NOTES

Mu'Min v. Virginia—Content Questioning for Media Bias in Jury Selection: Ask Them No Questions, They'll Tell You No Lies

By JILL SIMEONE*

Introduction

Mass media communication networks have made an indelible mark on the American jury trial. The prosecutions of Washington, D.C. Mayor Marion Barry,[1] Oliver North,[2] the Central Park jogger's assailants,[3] Panamanian leader Manuel Noriega,[4] William Kennedy Smith,[5] Jeffrey Dahmer,[6] and the Los Angeles police who were charged with beating Rodney King[7] were all proceedings tried, to some extent, in living rooms across America. As a result of media "overexposure," courts have experienced increased difficulty in satisfying the Sixth Amend-

* Member, Third Year Class; A.B., Harvard University, 1989. The author would like to thank Susanne Aronowitz, Matthew Burke, Melissa Burke, Ted Franklin, Joanne Spalding, and Marilyn Zola for their assistance on earlier drafts of this Note. She would also like to thank Professors Wayne Woody and Scott Sundby for their insights at the project's conception, and Professor Kate Bloch for her support throughout. Finally, special thanks and appreciation to Michael Wadman for his unyielding encouragement.

1. *See, e.g.*, Mike Folks, *Stephens Makes Case for Jurors in the Know*, WASH. TIMES, May 14, 1990, at A1.

2. *See, e.g.*, Newton Minow, *'Impartial' Juries: Trial By Ignorance*, N.Y. TIMES, Nov. 15, 1989, at A29; Michael Wines, *Judge in North Case Angered by ABC News Report*, N.Y. TIMES, Feb. 2, 1989, at A23.

3. Minow, *supra* note 2.

4. Mary T. Schmich, *Picking Noriega Jury May Be A Tricky Task*, CHI. TRIB., Sept. 8, 1991, at C21.

5. *Jury vs. Media Circus*, USA TODAY, Dec. 3, 1991, at 12A.

6. *Jurors Drawn from Extra-Large Pool*, USA TODAY, Jan. 27, 1992, at 3A.

7. Linda Deutsch, *Selection of Jury Begins in King Case; Jurisprudence: The Four Officers Watch Solemnly as the First Batch of Prospects Are Quizzed. Some Strong Opinions Are Expressed*, L.A. TIMES, Feb. 20, 1992, at B1.

ment's[8] mandate that a defendant receive an impartial jury. Finding potential jurors who are not prejudiced by negative publicity is a challenge for courts trying a defendant for a notorious crime.

Voir dire is the only opportunity a defendant has to detect juror bias resulting from media exposure. Voir dire, meaning "to speak the truth," involves routine questioning of potential jurors to gauge competence.[9] Voir dire questions typically include inquiry about a potential juror's job, family, education, prior convictions, prior encounters with the police or parties to the trial, knowledge of the trial, or prior jury service.[10] If the questioning reveals a potential juror's bias, counsel may challenge that juror "for cause."[11] Voir dire also provides attorneys with information they may use to exercise a limited number of "peremptory" challenges of jurors without showing "cause" or legal basis for disqualification.[12] While some jurisdictions allow expansive voir dire to enhance the meaningfulness of peremptory challenges, others have restricted the process to questions aimed at making challenges for cause.[13]

Under the Federal Rules of Criminal Procedure, either the court or the attorneys may conduct voir dire.[14] If the court conducts voir dire, then the attorneys may submit reasonable questions for the court to ask potential jurors.[15] Because the judge determines the reasonableness of the proposed queries, the court is the ultimate arbiter of what the jurors will be asked.[16]

Voir dire procedure in state courts varies widely.[17] The current trend favors court-conducted voir dire because of its greater efficiency.[18]

---

8. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ." U.S. CONST. amend. VI. The Fourteenth Amendment imposes the right to trial by an impartial jury upon the states. Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968).

9. BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

10. BNA Crim. Prac. Manual, 81:301-02 (Mar. 20, 1991).

11. A challenge for cause is "[a] request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons," such as bias or a close relationship with one or more of the parties. BLACK'S LAW DICTIONARY, *supra* note 9, at 209.

12. Peremptory challenges give attorneys "[t]he right to challenge a juror without assigning a reason for the challenge." *Id.* at 1023.

13. *See, e.g.*, People v. Williams, 628 P.2d 869, 876-77, 879-80 (Cal. 1981) (expansive); Commonwealth v. DeMarco, 481 A.2d 632, 640 (Pa. Super. Ct. 1984) (restrictive). Restrictive jurisdictions do not deny the parties peremptory challenges, they just do not allow them to ask a range of questions upon which to base those challenges.

14. FED. R. CRIM. P. 24.

15. *Id.*

16. BNA Crim. Prac. Manual, *supra* note 10, at 81:301.

17. States are about evenly split on their voir dire procedure policies: some allow attorneys to direct voir dire, others place voir dire in the hands of the judge, and the remainder split the duty between counsel and the court. JON M. VAN DYKE, JURY SELECTION PROCEDURES 282-84, App. D (1977).

18. BNA Crim. Prac. Manual, *supra* note 10, at 81:304.

Although busy dockets make the more streamlined process of judge-conducted voir dire appealing, some states are concerned that the essence of voir dire may be lost. Connecticut, for example, has safeguarded the right to attorney voir dire in its state constitution.[19] Jury selection experts agree that "attorneys have [an interest] in uncovering any potential bias; whereas the judge, who is in a more neutral stance, may not be quite as dedicated to asking follow-up questions . . . ."[20] Thus attorney-conducted voir dire, though more time-consuming, has greater potential to expose prejudice than judge-conducted voir dire.

One way to discover prejudice in a high-profile trial is through individualized content questioning. Content questions involve eliciting specific details from each potential juror about the content of the publicity she has encountered regarding the case.[21] This procedure allows the questioner to evaluate the impact of the media upon each juror.

When a state court judge alone conducts jury voir dire, the judge's acceptance of a juror as qualified is only reviewable by a higher court for "manifest error."[22] The burden of proof for error is on the defendant.[23] In the 1991 *Mu'Min v. Virginia*[24] decision, the Supreme Court held that a state trial judge's refusal to question prospective jurors during voir dire in a capital punishment trial about the specific content of news reports which they had seen did not violate either a defendant's Sixth Amendment right to an impartial jury or Fourteenth Amendment due process guarantees.[25] The judge's limited voir dire in *Mu'Min*, mostly conducted in a group format,[26] created a difficult hurdle for the defendant to overcome in proving jury prejudice. The lack of content questions may indicate that the judge did not know to what extent news reports had affected or prejudiced each juror. The empty record, however, provided insufficient evidence of a reversible error.

There are strong arguments for the stringent manifest error standard of review. From a public policy standpoint, there is an undeniable

19. "In all civil and criminal actions tried by a jury, . . . [t]he right to question each juror individually by counsel shall be inviolate." CONN. CONST., art. 1, § 19 (1965). *See also*, N.Y. CRIM. PROC. LAW § 270.15 (codifying attorney-conducted voir dire).

20. Symposium, *Panel on the Selection and Function of the Modern Jury: What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest For Impartiality*, 40 AM. U. L. REV. 547, 563 (1991). Judge Abner Mikva of the D.C. Circuit noted, "The judge wants to get the voir dire over with as quickly as possible and seat the jury. As long as nothing comes out in the questions that forces him to address a bias, he or she will pass it by; whereas when the individual lawyers are doing it, obviously they are looking for bias." *Id.* at 564.

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

22. Patton v. Yount, 467 U.S. 1025, 1031 (1984) (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)).

23. Wainwright v. Witt, 469 U.S. 412, 423 (1985).

24. 111 S. Ct. 1899 (1991).

25. *See infra* notes 147-53 and accompanying text.

26. *See infra* notes 136-42 and accompanying text.

need for judicial expediency in the criminal justice system. When state legislatures allow the trial judge to control the scope of voir dire, they rein in a potentially limitless process. The costs to the defendant, however, can be substantial. This Note argues that the *Mu'Min* majority's bright line rule that content questioning is unnecessary in media bias cases wrongly tips the scale away from a defendant's Sixth Amendment and Due Process rights in favor of judicial expedience without weighing the costs of error in a capital punishment scenario.

