St. Mary's Law Journal

Volume 10 | Number 3 Article 15

9-1-1979

Supplemental Voir Dire Is Required When Significant Delay Occurs between Jury Selection and Start of Trial.

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the second sovereignty with the consent and cooperation of the first refuses to give testimony, comity restricts the second sovereignty from compelling or coercing the prisoner to testify.[88] The lending doctrine, which focuses on the consent of the first sovereignty, is therefore only effective when the prisoner is willing to testify in the second jurisdiction. In answer to the *Liberatore* view, the argument can be made that when the first sovereignty consents to lend the prisoner to testify, it also consents to the coercive measures which the second jurisdiction may use. Lending of a prisoner would otherwise be useless. Preventing the second sovereignty from imposing a civil contempt sentence would restrict the second sovereignty to the remedy of criminal contempt. Although a criminal contempt sentence would punish the contemnor for his failure to testify, it would not aid the court in securing his testimony.[89]

In re Liberatore is important for two reasons. It is the first case dealing with federal interruption of a preexisting state sentence to coerce a contemnor by tolling his sentence. The decision reaffirms the principle of separate and distinct sovereignties of state and federal governments. It is also the first decision indicating that a federal court does not have the power to interrupt a federal sentence. *Liberatore's* dicta, rejecting the opinions of seven courts of appeals and narrowly interpreting the Recalcitrant Witnesses statute,[90] advocates a new and more restrictive interpretation. The *Liberatore* decision hinders the ability of a federal grand jury or a court to elicit testimony or evidence from a recalcitrant witness who is already incarcerated.

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FEDERAL CRIMINAL PROCEDURE—Juries—Supplemental *Voir Dire* Is Required When Significant Delay Occurs Between Jury Selection and Start of Trial

United States v. Price,
573 F.2d 356 (5th Cir. 1978).

On March 8, 1977, the cases of Jose Mireles, indicted for conspiracy to possess and distribute cocaine, and George Price, indicted for possession of marijuana with intent to distribute, were called for jury selection. The attorneys for Price and Mireles moved to quash the venire as the attorneys thought the jury members might participate in similar trials or trials in-

88. *In re* Liberatore, 574 F.2d 78, 88 (2d Cir. 1978).

89. *See* United States v. Liddy, 510 F.2d 669, 675 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 980 (1975); Martin v. United States, 517 F.2d 906, 913 (8th Cir.) (dissenting opinion), *cert. denied,* 423 U.S. 856 (1975).

90. 28 U.S.C. § 1826 (1970).

volving the same witnesses between the time of their selection and the start of the trial. The motion was denied and the juries were selected. The jury for the Mireles case was instructed to return for trial forty-nine days later on April 27, 1977, and the jury for the Price case was ordered to return on April 21, 1977, forty-three days later. Immediately prior to trial, counsel for defendants renewed their motion to quash, but the motions were denied once more. After trial both defendants were convicted and their cases were joined on appeal to the Court of Appeals for the Fifth Circuit. Price and Mireles contended the trial court erred in refusing to quash the jury panel because of the interim jury service performed by some of the jurors in similar cases or in cases in which the same government witnesses testified. Held—*Reversed and remanded.* When a significant delay occurs between selection of the jury and the start of the trial, the trial court has a duty to conduct a supplemental *voir dire.*[1]

The purpose of *voir dire* is to aid the parties to a lawsuit in obtaining the impartial jury guaranteed them under the sixth amendment.[2] Biased jurors may be removed during the *voir dire* by use of challenges to the venire.[3] Two types of challenges exist: peremptory and for cause.[4] No limit is placed on the number of challenges that may be made for cause,[5] but a juror is only subject to such a challenge if he is unqualified or if he is shown to be biased.[6] No grounds need be given for peremptory challenges,[7] but

1. United States v. Price, 573 F.2d 356, 364 (5th Cir. 1978).

2. *See* Murphy v. Florida, 421 U.S. 794, 799 (1975)(defendant must have panel of impartial jurors); United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973)(primary purpose of *voir dire* is to empanel an impartial jury); *The United States Courts of Appeals: 1976-1977 Term Criminal Law and Procedure,* 66 GEO. L.J. 203, 495 (1977). The sixth amendment reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend VI.

