

The record is devoid of what instructions the trial court gave the jury with respect to the jurors' reading newspapers, listening to radio commen

laries or viewing television. We must assume, therefore, that the impartiality of the jury remained during the course of the trial, that the trial judge was correct in denying appellant's motion for mistrial when a copy of a magazine (P-7) had been found in the courtroom.

Questions asked the jurors on voir dire examination regarding their knowledge of the case or their contact with any pretrial publicity are not part of the record. Again it must be presumed that some measure of discretion must be held to reside in the trial judge in determining which of the panel were competent to serve as jurors. We must also presume that the appellant, represented by able trial counsel, was satisfied with the panel ultimately selected and sworn.

Since the record is not before us, we must again presume that the jurors sworn to serve were duly and properly instructed by the court, that the provisions of Utah Code Ann. § 77-31-28 (1953) were complied with requiring the court to admonish the jury regarding conversations among themselves or with others on any subject connected with the trial, and not to form or express any opinion thereon until the case was submitted to them.

There is no evidence before this court that any juror disobeyed any instruction of the trial court. Nor is there any evidence that the jury, or any member thereof, came into contact with any publicity concerning the trial that could in any way be deemed "prejudicial." Quite the contrary, at the

hearing on appellant's petition, the appellant produced testimony for one juror that he was not familiar with any story involving the appellant appearing in a magazine entitled **Startling Detective** (P-7, not admitted); that the first time he saw that magazine was at 1:30 p.m. on the day of the hearing (R-137). Nor did he hear any conversation at all regarding homosexuality (R-136). He stated he did not hear the word "homosexuality" from any spectator while he was going to and from the courtroom (R-136).

The record is devoid of any evidence that there was any misconduct on the part of the spectators which may have influenced the jury. In fact, the appellant's witness ElRoy Nielson said that he had attended part of the trial, that he did not see a copy of plaintiff's Exhibit 7 while he was in attendance, nor did he overhear any conversation regarding homosexuality made in the presence of jurors (R-138).

Appellant has not demonstrated sufficiently that pretrial publicity and publicity during the trial were of such a nature as to require the trial court to disregard the jurors' statements of impartiality on voir dire examination.

The basic problem involving pretrial publicity is whether individual jurors who have seen or heard such publicity fulfill the constitutional standard of impartiality. Where a juror has been exposed to pretrial publicity, but asserts that he is impartial, it has been held adequate and not prejudicial to the defendant's right to a fair trial. See for example **Stroble**

v. California, 343 U. S. 181, 96 L.Ed. 872, 72 S.Ct. 599 (1952).

In the case of **Reynolds v. United States**, 98 U.S. 145, 25 L.Ed. 244 (1879), although not indicating that the views of the juror in question were based on pretrial publicity, the court there stated:

In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.

See also **Hopt v. Utah**, 120 U.S. 430, 30 L.Ed. 709 (1887), wherein the court holds that the judgment of the trial court as to the competency of the juror upon his declaration under oath or otherwise is conclusive wherein the juror in question testified that he had heard of the case through the newspapers, read what was represented to be the evidence, and talked about it since that time, but he did not think he had ever expressed an opinion on the case, that he was not conscious of any bias or prejudice that might prevent him from dealing with the defendant impartially, and that he thought he could try the case according to the law and the evidence given in court.

See also **Theide v. Utah**, 159 U.S. 510, 40 L.Ed. 237 (1895), wherein the Supreme Court denied a challenge for cause of a juror who testified on his voir dire that he had read an account in a local

newspaper of the homicide with which the defendant was accused, had formed some impression touching it, which he could lay aside, and could try the case fairly and impartially on the evidence. See also annotation **Juror Reading Newspaper**, 3 L.Ed. 2d 1250, and annotation **Juror Reading Newspaper**, 31 A.L.R. 2d 417.

The United States Supreme Court has recently expressed the opinion that:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any pre-conceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebuke the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. **Irvin v. Dowd**, op. cit.

Recent decisions wherein the defendant was held not to have been denied a fair trial by reason of pretrial publicity as alleged by defendant include **United States ex rel., Darcy v. Handy**, 351 U.S. 454, 100 L.Ed. 1331, 76 S.Ct. 965 (1956); **Latham v. Crouse**, 320 F.2d 120 (10th Cir. 1963). A thorough account of recent decisions including the manner of the alleged "prejudicial" pretrial publicity in each

case is contained in an annotation entitled **Pretrial Publicity-Fair Trial**, 10 L.Ed. 2d 1243, § 4 (C), page 1255. See also **Beck v. Washington**, 369 U.S. 541, 8 L.Ed. 2d 98, 82 S.Ct. 955, reh. den. 370 U.S. 965, 8 L.Ed. 2d 834, 82 S.Ct. 1575, (1962), and **Reizzo v. United States**, 304 F.2d 810, (8th Cir. 1962), cert. den. 371 U.S. 890, 9 L.Ed. 2d 123, 83 S. Ct. 188 (1962).

In the case of **United States v. Synodinos**, 218 F. Supp. 479 (DC Utah 1963), the court denied a motion for a change of venue on the ground of pretrial publicity in an action involving interstate transmission of wagering information. Claiming substantial newspaper, radio, and television publicity constituting prejudice to the defendants, the court held that the newspaper accounts were merely an objective reporting of the court record.

As stated in the annotation, **Pretrial Publicity-Fair Trial**, op. cit., the decisions holding that a defendant was deprived of a fair trial as a result of pretrial publicity have been far outnumbered by those holding that the defendant was not deprived of a fair trial, citing a collection of cases commencing at page 1251. The annotation further compiles cases involving pretrial publicity wherein the allegation of the defendant regarding pretrial publicity had not been sustained, and also the failure of the defendant to seek certain forms of relief.