This Note focuses on Supreme Court review of judicial voir dire in state capital cases. Part I discusses the history of voir dire in media bias cases. Part II addresses the standard of review for judge-conducted voir dire. Part III centers on the *Mu'Min* decision and explores the tensions between the majority, concurring, and dissenting opinions. Part IV analyzes the *Mu'Min* decision and its impact on Fourteenth Amendment due process guarantees and finds that it has created a zone of unreviewable judicial voir dire. Part V proposes that the weighty task of a capital jury demands that a judge's voir dire substantially probe for juror bias. Because the burden of proving impartiality is on the defendant, content questioning is necessary in capital voir dire to assure that the defendant's due process right to a meaningful appeal cannot be blocked by an empty record.[27] The proposal also notes that *Mu'Min* has effectively returned the issue of content questioning to the states and suggests that local courts and legislatures act affirmatively to fill the *Mu'Min* gap.

I. Voir Dire: Looking Back

A. The Origins of Jury Trial and Jury Selection

Many scholars believe that the Magna Carta was the first document to guarantee a right to jury trial.[28] English criminal juries predated the Magna Carta, but defendants had to pay for them.[29] Voir dire during jury selection has a strong historical tradition although its focus has changed over time. Contrary to current practice, Magna Carta era courts chose juries for their *knowledge* of facts relating to the trial.[30]

27. *See infra* note 194. When a state grants defendants the right to appeal, that right must be meaningful. Griffin v. Illinois, 351 U.S. 12, 18 (1956).

28. *See, e.g.*, LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 47-49 (1988) "While it is true that the main purpose of the charter was to make the king subject to law, several provisions of the charter nonetheless referred to the right to trial by jury . . . . A reading of the Magna Carta indicates that Article 36 is the one guaranteeing jury trial." *Id.* at 48-49.

29. *Id.* at 49. The English jury system was not the first: "Greece and Rome knew forms of it, as did the Germanic tribes, the Scandinavians and the Normans. When the latter invaded England and brought their own version, a native brand of local justice was already flourishing on English soil." NATIONAL COLLEGE OF THE STATE JUDICIARY, JURY 5 (1975).

30. "Both parties had a right to be present at the election [of the jurors] and challenge for good cause members of the proposed jury . . . . If it developed that the jury testified under oath

Only jurors with pre-trial exposure to details and opinions about the case sat on trials.[31] Continuing the tradition, colonial American courts also preferred jurors who were knowledgeable about the facts of a case prior to trial.[32]

As revolutionary discourse peaked, however, Americans' mistrust of public officials spawned an interest in guaranteeing a right to impartial jurors.[33] The first Continental Congress wrote in 1774 that "colonists had the right to be 'tried by their peers.' "[34] The Sixth Amendment, ratified as part of the Bill of Rights in 1791, states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* . . . ."[35] Thus by the end of the eighteenth century, Americans had incorporated lack of bias and impartiality into the federal jury selection criteria.

It was not until 1968 that the constitutional right to an impartial jury broadened beyond the federal justice system. *Duncan v. Louisiana*[36] held that the Sixth Amendment right to an impartial jury applies to states under the Fourteenth Amendment Due Process Clause.[37] Since then, states and the Supreme Court have grappled with the definition of "impartiality" and how to test jurors for it.

B. Jury Selection and Media Bias: Early Cases

The first American case in which a defendant challenged juror impartiality due to media taint was *United States v. Burr*.[38] The trial was over a very public conflict between Aaron Burr and President Thomas Jefferson; the former had been accused of treason.[39] Burr argued that to avoid prejudice, he must be tried by jurors with no knowledge of the

---

that they were unacquainted with the facts, other jurors were summoned until there were 12 who had knowledge and who agreed. Knowledge did not mean first-hand knowledge, but declarations of a juror's father or other equally reliable sources were sufficient." VALERIE HANS AND NEIL VIDMAR, JUDGING THE JURY 23-24 (1986).

31. *Id.*

32. *See* Symposium, *supra* note 20, at 638.

33. THE FEDERALIST No. 83 at 616 (Alexander Hamilton) (New Am. Library Ed. 1961). The Declaration of Independence, for example, chronicled the value of the jury trial among early Americans and claimed that one of the reasons behind the desired separation from the king was for "depriving [colonists], in many cases, of the benefits of Trial by Jury." MOORE, *supra* note 28, at 100.

34. PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 28 (1984).

35. U.S. CONST. amend. VI (emphasis added).

36. 391 U.S. 145 (1968).

37. *Id.* at 157-58.

38. 25 F. Cas. 201 (C.C.D. Va. 1807) (No. 14,694a).

39. R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 33 (1986) ("President [Jefferson] had no doubt that Burr's mysterious expedition down the Mississippi River was for the treasonable purpose of separating the Southwest from the Union."). Burr was ultimately acquitted of these charges. *Id.* at 34.

case.[40] Chief Justice John Marshall held that jurors do not have to be ignorant of publicity, but they must base their verdict solely on in-court testimony.[41] Although Marshall was unwilling to uphold Burr's claim, this case reflects a concern in early American judicial discourse about the impact of adverse press on juror partiality.[42]

It was not until 1878 that the Court affirmatively stated that jurors are impermissibly biased when pretrial exposure to media coverage of a case leads them to form an opinion.[43] In *Reynolds v. United States*,[44] the defendant appealed his conviction because one of the jurors stated in voir dire that he " 'believed' he had formed an opinion [based upon newspaper accounts] which he had never expressed, but which he did not think would influence his verdict on hearing the testimony."[45] The Court held that an "opinion" is more than an "impression" and the judge must determine which is the more accurate characterization of each juror's state of mind.[46] The *Reynolds* Court concluded that "[a] juror who has formed an opinion cannot be impartial."[47]

C. Modern Media Bias Cases: The Legal Framework

The media bias issue resurfaced during the Warren Court era[48] due to the Court's focus on civil liberties. Since then, the Court has defined and refined standards for evaluating the effects of prejudicial media on jurors. The Court has devised two tiers of analysis for juror bias: a Fourteenth Amendment presumption of prejudice test, first stated in *Irvin v. Dowd*[49] and later modified by *Rideau v. Louisiana*,[50] and a Sixth Amendment totality of circumstances test developed in *Murphy v. Florida*.[51]

40. 1 REPORTS ON THE TRIALS OF COLONEL AARON BURR 416 (DaCapo Press 1969) (1807).

41. *Id.*

42. Marshall wrote, "[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no significant objection to a juror; but . . . those strong and deep impressions, which will close the mind against the testimony that may be offered . . . do constitute a sufficient objection to him." *Id.*

43. Reynolds v. United States, 98 U.S. 145, 155-56 (1878).

44. 98 U.S. 145 (1878).

45. *Id.* at 156.

46. *Id.* at 157.

47. *Id.* at 155.

48. Earl Warren was Chief Justice of the United States Supreme Court from 1953-69. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1722 (1988).

49. 366 U.S. 717 (1961).

50. 373 U.S. 723 (1963).

51. 421 U.S. 794 (1974).

1. The Presumption of Prejudice Test

The *Irvin* presumption of prejudice test looks at both the voir dire testimony and the general tenor of the community for evidence that the venire, the group of potential jurors from which the jury is selected, is presumptively biased.[52]

In 1961, the Supreme Court reviewed the conviction in *Irvin v. Dowd* in light of extreme media bias allegations;[53] defendant Irvin claimed denial of due process by an unconstitutionally partial jury. The facts surrounding the *Irvin* trial are indeed dramatic. At the time of Irvin's arrest, six murders were unsolved in his small Indiana community. Shortly after Irvin's arrest for one of the murders, the police made widely broadcast statements to the press telling the public that the defendant had confessed to all six murders.[54] The impact of the media upon the county intensified as the trial approached.[55] The record reflected that ninety-five percent of the homes within the county received the newspapers in which these highly prejudicial articles appeared.[56] Media saturation was nearly complete.

