

1992

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Recommended Citation

David Edsey, *Mu'Min v. Virginia: The Supreme Court's Failure to Establish Adequate Judicial Procedures to Counter the Prejudicial Effects of Pretrial Publicity*, 23 Loy. U. Chi. L. J. 557 (1992).

Available at: <http://lawcommons.luc.edu/lucj/vol23/iss3/8>

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Mu'Min v. Virginia: The Supreme Court's Failure to Establish Adequate Judicial Procedures to Counter the Prejudicial Effects of Pretrial Publicity

I. INTRODUCTION

On May 30, 1991, the United States Supreme Court decided *Mu'Min v. Virginia*.¹ In this five-to-four decision, the Court held that the Due Process Clause of the Fourteenth Amendment² does not require prospective jurors to be screened regarding the specific content of media exposure in *voir dire* examinations.³ Thus, in cases accompanied by significant pretrial publicity, the Sixth Amendment's impartial jury requirement⁴ will be satisfied when jurors do not admit during *voir dire* that they have been prejudiced by pretrial publicity.

The issue before the Court in *Mu'Min* was one of first impression. Although the Court previously had dealt with the issue of juror partiality due to pretrial publicity,⁵ it never before had ruled on the extent of questioning required to uncover such partiality. In holding that minimal *voir dire* questioning on the issue of pretrial publicity satisfies due process, the Court in *Mu'Min* undermined its prior decisions that recognized the adverse effects of pretrial publicity on juries. As a result, the procedural safeguards put in place to protect criminal defendants from the adverse effects of pretrial publicity now can be easily thwarted.

This Note begins with a discussion of the relevant case law leading up to *Mu'Min* and the facts of that case. It then analyzes the majority opinion and points out the inadequacies of its reasoning. In particular, this Note explains that the Court's holding in *Mu'Min* severely restricts a criminal defendant's right to obtain an impartial jury when considerable publicity accompanies the case.

1. 111 S. Ct. 1899 (1991).

2. The Fourteenth Amendment provides in pertinent part:

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. . . .

U.S. CONST. amend. XIV, § 1.

3. *Mu'Min*, 111 S. Ct. at 1908.

4. See *infra* note 6 (setting forth the text of the Sixth Amendment).

5. See *infra* notes 18-38 and accompanying text.

This Note argues that the detrimental impact of *Mu'Min* can be eradicated if state courts offer criminal defendants greater rights under their state constitutions. Finally, this Note stresses that in Illinois, independent state grounds exist to provide an adequate level of protection to criminal defendants in order to compensate for the inadequate rights afforded to them under *Mu'Min*.

II. BACKGROUND

A. *The Voir Dire*

The Sixth Amendment guarantees a criminal defendant the right to a trial by an impartial jury.⁶ An impartial jury is one that determines the guilt or innocence of the defendant based only on the evidence submitted at trial.⁷ Jurors must leave their preconceived notions and prejudices outside of the jury box in order to provide the criminal defendant with the fundamental guarantees of due process. Of course, due process does not require that jurors be completely ignorant of the facts and issues involved.⁸ The Constitution mandates only that jurors decide the case based on the facts presented during the trial.⁹

One of the principle methods by which a defendant can assure his right to an impartial jury is the *voir dire*. Through probing questioning, the court and counsel attempt to eliminate any members of the venirepanel who harbor prejudicial attitudes. *Voir dire* has two basic purposes: to allow the trial judge to identify any potential jurors who should be challenged for cause;¹⁰ and to allow

6. The Sixth Amendment provides in relevant part:

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. . . .

U.S. CONST. amend. VI.

7. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

8. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Id.* at 723.

9. *See Patterson*, 205 U.S. at 462.

10. Generally, a party or court should challenge a potential juror for cause if it is shown that the juror would be unable to lay aside his or her impressions or opinions and render a verdict based solely on the evidence presented in court. *Irvin*, 366 U.S. at 723. Although the trial court can exercise an unlimited number of challenges for cause, a removal for cause is only allowed in certain circumstances. *See Hopt v. Utah*, 120 U.S. 430, 432-33 (1887). Typical reasons for being excused for cause are: being related to the defendant or the victim; having previously been a juror in the same case that ended in mistrial; or having formed an expressed and fixed opinion as to the defendant's guilt or innocence. *Id.*

counsel the opportunity to intelligently and effectively exercise peremptory challenges.¹¹ Generally, the trial judge has broad discretion in conducting *voir dire*.¹² Thus, a reviewing court will set aside the trial court's determination of juror impartiality only upon a showing of manifest error.¹³

B. Racial Bias

Even though the Supreme Court recognizes the broad discretion of trial judges in conducting *voir dire*, it nonetheless requires inquiry in specific instances.¹⁴ For example, the Court mandates examination of the venirepanel if requested by the defendant when a

11. Unlike the challenge for cause, peremptory challenges are limited in number and can be exercised without a stated reason. Although peremptory challenges are not constitutionally guaranteed, the Supreme Court has recognized their importance in eliminating bias from the jury box:

[T]he challenge is "one of the most important of the rights secured to the accused." . . . [T]he very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire*. . . . It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," upon a juror's "habits and associations" or upon the feeling that the "bare questioning [a juror's] indifference may sometimes provoke a resentment."

Swain v. Alabama, 380 U.S. 202, 219, 220 (1965) (citations omitted), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986). Until recently, impairment of the right to exercise peremptory challenges was held to be reversible error. *Cf.* Ross v. Oklahoma, 487 U.S. 81, 86 (1988) (holding that impairment of the right to a peremptory challenge violates the Sixth Amendment right to an impartial jury only if actual bias is shown).

12. Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981). The *Rosales* Court observed that "[b]ecause the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*." *Id.* This reasoning also applies to state trial court judges. *See, e.g.,* Ham v. South Carolina, 409 U.S. 524, 527 (1973) (recognizing the broad discretion of state trial judges in determining the form and extent of *voir dire* questioning).

The *voir dire* can be conducted in a number of ways. Questions can be posed by the judge, by counsel, or by both. *E.g.,* NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES § 2.05 (2d ed. 1990) [hereinafter NATIONAL JURY PROJECT]. Additionally, in order to expedite *voir dire* proceedings, courts have issued written questionnaires to jurors as supplements, not substitutes, to *voir dire* questioning. *Id.* § 2.08. The venirepersons also can be questioned *en masse*, in small groups, individually, or in sequestration. *Id.* § 2.05[3][a], at 2-27 to 2-30. Finally, the extent, form, and content of questions can vary considerably. *Id.* § 2.05[3][c][iii], at 2-33 to 3-35.

13. Irvin v. Dowd, 366 U.S. 717, 723 (1961) (citing Reynolds v. United States, 98 U.S. 145, 156 (1878)).

14. For example, in a capital murder case, if requested by the defendant, the court is required to determine the jurors' attitudes toward applying the death penalty. *See* Wainwright v. Witt, 469 U.S. 412 (1985). A juror is not qualified to serve on a capital sentence proceeding if it is determined during *voir dire* that his beliefs would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 420 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

substantial likelihood of racial or ethnic prejudice exists.¹⁵ In this context, the Court held that a substantial likelihood of racial prejudice exists only when racial issues are inextricably intertwined with the conduct of the trial.¹⁶ Therefore, to constitutionally require questions concerning racial bias, there must be a pressing racial issue and not simply a defendant of a different race than the victim.

15. *Rosales-Lopez*, 451 U.S. at 190 ("Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of the defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.").

16. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976). In *Ristaino*, a black defendant was convicted in a Massachusetts court for violent crimes against a white security guard. *Id.* at 589-90. The issue presented to the Court was whether the defendant was denied his constitutional right to a trial by an impartial jury due to the trial court's failure to question the venirepanel regarding possible racial bias. *Id.* at 590. The *Ristaino* Court held that "the mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes" did not "suggest a significant likelihood that racial prejudice might infect Ross' trial." *Id.* at 597-98.

In contrast, in *Ham v. South Carolina*, 409 U.S. 524 (1973), the Court found a constitutional violation when a state trial court refused to question prospective jurors regarding racial bias. In *Ham*, the defendant, a black man who was well known locally for his civil rights activities, was convicted for possession of marihuana. *Id.* at 524, 525. His defense at trial was that law enforcement officials were "out to get him" because of his civil rights affiliations. *Id.* at 525. The Court held that "the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that . . . [the record demonstrate that] the petitioner [was] permitted to have the jurors interrogated on the issue of racial bias." *Id.* at 527. Although the Court's holding required questioning about racial bias, it neither limited the trial judge's broad discretion in conducting *voir dire* nor mandated content questions: "[T]he trial judge [is] not required to put the question in any particular form, or ask any particular number of questions on the subject [of racial bias], simply because requested to do so by the petitioner." *Id.*

However, in *Aldridge v. United States*, 283 U.S. 308, 314 (1931), the Court held that it was a denial of due process not to inquire into the venirepanel's potential racial bias when the defendant was black and the victim was white. The Court based the holding on its supervisory power over the lower federal courts. *Marshall v. United States*, 360 U.S. 310, 313 (1959). Thus, under *Aldridge*, the federal courts are required to inquire into racial prejudice in instances when state courts are not so required. See *Ristaino*, 424 U.S. at 598 n.10 (distinguishing the *Aldridge* and *Ham* decisions).

Aldridge has been relied on for the proposition that the need for questioning racial bias has "constitutional stature" in certain instances. See, e.g., *Ham*, 409 U.S. at 528. Indeed, the language of *Aldridge* strongly suggests that when a defendant is black and a victim is white, questions regarding racial bias are an essential demand of fairness. For example, the Court stated:

The practice of permitting questions as to racial prejudice is not confined to any section of the country, and this fact attests the widespread sentiment that fairness demands that such inquiries be allowed. . . .

. . . .

. . . We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred.

No surer way could be devised to bring the processes of justice into disrepute.

Aldridge, 283 U.S. at 313 n.2, 315.

Even when such additional issues exist, however, the trial court need only inquire into the subject of racial bias and need not ask any specific amount or type of questions.¹⁷

C. Pretrial Publicity

Before *Mu'Min*, the Supreme Court had never considered the proper scope of *voir dire* in cases plagued by pretrial publicity. It had, however, recognized the prejudicial effects of pretrial publicity on the jury.¹⁸ The basic principle that emerged from the Court's prior pretrial publicity cases was that a juror's self-assessment of impartiality was not always credible.¹⁹ When pretrial publicity reached a significant level, a presumption was raised that jurors could be tainted by prejudicial publicity.²⁰ The focus of the Court's early pretrial publicity cases, therefore, was the extent and content of the media exposure.²¹

For example, in *Irvin v. Dowd*,²² the defendant was convicted of committing six murders in a rural area of Indiana. The crimes generated substantial media coverage.²³ The issue before the Court was whether the defendant received a fair trial by an impartial jury.²⁴ To resolve the issue, the Court examined the nature and extent of the pretrial publicity as well as the *voir dire* record of the trial court.²⁵ The Court found that the publicity was continuous,

17. *Rosales-Lopez*, 451 U.S. at 190; *Ham*, 409 U.S. at 527.

18. See *Patton v. Yount*, 467 U.S. 1025, 1027-28 (1984); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 541 (1976); *Murphy v. Florida*, 421 U.S. 794, 795 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963); *Beck v. Washington*, 369 U.S. 541, 542 (1962); *Irvin v. Dowd*, 366 U.S. 717, 719-20 (1961); *Marshall v. United States*, 360 U.S. 310, 311 (1959).

19. See *Irvin*, 366 U.S. at 728.

20. See, e.g., *Estes v. Texas*, 381 U.S. 532, 542-43 (1965) ("[N]evertheless, at times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process.").

21. *Id.* at 543-44.

22. 366 U.S. 717 (1961).

23. *Id.* at 725-26. The exhibits presented by the defense counsel revealed a "barrage of newspaper headlines, articles, cartoons, and pictures unleashed against [the defendant] during the six or seven months preceding his trial." *Id.* at 725. Not only were the newspapers in which these stories appeared delivered to 95% of the homes in the county in which the case was tried, but television and radio stations also "blanketed" the county with the same stories. *Id.* The news stories clearly were prejudicial to the defendant because they referred to his prior criminal background as a juvenile, to his previous convictions for arson and burglary, and to his court martial from the military. *Id.* The newspapers also reported his confession to the six murders and to 24 burglaries. *Id.* at 725-26. One story even characterized the defendant as "remorseless and without conscience" and noted that he had been found sane by court-appointed doctors. *Id.* at 726.

24. *Id.* at 719-20.

25. *Id.* at 725-27.

“adverse,” and “fostered a strong prejudice among the people.”²⁶ The *voir dire* record also revealed that eight of the twelve jurors who heard the case had decided that the defendant was guilty before the trial began.²⁷ Nonetheless, the trial judge accepted as conclusive the jurors’ statements that they would be able to render an impartial verdict.²⁸

The Supreme Court held that in light of the substantial publicity, the trial court’s determination of juror impartiality was erroneous.²⁹ The basic rule of *Irvin*, then, is that when a case has generated substantial pretrial publicity, a trial court should not necessarily accept a juror’s assertion of impartiality.³⁰ Instead, when jurors have been exposed to pretrial publicity that is extreme in both content and volume, a presumption is raised that the jurors are biased.³¹

Obviously, every case that receives media attention will not result in a biased jury. There are a number of factors courts consider when examining the prejudicial effect of pretrial publicity. First, the coverage must have been extensive because the greater the volume of media coverage, the greater the likelihood that the jurors were exposed to pretrial information.³² Second, the coverage must

26. *Id.* at 726.

27. *Id.* at 727. The *voir dire* record revealed that of the entire venire panel of 430 persons, the court excused 268 on challenges for cause for having fixed opinions as to the guilt of the defendant. *Id.* The defense counsel used 20 peremptory challenges, the maximum allowed under state law. *Id.* The record also revealed that of the entire panel, “90% of those examined on the point entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty.” *Id.* The *Irvin* Court concluded that “[w]ith such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.” *Id.*

28. *Id.* at 724.

29. *Id.* at 728-29. The Court quoted *Reynolds v. United States*, 98 U.S. 145 (1878), for the proper standard in reversing a trial court’s determination of juror impartiality:

[T]he test is “whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. . . . The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.”

Irvin, 366 U.S. at 723 (quoting *Reynolds*, 98 U.S. at 156-57).

30. *Id.* at 728.

31. *See id.* at 725 (stating that, in light of the highly extensive publicity within the community, the “build up of prejudice” was “clear and convincing”).