In those instances wherein the defendant has sought reversal of a conviction or has sought a writ of habeas corpus on the general ground that pretrial publicity deprived him of a fair trial, or where

he has alleged that it was error to deny a motion for change of venue or continuance, or challenges to jurors involving pretrial publicity, the allegations of the defendant have generally not been sustained. For example, in affirming convictions despite claims of prejudicial pretrial publicity, the courts have referred to the failure of the defendant to (1) seek a change of venue, (2) seek a continuance, (3) avail himself of the opportunity to ask jurors such questions as might reveal whether they were influenced by pretrial publicity, (4) exhaust his challenges, (5) challenge individual jurors for cause, (6) challenge the whole jury panel, or, (7) raise the issue of pretrial publicity until after he was convicted. Similarly, the courts have rejected the defendant's claim that he was prejudiced by pretrial publicity where he either has selected to be tried without jury or has expressed his satisfaction with the members of the jury. See cases cited in annotation **Pretrial Publicity-Fair Trial**, op. cit.

It is well settled that the petitioner in a habeas corpus proceeding has the burden of proving the grounds on which he relies for his release by evidence that is clear and convincing. See **Workman v. Turner**,Utah 2d....., 425 P.2d 402, (1967), **McGuffey v. Turner**,Utah 2d....., 423 P.2d 166 (1967), **Beck v. Washington**, op. cit.

Respondent submits that appellant has failed to prove any grounds upon which release can be granted, and further, the evidence adduced by appellant at the hearing was less than clear and convincing. Moreover, respondent submits that the rec-

ord discloses no publicity either in the pretrial stage or during the trial which could be considered to be a clear and convincing proof of prejudice and unfair trial.

Respondent submits the totality of the circumstances indicate that the appellant was afforded a fair trial. Admittedly, there was publicity, but it lacked the animadversion which, respondent submits, is necessary to constitute prejudice to appellant.

There is nothing in the record to indicate that any of the jurors were in any way influenced by either pretrial publicity or news accounts during the trial. Quite the contrary. Although it can be established that the Don Foster murder and the subsequent arrest of Jean Sinclair did command a substantial amount of publicity from the various news media within Salt Lake County, it cannot be said that such publicity was prejudicial.

In no instance in the Sinclair case do we find any type of publicity similar to that which occurred in **Sheppard v. Maxwell**, op, cit., wherein front page headlines announced "testify now in death, Bay doctor is ordered", "Doctor balks at lie test; retells story". "Kerr (Captain of Cleveland police) urges Sheppard's arrest"; nor do we have editorial bombardment with front page charges that somebody is "getting away with murder". In no instance were any of the proceedings in the Sinclair case televised, as in the Sheppard case in which the coroners inquest was televised in a school gymnasium,

or the in the Estes case. Nor did the press stam-pede the law enforcement agencies and prosecutors into arresting and charging Sinclair with the murder of Foster as occurred with Sheppard for the murder of his wife with such headlines as "Why Don't Police Quiz Top Suspect", "Why Isn't Sam Sheppard in Jail", and "Quit Stalling—Bring Him In".

The Sinclair case did not attract journalists and news commentators of national prominence as did the Sheppard case, nor did we have the printing of individual pictures of prospective jurors in the local newspapers.

There is great dissimilarity between the Sinclair case and the Sheppard case. In the Sinclair case no local newspaper featured the home life of an alternate juror, nor were the jurors separated into two groups to pose for photographs which appeared in newspapers, taken while the jury was sequestered. In Sinclair we have no radio broadcasts of debates staged by newspaper reporters in which Sinclair's counsel was accused of throwing road blocks in the way of the prosecution. Nor do we have reports in any news media of testimony not produced at trial or evidence not produced at trial.

Respondent submits that the "totality of circumstances" in the Estes and Sheppard cases are totally different than what occurred during the Sinclair case.

In commenting on the obvious abuses that occurred in the Sheppard trial, the Supreme Court in-

licated that the trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which involves prejudicial matters such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimonies; any belief in guilt or innocence; or like statements concerning the merits of the case, citing **State v. Van Duyne**, 43 N.J. 369, 389, 204 A.2d 841, 850 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. The Supreme Court further stated that the trial court, being advised of potential prejudicial impact of publicity, could have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. Also, that reporters who wrote or broadcast prejudicial stories could have been warned as to the impropriety of publishing material not introduced in the proceedings.

Again, a comparison of the Sinclair and Sheppard cases in light of the suggestions of the United States Supreme Court is warranted. In no instance in the Sinclair case does the record reflect any publication of prejudicial matter with regard to interrogation of Sinclair or lie detector tests, any statement made by Sinclair to officials, the identity of prospective witnesses or their probable testimony, any belief in guilt or innocence or like statements concerning the merits of the case. Nor is there any evidence

of potential or real prejudicial impact of publicity with respect to dissemination of information by public employees.

Examining now the alleged disruptive influences in the courtroom during appellant's trial, the bailiff testified that he had no difficulty in controlling the crowd in the courtroom (R-101), that the spectators were quiet in the courtroom (R-102), and that to his knowledge there were no photographs of any kind taken during the course of the trial (R-100).

None of the matters of which appellant claims as disruptive were of such gravity as to require the court to discharge appellant. As a matter of fact, the court considered many of these complaints in the previous case of **State v. Sinclair**, 15 Utah 2d 162, 389 P.2d 465 (1964), wherein the court stated at 389 P.2d 470:

We have considered and find without merit various other claimed errors in rulings on evidence; and also a number of alleged improprieties in the conduct of the attorneys, witnesses, jurors, and spectators talking to each other, exchanging greetings, shaking hands, and a spectator soliciting autographs. Considering the fact that this trial attracted a great deal of public attention, and that it lasted for about three weeks, it would be strange indeed if some incident short of perfect decorum had not occurred, particularly short of what defense counsel now demands. It is agreed that some of the conduct complained of may not have been exemplary, and that those involved in an official capacity in the trial should avoid any familiarity beyond discreet and reserved civility with the parties, witnesses and jurors.