During voir dire, two-thirds of the jurors ultimately empaneled stated that they already thought the defendant was guilty.[57] As one admitted, "You can't forget what you hear and see."[58] Yet all the jurors promised to be fair.[59] Justice Clark, writing for the majority, explained the contradiction of jurors ensuring impartiality when prejudice is obvious: "No doubt each juror was sincere when he said that he would be fair and impartial to the petitioner, but the psychological impact of requiring such a declaration" before fellow jurors is often enough to inhibit a member of the venire from admitting true bias.[60] The Court held that the defendant did not receive due process under the Fourteenth Amendment because the jury was biased.[61]

---

52. *Irvin v. Dowd*, 366 U.S. 717, 726-29 (1961).

53. *Id.* at 720.

54. *Id.* at 725-26. "In many of the stories petitioner was described as the 'confessed slayer of six.'" *Id.* at 726. The media also revealed that the defendant had failed a lie detector test, had prior unrelated convictions, had been identified in a police line-up, and had been court-martialled while in the military for going AWOL. *Id.* at 725.

55. "[P]etitioner had become a *cause celebre* of this small community—so much so that curb stone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations." *Id.* at 725.

56. *Id.*

57. *Id.* at 728.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 728. At the time of the *Irvin* decision, the Sixth Amendment right to a fair jury trial had not yet been applied to the states. *See, e.g.* Palko v. Connecticut, 302 U.S. 319, 324 (1937). Any state that offered a defendant a right to jury trial had to ensure "a panel of

Extremely hostile publicity within a community can create a presumption of prejudice.[62] To evaluate whether the presumption applies, the court must weigh the mental state of the community in light of the media exposure.[63] *Irvin* established a two-part test to evaluate juror bias: (1) A court must look at the environment surrounding the trial for evidence that the entire community is tainted by the media, and (2) the court should examine the "sum total of the voir dire" testimony to see if the empaneled jurors as a group harbor prejudice.[64]

After examining the community setting of the *Irvin* trial, the Court concluded that the "build-up of prejudice [within the community was] clear and convincing."[65] The *Irvin* court also examined the voir dire testimony for evidence of jury bias. Considering that eight of the twelve jurors admitted during voir dire that they already thought the defendant was guilty, the court concluded that "the 'pattern of deep and bitter prejudice' shown to be present throughout the community . . . was clearly reflected in the sum total of the voir dire examination."[66] The Court's analysis of the community and the voir dire together revealed a presumptively prejudicial environment which failed to provide this defendant with a fair trial under Fourteenth Amendment due process standards.

The Court's 1963 *Rideau v. Louisiana*[67] decision modified the two-prong *Irvin* test. Defendant Rideau was arrested for bank robbery, kidnapping, and murder, then placed in the local jail.[68] The police interrogated the defendant in jail and filmed and recorded the entire session.[69] The "interview," which included a confession by the defendant in the absence of counsel,[70] was broadcast by local television stations for the next few days.[71] An estimated two-thirds of the community watched the broadcasts.[72]

---

impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standard of due process." *Irvin*, 366 U.S. 717, 722 (citing In re Oliver, 333 U.S. 257 (1948)). For this reason, the *Irvin* decision was based upon due process, rather than Sixth Amendment grounds.

62. "It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County." *Irvin*, 366 U.S. at 722.

63. *Id.* at 725-26.

64. *Id.* at 725-28.

65. *Id.* at 725.

66. *Id.* at 727 (citation omitted).

67. 373 U.S. 723 (1963).

68. *Id.* at 723.

69. *Id.* at 724.

70. This decision predated the 1966 *Miranda* decision, which held that custodial interrogations are subject to Fifth Amendment protection and that a defendant must be warned of his rights to an attorney and to remain silent. Miranda v. Arizona, 384 U.S. 436, 469-70 (1966).

71. *Rideau*, 373 U.S. at 724.

72. *Id.*

The *Rideau* Court emphasized the impact of the televised confession on the community as they evaluated whether the defendant had received due process. "This spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."[73]

Based solely upon the atmosphere within the community and without consideration of voir dire testimony, the majority concluded that the entire community was per se biased by the pre-trial media event and overruled the trial judge's evaluation of jury impartiality.[74]

Rideau departed from *Irvin* by reducing the two-prong media bias test into a single-prong test: community-wide taint alone may raise a presumption of prejudice sufficient to deem the entire region biased and therefore unsuitable as an impartial jury pool under Fourteenth Amendment due process standards.[75] The *Rideau* Court found sufficient prejudice in the televised confession to presume a biased jury. Without focusing on the voir dire examination, it reversed the trial judge for sanctioning a "kangaroo court."[76]

Presumption of prejudice analysis focuses on Fourteenth Amendment due process requirements. Both *Irvin* and *Rideau* involved defendants facing trial in communities where the bias generated by the media precluded any opportunity for a fair adjudication. As the Court has more recently stated, "Due process means a jury capable and willing to decide the case solely on the evidence before it . . . ."[77]

2. *The Totality of Circumstances Test*

The Court presented a new test for juror bias in *Murphy v. Florida*.[78] Defendant Murphy was convicted in a Florida state court for armed robbery.[79] His habeas corpus petition alleged that the jurors on his case were predisposed to convict because of media accounts of his notorious reputation as a thief.[80]

---

73. *Id.* at 726.

74. *Id.* at 726-27. The dissent criticized the majority for failing to establish a nexus between the environment and their conclusion of prejudicial taint. "Unless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference . . . ." *Id.* at 729 (Clark, J., dissenting).

75. *Id.* at 726-27.

76. *Id.*

77. Smith v. Phillips, 455 U.S. 209, 217 (1982).

78. 421 U.S. 794 (1975).

79. *Id.* at 795.

80. Murphy's credentials included participation in the theft of the Star of India sapphire from a New York museum and the well-known nickname "Murph the Surf," given to him because of his scurrilous behavior. *Id.*

A seven-member majority disagreed with his claims. Distinguishing Murphy's case from *Irvin* and *Rideau*,[81] the Court concluded that Murphy's trial was not enveloped in an atmosphere of prejudice. "[*Irvin* and *Rideau*] cannot be made to stand for the proposition that juror exposure to . . . news accounts . . . alone presumptively deprives the defendant of due process."[82]

Because *Murphy* was decided after *Duncan* had applied the Sixth Amendment right to an impartial jury to the states,[83] the Court could review the state trial proceedings under a Sixth Amendment impartial jury standard as well as the traditional due process review of *Irvin* and *Rideau*. The *Murphy* Court crafted a new Sixth Amendment totality of circumstances test to judge jury bias where a presumption of prejudice was unjustified. Under the new test, the trial court must first decide if the proceeding is more than a "hollow formality" of a trial. If it is, and the circumstances do not warrant a presumption of prejudice under due process standards, then the court must look for "any indications in the *totality of circumstances* that the petitioner's trial was not fundamentally fair" within the context of the Sixth Amendment.[84]

The *Murphy* totality of circumstances test examines the same factors considered by the *Irvin* court: media impact and voir dire testimony.[85] Most of the news articles about Murphy were factual in nature and appeared almost seven months before the start of the trial.[86] The voir dire uncovered little juror hostility or pervasive bias.[87] Therefore, the Court concluded that the totality of circumstances did not reveal sufficient prejudice to warrant a new trial.[88]

3. Distilling a Rule of Law

The two-prong due process test of *Irvin v. Dowd* states that (1) extensive adverse publicity, and (2) voir dire uncovering bias could create a presumption of prejudice within a trial and overturn a jury's conviction.[89] *Rideau* modified *Irvin* and held that extreme adverse publicity, if dramatic enough, could *alone create per se bias in a community* and therefore taint the entire jury pool.[90] The *Irvin/Rideau* rule created a

81. "The proceedings in [*Irvin*, *Rideau*, and other cases] were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Id.* at 799.

82. *Id.*

83. *See supra* notes 36-37 and accompanying text.

84. *Murphy*, 421 U.S. at 799.

85. *Id.* at 800-03.

86. *Id.* at 802.

87. *Id.*

88. *Id.* at 802-03.

