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A Trial Court's Refusal to Question Prospective Jurors about the Specific Contents of Pretrial Publicity Which They Had Read or Heard Did Not Violate a Defendant's Sixth Amendment Right to an Impartial Jury, or Fourteenth Amendment Right to Due Process.

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CONSTITUTIONAL LAW—Voir Dire—A Trial Court's Refusal to Question Prospective Jurors About the Specific Contents of Pretrial Publicity Which They Had Read or Heard Did Not Violate a Defendant's Sixth Amendment Right to an Impartial Jury, or Fourteenth Amendment Right to Due Process.

Mu'Min v. Virginia, 500 U.S. __, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991).

Dawud Majid Mu'Min escaped from a prison work detail[1] and went to a nearby shopping center where he murdered a store owner.[2] Substantial publicity preceded his trial, and on voir dire, eight of twelve venirepersons said they had been exposed to news reports about the case.[3] Despite the defendant's objection, the trial judge denied individual voir dire and refused to ask the venire specific questions regarding the contents of what they read or heard about the case.[4] However, all of the jurors collectively swore they could be impartial.[5] After the trial court found Mu'Min guilty of capital murder,[6] he appealed claiming that the judge's preclusion of proposed voir

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1. Mu'Min v. Virginia, 500 U.S. __, __, 111 S. Ct. 1899, 1901, 114 L. Ed. 2d 493, 501 (1991). Mu'Min was an inmate at the Haymarket Correctional Unit in Virginia serving a sentence of forty-eight years for first degree murder. He was assigned to the Virginia Department of Transportation (VDOT) on work detail supervised by an employee of VDOT. *Id.*

2. *Id.* After stepping over a small perimeter fence Mu'Min walked about a mile to a retail carpet store, where he asked the store owner about prices of oriental carpets. According to Mu'Min, they argued about prices and the store owner called him "nigger," spit in his face, and kicked him in the genitals. Mu'Min v. Virginia, 389 S.E.2d 886, 890 (Va. 1990), *aff'd*, 500 U.S __, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991).

3. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1902-03, 114 L. Ed. 2d at 502-03. Over forty-seven newspaper articles were submitted to the trial court in support of a motion for a change of venue. These articles included discussions of Mu'Min's alleged confession of murder, his rejection for parole six times, and alleged prison infractions. *Id.* at __, 111 S. Ct. at 1901, 114 L. Ed. 2d at 501.

4. *Id.* at __, 111 S. Ct. at 1902-03, 114 L. Ed. 2d at 502-03 (1991). *See* FED. R. CRIM. P. 24(a) (voir dire to be conducted as trial court "deems proper").

5. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1903, 114 L. Ed. 2d at 503. Potential jurors were asked specific questions as to their ability to remain impartial and the judge removed four venirepersons for cause. *Id.*

6. *Id.* At the time, the Virginia Code § 18.2-31 defined Capital murder, punishable as a class one felony, as:

> (c) The willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in 53.1-1, or while in the custody of an employee thereof;

dire questions entitled him to a new trial.[7] The Virginia Supreme Court affirmed the conviction and ruled that the accused did not have a constitutional right to ask the venire about the specific content of pretrial publicity to which they have been exposed, but did have a constitutional right to know whether a juror can remain impartial.[8] Mu'Min then petitioned for certiorari to the United States Supreme Court.[9] Held—*affirmed*. A trial court's refusal to question prospective jurors about the specific contents of pretrial publicity which they had read or heard did not violate a defendant's Sixth Amendment right to an impartial jury, or Fourteenth Amendment right to due process.[10]

The concern about protecting jurors from pretrial publicity emanates from the basic premise that the accused has a right to a fair trial, which is guaranteed by the Constitution.[11] The Sixth Amendment provides that in criminal prosecutions an accused has the right to an impartial jury.[12] The concept

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(d) The willful, deliberate and premeditated killing of any person in the commission of a robbery while armed with a deadly weapon.

VA. CODE ANN. § 18.2-31 (Michie 1988). Mu'Min was sentenced to death for repeatedly stabbing the store owner with a sharp instrument he made at the VDOT shop, robbing, and disrobing her. *Mu'Min*, 389 S.E.2d at 889-90.

7. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1903, 114 L. Ed. 2d at 503. Mu'Min did not renew a previous motion for a change of venue nor had he previously objected to the composition of the jury. *Id.* Mu'Min relied on the Code of Virginia, section 8.01-358. *Mu'Min*, 389 S.E.2d at 892 n.5. The code provides:

> The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has an interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case. A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.

VA. CODE ANN. § 8.01-358 (Michie 1984).

8. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1903, 114 L. Ed. 2d at 503.

9. *Id.*

10. *Id.* at __, 111 S. Ct. at 1908, 114 L. Ed. 2d at 509-10.

11. *See* U.S. CONST. amend. VI (protects right to fair trial by impartial jury); U.S. CONST. amend. XIV, § 1 (protecting defendant's right to due process); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (defendant has right to impartial jury); Harris v. Pulley, 885 F.2d 1354, 1361 (9th Cir. 1988) (Due Process Clause of Fourteenth amendment safeguards accused's Sixth Amendment right to impartial jury); United States v. Burr, 25 F. Cas. 1, 50-52 (C.C.D. Va. 1807) (No. 14,692g) (defendant entitled to impartial jury); *see also* Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas Corpus Proceedings*, Patton v. Yount, 1985 S. ILL. U. L.J. 565, 567 (standard for determining impartiality established by Chief Justice Marshall in Aaron Burr's trial).

12. U.S. CONST. amend. VI. The Sixth Amendment provides:

that an individual has a fundamental right to a fair trial before an impartial jury was firmly rooted in English common law and adopted by the first Supreme Court of the United States.[13] The Due Process Clause of the Fourteenth Amendment guarantees that no person be deprived of "[l]ife, liberty, or property, without due process of law."[14] Even though the United States

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defence.

Id.; *see, e.g.*, Ross v. Oklahoma, 487 U.S. 81, 85 (1988) (well settled that accused entitled to impartial jury under Sixth and Fourteenth Amendments); *Irvin*, 366 U.S. at 722 (even defendant charged with heinous crime has right to impartial jury); *Harris*, 885 F.2d at 1361 (accused's Sixth Amendment right to impartial jury protected by Due Process Clause of Fourteenth amendment); *see also* James G. Bonebrake, Note, *Sixth and Fourteenth Amendments—The Lost Role of the Peremptory Challenge in Securing an Accused's Right to an Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 899, 900 (1988) (defendant's Sixth Amendment rights unnecessarily jeopardized by decision in *Ross*). Justice Marshall dissented in *Ross* saying the Court was "condoning a scheme" to deprive defendant of Sixth Amendment right to an impartial jury. *Ross*, 487 U.S. at 92 (Marshall, J., dissenting); *see also* Karen T. Grisez, Note, Ross v. Oklahoma: *A Reversal of the Reversible-Error Standard in Death-Qualification Cases*, 38 CATH. U. L. REV. 881, 883 (1989) (peremptory challenges developed to secure Sixth Amendment guarantees).

13. *Irvin*, 366 U.S. at 722; *see* Spies v. People, 123 U.S. 131, 167-68 (1888) (trial by impartial jury fundamental right); Reynolds v. United States, 98 U.S. 145, 156 (1878) (juror who has formed strong opinion may bias trial); *see also* Samuel Rosenthal & Michelle Rice, *Whittling Away the Right to Counsel: The Supreme Court's New Approach to the Sixth Amendment*, 3 CRIM. JUST. 2, 3 (1989) (Court's definition of right to impartial jury narrowly defined). *See generally* FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 28-29 (1968) (Sixth Amendment mechanism for procedural safeguards).

14. U.S. CONST. amend. XIV, § 1. Section one which constitutes the Due Process Clause of the Fourteenth Amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.; *see* Rosales-Lopez v. United States, 451 U.S. 182 189 (1981) (where accused and victim members of different races, inquiry as to racial prejudice may be required by Constitution); Aldridge v. United States, 283 U.S. 308, 315 (1931) (reversible error for court not to ask about racial bias); Connors v. United States, 158 U.S. 408, 413 (1895) (inquiry permissible to determine if juror holds opinion or prejudice); *see also* Stanton D. Krauss, Comment, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 618 (1989) (constitutional limitations on practice of death-qualification determination in jury selection); Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 175-76 (1990) (fair trial requires jurors be free of outside influences).