Under our statute, which requires that errors which do not effect the essential rights of the parties be disregarded, we could not properly interfere with the jury's verdict unless upon review of the whole case it should appear that there was error of sufficient gravity that the defendant's right were prejudiced in some substantial way. We have found nothing of any such consequence here. (Citing Utah Code Ann. § 77-42-1 (1953), and **State v. Siddoway**, 61 Utah 189, 211 P. 968 (1922).

Respondent is not unmindful of many situations where pretrial publicity or publicity during the trial have resulted in unfair trials and have deprived the accused of a fair trial, e.g. **Estes v. Texas**, op. cit. **Sheppard v. Maxwell**, op. cit. However, the respondent submits there are many contributions the news media can make during a trial. As stated in **Fair Trial and Free Press**, American Bar Association Institute of Judicial Administration Project on Minimum Standards for Criminal Justice, Paul C. Reardon, Chairman, 1966, P. 50:

During the trial, there are several important contributions the news media can make. First, informed and intelligent reporting can educate the public—many of whom have never been in a courtroom—on the workings of the criminal process. Second, such reporting can help to insure that the conduct of those who participate in the trial—judges, lawyers, and witnesses—live up to the standards that our system of justice demands. Finally, as in the case of reports of arrests and requests for evidence, reporting of the trial may evoke evidence that will aid in convicting or exonerating the accused.

Many proposals have been made by different bodies, many debates have been held, and many

recommendations have been heard dealing with the problem. These recommendations include additional legislation giving the courts increased contempt powers, modifications and revisions of the Canons of Professional Ethics of the American Bar Association, and regulations and departmental rules affecting law enforcement agencies. See **Fair Trial and Free Press**, Reardon, op. cit., pp. 2-15. See also **Report of Symposium, Free Trial-Free Press**, New York State Bar Association (1966), reprinted in **Criminal Law Bulletin**, Vol. 2 No. 3, (1966). For views of the news media regarding censorship of criminal proceedings, see reprint of speech of Clifton Daniel, managing editor, **New York Times**, printed in **Journal of the National District Attorneys Association**, Vol. 1, No. 2, (1965).

It was stated in the **Interim Report of the Special Committee on Radio and Television of the Association of the Bar of the City of New York**, Harold R. Medina, Chairman, Columbia University Press, 1965, at page 272:

The problem of free press versus fair trial is not a new one. The last seventy years have witnessed many unsuccessful attempts on the part of the news media and bar representatives to formulate a satisfactory code of principles that would govern the conduct of members of both professions.

Commenting on what controls should be placed on police, lawyers, and the press by the courts, a special committee of the Bar of New in its final report entitled **Freedom of the Press and Fair Trial**, op. cit., had the following comment:

As usual there is, on the one hand, the question of power or jurisdiction, and, on the other hand, the question of policy. Moreover, one cannot consider the two questions *in vacuo*. They must be discussed in relation to the groups of persons who would be affected by the control of prejudicial publicity. Thus, starting with the commission of the crime or the arrest of the accused, or the filing of the indictment or the information, and continuing up to the time of the trial or thereabouts, it is a serious question, both of power and publicity, whether the court in which the case is to be tried, or any courts, should, by rule of court, by authority of legislative enactment, or by virtue of some competence supposed to be inherent in the judicial function, have the right, vis-a-vis, lawyers, members of the police force, or representatives of the press, to proscribe to the publication or utterance of matters deemed prejudicial to the right of the accused to a fair trial. If such right exists, either actual or *in ovo*, then the judges, in this pretrial period, must have the power to fine and imprisonment for contempt of court all lawyers, members of the police force, and representatives of the press, who violate the orders of rules of proscription. The prospect, in this pretrial period, of judges of various criminal courts of high and low degree, sitting as petty tyrants, handing down sentences of fine and imprisonment for contempt of court against lawyers, policemen, and reporters and editors, is not attractive. Such an innovation might well cut prejudicial publicity to a minimum. But at what a price! (P. 39)

Concluding that such controls are unwise, the report continued at page 40:

Nevertheless, with respect to the police and the press in the entire pretrial period we think it unwise and detrimental to the public interest to give such contempt powers to the courts and the judges. Moreover, we think that such proceedings and court

rules, legislation or whatnot else authorizing such contempt proceedings might well be held to be a violation of the first amendment guarantees of free press and free speech. Furthermore, as to the police, we find no authority inherent in the courts or the judges to discipline them for alleged breach of their duties as police officers.

The First Amendment of the United States Constitution provides:

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

This provision of the First Amendment has been made applicable to the states through the due process clause. See **Near v. Minnesota**, 283, U.S. 697, 707; 51 S.Ct. 625, 628 (1930).

Yet the Fifth, Sixth and Fourteenth Amendments assure the accused a fair trial. The problem of guaranteeing freedom of speech and press, while at the same time guaranteeing to the accused a fair trial is indeed difficult. Commenting on these concepts the United States Supreme Court in the case of **Estes v. Texas**, op. cit., held that Estes was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. In discussing the concepts referred to above, the court noted:

The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum must be allowed the press in carrying on

this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. While the state and federal courts have differed over what spectators may be excluded from a criminal trial, 6 Wigmore, Evidence, section 1834 (3rd addition 1940) primary concern of all must be the proper administration of justice; that 'the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media'; 'the due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial'

Continuing, the court stated, at page 541:

It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media. This was settled in **Bridges v. California**, 314 U.S. 252 86 L.Ed. 192, 62 S.Ct. 190, 159 A.L.R. 1346 (1941), and **Pennekamp v. Florida**, 328 U.S. 391, 90 L.Ed. 1295, 66 S.Ct. 1209 (1946), which we reaffirm. These reportorial privileges of the press were stated years ago: 'The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they cannot have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions, which he would not have been likely to receive from hearing the trial itself.' 2 Cooley's Constitutional Limitations, 931-932 (Carlington Edition 1927).