89. Irvin v. Dowd, 366 U.S. 717, 728 (1961).

90. Rideau v. Louisiana, 373 U.S. 723 (1963).

Fourteenth Amendment due process standard that looks at systemic corruption and asks, "Is it possible to select impartial jurors from this community?" To overrule a conviction using this test, an appellate court would have to find that the trial was irreparably tainted by bias, and due process thoroughly denied.

The 1974 *Murphy* decision concerned a trial environment which did not rise to the due process presumption of prejudice standard formulated in *Irvin* and *Rideau*. The *Murphy* court therefore established a totality of circumstances standard to test for Sixth Amendment violations. The Court weighed two factors for evidence to determine if a jury was impermissibly biased: the extent of prejudicial media surrounding the trial and jury bias reflected in the voir dire process.[91] Because *Murphy* was decided subsequent to the *Duncan* ruling,[92] the *Murphy* Court was able to add to the existing Fourteenth Amendment due process protection—articulated in *Irvin* and *Rideau*—a Sixth Amendment right to an impartial jury without individual juror taint.

4. Standard of Review

If evidence of prejudice is found under either test, the reviewing court must balance the weight of its findings against the firsthand impression of the presiding judge. "[T]he trial court's resolution of such questions is entitled . . . to 'special deference.' "[93] There are situations, however, where voir dire is inadequate to uncover bias.[94] To overturn a trial judge's evaluation of taint, the higher court must find "manifest error" in the lower court's ruling.[95] If the Court determines that the environment surrounding the trial meets the presumption of prejudice test, then *Irvin* holds that a juror's "statement of impartiality can be given little weight" by the trial judge, and lack of further inquiry during voir dire may be manifest error.[96] On the other hand, in the absence of prejudice per se, a judge reviewing a voir dire transcript for Sixth Amendment claims of individual juror bias may accept a trial court's finding of nonbias "after [a] . . . voir dire proceeding designed specifically to identify biased veniremen."[97]

This tension between protecting a defendant's rights and deferring to the judgment of the trial judge has led to uneven decisionmaking. The

91. *Murphy*, 421 U.S. at 800-03.

92. *Duncan* applied the Sixth Amendment right to an impartial jury to the states. Duncan v. Louisiana, 391 U.S. 145 (1968).

93. Patton v. Yount, 467 U.S. 1025, 1038 (1984).

94. Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring).

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

96. *Irvin*, 366 U.S. at 728. For a discussion of manifest error, see *infra* text accompanying notes 98-102.

97. *Patton*, 467 U.S. at 1038; *see infra* text accompanying notes 181-86.

next section will focus on what "manifest error" really means in the context of jury selection.

II. The Standard of Review: Must "Manifest Error" Be Manifest?

A. Deference to the Trial Court

Voir dire and jury selection are procedures conducted within the purview of the trial judge. As the *Reynolds* Court warned over a hundred years ago, "The finding of the trial court upon [juror bias] ought not be set aside by a reviewing court, unless the error is manifest."[98] A reviewing court will therefore grant trial judges a presumption of correctness when they review their evaluations of non-bias.[99]

The Supreme Court is still hesitant to allow appellate courts to reverse a lower court judge's firsthand evaluation of jurors from a "cold record." There are many reasons for such deference. The manner and demeanor of the jurors during voir dire are often more revealing than their answers, and a trial judge may evaluate their credibility firsthand.[100] Deference also engenders finality. With a more stringent standard of review, the trial court could become "an 'entrance gate' for fact collecting subject to appellate" scrutiny, and lose all authority as a final arbitrator.[101]

Other courts have interpreted and clarified the *Reynolds* rule. The Seventh Circuit, for example, held that a court's voir dire technique does not establish grounds for reversal unless there is a clear abuse of discretion.[102] Thus, not only the trial judge's evaluation of juror bias, but the court's method of inquiry can be immune, to some extent, from review.

B. Constraints on Judicial Voir Dire

1. What Must a Judge Ask?

Despite a high standard of deference to the procedure and judgment of the trial court, a judge must ask or allow counsel to ask certain questions during voir dire. For example, the defendant has a right to have potential jurors questioned about ethnic prejudices if the prejudices might reasonably affect the jury.[103] A defendant also has a right to ex-

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

99. Wainwright v. Witt, 469 U.S. 412, 428 (1984).

100. *Wainwright*, 469 U.S. at 428.

101. *Id.* at 428 n.10 (citing O'Bryan v. Estelle, 714 F.2d 365, 392 (5th Cir. 1983) (Higginbotham, J., concurring specially)).

102. United States v. Banks, 687 F.2d 967, 975-76 (7th Cir. 1982).

103. Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981).

amine jurors about racial and other serious prejudices.[104] Such questioning into racial prejudice is a vital safeguard of due process.[105] Although the Supreme Court has focused its Sixth Amendment review of voir dire on racial prejudice, several circuits have, by analogy, called on the trial courts to make good faith explorations into broader sources of bias, including pretrial exposure to media.

2. *The Grey Zone: Has the Judge Asked Enough?*

Beyond subjects like race and ethnicity, the Supreme Court allows the trial judge much discretion in voir dire procedures.[106] In an attempt to rein in what has become an ad hoc process, many of the circuit courts have begun to define guidelines for review of voir dire.

The Fifth Circuit has held that the standard of review should be "whether the means employed to test impartiality have created a reasonable assurance that prejudice would be discovered if present."[107] The Tenth Circuit held that a judge has a "duty" to ask questions that would reveal prejudice.[108] Moreover, in the Tenth Circuit the trial court must consider the perspectives of both the prosecution and the defense in selecting which questions to ask.[109] If a trial shows signs of potential prejudice, the judge has an obligation to ask more probing questions.[110] These standards allow an appellate court to examine the thoroughness of a trial judge's voir dire. If questions about certain subjects are not asked, then the reviewing court may have grounds for questioning the impartiality of the jury.

Several circuits, including the Ninth, have offered more focused discussion about voir dire in a trial preceded by extensive adverse media coverage. In *Silverthorne v. United States*,[111] the Ninth Circuit held that a trial judge's evaluation of non-bias can be reversed "when pre-trial publicity is great" and the judge merely "obtain[s] jurors' assurances of impartiality" during voir dire.[112] A District of Columbia Circuit decision

104. Turner v. Murray, 476 U.S. 28, 31 (1986); Aldridge v. United States, 283 U.S. 308, 313 (1931).

105. Even the *Mu'Min* court conceded that "the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice . . . ." Mu'Min v. Virginia, 111 S. Ct. 1899, 1904 (1991).

106. Rosales-Lopez v. United States, 451 U.S. 182, 189-90 (1981).

107. United States v. Shavers, 615 F.2d 266, 268 (5th Cir. 1980). The court held that it was abuse of discretion for the trial court not to ask the venire specific questions. Because the defendant was charged with assault with a deadly weapon, the court stated that the defendant had a right to ask the prospective jurors whether they had been crime victims. *Id.*

108. United States v. Baker, 638 F.2d 198, 201 (10th Cir. 1980).

109. *Id.*

110. *Id.* at n.2.

111. 400 F.2d 627 (9th Cir. 1968).

112. *Id.* at 637-38.

embraced *Silverthorne* when it held that a judge should use voir dire to explore issues about which "the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact."[113] In other words, the trial judge should evaluate the atmosphere surrounding the trial and conduct voir dire accordingly. A Tenth Circuit decision warned that if jurors have viewed pre-trial media, "they must be examined with especial care to ensure that such publicity did not cause them to form prejudices."[114] These cases reflect a consensus among many courts that media exposure often engenders juror bias. They suggest from practical experience that it is essential to probe jurors about media in high profile trials using content questions or other methods of inquiry during voir dire. Otherwise, biased jurors will take seats in the jury box.

3. *Can Lack of Record be "Manifest Error?"*

It is difficult for an appellate court to review Sixth Amendment claims of insufficient voir dire. If the record does not overtly reflect juror bias, then the defendant has little basis for challenging the discretion of the trial judge.