3. *See* Swain v. Alabama, 380 U.S. 202, 219 (1965); 28 U.S.C. § 1870 (1970); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges,* 27 STAN. L. REV. 1493, 1498-99 (1975).

4. *See* 28 U.S.C. § 1870 (1970); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 382, at 31 (1969); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges,* 27 STAN. L. REV. 1493, 1498-99 (1975).

5. *See* Jackson v. United States, 408 F.2d 306, 308 (9th Cir. 1969); Wilson v. Wiggins, 94 P.2d 870, 871 (Ariz. 1939); State v. Arbeitman, 313 A.2d 17, 19 (Vt. 1973).

6. *See* Irvin v. Dowd, 366 U.S. 717, 723 (1961); United States v. Haynes, 398 F.2d 980, 984 (2d Cir. 1968), *cert. denied,* 393 U.S. 1120 (1969); 28 U.S.C. § 1865 (1970 & Supp. V 1975); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 383, at 38 (1969). To qualify for federal jury duty a person must meet certain qualifications: United States citizenship; at least eighteen years of age; at least one year of residence within the district; ability to read, write, speak and understand the English language; no mental or physical infirmity affecting capability; and no pending charge or conviction of a state or federal crime punishable by imprisonment for more than one year and not restored by amnesty or pardon. 28 U.S.C. § 1865 (1970 & Supp. V 1975).

7. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965)(peremptory challenges exercised without stating reason); United States v. Carter, 528 F.2d 844, 848 (8th Cir. 1975)(reasons need not be stated when exercising peremptory challenges), *cert. denied,* 425 U.S. 961 (1976).

the number of peremptory challenges is generally limited by statute.[8] Prior jury service generally does not disqualify a prospective juror,[9] and bias sufficient for a challenge for cause is not implied by prior jury service, even if the juror has served in a similar trial.[10] To be entitled to such a challenge based on the prospective juror's knowledge of the case or his prior jury service, counsel must prove actual bias of the juror.[11] Although the trial court is given wide discretion in the method[12] and extent[13] of the examination of jurors, such examination must provide counsel opportunity to obtain sufficient information on which to base their challenges.[14]

In addition to the initial *voir dire,* a trial court has discretion to permit reexamination of jurors who have already been accepted.[15] Counsel, however, is usually not permitted to question sworn jurors further and refusal to allow additional questioning is generally not reversible error.[16] Before conducting a reexamination, a court may first require counsel to satisfy certain requirements, such as setting aside the impaneling of the jury or

8. *See* FED. R. CRIM. P. 24; 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 384-385, at 43-44 (1969).

9. *See* United States v. Spinelli, 446 F.2d 646, 647 (9th Cir. 1971)(per curiam), *cert. denied,* 404 U.S. 1061 (1972); Casias v. United States, 315 F.2d 614, 615 (10th Cir.), *cert. denied,* 374 U.S. 845 (1963).

10. United States v. Ochoa, 543 F.2d 564, 566 (5th Cir. 1976) (per curiam); United States v. Reibschlaeger, 528 F.2d 1031, 1032 (5th Cir.) (per curiam), *cert. denied,* 429 U.S. 828 (1976); Virgin Islands v. Hendricks, 476 F.2d 776, 778 (3d Cir. 1973).

11. Irvin v. Dowd, 366 U.S. 717, 723 (1961); *see* United States v. Haynes, 398 F.2d 980, 984 (2d Cir. 1968), *cert. denied,* 393 U.S. 1120 (1969); Casias v. United States, 315 F.2d 614, 618 (10th Cir.), *cert. denied,* 374 U.S. 845 (1963).