Supreme Court has ruled that the limited incorporation of the Sixth Amendment through the Fourteenth Amendment does not require states to employ juries in criminal proceedings, every state has provided for them in felony trials.[15] Historically, the Court has applied the Fourteenth Amendment's Due Process Clause and the Sixth Amendment simultaneously to achieve the definition of "impartial jury."[16]

To protect the defendant's right to an impartial jury, the trial court conducts voir dire examination by questioning prospective jurors.[17] Trial judges have traditionally been afforded broad discretion in conducting voir dire because of the subjective nature of jury selection.[18] Although trial judges in both state and federal courts have broad discretion to choose the method of

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15. *Irvin*, 366 U.S. at 721; *see* Fay v. New York, 332 U.S. 261, 266 (1947) (state's use of jury trials not demanded by Fourteenth Amendment); Palko v. Connecticut, 302 U.S. 319, 324 (1937) (jury trials not required in state's criminal procedure); *see also* COLUMBIA UNIVERSITY LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 578-579 (1959) (states universally adopted right to trial by jury); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1326-32 (1982) (states' bills of rights mirror Constitution).

16. *See, e.g.*, *Ross*, 487 U.S. at 85 (Sixth and Fourteenth Amendments guarantee defendant facing death penalty right to impartial jury); *Harris*, 885 F.2d at 1361 (standards which govern change of venue derive from Due Process Clause which safeguards defendant's Sixth Amendment right); Bailey v. Delaware, 490 A.2d 158, 162 (Del. 1984) (Sixth and Fourteenth Amendments provide for impartial jury); *see also* Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas Corpus Proceedings*, Patton v. Yount, 1985 S. ILL. U. L.J. 565, 570 (Sixth Amendment not *per se* applicable to states, so accused contends trial court violated Fourteenth Amendment right to due process). *But see* Buxton S. Copeland, Note, *Criminal Procedure—Motion for a Change of Venue—In Search of a Guiding Light*—State v. Jerrett, 7 CAMPBELL L. REV. 73, 74 (1984) (denial of motion infringed upon defendant's Sixth Amendment Rights).

17. *See* Patton v. Yount, 467 U.S. 1025, 1038 n.13 (1984) (voir dire long recognized as effective method to root out bias when conducted in careful and thorough manner); *Rosales-Lopez*, 451 U.S. at 188 (adequate voir dire serves to discover juror bias and provides counsel with tool for intelligent use of peremptory challenges); Dennis v. United States, 339 U.S. 162, 171-72 (1950) (right to impartial jury guaranteed by voir dire because defendant may expose prospective juror's bias); *see also* Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 173 (1988) (voir dire preferred way to judge effect of pretrial publicity on community); Rodney L. LaGrone et al., Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1988-1989*, 78 GEO. L.J. 699, 1116 (1990) (voir dire secures right to impartial jury).

18. *See Patton*, 467 U.S. at 1038 (good reasons to apply presumption of correctness to trial court's decision); Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 503-511 (1984) (court's resolution entitled special deference); *Reynolds*, 98 U.S. at 156 (trial court decision should not be put aside unless manifest error shown). *See generally*, 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 22.2 at 763 n.5 (1984) (notion that administration of justice is in community's hands based on premise that jurors strive for fairness); John A. Burgess, Note, *The Efficacy of a Change of Venue in Protecting a Defendant's*

jury selection,[19] the responsibility of impaneling unbiased jurors falls primarily on the judge, who decides what questions may be asked on voir dire.[20] The judge then weighs the jurors' answers and the total demeanor of the venirepersons to evaluate impartiality.[21]

Pretrial publicity presents a challenge to a trial judge who must balance the interest of the state in trying the case in the county of the alleged crime, and the right of the accused to an unbiased jury.[22] Protecting the right to an

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Right to an Impartial Jury, 42 NOTRE DAME L. REV. 925, 941-42 (1967) (courts not inclined to use change of venue to solve prejudicial publicity problems).

19. *See Patton*, 467 U.S. at 1038 (demeanor plays important role in judge's evaluating jurors); *cf.* Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968) (content questioning required); Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 730 n.5 (1985) (same standards for federal trials as for state trials); Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas Corpus Proceedings*, Patton v. Yount, 1985 S. ILL. U. L.J. 565, 579-80 (latitude given trial court grants judge almost unlimited discretion).

20. *See Rosales-Lopez*, 451 U.S. at 195 (Rehnquist, J., concurring) (would allow trial judge to determine method of voir dire on case by case basis instead of adopting rule); Ristaino v. Ross, 424 U.S. 589, 594 (1976) (Constitution does not entitle accused to have specific questions posed during voir dire); *cf.* Turner v. Murray, 476 U.S. 28, 36-37 (1986) (court retained discretionary authority over method of questioning even though required to ask racial bias questions). *See generaly* Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 182 (1988) (methodology for determining impartiality not chained to artificial formula but left to trial judge's discretion); Rodney L. LaGrone et al., Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1988-1989*, 78 GEO. L.J. 699, 1116 (1990) (trial court may choose most effective method to conduct voir dire).

21. *See* United States v. Taylor, 487 U.S. 326, 337 (1988) (trial court's judgment not to be lightly disturbed); Geders v. United States, 425 U.S. 80, 86-87 (1976) (judge not just moderator, but governor of trial responsible for assuring proper conduct); Montana v. Link, 640 P.2d 366, 368 (Mont. 1981) (trial judge allowed discretion to conduct voir dire in appropriate manner); Rodney L. LaGrone et al., *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1988-1989*, 78 GEO. L.J. 699, 1116-17 (1990) (trial judge determines what questions asked and may examine individually or as group); Michael J. Whellan, Note, *What's Happened to Due Process among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 188-89 (1990) (format of voir dire important because jurors questioned as a group are less likely to disclose their prejudice).

22. *See* Fisher v. Mississippi, 481 So.2d 203, 216 (Miss. 1985) (interest state may have may be legitimate, but subordinate to defendant's right to fair trial); *In Re* Brown, 478 So.2d 1033, 1037 (Miss. 1985) (state's pragmatic interests sacrificed for accused's fundamental rights); *see also* 28 U.S.C. § 1866(c)(2) (1988) (court may use discretion to exclude prospective juror for inability to be impartial); Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 184 (1988) (subtle issue is question of how judge determines if juror biased); *cf.* David Suggs & Bruce D. Sales, *Juror Self Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 271 (1981) (voir dire practices not conducive to juror self-disclosure).

impartial jury through voir dire has become problematic because of the recent advent of rapid and comprehensive news coverage and public interest in criminal cases.[23] Constitutional protection of the right to an impartial jury does not require that jury members know nothing about the case, only that they be able to judge the case impartially.[24]

Since a federal court will intervene in a state court's proceeding only when a defendant demonstrates deprivation of a constitutional guarantee, analysis of pretrial publicity and the jury begins with standards defined by the United States Supreme Court.[25] The standards which guide state judges in voir dire questioning remain in flux because the Supreme Court has refused to apply Sixth or Fourteenth Amendment analysis to this issue.[26] The Court instead

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23. *See* Chandler v. Florida, 449 U.S. 560, 574 (1981) (highly publicized trial poses risk of compromised right to fair trial); Colorado v. McCrary, 549 P.2d 1320, 1325 (Colo. 1976) (public interest keen in criminal cases so that qualified jurors likely to know about case); Ford v. Nevada, 717 P.2d. 27, 30 (Nev. 1986) (jurors will know high profile criminals because of "realities of our age"); *see also* Hans Ziesel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury & Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 528-29 (1978) (experiment suggests voir dire not sufficient to identify prejudiced jurors); Michael J. Whellan, Note, *What's Happened to Due Process among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 176 (1990) (rapid dissemination of criminal trial news coverage problematic to seating unbiased jurors).

24. *See Ross*, 487 U.S. at 85 (claim that jury not impartial must focus on seated jurors); *Irvin*, 366 U.S. at 722 (not required that jurors be totally ignorant of case); United States v. Glaze, 866 F.2d 253, 254 (8th Cir. 1989) (ongoing publicity not sufficient to claim impartial jury unless jurors shown to be impartial). *See generally* Ralph Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 JUDICATURE 162, 162 (1988) (disqualification of upstanding citizens because they read or heard about case would leave ignorant to serve); James G. Bonebrake, Note, *Sixth & Fourteenth Amendments—The Lost Role of The Peremptory Challenge in Securing an Accused's Right to an Impartial Jury*, 79 J. CRIM L. & CRIMINOLOGY 899, 903 (1988) (loss of peremptory challenge did not violate Sixth Amendment right).

25. *Irvin*, 366 U.S. at 721; *see Fay*, 332 U.S. at 266 (state's use of jury trials not demanded by Fourteenth Amendment); *Palko*, 302 U.S. at 324 (jury trials not required in state's criminal procedure); *cf.* Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas Corpus Proceedings*, Patton v. Yount, 1985 S. ILL. U. L.J. 565, 570 (Sixth Amendment not per se applicable to states); Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 175 (1990) (courts and commentators disagree on Sixth and Fourteenth Amendments' application to state proceedings); .