A few judicial opinions have acknowledged the dilemma created by sparse voir dire records. In a dissenting opinion from *United States v. Blanton*,[115] Judge Engel of the Sixth Circuit explored the implications of a trial judge's refusal to ask content questions during the voir dire in a high profile case:

> Although the trial court's finding [of impartiality] might be correct, there is no way on this record to probe that finding since the record is silent on the extent of the veniremen's exposure to the pretrial publicity and the . . . extent of their personal reactions . . . . [T]he court should have probed into the effect of the publicity upon the prospective jurors.[116]

Without voir dire questioning about the effects of the media upon the individual jurors, the dissent stated that the appellate court had no means to estimate how the trial judge determined that this set of jurors had not been prejudiced by exposure to the news.[117] In effect, the terse record created a pocket of unreviewable decisionmaking.

A logical extension from the dissent in *Blanton* is that a court's failure to establish a sufficient voir dire record denies a defendant meaningful opportunity to appeal on Sixth Amendment grounds, and therefore is

113. United States v. Robinson, 475 F.2d 376, 381 (D.C. Cir. 1973).

114. United States v. Hall, 536 F.2d 313, 324 (10th Cir. 1976).

115. United States v. Blanton, 719 F.2d 815 (6th Cir. 1983).

116. *Id.* at 841 (Engel, J., dissenting) (quoting United States v. Blanton, 700 F.2d 298, 309-10 (6th Cir. 1983)).

117. *Id.*

itself manifest error. In *Emmons v. State*,[118] the trial judge refused requests to put voir dire questioning about media bias on the trial record.[119] The Indiana Supreme Court held that a trial judge's refusal to record voir dire proceedings denied the defendant the opportunity for appellate review.[120] Defendant's conviction was reversed by the Indiana Supreme Court because it found abuse of discretion and manifest error in the court's refusal to create a record of voir dire.[121]

This Note will argue that when a trial's environment is charged with prejudicial media attention, a judge's failure to probe for evidence of bias during voir dire is the functional equivalent of turning off the record. An empty record can reveal neither evidence to support nor refute juror impartiality. As a result, it denies the defendant a meaningful appeal and constitutes manifest error.

III. *Mu'Min v. Virginia*

The Supreme Court considered for the first time whether a defendant has a constitutional right to ask content questions during voir dire in *Mu'Min v. Virginia*.[122]

A. Factual Background

Petitioner Mu'Min was convicted of first degree murder in 1973 and sentenced to forty-eight years in prison.[123] While out of prison on work detail, Mu'Min escaped and walked to a nearby shopping mall.[124] There, he engaged in a fight with the owner of a carpet store over the cost of oriental rugs and brutally stabbed her to death.[125] There was also evidence that the victim had been raped.[126] Mu'Min then returned to his work site in time to change his bloody shirt and join the crew for

118. 492 N.E.2d 303 (Ind. 1986).

119. "Defendant requested that voir dire be recorded because pretrial publicity had become a concern and he wished to preserve the issue of juror bias for appeal." *Id.* at 304. Although voir dire was performed, it was not recorded by the court reporter. *Id.*

120. *Id.* at 305.

121. "Judicial discretion should be exercised in a way which . . . facilitates and expedites the trial of cases *and appeals therefrom*." *Id.* (emphasis added).

122. 111 S. Ct. 1899 (1991).

123. *Id.* at 1901.

124. *Id.*

125. *Id.* at 1911 (Marshall, J., dissenting). *See also* John F. Harris, *Suspect Describes Fatal Dale City Stabbing*, WASH. POST, Dec. 7, 1988, at A9 (" 'I started asking her questions,' Mu'Min, 36, said near the end of the interrogation. 'She got insulted because I told her that her prices were stupid. She started calling me names . . . and then I stabbed her twice.' ").

126. "Readers of local papers learned that [the victim] had been discovered in a pool of blood, with her clothes pulled off and semen on her body." *Mu'Min*, 111 S. Ct. 1911 (Marshall, J., dissenting). *See also* Pierre Thomas, *Inmate Said to Admit to Killing; Convict Charged in Fatal Stabbing of Dale City Storekeeper*, WASH. POST, Oct. 7, 1988, at C3 ("[S]emen was found on the body.").

lunch.[127]

Substantial publicity surrounded the crime.[128] Community residents were exposed to graphic details of the "macabre" crime scene as well as numerous confession statements made by the defendant and a detailed history of his violent criminal record.[129] Public outrage over the Mu'Min crime was exacerbated by simultaneous national coverage of Willie Horton, who had become a symbol of violent crime in the 1988 presidential campaign.[130] Local politicians pronounced Mu'Min's guilt to the community as they expressed policy concerns over the laxity of state prison regulations.[131]

B. Lower Court Decisions

Prior to trial, the petitioner moved for a change of venue due to the pretrial publicity.[132] The trial judge refused to rule on the motion until after an attempt to empanel a jury.[133] Prior to the start of trial, petitioner offered the court sixty-four proposed voir dire questions and requested individual voir dire.[134] The court denied individual voir dire and refused to use any of petitioner's proposed content questions regarding what individual jurors had heard in the news.[135]

---

127. *Mu'Min*, 111 S. Ct. at 1901, 1911 (Marshall, J., dissenting).

128. *Id.* at 1901. *See also* Pierre Thomas, *Escapee's Murder Trial Opens: Store Owner Slain in Woodbridge*, WASH. POST, Apr. 18, 1989, at B3; *Inmate's Murder Trial Set*, WASH. POST, Oct. 8, 1988, at B5; Pierre Thomas, *Va. Officials Probe Prisoner's Escape From Work Crew*, WASH. POST, Oct. 5, 1988, at D3; Pierre Thomas, *Va. Inmate Charged in Store Slaying: Convicted Killer Was In Trusty Program*, WASH. POST, Oct. 4, 1988, at B1.

129. *Mu'Min*, 111 S. Ct. at 1911 (Marshall, J., dissenting) ("Those who read the detailed reporting of Mu'Min's background would have come away with little doubt that Mu'Min was fully capable of committing the brutal murder of which he was accused.").

130. *Id.* at 1910. Horton had raped and assaulted a woman while on prison furlough. *See infra* note 178. *See also* Dana Priest, *Va. Halts Furloughs for Inmates Convicted of Violent Crimes*, WASH. POST, Nov. 24, 1988, at D1; Pierre Thomas, *Va. Prisoners Banned From Urban Road Crews: Baliles Acts After Prince William Slaying*, WASH. POST, Oct. 20, 1988, at D1.

131. "The local Congressman announced that he was 'deeply distressed by news that my constituent Gladys Nopwasky was murdered by a convicted murderer serving in a highway department work program.' " *Mu'Min*, 111 S. Ct. at 1912 (Marshall, J., dissenting).

132. *Id.* at 1901. *See also* Brief for Petitioner at 9.

133. *Id.* at 1902. *See also* Brief for Petitioner at 10. Petitioner renewed his motion for change of venue during voir dire, and it was denied by the court. Brief for Petitioner at 14.

134. *Mu'Min*, 111 S. Ct. at 1902.

135. *Id. See also* Joint Appendix at 31-34 [hereinafter J.A.]. The trial judge based his refusal to ask content questions on Virginia Supreme Court Rule 14A, which sets a minimum standard for voir dire. Despite his claims of strict adherence to this rule, he permitted other types of questions which were not set forth in the rule. Brief for the Petitioner at 11 n.13. The content questions which the trial court refused to ask were:

> [1]. Have you acquired any information about this case, from the newspapers, television, conversations or any other source?
> [2]. What have you seen, read or heard about this case?
> [3]. From whom or what did you get this information?
> [4]. When and where did you get this information?

The trial judge questioned the venire as a group.[136] From a panel of twenty-six, sixteen answered that they had heard media reports about the case.[137] The judge then asked them to single themselves out if they could not be impartial jurors based on the news they had heard:

> Then considering what you've heard, or read, or what you know about the case from whatever the source, do you believe that you can enter the Jury box with an open mind, wait until the entire case is presented before reaching a fixed opinion . . . as to the guilt or innocence of the accused?[138]

Only one of the sixteen potential jurors who had been exposed to media admitted bias, and he was excused.[139]

The court continued general voir dire of the venire in groups of four.[140] Eight of the twelve jurors admitted that they had at one time or another read or heard something about the case.[141] Not one of the twelve selected jurors had indicated during the voir dire any individualized bias against the petitioner.[142] The jury found Mu'Min guilty of first-degree murder and recommended that he be sentenced to death.[143]

The Virginia Supreme Court, by split vote, affirmed the conviction by the trial court.[144] It held that a defendant does not have a constitutional right to demand content questions during voir dire.[145]

The U.S. Supreme Court granted certiorari[146] to the Supreme Court of Virginia and affirmed in a five-to-four decision.