12. *See* Howard v. Swenson, 293 F. Supp. 18, 22 (E.D. Mo. 1967)(collective poll of jurors within trial court's discretion), *aff'd,* 404 F.2d 469, 473 (8th Cir. 1968); Cohen v. State, 195 A. 532, 535 (Md. 1937)(discretionary with trial court to allow counsel to question jurors), *cert. denied,* 303 U.S. 660 (1938); *The United States Courts of Appeals: 1976-1977 Term Criminal Law and Procedure,* 66 GEO. L.J. 203, 495 (1977) (whether judge or attorneys ask questions on *voir dire* is within trial court's discretion).

13. *See* Kreuter v. United States, 376 F.2d 654, 656-57 (10th Cir. 1967)(within trial court's discretion not to question jurors to extent requested), *cert. denied,* 390 U.S. 1015 (1968).

14. *See* Dennis v. United States, 339 U.S. 162, 171-72 (1950)(defendant guaranteed opportunity to prove actual basis); United States v. Ledee, 549 F.2d 990, 993 (5th Cir.)(challenges worthless unless counsel obtains sufficient information), *cert. denied,* 98 S. Ct. 297 (1977); United States v. Montelongo, 507 F.2d 639, 641 (5th Cir. 1975)(defendant entitled to knowledge of prior jury duty).

15. United States v. Abraham, 541 F.2d 1234, 1240 (7th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977); State v. Rasor, 167 S.E. 396, 401 (S.C. 1933); State v. Lopez, 406 P.2d 941, 943 (Wash. 1965).

16. United States v. Abraham, 541 F.2d 1234, 1240 (7th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977); People v. Wheeler, 100 Cal. Rptr. 198, 211 (Ct. App. 1971); *see* Brown v. People, 238 P.2d 847, 851 (Colo. 1951)(trial court did not err in refusing reexamination); Albright v. State, 191 So. 2d 65, 67 (Fla. Dist. Ct. App. 1966)(waiver of right to have attorney until after *voir dire* does not give right to reexamine jurors), *cert. denied,* 389 U.S. 862 (1967); State v. Gibbs, 168 S.E.2d 507, 508 (N.C. Ct. App. 1969)(refusal does not violate defendant's right to fair trial).

showing sufficient facts to merit reexamination.[17] Several state court decisions have allowed additional questioning of the jury when new facts come to the knowledge of one of the parties after the jury's acceptance,[18] and when something occurs in a juror's personal life after his selection to disqualify him.[19]

Several recent Fifth Circuit decisions have dealt with the problem of possible bias of jurors who have served at another trial during the interim between their initial selection and the beginning of the trial.[20] In *United States v. Mutchler*[21] the court held that interim jury service in a similar trial or in a trial in which the same witnesses appeared rendered the prior *voir dire* and peremptory challenges meaningless.[22] *Mutchler* was interpreted in *United States v. Jefferson*[23] to mean that interim jury service is a sufficient ground for a challenge for cause.[24] These decisions have established interim jury service in a similar trial or in a trial in which the same witnesses appear as an additional test for challenges for cause.[25] The Fifth Circuit diluted the holdings of *Mutchler* and *Jefferson*, however, in *United States v. Eldridge*.[26] In *Eldridge* the court determined that the defendant has the duty to raise the propriety of interim jury service prior to the commencement of the trial, and failure to do so would waive an objection based on interim jury service.[27]

In *United States v. Price*[28] counsel was unable to introduce positive evidence of jury service between the *voir dire* and the start of the trial to meet the test established in *Mutchler* and *Jefferson*.[29] The issue of interim

17. *See* Maddox v. State, 102 N.E.2d 225, 229 (Ind. 1951)(impaneling jury); Schissler v. State, 99 N.W. 593, 597 (Wis. 1904)(sufficient cause to reexamine).

18. State v. Hashimoto, 377 P.2d 728, 733 (Hawaii 1962); *see* Sullivan v. State, 125 So. 115, 116 (Miss. 1929)(prosecution discovered one juror not qualified).

19. *See* State v. Crane, 100 S.W. 422, 430 (Mo. 1907)(newspaper accounts of the crime and the impaneling of the jury); State v. Hottman, 94 S.W. 237, 241 (Mo. 1906)(purported confession in newspaper when jury not sequestered).