32. *See Beck v. Washington*, 369 U.S. 541 (1962) (finding that the pretrial publicity was not so extensive or intensive as to compel a finding of juror bias); *see also United States v. Kimberlin*, 805 F.2d 210, 224 (7th Cir. 1986) (refusing to order a mistrial due to

have been close in time to the actual trial.³³ Finally, courts must examine the nature and content of the news reports. Reports clearly slanted against the defendant or containing information not admissible at trial have a greater potential for prejudicing jurors.³⁴

In addition to examining the nature of the actual publicity, trial courts must determine the extent to which pretrial publicity has influenced prospective jurors. The sole means of accomplishing this is through the *voir dire*. A presumption that the entire venirepanel is biased exists when the *voir dire* reveals that a significant number of venirepersons formed an opinion about the defendant's guilt.³⁵ In such a situation, the jurors' statements that they

pretrial publicity because the record did not reveal a " 'wave of public passion that would have made a fair trial unlikely' " (quoting *Patton v. Yount*, 467 U.S. 1025, 1032-33 (1984))).

33. See *Patton v. Yount*, 467 U.S. 1025, 1032 (1984). The *Patton* Court declined to find that the defendant was denied a fair trial by an impartial jury despite a finding of extensive and adverse pretrial publicity. *Id.* at 1040. The Court held that because the jury selection did not occur until four years after media coverage had peaked, the effect of the coverage had diminished and "community sentiment had softened." *Id.* at 1032. Therefore, the trial court's finding of jury impartiality was not manifest error. *Id.*; see also *Murphy v. Florida*, 421 U.S. 794, 802 (1975) (finding the fact that most news articles appeared over a fourteen month period ending seven months before the trial court selected a jury to be dispositive of the issue of jury bias).

34. News items that are purely factual in nature are not prejudicial; however, when news reports are inflammatory, vicious, and emotionally charged, potential prejudice is brought into issue. See, e.g., *Beck*, 369 U.S. at 556 (finding that "the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill-will and vindictiveness").

Other forms of prejudicial news items include statements made by public officials, confessions of the defendant, and reports containing information that would be inadmissible at trial. See *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (holding that a news report of defendant's confession was too prejudicial); *Marshall v. United States*, 360 U.S. 310 (1959) (granting a new trial after finding that the jurors' exposure to information regarding the defendant's prior conviction was prejudicial to the defendant); see also *People v. Gacy*, 468 N.E.2d. 1171, 1185-87 (Ill. 1984) (discussing the factors to be taken into account when analyzing the prejudicial effect of certain media coverage). See generally NATIONAL JURY PROJECT, *supra* note 12, § 7.04[1][a]-[h], at 7-21 to 7-27 (discussing types of publicity that have been held to be highly prejudicial); Norbert L. Kerr, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 695 (1991) (finding that information concerning the defendant's prior record, the existence of incriminating physical evidence, and the defendant's implication in another crime biased mock juries); John S. Carroll et al., *Free Press and Free Trial: The Role of Behavioral Research*, 10 LAW & HUM. BEHAV. 187, 193 (1986) (citing a number of empirical studies indicating that jurors' exposure to reports of confessions, prior criminal record, and failed lie detector test increased guilty verdicts).

35. *Murphy*, 421 U.S. at 803. The *Murphy* court stated:

In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

can remain impartial are not credible.³⁶ Unless such a presumption of partiality is raised,³⁷ a court will accept as proof of impartiality a juror's statement that he or she will decide the case based solely on the evidence presented at trial.³⁸

The issue before the Court in *Mu'Min v. Virginia* was whether

Id.

36. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In *Sheppard*, 74 of 75 venirepersons admitted to hearing about the case. *Id.* at 345. In light of both this and the inflammatory and excessive nature of the publicity, the Court refused to accept the jurors' statements that they would not be influenced by what they had read, seen, or heard. *Id.* at 354 n.9, 355-56; see also *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (finding that when two-thirds of the venirepersons admitted to having an opinion concerning the defendant's guilt, the jurors' statements of impartiality were not credible). In *Irvin*, the Court stated:

No doubt each juror was sincere when he said that he would be fair and impartial to the petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.

Id.

37. This presumption of partiality, as raised in *Sheppard* and *Irvin*, applied to the entire venirepanel and was due to unprecedented pretrial publicity. See, e.g., *Sheppard*, 384 U.S. at 356 ("Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public."); *Irvin*, 366 U.S. at 726 ("It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice . . .").

In a case evincing such widespread public hostility, a fair trial in the community where the crime occurred will be impossible and a change of venue or continuance likely will be granted. See, e.g., *Irvin*, 366 U.S. at 721 (requiring a court to consider the totality of circumstances in considering jury impartiality before granting a venue change). When there is substantial pretrial publicity unaccompanied by deep-rooted community outrage, a presumption of partiality should not be raised as to the entire venirepanel. See, e.g., *Murphy*, 421 U.S. at 802, 803 (failing to find a "community with sentiment so poisoned" as to require impeachment of all the jurors). However, a presumption of partiality might be raised as to individual jurors who were exposed to highly inflammatory and prejudicial information. See, e.g., *Patton*, 467 U.S. at 1039-40 (holding that mere ambiguity in the testimony of jurors challenged for cause was not enough to overcome a presumption of the trial court's correctness). Of course, determining which jurors were exposed to such prejudicial information will require more than superficial inquiry into pretrial publicity during *voir dire*. *Id.* at 1038 (stating that the identification of biased veniremen is determined through extended *voir dire* proceedings).

38. See *Murphy*, 421 U.S. at 803, in which the court excused 20 of 78 venirepersons because they expressed an opinion as to the defendant's guilt. The *Murphy* Court declined to find this sufficient to raise a presumption of partiality: "This may indeed be 20 more than would occur in a trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." *Id.*; see also *Beck v. Washington*, 369 U.S. 541, 556-57 (1962) (only 8 of 52 venirepersons admitted to having formed an opinion regarding petitioner's guilt). Although almost all of the actual jurors in *Beck* were exposed to some pretrial publicity, they all professed during *voir dire* that they had not formed an opinion and that they "would enter the trial with an open mind disregarding anything [they] had read on the case." *Id.* at 555. The Court did not find that the nature of the pretrial publicity or the examination of the *voir dire* record compelled it "not to believe the answers of the jurors." *Id.*

due process requires a trial court to ask potential jurors what they know about the case as a result of the publicity, even though the jurors assure the trial court that they can remain impartial. The United States Supreme Court held that due process does not require such an inquiry.

III. DISCUSSION

A. *The Facts of Mu'Min*

In 1973, David Majid Mu'Min was convicted of first-degree murder in Virginia and sentenced to prison for forty-eight years.³⁹ Mu'Min was therefore incarcerated in a Virginia prison and, on the morning of September 22, 1988, he and five other inmates were assigned to a work detail in Prince William County, supervised by an employee of the Virginia Department of Transportation.⁴⁰ During his lunch break, Mu'Min crossed a perimeter fence and walked about a mile to a shopping center where he entered a retail carpet store.⁴¹ Using a sharp instrument he had made that morning, Mu'Min murdered and robbed Mrs. Gladys Nopwasky, the proprietor of the store.⁴² Mu'Min then returned to his work detail after discarding his weapon and his bloody clothes.⁴³

The murder of a local citizen by a member of a prison work crew generated a substantial amount of publicity in Prince William County.⁴⁴ Mu'Min's motions for change of venue and individual

39. *Mu'Min v. Commonwealth*, 389 S.E.2d 886, 889 (Va. 1990).

40. *Id.*

41. *Id.* at 890.