C. The U.S. Supreme Court Opinions

1. Chief Justice Rehnquist's Majority Opinion

A five-member majority affirmed the decision of the Virginia

---

[5]. What did you discuss?

J.A. at 4-5. The trial court ruled that potential jurors would only be asked whether they had been exposed to any media and whether the juror felt he or she was biased as a result. J.A. at 31-32.

136. J.A., *supra* note 135, at 42-66.

137. Brief for Petitioner at 12.

138. J.A., *supra* note 135, at 47-48.

139. Brief for Petitioner at 13.

140. Four more jurors were removed by the trial judge: two for bias and two for prejudices related to the death penalty. Prosecution and defense counsel peremptorily challenged and removed six jurors each. The remaining fourteen were empaneled as the twelve jurors and two alternates. *Mu'Min*, 111 S. Ct. at 1903.

141. *Id.*

142. *Id.*

143. *Id.*

144. Mu'Min v. Commonwealth, 389 S.E.2d 886, 898 (Va. 1990).

145. *Id.* at 893.

146. Mu'Min v. Virginia, 111 S. Ct. 242, 243 (1990).

Supreme Court.[147] They held that a trial judge's refusal to allow prospective jurors to be questioned about the content of the media to which they had been exposed did not violate petitioner's Sixth Amendment right to an impartial jury nor his Fourteenth Amendment right to due process.[148]

The majority began its analysis with an examination of the extent of publicity surrounding the *Mu'Min* trial.[149] In prior cases where the Court had found that pretrial publicity had caused bias per se, either two-thirds of the jurors stated that they had formed an opinion of the defendant's guilt before trial, or else due process had been blatantly denied and the defendant had been tried in the press.[150] Noting that none of the twelve jurors in Mu'Min's case admitted to subjectivity and that publicity surrounding his trial had not reached hysterical proportions, the majority concluded that although media impact was substantial, it failed to meet the standard of community-wide prejudice per se.[151]

The majority stated that for content questioning to rise to the level of a constitutional requirement, it must not merely be helpful, but the lack of such questioning must render the trial fundamentally unfair.[152] When adverse publicity does not justify a presumption of prejudice, jurors' professions of impartiality may be believed.[153] Therefore, a trial judge's refusal to question jurors about the content of media exposure need not impinge on a defendant's Sixth Amendment right to an impartial jury or Fourteenth Amendment right to due process.

2. *Justice O'Connor's Concurrence*

Justice O'Connor argued in her concurrence that the Court should focus on only one issue: Could the trial judge credit jurors' assurances of impartiality without making further inquiry into the content of the media that they had heard or read?[154]

Justice O'Connor concluded that the trial judge did not need to ask potential jurors content questions.[155] She conceded that asking such questions might give the trial court more insight into the specific attitude

147. The majority included Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Souter. Justice O'Connor also filed a concurring opinion.

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

149. The majority's discussion included a differentiation between the Supreme Court's supervisory role in reviewing federal decisions, and its more limited role of verifying the constitutionality of state court decisions. Because *Mu'Min* is a state case, the Supreme Court could only reverse for unconstitutional abuse of judicial discretion. *Id.* at 1904.

150. *See* Patton v. Yount, 467 U.S. 1025, 1040 (1984); Rideau v. Louisiana, 373 U.S. 723, 726-27 (1962); Irvin v. Dowd, 366 U.S. 717, 728 (1961).

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

152. *Mu'Min*, 111 S. Ct. at 1905 (citing Murphy v. Florida, 421 U.S. 794, 799 (1975)).

153. *Patton*, 467 U.S. at 1031.

154. *Mu'Min*, 111 S. Ct. at 1909 (O'Connor, J., concurring).

155. *Id.*

of each juror. However, she did not view failure to ask content questions a constitutional violation if the judge already knew the content of the inflammatory publicity.

3. *Justice Marshall's Dissent*[156]

Justice Marshall's dissent vigorously condemned the majority opinion. He wrote, "Today's decision turns a critical constitutional guarantee—the Sixth Amendment's right to an impartial jury—into a hollow formality." He added that "[t]he majority's reasoning is unacceptable."[157] Justice Marshall chronicled the extensive prejudicial media surrounding the crime and trial.[158] In light of the charged environment, Justice Marshall found it unacceptable that a prospective juror could deem himself "unbiased" and constitutionally satisfy a trial judge's duty to empanel an impartial jury.[159] To refute the majority's holding, Justice Marshall discussed the body of jurisprudence warning that jurors' assertions of impartiality are not reliable.[160]

He further argued that once jurors admitted exposure to publicity surrounding a trial, content questioning is essential to determine if there is prejudice per se. Moreover, content questioning is appropriate "trial court fact finding" and failure to make such inquiry "does not merit appellate deference."[161]

Justice Marshall opposed the majority's suggestion that content questioning was unduly burdensome in light of the constitutional implications of permitting a partial jury.[162] He concluded that Mu'Min's trial

156. Justice Marshall was joined by Justices Blackmun and Stevens in all but part IV of the opinion. Part IV of Marshall's dissent stated:

> Even if I were to believe that the procedures employed at Mu'Min's jury selection satisfied the requirements of the Sixth Amendment, I still would vacate his death sentence. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.

Id. at 1917 (Marshall, J. dissenting).

157. *Id.* at 1909-10.

158. *Id.* at 1910-12.

159. *Id.* at 1912-16.

160. *Id.* at 1913 ("[A]n individual 'juror may have an interest in concealing his own bias . . . [or] may be unaware of it.' ") (quoting Smith v. Phillips, 455 U.S. 209, 221-22 (1982) (concurring opinion)); United States v. Dellinger, 472 F.2d 340, 375 (7th Cir. 1972) ("Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial.").

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

162. Justice Marshall quoted former Justice Hughes's response to a similar contention sixty years earlier:

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. 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

was tainted by *Rideau*-style prejudice per se.[163]

4. Justice Kennedy's Dissent

Justice Kennedy's brief dissent criticized Justice Marshall's dissent for blurring the lines between a per se prejudicial environment and bias harbored by individual jurors.[164] Justice Kennedy concluded that the presumption of prejudice rule did not apply to Mu'Min's case.[165] Considering the extent of the pre-trial publicity, however, he concluded that the judge-conducted voir dire "was inadequate for an informed ruling that the jurors were qualified to sit."[166]

Unlike the majority, Justice Kennedy concluded that a reviewing court's deference to the trial court's findings should be predicated on the lower court's creation of a sufficient voir dire record.[167] "Our willingness to accord substantial deference to a trial court's finding of juror impartiality rests on our expectation that the trial court will conduct a sufficient voir dire to determine the credibility of a juror professing to be impartial."[168] He did not find that the *Mu'Min* court performed adequate voir dire,[169] and thus dissented.

IV. A Critique of *Mu'Min*: Judicial Efficiency Strikes Due Process a Hard Blow

A. Chief Justice Rehnquist's Majority Opinion

The majority opinion failed to apply the *Murphy* totality of circumstances test accurately to the *Mu'Min* scenario.[170] The majority criticized petitioner's reliance on *Irvin v. Dowd*[171] and went to great lengths to differentiate *Irvin* from the case at hand.[172] Finding that Mu'Min's trial was not surrounded by a wave of adverse passion such as existed in

---

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

Aldridge v. United States, 283 U.S. 308, 314-15 (1931).

163. 111 S. Ct. at 1915 (Marshall, J., dissenting).

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

165. *Id.* at 1918.

166. *Id.*

167. *Id.* at 1918-19.

168. *Id.* at 1919.