26. *See* Crawford v. Georgia, 489 U.S. 1040, 1041 (1989) (Marshall, J., dissenting) (standard of review so hard to satisfy it violates any notion of due process); Brecheen v. Oklahoma, 485 U.S. 909, 911-12 (1988) (Marshall, J., dissenting) (noting that states have diverged in wake of Supreme Court vacuum); Murphy v. Florida, 421 U.S. 794, 804 (1975) (Burger, C.J., concurring) (conviction stands because circumstances at trial do not rise to due process violation); *see also* Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas*

has ruled that the accused is simply entitled to a fair trial, and unless the trial court's failure to ask specific questions renders the trial fundamentally unfair, such questions are not constitutionally required.[27] Although the Supreme Court has been more sensitive to the constitutional issue of voir dire questioning where race is a factor, it has offered few specific guidelines.[28]

The lack of standards promulgated by the Supreme Court has caused a split in the lower courts as to minimum requirements for change of venue where pretrial publicity may threaten guarantees derived from the Due Process Clause and Sixth Amendment.[29] Some jurisdictions apply the "inherent

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Corpus Proceedings, Patton v. Yount, 1985 S. ILL. U. L.J. 565, 573 (fair trial standard tends to presume correctness of state trial court's decision); Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 178 (1990) (courts argue whether the Sixth or Fourteenth Amendment allows change of venue, but merely employ "fair trial" standard).

27. *See Rosales-Lopez*, 451 U.S. at 189 (trial judge must use discretion in questioning jurors); *cf. Aldridge*, 283 U.S. at 311 (reversible error for court not to ask question that covered racial bias subject); *Connors*, 158 U.S. at 413 (suitable inquiry permissible at trial judges' discretion). *See generally* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 57-58 (1986) (local jurors know local norms of conduct conducive to fair trial); Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas Corpus Proceedings*, Patton v. Yount, 1985 S. ILL. U. L.J. 565, 570 (manifest error only standard to set aside judge's ruling).

28. *See Rosales-Lopez*, 451 U.S. at 189 (where defendant and victim are different races inquiry about racial prejudice required); *Ristaino*, 424 U.S. at 594 (Constitution does not require racial inquiry in every case involving black defendant); Ham v. South Carolina, 409 U.S. 524, 527 (1973) (risk of prejudice against black defendant charged with killing white victim great enough that Due Process Clause requires racial prejudice inquiry); *cf. Aldridge*, 283 U.S. at 311 (reversible error not to ask racial bias question because trial court failed to "cover the subject"); Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 171, 176 (1988) (decision to grant change of venue dependent on facts of specific case); Rodney L. LaGrone et al., Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1988-1989*, 78 GEO. L.J. 699, 1116 (1990) (voir dire examination required to discover potential bias).

29. *See* Gray v. Mississippi, 481 U.S. 648, 660-61 (1987) (inquiry should be whether jury composition affected as a whole). *But see* Ross v. Oklahoma, 487 U.S. 81, 86 (1988) (Court retreats from *Gray* analysis); Swain v. Alabama, 380 U.S. 202, 219 (1965) (right to challenge only impaired if defendant does not receive what state law provides). *Compare* United States v. Vest, 842 F.2d 1319, 1332-33 (1st Cir. 1988) (mixed collective and individual voir dire no abuse of discretion where publicity not widespread and jurors not reluctant to admit knowledge of case) *and* United States v. De Peri, 778 F.2d 963, 971-72 (3d Cir. 1985) (no error because exhaustive voir dire adequate to overcome extensive inflammatory pretrial publicity) *with* Jordan v. Lippman, 763 F.2d 1265, 1279-81 (11th Cir. 1985) (individual voir dire required where newspapers carried sensational reports) *and* United States v. Davis, 583 F.2d 190, 196 (5th Cir. 1978) (individual voir dire required where coverage inflammatory and emphasized racial overtones). *See generally* Rodney L. LaGrone et al., Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1988-1989*, 78

prejudice," or "actual prejudice" standard which requires the defendant to show that a fair trial is virtually impossible or that seated jurors were unable to remain impartial.[30] Trial judges will grant very few motions for a change in venue by application of this standard and appeals courts remain reticent to overrule them.[31] The presumption in the state courts is that the judge is in the best position to impanel an impartial jury.[32] Therefore, unless the defendant can prove that pretrial publicity was inherently prejudicial, that is,

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GEO. L.J. 699, 1116-17 (1990) (trial court has broad discretion to determine best method of conducting voir dire); Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas Corpus Proceedings*, Patton v. Yount, 1985 S. ILL. U. L.J. 565, 573 (convictions under state proceedings must meet higher burden of proof than federal appeals because defendant must show actual prejudice by jury or that trial setting "inherently prejudicial").

30. *See* Murphy v. Florida, 421 U.S. 794, 803 (1975) (defendant must show that trial setting "inherently prejudicial" or that jury-selection process permits inference of actual prejudice); Marsden v. Moore, 847 F.2d 1536, 1542 (11th Cir. 1988) (prejudicial publicity analyzed under two standards, "presumed prejudice" and "actual prejudice"); Connecticut v. Townsend, 558 A.2d 669, 674-75 (Conn. 1989) (defendant must generally prove actual juror prejudice except in "extreme circumstances" where inherent prejudicial publicity requires presumed prejudice); Constance M. Jones, Comment, *Appellate Review of Criminal Change of Venue Rulings: The Demise of California's Reasonable Likelihood Standard*, 71 CAL. L. REV. 703, 704 (1983) (prejudicial publicity analyzed under different standards, "presumed prejudice" and "actual prejudice"); Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 179 (1990) (defendant in habeas corpus proceeding may show state denied change of venue because pretrial publicity created "actual prejudice" or "inherent prejudice").

31. *See* Arizona v. Befford, 754 P.2d 1141, 1143 (Ariz. 1988) (change of venue granted only in "unusual circumstances"); New Jersey v. Gary, 550 A.2d 1259, 1265 (N.J. Super. Ct. App. Div. 1988) (appeals for claim of prejudicial voir dire "rare indeed"); State v. Thompson, 292 S.E.2d 581, 585 (S.C.) (only "extraordinary circumstances" would cause ruling for motion to change venue because of pretrial publicity), *cert. denied*, 456 U.S. 938 (1982); J. Skelly Wright, *Fair Trial—Free Press*, 38 F.R.D. 435, 435-437 (1966) (Sixth Amendment rights violated in very few cases so dismissal of those few cases necessary to administer justice); Constance M. Jones, Comment, *Appellate Review of Criminal Change of Venue Rulings: The Demise of California's Reasonable Likelihood Standard*, 71 CAL. L. REV. 703, 705 (1983) (court limits trial judges to actual prejudice standard unless public sentiment so inflamed as to make fair trial "impossible").

32. *See* Turner v. Murray, 476 U.S. 28, 36-37 (1986) (court retains discretion over method of questioning); Rosales-Lopez v. United States, 451 U.S. 182, 195 (1981) (Rehnquist, J., concurring) (trial judge should determine questioning on case by case basis); Cummings v. Dugger, 862 F.2d 1504, 1508 (11th Cir. 1989) (no abuse of discretion to screen jurors individually before group questioning); *see also* MARC A. FRANKLIN, THE FIRST AMENDMENT AND THE FOURTH ESTATE 185 (1977) (jurors who may have learned inadmissible evidence outside courtroom may present problem of prejudicial bias); Alice M. Padawer-Singer & Allen H. Barton, *The Impact of Pretrial Publicity on Juror's Verdicts*, in THE JURY SYSTEM IN AMERICA—A CRITICAL OVERVIEW 125, 135 (Rita J. Simon ed., 1975) (jurors exposed to inadmissible evidence outside courtroom found defendant guilty in eighty percent of cases).

so inflammatory as to preclude an impartial jury, deference is shown to the trial judge's decision.[33] While trial courts rarely find inherent prejudice,[34] the subjective nature of this test is apparent from the variety of language used among the jurisdictions.[35]

Other jurisdictions use the "reasonable likelihood" standard, which the

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33. *Compare Rosales-Lopez*, 451 U.S. at 192-94 (Constitution does not require inquiry into racial bias by state court, but federal court must allow if basis for prejudice present) *and* United States v. Casey, 835 F.2d 148, 152 (7th Cir. 1987) (no abuse of discretion where judge refused individual voir dire when no climate of racial tension) *with* Davis v. Florida, 473 U.S. 913, 914 (1985) (Marshall, J., dissenting in mem. opinion to denial of cert.) (Court should address whether, and on what grounds individual voir dire required) *and* United States v. Rucker, 557 F.2d 1046, 1047 (4th Cir. 1977) (trial court erred in refusing to question jurors individually on capacity). *See generally* John E. Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 WM. & MARY L. REV. 1, 68 (1971) (no "mathematical formula" for trial judges because Court sees danger in "hard and fast" rules concerning defendant's Fourteenth Amendment rights in state court); Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 178 (1990) (confusion surrounding motions for change of venue stems from broad, indeterminate language of Fourteenth Amendment which encourages judges' imprecise discretion).