The United States Supreme Court in **Sheppard v. Maxwell**, op. cit., acknowledged that a responsible press has always been regarded as the "handmaiden of effective judicial administration, especially in the criminal field." The court further acknowledged that it has:

. . . been unwilling to place any direct limitation on the freedom traditionally exercised by the news media for 'what transpires in the courtroom is public property.' 16 L.Ed. 2d at 613.

Because of myriad views on prejudicial publicity and the general subject of free press-fair trial, respondent is setting forth as an appendix to this brief certain recommendations, positions taken and views expressed by various Bar associations, the United States Department of Justice and certain writers, as an aid to this court in the event it should deem it advisable as part of the decision in this case to set down guidelines to be followed in the future by law enforcement personnel and agencies, prosecution and defense counsel, trial judges, and the news media.

CONCLUSION

It is apparent from an analysis of the record in this case that the jury was not prejudiced by any publicity occurring prior to or during trial, nor was there any evidence of misconduct on the part of the jury.

Appellant has failed to meet her burden of pro-

ducing clear and convincing evidence of prejudice and unfair trial.

Respondent submits that the totality of the circumstances do not show that appellant was not accorded a fair trial.

Respondent respectfully submits that the judgment of the District Court denying appellant's petition for writ of habeas corpus be affirmed.

Respectfully submitted,

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APPENDIX

A STATEMENT OF PRINCIPLES FOR THE GUIDANCE OF THE POLICE, PROSECUTING ATTORNEYS, DEFENSE COUNSEL, JUDGES, AND THE NEWS MEDIA WITH RESPECT TO CRIME NEWS RELEASES AND REPORTING.

The following is a statement of principles for the guidance of the police, prosecuting attorneys, defense counsel, judges and the news media with respect to crime news releases and reporting.^{1/}

The police, prosecuting attorneys, defense counsel, judges, and newsmen who have participated in this conference recognize their responsibilities to protect the right of an accused person to a fair trial. We believe that a proper balance can be maintained between freedom of the press and the right of an accused person to a fair trial by adherence to the following principles on the part of the police, prosecuting attorneys, defense counsel, judges, and newsmen:

1. It is the responsibility of the police to investigate violations of the criminal law and to report their findings to the authority charged with the prosecution of criminal offenses. In disclosing to the news media the progress of a criminal investigation, the police should avoid speculation, theories, and conclusions which characterize any person in custody as guilty of the offense.
2. Once a person is formally charged with a criminal offense, neither the prosecuting nor the defense counsel should make any statement for publication purposes with respect to

^{1/} Report of the Proceedings of a Conference on Prejudicial News Reporting in Criminal Cases, Free press - Fair trial, Northwestern University School of Law, Fred E. Inbau, editor, (1964).

the guilt or innocence of the accused, or with respect to the evidence either attorney may view as supporting his side of the case. Any violation of this obligation should be considered as unethical conduct and subject to appropriate disciplinary actions by the organized bar or the courts.

3. Judges should utilize all remedies available under the law to insure that jurors are not subjected to outside influences and that they, in fact, are complying with the instructions and mandates of the court with respect to such influences.

4. It is the responsibility of the free press to report the occurrence of crime and the disposition of criminal offenders in the courts of this country.

The day has long since passed when the average citizen can observe in person that justice is being administered in our courts; the public must rely, therefore, upon the news media to report—promptly and accurately—the disposition of criminal cases in the courts.

Divergent views prevent us from satisfactorily resolving the controversy as to whether it is a fact that news reporting can be so prejudicial as to actually interfere with an accused person's right to a fair trial. Nevertheless, we are concerned with the trend of recent appellate court cases which seem to act upon that assumption and thereby reverse the convictions of accused persons on the ground of prejudicial news reporting.

It is the sense of this conference, therefore, that the news media, in reporting crime and the administration of criminal justice in this country, should refrain from the following practices:

- (a) Publicity which may result in a hos-

tile atmosphere prejudicial to the accused at the time of his trial;

(b) Over-emphasis upon the past criminal record of an accused person in relation to the crime for which he has been on trial;

(c) Detailed reporting of any statement labeled by the police or prosecution as a confession of guilt;

(d) Reporting events at the trial which the court has, in accordance with long established rules of evidence, excluded from the consideration of the jury, and which are inflammatory or extraneous to the merits of the matter on trial that it would be decidedly unfair to the accused that the jury should learn of such matters through a news communication.^{2/}

WHAT CONSTITUTES PREJUDICIAL PUBLICITY? (Synopsis)

LeWine, What Constitutes Prejudicial Publicity in Pending Cases, **ABA Journal**, Vol. 51, No. 10, Oct. 1965.

1. Publication of alleged confessions
2. Publication of prior criminal convictions and conduct
3. Inadmissible evidence in general
4. Tangible evidence connecting the accused with the commission of the crime charged
5. Evidentiary facts generally
6. Matters excluded from evidence by the judge

^{2/}The statement of policy was not adopted by the conference.