20. *See* United States v. Eldridge, 569 F.2d 319, 320 (5th Cir. 1978); United States v. Jefferson, 569 F.2d 260, 263 (5th Cir. 1978); United States v. Mutchler, 559 F.2d 955, 958 (5th Cir. 1977), *opinion amended*, 566 F.2d 1044 (5th Cir. 1978).

21. 559 F.2d 955 (5th Cir. 1977), *opinion amended*, 566 F.2d 1044 (5th Cir. 1978).

22. *Id.* at 958; *see* United States v. Montelongo, 507 F.2d 639, 641 (5th Cir. 1975)(must have opportunity to develop nature and extent of prior jury service).

23. 569 F.2d 260 (5th Cir. 1978).

24. *Id.* at 263; *cf.* State v. Krohn, 514 P.2d 1359, 1361 (Or. Ct. App. 1973)(can challenge individual juror, not array, for service in companion case).

25. *See* United States v. Jefferson, 569 F.2d 260, 263 (5th Cir. 1978); United States v. Mutchler, 559 F.2d 955, 958 (5th Cir. 1977), *opinion amended*, 566 F.2d 1044 (5th Cir. 1978).

26. 569 F.2d 319, 320 (5th Cir. 1978).

27. *Id.* at 320; *see* United States v. Ragland, 375 F.2d 471, 475 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968).

28. 573 F.2d 356 (5th Cir. 1978).

29. *Id.* at 364. To meet the interim service test it must be shown the juror served at a similar trial or when the same witnesses testified. *See* United States v. Jefferson, 569 F.2d 260, 262 (5th Cir. 1978); United States v. Mutchler, 559 F.2d 955, 960 (5th Cir. 1977), *opinion amended*, 566 F.2d 1044 (5th Cir. 1978).

jury service had not been waived as in *Eldridge* as objections had been made prior to trial.[30] As a result, the Fifth Circuit was presented with the question whether the defendants were entitled to a new trial without a showing of interim service.[31] Its prior decisions relating to interim jury service were held inapplicable due to the lack of any evidence of interim service.[32] The court recognized, however, that not only interim jury service, but also occurrences in everyday life may affect the impartiality of a juror.[33] As a result, the court determined that when a significant lapse of time occurs between the selection of the jury and the commencement of the trial an obligation arises to conduct supplemental *voir dire*.[34] When permissible, therefore, counsel should be allowed additional challenges in order to effectively use the information acquired during the reexamination of the jury.[35] The court emphasized that the obligation to conduct supplemental *voir dire* was limited to those cases in which a significant delay occurs.[36]

In *Price* the Fifth Circuit went beyond prior decisions by adding a new test of supplemental *voir dire* to assure the parties of juror impartiality.[37] The effect of the *Price* decision on obtaining an impartial jury is twofold. First, an independent test of supplemental *voir dire* after a significant delay has been added to the interim jury service test of *Mutchler*.[38] On appeal the appellate court will not only look at whether the trial court permitted challenges for cause for jurors with interim service, but it will also determine whether there was a lapse of time between jury selection and trial that warranted additional *voir dire*, and, if so, whether that supplemental *voir dire* was properly granted.[39] Failure of the trial judge to provide such a reexamination of the jury constitutes reversible error.[40] An

30. United States v. Price, 573 F.2d 356, 365 (5th Cir. 1978).

31. *Id.* at 363.

32. *Id.* at 364.

33. *Id.* at 363-64; *see* State v. Hashimoto, 377 P.2d 728, 733 (Hawaii 1962)(trial publicity); State v. Crane, 100 S.W. 422, 430 (Mo. 1907)(trial publicity); State v. Hottman, 94 S.W. 237, 241 (Mo. 1906)(trial publicity).

34. United States v. Price, 573 F.2d 356, 364 (5th Cir. 1978); *cf.* People v. Wheeler, 100 Cal. Rptr. 198, 211 (Ct. App. 1971)(trial court discretion to permit reexamination); Brown v. People, 238 P.2d 847, 851 (Colo. 1951)(discretion of court); State v. Farley, 290 P.2d 987, 990 (Wash. 1955)(reexamination within discretion of court), *cert. denied*, 352 U.S. 858 (1956).