169. "[F]indings of impartiality must be based on something more than the mere silence of the individual in response to questions asked *en masse*." *Id.*

170. Under *Murphy*, if the atmosphere surrounding the trial does not rise to a presumption of prejudice, the Court should then look at the totality of circumstances surrounding the trial for indicia of an unconstitutionally biased jury. Murphy v. Florida, 421 U.S. 794 (1975). *See supra* text accompanying notes 78-88.

171. 366 U.S. 717 (1961) (extreme adverse publicity and voir dire uncovering bias can create a presumption of prejudice). *See supra* text accompanying notes 62-66.

172. "[T]he cases differ both in the kind of community in which the coverage took place and in extent of media coverage." As a result of adverse publicity, two-thirds of the *Irvin*

the *Irvin* community, Justice Rehnquist's opinion concluded that the *Mu'Min* trial was not biased per se.[173] This Note agrees with the majority that the *Mu'Min* trial was not surrounded by a presumptively prejudicial environment. Although media coverage of the *Mu'Min* crime was extensive, the community reaction did not turn the trial proceedings into a circus as in *Irvin* and *Rideau*.[174] Nevertheless, this Note will argue that the majority did not look for Sixth Amendment *Murphy*-style taint in the *Mu'Min* jury, and therefore the majority's analysis was incomplete.

A trial that does not suffer from a due process "community-wide" presumption of prejudice may still be flawed. The Sixth Amendment guarantees that the jurors, individually and as a whole, will be impartial. *Murphy* instructs that when media impact is significant but does not reach a presumption of prejudice, the court must evaluate jury bias by weighing the effect of the prejudicial news and the voir dire testimony.[175] The *Mu'Min* majority failed to conduct this second level of analysis, and thus never performed the totality of circumstances balancing test mandated by its earlier decisions.[176]

Mu'Min has similarities to *Murphy*. In both cases the media publicized the crime extensively and informed the community of the defendant's prior criminal record. The *Murphy* Court held that under the totality of circumstances there was insufficient evidence to find jury bias in that trial.[177] The *Mu'Min* murder case, in contrast, involved a much more violent crime than the *Murphy* robbery. It became a local source of political debate in the context of the national Willie Horton presidential ad campaign.[178] Moreover, the pretrial releases of defendant Mu'Min's confessions, coupled with statements by local politicians emphasizing their belief in his guilt, indicate that Mu'Min was tried in a much more prejudicial environment than that which surrounded the *Murphy* trial.

1. Through a Glass Darkly: Sleight of Hand in the Rehnquist Test

The prejudicial setting of the *Mu'Min* trial requires the reviewing court to examine the totality of circumstances to evaluate whether individual jurors were biased. Courts should perform this test by examining the voir dire testimony within the context of the prejudicial media.[179] Instead, the majority decided that because adverse publicity of the

jurors had formed an opinion before the trial, whereas none of the *Mu'Min* jurors admitted to having formed an opinion. *Mu'Min*, 111 S. Ct. at 1906-07.

173. *Id.* at 1907.

174. *See supra* text accompanying notes 49-76 and accompanying text.

175. Murphy v. Florida, 421 U.S. 794, 800-03 (1975).

176. *Id.* at 799.

177. *Id.* at 803.

178. *See, e.g.*, David Lauter, *Repeated Horton References, Prison Ad Cited; Bentsen, Jackson Accuse Bush of Using Racism*, L.A. TIMES, Oct. 24, 1988, at A15.

179. *Id.*

Mu'Min trial did not rise to a presumption of prejudice, juror assurances of impartiality should be believed.[180]

This conclusion works inverse logic on the *Patton*[181] opinion. *Patton* involved a defendant whose first trial for a notorious murder was surrounded by extensive media coverage. When his conviction was reversed on appeal and he was retried and convicted five years later for the same crime, Patton filed a habeas corpus petition claiming jury bias.[182] The *Patton* court reasoned, invoking the language of *Irvin*, that when there is a presumption of prejudice within the community, a court cannot rely on jurors' claims of impartiality.[183] Because Patton's second trial did not involve a per se prejudicial "wave of public passion"[184] as in *Irvin*, the *Irvin* scrutiny does not apply: "We do not think [this rationale] can be extended to a . . . case in which the partiality of an *individual juror* is placed in issue."[185] Thus under a Sixth Amendment totality of circumstances analysis for individual juror taint, "the question is whether there is *fair support in the record* for the state court's conclusion that the jurors here would be impartial."[186] Absent a community-wide presumption of prejudice, the Court is likely to believe a juror's assurances of non-bias if there is a strong voir dire record to support the trial judge's finding.

The *Mu'Min* Court eliminated the *Irvin/Patton* bifurcated review for bias. Chief Justice Rehnquist wrote,

> In *Patton*, we acknowledged that 'adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed,' *but this is not such a case*. Had the trial court in this case been confronted with [a] 'wave of public passion' . . . the Fourteenth Amendment might well have required more extensive examination of potential jurors than it undertook here.[187]

The majority turned a requirement for further questioning of jurors *whenever there is a presumption of prejudice* into unreviewable believability of jurors *whenever there is not a presumption of prejudice*. Chief Justice Rehnquist's smoke and mirrors shift of the *Irvin* rule effectively eliminated the second stage of the *Murphy* totality of circumstances test.[188] He failed to conduct a *Patton* analysis to see whether there was fair support for the judge's determination of non-bias within the voir dire record. Instead of balancing the voir dire testimony and the media envi-

180. *Mu'Min*, 111 S. Ct. 1907. *See* Patton v. Yount, 467 U.S. 1025, 1031 (1984).
181. *Patton*, 467 U.S. 1025. *See supra* note 97 and accompanying text.
182. 467 U.S. at 1028.
183. *Id.* at 1031.
184. *Id.* at 1033 (citing Irvin v. Dowd, 366 U.S. 717, 728 (1961)).
185. *Patton*, 467 U.S. at 1036 (emphasis added).
186. *Id.* at 1038 (emphasis added).
187. *Mu'Min*, 111 S. Ct. at 1907 (citing *Patton*, 467 U.S. at 1031 (emphasis added)).
188. *See supra* notes 78-92 and accompanying text.

ronment by careful examination of the record, the majority allowed the jurors' bald assurances of non-bias[189] to substantiate the trial judge's conclusion that the group was impartial, and thus terminated the analysis.[190]

The substitution of the *Irvin*-mirror rule[191] for the *Irvin/Patton*[192] bifurcated test fails to sufficiently safeguard a defendant's rights. Numerous decisions have warned against the unreliability of a juror's self-evaluation when testing for bias.[193] Moreover, the majority's extreme deference to the judgment of the trial court and acceptance of a silent voir dire record make it nearly impossible for a petitioner to prove manifest error upon review.

2. *Unreviewable Error and Denial of Due Process*

Chief Justice Rehnquist's standard of review requires reversal only if the trial judge commits an affirmative error that is visible in the trial record. The *Mu'Min* record is vacuous: the trial judge asked only a few group-directed questions and failed to pierce the veil of individual juror bias. A petitioner who claims that the trial court has made an error of omission rather than commission will not be able to remedy a biased verdict. By accepting the trial judge's limited voir dire as a sufficient evaluation of the Sixth Amendment right to jury impartiality, the majority leaves the petitioner with nothing to point to in the record as visibly "manifest" error. As a result, *Mu'Min* deprives defendants of a mean-

189. These assurances were silent, for the judge only asked the venire, as a group, to single themselves out if they privately harbored bias. *Mu'Min*, 111 S. Ct. at 1919 (Kennedy, J., dissenting). Justice Kennedy argued that because the trial judge had no way to evaluate credibility, his determination should be given little deference. *Id.*

190. *See* United States v. Blanton, 719 F.2d 815, 834 (6th Cir. 1983) (Engel, J., dissenting). Judge Engel wrote in his dissent, "[T]o my knowledge, no court of appeals has ever . . . affirmed a conviction in a case of widespread and inflammatory pretrial publicity when the entire *voir dire* concerning publicity consisted of a single question eliciting only a juror assurance (through silence) of impartiality . . . ." *Id.* at 834.