42. *Id.* According to Mu'Min's testimony at trial, a heated argument between himself and Mrs. Nopwasky ensued over the prices of oriental carpets. *Id.* After Mrs. Nopwasky called Mu'Min a "nigger" and "spit in [his] face," Mu'Min slapped her, and then she kicked him in the groin. *Id.* Mu'Min alleged that as he fell, he "caught the top part of her pants" and pulled them down. *Id.* Mrs. Nopwasky then began to slash at him with a steak knife. *Id.* Mu'Min next went for his weapon and hit her in the chest and neck and she started to bleed profusely. *Id.* Searching for a first aid kit, Mu'Min alleged that he found four dollars in change which he took to buy ice to apply to the victim's wounds. *Id.* He changed his mind, however, and returned only to wipe up his fingerprints. *Id.*

43. *Id.*

44. "Surprise, outrage, and fear" were expressed "for the safety of local residents upon discovery that prisoners like Mu'Min, who had been convicted of violent crimes, were permitted to work in such close contact with the public." *Id.* at 899 (Whiting, J., dissenting). Thus, a great deal of the media coverage focussed on the gross negligence of the officials in charge of the prison work detail. *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1910 (1991) (Marshall, J., dissenting). The details of Mu'Min's crime and his prior criminal record and behavior, however, also attracted media attention. The content of these stories contained highly prejudicial information:

Readers of local papers learned that Nopwasky had been discovered in a pool of

voir dire, however, were denied by the trial judge.⁴⁵ Although eight of the twelve jurors admitted to reading or hearing about the case, the trial judge accepted as conclusive the fact that none admitted to any bias.⁴⁶ In a bifurcated trial, the jury found Mu'Min guilty of

blood, with her clothes pulled off and semen on her body. . . . That Mu'Min had confessed to the crime. . . . Mu'Min initially offered the incredible claim that he had entered the store only to help Nopwasky after witnessing another man attempting to rape her. . . . Another story reported that Mu'Min had admitted to at least having contemplated raping Nopwasky. . . . One front page story set forth the details of Mu'Min's 1973 murder of a cab driver. . . . [Another stated that] Mu'Min had been cited for 23 violations of prison rules. . . . Several stories reported that Mu'Min had strayed from the . . . work detail to go on numerous criminal forays before murdering Nopwasky. . . . [R]eaders learned that the murder of Nopwasky could have been avoided if the state had been permitted to seek the death penalty in Mu'Min's 1973 murder case.

Id. at 1911 (Marshall, J., dissenting). Mu'Min's crime also generated a number of front page headlines:

MURDERER CONFESSES TO KILLING WOMAN . . . INMATE SAID TO ADMIT TO KILLING . . . ACCUSED KILLER SAYS HE STABBED DALE CITY WOMAN AFTER ARGUMENT . . . MU'MIN SAYS HE DECIDED AGAINST RAPING NOPWASKY . . . LAXITY WAS FACTOR IN SEX KILLING.

Id. (Marshall, J., dissenting). Also, a number of stories appeared quoting the opinions of local officials on the subject:

As quoted in a local paper, a Department of Corrections report acknowledged that Mu'Min "could not be described as a model prisoner." . . . The local Congressman announced that he was "deeply distressed by news that my constituent . . . was murdered by a convicted murderer serving in a highway department work program." . . . His opponent in the 1988 congressional election, a member of the Virginia House of Delegates, likewise wrote an editorial in which he stated, "I am outraged that a Department of Corrections inmate apparently murdered a resident of Dale City."

Id. (Marshall, J., dissenting). The local police chief also assured the public that the right person had been charged with the crime. *Id.* (Marshall, J., dissenting).

45. *Id.* at 1902 & n.2. The trial court did not allow the following questions requested by the defense counsel:

What have you seen, read or heard about this case?
 From whom or what did you get this information?
 When and where did you get this information?
 What did you discuss?
 Has anyone expressed an opinion about this case to you?
 Who? What? When? Where?

Id. at 1902 n.2.

46. *Id.* at 1903. The venirepanel consisted of 26 persons. *Id.* at 1902. Seated in one group, the panel was asked if anyone previously had heard of the case through the media or other sources. *Id.* Sixteen responded affirmatively. *Id.* The trial court then posed the following questions:

Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?

Is there anyone that would say that you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?

In view of everything that you've seen, heard, or read, or any information

murder and sentenced him to death.⁴⁷ The Virginia Supreme Court affirmed the lower court's decision and sentence, with three Justices dissenting on the basis that the defendant had not been tried by an impartial jury.⁴⁸

In a five-to-four opinion, the United States Supreme Court affirmed the ruling of the Virginia Supreme Court. The issue before the Court was whether prohibiting a criminal defendant from questioning the venirepanel about the specific content of previously acquired information violates due process.⁴⁹ Writing for the majority, Chief Justice Rehnquist held that a defendant is entitled to question potential jurors who have acquired previous information only as to their ability to remain impartial.⁵⁰

B. The Majority Opinion

The Court concluded that the Due Process Clause of the Fourteenth Amendment does not require that jurors be asked about the specific content of their exposure to pretrial publicity.⁵¹ The Court stated that in order to compel state courts to ask content questions about pretrial publicity, this compulsion must be constitutionally mandated. Thus, the proper standard is whether the trial court's failure to ask such questions rendered the trial fundamentally unfair.⁵² The Court conceded that allowing content questions would help counsel to use peremptory challenges more effectively.⁵³ The Court concluded, however, that simply because the questions might be "helpful" does not mean they are constitutionally compelled, especially since peremptory challenges are not constitutionally required.⁵⁴ In addition, the Court noted that asking content questions would necessitate interrogation of individual jurors and found that such a procedure should not be required because it is

from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

Id. Only one juror responded in the affirmative to these questions and was dismissed for cause. *Id.* The rest remained silent. *Id.*

47. *Mu'Min v. Commonwealth*, 389 S.E.2d 886, 889 (Va. 1990), *aff'd*, 111 S. Ct. 1899 (1991).

48. *Id.* at 898 (Whiting, J., dissenting, joined by Stephenson and Hassell, JJ.).

49. *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1901 (1991).

50. *Id.* at 1903.

51. *Id.* at 1908.

52. *Id.* at 1905.

53. *Id.*

54. *Id.* (citing *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988)).

not constitutionally compelled.⁵⁵

In reaching its decision, the Court recognized the absence of a wide consensus favoring content questions among the state and lower federal courts.⁵⁶ It compared *Mu'Min* with *Aldridge v. United States*⁵⁷ in which the Court largely relied on a consensus among state courts to require the questioning of jurors about racial prejudice.⁵⁸ Additionally, the Court stressed the importance and tradition of allowing the trial judge wide discretion in conducting *voir dire*.⁵⁹

Lastly, the majority examined the extent of the publicity and the *voir dire* record of this specific case.⁶⁰ Comparing both to the facts of *Irvin v. Dowd*,⁶¹ the Court concluded that *Mu'Min*'s case did not create the "wave of public passion" that raises a presumption of prejudice and that the claims of the jurors as to their impartiality were credible.⁶² Further, the Court found the *voir dire* conducted by the trial court sufficiently thorough in uncovering any bias due to pretrial publicity.⁶³

C. Justice O'Connor's Concurrence

According to Justice O'Connor, the trial judge's assessment of the jurors' own statements of impartiality did not suffer from manifest error.⁶⁴ Justice O'Connor stated two reasons why the trial judge was competent to make this determination despite his failure to ask content questions. First, the trial judge was aware of all of the information that the jurors may have been exposed to through the media.⁶⁵ Second, the trial judge repeatedly questioned the prospective jurors about their ability to remain impartial despite their exposure to pretrial publicity.⁶⁶ Thus, aware of the full-range of potentially damaging information, the trial judge was in a position to determine whether the jurors' own statements of impartiality were believable. Although Justice O'Connor conceded that asking content questions might have facilitated a more accurate assess-

55. *Id.*

56. *Id.* at 1905-06.