7. Out of court statements of witnesses
8. Personal opinions as to the guilt of the accused
9. Comments on evidence introduced and the credibility of witnesses
10. Inflammatory publicity and sensationalism tending to charge the community with an emotional atmosphere
11. Articles relating generally to a pending proceeding bearing incidentally on the issues to be decided
12. Intimidation of jurors or matter intended to coerce or influence jurors by intimidation
13. False or misleading reports of proceedings
14. Publications affecting witnesses tending to influence or discourage their testimony

MASSACHUSETTS

The Introduction to the Massachusetts Guide for the Bar and News Media contains Articles I and VI of the Amendments to the United States Constitutions. It continues:

In an attempt to reconcile long-standing divergence of opinion as to the relative rights of the press and that of the individual to a fair trial, a special Massachusetts Bar-Press Committee was established in the fall of 1960. After two and a half years of study and discussion, the Committee, with the aid of observers from the judiciary, drafted a Guide which was approved by the Committee. Subsequently ratified by the four sponsoring groups, the Guide was adopted by 26 daily and 31 weekly newspapers in the State.

The Guide was approved in June, 1963, and has been adopted by the Massachusetts and Boston Bar Associations, the Massachusetts Newspaper Information Service, and the Massachusetts Broadcasters Association. The Guide reads:

Preamble

1. To promote closer understanding between the bar and the press, especially in their efforts to reconcile the constitutional guarantee of freedom of the press and the right to a fair, impartial trial, the following mutual and voluntary statement of principles is recommended to all members of both professions.

2. Both professions, recognizing that freedom of the press is one of the fundamental liberties guaranteed by the First Amendment to the United States Constitution, agree that this fundamental freedom must be zealously preserved and responsibly exercised subject only to those restrictions designed to safeguard equally fundamental rights of the individual.

3. It is likewise agreed that both the press and the bar are obliged to preserve the principle of the presumption of innocence for those accused of wrongdoing pending a finding of guilty.

4. The press and the bar concur on the importance of the natural right of the members of an organized society to acquire and impart information about their common interests.

5. It is further agreed, however, that the inherent right of society's members to impart and acquire information should be exercised with discretion at those times when public disclosures would jeopardize the ends of justice, public security and other rights of individuals.

6. The press and the bar recognize that there may arise circumstances in which disclosures of names of individuals involved in matters coming to the attention of the general public would result in personal danger, harm to the reputation of a person or persons or notoriety to an innocent third party.

7. Consistent with the principles of this preamble, it is the responsibility of the bar, no less than that of the press to support the free flow of information.

For the Press

Newspapers in publishing accounts of crime should keep in mind that the accused may be tried a court of law.

To preserve the individuals rights to a fair trial ,news stories of crime should contain only a factual statement of the arrest and attending circumstances.

The following should be avoided:

1. Publication of interviews with subpoenaed witnesses after an indictment is returned.

2. Publication of the criminal record or discreditable acts of the accused after an indictment is returned or during the trial unless made part of the evidence in the court record. The defendant is being tried on the charge for which is as accused and not on his record. (Publication of a criminal record could be grounds for a libel suit.)

3. Publication of confessions after an indictment is returned unless made a part of the evidence in the court record.

4. Publication of testimony stricken by the court unless reported as having been stricken.

5. Editorial comment preceding or during trial, tending to influence judge or jury.

6. Publication of names of juveniles involved in juvenile proceedings unless the names are released by the judge.

7. The publication of any "leaks," statements or conclusions as to the innocence or guilt, implied or expressed, by the police or prosecuting authorities or defense counsel.

For the Bar

To preserve the individual's rights to a fair trial in a court of law the following guide lines are prescribed for the Bar.

1. A factual statement of the arrest and circumstances and incidents thereof of a person charged with a crime is permissible, but the following should be avoided:

- (a) Statements or conclusions as to the innocence or guilt, implied or expressed, by the prosecuting authorities or defense counsel.

- (b) Out-of-court statements by prosecutors or defense attorneys to news media in advance of or during trial,

stating what they expect to prove, whom they propose to call as witnesses or public criticism of either judge or jury.

- (c) Issuance by the prosecuting authorities, counsel for the defense or any person having official connection with the case of any statements relative to the conduct of the accused, statements, "confessions" or admissions made by the accused or other matters bearing on the issue to be tried.
- (d) Any other statement or press release to the news media in which the source of the statement remains undisclosed.

2. At the same time, in the interest of fair and accurate reporting, news media have a right to expect the cooperation of the authorities in facilitating adequate coverage of the law enforcement process.

It is to be noted that while the Guide was at first designed for the bar and press, its provisions are by agreement made applicable to the broadcast news media.

OREGON

The Oregon Statement of Principles is the product of meetings and lengthy discussion periods held by the Oregon-Bar-Press-Broadcasters Joint Committee beginning in March, 1962. One month later, a final draft was completed and approved by the original committee. During the summer of 1962 the three groups involved gave approval to the code at their annual meetings, and the Statement of Principles was printed and distributed to all members of the Oregon State Bar, the Oregon Newspaper Publishers Association, and the Oregon Association of Broadcasters. The text follows:

Oregon Bar

Press Broadcasters

Joint Statement of Principles

Oregon's Bill of Rights provides both for fair trials and for freedom of the press. These rights are basic and unqualified.

They are not ends in themselves but are necessary guarantors of freedom for the individual and the public's rights to be informed. The necessity of preserving both the right to a fair trial and the freedom to disseminate the news is of concern to responsible members of the legal and journalistic professions and is of equal concern to the public. At times these two rights appear to be in conflict with each other.

In an effort to mitigate this conflict, the Oregon State Bar, the Oregon Newspaper Publishers Association and the Oregon Association of Broadcasters have adopted the following statement of principles to keep the public fully informed without violating the rights of any individual.

1. The news media have the right and the responsibility to print and to broadcast the truth.

2. However, the demands of accuracy and objectivity in news reporting should be balanced with the demands of fair play. The public has a right to be informed. The accused has the right to be judged in an atmosphere free from undue prejudice.

3. Good taste should prevail in the selection, printing and broadcasting of the news. Morbid or sensational details of criminal behavior should not be exploited.