35. United States v. Price, 573 F.2d 356, 364 (5th Cir. 1978).

36. *Id.* at 365.

37. *Id.* at 365.

38. *Compare* United States v. Price, 573 F.2d 356, 364 (5th Cir. 1978)(applies only when a significant delay occurs) *with* United States v. Mutchler, 559 F.2d 955, 960 (5th Cir. 1977)(applies in all cases when there has been interim jury service), *opinion amended*, 566 F.2d 1044 (5th Cir. 1978).

39. United States v. Price, 573 F.2d 356, 365 (5th Cir. 1978).

40. *See* United States v. Montelongo, 507 F.2d 639, 641 (5th Cir. 1975)(reversible error if defendant not given opportunity to develop nature and extent of prior service); *cf.* United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976)(procedure must give reasonable assurance

additional effect of *Price* is that it allows counsel to question the jurors in an effort to uncover situations justifying application of the *Mutchler* test.[41] Thus, the *Price* decision may serve both an independent function and a complementary function.

Although *Price* gives counsel an additional opportunity to determine whether the jury is impartial, the decision is limited by the requirement that a significant delay occur before the right to supplemental *voir dire* arises.[42] The likelihood of a juror becoming prejudiced naturally increases with time, but a short delay may also prejudice a juror.[43] A juror is more likely to serve on another jury during a significant lapse of time,[44] but events affecting a juror's disposition toward one of the parties or toward the offense may occur in the jurors' personal lives in a much shorter period of time.[45] In one early state case, the right to reexamine jurors was granted after a delay of only two days.[46] By giving the trial court discretion over the determination of significant delay, the Fifth Circuit acknowledged that the time period is necessarily flexible, but implied, by emphasizing "significant," that its holding would not apply to delays of only a few days.[47]

The wide discretion of the trial court in conducting the *voir dire* of the jury is subject to the protection of the defendant's rights.[48] *Price* replaces the trial court's discretion with a duty in regard to the reexamination of jurors after a significant delay;[49] however, the determination of what constitutes a significant delay remains within the discretion of the judge.[50] As during initial *voir dire,* the scope and nature of the questioning at the

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that any prejudice will be discovered); United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972)(procedure must be such that any prejudice would probably be discovered), *cert. denied,* 410 U.S. 970 (1973).

41. *Compare* United States v. Price, 573 F.2d 356, 364 (5th Cir. 1978)(only requirement is significant delay) *with* United States v. Mutchler, 559 F.2d 955, 960 (5th Cir. 1977)(must show interim service with same witnesses or in similar trial), *opinion amended,* 566 F.2d 1044 (5th Cir. 1978).

42. *See* United States v. Price, 573 F.2d 356, 365 (5th Cir. 1978)(must be a significant delay); *cf.* State v. Hashimoto, 377 P.2d 728, 733 (Hawaii 1962)(no time limit).

43. *Compare* United States v. Price, 573 F.2d 356, 364 (5th Cir. 1978)(forty-nine days) *with* State v. Hottman, 94 S.W. 237, 241 (Mo. 1906)(two day delay).

44. *See* United States v. Jefferson, 569 F.2d 260, 261 (5th Cir. 1978)(forty-nine day delay).

45. *See* State v. Crane, 100 S.W. 422, 430 (Mo. 1907)(adverse publicity); State v. Hottman, 94 S.W. 237, 241 (Mo. 1906)(adverse publicity).

46. *See* State v. Hottman, 94 S.W. 237, 241 (Mo. 1906).

47. *See* United States v. Price, 573 F.2d 356, 365 (5th Cir. 1978)(discretion about what constitutes "significant delay"); *cf.* State v. Hashimoto, 377 P.2d 728, 733 (Hawaii 1962)(complete discretion).

48. *See* Dennis v. United States, 339 U.S. 162, 168 (1950); United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976).