57. 283 U.S. 308 (1931).

58. *Mu'Min*, 111 S. Ct. at 1905-06; *see supra* note 16.

59. *Mu'Min*, 111 S. Ct. at 1906.

60. *Id.* at 1907.

61. 366 U.S. 717 (1961); *see supra* notes 22-31 and accompanying text.

62. *Mu'Min*, 111 S. Ct. at 1907.

63. *Id.* at 1908.

64. *Id.* at 1909 (O'Connor, J., concurring).

65. *Id.* (O'Connor, J., concurring).

66. *Id.* (O'Connor, J., concurring).

ment of the jurors' partiality, she did not think that such questions were so "indispensable" as to be required by the Sixth Amendment.⁶⁷

D. Justice Marshall's Dissent

Justice Marshall, joined by Justices Brennan and Stevens, criticized the majority's holding for turning "the Sixth Amendment's right to an impartial jury . . . into a hollow formality."⁶⁸ According to Marshall, three reasons exist for asking content questions when jurors have been exposed to pretrial publicity. First, content questions are necessary to determine if a juror should be excused for cause.⁶⁹ Since a juror exposed to certain types of publicity will automatically be disqualified despite any profession of impartiality,⁷⁰ inquiry into the extent of exposure is necessary.⁷¹ Second, by asking content questions, the trial court is able to give "legal depth" and confirmation to a juror's profession of impartiality.⁷² Third, requiring content questioning compels the trial court to scrutinize the actual media coverage, facilitating the court's accurate assessment of the jurors' partiality.⁷³ Since much of the publicity in *Mu'Min's* case was of the type that would disqualify a juror as a matter of law,⁷⁴ Justice Marshall concluded that the trial court could not have assessed the jurors' impartiality without knowing precisely the information to which they were exposed.⁷⁵

Justice Marshall also criticized the majority for interpreting the Court's racial bias cases to suggest that content questions were not constitutionally required.⁷⁶ Marshall stated that the racial bias cases never mandated content questioning because the issue in those cases was whether any inquiry into racial bias was required at all.⁷⁷ According to Marshall, the only clear rule from those cases is that a juror's profession of impartiality is not always believable.⁷⁸ Justice Marshall noted an earlier Court recognition that the "preservation of the opportunity to prove actual bias is a guaran-

67. *Id.* (O'Connor, J., concurring).

68. *Id.* at 1909 (Marshall, J., dissenting).

69. *Id.* at 1913 (Marshall, J., dissenting).

70. *See supra* note 27.

71. *Mu'Min*, 111 S. Ct. at 1913 (Marshall, J., dissenting).

72. *Id.* at 1914 (Marshall, J., dissenting).

73. *Id.* at 1915 (Marshall, J., dissenting).

74. *See supra* notes 34, 44.

75. *Mu'Min*, 111 S. Ct. at 1915 (Marshall, J., dissenting).

76. *Id.* at 1913 (Marshall, J., dissenting).

77. *Id.* (Marshall, J., dissenting).

78. *Id.* (Marshall, J., dissenting).

tee of a defendant's right to an impartial jury.'⁷⁹ Since the defendant has the burden of proving juror partiality, a thorough examination of the potential jurors is an essential component of the right to an impartial jury.⁸⁰

Finally, Justice Marshall confronted the majority's contention that content questioning would unduly burden trial courts and interfere with their discretion in conducting *voir dire*. In support of the opposite conclusion, Marshall cited authorities from numerous jurisdictions holding that content questions are necessary to due process.⁸¹ Thus, Justice Marshall concluded that the procedures used by the trial court in this case were simply routine motions unlikely to uncover actual juror bias and, therefore, did not ensure *Mu'Min* a fair trial with an impartial jury.⁸²

E. Justice Kennedy's Dissent

Justice Kennedy concluded that the trial court abused its discretion by failing to ask content questions.⁸³ According to Kennedy, a trial court has a duty to assess each individual juror's ability to be impartial when the juror has been exposed to pretrial publicity.⁸⁴ By simply relying on the silence of the prospective jurors as an indication of their impartiality, the trial court failed to make an adequate assessment of the jurors' impartiality.⁸⁵ Although he recognized the deference granted to a trial court's finding of juror impartiality, Justice Kennedy stressed that such deference is based on the expectation of a *voir dire* that sufficiently assesses the credibility of the jurors' assertion of impartiality.⁸⁶

IV. ANALYSIS

Mu'Min was the Supreme Court's first ruling on the extent and

79. *Id.* (Marshall, J., dissenting) (quoting *Dennis v. United States*, 339 U.S. 162, 171-72 (1950)).

80. *Id.* (Marshall, J., dissenting).

81. *Id.* at 1916 (Marshall, J., dissenting); *see, e.g.*, *United States v. Davis*, 583 F.2d 190, 196 (5th Cir. 1978) (holding that the trial court should have conducted content questioning); *United States v. Addonizio*, 451 F.2d 49, 67 (3d Cir. 1971) (finding that *voir dire* was appropriately sequestered and devoted to determining the extent and effect of each prospective juror's exposure to pretrial publicity), *cert. denied*, 405 U.S. 936 (1972); *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968) (stating that the trial court should have granted a request for content questioning of the venirepanel), *cert. denied*, 400 U.S. 1022 (1971).

82. *Mu'Min*, 111 S. Ct. at 1917 (Marshall, J., dissenting).

83. *Id.* at 1919 (Kennedy, J., dissenting).

84. *Id.* at 1918 (Kennedy, J., dissenting).

85. *Id.* at 1919 (Kennedy, J., dissenting).

86. *Id.* at 1918-19 (Kennedy, J., dissenting).

depth of *voir dire* required by both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. By declining to include content questions within the guarantees of due process, the Court's opinion can be criticized for a variety of reasons. First, the Court placed far too much faith in a juror's judgment of his or her own impartiality. Second, the Court's comparison of the *Mu'Min* facts to *Irvin*,⁸⁷ a case that generated nearly unprecedented publicity, is not dispositive of the issue. Third, the Court failed to recognize the higher degree of scrutiny that should be employed in a capital murder case. Finally, the Court failed to give credence to fundamental principles of fairness in judicial procedures as required by the Due Process Clause.

A. *The Inadequacy of a Juror's Self-Assessment of Impartiality*

According to *Mu'Min*, due process requires only that *voir dire* cover the subject of pretrial publicity. Trial courts, then, can dispose of the issue simply by asking two questions:

- (1) Have you read, seen, or heard about this case?
- (2) If so, would that affect your ability to remain impartial and judge the case based only on the evidence presented in court?

As a result, individual jurors become the judges of their own impartiality, a task that should be performed by the trial court. Making jurors the judges of their own impartiality is misguided for at least two reasons. First, jurors generally are unaware of their own prejudices; this is especially true in the area of prejudice due to pretrial publicity.⁸⁸ Second, *voir dire* does not invite an honest disclosure of prejudices.⁸⁹ This is true especially when *voir dire* is

87. *Id.* at 1906-07 (contrasting both the number of jurors in each case who had formed an opinion as to guilt and the types of media coverage prior to each trial).

88. See JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 27 (1987). Frederick noted:

A study specifically addressing the question of whether jurors recognize their own biases indicate that jurors are generally unaware of their own prejudices. Only 26% of those exposed to damaging pretrial publicity recognized their biases, while the remaining supposedly "neutral" jurors who were exposed to damaging pretrial publicity still convicted the defendant at a 2-to-1 rate as compared to jurors not exposed to such publicity.

Id. (citing Stanley Sue et al., *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors*, 37 *PSYCHOL. REP.* 1299 (1975)).

89. "The formal setting of the questioning, often by judges, and the public nature of the disclosures are among the influences that would attenuate honest responses." *Id.* at 27. Social science research reveals a variety of factors present during *voir dire* that affect juror responses. See NATIONAL JURY PROJECT, *supra* note 12, § 2.03. For example, evaluation apprehension, i.e., an awareness of the consequences of one's response, may

conducted in a group and a juror's silence is considered an indication of his or her impartiality. Thus, relying on a juror's own assessment of impartiality is not a reliable method of ensuring an impartial jury.⁹⁰

B. Overemphasizing the Comparison to Irvin v. Dowd

The Court contrasted the facts of *Irvin v. Dowd*⁹¹ with *Mu'Min* to stress that the pretrial publicity *Mu'Min* received was not great enough to create a presumption of prejudice.⁹² Although the majority admitted that "the pretrial publicity appear[ed] to be substantial," it concluded that the publicity "was not of the same kind or extent as that found to exist in *Irvin*."⁹³ The Court in *Irvin* held that due to the prejudicial effect of pretrial publicity, a change of venue should have been granted.⁹⁴ An examination of the record in *Irvin* revealed an extraordinary amount of pretrial publicity and a marked effect on the venirepanel.⁹⁵ The *Irvin* Court, however, did not establish that the excessive publicity present in that case was the threshold amount of publicity for viable claims of juror partiality. The publicity generated by *Mu'Min*'s crime was substantial as well as inflammatory.⁹⁶ Although the facts in *Mu'Min* may not have revealed a wave of public passion set against the defendant warranting a presumption of partiality of the entire venirepanel, a presumption of partiality should have been raised as to any member of the jury who was exposed to the prejudicial media coverage.⁹⁷ By not requiring content questions to be asked and

cause jurors to answer in ways that will have the most favorable results or portray themselves in the most favorable light. *Id.* § 2.03[1]. Generally, people seek to portray themselves as honest and fair, and thus, in the context of the *voir dire*, most people will seek to portray themselves as impartial. *Id.* § 2.03[2]. The greater the social status of the interviewer, the more the respondent's evaluation apprehension increases. The status difference between a judge and juror, therefore, would substantially increase apprehension. *Id.* § 2.03[3]. The presence of an audience also affects juror candor. *Id.* § 2.03[4]. The general tendency when responding in front of a large group and in an unfamiliar situation is to avoid embarrassment by giving minimal responses that conform to responses given by others. *Id.*

90. See NATIONAL JURY PROJECT, *supra* note 12, § 2.05[3][c][ii] (discussing the inadequacy of a juror's self assessment of impartiality); Kerr, *supra* note 34, at 700-01 (noting that results of an empirical study suggest that jurors' assertions of impartiality or partiality indicate very little about the actual degree of juror bias).

91. 366 U.S. 717 (1961).

92. *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1906-07 (1991).

93. *Id.* at 1907.

94. *Irvin*, 366 U.S. at 728-29.

95. See *supra* notes 23, 27.

96. See *supra* note 44.

97. The majority also ignored the fact that exposure to much of the publicity gener-

the extent of media exposure to be revealed, the *Mu'Min* Court ignored its prior holdings that had recognized the potential prejudicial effects of pretrial publicity.

C. *A Greater Level of Scrutiny in Capital Cases*

Given the stark finality of the death penalty, the Court has recognized that the procedures in capital cases warrant extra scrutiny.⁹⁸ David Majid Mu'Min was found guilty and sentenced to death, by a jury in which three-fourths of the jurors possibly were exposed to extremely prejudicial information. Since the trial court refused to question the jurors regarding the content of their exposure, no one can be certain how extensively the sensationalized news reports influenced the jury. The trial court and the United States Supreme Court both were satisfied that the jurors were capable of honestly determining their own impartiality. Neither court felt the need to delve any deeper into the matter, even though a man's life hung in the balance and a few minimal precautions could have ensured him an impartial jury and a fair trial.

D. *Fundamental Fairness*

The Court in *Mu'Min* chose judicial economy over fairness. At its heart, due process guarantees fundamental fairness in judicial proceedings.⁹⁹ The *Mu'Min* decision undermines this notion of

ated by the case may have necessitated a challenge for cause. See *supra* notes 18-38. News reports contained information regarding Mu'Min's prior convictions and his confession, see *supra* note 44, and both of these are grounds that the Court previously found warranted a presumption of partiality. See *Rideau v. Louisiana*, 373 U.S. 723 (1963) (jurors' exposure to defendant's publicized confession rendered trial fundamentally unfair); *Marshall v. United States*, 360 U.S. 310 (1959) (jurors' exposure through news accounts of defendant's prior convictions warranted new trial).

98. See *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *Irvin v. Dowd*, 366 U.S. 717, 727-28 (1961) ("*Where one's life is at stake*—and accounting for the frailties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards." (emphasis added)); *Aldridge v. United States*, 283 U.S. 308, 314 (1931) ("[W]e do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry. *And this risk becomes most grave when the issue is of life or death.*" (emphasis added)); see also *Turner v. Murray*, 476 U.S. 28, 35 (1986) (holding that inquiry into racial prejudice is required in a capital sentencing proceeding when defendant is black and victim is white due to the grave finality of the death penalty); *State v. Williams*, 459 A.2d 641, 652 (N.J. 1983) (stating that the "requirement of fairness—and particularly jury impartiality—is heightened in cases in which the defendant faces death").

99. *Argersinger v. Hamlin*, 407 U.S. 25, 47 (1972) (Powell, J., concurring) (noting that "the principle of due process . . . requires fundamental fairness in criminal trials"); *In re Murchison*, 349 U.S. 133, 136 (1955) (stating that "our system of law has always

fairness as well as the integrity of the criminal court system.¹⁰⁰ Rather than supporting procedures that are reasonably reliable in ascertaining juror bias due to pretrial publicity, the *Mu'Min* Court opted for a procedure that gives only the illusion of uncovering bias.¹⁰¹ Although the entire Court admitted that content questions would have been helpful in ensuring an impartial jury,¹⁰² only three Justices thought that due process required them.¹⁰³ The other Justices were more concerned with judicial economy than with guaranteeing the defendant a fair trial.

V. IMPACT

A. *The General Effect of Mu'Min*

The *Mu'Min* decision mandates that potential prejudice due to pretrial publicity be addressed during *voir dire*; however, *Mu'Min* only requires coverage of the subject in the most perfunctory way.¹⁰⁴ Although *Mu'Min* holds that due process does not require content questions in cases with substantial pretrial publicity, the

endeavored to prevent even the probability of unfairness"). In the words of Chief Justice Taft:

Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter of due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927); *see also* *Estes v. Texas*, 381 U.S. 532, 543 (1965) (holding that the televising and broadcasting of the petitioner's trial deprived him of his due process rights under the Fourteenth Amendment).

100. The Court has stated:

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

California v. Trobetta, 467 U.S. 479, 485 (1984).

101. *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1916 (1991) (Marshall, J., dissenting); *see supra* notes 88-90 and accompanying text.