4. The right of decision about the news rests with the editor or news director. In the exercise of judgment he should consider that:

- (a) an accused person is presumed innocent until proven guilty;
- (b) readers and listeners are potential jurors;
- (c) no person's reputation should be injured needlessly.

5. The public is entitled to know how justice is being administered. However, it is unprofessional for any lawyer to exploit any medium of public information to enhance his side of a pending case. It follows that the public prosecutor should avoid taking unfair advantage of his position as an important source of news; this shall not be construed to limit his obligation to make available information to which the public is entitled.

In recognition of these principles, the undersigned hereby testify to their continuing desire to achieve the best possible ac-

commodation of the rights of the individual and the rights of the public when these two fundamental precepts appear to be in conflict in the administration of justice.

PART 1. RECOMMENDATIONS RELATING TO THE CONDUCT OF ATTORNEYS IN CRIMINAL CASES


1.1 Revision of the Canons of Professional Ethics.

It is recommended that the Canons of Professional Ethics be revised to contain the following standards relating to public discussion of pending or imminent criminal litigation:

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by means of public communications, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

- (1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character**
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or reputation of the defendant, except that the lawyer may make a factual statement of the defendant's name, age, residence, occupation, and family status, and if the defendant has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the defendant, or the refusal or failure of the defendant to make any statement;

(3) The performance of any examinations or tests or the defendant's refusal or failure to submit to an examination or test;

(4) The identity testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) The defendant's guilt or innocence or other matters relating to the merits of the case or the evidence in the case, except that the lawyer may announce the circumstances of arrest, including time and place of arrest, resistance, pursuit, and use of weapons; may announce the identity of the investigating and arresting officer or agency and the length of the investigation; may make an announcement, at the time of the seizure, describing any evidence seized; may disclose the nature, substance, or text of the charge, including a brief description of the offense charged; may quote from or refer without comment to public records of the court in the case; may announce the scheduling or result of any stage in the judicial process; may request assistance in obtaining evidence; and, on behalf of his client, may announce without further comment that the client denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with

the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and while the matter is still pending in any court, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect judgment or sentence or otherwise prejudice the due administration of justice.

Nothing in this Canon is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

1.2 Rule of court.

In any jurisdiction in which Canons of Professional Ethics have not been adopted by statute or court rule, it is recommended that the substance of the foregoing section be adopted as a rule of court governing the conduct of attorneys.

1.3 Enforcement.

It is recommended that violation of the standards set forth in section 1.1 shall be grounds for judicial and bar association reprimand or for suspension from practice and, in more serious cases, for disbarment or punishment for contempt of court. It is further recommended that any attorney or bar association be allowed to petition an appropriate court for the institution of contempt proceedings, and that the court have discretion to initiate such proceedings, either on the basis of such a petition or on its own motion.

PART II. RECOMMENDATIONS RELATING TO THE CONDUCT OF LAW ENFORCEMENT OFFICERS AND JUDICIAL EMPLOYEES IN CRIMINAL CASES

2.1 Rule of court relating to disclosures by law enforcement officers.

It is recommended that the following rule be promulgated in each jurisdiction by the appropriate court:

Release of information by law enforcement officers.

From the time of arrest, issuance of an arrest warrant, or filing of any complaint, information, or indictment in any criminal matter within the jurisdiction of this court, until the completion of trial or disposition without trial, no law enforcement officer subject to the jurisdiction of this court shall release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

- (1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the defendant, except that the officer may make a factual statement of the defendant's name, age, residence, occupation, and family status, and if the defendant has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;**
- (2) The existence or contents of any confession, admission, or statement given by the defendant, or the refusal or failure of the defendant to make any statement;**
- (3) The performance of any examinations or tests or the defendant's refusal or failure to submit to an examination or test;**
- (4) The identity testimony, or credibility of prospective witnesses, except that the officer may announce the identity of the victim if the announcement is not otherwise prohibited by law;**

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) The defendant's guilt or innocence, or other matters relating to the merits of the case or the evidence in the case, except that the officer may announce the circumstances of arrest, including the time and place of arrest, resistance, pursuit, and use of weapons; may announce the identity of the investigating and arresting officer or agency and the length of the investigation; may make an announcement, at the time of the seizure, describing any evidence seized; may disclose the nature, substance, or text of the charge, including a brief description of the offense charged; may quote from or refer without comment to public records of the court in the case; may announce the scheduling or result of any stage in the judicial process; and may request assistance in obtaining evidence.

The court may, in its discretion, initiate proceedings for contempt for violation of this rule, either on its own motion or on the petition of any person.

Nothing in this rule is intended to preclude any law enforcement officer for replying to charges of misconduct that are publicly made against him, to preclude any law enforcement authority from issuing rules not in conflict herewith on this or related subjects, to preclude any law enforcement officer from participating in any legislative, administrative, or investigative hearing, or to supersede any more restrictive, or investigative hearing, or to supersede any more restrictive rule governing the release of information concerning juvenile or other offenders.

For purposes of this rule, the term 'law enforcement officer' includes any person employed or retained by any governmental agency to assist in the investigation of crime or in the apprehension or prosecution of persons suspected of or charged with crime.

2.2 Departmental rules.

It is recommended that law enforcement authorities in each jurisdiction promulgate an internal regulation (1)

embodying the prohibitions of the preceding section and (2) directing that releases not prohibited by that section be withheld during the relevant period if the information would be highly prejudicial and if public disclosure would serve no significant law enforcement function. It is further recommended that such agencies adopt the following internal regulations:

(a) A regulation governing the release of information, relating to the commission of crimes and to their investigation, prior to the making of an arrest or the filing of formal charges. This regulation should establish appropriate procedures for the release of information. It should further provide that, when a crime is believed to have been committed, pertinent facts relating to the crime itself may be made available but the identity of a suspect prior to arrest and the details of investigative procedures shall not be disclosed except to the extent necessary to assist in the apprehension of the suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(b) A regulation prohibiting (i) the deliberate posing of a person in custody for photographing or televising by representatives of the news media and (ii) the interviewing by representatives of the news media of a person in custody unless he requests an interview in writing after being adequately informed of his right to consult with counsel.

(c) A regulation providing for the enforcement of the foregoing by the imposition of appropriate disciplinary sanctions.

2.3 Rule of court relating to disclosures by judicial employees.

It is recommended that a rule of court be adopted in each jurisdiction prohibiting any judicial employee from disclosing, to any unauthorized person, information relating to a pending criminal case that is not part of the public records of the court and that may tend to interfere with the right of the people or of the defendant to a fair trial. Particular reference should be made in this rule to

the nature and result of any argument or hearing held in chambers or otherwise outside the presence of the public and not yet available to the public under the standards in section 3.1 and section 3.5(d) of these recommendations. Appropriate discipline, including proceedings for contempt, should be provided for infractions of this rule.

PART III. RECOMMENDATIONS RELATING TO THE CONDUCT OF JUDICIAL PROCEEDINGS IN CRIMINAL CASES

3.1 Pretrial hearings.

It is recommended that the following rule be adopted in each jurisdiction by the appropriate court:

Motion to exclude public from all or part of pretrial hearing.

In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury.

3.2 Change of venue or continuance.

It is recommended that the following standards be adopted in each jurisdiction to govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened interference with the right to a fair trial.

(a) Who may request.

Except as federal or state constitutional provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense.

(b) Methods of proof.

In addition to the testimony or affidavits of individuals in the community, which shall not be required as a condition to the granting of a motion for change of venue or continuance, qualified public opinion surveys shall be admissible as well as other materials having probative value.

(c) Standards for granting motion.

A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required.

(d) Same; time of disposition.

If a motion for change of venue or continuance is made prior to the impaneling of the jury, the motion shall be disposed of before impaneling. If such a motion is permitted to be made, or if reconsideration or review of a prior denial is sought, after the jury has been selected, the fact that a jury satisfying prevailing standards of acceptability has been selected shall not be controlling if the

record shows that the criterion for the granting of relief set forth in subsection (c) has been met.

(e) Limitations; waiver.

It shall not be a ground for denial of a change of venue that one such change has already been granted. The claim that the venue should have been changed or a continuance granted shall not be considered to have been waived by the waiver of the right to trial by jury or by the failure to exercise all available peremptory challenges.

3.3 Waiver of jury.

In those jurisdictions in which the defendant does not have an absolute right to waive a jury in a criminal case, it is recommended that the defendant be permitted to waive whenever it is determined that (1) the waiver has been knowingly and voluntarily made, and (2) there is reason to believe that, as a result of the dissemination of potentially prejudicial material, the waiver is required to increase the likelihood of a fair trial.

3.4 Selecting the jury.

It is recommended that the following standards be adopted in each jurisdiction to govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised.

(a) Method of examination.

Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him

that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

(b) Standard of acceptability.

Both the degree of exposure and the prospective juror's testimony as to his state of mind are relevant to the determination of acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge for cause no matter how slight his exposure. If he has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his judgment will be affected, his acceptability shall turn on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

(c) Source of the panel.

Whenever it is determined that potentially prejudicial news coverage of a given criminal matter has been intense and has been concentrated primarily in a given locality in a state (or federal district), the court shall have authority to draw jurors from other localities in that state (or district).

3.5 Conduct of the trial.

It is recommended that the following standards be adopted in each jurisdiction to govern the conduct of a criminal trial when problems relating to the dissemination of potentially prejudicial material are raised.

(a) Use of the courtroom.

Whenever appropriate in view of the notoriety of the

case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom, the assignment of seats, and other matters that may affect the conduct of the proceeding.

(b) Sequestration of jury.

Either party shall be permitted to move for sequestration of the jury at the beginning of trial or at any time during the course of the trial, and, in appropriate circumstances, the court shall order sequestration on its own motion. Sequestration shall be ordered if it is determined that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors. Whenever sequestration is ordered, the court in advising the jury of the decision shall not disclose which party requested sequestration.

(c) Cautioning parties and witnesses; insulating witnesses.

When appropriate in light of the issues in the case or the notoriety of the case, the court shall instruct parties and witnesses not to make extrajudicial statements, relating to the case or the issues in the case, for dissemination by any means of public communication during the course of the trial. The court may also order sequestration of witnesses, prior to their appearance, when it appears likely that in the absence of sequestration they will be exposed to extra-judicial reports that may influence their testimony.

(d) Exclusion of the public from hearings or arguments outside the presence of the jury.

If the jury is not sequestered, the defendant shall be permitted to move that the public be excluded from any portion of the trial that takes place outside the presence of the jury on the ground that dissemination of evidence or argument adduced at the hearing is likely to interfere with the defendant's right to a fair trial by an impartial

jury. The motion shall be granted unless it is determined that there is no substantial likelihood of such interference. With the consent of the defendant, the court may take such action on its own motion or at the suggestion of the prosecution. Whenever such action is taken, a complete record of the proceedings from which the public has been excluded shall be kept and shall be made available to the public following the completion of the trial. Nothing in this recommendation is intended to interfere with the power of the court, in connection with any hearing held outside the presence of the jury, to caution those present that dissemination of specified information by any means of public communication, prior to the rendering of the verdict, may jeopardize the right to a fair trial by an impartial jury.

(e) Cautioning jurors.

In any case that appears likely to be of significant public interest, an admonition in substantially the following form shall be given before the end of the first day if the jury is not sequestered.

During the time you serve on this jury, there may appear in the newspapers or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your verdict meet certain standards—for example, a witness may testify about events he himself has seen or heard but not about matters of which he was told by others. Also, witnesses must be sworn to tell the truth and must be subject to cross-examination. News reports about the case are not subject to these standards, and if you read, listen to, or watch these reports, you may be exposed to misleading or inaccurate information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction.

If the process of selecting a jury is a lengthy one, such an admonition shall also be given to each juror as he is selected. At the end of each subsequent day of the trial, and at other recess periods if the court deems necessary, an admonition in substantially the following form shall be given:

For the reasons stated earlier in the trial, I must remind you not to read, listen to, or watch any news reports concerning this case while you are serving on this jury.

(f) Questioning jurors about exposure to potentially prejudicial material in the course of the trial; standard for excusing a juror.

If it is determined that material disseminated during the trial raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The method of examination shall be the same as that recommended in section 3.4(a), above. The standard for excusing a juror who is challenged on the basis of such exposure shall be the same as the standard of acceptability recommended in section 3.4(b), above, except that a juror who has seen or heard reports of potentially prejudicial material shall be excused if the material in question would furnish grounds for a mistrial if referred to in the trial itself.

3.6 Setting aside the verdict.

It is recommended that, on motion of the defendant, a verdict of guilty in any criminal case be set aside and a new trial granted whenever, on the basis of competent evidence, the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to an extrajudicial communication of any matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. Nothing in this recommendation is intended to affect the rule in any jurisdiction as to whether and in what circumstances a juror may impeach his own verdict or as to what other evidence is competent for that purpose.

PART IV. RECOMMENDATIONS RELATING TO THE EXERCISE OF THE CONTEMPT POWER

4.1 Limited use of the contempt power.

The use of the contempt power against persons who disseminate information by means of public communication, or who make statements for dissemination, can in certain

circumstances raise grave constitutional questions. Apart from these questions, indiscriminate use of that power can cause unnecessary friction and stifle desirable discussion. On the other hand, it is essential that deliberate action constituting a serious threat to a fair trial not go unpunished and that valid court orders be obeyed. It is therefore recommended that the contempt power should be used only with considerable caution but should be exercised in at least the following instances, in addition to those specified in sections 1.3, 2.1, and 2.3, above:

(a) Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial:

(i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, if the statement is reasonably calculated to affect the outcome of the trial and seriously threatens to have such an effect; or

(ii) makes such a statement with the expectation that it will be so disseminated.

(b) Against a person who knowingly violates a valid judicial order not to disseminate until completion of the trial or disposition without trial, specified information referred to in the course of a judicial hearing from which the public is excluded under sections 3.1 or 3.5(d) of these recommendations.

4.2 Reimbursement of defendant.

In the event that a mistrial or change of venue is granted or a conviction set aside, as a result of an extrajudicial statement held to be in contempt of court, it is recommended that the court have the authority to require that all or part of the proceeds of any fine be used to reimburse the defendant for the additional legal fees and other expenses fairly attributable to the order that the case be tried in a different venue or tried again in the same venue.

POLICY OF THE DEPARTMENT OF JUSTICE

On April 16, 1965, Attorney General Nicholas deB. Katzenbach issued the following policy statement governing personnel of the Department of Justice and the release by them of information in criminal proceedings to news media representatives:

The availability to news media of information in criminal cases is a matter which has become increasingly a subject of concern in the administration of criminal justice. The purpose of this statement is to formulate specific guidelines for the release of such information by personnel of the Department of Justice.

While the release of information for the purpose of influencing a trial is, of course, always improper, there are valid reasons for making available to the public information about the administration of the criminal laws. The task of striking a fair balance between the protection of individuals accused of crime and public understanding of the problems of controlling crime depends largely on the exercise of sound judgment by those responsible for administering the criminal laws and by representatives of the press and other media.

Inasmuch as the Department of Justice has generally fulfilled its responsibilities with awareness and understanding of the competing needs in this area, this statement, to a considerable extent, reflects and formalizes the standards to which representatives of the Department have adhered in the past. Nonetheless, it will be helpful in ensuring uniformity of practice to set forth the following guidelines for all personnel of the Department of Justice.

Because of the difficulty and importance of the questions they raise, it is felt that some portions of the matters covered by this statement, such as the authorization to make available federal conviction records and a description of items seized at the time of arrest, should be the subject of continuing review and consideration by the Department on the basis of experience and suggestions from those within and outside the Department.

1. These guidelines shall apply to the release of information to news media from the time a person is arrested or is

charged with a criminal offense until the proceeding has been terminated by trial or otherwise.

2. At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial.

3. Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

- (a) The defendant's name, age, residence, employment, marital status, and similar background information.
- (b) The substance or text of the charge, such as a complaint, indictment, or information.
- (c) The identity of the investigating and arresting agency and the length of the investigation.
- (d) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest would be highly prejudicial and where the release thereof would serve no law enforcement function, such information should not be made public.

4. Personnel of the Department shall not volunteer for publication any information concerning a defendant's prior criminal record. However, this is not intended to alter the Department's present policy that, since federal criminal conviction records are matters of public record permanently maintained in the Department, this information may be made available upon specific inquiry.

5. Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of

information and shall include only information which is clearly not prejudicial.

6. The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

- (a) Observations about a defendant's character.
- (b) Statements, admissions, confessions, or alibis attributable to a defendant.
- (c) References to investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests.
- (d) Statements concerning the identity, credibility, or testimony of prospective witnesses.
- (e) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

7. Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.

8. This statement of policy is not intended to restrict the release of information concerning a defendant who is a fugitive from justice.

9. Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit release of information which would not be prejudicial under the particular circumstances. If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.