34. *See* Estes v. Texas, 381 U.S. 532, 565 (1965) (prejudice found even though some television cameras present in court); Turner v. Louisiana, 379 U.S. 466, 473 (1964) (prejudice found where deputies drove jurors to lodgings even though did not discuss trial); Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (Court refused to even look at voir dire record before ruling prejudice where video from jail broadcast in community); Irvin v. Dowd, 366 U.S. 717, 725 (1961) (wave of public passion caused presumption of prejudice). The "presumed prejudice" language is still used and upheld by the Court. *See* Coleman v. Kemp, 778 F.2d 1487, 1489-91 (11th Cir. 1985) (prejudice presumed where defendant made proper showing that pretrial publicity justified presumption), *cert. denied*, 476 U.S. 1164 (1986); *see also* MARC A. FRANKLIN, THE FIRST AMENDMENT AND THE FOURTH ESTATE 185 (1977) (prejudice presumed where jurors learn evidence outside courtroom); Alice M. Padawer-Singer & Allen H. Barton, *The Impact of Pretrial Publicity on Juror's Verdicts*, in THE JURY SYSTEM IN AMERICA—A CRITICAL OVERVIEW 135 (Rita J. Simon ed., 1975) (courts rarely find inherent prejudice despite fact that test results suggest that most jurors exposed to pretrial publicity found defendant guilty).

35. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (judge may sequester jury to remedy prejudice); Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980) (presumed prejudice rarely applicable unless extremely inflammatory publicity saturates community) *cert. denied*, 481 U.S. 913 (1981); Arizona v. Smith, 774 P.2d 811, 816 (Ariz. 1989) (inherent prejudice standard applies only where pretrial publicity creates "carnival atmosphere" of *Sheppard* and defendant "probably" deprived of fair trial); Pennsylvania v. Romeri, 470 A.2d 498, 501 n.1 (Pa. 1983) (inherent prejudice vague concept depending on effect of publicity in community), *cert. denied*, 466 U.S. 942 (1984). Commentators as well as judges find these standards problematic. *Compare* Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 183 (1990) (*Patton v. Yount* reinforced idea that as long as jurors can "lay aside" their bias trial should proceed) *with* Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas Corpus Proceedings*, Patton v. Yount, 1985 S. ILL. U. L.J. 565, 577-78

Supreme Court developed primarily in the sixties, to find inherent prejudice.[36] Using this more liberal standard, the defendant does not have to prove from voir dire records that seated jurors were biased, or that the trial setting was so inflammatory as to render a fair trial impossible.[37] Instead, the trial court will look to the totality of circumstances to determine if pretrial publicity has prejudiced the jury.[38] The reasoning behind the standard is that jurors who say they can remain impartial may consciously or subconsciously draw upon all of their life experience, including prejudicial bias, when deciding the case.[39] There is a broad range of application of the "rea-

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(Court applied "manifest error" standard to question as to entire jury's impartiality but applied "fair support" standard to impartiality question regarding two individual jurors).

36. *See Sheppard*, 384 U.S. at 363 ("reasonable likelihood" standard first mentioned); *In Re* Application of Dow Jones & Co., 842 F.2d. 603, 610-12 (2d Cir. 1988) (reasonable likelihood of prejudice permitted use of gag order when no effective alternatives found). *But see Murphy*, 421 U.S. at 802 (Court used "totality of circumstances" language instead of "reasonable likelihood" language). Although commentators disagree as to the effect of the *Murphy* decision, the "reasonable likelihood" language is still used in many jurisdictions. *See* Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 182 (1990) (*Murphy* abandoned "reasonable likelihood" standard and Court missed opportunity to further develop or establish new standard). *But see* Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 179 (1988) (A.B.A. Standard 8-3.3(b) (2d ed. 1978)) requires that judge grant change of venue request when "substantial likelihood" accused did not receive fair trial); Constance M. Jones, Comment, *Appellate Review of Criminal Change of Venue Rulings: The Demise of California's Reasonable Likelihood Standard*, 71 CAL. L. REV. 703, 711 (1983) (standard of proof defendant should meet is "reasonable likelihood" that pretrial publicity prejudiced proceedings).

37. *See Murphy*, 421 U.S. at 802 (court may ignore juror's claims of impartiality and draw inference of prejudice); *Irvin*, 366 U.S. at 728 (court may infer prejudice when many jurors admit prejudice); *see also* 28 U.S.C. § 1866(c)(2) (1982) (court may excuse prospective juror for failure to render impartial service).

38. *See Murphy*, 421 U.S. at 803 (inference of actual prejudice permitted if trial setting inherently prejudicial); *Sheppard*, 384 U.S. at 363 (Court found inherent prejudice using "reasonable likelihood" standard); New Jersey v. Williams, 459 A.2d 641, 652 (N.J. 1983) (constitutional requirement for jury to be "free of outside influences"); *see also* AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 22 (1968) (judge must grant change of venue if "substantial likelihood" jury decision influenced by media coverage); Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 170 (1988) (traditional standard for determining motions for change of venue is "actual prejudice" or "reasonable likelihood" of prejudice).

39. *See Murphy*, 421 U.S. at 802 (even if jurors say they can be impartial, court may ignore these "indicia of impartiality"); *Irvin*, 366 U.S. at, 728 (where many jurors admit prejudice, jurors statement of impartiality must be given "little weight"); *Romeri*, 470 A.2d at 503 (publicity saturating community may cause unfair trial despite juror's good intentions to set aside what they read or heard); *see also* Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 508-10 (1965) (experiment suggesting jurors unwilling to portray themselves as unfair or biased); Herald P. Fahringer, *In the Valley of the Blind: A*

sonable likelihood" test, which leaves states free to adopt any standard more liberal than the "inherent prejudice" standard.[40] Procedures requiring content questioning of jurors exposed to pretrial publicity are promulgated more frequently in jurisdictions using a "reasonable likelihood" standard.[41]

The Supreme Court addressed the issue of whether trial courts must ask jurors exposed to pretrial publicity content questions as to what they read or heard in *Mu'Min v. Virginia*.[42] The Court held in *Mu'Min* that a trial court's refusal to question prospective jurors about the specific contents of pretrial publicity which they had read or heard did not violate a defendant's right to due process under the Fourteenth Amendment or Sixth Amendment right to an impartial jury.[43] Justice Rehnquist, writing for the majority, ruled that the Due Process Clause does not reach as far as requiring specific questioning on voir dire and ruled that the trial court acted in compliance with the Fourteenth Amendment.[44] The Court concluded that a trial court's findings of juror impartiality may not be overturned except for "manifest error" that rendered the trial "fundamentally unfair."[45]

Primer on Jury Selection in a Criminal Case, 43 LAW & CONTEMP. PROBS. 116, 117 (1980) (jurors reluctant to disclose bias).

40. Commonwealth v. Kendrick, 535 N.E.2d 217, 220 (Mass. 1989) (change of venue not required because no substantial risk of extraneous influences existed); Lutes v. Mississippi, 517 So.2d 541, 545 (Miss. 1987) (reasonably likely that publicity prejudiced trial); New Jersey v. Biegenwald, 524 A.2d 130, 142 (N.J. 1987) (realistic likelihood that trial prejudiced by publicity); *see also* Peter G. Guthrie, Annotation, *Pretrial Publicity in Criminal Case as Ground for Change of Venue*, 33 A.L.R. 3d 17, 38-39 (1970) (list of cases decided on "reasonable likelihood" standard). California adopted the "reasonable likelihood" standard in *Maine v. Superior Court* and encouraged other courts to do likewise. *See* Maine v. Superior Court, 438 P.2d 372, 377 (Cal. 1968) (delineating more specific standards of reasonableness appropriate). For a discussion of *Maine*, see Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 186 (1990) (reasonable likelihood rule protects defendant from hidden bias).

41. *See Davis*, 583 F.2d at 196-98 (cursory questioning insufficient where nature of publicity raised significant possibility of prejudice); United States v. Colabella, 448 F.2d 1299, 1303 (9th Cir. 1971) (sequestered voir dire recommended where prejudicial pretrial publicity); Louisiana v. Goodson, 412 So.2d 1077, 1081 (La. 1982) (content questioning as method for screening juror bias); *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 87 F.R.D. 519, 532-33 (1980) (individual voir dire including content questioning required where "substantial likelihood" publicity prejudiced trial).

42. Mu'Min v. Virginia, 500 U.S. __, __, 111 S. Ct 1899, 1903, 114 L. Ed. 2d 493, 501 (1991).

43. *Id.* at __, 111 S. Ct. at 1908, 114 L. Ed. 2d at 510.