102. *Mu'Min*, 111 S. Ct. at 1901, 1905, 1909, 1913, 1918-19 (opinions of the majority, Justice O'Connor, Justice Marshall, and Justice Kennedy, respectively).

103. *Id.* at 1912 (Marshall, J., dissenting).

104. The Court's holding in *Mu'Min* does not, on its face, overrule any prior pretrial publicity decisions. In a case such as *Irvin*, when there is a "wave of passion" and widespread community outrage against the defendant, a presumption should still be raised that the entire community may be biased. In such a case, the court should grant a change of venue or a continuance.

There is a danger, however, that the *Mu'Min* decision undermines *Irvin*. If a trial court does not inquire into the extent and content of the prospective jurors' exposure to publicity, it might fail to become aware of a "wave of passion" set against the defendant. By relying solely on the jurors' self-assessment of impartiality, *see supra* notes 19-21 and

decision does not *prevent* courts from asking more probing questions than those required by due process.¹⁰⁵ Thus, state courts are free either to afford criminal defendants procedures above and beyond the demands of the Constitution or to follow the lax lead of the Supreme Court of the United States.¹⁰⁶

accompanying text, a trial court easily could seat a jury that has already been convinced by the media of the defendant's guilt.

105. A question not addressed in *Mu'Min* is whether federal courts must ask content-based questions in cases involving pretrial publicity. Under its supervisory power over federal courts, the Supreme Court has sometimes mandated procedures that are beyond the minimum requirements of due process. One example is the requirement of asking questions relating to racial bias. See *Aldridge v. United States*, 283 U.S. 308 (1931). The *Aldridge* rule, that racial bias questions must be asked whenever the defendant is black and the victim is white, only applies to federal courts. See *id.* Under *Ristaino v. Ross*, 424 U.S. 589, 597 (1976), however, due process only requires that racial bias questions be asked when race is at issue. See *supra* note 16.

Of course, because *Mu'Min* simply delineates the minimum constitutional due process requirements, the lower federal courts that already require content questions will not be affected by the *Mu'Min* decision, since it does not speak to any supervisory power issue. See, e.g., *United States v. Davis*, 583 F.2d 190, 197-98 (5th Cir. 1978) (holding that inadequate *voir dire* in cases involving substantial pretrial publicity renders the trial court unable to fairly assess the jurors' impartiality); *United States v. Dellinger*, 472 F.2d 340, 374 (7th Cir. 1972) (requiring inquiry into jurors' exposure to pretrial publicity when the defense brings the issue forward and requests questioning); *Silverthorne v. United States*, 400 F.2d 627, 638 (9th Cir. 1968) (reversing a conviction due to trial court's failure to make any effort to ascertain the impact of pretrial publicity on jurors).

106. Nothing prevents state courts from affording greater rights than those guaranteed by the United States Constitution. Federal guarantees are a floor beneath which state courts cannot fall in recognizing constitutional rights. See, e.g., James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1313 (1989). As long as state courts explicitly note that their decisions are based on adequate and independent state grounds, those courts are free to find that state constitutions offer greater rights than the Federal Constitution. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1037-38 (1983). In reaction to the Burger and Rehnquist Courts' narrowing of the protections of the Bill of Rights, many state courts have interpreted their state constitutions to offer greater liberties than those available under the Federal Constitution. For articles discussing this trend of "state specific" rights, see William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986); Timothy R. Lohraff, Note, *United States v. Leon and Illinois v. Gates: A Call for State Courts to Develop State Constitutional Law*, 1987 U. ILL. L. REV. 311; *Recent Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

The New Jersey Supreme Court has already afforded its capital defendants greater rights regarding *voir dire* than those guaranteed by the Federal Constitution under *Mu'Min*, maintaining that "*voir dire* in a capital cause should be open-ended, thorough and searching, and designed to elicit a potential juror's views, biases, and inclinations." *State v. Erazo*, 594 A.2d 232, 240-41 (N.J. 1991) (citations omitted). Basing its decision on state law precedent, the New Jersey court declined to march lock-step with the Supreme Court. In a strong concurring opinion in *Erazo*, Justice Handler stressed the inadequacy of the United States Supreme Court in insuring the due process rights of capital defendants: "It cannot, in this context, be overemphasized that the United States

B. *The Impact of Mu'Min in Illinois*

The Illinois Supreme Court has never specifically addressed the adequacy of *voir dire* in cases involving pretrial publicity. However, its approach to pretrial publicity in *People v. Taylor*¹⁰⁷ reveals a much more liberal stance than the United States Supreme Court's position in *Mu'Min*. Although the Illinois court in *Taylor* did not expressly hold that content questions are required, it maintained in dicta that these questions may be required:

Once the judge is aware that there has been intensive publicity which included dissemination of inadmissible and highly prejudicial information, the judge has no choice but to inquire as to the details which the potential juror remembers. As soon as the juror mentions these details, that juror is subject to a challenge for cause.¹⁰⁸

In *Taylor*, the trial court conducted a thorough and searching *voir dire* that revealed specific, inadmissible information to which the jurors had been exposed.¹⁰⁹ If the trial court had failed to ask the venirepanel these questions, however, the issue of actual prejudice due to knowledge of inadmissible information could not have been raised. If this had been the case, perhaps the Illinois Supreme Court would have been confronted with the same issue as that in *Mu'Min*. Based on the language of *Taylor*, it seems that the Illinois Supreme Court would have decided the issue differently than the United States Supreme Court. With the decision in *Mu'Min*, however, Illinois courts must now decide whether to stay true to

Supreme Court continues to eviscerate the procedural safeguards afforded capital defendants under the federal constitution That untoward development only strengthens the need and responsibility of state judiciaries to assure the sufficiency of protection in capital causes." *Id.* at 248 (Handler, J., concurring) (citing *Mu'Min v. Virginia*, 111 S. Ct. 1899 (1991)).

107. 462 N.E.2d 478 (Ill. 1984). *Taylor* dealt with the capital defendant's request for a change of venue due to pretrial publicity. *Id.* at 480-81. The *voir dire* record revealed that six of the seated jurors heard prior to trial that the defendant failed a lie detector test, information inadmissible at trial. *Id.* The court held that exposure to this information coupled with the unprecedented volume of publicity was enough to raise the presumption of partiality and, thus, that the jurors' assertions of impartiality were insufficient to rebut that presumption. *Id.* at 484.

108. *Id.* at 486.

109. The record revealed:

Voir dire in this case was conducted largely by the trial judge and lasted three days. Each prospective juror was asked a series of questions dealing with his knowledge of the case, including his exposure to and memory of written broadcast reports. When a juror remembered certain key details, that juror was specifically asked if he had formed any opinions or drawn any inferences from those facts.

Id. at 482-83.

the fairer standards enunciated in *Taylor* or instead to give defendants *Mu'Min's* bare minimum and inadequate due process requirements.

Although the Illinois Supreme Court has been criticized for blindly applying the United States Supreme Court's interpretations of the Federal Bill of Rights to similar provisions in the Illinois Constitution,¹¹⁰ the Illinois Supreme Court in recent years has begun to assert the independence of the Illinois Constitution.¹¹¹ Generally, the Illinois Supreme Court will follow federal constitutional principles unless the language of the Illinois Constitution or the records of the Illinois constitutional convention indicate an intention to construe the Illinois Constitution differently.¹¹² The Illinois Supreme Court has noted the differences in language between the Illinois and the United States constitutional rights to a jury trial.¹¹³

110. See Thomas B. McAfee, *The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1 (1987); Roger Kangas, Note, *Interpreting the Illinois Constitution: Illinois Supreme Court Plays Follow the Leader*, 18 LOY. U. CHI. L.J. 1271 (1987).

111. See *People ex rel Daley v. Joyce*, 533 N.E.2d 873, 878 (Ill. 1988) (providing greater rights involving waiver of jury trial); *People v. Duncan*, 530 N.E.2d 423, 430 (Ill. 1988) (providing greater rights in jury trial involving right of confrontation); *People v. Gacho*, 522 N.E.2d 1146, 1164 (Ill. 1988) (providing greater protection from cruel and unusual punishments than federal guarantees).

112. See *People v. Tisler*, 469 N.E.2d 147 (Ill. 1984). Other state courts have not limited the circumstances for diverging from federal constitutional decisions to the same extent. For example, some state courts have departed from United States Supreme Court decisions simply on public policy grounds or in reaction to the low levels of protection provided by the United States Constitution. See, e.g., *People v. Disbrow*, 545 P.2d 280 (Cal. 1976) (refusing to follow *Harris v. New York*, 401 U.S. 222 (1971)); *State v. Rogers*, 568 P.2d 199, 204 (N.M. Ct. App. 1977) (refusing to follow *Bartkus v. Illinois*, 359 U.S. 121 (1959)).

Other state courts, however, only depart from Supreme Court decisions when "state-specific factors" warrant independent state rights. These state-specific factors include: (1) textual differences between similar provisions of state and federal constitutions; (2) state statutes that grant rights greater than those offered by the United States Constitution; (3) state case law precedent that supports divergence from federal law; (4) records from state constitutional conventions that evince an intention to interpret state constitutional provisions independently from the U.S. Constitution; and (5) decisions from other state courts diverging from federal law. Lohraff, Note, *supra* note 106, at 347-48.

113. *Joyce*, 533 N.E.2d at 875. The Illinois Constitution has two provisions granting the right to a jury trial. The first provides:

In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury.

ILL. CONST. art. I, § 8. The second provides:

The right of trial by jury as heretofore enjoyed shall remain inviolate.

ILL. CONST. art. I, § 13.

In contrast, the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury.

The Illinois Supreme Court has held, therefore, that an independent analysis of the right to jury trial in Illinois is warranted.¹¹⁴

Since the Illinois Supreme Court has concluded that a separate analysis of the right to jury trial is justified, Illinois courts have at least two other independent state grounds or "state-specific" rights¹¹⁵ on which to require a higher level of protection than that offered by *Mu'Min*. First, Illinois has developed an independent body of case law dealing with pretrial publicity.¹¹⁶ As explained above, *People v. Taylor* and other Illinois cases evince a much more liberal attitude toward content questions than *Mu'Min*. Second, criminal defendants in Illinois have a statutory right to peremptory challenges and to have prospective jurors challenged for cause.¹¹⁷

U.S. CONST. amend. VI.

114. *Joyce*, 533 N.E.2d at 875. The Illinois Supreme Court stated:

[A]s to the jury trial issue, there is a difference in the language of our State constitution from that of the Federal Constitution, and the difference is one of substance and not merely one of form. . . . [W]e should give our State constitutional provision meaning independent of the construction the Federal courts have placed on the jury trial provisions of the Federal Constitution.

Id. (citations omitted).

115. *See supra* note 112.

116. *See People v. Lucas*, 548 N.E.2d 1003, 1011 (Ill. 1989) (holding that the fact that 19 venire members had been excused for cause due to exposure to pretrial publicity did not show that defendant had been denied a fair trial by an impartial jury, especially when no juror seated had indicated specific knowledge of the case or had formed an opinion); *People v. Britz*, 528 N.E.2d 703, 714 (Ill. 1988) (finding no bias due to pretrial publicity when the *voir dire* record revealed that four jurors who had been exposed to such publicity only had sketchy recollections of the case); *People v. Sanchez*, 503 N.E.2d 277, 285-86 (Ill. 1986) (holding that the defendant was not denied a fair trial due to pretrial publicity when only two of the impaneled jurors had read of the crime and neither had extensive recollections of details); *People v. Taylor*, 462 N.E.2d 478, 486-87 (Ill. 1984) ("What we have in this case is the documented fact of the unprecedented volume of publicity combined with the exposure of impaneled jurors to inadmissible, highly prejudicial information. . . . [T]he trial judge erred by denying the challenges for cause."); *People v. Gendron*, 243 N.E.2d 208, 210-13 (Ill. 1968) (finding that the defendant was not denied trial by an impartial jury when trial court excused 123 of 297 prospective jurors due to prejudice arising from pretrial publicity and when thorough *voir dire* did not disclose any bias due to pretrial publicity in the jurors seated), *cert. denied*, 396 U.S. 889 (1969); *People v. Kurtz*, 224 N.E.2d 817, 820 (Ill. 1967) (finding that "[t]he examination of prospective jurors on *voir dire* is, in a typical instance of pretrial publicity, probably the most valuable means of ascertaining partiality or indifference among persons summoned as jurors"); *People v. Hines*, 518 N.E.2d 1362, 1365-68 (Ill. App. Ct. 4th Dist. 1988) (finding no violation of right to impartial jury when pretrial publicity to which jurors were exposed was largely factual in nature).

117. ILL. REV. STAT. ch. 38, para. 115-4 (1989). This provision states in pertinent part:

(d) Each party may challenge jurors for cause.

(e) A defendant tried alone shall be allowed 20 peremptory challenges in a capital case, 10 in a case in which the punishment may be imprisonment in the penitentiary, and 5 in all other cases; except that, in a single trial of more than

By not allowing inquiry into a prospective juror's exposure to potentially prejudicial publicity, the defendant's statutory right to exercise his or her peremptory challenges or to have jurors challenged for cause is seriously impaired. The peremptory challenge is rendered worthless if the defendant has no means of intelligently assessing when it should be exercised, especially when jurors should be excused for cause but their exposure to prejudicial information cannot be revealed without adequate *voir dire*.

In summary, the constitution, statutes, and case law of Illinois establish independent and adequate grounds for Illinois courts to adequately guarantee impartial juries beyond what is required by the Federal Constitution. Thus, when a case receives substantial publicity, Illinois courts should grant criminal defendants the right to question potential jurors about their exposure to such pretrial publicity.

VI. CONCLUSION

Mu'Min v. Virginia places severe limitations on the Sixth Amendment's guarantee to an impartial jury. In effect, the decision denies criminal defendants the means to prove that pretrial publicity tainted jurors. By not requiring inquiry into the extent of media exposure and by instead placing blind reliance on a juror's judgment of his or her own impartiality, the Supreme Court has provided trial courts with an ill-designed method for judging juror impartiality. The result is obvious: when there has been extensive pretrial publicity, criminal defendants face the possibility of trial in front of jurors who prejudged the case before the trial began.

Due to the potentially unfair result that *Mu'Min* yields, Illinois and other states should rely on their own state laws to ensure fairness in judicial proceedings. The Supreme Court in *Mu'Min* continued down its untoward trail of limiting the procedural safeguards available to criminal defendants under the Federal Bill of Rights. When notions of fairness demand a higher level of protection, state courts should neither be led down nor blindly follow this same trail.

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one defendant, each defendant shall be allowed 12 peremptory challenges in a capital case, 6 in a case in which the punishment may be imprisonment in the penitentiary, and 3 in all other cases.

Id. para. 115-4(d), (e).