49. *See* United States v. Price, 573 F.2d 356, 364 (5th Cir. 1978)(obligation of trial judge); *cf.* State v. Lopez, 406 P.2d 941, 943 (Wash. 1965)(at trial judge's discretion).

50. United States v. Price, 573 F.2d 356, 365 (5th Cir. 1978).

reexamination also remains within the discretion of the trial judge.[51] As a further protection of the rights of defendants, *Price* comes into effect when the Speedy Trial Act leaves off, at the jury selection stage.[52] Like the Speedy Trial Act, which promotes rapid processing of cases to avoid dismissal, *Price* encourages proceeding to trial promptly in order to avoid the supplemental *voir dire* which would take up more time on the already congested court calendar.[53]

The court's decision in *Price* promotes the criminal defendant's right to an impartial jury as guaranteed by the sixth amendment and as implemented through the exercise of peremptory challenges and challenges for cause.[54] Without the additional *voir dire* that is afforded by *Price* the parties would not have all of the information that is needed for effective exercise of challenges.[55] By means of the supplemental *voir dire,* counsel is able to determine if events during the interim have prejudiced a previously impartial juror.[56]

Price is a logical extension of the decisions in *Mutchler* and *Jefferson,* as it continues the effort of the Fifth Circuit to protect a criminal defendant's constitutional right to an impartial jury. The decision raises an important problem, however, that the court did not address. It remains unclear whether delay caused by continuances based on motions by the

51. *See id.* at 365 (holding only adds duty to conduct supplemental *voir dire,* not how it is to be conducted); *cf.* Kreuter v. United States, 376 F.2d 654, 657 (10th Cir. 1967)(method used in *voir dire*), *cert. denied,* 390 U.S. 1015 (1968); Howard v. Swenson, 293 F. Supp. 18, 22 (E.D. Mo. 1967)(extent of *voir dire*), *aff'd,* 404 F.2d 469, 473 (8th Cir. 1968).

52. *See* United States v. Price, 573 F.2d 356, 365 (5th Cir. 1978) (applicable after significant delay between jury selection and trial); 18 U.S.C. § 3161 (Supp. V 1975) (Act applies up to commencement of trial); Black, *The Speedy Trial Act—Justice on the Assembly Line,* 8 ST. MARY'S L.J. 225, 251 (1976) (Act only applies up to time of jury selection).

53. *See generally* Black, *The Speedy Trial Act—Justice on the Assembly Line,* 8 ST. MARY'S L.J. 225 (1976); Clark, *A Commentary on Congestion in the Federal Courts,* 8 ST. MARY'S L.J. 407 (1976); Rubin, *How Can We Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of the Criminal Law,* 70 F.R.D. 176 (1976)(address delivered at the National Conference on the Popular Dissatisfaction with the Administration of Justice).

54. *See* United States v. Price, 573 F.2d 356, 365 (5th Cir. 1978); United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 384, at 43 (1969).

55. *See* Dennis v. United States, 339 U.S. 162, 171-72 (1950)(parties entitled to opportunity to show prejudice of juror); United States v. Mutchler, 559 F.2d 955, 958 (5th Cir. 1977)(prior information useless after interim jury service), *opinion amended,* 566 F.2d 1044 (5th Cir. 1978); United States v. Ledee, 549 F.2d 990, 993 (5th Cir.)(counsel entitled to information needed for peremptory challenges), *cert. denied,* 98 S. Ct. 297 (1977); United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972)(must have reasonable assurance that any bias will be discovered), *cert. denied,* 410 U.S. 970 (1973); Casias v. United States, 315 F.2d 614, 615 (10th Cir.)(per curiam)(must have opportunity to show actual bias), *cert. denied,* 374 U.S. 845 (1963).

56. United States v. Price, 573 F.2d 356, 364 (5th Cir. 1978); *see* Crane v. State, 100 S.W. 422, 430 (Mo. 1907)(adverse publicity in interim); State v. Hottman, 94 S.W. 237, 241 (Mo. 1906)(adverse publicity in interim).