44. *See id.* at __, 111 S. Ct. at 1903, 114 L. Ed. 2d at 503 (inquiry left to trial court's "sound discretion"). The Court stated that a defendant has no constitutional right to explore the content of information acquired by jurors because much discretion is afforded trial judges who have the responsibility of impaneling impartial juries. *Id.*

45. *See id.* at __, 111 S. Ct. at 1905, 1907-08, 114 L. Ed. 2d at 506, 508-10 (Due Process

The majority reached its narrow interpretation of the Fourteenth Amendment by ruling that the trial court was not faced with such a "wave of public passion" as to require more extensive juror examination under the Due Process Clause.[46] The Court distinguished prior case law[47] by stating that Mu'Min's trial was not confronted with a "wave of public passion" which would raise the presumption that jurors could not remain impartial despite their statements to the contrary.[48] Justice Rehnquist stated that content questions concerning racial bias may sometimes be required to "cover the subject" during voir dire, but said "we were careful not to specify the particulars" of such questioning.[49] The opinion mentioned that group questioning about publicity might be harmful to the defendant, because the jurors would be exposed to publicity to which they might not otherwise have been exposed.[50] Because publicity would be communicated to the other panel members, the Court noted that individual questioning would be required, but concluded only that content questioning was not constitutionally required.[51] The opinion rejected the American Bar Association's guideline which requires content questioning where there is a "substantial possibility" jurors will be biased by pretrial publicity.[52]

The Court recognized that voir dire serves two purposes: to provide an

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Clause does not reach as far as to require individual voir dire by trial court). The Court distinguished other cases in which specific individual questioning was required and rejected the A.B.A. "substantial possibility" standard. *Id.* at __, 111 S. Ct. at 1907-08, 114 L. Ed. 2d at 508-09.

46. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1907, 114 L. Ed. 2d at 508 (even though eight of twelve jurors knew about the case, they claimed collectively to be impartial).

47. *See id.* at __, 111 S. Ct. at 1906, 114 L. Ed. 2d at 506 (distinguishing Irvin v. Dowd, 366 U.S. 717, 725 (1961) where build-up of prejudice was clear and convincing).

48. *See id.* at __, 111 S. Ct. at 1907, 114 L. Ed. 2d at 507-08 (recognizing pretrial publicity can be so inflammatory as to require questioning, but instant case in Washington, D.C., where murders commonplace).

49. *See id.* at __, 111 S. Ct. at 1905, 114 L. Ed. 2d at 505 (noting "commonsense appeal" to argument that content questions help in peremptory challenges, but that does not make it required by Constitution). The Court implied that an individual voir dire requirement would be burdensome to courts and that requiring the content questioning to groups of jurors might "do more harm than good." *See id.* at __, 111 S. Ct. at 1904-05, 114 L. Ed. 2d at 505 (accepting petitioner's claim would require individual voir dire).

50. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1905, 114 L. Ed. 2d at 505 (individual questioning of jurors required to avoid transmission of pretrial publicity descriptions to group).

51. *See id.* (accepting petitioner's claim would require individual interrogation of each potential juror).

52. *Id.* at __, 111 S. Ct. at 1907-08, 114 L. Ed. 2d at 509. Justice O'Connor wrote a concurring opinion in *Mu'Min*, which did not vary substantially from the analysis of the majority. *Id.* at __, 111 S. Ct. at 1908, 114 L. Ed. 2d at 510 (O'Connor, J., concurring). It may be significant from the standpoint that her opinion mentioned the Sixth Amendment rather than the Fourteenth, which the majority stressed in the conclusion. *Id.* (O'Connor, J., concurring) (court did not violate defendant's Sixth Amendment right).

impartial jury, and to help counsel utilize peremptory challenges.[53] The majority conceded that content questions may help counsel to strike prospective jurors, but, however helpful, peremptory challenges are not constitutionally required.[54] Therefore, the majority reasoned, the defendant has no right to ask jurors about what they have read or heard since the defendant is only entitled to know if a juror can remain impartial despite publicity.[55]

Justice Marshall, writing for the dissent, rejected the majority's interpretation of the Due Process Clause and stated the Sixth Amendment right to an impartial jury was a "hollow formality"[56] because merely asking jurors if they can remain impartial is not enough.[57] He criticized the majority's analysis by rejecting the reasoning that publicity was not as widespread in *Mu'Min* as in other cases, because two-thirds of the jury knew about the case.[58] Justice Marshall further argued that the racial bias cases were not controlling because *Mu'Min* was a case of first impression.[59] He contended that content questions must be asked in cases involving extensive pretrial publicity for three reasons.[60] First, content questions are necessary to determine if the type of information the jurors were exposed to would disqualify them as a matter of law.[61] Second, asking the questions individually would lend more legal depth to the trial court's finding of impartiality because jurors may be unaware they are biased.[62] Third, content questioning facilitates trial court fact finding because evidence is garnered at trial, not outside the courtroom.[63]

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53. *See id.* at __, 111 S. Ct. at 1908, 114 L. Ed. 2d at 509 (voir dire serves dual purpose in enabling court to assist counsel in exercising challenges and to select impartial jury).

54. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1905, 114 L. Ed. 2d at 505.

55. *See id.* at __, 111 S. Ct. at 1903, 114 L. Ed. 2d at 503 ("content" questions might be helpful in determination of impartiality, but not enough to make them constitutionally required).

56. *Id.* at __, 111 S. Ct. at 1909, 114 L. Ed. 2d at 511 (Marshall, J., dissenting).

57. *See id.* at __, 111 S. Ct. at 1910, 114 L. Ed. 2d at 511 (Marshall, J., dissenting) (pretrial publicity had caused statements such as "[t]he world's in an uproar" in community which learned from papers that Mu'Min confessed to killing and raping woman).

58. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1910-11, 114 L. Ed. 2d at 511-12 (Marshall, J., dissenting) (eight of twelve jurors said they had read or heard something about the case).

59. *See id.* at __, 111 S. Ct. at 1912-13, 114 L. Ed. 2d at 515 (Marshall, J., dissenting) (Court misses point by comparing racial bias questions, meaningful examination of jury necessary to guarantee right to impartial jury).

60. *Id.* at __, 111 S. Ct. at 1913, 114 L. Ed. 2d at 516 (Marshall, J., dissenting) (since defendant bears burden of proving impartiality, it is imperative that defendant be entitled to meaningful examination).

61. *Id.* at __, 111 S. Ct. at 1913, 114 L. Ed. 2d at 516 (Marshall, J., dissenting) (certain circumstances require determination that juror not impartial despite assertion to contrary).

62. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1914, 114 L. Ed. 2d at 517 (Marshall, J., dissenting) (issue of impartiality mixed one of law and fact).

63. *Id.* at __, 111 S. Ct. at 1915, 114 L. Ed. 2d at 517 (Marshall, J., dissenting) (if trial

Justice Kennedy, in a separate dissent, proposed a three-part test in cases where defendants claim prejudice from pretrial publicity.[64] He suggested that the United States Supreme Court should first examine whether the atmosphere at trial was so corruptive that the defendant was denied a fair trial.[65] The second consideration should be whether any seated jurors actually were not impartial,[66] and finally, whether the trial judge conducted an adequate examination to determine if jurors can "lay aside" pretrial publicity.[67] Kennedy concluded that the trial setting in *Mu'Min* was not so corruptive as to deny Mu'Min an impartial trial, but that examination was insufficient because group questioning permitted jurors to merely remain silent about bias.[68]

In *Mu'Min*, the Court declined to set minimum standards for voir dire which would guarantee a defendant's right to due process and a fair trial under the Sixth Amendment.[69] By allowing trial court judges "ample discretion" in conducting voir dire, jurisdictions will continue to be split as to what type of questioning is required where pretrial publicity may prejudice the proceedings.[70] The determination of whether it was "manifest error" for

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court refuses to develop background of impartiality its finding of impartiality does not merit deference).

64. *Id.* at __, 111 S. Ct. at 1917-19, 114 L. Ed. 2d at 520-23 (Kennedy, J., dissenting).

65. *Id.* at __, 111 S. Ct. at 1917, 114 L. Ed. 2d at 521 (Kennedy, J., dissenting) (instant case does not fall into this category).

66. *Mu'Min*, 500 U.S. at __, 111 S. Ct at 1918, 114 L. Ed. 2d at 522 (Kennedy, J., dissenting).

67. *Id.* at __, 111 S. Ct at 1918, 114 L. Ed. 2d at 523 (Kennedy, J., dissenting).

68. *Id.* at __, 111 S. Ct. at 1918-19, 114 L. Ed. 2d at 522-23 (Kennedy, J., dissenting).

69. *See* Mu'Min v. Virginia, 500 U.S. __, __, 111 S. Ct. 1899, 1908, 114 L. Ed. 2d 493, 509 (1991) (Court careful not to specify particulars of how this could be done); *see also* Aldridge v. United States, 283 U.S. 308, 311 (1931) (court's voir dire questioning must "cover the subject" of possible racial bias). *See generally* United States v. Ramos, 861 F.2d 461, 464-66 (6th Cir. 1988) (discretion not abused in dismissing juror when juror had friendly conversation with defendant and his wife); United States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987) (abuse of discretion in denying motion for mistrial because sleeping juror missed testimony); United States v. Molinares Charris, 822 F.2d 1213, 1222-23 (1st Cir. 1987) (no abuse of discretion in excusing juror who was having nervous problems when judge determined health risk too great); United States v. Jonas, 786 F.2d 1019, 1023 (11th Cir. 1986) (no abuse of discretion in allowing juror who said midway through trial that his "mind was made up" about case, to continue after court received juror's assurance that he could be impartial).

70. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1904, 114 L. Ed. 2d at 504; *see also* Patton v. Yount, 467 U.S. 1025, 1035-40 (1984) (extensive publicity prior to first trial does not prejudice second trial four years later); Dobbert v. Florida, 432 U.S. 282, 302 (1977) (defendant must show either trial atmosphere prejudicial or jury selection procedure permitted inference of actual prejudice); Murphy v. Florida, 421 U.S. 794, 799-803 (1975) (defendant must show publicity actually prejudiced jurors or caused pervasive hostility). Precedents distinguish between claims that the individual jurors might be biased from exposure to pretrial publicity, and the separate problem of a corruptive atmosphere causing a presumption of prejudice. *See Patton*, 467 U.S. at 1032 (voir dire testimony showed many jurors had forgotten publicity from

the judge not to allow content questions on individual voir dire is highly subjective.[71] Whether pretrial publicity has rendered the trial "fundamentally unfair" is equally subjective because the burden of proof remains on the defendant to show that seated jurors were actually unable to "lay aside" knowledge gained prior to trial.[72]

By determining that publicity in *Mu'Min* was not as widespread as in another case,[73] the Court further highlighted the subjective nature of this analysis.[74] The Court acknowledged that pretrial publicity can raise the presumption that jurors' claims of impartiality are not to be believed, but stated this was not such a case.[75] As a consequence of the majority's depen-

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prior trial); *Murphy*, 421 U.S. at 797-99 (huge wave of public passion requires presumption of prejudice); Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (trial judge may use remedies such as sequestration to protect jurors from publicity); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (pretrial reports of inadmissible evidence not prejudicial where five day voir dire).

71. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1907, 114 L. Ed. 2d at 508 (defendant must show "manifest error"); *Sheppard*, 384 U.S. at 355-57 (publicity inherently prejudicial where reporters in courtroom and judge failed to take protective measures); Estes v. Texas, 381 U.S. 532, 544 (1965) (televising courtroom proceedings prejudicial even though no identifiable prejudice); Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963) (due process denied where defendant's confession televised prior to trial). *Compare* Simmons v. Lockhart, 814 F.2d 504, 508-11 (8th Cir. 1987) (no presumption of bias in case headlined "largest mass murder in Arkansas history," despite pervasive publicity) *with* Coleman v. Kemp, 778 F.2d 1487, 1540 (11th Cir. 1985) (inflammatory pretrial publicity pervasive to presume prejudice in rural Georgia community).

72. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1906, 114 L. Ed. 2d at 508 (trial judge has broad discretion); United States v. Mercer, 853 F.2d 630, 633 (8th Cir. 1988) (trial court properly denied motion for change of venue, because no prejudicial publicity for six months before selection of jury); United States v. Doggett, 821 F.2d 1049, 1050-51 (5th Cir. 1987) (no prejudice where prospective juror commented on his inability to be impartial due to media exposure because juror not chosen); United States v. De Peri, 778 F.2d 963, 971-72 (3d Cir. 1985) (defendant given fair trial despite series of articles entitled "Cops on the Take" because lack of impartiality not shown); United States v. Rucker, 557 F.2d 1046, 1047 (4th Cir. 1977) (trial court erred in refusing individual voir dire pertaining to capacity to serve).

73. *See Irvin*, 366 U.S. at 723 (defendant deserves verdict based solely on evidence at trial).

74. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1906-07, 114 L. Ed. 2d at 507-08 (publicity not so wide-spread as in *Irvin*); Willard v. Pearson, 823 F.2d 1141, 1146-47 (7th Cir. 1987) (publicity dealing mostly with eccentricities of victim does not satisfy burden of showing actual juror bias); United States v. Greschner, 802 F.2d 373, 380-81 (10th Cir. 1986) (article about defendants' prior criminal activity and membership in white supremacy organization not prejudicial); United States v. Fuentes-Coba, 738 F.2d 1191, 1195 (11th Cir. 1984) (prejudice not shown by polling of jurors where none gave affirmative responses to questions during voir dire about possible bias).

75. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1906, 113 L. Ed. 2d at 508; *see Dobbert*, 432 U.S. at 302 (defendant must prove either trial atmosphere inherently prejudicial or jury selection procedure permitted inference of actual prejudice); *Sheppard*, 384 U.S. at 355-57 (publicity inherently prejudicial where trial judge allowed reporters to dominate courtroom); *Estes*, 381 U.S. at 544 (televised courtroom proceedings prejudicial, despite no indication defendants

dence on vague guidelines such as "unfair trial," lower courts will reach inconsistent results when considering to what extent publicity may prejudice the proceedings.[76]

By rejecting the "substantial possibility" standard of the American Bar Association, the Supreme Court failed to recognize an accepted method of conducting voir dire in light of pretrial publicity.[77] While conceding that questions about pretrial publicity can be helpful, the Court ruled that they are not required because peremptory challenges are not constitutionally mandated.[78] Such reasoning is not relevant because typically the defend-

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actually prejudiced); *Rideau*, 373 U.S. at 726-27 (due process denied when defendant's confession televised before trial). *Compare Simmons*, 814 F.2d at 509-11 (no presumption of bias where murder in rural Arkansas county called "largest mass murder in Arkansas history") *with Coleman*, 778 F.2d at 1540 (pretrial publicity so pervasive as to create presumed prejudice in rural Georgia community).

76. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1907, 114 L. Ed. 2d at 508 (no "wave of public passion"); *see also Mercer*, 853 F.2d at 633 (judge denied motion for change of venue because no prejudicial publicity immediately preceding trial); *Doggett*, 821 F.2d at 1050-51 (defendant not denied fair trial when prospective juror commented on inability to be impartial due to media exposure); United States v. Peters, 791 F.2d 1270, 1295 (7th Cir. 1986) (due process did not require evidentiary hearing on publicity when judge assessed impact through voir dire); *De Peri*, 778 F.2d at 971-72 (trial court decision affirmed in determining fair trial where police officers' alleged extortion covered in magazine series called "Cops on the Take"); *Compare Simmons*, 814 F.2d at 508-11 (no presumption of bias despite existence of pervasive publicity in case involving murder of four people in rural Arkansas called "largest mass murder in Arkansas history") *with Coleman*, 778 F.2d at 1540 (inflammatory publicity so pervasive as to create presumed prejudice in trial of defendant who murdered six members of family in rural Georgia community).

77. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1908, 114 L. Ed. 2d at 509 (standard stricter than constitutionally required); Commonwealth v. Kendrick, 535 N.E.2d 217, 220 (Mass. 1989) ("substantial risk of extraneous influences" requires change of venue); Iowa v. Walters, 426 N.W.2d 136, 138 (Iowa 1988) (substantial likelihood is test); Illinois v. Gendron, 243 N.E.2d 208, 211 (Ill. 1968) (reasonable apprehension defendant will be deprived of fair trial); *see also* Peter G. Guthrie, Annotation, *Pretrial Publicity in Criminal Case as Ground for Change of Venue*, 33 A.L.R. 3d 17, 38-39 (1970) (language varies in courts from "reasonable likelihood" to "substantial likelihood"). *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE ch. 8 (2d ed. 1980 and supp. 1986) (covering pretrial publicity).

78. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1907-08, 114 L. Ed. 2d at 509. *See* Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (right of peremptory challenge not constitutionally guaranteed); Swain v. Alabama, 380 U.S. 202, 219 (1965) (right of peremptory challenge only impaired if defendant does not receive what state law provides); *see also* James G. Bonebrake, Note, *Sixth and Fourteenth Amendments—The Lost Role of the Peremptory Challenge in Securing an Accused's Right to an Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 899, 899 (1988) (loss of challenge because of error in removing venireman for cause does not constitute reversible error on Sixth Amendment claim); Karen T. Grisez, Note, Ross v. Oklahoma: *A Reversal of the Reversible-Error Standard in Death-Qualification Cases*, 38 CATH. U. L. REV. 881, 881 (1989) (Court erred in abandoning critical test of examining jury as a whole because peremptory challenges developed to secure Sixth Amendment guarantees). *But see* Gray v.

ant's claim that publicity has prejudiced a trial is based on the Sixth or Fourteenth Amendments, not a peremptory challenge deficiency.[79] The Court distinguishes between state courts and federal courts but points out it has supervisory authority over state courts only on constitutional issues.[80] The distinction is moot, in as much as the very issue in this case was whether incorporation of the Sixth Amendment through the Fourteenth Amendment requires content questioning during voir dire.[81] The ruling in *Mu'Min*

Mississippi, 481 U.S. 648, 660-661 (1987) (rejecting idea that inquiry should be whether jury composition affected as a whole).

79. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1907, 114 L. Ed. 2d at 509 (voir dire aids in peremptory challenges); *Ross*, 487 U.S. at 85 (well settled that Sixth and Fourteenth Amendments guarantee defendant on trial for his life right to impartial jury); Harris v. Pulley, 885 F.2d 1354, 1361 (9th Cir.1988) (standards governing change of venue derive from Due Process Clause which safeguards defendant's Sixth Amendment right); Bailey v. Delaware, 490 A.2d 158, 162 (Del. 1984) (Sixth and Fourteenth Amendments provide guarantees); *see also* Groppi v. Wisconsin, 400 U.S. 505, 510 (1971) (on at least one occasion Court held that only change of venue constitutionally sufficient to assure impartial jury which Fourteenth Amendment guarantees); Maine v. Addington, 518 A.2d 449, 451 (Me. 1986) (Fourteenth Amendment may require change of venue if invidious pretrial publicity); Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas Corpus Proceedings*, Patton v. Yount, 1985 S. ILL. U. L.J. 565, 566 n.13 (defendant usually contends due process violation by writ of habeas corpus proceeding under Fourteenth Amendment). *But see* South Dakota v. Luna, 378 N.W.2d 229, 236 (S.D. 1985) (Sixth Amendment right infringed); Buxton S. Copeland, Note, *Criminal Procedure—Motion for Change of Venue—In Search of a Guiding Light*—State v. Jerrett, 7 CAMPBELL L. REV. 73, 79-80 (1984) (due to constitutional nature of this area of law, state courts bound by U.S. Supreme Court decisions).

80. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1903-04, 114 L. Ed. 2d at 503-04. The Court in *Mu'Min* noted that it has supervisory power over federal courts. *See* Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (adequacy of voir dire not easily subject to review); *Aldridge*, 283 U.S. at 311 (court failed to ask question which "covered the subject"); Connors v. United States, 158 U.S. 408, 413 (1895) (suitable inquiry permissible but much left to discretion). The *Mu'Min* Court distinguished state courts in which the Court's authority is limited to enforcing the Constitution. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1903-04, 114 L. Ed. 2d at 503-04; *see* Turner v. Murray, 476 U.S. 28, 37 (1986) (capital defendant entitled to racial bias questions); Ristaino v. Ross, 424 U.S. 589, 597-98 (1976) (no significant likelihood of bias where black defendant and white victim); Ham v. South Carolina, 409 U.S. 524, 527 (1973) (black defendant entitled to racial bias questions).

81. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1904, 114 L. Ed. 2d at 505 (petitioner asserted Fourteenth Amendment right to content questions); *Rosales-Lopez*, 451 U.S. at 189 (inquiry as to racial prejudice may be required by Sixth and Fourteenth Amendments); *Aldridge*, 283 U.S. at 311 (reversible error under Sixth and Fourteenth Amendments for Court not to ask about racial bias); *Connors*, 158 U.S. at 413 (inquiry permissible to determine if juror holds opinion or prejudice); *see also* Stanton D. Krauss, Comment, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 617 (1989) (voir dire practice should consider constitutional limitations); Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 176 (1990) (fair trial requires jurors be free of outside influences). *Compare* United States v. Hill,

leaves too much discretion to the trial judge because the lack of minimum standards will result in the application of varying standards among the jurisdictions.[82] The absence of minimum standards also leaves the defendant no clear basis for appeal.[83] Because of the ample discretion accorded the trial judge, an appellate judge will be reluctant to find "manifest error" where the trial judge found the voir dire method "fair."[84]

The premise that where pretrial publicity may prejudice trial a defendant has a constitutional right to determine whether individual jurors are impartial, was articulated in Justice Marshall's dissent in *Mu'Min*.[85] Because the

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738 F.2d 152, 153 (6th Cir. 1984) (*per se* reversible error when court refused to ask whether jurors could presume innocence) *with* United States v. Miller, 758 F.2d 570, 571-73 (11th Cir. 1985) (no need for specific questions when voir dire jury as whole).

82. *See Rosales-Lopez*, 451 U.S. at 195 (Rehnquist, J., concurring) (would allow trial judge to determine on case by case basis instead of adopting rule); *Ristaino*, 424 U.S. at 594 (Constitution does not entitle accused to have specific questions posed during voir dire); *cf. Turner*, 476 U.S. at 36-37 (court required to ask racial bias questions); Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968) (content questioning required). *See generally* Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution,* 52 U. CHI. L. REV. 729, 730 n.5 (1985) (same standards for federal trials as for state trials); Norman L. McGill, Note, *Juror Impartiality—Prejudicial Publicity: The Supreme Court Makes the Doctrine of Presumed Prejudice Unavailable to State Defendants on Habeas Corpus Proceedings,* Patton v. Yount, 1985 S. ILL. U. L.J. 565, 579-80 (latitude given trial court grants judge almost unlimited discretion).

83. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1907, 114 L. Ed. 2d at 508-09 (Court determined that because Mu'Min lived in big city pretrial publicity was not prejudicial); *Patton*, 467 U.S. at 1038-40 (only trial judge knows which of various answers given were with greatest "certainty and comprehension"). The Court interprets the "fair support" statute to support the idea that no decision should be overturned unless there is "manifest error." *Patton*, 467 U.S. at 1032 n.7; *see* 28 U.S.C. § 2254(d) (1988) (determination of state court shall be presumed correct). By refusing to clarify minimum standards required for due process, the Supreme Court encourages states to maintain their various interpretations of what due process requires. *Patton*, 467 U.S. at 1034-35; Brecheen v. Oklahoma, 485 U.S. 909, 911-12 (1988) (Marshall, J., dissenting) (in wake of Supreme Court "vacuum of constitutional precedent" states have diverged); *Gendron*, 243 N.E.2d at 211 (reasonable apprehension standard); Lutes v. Mississippi, 517 So.2d 541, 545 (Miss. 1987) (reasonably likely standard).

84. *See* United States v. Glaze, 866 F.2d 253, 254 (8th Cir. 1989) (jury not prejudiced by ongoing news coverage about defendant being "serial killer"); United States v. Beniach, 825 F.2d 1207, 1212-13 (7th Cir. 1987) (juror's knowledge of guilty pleas through publicity not prejudicial when juror claimed impartiality and defendant made no showing of actual prejudice); *De Peri*, 778 F.2d at 971-72 (newspaper's series of articles entitled "Cops on the Take" not prejudicial); United States v. Drougas, 748 F.2d 8, 30 (1st Cir. 1984) (pretrial reports of evidence later found inadmissible not prejudicial).

85. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1912, 114 L. Ed. 2d at 514 (Marshall, J., dissenting) (acknowledging that the Court has long recognized that pretrial publicity may deny defendant's Sixth Amendment right to trial by impartial jury); *Ristaino*, 424 U.S. at 595 n.6 (Due Process Clause likewise guarantees defendant's right to fair trial); *Sheppard*, 384 U.S. at 363 (explaining that defendant did not have to show prejudice because pretrial publicity so extensive); *Rideau*, 373 U.S. at 727 (refusing to review voir dire because publicity presumed to

burden is on the defendant to prove prejudice, there is ample reason to allow meaningful examination of jurors.[86] The proposal that content questioning be a part of voir dire in publicity cases is apt because there is no way to adequately determine if a juror can be impartial without asking probing questions individually.[87]

Justice Marshall noted that by finding out what jurors had read or heard about the case before trial, the court would be able to determine whether a juror is impartial as a matter of law.[88] In prior cases,[89] the Court ruled that determining whether the defendant had been afforded due process was a mixed question of law and fact.[90] The dissent in *Mu'Min* also recognized that because jurors may be confused as to what "impartiality" means, asking jurors specifically what they know about the case and what impressions they had formed would lend depth to the trial court's finding of impartiality.[91]

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prejudice trial); *Irvin*, 366 U.S. at 722 (conclusions of our justice system should be reached only by evidence and argument in open court, not outside influence).

86. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1912, 114 L. Ed. 2d at 515 (we have never specified what type voir dire required); *Patton*, 467 U.S. at 1031 (recognizing problem of pretrial publicity but decision based on particular facts in case). Justice Marshall commented that the Court has never addressed in "any great detail" procedures necessary to protect defendant's right to impartial jury. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1912, 114 L. Ed. 2d at 515 (Marshall, J., dissenting); *see also* Bose Corp. v. Consumers Union of U.S., 466 U.S. 485, 500 (1984) (appeals court properly declined to second guess judge).

87. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1913, 114 L. Ed. 2d at 515 (Marshall, J., dissenting) (only firm conclusion from our impartial-jury jurisprudence is that juror's own assurances cannot be dispositive of defendant's rights); *see also Murphy*, 421 U.S. at 800 (juror's assurances cannot be dispositive of defendant's rights); Smith v. Phillips, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) (juror may have interest in concealing bias, or be unaware of it); United States v. Dellinger, 472 F.2d 340, 375 (1972) (human pride suggests negative answer to whether juror could not be fair and impartial).

88. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1913, 114 L. Ed. 2d at 516 (Marshall, J., dissenting) (content questioning necessary to determine whether type and extent of publicity juror exposed to would disqualify juror as matter of law); *Patton*, 467 U.S. at 1031 n.6 (question mixed one of law and fact); *Murphy*, 421 U.S. at 798-99 (constitutional standard requires impartial "indifferent" jurors); *Rideau*, 373 U.S. at 726 (presumed prejudice mandated change in venue).

89. *See Irvin*, 366 U.S. at 723 (whether jurors' opinions are prejudicial is question of "mixed law and fact").

90. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1914, 114 L. Ed. 2d at 517 (Marshall, J., dissenting) (content questioning necessary to determine if juror should be disqualified as matter of law); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976) (searching questions should be asked); *Ham*, 409 U.S. at 532 (Marshall, J., concurring in part and dissenting in part) (without such inquiry defendant's rights rendered meaningless); *Irvin*, 366 U.S. at 728 (no doubt each juror would claim he would be fair and impartial, requiring such a declaration before "one's fellows is often its father"); Dennis v. United States, 339 U.S. 162, 171-72 (1950) (preservation of opportunity to discover bias is guarantee of fair trial).

91. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1914, 114 L. Ed. 2d at 517 (Marshall, J., dissenting) (because jurors are often not aware of prejudice, content questioning lends depth to

Content questioning lends credibility to the trial court's finding because a background of impartiality develops which facilitates accurate fact finding.[92] The dissent's rationale is supported by the fact that many jurisdictions have initiated procedures which specify content questioning in the presence of pretrial publicity.[93] Indeed, in his dissent, Justice Marshall concluded that the presence of such minimum standards in many jurisdictions indicates that such a requirement would not be burdensome as the majority suggests.[94]

Justice Kennedy's three-step approach falls short of requiring trial judges to include content questions in voir dire, but does at least recommend some procedures for use in analyzing pretrial publicity cases.[95] Justice Kennedy's

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court's finding); *see also* 28 U.S.C. § 1866(c)(2) (1988) (court may excuse prospective juror for failure to render impartial service); *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) (juror may be unaware of own bias); *Murphy*, 421 U.S. at 802 (court may ignore juror's claims of impartiality and draw inference of prejudice); *Irvin*, 366 U.S. at 728 (court may infer prejudice when many jurors admit prejudice); Alice M. Padawer-Singer & Allen H. Barton, *The Impact of Pretrial Publicity on Juror's Verdicts*, in THE JURY SYSTEM IN AMERICA—A CRITICAL OVERVIEW 125, 135 (Rita J. Simon ed., 1975) (jurors exposed to inadmissible evidence outside courtroom found defendant guilty in vast majority of cases); Hans Ziesel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury & Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 528-29 (1978) (experiment suggests voir dire as conducted not sufficient to identify prejudiced jurors).

92. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1915, 114 L. Ed. 2d at 517 (Marshall, J., dissenting) (individual voir dire including content questioning would lend credibility to process); *Patton*, 467 U.S at 1038 (determination one of credibility); *Nebraska Press Ass'n*, 427 U.S. at 547 (jurors exposed to information traditionally thought uniquely destructive); NATIONAL JURY PROJECT, JURYWORK § 10.03[3] at 10-33 (2d ed. 1983) (voir dire questions give understanding of lay people's reaction to parties, issues and facts of case).

93. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1916, 114 L. Ed. 2d at 519 (Marshall, J., dissenting) (numerous federal and states courts have adopted procedures for screening juror bias that majority disparages as intrusive); United States v. Davis, 583 F.2d 190, 196 (5th Cir. 1978) (content questioning required); United States v. Addonizio, 451 F.2d 49, 67 (3d Cir. 1971) (content questioning and sequestered voir dire); *Silverthorne*, 400 F.2d at 639 (content questioning correct procedure); Louisiana v. Goodson, 412 So.2d 1077, 1081 (La. 1982) (content questioning and sequestered voir dire); Tennessee v. Claybrook, 736 S.W.2d 95, 99-100 (Tenn. 1987) (sequestered voir dire).

94. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1916, 114 L. Ed. 2d at 519 (Marshall, J., dissenting) (administrative convenience argument gratuitous); United States v. Harris, 542 F.2d 1283, 1295 (7th Cir. 1976) (sequestered voir dire); United States v. Colabella, 448 F.2d 1299, 1303 (2d Cir. 1971) (sequestered voir dire); AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 8-3.5(a) (2d ed. 1980) (content questioning required where substantial likelihood of prejudice); Judicial Conference of the United States, *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 87 F.R.D. 519, 532-33 (1980).

95. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1915, 114 L. Ed. 2d at 517 (Kennedy, J., dissenting) (instant case does not fall this category where inflammatory publicity causes presumption of prejudice); *see Patton*, 467 U.S. at 1036-40 (distinguishing between dual inquiry whether jurors actually prejudiced or trial setting caused presumption of prejudice); *Murphy*, 421 U.S. at 799-803 (inflammatory trial atmosphere required presumption of prejudice).

assertion that the atmosphere at trial had not risen to a "carnival" level because of publicity still leaves it to a trial judge to subjectively decide what constitutes a "carnival" atmosphere.[96] However, Justice Kennedy's requirement that jurors be questioned individually rather than *en masse* about bias would provide for more meaningful examination during voir dire than the group questioning approved by the majority.[97]

By setting such an unreviewable standard for voir dire examination where pretrial publicity may prejudice trial, the Supreme Court has assured that many accused will receive unequal justice in United States courts. Defendants in jurisdictions that apply the more rigid "inherent prejudice" test will require the defendant to prove that the trial setting was so "carnival" like in nature that a fair trial was impossible, or prove that a seated juror was actually unable to remain impartial. Defendants tried in jurisdictions using the "reasonable likelihood" or "substantial likelihood" test will receive justice based on the totality of circumstances, which relieves their burden of proof substantially. Without a doubt, there is valid support for the notion that trial judges should have ample discretion in conducting voir dire, but the Supreme Court's refusal to formulate reviewable standards for voir dire has deprived defendants of equal justice under the law. The American Bar Association's standard that where there is a "substantial possibility" that pretrial publicity may prejudice trial, requiring individual voir dire including content questions would provide minimum guidelines to federal and state courts alike. Had the Supreme Court adopted this standard, the gap of disparity between the jurisdictions would have been narrowed because the courts would look to the totality of the circumstances to make a determination of impartiality.

Karen A. Cusenbary

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96. *Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1917, 114 L. Ed. 2d at 521 (Kennedy, J., dissenting); *Patton*, 467 U.S. at 1031-35 (inquiry as to whether "carnival" atmosphere present); *Murphy*, 421 U.S. at 797-99 (publicity caused "carnival" atmosphere).

97. *See Mu'Min*, 500 U.S. at __, 111 S. Ct. at 1919, 114 L. Ed. 2d at 523 (Kennedy, J., dissenting) (group questioning inadequate); Jordan v. Lippman, 763 F.2d 1265, 1279-81 (11th Cir. 1985) (individual voir dire required where newspapers carried sensational reports); *Davis*, 583 F.2d at 196 (individual voir dire required where coverage inflammatory and emphasized racial overtones); *see also* John A. Burgess, Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME L. REV. 925, 935 (1967) (change of venue is subordinate to procedures which insure impartial jury); Constance M. Jones, Comment, *Appellate Review of Criminal Change of Venue Rulings: The Demise of California's Reasonable Likelihood Standard*, 71 CAL. L. REV. 703, 718 (1983) (*Maine* made clear that town population not determinative in finding prejudice).