191. I call Chief Justice Rehnquist's new analysis the "*Irvin*-mirror rule" because it at first appears to be the logical inverse of *Irvin*, but upon closer scrutiny it has little substance. The presence of community-wide prejudice requires examination of jurors beyond their assurances of non-bias. Therefore, under the "mirror rule," the absence of a presumption of prejudice allows a court to rely on mere assurances by jurors that they are not biased. The problem with the "*Irvin*-mirror rule" is that contrary to the *Murphy* holding, it ignores the significance of jury prejudice that does not rise to the level of a presumption of prejudice. It appears that the Court is now willing to accept the risk of criminal verdicts where a juror or two may have concealed their biases.

192. The *Irvin/Patton* bifurcated test requires different standards of review based upon the level of prejudice. Under *Irvin*, the reviewing judge must not trust a juror's assertions of impartiality in a per se prejudicial environment. *Irvin*, 366 U.S. at 728. In a setting absent a presumption of prejudice, *Patton* holds that the reviewing court may rely on jurors' assurances documented in extended voir dire. *Patton*, 467 U.S. at 1038.

193. *See supra* note 150.

ingful appeal and therefore denies them due process.[194]

B. Justice O'Connor's Concurrence

Justice O'Connor's concurring opinion attempts to supplement the sparse *Mu'Min* voir dire record by suggesting that judicial knowledge of "content" was gained through news articles in evidence, and therefore the judge had an "objective" basis for evaluating the extent of media prejudice.[195] Her reasoning fails, however, because she does not require trial judges to use their objective knowledge of the news accounts to evaluate the subjective effects of media on the individuals seated as jurors. As a result, Justice O'Connor's approach still leaves the personal biases of the jury unprobed.

V. Proposal: A Compromise

The *Mu'Min* majority held that content questioning is unnecessary during voir dire in high profile trials that fail to create a presumption of prejudice.[196] Undoubtedly, the Court was hesitant to open the door to habeas review of what must have been, on the local level, a decision based on judicial efficiency. Because state resources are limited, the majority refused to dictate specific guidelines as to how a trial judge should conduct voir dire.[197] As a result, the Rehnquist opinion drew a line at prejudice per se. The majority ignored the *Murphy* totality of circumstances test and sanctioned the "impartiality" finding of the trial judge despite its lack of grounding in the voir dire record.

This decision creates a loophole by allowing a zone of unreviewable judicial decisionmaking. If a trial is subjected to significant media attention (though not enough to create a presumption of prejudice), the defendant has the burden of proof when alleging on appeal that the jury was biased.[198] The defendant must show that the trial judge committed manifest error by empaneling a biased jury.[199] But because the *Mu'Min* majority is willing to sanction a virtually empty voir dire record in deference to the local trial judge, there is nothing in the record to which a defendant may point and label as an affirmative error. The trial court's errors of omission are thus unreviewable, and the petitioner's loss of op-

194. *See* Griffin v. Illinois, 351 U.S. 12 (1956). "[A] State is not required by the Federal Constitution to provide . . . a right to appellate review at all . . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates . . . ." *Griffin*, 351 U.S. at 18. As a result of *Griffin*, when a state grants defendants an appeal of right, they must, under the Fourteenth Amendment, allow that appeal to be "meaningful."

195. *See supra* notes 128-31 and accompanying text.

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

197. *Id.*

198. Wainwright v. Witt, 469 U.S. 412, 426 n.7 (1985).

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

portunity to prove his appeal is a due process violation.[200]

It is difficult to determine from the *Mu'Min* voir dire record whether the trial judge had any real idea whether the jurors he empaneled were biased or not. Mu'Min was convicted of murder and sentenced to death by a jury that may or may not have been impartial.

A. A Capital Standard

The courts have traditionally offered greater safeguards for the rights of capital defendants.[201] The *Irvin* Court focused on the weight of a capital conviction in its conclusion: "*With his life at stake*, it is not requiring too much that the petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ."[202] In *Turner v. Murray*, the Court vacated a capital sentence because inadequate voir dire created "unacceptable risk of racial prejudice infecting the capital sentencing proceeding."[203] In 1983, the Court wrote that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny."[204] Moreover, the Court has struck down death sentences when it has found that "the circumstances under which they were imposed 'created an unacceptable risk that the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake.' "[205]

Arguably, the *Mu'Min* majority balanced the pressures for judicial efficiency with the costs of one small loophole and found it most prudent to avoid second-guessing the decisions of local courts. But nowhere in the equation did the majority weigh their margin of error against Mu'Min's death sentence.[206]

The Court should require content questions in capital cases. While the *Mu'Min* majority may find that trial efficiency outweighs due process appellate rights in most cases, the Court traditionally has guarded capital trials with a higher standard for voir dire questions and should continue to do so.

B. *Mu'Min* Sets the Stage for State Response

The *Mu'Min* decision holds that a defendant has no constitutional right to demand content questioning during voir dire in order to probe

200. This is because without a "meaningful" voir dire record, an appeal premised on jury bias cannot be meaningful. *See supra* note 194.

201. *But see* Herrera v. Collins, 122 L. Ed. 2d 203 (1993) (limiting extra protections normally granted to capital defendants to trial proceedings, and not to habeas corpus petitions).

202. Irvin v. Dowd, 366 U.S. 717, 728 (1960) (emphasis added).

203. Turner v. Murray, 476 U.S. 28, 37 (1986).

204. California v. Ramos, 463 U.S. 992, 998-99 (1983).

205. Turner v. Murray, 476 U.S. at 35-36 (citing Caldwell v. Mississippi, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring)).

206. Or if they did, they did not address it in the opinion.

for media bias.[207] Moreover, a trial judge may rely on the silent acquiescence of the potential jurors, to infer that they do not perceive themselves as impermissibly prejudiced, and upon this basis dismiss the existence of bias.[208] Because of the Court's holding, defendants will unfortunately continue to lose appellate rights through the *Mu'Min* loophole without federal protection. The fate of content questioning will be played out in the states.

The *Mu'Min* loophole arose because the Supreme Court did not want to impose standards on the voir dire procedures of local state courts.[209] Instead of allowing the federal gap in rights to stand, states should read the *Mu'Min* decision as a signal to take action in local policymaking.

Unlike the United States Supreme Court, state courts and legislatures do have supervisory discretion to regulate local trial courts. As a result, they could direct standards for voir dire procedure without having to point to a constitutional error. Moreover, the issue of judicial efficiency is a singularly local issue. Local policymakers can evaluate and weigh the burden of protection on their own system.

Since *Mu'Min*, only action by states will secure content questioning and essential appellate rights of defendants. States have a duty to grant their citizens, at a minimum, rights equal to the Federal Constitution. States may, however, bestow greater rights upon their residents. In Connecticut, for example, the *Mu'Min* problem will never arise because the state constitution guarantees a criminal defendant the right to have an attorney question each juror individually.[210] New York, a strong guardian of defendants' rights, has enacted a statute in its criminal procedure code to ensure that the defendant, as well as the prosecutor and judge, may question the venire.[211] In addition to legislative action, where state constitutions provide more constitutional rights than are guaranteed in the United States Constitution, state courts may close up the *Mu'Min* loophole through judicial decisions.

VI. Conclusion

States should weigh heavily the United States Supreme Court's warnings against sloppy jury selection in capital cases when a defendant's

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

208. *Id.*

209. The Supreme Court has discretionary power to regulate federal voir dire, but may only censure state voir dire for violating the Constitution. *Mu'Min*, 111 S. Ct. at 1903.

210. CONN. CONST. art. I, § 19.

211. N.Y. CRIM. PROC. LAW § 270.15 (West 1993). See also People v. Antommarchi, 80 N.Y.2d 247 (1992), a controversial decision out of New York's highest court that recognized a criminal defendant's fundamental right under the state constitution to be present during voir dire side bars. This case is a compelling example of a state court taking a stand to fill in a gap it perceives in defendants' rights left by federal courts.

life hangs in the balance. The concerns of Justice Frankfurter are no less true today: "More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with a crime, particularly with offenses which arouse the passions of a community."[212] When balancing judicial efficiency needs against the rights of capital defendants, states should conclude that the small burden of content questioning far outweighs the economic costs of appeal and the social costs of lost systemic integrity.

212. Irvin v. Dowd, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring).