U.S. Court Opinions on Publicity and Fair Criminal Trials

Table of Contents

Introduction

My essay, *Pretrial Publicity Prevents a Fair Trial in the USA,* at http://www.rbs2.com/pretrial.pdf discusses the conflict between three fundamental legal rights in the USA: (1) "freedom of speech", which is mentioned in the First Amendment to the U.S. Constitution, (2) "freedom ... of the press", which is also mentioned in the First Amendment to the U.S. Constitution and (3) a criminal defendant's right to a fair trial, specifically the right to a trial "by an impartial jury", which is mentioned in the Sixth Amendment to the U.S. Constitution.

This document is a collection of long quotations from opinions of the U.S. Supreme Court and the U.S. Courts of Appeals, along with my introduction and terse explanation.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

Court Opinions on Publicity in Criminal Trials

Reynolds v. U.S. (1878)

In the year 1878, the U.S. Supreme Court explained what was meant by "impartial jury" in the context of pretrial publicity in newspapers. The defendant was convicted of bigamy and the defendant appealed, on grounds that a juror, Charles Read, had already formed an opinion of the defendant's guilt before the trial began.

> By the Constitution of the United States (Amend. VI.), the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, 'be indifferent as he stands unsworn.' Co. Litt. 155 *b*. Lord Coke also says that a principal cause of challenge is 'so called because, if it be found true, it standeth sufficient of itself, without leaving any thing to the conscience or discretion of the triers' (id. 156 *b*); or, as stated in Bacon's Abridgment, 'it is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the . . . juror.' Bac. Abr., tit. Juries, E. 1. 'If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to the satisfaction of the court or the triers.' Id. E. 12. To make out the existence of the fact, the juror who is challenged may be examined on his *voire dire*, and asked any questions that do not tend to his infamy or disgrace.
>
> All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive (Gabbet, Criminal Law, 391); others, that it must be decided and substantial (*Armistead's Case*, 11 Leigh (Va.), 659; *Wormley's Case*, 10 Gratt. (Va.) 658; *Neely* v. *The People*, 13 Ill. 685); others, fixed (*State* v. *Benton*, 2 Dev. & B. (N. C.) L. 196); and, still others, deliberate and settled (*Staup* v. *Commonwealth*, 74 Pa. St. 458; *Curley* v. *Commonwealth*, 84 id. 151). All concede, however, that, if hypothetical only, the partiality is

not so manifest as to necessarily set the juror aside. Mr. Chief Justice Marshall, in *Burr's Trial* (1 Burr's Trial, 416), states the rule to be that 'light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him.' The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court.

The challenge in this case most relied upon in the argument here is that of Charles Read. He was sworn on his *voire dire;* and his evidence, [footnote omitted] taken as a whole, shows that he 'believed' he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony. We cannot think this is such a manifestation of partiality as to leave nothing to the 'conscience or discretion' of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality.

In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. 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, and it will not be error in the court to refuse to do so. Such a case, in our opinion, was not made out upon the challenge of Read. The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed. Under these circumstances, it is unnecessary to consider the case of Ransohoff [another juror], for it was confessedly not as strong as that of Read.

Reynolds v. U.S., 98 U.S. 145, 154-57 (1878).

Shepherd v. Florida (1951)

This is a truly ugly case in which four black men were accused, tried, and convicted of the rape of a 17 y old white woman in Florida in July 1949. The accused were arrested a few hours after the crime. There was violence in the community directed against black people in general and the families of the accused in particular, and the local newspapers were full of publicity about the accused. The trial judge denied a change of venue motion by defendants. The accused were tried and convicted in a Florida state court.[1] The Florida Supreme Court affirmed the convictions.[2] The U.S. Supreme Court tersely reversed the Florida court, because jury selection in the first trial had "discriminated against the Negro race".[3]

The Florida Supreme Court tersely noted some of the community violence subsequent to the arrest of the accused, but found that the accused received a fair trial.

> It is not disputed that Irvin and Shepherd lived at or near Groveland and a mob burned the Shepherd home and two other houses about Groveland; that shortly thereafter troops were called and stationed at Groveland to preserve order but were removed from the troubled area on July 24, 1949. It is true that strained racial relations existed in about a five-mile square area which embraced Groveland, Mascotte and Starkey's Still. The Flare subsided on or before July 24, 1949, the colored people returned to the area, order thereafter prevailed and the troops were recalled. Our study of the record reflects the view that harmony and good will and friendly relations continuously existed between the white and colored races in all other sections of Lake County. The inflamed public sentiment was against the crime with which the appellants were charged rather than defendants' race. It is true that the newspapers carried reports of the alleged crime, but the impression of prejudice, if any made, yielded to the sworn testimony.

46 So.2d at 883.

Justice Jackson, joined by Justice Frankfurter, wrote a concurring opinion at the U.S. Supreme Court that explained in some detail the prejudice in the community, including newspaper publicity.

> But projudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which is generated.
>
> Newspapers published as a fact, and attributed the information to the sheriff, that these defendants had confessed. No one, including the sheriff, repudiated the story. [footnote omitted] Witnesses and persons called as jurors said they had read or heard of this

---

[1] Two (Shepherd and Irvin) of the four accused were sentenced to death, one of the accused was a 16 y old minor at the time of the crime and he was sentenced to life in prison, and the fourth suspect was killed when he resisted arrest.

[2] *Shepherd v. State,* 46 So.2d 880 (Fla. 1950).

[3] *Shepherd v. State of Florida,* 341 U.S. 50 (1951)(per curiam).

statement. However, no confession was offered at the trial. The only rational explanations for its nonproduction in court are that the story was false or that the confession was obtained under circumstances which made it inadmissible or its use inexpedient. [footnote omitted]

If the prosecutor in the courtroom had told the jury that the accused had confessed but did not offer to prove the confession, the court would undoubtedly have declared a mistrial and cited the attorney for contempt. If a confession had been offered in court, the defendant would have had the right to be confronted by the persons who claimed to have witnessed it, to cross-examine them, and to contradict their testimony. If the court had allowed an involuntary confession to be placed before the jury, we would not hesitate to consider it a denial of due process of law and reverse. When such events take place in the courtroom, defendant's counsel can meet them with evidence, arguments, and requests for instructions, and can at least preserve his objections on the record.

But neither counsel nor court can control the admission of evidence if unproven, and probably unprovable, 'confessions' are put before the jury by newspapers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented. It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here just such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury.

This Court has recently gone a long way to disable a trial judge from dealing with press interference with the trial process, *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546; *Pennekamp v. State of Florida,* 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295; *Bridges v. State of California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, though it is to be noted that none of these cases involved a trial by jury. And the Court, by strict construction of an Act of Congress, has held not to be contemptuous of any kind of interference unless it takes place in the immediate presence of the court, *Nye v. United States,* 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172, the last place where a well- calculated obstruction of justice would be attempted. No doubt this trial judge felt helpless to give the accused any real protection against this out-of-court campaign to convict. But if freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law. That alone is sufficient, to my mind, to warrant reversal.

But that is not all. Of course, such a crime stirred deep feeling and was exploited to the limit by the press. These defendants were first taken to the county jail of Lake County. A mob gathered and demanded that defendants be turned over to it. By order of court, they were quickly transferred for safekeeping to the state prison, where they remained until about two weeks before the trial. Meanwhile, a mob burned the home of defendant Shepherd's father and mother and two other Negro houses. Negroes were removed from the community to prevent their being lynched. The National Guard was called out on July 17 and 18 and, on July 19, the 116th Field Artillery was summoned from Tampa. The Negroes of the community abandoned their homes and fled.

Every detail of these passion-arousing events was reported by the press under such headlines as, “Night Riders Burn Lake Negro Homes” and “Flames From Negro Homes Light Night Sky in Lake County.” These and many other articles were highly prejudicial, including a cartoon published at the time of the grand jury, picturing four electric chairs and headed, “No Compromise — Supreme Penalty.”

Counsel for defendants made two motions, one to defer the trial until the passion had died out and the other for a change of venue. These were denied. The Supreme Court of

> Florida, in affirming the conviction, observed that "The inflamed public sentiment was against the crime with which the appellants were charged rather than defendants' race." [46 So.2d at page 883.] Such an estimate seems more charitable than realistic, and I cannot agree that the prejudice had subsided at the time of trial.

341 U.S. at 51-54.

Justice Jackson then noted that an inadequate number of black people on the jury was *not* the real problem in this case. Instead, Justice Jackson saw the mob environment in the community as the real problem.

> While this record discloses discrimination which under normal circumstances might be prejudicial, this trial took place under conditions and was accompanied by events which would deny defendants a fair trial before any kind of jury. I do not see, as a practical matter, how any Negro on the jury would have dared to cause a disagreement or acquittal. The only chance these Negroes had of acquittal would have been in the courage and decency of some sturdy and forthright white person of sufficient standing to face and live down the odium among his white neighbors that such a vote, if required, would have brought. To me, the technical question of discrimination in the jury selection has only theoretical importance. The case presents one of the best examples of one of the worst menaces to American justice. It is on that ground that I would reverse.

341 U.S. at 55.

A new trial was ordered,[4] and the final result is not reported in Westlaw. There is an incidental mention in a habeas corpus proceeding in state court that Shepherd was "shot and killed" by a sheriff after the first trial.[5]

Marshall (1959)

Marshall was tried in Federal District Court for dispensing dextro-amphetamine tablets without a prescription. Marshall was convicted and the U.S. Court of Appeals affirmed.[6] The U.S. Supreme Court ordered a new trial for Marshall because of newspaper publicity *during* the trial.[7]

The U.S. Court of Appeals considered the effect of the publicity on the trial, but found no reason to reverse the trial court.

> During the course of the trial two articles of a reckless nature were published in local newspapers covering matters far removed in time and place from a factual report of the trial occurrence. Six of the jurors read one of the articles and two of the six had read both. The

---

[4] *Shepherd v. State,* 52 So.2d 903 (Fla. 1951).

[5] *Irvin v. Chapman,* 75 So.2d 591, 592 (Fla. 1954).

[6] *Marshall v. U.S.,* 258 F.2d 94 (10th Cir. 1958).

[7] *Marshall v. U.S.,* 360 U.S. 310 (1959).

trial court separately interviewed, in the presence and with the assistance of counsel, each of the jurors and thereafter denied a motion for mistrial. Each of the jurors indicated the articles would in no way influence his verdict. [footnote quoting judge's interview with juror Bottinelli omitted]

.... A cautionary instruction against prejudice or consideration of evidence beyond that presented in the courtroom has been held in such instances to be sufficient safeguard for defendant's rights.

It is true that in certain instances the probable influence of newspaper publicity is so obvious that instructions by the court cannot be held to have preserved inviolate defendant's rights to a fair trial before an unbiased jury. See concurring opinion of Justices Jackson and Frankfurter, *Shepherd v. State of Florida,* 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740; *Griffin v. United States,* 3 Cir., 295 F. 437. But the difficulties of ever obtaining a jury completely unknowing and hence presumably unprejudiced in this day of wide coverage and circulation of newspapers presents a very real problem in the administration of justice. For this reason, some courts have been led to holding that to secure a reversal on this ground the defendant must demonstrate that the failure to declare a mistrial under such circumstances was prejudicial to him, *Gicinto v. United States,* 8 Cir., 212 F.2d 8, *certiorari denied* 348 U.S. 884, 75 S.Ct. 125, 99 L.Ed. 695; *United States v. Carruthers,* supra.

Had the instant trial been to the court alone it would be unquestioned that the court would be capable of and would divorce the extraneous matters from his mind and be perfectly free to continue with the trial. The care with which the trial court explored the knowledge and feeling of the individual jurors indicated to him that each juror was similarly qualified to proceed without prejudice. We cannot say the trial court abused its discretion in accepting as true the solemn statements of the individual jurors that no improper influence would carry over into their deliberations. See United States v. Postma, 2 Cir., 242 F.2d 488. ....

Here no affirmative defense was offered, neither the appellant nor a witness for him testified in his behalf; he was content to rely upon the hope of a failure of proof by the prosecution. The evidence was uncontroverted that he committed the crime and his contention that he was entitled to go to the jury on evidence of entrapment appearing in government testimony was, as we have held, without merit. Under all of the circumstances of the case, therefore, a jury properly instructed and acting in accordance with its duty could but return a verdict of guilty. We find no area for prejudice to occupy, even if it existed.

258 F.2d at 97-99.

The U.S. Supreme Court, in a terse per curiam decision, reversed the U.S. Court of Appeals and ordered a new trial for Marshall.

Yet during the trial two newspapers containing such information got before a substantial number of jurors. One news account said:

'Marshall has a record of two previous felony convictions.

'In 1953, while serving a forgery sentence in the State Penitentiary at McAlester, Okla., Marshall testified before a state legislative committee studying new drug laws for Oklahoma.

'At that time, he told the committee that although he had only a high school education, he practiced medicine with a $25 diploma he received through the mails. He told in detail of the ease in which he wrote and passed prescriptions for dangerous drugs.'

The other news account said:

'The defendant was Howard R. (Tobey) Marshall, once identified before a committee of the Oklahoma Legislature as a man who acted as a physician and prescribed restricted

> drugs for Hank Williams before the country singer's death in December, 1953.
> 'Marshall was arrested with his wife, Edith Every Marshall, 56, in June, 1956. She was convicted on the drug charges in Federal District Court here in November and was sentenced to 60 days is jail.
> 'Records show that Marshall once served a term in the Oklahoma penitentiary for forgery. There is no evidence he is a doctor, court attaches said.'
>
> The trial judge on learning that these news accounts had reached the jurors summoned them into his chamber one by one and inquired if they had seen the articles. Three had read the first of the two we have listed above and one had read both. Three others had scanned the first article and one of those had also seen the second. Each of the seven told the trial judge that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles. The trial judge, stating he felt there was no prejudice to petitioner, denied the motion for mistrial.
>
> The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt v. United States,* 218 U.S. 245, 251, 31 S.Ct. 2, 6, 54 L.Ed. 1021. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson v. United States,* 335 U.S. 469, 475, 69 S.Ct. 213, 218, 93 L.Ed. 168. It may indeed be greater for it is then not tempered by protective procedures.
>
> In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts [two citations omitted] we think a new trial should be granted.

360 U.S. at 311-313.

The significance of the U.S. Supreme Court's decision in *Marshall* was explained in a subsequent U.S. Supreme Court decision, *Murphy v. U.S.,* 421 U.S. 794 (1975).

- *Marshall* applies only to trials in Federal Courts, and is *not* a constitutional ruling that applies to trials in state courts, via the 14th Amendment to the U.S. Constitution. *Murphy* at 798.

- "Qualified jurors need not, however, be totally ignorant of the facts and issues involved." *Murphy* at 799-800.

- The assurances by a juror that he/she can be impartial is *not* "dispositive of the accused's rights" to trial by an impartial jury, especially when "the general atmosphere in the community or courtroom is sufficiently inflammatory". *Murphy* at 800, 802. (Also see *Irvin,* 366 U.S. at 727-28.)

Irvin v. Dowd (1961)

Irvin committed six heinous murders in Indiana in 1954-55. He was tried and found guilty in state court for one murder and sentenced to death.[8] Irvin then filed a habeas corpus proceeding in federal court, which was denied, appealed to the U.S. Court of Appeals which affirmed,[9] and then appealed to the U.S. Supreme Court, which ordered a decision on the merits.[10] The first decision by the U.S. Supreme Court in this case presented the facts:

> Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized, stating that the petitioner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner, counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue. [footnote omitted]
>
> The voir dire examinations of prospective jurors began in Gibson County on November 14, 1955. The averments as to the prejudice by which the trial was allegedly environed find corroboration in the fact that from the first day of the voir dire considerable difficulty was experienced in selecting jurors who did not have fixed opinions that the petitioner was guilty. The petitioner's counsel therefore renewed his motion for a change of venue, which motion was denied. He renewed the motion a second time, on December 7, 1955, reciting in his moving papers: 'in the voir dire examination of 355 jurors called in this case to qualify as jurors 233 have expressed and formed their opinion as stated in said voir dire, that the defendant is guilty ....' Again the motion was denied. Alternatively, on each of eight days over the four weeks required to select a jury, counsel sought a continuance of the trial on the ground that a fair trial at that time was not possible in the prevailing atmosphere of hostility toward the petitioner. All of the motions for a continuance were denied. The State Prosecutor, in a radio broadcast during the second week of the voir dire examination, stated that 'the unusual coverage given to the case by the newspapers and radio' caused 'trouble in getting a jury of people who are not (sic) unbiased and unprejudiced in the case.'

---

[8] *Irvin v. Indiana,* 139 N.E.2d 898 (Ind. 1957), *cert. den.,* 353 U.S. 948 (1957).

[9] *Irvin v. Dowd,* 153 F.Supp. 531 (N.D.Ind. 1957), *aff'd,* 251 F.2d 548 (7th Cir. 1958).

[10] *Irvin v. Dowd,* 359 U.S. 394 (1959).

The petitioner's counsel exhausted all 20 of his peremptory challenges, and when 12 jurors were ultimately accepted by the court also unsuccessfully challenged all of them for alleged bias and prejudice against the petitioner, complaining particularly that four of the jurors, in their voir dire examinations, stated that they had an opinion that petitioner was guilty of the murder charged. [FN5]

FN5. The trial judge qualified the jurors in question under the authority of Burns' Ind.Stat.Ann., 1956 Replacement Vol., § 9–1504, which provides:

'The following shall be good causes for challenge to any person called as a juror in any criminal trial:

'Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case.'

Irvin v. Dowd, 359 U.S. 394, 396-98 (1959).

Upon remand to the U.S. Court of Appeals, it was held that Irvin had received a fair trial.

It cannot be denied that it was the duty of the state of Indiana to apprehend and punish the person who perpetrated the aforesaid murders. Upon a state there rests no more sacred duty than the protection of the lives of its citizens from criminal attack. At the same time the state owes a duty to any person charged with such crimes to afford him a fair trial as required by the federal constitution. What is a fair trial depends upon the circumstances existing at and prior to the trial. An accused's right to a fair trial is coexistent with the right of law-abiding citizens to lawful protection by their government. It is not surprising that, the more extensive the news coverage of a crime and the more wanton and unjustified the crime itself, the greater and more extensive is the indignation of citizens. Such indignation, varying in its degree according to the violence of the crime, and geographically extensive with the area of news distribution, undoubtedly causes many people to form impressions or beliefs as to the guilt or innocence of suspected or indicted persons. In these days of widely effective and thorough news distributing instrumentalities, such as the telephone, newspaper, radio and television, as well as rapid travel of persons by automobiles, trains and airplanes, hardly a person anywhere in a state, or in fact in the United States, is long ignorant of the details of crimes committed in any state (or in this country), unless he be completely mentally incompetent or is in solitary confinement in a jail. In fact, it may well be that into the latter place the grapevine reaches. We no longer live in a day when what happened in the next county was learned only by conversation with a traveling man or a brakeman on the way freight train. It is into this modern society with facilities for quick and broad news coverage that a person who commits six murders projects himself. When apprehended, he is entitled to a fair trial and is to be accorded due process of law, according to the existing circumstances .

Our problem in its last analysis is whether the general resentment of a people following the publication by news distributing media of information in regard to a series of murders may be relied upon to prevent the state from prosecuting a person indicted for these crimes, even though his trial be held before an unbiased judge and a jury is selected in accordance with established principles applicable to such a case. If the state is so prevented from trying such a person, it means that the commission within a state of a multiplicity of criminal acts, followed by the usual publicity, actually immunizes the offender from prosecution. We reject such a

conclusion as the law of this circuit.

There was undoubtedly a prejudice against the person or persons who committed the series of murders, including that of Whitney Leslie Kerr on December 23, 1954 for which defendant was indicted. It was publicly announced that defendant had confessed that killing and five other murders.

Irvin v. Dowd, 271 F.2d 552, 554-55 (7th Cir. 1959).

The U.S. Court of Appeals quoted Indiana statute § 9-1504 and then observed:

The record reveals that the trial judge applied this act in this case. With painstaking care, the court, in asking questions of jurors expressing an opinion as to the guilt or innocence of defendant, founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, required each such juror to state on oath whether he felt able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence. Several of those who answered in the affirmative were accepted upon the trial jury. Defendant now seeks to have us determine, as a matter of federal constitutional law, that this action by the trial court deprived defendant of a fair trial.

We have no right to question the intelligence, the truthfulness or the sincerity of these jurors, whose impartiality to render a verdict upon the law and the evidence was, after examination, determined to the trial judge's satisfaction, in the manner provided by the Indiana act.

A careful reading of the entire record convinces us that the jury which tried defendant was properly qualified as a fair and impartial fact-finding body.

Irvin v. Dowd, 271 F.2d at 555-56.

One judge on the U.S. Court of Appeals dissented:

... I must respectfully dissent from that part of the majority opinion which holds that the defendant herein had a fair trial. It is well established that: 'A fair trial in a fair tribunal is a basic requirement of due process. * * *' *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. In my judgment defendant was not afforded due process of law in the trial which resulted in his conviction and upon which verdict the death sentence was imposed.

There is no dispute as to the fact that more than half of the jurors who sat in the case had preconceived ideas that defendant was guilty of the offense charged. Some of them testified on the voir dire that it would take evidence to change that opinion. Defendant had exhausted his twenty peremptory challenges. His several motions for continuances had been denied.

One of the most important rights of our citizens is the right to a public trial by a fair and impartial jury. The courts should be ever alert to preserve that right untarnished. *Baker v. Hudspeth,* 129 F.2d 779, 781 [10thCir. 1942].

I am well aware that a brutal crime is almost certain to receive extensive news coverage by newspapers, radio and television. I realize that in the instant case a prolonged effort was made to obtain an impartial jury, but I am, nevertheless, forced to the conclusion that the jury, as finally constituted, was not impartial. Possibly it was as impartial a jury as could have been found in Gibson County on that date, but that was not sufficient. That did not insure due process.

When it became apparent that an impartial jury could not be obtained, the motion for a further continuance should have been granted. The majority opinion argues that a further delay might not have been helpful, but, on the other hand, that public opinion might have been aroused by the slowness of the judicial process. The passage of time is a great healer.

We have no right to speculate that any subsiding of public prejudice would be offset because our fundamental law insists that a defendant in a criminal case shall have a fair trial.

Irvin v. Dowd, 271 F.2d at 561 (Duffy, J., dissenting).

The defendant again appealed to the U.S. Supreme Court, which vacated the verdict and observed:

> England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, *Fay v. People of State of New York,* 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043; *Palko v. State of Connecticut,* 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, every State has constitutionally provided trial by jury. See Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions, 578-579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver,* 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682; *Tumey v. State of Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co.Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416(1807). [FN3] 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds v. United States,* 98 U.S. 145, 155, 25 L.Ed. 244.
>
> FN3. '(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 sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him.'
>
> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any 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. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. People of State of Illinois,* 123 U.S. 131, 8 S.Ct. 22, 31 L.Ed. 80; *Holt v. United States,* 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021; *Reynolds v. United States,* supra.
>
> The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.' *Lisenba v. People of State of California,* 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166. As stated in *Reynolds*, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily * * * raise the presumption of partiality. The question thus presented is one of mixed law and fact * * *.' At page 156 of 98 U.S. '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.' At page 157 of 98 U.S. As was stated in *Brown v. Allen,* 344 U.S. 443, 507, 73 S.Ct. 397, 446, 97 L.Ed. 469, the 'so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore, the duty of the Court of Appeals to independently evaluate the voir dire testimony of the impaneled jurors.

The rule was established in *Reynolds* that '(t)he finding of the trial court upon that issue (the force of a prospective juror's opinion) ought not be set aside by a reviewing court, unless the error is manifest.' 98 U.S. at page 156. In later cases this Court revisited *Reynolds,* citing it in each instance for the proposition that findings of impartiality should be set aside only where prejudice is 'manifest.' *Holt v. United States,* supra; *Spies v. People of State of Illinois,* supra; *Hopt v. People of State of Utah,* 120 U.S. 430, 7 S.Ct. 614, 30 L.Ed. 708. Indiana agrees that a trial by jurors having a fixed, preconceived opinion of the accused's guilt would be a denial of due process, but points out that the voir dire examination discloses that each juror qualified under the applicable Indiana statute. [FN4] It is true that the presiding judge personally examined those members of the jury panel whom petitioner, having no more peremptory challenges, insisted should be excused for cause, and that each indicated that notwithstanding his opinion he could render an impartial verdict. But as Chief Justice Hughes observed in *United States v. Wood,* 299 U.S. 123, 145-146, 57 S.Ct. 177, 185, 81 L.Ed. 78: 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.'

FN4. 'Challenges for cause. — The following shall be good causes for challenge to any person called as a juror in any criminal trial:
'Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may in its discretion, admit him as competent to serve in such case.'
Burns' Ind.Stat.Ann., 1956 Replacement Vol., § 9–1504.

Here the build-up of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing. For example, petitioner's first motion for a change of venue from Gibson County alleged that the awaited trial of petitioner had become the cause celebre of this small community — so much so that curbstone 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. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his

convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the modus operandi of these robberies was compared to that of the murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. Another characterized petitioner as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories petitioner was described as the 'confessed slayer of six,' a parole violator and fraudulent-check artist. Petitioner's court-appointed counsel was quoted as having received 'much criticism over being Irvin's counsel' and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to represent Irvin. On the day before the trial the newspapers carried the story that Irvin had orally admitted the murder of Kerr (the victim in this case) as well as 'the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky.'

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. In fact, on the second day devoted to the selection of the jury, the newspapers reported that 'strong feelings, often bitter and angry, rumbled to the surface,' and that 'the extent to which the multiple murders — three in one family — have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions * * *.' A few days later the feeling was described as 'a pattern of deep and bitter prejudice against the former pipe-fitter.' Spectator comments, as printed by the newspapers, were 'my mind is made up'; 'I think he is guilty'; and 'he should be hanged.'

Finally, and with remarkable understatement, the headlines reported that 'impartial jurors are hard to find.' The panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were peremptorily challenged by petitioner and 10 by the State; 12 persons and two alternates were selected as jurors and the rest were excused on personal grounds, e.g., deafness, doctor's orders, etc. An examination of the 2,783-page voir dire record shows that 370 prospective jurors or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opinion) entertained some opinion as to guilt — ranging in intensity from mere suspicion to absolute certainty. A number admitted that, if they were in the accused's place in the dock and he in theirs on the jury with their opinions, they would not want him on a jury.

Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community, cf. *Stroble v. State of California,* 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With 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. See *Delaney v. United States,* 1 Cir., 199 F.2d 107, 39 A.L.R.2d 1300. 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. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he 'could not * * * give the defendant the benefit of the doubt that he is innocent.' Another stated that he had a 'somewhat' certain fixed opinion as to petitioner's guilt. No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but 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. As one of the jurors put it, 'You can't forget what you hear and see.' With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt. *Stroble v. State of California,* 343 U.S. 181, 72 S.Ct. 599; *Shepherd v. State of Florida,* 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740 (concurring opinion); *Moore v. Dempsey,* 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543.
>
> Petitioner's detention and sentence of death pursuant to the void judgment is in violation of the Constitution of the United States and he is therefore entitled to be freed therefrom. The judgments of the Court of Appeals and the District Court are vacated and the case remanded to the latter. However, petitioner is still subject to custody under the indictment filed by the State of Indiana in the Circuit Court of Gibson County charging him with murder in the first degree and may be tried on this or another indictment. The District Court has power, in a habeas corpus proceeding, to 'dispose of the matter as law and justice require.' 28 U.S.C. § 2243, 28 U.S.C.A. § 2243. Under the predecessors of this section, 'this court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected.' *Mahler v. Eby,* 264 U.S. 32, 46, 44 S.Ct. 283, 288, 68 L.Ed. 549. Therefore, on remand, the District Court should enter such orders as are appropriate and consistent with this opinion, cf. *Grandsinger v. Bovey,* D.C., 153 F.Supp. 201, 240, which allow the State a reasonable time in which to retry petitioner. Cf. *Chessman v. Teets,* 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253; *Dowd v. United States ex rel. Cook,* 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215; *Tod v. Waldman,* 266 U.S. 113, 45 S.Ct. 85, 69 L.Ed. 195.
>
> Vacated and remanded.

Irvin v. Dowd, 366 U.S. 717, 721-29 (1961).

Justice Felix Frankfurter wrote a brief concurring opinion that is quoted here in its entirety:

> Of course I agree with the Court's opinion. But this is, unfortunately, not an isolated case that happened in Evansville, Indiana, nor an atypical miscarriage of justice due to anticipatory trial by newspapers instead of trial in court before a jury.
>
> 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 crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box,

> their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.
>
> Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts — too often, as in this case, with the prosecutor's collaboration — exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury. See *State of Maryland v. Baltimore Radio Show,* 338 U.S. 912, 915, 70 S.Ct. 252, 253, 94 L.Ed. 562. For one reason or another this Court does not undertake to review all such envenomed state prosecutions. But, again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome. *Janko v. United States,* 366 U.S. 716, 81 S.Ct. 1662, 6 L.Ed.2d 846; see e.g., *Marshall v. United States,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250. See also *Stroble v. State of California,* 343 U.S. 181, 198, 72 S.Ct. 599, 607, 96 L.Ed. 872 (dissenting opinion); *Shepherd v. State of Florida,* 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740 (concurring opinion). This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system — freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.

Irvin v. Dowd, 366 U.S. 717, 729-30 (1961) (Frankfurter, J., concurring).

Judges and legislators have developed elaborate rules of evidence and rules of procedure to assure a fair trial. When we allow jurors to consider information learned *outside* of the trial, we contaminate the process and corrupt the trial. I agree with Justice Frankfurter that journalists often "poison" the judicial process and deny defendants a fair trial.

Presumedly, Irvin received a new trial in Indiana state court, but there is no further opinion in the Westlaw database for this case.

Bloeth (1963)

Francis Henry Bloeth was convicted of murder and sentenced to death by a trial court in New York State. The New York State appellate courts held that his confession was voluntary and admissible.[11] Bloeth then filed a habeas corpus petition in federal court, which was denied.[12] Bloeth appealed the denial of the habeas corpus petition and the U.S. Court of Appeals for the Second Circuit ordered that Bloeth receive a new trial.[13] The U.S. Court of Appeals recited the facts of this case, including the pretrial publicity:

> Between July 31, 1959 and August 8, 1959, there occurred three nighttime murders of lone attendants at small business establishments in Suffolk County, New York. In each instance it appeared that robbery was perpetrated and the victim killed in cold blood by .32 caliber pistol shot to prevent identification of the robber. After the third killing, a witness came forward to tell of the sale of a .32 pistol to appellant prior to the third shooting, and apparently also of statements by appellant admitting the earlier two.
>
> Bloeth was picked up and questioned, denying implication in the murders. Holsters identified as sold him with the pistols referred to were found at Bloeth's residence. He was allowed to see counsel, from the firm of one Siben, in whose office Bloeth's sister was employed. After four days of intermittent questioning, and instruction from Siben that he need not make any statement, but advice from Siben and Bloeth's mother and wife that he should tell the truth and cooperate with the police, Bloeth confessed the Currier murder, for which he was tried, the other two robbery murders, a rape, an assault with a claw-hammer on an elderly woman, and at least one other armed robbery. Bloeth pointed out to the police where he had disposed of the gun used in the Currier murder. The gun was located and its identity later confirmed by ballistic tests. Prior to the confession Siben informed the District Attorney that Bloeth was in his opinion insane and that he would confess. Siben did not remain with Bloeth to hear the confession to the authorities.
>
> The communities in Suffolk County, small towns and cities in transition from semi rural to industrial and suburban residential areas, had been thoroughly alarmed at the murders and the presence of a 'mad killer' in their midst. The press gave front page space and scare headlines to the killings, the search for the killer, and the fears of the people. The press received and widely published news of Bloeth's confession from the District Attorney's office, from the police, from Siben, and from Bloeth's wife, of the contemplated defense of insanity from Siben and from the District Attorney of the District Attorney's belief that Bloeth was sane and must get the chair. [FN1] Prior to the confession, while Bloeth was being held for questioning, the District Attorney was quoted in the press as stating that the method of the stickup was 'characteristic of the sadistic nature of Bloeth'. The press reported that Bloeth 'Flunked' lie detector tests given by the police in New York City. After the confession, records from Woodbourne Prison were released through the press, describing Bloeth as 'hostile, sadistic' with a 'deep hatred of discipline' and an admitted narcotic user.

---

[11] *People v. Bloeth,* 173 N.E.2d 782, 213 N.Y.S.2d 51 (N.Y. 1961), *cert. den.,* 368 U.S. 868 (1961).

[12] *U. S. ex rel. Bloeth v. Denno,* 204 F.Supp. 263 (S.D.N.Y. 1962).

[13] *U. S. ex rel. Bloeth v. Denno,* 313 F.2d 364 (2nd Cir. 1963), *cert. den.,* 372 U.S. 978 (1963).

FN1. The inflammatory and prejudicial nature of the newspaper commentary can only be indicated from the following sample of headlines and articles:
'Mad Killer' Confesses' (Newsday, August 14)
'Bloeth: From Bad Boy to 'Mad Killer'' (Newsday, August 15)
'Bloeth Must Go To Chair: DA' (Newsday, August 18)
'Bloeth is Insane, His Lawyer Claims Hopes to Save Killer from Chair' (Long Island Press, August 15)
"If I Get Chair, That's It': Bloeth' (Newsday, August 18)
‘'Joker' in Law: Bloeth Could Go Free Again' (Newsday, August 18)
'Mental Hospital 'Rejects' Bloeth' Killer to Get Sanity Test in Jail' (Long Island Press, September 8)

'As it happens with most major criminals, the wife and neighbors of Francis Henry Bloeth pictured him yesterday as a quiet family man. But to police, he is a violent, sadistic ex-con who is a likely suspect in the 'mad killer' murders.' (Newsday, August 12)

'Francis Henry Bloeth, who murdered three humans with as little emotion as other persons feel while swatting mosquitos, could walk put of court a free man in the not-too-distant future because of New York's archaic sanity law * * * Result: The defendant would be free — perhaps to kill again * * * Experts admit that the present law leaves loopholes through which dangerous criminals can escape. But they are quick to say that no one has come up with acceptable substitute proposals * * *' (Newsday, August 18)

'As far as I am concerned;' said Cohalan, (the District Attorney for Suffolk County) 'Bloeth is legally sane and will stand trial for the three murders. He knew what he was doing and that it was wrong to do it.' (Long Island Press, August 16)

One Newsday article carried the headline "Joker' in law, Bloeth could go free again', with comment on the New York 'archaic sanity law' pointing out a claimed possibility of a jury verdict of acquittal on the grounds of temporary insanity — 'Result: The defendant would be free — perhaps to kill again.' The newspapers, particularly Newsday and other local papers, as well as New York papers and radio and T.V. news programs, gave extensive coverage to these statements. Newsday, a daily, had a circulation of 100,000, the Long Island Daily Press 35,000 in the county with a population of about 600,000.

When the case was assigned for trial, under New York practice motion was made in the Appellate Division for change of venue by Clarke, formerly of Siben's office, who had taken over the defense. The results of a survey purporting to show widespread knowledge of the case from the publicity, the formation of opinions of guilt and an opinion by a majority of those questioned that a fair trial was impossible in Suffolk County, were submitted to the Court. [FN2] The Court however, was apparently of the opinion that a fair trial could be had without change of venue and denied the motion.

FN2. The affidavit of one Boskin, submitted to the Appellate Division, contained the following:

- 'That he is over the age of 21 and resides at 51 Marvin Lane, Islip, New York.
- That between the dates of February 8, 1960 and February 19, 1960, he was employed by the firm of Clarke & Sider for the purpose of taking a public opinion poll in order to ascertain the status of the opinion of the people residing in Suffolk County towards Francis Henry Bloeth, presently under indictment for murder.
- A sample of two hundred and ten residents whose answers to the following questions are annexed hereto and made part of this affidavit are set forth:
  1-- To the question 'Have you ever heard of Francis Henry Bloeth who is accused of murdering three people in Suffolk County?', all two hundred and ten indicated that they were familiar with the subject.
  2-- To the question 'Do you think he is guilty', two hundred and three answered 'Yes', one 'Not sure', three are of no opinion and three say 'Insane'.

> 3-- To the question, 'Do you know that he has already confessed?', ten said 'No' and two hundred answered 'Yes'.
> 4-- To the question, 'Do you think he would receive a fair trial in Suffolk County?', one hundred and thirty-three answered 'No', seventy six said 'Yes' and one had no opinion.'

> Of the 16 jurors seated in the case as regular and alternate jurors, only one had not read of the case. Of the 16, eight stated that they had formed no opinion of guilt or innocence, the other eight stated that they had formed an opinion of guilt, but expressed themselves in various terms as being able to change the opinion or to render an impartial verdict. [footnote omitted] Of 80 other jurors drawn, 42 were excused on various grounds without interrogation as to knowledge of the case from the publicity. Of the remaining 38, 36 had read about the case, 2 had not, 31 stated that they had formed an opinion of guilt or innocence, 5 stated they had formed no opinion. In every case where the talesmen were asked to specify which way the opinion went, it was toward Bloeth's guilt. [footnote omitted]

U. S. ex rel. Bloeth v. Denno, 313 F.2d 364, 366-69 (2nd Cir. 1963).

The U.S. Court of Appeals in *Bloeth* noted that the judge in federal district court, who denied the writ of habeas corpus, did not have the opportunity to read the record of voir dire examination of the veniremen. However, that record was submitted to the U.S. Court of Appeals, who found the opinion of the judge in federal district court to be clearly erroneous. The Court of Appeals then wrote:

> Jury impartiality must be measured by the standards established by the Supreme Court in the line of cases culminating in *Irvin v. Dowd,* 1961, 366 U.S 717, 81 S.Ct. 1639, 6 L.Ed.2d 751. There the court traced the history of the development of the rule in the face of the wide growth of crime coverage by expanding news media, pointing out the right to a fair trial by a panel of impartial, 'indifferent' jurors, the growing difficulty of obtaining a panel who had never heard of a well known case, the acceptability of a juror who had some preconceived notion of guilt or innocence, provided the juror could lay aside his impression or opinion and render a verdict based on the evidence presented in court. Applying these rules to the facts of that case, however, it was made plain that merely going through the form of obtaining jurors' assurances of impartiality is insufficient. The reviewing court must determine, from a review of the entire voir dire, whether the extent and nature of the publicity has caused such a build up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial.
>
> These standards are not met in the case at bar. The publicity was in its nature highly inflammatory, in volume great, and accessibility universal. It reached and entered the consciousness of the overwhelming majority of available talesmen. It is true that defense counsel shared with the state responsibility for much of the publicity which made the selection of an impartial jury difficult. As against this, however, there remain the considerations that much of the prejudicial matter, particularly that from the files of a state institution, and in part the attack on the insanity defense, came from the prosecution. Counsel in the jury selection failed to exhaust his challenges on the original twelve chosen (although he did exhaust them on the choice of one of the alternates, who participated in the deliberations and verdict of the jury) and counsel stated that each juror finally chosen was acceptable to the defense. But the ultimate responsibility lies with the state: It successfully opposed the change of venue requested by substituted counsel to obviate the effects of prejudicial publicity to which the District Attorney had heavily contributed. This disavowal of the tactics of Bloeth's original counsel cannot be ignored. It is true that there was drawn from jurors, even those who stated that it would take evidence to alter their opinions of guilt, the statement that they felt they could

act impartially. This, however, placed on those individuals a burden we think impossible to be borne, in the light of the nature of the publicity, the high proportion of jurors holding opinions of guilt, the length of time the opinions had been held and their persistence. '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.' *Irvin v. Dowd,* supra, at 727, 81 S.Ct. at 1645. Compare *Beck v. Washington,* 1962, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98. In the Beck case, all those who admitted bias or preformed opinion as to guilt or that they might be biased or might have formed an opinion were excused. Id. at 556, 82 S.Ct. at 963. Here there were so few that had not formed an opinion that the inquiry was mainly whether the juror could 'law aside his impression or opinion and render a verdict based on the evidence presented in court.' *Irvin v. Dowd,* supra, at 723, 81 S.Ct. at 1643. The difficulty in this situation has been described by the First Circuit in *Delaney v. United States,* 1st Cir., 1952, 199 F.2d 107, 112-113, 'One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity.' We think it quite impossible that the jury here chosen succeeded in doing so.

It may be argued that since the trial strategy adopted by Siben and perforce followed by his successor Clarke called for emphasis on the number and brutality of Bloeth's crimes as a basis for the defense of insanity, no harm was done in choosing a jury already familiar with his otherwise inadmissible history. There are at least two insurmountable difficulties with this argument. The publicity, partly sponsored by the prosecution, created opinions of guilt long before trial, far removed from any safeguards against inadmissible matter, and included inadmissible material emanating from the prosecution denigrating the insanity defense and so predisposing the prospective jurors to reject it. A defendant is entitled to be tried on the evidence and arguments before the jury in open court, under the guidance of a judge.

The opinions formed in this case, moreover, were based not solely on accounts of the crime at issue, but on accounts of admissions of many other crimes not on trial, and on accounts containing expressions of the disbelief of the District Attorney in the lack of sanity of the defendant, with editorial attack upon the possibility of a legal loophole that by the defense of insanity would free the mad killer to strike again. The interest of the public in the knowledge of the apprehension of the one terrorizing the countryside exists, but cannot justify the denial of an impartial jury to the one accused. The record is convincing that such an impartial jury could not be obtained in Suffolk County at the time this jury was drawn for the trial of this case. While time elapsing between the original publicity and the trial might in many cases blunt the effect of publicity and obviate the need for change of venue, it did not in this case, in view of the saturation nature of the publicity in the non-metropolitan area covered. The record of the voir dire amply demonstrates that despite the interval, the effect of the publicity was little diminished at the time of trial. There is, moreover, no demonstrable difficulty in such a case as this, in providing against probable prejudice. Either a metropolitan county or a rural county at some distance, without the intense local interest and intense local press coverage would undoubtedly provide a much higher percentage of talesmen uncontaminated by improper publicity. No harm would have been done the People, either at the time of the trial or now in bringing Bloeth on trial before a jury assuredly unprejudiced by long held opinions of guilt.

313 F.2d at 372-73.

The U.S. Court of Appeals concluded that the biased jury was a violation of due process in the 14th Amendment to the U.S. Constitution:

> Because on the record we hold that the jury drawn in this case did not meet the standards of impartiality required by the Fourteenth Amendment, we reverse the orders of the District Court appealed from, and remand for the issuance of a writ of habeas corpus, which should however be conditioned to permit retention in custody for the purpose of retrial on the indictment before a proper jury. In view of the time which has now elapsed we do not make it a condition that a change of venue be granted, provided that wherever the trial be held the jury meet the standards of impartiality outlined herein.

313 F.2d at 374.

The subsequent history of Bloeth's case was tersely described by an New York State appellate court:

> After the reversal by the U. S. Court of Appeals, the District Attorney of Suffolk County applied to the Appellate Division, Second Department, for a change of venue. The motion was granted and the four indictments were transferred to New York County. Petitioner was arraigned on the four indictments and the District Attorney proceeded to trial on one of the indictments. In October, 1963, petitioner was found guilty of murder, first degree, and on November 8, 1963 he was sentenced to death. He is presently in the death house at Sing Sing Prison pending the automatic appeal to the Court of Appeals from his conviction.

Bloeth v. Marks, 247 N.Y.S.2d 410, 412 (N.Y.A.D. 1 Dept. 1964).

Rideau v. Louisiana (1963)

The U.S. Supreme Court summarized the facts of this case:

> On the evening of February 16, 1961, a man robbed a bank in Lake Charles, Louisiana, kidnapped three of the bank's employees, and killed one of them. A few hours later the petitioner, Wilbert Rideau, was apprehended by the police and lodged in the Calcasieu Parish jail in Lake Charles. The next morning a moving picture film with a sound track was made of an 'interview' in the jail between Rideau and the Sheriff of Calcasieu Parish. This 'interview' lasted approximately 20 minutes. It consisted of interrogation by the sheriff and admissions by Rideau that he had perpetrated the bank robbery, kidnapping, and murder. Later the same day the filmed 'interview' was broadcast over a television station in Lake Charles, and some 24,000 people in the community saw and heard it on television. The sound film was again shown on television the next day to an estimated audience of 53,000 people. The following day the film was again broadcast by the same television station, and this time approximately 20,000 people saw and heard the 'interview' on their television sets. Calcasieu Parish has a population of approximately 150,000 people.
>
> Some two weeks later, Rideau was arraigned on charges of armed robbery, kidnapping, and murder, and two lawyers were appointed to represent him. His lawyers promptly filed a motion for a change of venue, on the ground that it would deprive Rideau of rights guaranteed to him by the United States Constitution to force him to trial in Calcasieu Parish after the three television broadcasts there of his 'interview' with the sheriff. [footnote omitted] After a hearing, the motion for change of venue was denied, and Rideau was accordingly convicted and sentenced to death on the murder charge in the Calcasieu Parish trial court.

Rideau v. State of Louisiana, 373 U.S. 723, 723-25 (U.S. 1963).

The Louisiana Supreme Court affirmed the conviction, after tersely considering the confession:

> ... on the morning of February 17, 1961, the defendant was interviewed by the sheriff, and the entire interview was filmed (with a sound track) and shown to the audience of television station KPLC-TV on three occasions. The showings occurred prior to the arraignment of defendant on the murder charge. In this interview the accused admitted his part in the crime for which he was later indicted. Defendant contends that this was prejudicial to the accused and that either the State should be estopped from seeking the death penalty or the accused should be granted a new trial in a locale other than Calcasieu Parish.
>
> This second ground is somewhat related to the grounds asserted in the motion for a change of venue. The evidence taken on the change of venue has been previously discussed. It was established that the accused could get a fair trial in the Parish.

State v. Rideau, 137 So.2d 283, 289 (La. 1962).

The Louisiana Supreme Court had also tersely dismissed the change of venue motion:

> The motion for a change of venue is based on the 'sensational' news coverage, radio and television broadcasts, and the fact that the employees of the Gulf National Bank, victims of the crime, are well known citizens of the City of Lake Charles.
>
> In the case of *State v. Scott,* 237 La. 71, 110 So.2d 530, this Court stated the rule applicable to a change of venue:
>
> > 'The burden of establishing that an applicant cannot obtain a fair trial in the parish where the crime was committed rests with him. The test is whether there can be secured with reasonable certainty from the citizens of the parish a jury whose members will be able to try the case on the law and evidence, uninfluenced by what they may have heard of the matter and who will give the accused full benefit of any reasonable doubt arising either from the evidence or the lack of it. *State v. Rini,* 153 La. 57, 95 So. 400 and *State v. Faciane,* 233 La. 1028, 99 So.2d 333 and authorities there cited. The power to grant a change of venue rests in the sound discretion of the trial judge, whose ruling will not be disturbed in the absence of a showing of clear abuse thereof.'
>
> See also [two citations omitted].
>
> Of the witnesses produced at the hearing of the motion for a change of venue, five testified that in their opinion defendant could not get a fair trial in Calcasieu Parish, and twenty-four testified that in their opinion the defendant could get a fair and impartial trial. A stipulation was made that five other witnesses would testify that defendant could obtain a fair trial in the parish.
>
> After reviewing the evidence on the motion for a change of venue, we are of the opinion that the trial judge properly denied this motion.

State v. Rideau, 137 So.2d 283, 287-88 (La. 1962).

The U.S. Supreme Court held that the denial of the motion for a change of venue was a violation of defendant's due process rights under the 14th Amendment to the U.S. Constitution.

> Three members of the jury which convicted him had stated on voir dire that they had seen and heard Rideau's televised 'interview' with the sheriff on at least one occasion. Two members of the jury were deputy sheriffs of Calcasieu Parish. Rideau's counsel had requested that these jurors be excused for cause, having exhausted all of their peremptory challenges, but these challenges for cause had been denied by the trial judge. The judgment of conviction was affirmed by the Supreme Court of Louisiana, 242 La. 431, 137 So.2d 283, and the case is here on a writ of certiorari, 371 U.S. 919, 83 S.Ct. 294, 9 L.Ed.2d 229.

The record in this case contains as an exhibit the sound film which was broadcast. What the people of Calcasieu Parish saw on their television sets was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff. [FN2] The record fails to show whose idea it was to make the sound film, and broadcast it over the local television station, but we know from the conceded circumstances that the plan was carried out with the active cooperation and participation of the local law enforcement officers. And certainly no one has suggested that it was Rideau's idea, or even that he was aware of what was going on when the sound film was being made.

FN2. The Supreme Court of Louisiana summarized the event as follows: '(O)n the morning of February 17, 1961, the defendant was interviewed by the sheriff, and the entire interview was filmed (with a sound track) and shown to the audience of television station KPLC-TV on three occasions. The showings occurred prior to the arraignment of defendant on the murder charge. In this interview the accused admitted his part in the crime for which he was later indicted.' 242 La., at 447, 137 So.2d, at 289.

In the view we take of this case, the question of who originally initiated the idea of the televised interview is, in any event, a basically irrelevant detail. For we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that 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.

....

.... The kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law. Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, [FN3] the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a 'trial' of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute.

FN3. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.

The record shows that such a thing as this never took place before in Calcasieu Parish, Louisiana. [footnote omitted] Whether it has occurred elsewhere, we do not know. But we do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.' "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." *Chambers v. Florida,* 309 U.S. 227, 241, 60 S.Ct. 472, 479, 84 L.Ed. 716.

Rideau v. State of Louisiana, 373 U.S. 723, 725-27 (U.S. 1963).

On remand, the Louisiana Supreme Court stated: "the trial judge is ordered to grant a change of venue in this case for the trial of the defendant, Wilbert Rideau, to a parish in this state outside the range of those reached by televised broadcasts beamed by KPLC-TV, Lake Charles, Louisiana."[14] Rideau received a new trial, this time in East Baton Rouge Parish, was again found guilty, and was again sentenced to death. The Louisiana Supreme Court again affirmed the conviction, despite the possibility that the change of venue was *in*adequate:

> The defense produced five witnesses who testified they could receive telecasts from KPLC-TV in East Baton Rouge Parish. Their testimony related to 1964, not to 1961 when the defendant was interviewed. The defense offered no witness who had actually seen the televised interview in East Baton Rouge Parish.
>
> The trial judge properly overruled the objection to the trial in East Baton Rouge Parish. The defendant made no showing the community was exposed to the televised interview in violation of defendant's constitutional rights.

State v. Rideau, 193 So.2d 264, 268 (La. 1966), *cert. den.,* 389 U.S. 861 (1967).
Notice that the previous instruction of the Louisiana Supreme Court to find a new trial location outside the range of KPLC-TV was *not* followed, and when the case again came before the Louisiana Supreme Court, they ignored this disregard of their previous instructions.

Rideau then applied to a federal court for a writ of habeas corpus, on grounds irrelevant to this essay. The Louisiana Supreme Court subsequently annulled the death sentence and ordered Rideau to be sentenced to life in prison.[15]

Sam Sheppard (1966)

This is the leading case in the USA about the effect of pretrial and trial publicity on the right of an accused to have an "impartial jury", as required by the Sixth Amendment to the U.S. Constitution. Sheppard's pregnant wife was murdered in their home in Cleveland, Ohio on 4 July 1954, while her husband was at home. The police arrested Sam Sheppard on 30 July 1954 and he remained in custody continuously until 1966. After numerous serious irregularities in the pretrial legal proceedings, Sam Sheppard was charged with the murder of his wife. Despite massive pretrial publicity in the local newspapers, the trial judge denied Sheppard's motion for a change of venue, which was later held to be an error that denied Sheppard a fair trial. Despite continuing intense publicity in the local newspapers, the trial judge did not sequester the jurors during the trial, which was another error that denied Sheppard a fair trial. Not surprisingly, given the tone of the intense local newspaper coverage, the jury found Sheppard guilty of murder on 21 December 1954. Sheppard appealed to higher courts in Ohio, but the appellate courts affirmed

---

[14] *State v. Rideau,* 165 So.2d 282, 285 (La. 1964).

[15] *State v. Rideau,* 278 So.2d 100 (La. 1973).

his conviction and the U.S. Supreme Court denied his request for a writ of certiorari.[16] After Sheppard had been incarcerated in the Ohio State Penitentiary for about nine years, he filed a habeas corpus petition in federal district court. In a lengthy decision, the federal judge held that Sheppard had been denied a fair trial for five different reasons, including the failure to change the venue and failure to sequester the jurors. The state appealed to the U.S. Court of Appeals, which — by a vote of 2 to 1 — reversed the District Court. Sheppard then appealed to the U.S. Supreme Court, which reversed the Court of Appeals and remanded the case to Ohio for a new trial.[17] Sheppard was found "not guilty" at a second trial in 1966 and he died in 1970.

To make this essay shorter and to focus on the legal issues of pretrial publicity, I have chosen to omit the facts of this case from this essay. Readers interested in the factual details can find a good summary at:

- *Sheppard v. Maxwell,* 231 F.Supp. 37, 39-41 (S.D. Ohio 1964)(stipulated facts and history of the case).
- *Sheppard v. Maxwell,* 384 U.S. 333, 336-349 (1966).

There are also some websites devoted to this famous trial, for example:

- http://www.law.umkc.edu/faculty/projects/ftrials/sheppard/Sheppard.htm
- collection of case documents: http://www.courttv.com/archive/trials/sheppard/shepdocs_ctv.html
- 1999 DNA evidence: http://www.pbs.org/wgbh/nova/sheppard/
- website by Sam Sheppard's son: http://www.samreesesheppard.org/

To make this essay shorter, I have chosen to present clippings from local newspapers before and during Sheppard's first trial as a separate document at http://www.rbs2.com/shepp.htm . Readers who are in a hurry can skip the newspaper clippings, which show that the local newspapers repeatedly hinted that Sheppard was the murderer, demanded that Sheppard be arrested and punished for the gruesome crime, and mentioned many "facts" that would be *in*admissible as evidence at trial.

---

[16] *State v. Sheppard,* 128 N.E.2d 471 (Ohio App. 1955), *aff'd,* 135 N.E.2d 340 (Ohio 1956), *cert. den.,* 352 U.S. 910 (1956).

[17] *Sheppard v. Maxwell,* 231 F.Supp. 37 (S.D.Ohio 1964), *rev'd,* 346 F.2d 707 (6th Cir. 1965), *rev'd,* 384 U.S. 333 (1966).
Incidentally, Maxwell, whose name appears as the defendant in this case, was the Warden of the Ohio State Penitentiary. Through the form of a habeas corpus petition, the name of the innocent Maxwell is forever linked with this famous case.

The legal recognition that the newspaper articles had prejudiced jurors in Sheppard's trial began with the opinion of Judge Weinman in the habeas corpus proceeding. The evidence in that proceeding included:

- Five volumes of green covered scrap books of news clippings from the Cleveland Press, the Cleveland News (which has since merged with the Cleveland Press) and the Cleveland Plain Dealer. These scrap books contain substantially all of the clippings relating to the Sheppard case which were published by these three newspapers during the period from July 1954 through December 1954.
- The fact that there was published in all three Cleveland newspapers previously referred to, and particularly on September 23, 1954, 25 days before the selection of a jury began, a list of 75 veniremen who had been drawn as prospective jurors in the Sheppard Case, giving the full name and street address of each juror listed.
- The fact that the 13 petit jurors who heard the evidence and decided petitioner's case were allowed to go to their homes each night during the trial, and were not sequestered or kept apart until after the court's charge, at which time the jury was committed to the custody of two bailiffs and were thereafter kept under constant guard and supervision during their deliberations and until their verdict had been returned in open court.
- The fact that the trial judge, before the commencement of the trial, made certain arrangements with respect to the seating whereby a major portion of the courtroom where the case was to be tried was assigned to the news media.
- Prior to commencement of trial, counsel for petitioner made a number of motions for change of venue or for continuance. The trial judge held these motions in abeyance until after the jury was selected; after which he overruled each of the motions.

Sheppard v. Maxwell, 231 F.Supp. 37, 44 (S.D.Ohio 1964).

After quoting some of the pretrial newspaper articles, Judge Weinman remarked:

> The Court does not deem it necessary to analyze in detail the above quoted newspaper editorials, articles and headlines or the remainder of the five volumes of clippings submitted into evidence. Suffice it to say that each of the three Cleveland newspapers repeatedly printed material which strongly suggested and, in fact, urged petitioner's guilt. Indicative of the suggestion of guilt was the repeated and extensive coverage given to petitioner's refusal to submit to a lie detector test or to receive an injection of truth serum.

231 F.Supp. at 57.

Judge Weinman then considered the opinions of the U.S. Supreme Court in *Irvin v. Dowd* and *Rideau v. Louisiana* and then concluded:

> This Court now holds that the prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions and instructions of the trial judge.

231 F.Supp. at 60.

Judge Weinman then quoted one example of a newspaper article during the trial, as well as quoted a number of newspaper headlines during the trial and mentioned one local radio broadcast, cited two court cases about publicity during trials, and then concluded:

> It must be recalled that the jury in this case was not sequestered until the cause was submitted to them after the charge of the court. It is clear beyond doubt, because of the sheer volume of publicity which attended the trial, that the jury read and heard about the case

through the news media. [see infra, at page 63.] In fact, the records shows, at page 5429 of the Bill of Exceptions, that the trial judge asked if any juror had heard a certain broadcast by Walter Winchell and two jurors replied that they had. [FN5]

> FN5 In that broadcast, it was reported that a woman, then under arrest for robbery, had stated that 'she was the mistress of Sam Sheppard, and that he was responsible for the birth of a child.' Each of the jurors who had heard the broadcast answered 'No' to the question: 'Would that have any effect upon your judgment?'

This Court holds that there was such a plethora of prejudicial material contained in the newspapers that no admonition or charge of the court could vitiate the effect of the publicity. Further, the trial judge committed error when he failed to question the jury regarding the Robert Considine broadcast. It was incumbent upon the judge to take every precaution to insure that highly prejudicial material did not infect the minds of the jury. *Holmes v. United States,* 284 F.2d 716 (4 Cir. 1960). It has even been held that where there is highly prejudicial publicity, the judge should carefully examine each juror out of the presence of the others to determine the effect of the articles on those who had read them and whether they had discussed the articles with others, *United States v. Accardo,* 298 F.2d 133, 136 (7 Cir. 1962).

The Court also notes the manner in which the trial judge allocated the courtroom to members of the news media. It is one thing to accommodate the news media; it is quite different when a major portion of the courtroom is reserved for it. Here a comparatively small courtroom was reserved primarily for the news media and the trial became its showpiece. The Supreme Court of Ohio characterized the atmosphere surrounding the trial as 'a 'Roman holiday' for the news media.'[18] Under such circumstances, the requisite atmosphere for a fair trial could not, and in fact did not, exist.

Any one of the above mentioned factors, i.e., the insidious, prejudicial newspaper reporting, the refusal of the trial judge to question jurors regarding an alleged prejudicial radio broadcast and the carnival atmosphere which continued throughout the trial, would be sufficient to compel the conclusion that petitioner's constitutional rights were violated. But when they are cumulated, this Court cannot, unless it were to stretch its imagination to a point of fantasy, say the petitioner had a fair trial in view of the publicity during trial.

---

[18] Earlier, the Ohio Supreme Court began their opinion on this case with the following paragraph:

> Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life.

State v. Sheppard, 135 N.E.2d 340, 342 (Ohio 1956)

Despite this opening paragraph, the Ohio Supreme Court affirmed Sheppard's conviction by a 5-to-2 vote. Later, the U.S. Supreme Court wrote about the first trial of Sheppard:

> 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. [footnote about comments by *The Saturday Review* and *The Toledo Blade* omitted]

Sheppard v. Maxwell, 384 U.S. 333, 356 (U.S. 1966).

> The Court cannot pass to the next claim of error without pausing to comment further on the manner in which the three Cleveland newspapers reported the murder of Marilyn Sheppard and the subsequent events. It is often difficult to draw the line between propriety and impropriety in newspaper reporting. Newspapers have the right and indeed an obligation to the community to advocate and to criticize. But with respect to the Sheppard case, there can be no doubt as to the impropriety in the manner in which it was reported by the Cleveland newspapers. The inflammatory and prejudicial reporting did not subside when the trial began; it continued throughout the trial. And special note must be given to the attempt of the newspapers to influence the jury. It was startling to find photographs of the entire jury and of individual jurors (at times giving their home addresses) in no less than 40 issues of the Cleveland newspapers. The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting. Also, the newspapers ran editorials praising the trial judge (he was a candidate for re-election) and published photographs and sketches of him in at least 46 separate issues. This was certainly an attempt to bring him around to their way of thinking.
>
> If ever there was a trial by newspaper, this is a perfect example. And the most insidious violator was the Cleveland Press. For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame and prejudice the public. Such a complete disregard for a sense of propriety results in a grave injustice not only to the individual involved but to the community in general. Public officials, the courts and the jury are unable to perform their proper functions when the news media run rampant, with no regard for their proper role. Numerous responsible newspapers and magazines noted this abuse of freedom of the press and published editorials [footnote omitted] which were highly critical of the Cleveland newspapers, especially the Cleveland Press.

231 F.Supp. at 62-64.

> By its actions in the Sheppard case, the Cleveland Press showed no respect for its responsibilities. If ever a newspaper did a disservice to its profession; if ever the cause of freedom of the press was set back, this was it. The failure of that newspaper and the two other Cleveland newspapers to adhere to their responsibilities cannot be permitted to deny petitioner his right to a fair trial.

231 F.Supp. at 64.

Judge Weinman concluded:

> Once again, the Court repeats what was stated at the beginning of this decision, and that is that the guilt or innocence of petitioner was not before the Court. The Court has considered the question of whether or not petitioner received a fair trial and in regard to that question has found five separate violations of petitioner's constitutional rights, i.e.,
>
> - failure to grant a change of venue or a continuance in view of the newspaper publicity before trial;
> - inability of maintaining impartial jurors because of the publicity during trial;
> - failure of the trial judge to disqualify himself although there was uncertainty as to his impartiality;
> - improper introduction of lie detector test testimony and
> - unauthorized communications to the jury during their deliberations.

> Each of the aforementioned errors is by itself sufficient to require a determination that petitioner was not afforded a fair trial as required by the due process clause of the Fourteenth Amendment. And when these errors are cumulated, the trial can only be viewed as a mockery of justice. For this reason, it is not necessary to consider the remainder of the 23 stipulated issues, which range from having significant merit to no merit at all.
>
> This Court is well aware of the fact that many State Court judges have affirmed petitioner's conviction on appeal (two judges of the Supreme Court of Ohio dissented), but after reviewing the evidence submitted, the Court has no hesitancy in reaching the conclusions already noted. ....
>
> The order which follows is somewhat atypical in that it permits petitioner's immediate release, but this case is unusual, for petitioner has been incarcerated for almost ten years as a result of a trial which fell far below the minimum requirements of due process.

231 F.Supp. at 71-72. [bullets added]

Two years after Judge Wienman's opinion, the U.S. Supreme Court issued their opinion in the *Sheppard* case.

> But the Court has also pointed out that "(l)egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. State of California,* supra, 314 U.S. [252,] 271 [(1941)] .... Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall v. United States,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), we set aside a federal conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313, 79 S.Ct. at 1173. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.' At 312, 79 S.Ct. at 1173. Likewise, in *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction ....

Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1966).

> Only last Term in *Estes v. State of Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:
>
> > 'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, 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.'
>
> At 542--543, 85 S.Ct. at 1632.
>
> And we cited with approval the language of Mr. Justice Black for the Court in *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), that "our system of law has always endeavored to prevent even the probability of unfairness."
>
> It is clear that the totality of circumstances in this case also warrants such an approach. Unlike Estes, Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered. The Estes jury saw none of the television broadcasts from the courtroom. On the contrary, the Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings.

They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. The judge's 'admonitions' at the beginning of the trial are representative:

> 'I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as this case is concerned. You will feel very much better as the trial proceeds * * *. I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content * * *.'

At intervals during the trial, the judge simply repeated his 'suggestions' and 'requests' that the jurors not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. See *Estes v. State of Texas,* supra, 381 U.S., at 545-546, 85 S.Ct., at 1634. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.

The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the Cleveland newspapers and broadcasting stations to Sheppard's prosecution. [FN8] Sheppard stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships. [FN9]

FN8. Many more reporters and photographers attended the Sheppard trial. And it attracted several nationally famous commentators as well.

FN9. At the commencement of trial, defense counsel made motions for continuance and change of venue. The judge postponed ruling on these motions until he determined whether an impartial jury could be impaneled. Voir dire examination showed that with one exception all members selected for jury service had read something about the case in the newspapers. Since, however, all of the jurors stated that they would not be influenced by what they had read or seen, the judge overruled both of the motions. Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in *Delaney v. United States,* 199 F.2d 107, 115 (C.A.1st.Cir. 1952), recognized such a duty under similar circumstances, holding that 'if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that.'

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that 'judicial serenity and calm to which (he) was entitled.' *Estes v. State of Texas,* supra, 381 U.S., at 536, 85 S.Ct., at 1629. The fact is that bedlam reigned at the courthouse

> during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes.
> The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gauntlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

384 U.S. at 352-55.

> Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a 'Jekyll-Hyde'; that he was 'a bare-faced liar' because of his testimony as to police treatment; and finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being 'doctored' to show more clearly an alleged imprint of a surgical instrument.
>
> Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury. See *Commonwealth v. Crehan,* 345 Mass. 609, 188 N.E.2d 923 (1963).

384 U.S. at 356-57.

The U.S. Supreme Court then considered what measures the trial judge should have undertaken to prevent publicity from affecting jurors.

> The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias

now made against the state trial judge. [FN11]

FN11. In an unsworn statement, which the parties agreed would have the status of a deposition, made 10 years after Sheppard's conviction and six years after Judge Blythin's death, Dorothy Kilgallen asserted that Judge Blythin had told her: 'It's an open and shut case * * * he is guilty as hell.' It is thus urged that Sheppard be released on the ground that the judge's bias infected the entire trial. But we need not reach this argument, since the judge's failure to insulate the proceedings from prejudicial publicity and disruptive influences deprived Sheppard of the chance to receive a fair hearing.

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes,* the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. [FN12] Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

FN12. The judge's awareness of his power in this respect is manifest from his assignment of seats to the press.

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule. See *Estes v. State of Texas,* supra, 381 U.S., at 547, 85 S.Ct., at 1635.

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion. [FN13] That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution. The judge made this statement in the presence of the jury:

'Now, the Court wants to say a word. That he was told — he has not read anything about it at all — but he was informed that Dr. Steve Sheppard, who has been granted the privilege of remaining in the court room during the trial, has been trying the case in the newspapers and making rather uncomplimentary comments about the testimony of the witnesses for the State.

'Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case. 'The Court appreciates he cannot deny Steve Sheppard the right of free speech, but he can deny him the * * * privilege of being in the courtroom, if he wants to avail himself of that method during the progress of the trial.'

FN13. The problem here was further complicated by the independent action of the newspapers in reporting 'evidence' and gossip which they uncovered. The press not only inferred that Sheppard was guilty because he 'stalled' the investigation, hid behind his family, and hired a prominent criminal lawyer, but denounced as 'mass jury tampering' his efforts to gather evidence of community prejudice caused by such publications. Sheppard's counterattacks added some fuel but, in these circumstances, cannot preclude him from asserting his right to a fair trial. Putting to one side news stories attributed to police officials, prospective witnesses, the Sheppards, and the lawyers, it is possible that the other publicity 'would itself have had a prejudicial effect.' Cf. Report of the President's Commission on the Assassination of President Kennedy, at 239.

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that 'misrepresented entirely the testimony' in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts.[19] And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner. [FN14] The story that Sheppard had been called a 'Jekyll-Hyde' personality by his wife was attributed to a prosecution witness. No such testimony was given. The further report that there was 'a 'bombshell witness' on tap' who would testify as to Sheppard's 'fiery temper' could only have emanated from the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record. [FN15]

FN14. When two police officers testified at trial that Sheppard refused to take a lie detector test, the judge declined to give a requested instruction that the results of such a test would be inadmissible in any event. He simply told the jury that no person has an obligation 'to take any lie detector test.'

FN15. Such 'premature disclosure and weighing of the evidence' may seriously jeopardize a defendant's right to an impartial jury. '(N)either the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against (Sheppard).' Cf. Report of the President's Commission, supra, at 239, 240.

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. See *Stroble v. State of California,* 343 U.S. 181, 201, 72 S.Ct. 599, 609, 96 L.Ed. 872 (1952) (Frankfurter, J., dissenting). Effective control of these sources — concededly within the court's power — might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement

---

[19] I wonder if this sentence is hyperbole. The U.S. Supreme Court during the 1960s and 1970s enjoyed an era of great respect for both freedom of speech and freedom of press, with great justices such as Douglas and Brennan. I have difficulty believing that such a Court would endorse censorship of journalists.

made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State v. Van Duyne,* 43 N.J., 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. [FN16] In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings.[20] The judge was put on notice of such events by defense counsel's complaint about the WHK broadcast on the second day of trial. See p. 1513, supra. In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom — not pieced together from extrajudicial statements.

FN16. The Department of Justice, the City of New York, and other governmental agencies have issued such regulations. E.g., 28 CFR § 50.2 (1966). For general information on this topic see periodic publications (e.g., Nos. 71, 124, and 158) by the Freedom of Information Center, School of Journalism, University of Missouri.

384 U.S. at 357-362.

The U.S. Supreme Court then concluded:

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from

---

[20] Again, I wonder if this sentence is hyperbole.

custody unless the State puts him to its charges again within a reasonable time.
It is so ordered.
384 U.S. at 362-363.

After his second trial, Sheppard sued the Coroner and both the editor and publisher of a local newspaper for conspiracy to violate Sheppard's civil rights.[21] The court dismissed Sheppard's Complaint, because the U.S. Supreme Court had previously determined that the acts of the trial judge (who had immunity from civil prosecution) were responsible for the deprivation of due process, because the Coroner had immunity from civil prosecution, and because the newspaper was not a state actor, as required by the federal civil rights statute, 42 U.S.C. § 1983. Twenty-five years after Sheppard died, the administrator of his estate *un*successfully sued the state for wrongful imprisonment.[22]

comments on *Sheppard*

In my opinion, there were *many* problems with both the pretrial publicity and the publicity during the first trial of Sam Sheppard in 1954.

- The newspapers repeatedly implied that Sheppard's refusals to take a "lie detector test", or be interrogated after an injection of "truth serum", implied that he was guilty. Even in 1954, suspects had the legal right to refuse such tests or examinations, and it was legally *im*permissible to infer anything from his refusal. By publishing such *im*proper conclusions, the newspapers poisoned potential jurors and defeated carefully designed rules of legal evidence, as well as ignored Constitutional rights of the accused against self-incrimination. Indeed, an accused has no legal obligation to prove his innocence, and no legal obligation to cooperate with police.
- The newspapers implied that Sheppard must have been guilty because he hired a prominent criminal defense attorney. This suggestion by the newspapers is outrageous. An accused person is legally *entitled* to be represented by an attorney, according to the Sixth Amendment to the U.S. Constitution. Given the hysterical and sensational publicity confronting him, as well as considering that he was suspected of — and later charged with — first-degree murder, which carries the possible death penalty, Sheppard would have been a fool to hire anyone less than the best available criminal defense attorney.
- The newspapers repeatedly expressed a conclusion that Sheppard was guilty.
  While journalists and publishers are entitled to their personal opinion, it is both *un*professional and a perversion of Justice to express that opinion and contaminate potential jurors. Society should wait for *impartial jurors* to hear evidence in court and then decide the guilt of accused,

---

[21] *Sheppard v. E. W. Scripps Co.,* 421 F.2d 555 (6th Cir. 1970), *cert. den. sub nom. Strickland v. E. W. Scripps Co.,* 400 U.S. 941 (1970).

[22] *State ex rel. Jones v. Suster,* 701 N.E.2d 1002 (Ohio 1998)(denying writ of prohibition requested by county prosecutor); *Murray v. State,* 2002 WL 337732, 2002-Ohio-664 (Ohio App. 2002)(state won), *appeal not allowed,* 772 N.E.2d 1202, 2002-Ohio-3910 (Ohio 2002).

instead of having trials by journalists. Guilt is something that should be uniquely determined by a jury.

- As the trial judge apparently believed that Sheppard was guilty of murder, it appears that the publicity may have affected and biased the judge himself.[23] That result should *not* be surprising: (1) the judge, like the jurors, lived in Cleveland and read the local newspaper(s) and (2) judges are people, and people are susceptible to biases.
- Finally, this pretrial publicity destroyed the presumption that the accused is innocent. This presumption of innocence is *not* a meaningless slogan, but a cherished principle of law that helps ensure a fair trial.

In 1954, at the time of the murder of Sheppard's wife, there were *three* newspapers in Cleveland. One newspaper, *The Cleveland Press* published more sensational coverage than the other two newspapers.[24] One wonders about the competitive pressure on the reputable newspaper, *The Cleveland Plain Dealer,* to also publish sensational material, in order to avoid losing sales to other newspapers.

Amongst the condemnation of the publicity before and during the trial in the U.S. Supreme Court's landmark opinion in *Sheppard,* it is easy to miss some specific recommendations to judges for use in future trials:

- "continue the case until the threat abates,"
- change venue to a location "not so permeated with publicity" and
- sequestration of the jury.[25]

Perhaps most importantly, *Sheppard* was the first U.S. Supreme Court case to suggest that trial judges issue what is now called a "gag order" that prohibits:

- all witnesses,
- law enforcement officers,
- attorneys for both the prosecution and defense,
- the defendant, and
- court officials

from making public comments (called "extrajudicial statements") on the case that included "prejudicial matters".[26]

---

[23] 231 F.Supp. at 64-66 (holding that the "trial judge should have disqualified himself" from Sheppard's case). See also 384 U.S. at 358, n. 11 (U.S. Supreme Court declines to consider whether judge was biased, because publicity alone was an adequate ground for requiring a new trial.)

[24] 231 F.Supp. at 63 ("If ever there was a trial by newspaper, this is a perfect example. And the most insidious violator was the Cleveland Press.").

[25] 384 U.S. at 363.

[26] 384 U.S. at 359 and at 361-62.

As I write this discussion of the *Sheppard* case in November 2003, I am struck by the parallels with the currently pending case of Scott Peterson in California. Both cases involve:

- the death of a pregnant woman
- the arrest of her husband as the only suspect
- the husband was having an affair before his wife died, and husband lied about the affair
- there are almost daily newspaper and television reports about the investigation of the murder, and then the pretrial legal proceedings. Again, journalists are reporting information about Scott Peterson that is *un*likely to be admitted as evidence at trial, thereby contaminating the jury pool with knowledge of *ir*relevant or *un*fairly prejudicial "facts".

Have journalists learned nothing in the fifty years since the *Sheppard* debacle?

Yount (1984)

After the strong words in defense of a fair trial in *Irvin* and *Sheppard*, in 1984 the U.S. Supreme Court in *Yount* appeared to weaken its previous rulings about pretrial publicity. Yount was a high school mathematics teacher who murdered an 18-y-old female pupil in April 1966, then voluntarily appeared at a State Police Substation and confessed to the murder. In the midst of intensive pretrial publicity and publicity during the trial, Yount was tried in 1966 and found guilty of both first-degree murder and rape. The Pennsylvania Supreme Court granted Yount a new trial, ruling that his confession was *in*admissible.[27] At a second trial in 1970, Yount was again found guilty and again sentenced to life imprisonment. The Pennsylvania Supreme Court affirmed the result of the second trial.[28] Yount then applied for a writ of habeas corpus in Federal court, which was denied.[29] Yount appealed and the U.S. Court of Appeals granted him a new trial.[30] The State appealed and the U.S. Supreme Court reversed the Court of Appeals by a 7-to-2 vote.[31]

The U.S. Supreme Court suggested that publicity might have been a problem during the first trial, but Yount's conviction during his second trial was acceptable.

> In this case, the extensive adverse publicity and the community's sense of outrage were at their height prior to Yount's first trial in 1966. The jury selection for Yount's second trial, at issue here, did not occur until four years later, at a time when prejudicial publicity was greatly

---

[27] *Commonwealth v. Yount,* 256 A.2d 464 (Pa. 1969), *cert. den.,* 397 U.S. 925 (1970).

[28] *Commonwealth v. Yount,* 314 A.2d 242 (Pa. 1974).

[29] *Yount v. Patton,* 537 F.Supp. 873 (W.D.Pa. 1982).

[30] *Yount v. Patton,* 710 F.2d 956 (3rd Cir. 1983).

[31] *Patton v. Yount,* 467 U.S. 1025 (1984).

> diminished and community sentiment had softened. In these circumstances, we hold that the trial court did not commit manifest error in finding that the jury as a whole was impartial.

467 U.S. at 1032.

> The Court of Appeals below thought that the fact that the great majority of veniremen "remembered the case" showed that time had not served "to erase highly unfavorable publicity from the memory of [the] community." 710 F.2d, at 969. This conclusion, without more, is essentially irrelevant. The relevant question is not whether the community remembered the case, but whether the jurors at Yount's trial had such fixed opinions that they could not judge impartially the guilt of the defendant. *Irvin,* 366 U.S., at 723, 81 S.Ct., at 1642-1643. It is not unusual that one's recollection of the fact that a notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed. It would be fruitless to attempt to identify any particular lapse of time that in itself would distinguish the situation that existed in *Irvin.* [footnote omitted] But it is clear that the passage of time between a first and a second trial can be a highly relevant fact. In the circumstances of this case, we hold that it clearly rebuts any presumption of partiality or prejudice that existed at the time of the initial trial. There was fair, even abundant, support for the trial court's findings that between the two trials of this case there had been "practically no publicity given to this matter through the news media," and that there had not been "any great effect created by any publicity." [citation to appellate briefs]

467 U.S. at 1035.

A careful reading of the opinion of the U.S. Court of Appeals and of the dissenting opinion in the U.S. Supreme Court convinces me that there was a problem with pretrial publicity at the second trial. Everyone acknowledges that there was intensive publicity during the first trial in a rural community, in which there was widespread belief that Yount was guilty before the first trial began. It is reasonable to conclude that jurors during the second trial remembered that Yount had confessed to the murder, and had been previously found guilty, although *neither* the confession *nor* the result of the first trial were admissible at the second trial. It took ten days to select a jury for the second trial, although the trial itself lasted only four days.

Consider the opinion of the U.S. Court of Appeals:

> Clearfield County [where the murder occurred and where *both* trials occurred] is a rural county with a population of approximately seventy thousand served by two newspapers with a total circulation of approximately twenty-five thousand. On April 29, 1966, each of the newspapers devoted its front page to the Rimer homicide and to petitioner's appearance at the substation. Both newspapers gave front-page coverage to the pre-trial proceedings, the voir dire of 104 veniremen, and the nine-day trial. In the DuBois *Courier Express* the publicity culminated in seventeen consecutive editions each bearing banner headlines and carrying at least two feature articles. The Clearfield *Progress* gave the case similarly intense coverage. As the papers related, public interest in the proceedings was unprecedented; *The Progress* later adjudged petitioner's trial the top news item of 1966. [footnote omitted]
>
> The coverage was as detailed as it was extensive. The newspapers related in full petitioner's detailed written confessions as well as his testimony at trial retelling the homicide. They also detailed petitioner's defense of temporary insanity, the charge and evidence of rape, and finally petitioner's conviction on October 7, 1966, of both rape and first-degree murder.

Petitioner's cause continued to receive front-page coverage at every step of his appeal. Banner headlines announced the reversal of the conviction in *Yount I.* The dissent was reprinted in full, and a local radio program became a forum in which callers expressed their hostility to petitioner. As the second trial approached, newspaper coverage increased. The selection of each juror merited an article and often a profile. By the close of voir dire the two newspapers had printed sixty-six front-page articles on the appeal and retrial. [FN7]

FN7. Petitioner's second trial and his subsequent efforts to gain retrial or parole also received front-page coverage. Those efforts have provoked substantial community protest in Clearfield County. The magistrate found that even "at this late date, fifteen years after the crime, there is considerable public feeling in Clearfield County in opposition to the petitioner."

Petitioner was returned to Clearfield for retrial before the same judge. On May 5, 1970, petitioner requested a change of venue. He claimed that the publicity which had saturated the county since the murder, and the continuing discussion of the case among residents, made a fair trial in Clearfield County impossible. In particular, petitioner alleged that the dissemination of prejudicial information outside of evidence was so widespread that it could not be eradicated from the minds of potential jurors. The prosecution argued in response that the case had received so much publicity across the state that it would be useless to change the venue. The trial court found that after the initiation of the appeal the newspapers had merely publicized the actions of the courts "without editorial comment of any kind." It denied the petition for change of venue on September 12, 1970.

Jury selection began on November 4, 1970, and took ten days, seven jury panels, 292 veniremen and 1186 pages of testimony. One hundred and twenty- five of the 292 veniremen were excused because they had not been chosen properly. Four others were dismissed for cause before they were questioned on the case. Of the 163 remaining veniremen who were questioned, all but two had read of the case in the newspapers, had heard about it on radio or television, or were otherwise familiar with it. When asked whether they had discussed the case, had heard it discussed, or had heard others express their opinion as to petitioner's guilt or innocence, over ninety percent said that they had. [FN8]

FN8. Ninety-six veniremen were asked, and 88 responded affirmatively.

Of the 163 veniremen questioned on the case, 121 were dismissed for cause. [FN9] Ninety-six of those 121 veniremen were successfully challenged after they testified that they had firm and fixed opinions [FN10] which could not be changed regardless of what evidence was presented. [footnote omitted] An additional 21 of the 121 veniremen were dismissed for cause after they said that they had an opinion which they could change only if the petitioner could convince them to do so. [footnote omitted] Thus 117 out of the 163 veniremen questioned were successfully challenged for cause after they said they could not set their opinion aside before entering the jury box.

FN9. Petitioner made 114 successful challenges, the prosecution seven.

FN10. After objection by respondent, petitioner was not permitted to ask each venireman what his opinion was. Many veniremen nonetheless volunteered that they thought petitioner was guilty because he had confessed to the crime or because he had been convicted in the first trial. Other veniremen remembered hearing members of the public express the opinion that petitioner was guilty. No venireman said he thought petitioner was not guilty.

710 F.2d at 962-64 [numerous citations to appellate briefs and trial transcript omitted].

In fact the publicity had reached all but one of the twelve jurors and two alternates finally empanelled. [FN15] Juror No. 1 said that he had read about the case and heard others express their opinions, but had never come to a "true" opinion. Juror No. 2 testified that he had recently discussed the case with others and had formed an opinion which was not firm and fixed and could be set aside. The next of the jurors to be selected, Juror No. 4, [footnote omitted] had recently moved into Clearfield County and had never heard about the case. Juror No. 5 said that she "remembered that they had said he was guilty before" and wondered why petitioner was getting a new trial, but had no opinion and would try to forget what she knew.

FN15. Juror No. 1 stated that "it was pretty hard to be here in Clearfield County and not read something in the paper." Juror No. 2 said that "[y]ou could hardly miss it" on the radio and television news. Juror No. 6 volunteered that "[i]t's rather difficult to live in DuBois and get the paper and find out what the people are talking about — at least the local people without having some opinion or at least reserving some opinion." Several potential jurors gave similar appraisals of the publicity's effect.

710 F.2d at 964-65 [numerous citations to appellate briefs and trial transcript omitted].

The publicity preceding petitioner's trial was extensive and had great potential for prejudice. As in *Irvin,* petitioner's case was a *"cause celebre"* in a rural community which had been subjected to a barrage of publicity concerning a sensational murder. *Irvin,* 366 U.S. at 725, 81 S.Ct. at 1644; *see Murphy,* 421 U.S. at 798, 95 S.Ct. at 2035. That publicity, although accurate, factual in nature, and without editorial comment, *see Murphy,* 421 U.S. at 800 n. 4, 802, 95 S.Ct. at 2036, n. 4, 2037; *Beck,* 369 U.S. at 556, 82 S.Ct. at 963; revealed prejudicial information "never heard from the witness stand" in the second trial. *See Sheppard,* 384 U.S. at 356, 86 S.Ct. at 1519.

First, the publicity disclosed that the jury in the first trial had convicted petitioner of the murder. Few revelations could be so damning to an accused. *United States v. Williams,* 568 F.2d 464, 471 (5th Cir. 1978). Possibly even more prejudicial was the disclosure of petitioner's written confessions and his testimony at the first trial. *See Rideau,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663; *United States v. Haldeman,* 559 F.2d 31, 61 (D.C.Cir. 1976) (in banc) (per curiam), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *see also United States ex rel. Doggett v. Yeager,* 472 F.2d 229, 231 (3d Cir. 1973). The confessions and testimony detailed in a highly unfavorable light petitioner's actions and thoughts at the time of the homicide. They were sworn revelations of information which petitioner's properly admitted oral statements simply did not convey. *Cf. Stroble v. California,* 343 U.S. 181, 195, 72 S.Ct. 599, 606, 96 L.Ed. 872 (1952) (confession printed in newspaper was introduced into evidence); *see also United States v. D'Andrea,* 495 F.2d 1170, 1172-73 (3d Cir.) (per curiam), *cert. denied,* 419 U.S. 855, 95 S.Ct. 101, 42 L.Ed.2d 88 (1974). Finally, the publicity revealed that petitioner at the first trial had pled temporary insanity and had been convicted of rape. Such highly inflammatory facts carried too great a risk of prejudice to be directly offered as evidence. *See Marshall,* 360 U.S. at 312-13, 79 S.Ct. at 1172-1173; *United States ex rel. Greene v. New Jersey,* 519 F.2d 1356 (3d Cir. 1975) (per curiam). "The exclusion of such evidence in court is meaningless when the news media makes it available to the public." *Sheppard,* 384 U.S. at 360, 86 S.Ct. at 1521; *see Murphy,* 421 U.S. at 802, 95 S.Ct. at 2037.

The publicity was understandably most extensive and most potentially prejudicial before and during petitioner's first trial, which was four years before his second trial. The passage of time may work to erase highly unfavorable publicity from the memory of a community. *See, e.g., Murphy,* 421 U.S. at 802, 95 S.Ct. at 2037; *Beck,* 369 U.S. at 556, 82 S.Ct. at 963.

In this case, however, voir dire revealed that more than 98 percent of the veniremen questioned remembered the case. In part this was due to the repeated community exposure provided by newspaper coverage of the appeal and retrial [FN21] which helped keep fresh the imprint of the case in the minds of the public. [FN22] More important, the publicity attending the homicide and first trial had been so extensive and intensive that the case was firmly implanted in the memories of Clearfield County residents.

FN21. The state trial court, though the record contained at least 17 front-page articles, said that between trial and retrial "there was practically no publicity given to this matter through the news media ... except to report that a new trial had been granted by the Supreme Court." We believe, however, that petitioner has established by convincing evidence that the state court's characterization of the coverage was erroneous. 28 U.S.C. § 2254(d) (1976). The record on this petition indicates that 66 front-page articles were published covering the appeal and second trial. *Cf. Sumner v. Mata,* 449 U.S. at 547, 101 S.Ct. at 769 (federal and state court had identical record). We agree with the magistrate who after two days of evidentiary hearings found that the second trial "was surrounded with publicity, but not to the same degree" as the first trial.

FN22. The trial court stated that "as far as this Court can recall" there was little talk in public concerning the second trial. Veniremen during voir dire indicated, however, that there had been public discussion of the case, particularly in last weeks before retrial. Such discussion apparently did not reach the attention of the trial court.

The trial court also noted that few spectators had attended trial on some days, particularly during voir dire. Because petitioner alleges prejudice not from a "circus atmosphere" in the courtroom, *see Murphy,* 421 U.S. at 798, 95 S.Ct. at 2035; *Martin,* 653 F.2d at 805, but from public knowledge of extra-record facts, occasional low attendance is a factor of limited significance.

Petitioner has established that the publicity before his second trial had revealed prejudicial information from his first trial, information which was not officially in evidence against him. The widespread dissemination of such extra-record information, while not rendering the jury presumptively prejudiced, poisoned the "general atmosphere of the community" in which petitioner was retried. If petitioner can show that that atmosphere caused actual prejudice in the jurors, their assurances of impartiality can be disregarded.
710 F.2d at 968-70 [numerous citations to appellate briefs omitted].

In the long and difficult voir dire [FN23] 163 veniremen were questioned on the case. Our independent examination of the voir dire testimony shows that 126 prospective jurors, or 77 percent of the 163 veniremen questioned, admitted that they would carry an opinion into the jury box. The trial court itself excused on challenges for cause 117 of those veniremen, or 72 percent of the 163, after they stated that they could not set aside their opinion. [FN24] Only when petitioner had exhausted his peremptory challenges could enough jurors be found to fill the jury box. [citations to two cases omitted]

FN23. The trial court explained that the voir dire was lengthy because petitioner was permitted to ask so many questions. The court did indeed extend great leniency to petitioner in his questioning of the veniremen. Such leniency was commendable. It was also necessary under the circumstances, and does not explain away the difficulty of the voir dire as a real factor in our consideration.

FN24. The trial court stated that the difficulty in selecting a jury was due in part to his leniency in granting challenges for cause. In our independent evaluation, each of the 117 veniremen dismissed for cause by the trial court had expressed a disqualifying prejudice which required dismissal. In fact, as we have noted, the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors.

> In *Irvin* the trial court dismissed for cause 268 of 430 veniremen, or 62 percent, because they had fixed opinions concerning the petitioner's guilt. Almost 90 percent of those examined entertained some opinion as to guilt. 366 U.S. at 727, 81 S.Ct. at 1645. .... [mentions of seven other cases omitted]
>
> In the instant case voir dire revealed other indications of a deep and bitter prejudice present in the community. One venireman apparently veiled his strong feelings when testifying. Another said that her fellow parishioners tried to influence her to vote guilty. Many veniremen volunteered opinions of guilt, and over 90 percent of those asked said they had discussed the case or heard others express their opinions.
>
> We believe that the voir dire in this case more strongly resembles that of *Irvin* than that of *Murphy*. *See Martin,* 653 F.2d at 806. Three-quarters of the veniremen admitted to an opinion of guilt which they could not set aside. "Where so many, so many times, admitted prejudice, [a juror's] statement of impartiality can be given little weight." *Irvin,* 366 U.S. at 728, 81 S.Ct. at 1645; *Martin,* 653 F.2d at 806.

710 F.2d at 970-71 [citations to appellate briefs omitted].

> The prejudice permeating the voir dire and the community was reflected in the voir dire testimony of the majority of the twelve jurors and two alternates ultimately placed in the jury box. All but one of the jurors were familiar with the case, and several explicitly recalled petitioner's conviction or confessions. Eight out of fourteen jurors would admit that, before hearing any testimony, they had formed an opinion as to petitioner's guilt or innocence.

710 F.2d at 971 [one footnote and citations to two cases omitted].

> We must view the jurors' assurances of impartiality in light of the pretrial publicity, the difficulty of voir dire, and the testimony of the jurors selected. We conclude that despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court. Petitioner has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County. After examining the totality of circumstances, we hold that petitioner's retrial was not fundamentally fair.

710 F.2d at 972.

Judge Herbert J. Stern wrote a concurring opinion that has been largely ignored, but which I believe deserves attention. I caution the reader that Judge Stern's opinion is *not* the law in the USA.

> Under any test reflecting even the most minimal respect for the values embodied in the sixth amendment, we would be compelled to invalidate this conviction. My concern, however, is with the particular constitutional standard which for 175 years has guided the lower courts, which we are obligated to apply today, and which renders constitutional trials taking place under circumstances only slightly less shocking than those presented in this case.
>
> In *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), the Supreme Court, crystalizing earlier language from *United States v. Burr,* 25 F.Cas. 49, 50-51 (C.C.D.Va. 1807) (No. 14,692g) (Marshall, C.J.); *Reynolds v. United States,* 98 U.S. 145, 155-156, 25 L.Ed. 244 (1878); *Spies v. Illinois,* 123 U.S. 131, 179-80, 8 S.Ct. 21, 30-31, 31 L.Ed. 80 (1887), and *Holt v. United States,* 218 U.S. 245, 248, 31 S.Ct. 2, 4, 54 L.Ed. 1021 (1910), established that it is permissible to empanel a jury composed of 12 persons, all of whom have a preconceived opinion that the defendant is guilty, as long as each promises to "lay aside his impression or opinion and render a verdict based on the evidence presented in

court." *Irvin,* 366 U.S. at 723, 81 S.Ct. at 1643. *Accord Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Martin v. Warden,* 653 F.2d 799 (3d Cir. 1981), *cert. denied,* 454 U.S. 1151, 102 S.Ct. 1018, 71 L.Ed.2d 306 (1982).

710 F.2d at 972-973 (Stern, J., concurring).

There can be but two possible explanations for the *Irvin* standard. The first is that it presumes to be meaningful: that a promise to lay aside an opinion, for example, that an accused high school teacher brutally killed one of his own students is either believable or enforceable. Definitive refutation of this precept as a psychological matter is, of course, beyond my capabilities, but I would venture that no one of us would want to gamble our freedom on the ability of a person to erase a preformed opinion as to guilt. [FN1] Moreover, even if such self-imposed amnesia is possible as a cognitive event, surely its prediction is not reliable — that is, we cannot expect a person to know with any degree of accuracy at the time of voir dire whether or not he will be able to lay aside an opinion, however desirous he is of achieving that end. I see no reason to subject our jury system to the hazards of guesswork, particularly where the alternative is so easily achieved. Thus, I reject the *Irvin* standard as a means to insure impartial jurors. [FN2]

FN1. Commentators with psychological training have come to the same conclusion. *See, e.g.,* Comment, Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial; A Plea for Reform, 38 S.Cal.L.Rev. 672, 682 & nn. 53, 54 (1965); *see also* Stanga, Jr., Judicial Protection of the Criminal Defendant Against Adverse Press Coverage, 13 Wm. & Mary L.Rev. 1, 5 & n. 23 (1971).

FN2. The voir dire at the celebrated trial of "Boss" Tweed over 100 years ago provides a wonderful example of the strain imposed upon any notion of "impartiality" by the "laying aside" standard. Various veniremen, all of whom indicated a preformed opinion of some degree, revealed a variety of strategies by which they felt they could rid themselves of their initial partiality. In listening to their voices, we must decide if it makes sense to continue the same dialogues today. ....

710 F.2d at 973 (Stern, J., concurring).

The second conceivable rationale for the *Irvin* test is that it is a practical necessity, without which the empanelling of juries would be impossible. I simply refuse to believe that in a land as populous as ours, where potential jurors abound, the only way to assemble a group of 12 impartial persons is to allow those with advance opinions to sit as long as they give a proper incantation of their ability to lay aside those opinions. If a jury cannot be selected without resort to persons with preformed views of a defendant's guilt, it should be a simple matter to transfer the case to another county. There is simply no societal interest advanced by seating a juror who has openly stated that he has a view concerning the defendant's guilt, notwithstanding that it can be "laid aside."

The vulnerability of the *Irvin* "laying aside" standard is only heightened where attempts to temper its potentially devastating consequences for a criminal defendant are examined. The *Murphy* Court pointed out that,

> [T]he juror's assurances that he is equal to this task [laying aside prior opinion] cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality."

Murphy, 421 U.S. at 800, 95 S.Ct. at 2036 (quoting *Irvin,* 366 U.S. at 723, 81 S.Ct. at 1643). I am at a loss to understand how a defendant would ever be able to demonstrate that despite a venireman's assurance that he is able to lay aside a preconception of defendant's guilt, there actually exists in the potential juror's mind a "fixed" opinion which cannot be extinguished.

> My view of the proper standard by which to measure the propriety of seating a particular juror does away with the distinction between opinions that are "fixed" and those that are something less so, as a spectral analysis empty of meaning. A person with any opinion going to the issue of a defendant's guilt is simply unfit to serve on a jury. It is incredible to me that anyone would want to take the contrary view. Further, in a highly publicized case, I would discredit the denial of preconceived opinions where a significant percentage of those polled state that they hold opinions concerning the defendant. While the Court has recognized that veniremen prejudice may be presumed in the face of protestations to the contrary where most of the other prospective jurors admit to a disqualifying bias, *compare Irvin,* 366 U.S. at 727, 81 S.Ct. at 1645 (nearly 90 percent of veniremen have some opinion regarding defendant's guilt; prejudice in remainder presumed), *with Murphy,* 421 U.S. at 802, 95 S.Ct. at 2037 (roughly 26 percent of veniremen have an opinion; no presumption regarding remainder), I would not allow any jury to be empanelled where more than 25 percent of the veniremen state that they hold an opinion concerning the defendant's guilt. Where over one quarter of those polled indicate such bias, I have grave doubts as to the sincerity of representations of impartiality by others in the community.
>
> It has long been the foundation of our legal system that, "[N]o man's life, liberty or property be forfeited as criminal punishment for violation of that law until there ha[s] been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida,* 309 U.S. 227, 236-37, 60 S.Ct. 472, 476-477, 84 L.Ed. 716 (1940). I do not see how we can live by this ideal while continuing to apply the *Irvin* test. I would adopt a different standard, originating at the confluence of sense and simplicity, which would prevent any person from entering the jury box and becoming a judge of the facts if he has any preconceived view of the merits of the case.

710 F.2d at 974-975 (Stern, J., concurring).

When the case reached the U.S. Supreme Court, Justice Stevens wrote an eloquent dissenting opinion, which was joined by Justice Brennan. I caution the reader that a dissenting opinion is *not* law.

> The relevant events all occurred in Clearfield County, Pa., where both Yount and the victim lived. It is a rural county, with a population of about 70,000, served by two newspapers with a combined circulation of about 25,000. Not surprisingly, both newspapers gave front-page coverage to the homicide, the pretrial proceedings, and the trial itself. In numerous editions of the DuBois Courier Express, the newspaper carried banner headlines on the front page, news stories and feature articles. The Clearfield Progress evaluated the trial as the "Top News Story of 1966." Both papers reported that public interest in the proceedings was "unprecedented." 710 F.2d 956, 962 (CA3 1983). Moreover, the case also received radio and television coverage, and, according to the Court of Appeals, was publicized in out-of-state and national publications. 710 F.2d, at 962, n. 6.
>
> The articles were extremely detailed. [FN1] As the Court of Appeals noted, they "related in full [Yount's] detailed written confessions as well as his testimony at trial retelling the homicide. They also detailed [Yount's] defense of temporary insanity, the charge and evidence of rape, and finally [Yount's] conviction on October 7, 1966, of both rape and first-degree murder." Id., at 963. As this Court notes, "the extensive adverse publicity and the community's sense of outrage were at their height prior to Yount's first trial in 1966," ante, [467 U.S. at 1032].

> FN1. The "details" of the articles prompted two citizens to write letters to the Courier Express. One letter complained that the paper had "fanned the already poisoned atmosphere of malicious gossip" by putting a picture of the corpse on the front page and by the "repetitive use of gory details." The author added that he thought he "was looking at the National Enquirer." The second letter noted: "Emotional editorializing most certainly has it's [sic] place in reporting, but I strenuously object to such when it appears in headline stories.... [D]escriptive words that do much to sell newspapers and stir emotions discredit headline reporting and tend to prejudice the suspect regardless of degree of guilt." Record, Ex. P-1-e.

In 1969, a divided Supreme Court of Pennsylvania reversed Yount's conviction and ordered a new trial. *Commonwealth v. Yount,* 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied,* 397 U.S. 925, 90 S.Ct. 918, 25 L.Ed.2d 104 (1970). This event did not pass unnoticed in Clearfield County. To the contrary, banner headlines announced the reversal. The local press reprinted the entire dissenting opinion. And, as the Court of Appeals stated, "a local radio program became a forum in which callers expressed their hostility to [Yount]." 710 F.2d, at 963. This evidence contradicts the easy assumption that "community sentiment had softened," ante, [467 U.S. at 1032].

In 1970, Yount was returned to Clearfield County for a retrial in the same courtroom before the same judge who had presided at the first trial--the judge whose erroneous rulings had made the second trial necessary. Yount moved for a change of venue on the ground that the continuing discussion of the case among local residents made it impossible for him to receive a fair trial in Clearfield County. In response the prosecutor argued that a change of venue would be pointless because the case had been so widely publicized throughout the State. The trial court denied the motion, explaining that the recent newspaper items had consisted of purely factual reporting "without editorial comment of any kin[d]." This venue ruling generated a front-page article. Additionally, during the subsequent voir dire, the selection of jurors merited numerous articles and sometimes merited a profile on the juror selected.

.... [omit discussion of the voir dire of the wife of a minister]

The minister's wife was excused. Her testimony, as well as that of other veniremen who were excused, not only repudiates the notion that the community had all but forgotten the Yount case, but also suggests that some veniremen might have been tempted to understate their recollection of the case because they felt they had a duty to their neighbors "to follow through." [footnote omitted] In all events, the record clearly establishes that the case was still a "cause celebre" in Clearfield County in 1970.

467 U.S. at 1041-44 (Stevens, J., dissenting) [citations to transcript and appellate briefs omitted].

The totality of these circumstances convinces me that the trial judge committed manifest error in determining that the jury as a whole was impartial. The trial judge's comment that there was little talk in public about the second trial is plainly inconsistent with the evidence adduced during the voir dire. Similarly, the trial court's statement that "there was practically no publicity given to this matter through the news media ... except to report that a new trial had been granted by the Supreme Court," simply ignores at least 55 front-page articles that are in the record. Further, the trial judge's statement that "almost all, if not all, [of the first 12] jurors ... had no prior or present fixed opinion," is manifestly erroneous; a review of the record reveals that 5 of the 12 had acknowledged either a prior or a present opinion. The trial judge's "practically no publicity" statement also ignores the first-trial details within the news stories. These included Yount's confessions, testimony, and conviction of rape--all of which were outside of the evidence presented at the second trial. Under these circumstances, I do not

believe that the jury was capable of deciding the case solely on the evidence before it. *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it").

467 U.S. at 1047-48 (Stevens, J., dissenting) [citations to transcript and appellate briefs omitted].

Justice Stevens was also particularly concerned that the same trial judge presided over both the first and second trials of Yount.

> There is a special reason to require independent review in a case that arouses the passions of the local community in which an elected judge is required to preside. Unlike an appointed federal judge with life tenure, an elected judge has reason to be concerned about the community's reaction to his disposition of highly publicized cases. Even in the federal judiciary, some Circuits have determined that it is sound practice to have the retrial of a case assigned to a different judge than the one whose erroneous ruling made another trial necessary; for though the risk that a judge will subconsciously strive to vindicate the result reached at the first trial may be remote, as long as human beings preside at trials, that possibility cannot be ignored entirely.

467 U.S. at 1052-53 (Stevens, J., dissenting).

Justice Stevens then concluded:

> [FN8] As I recently noted, in 19 consecutive cases in which the Court exercised its discretion to decide a criminal case summarily, the Court made sure that an apparently guilty defendant was not given too much protection by the law. See *Florida v. Meyers,* 466 U.S. 380, 385-387, and n. 3, 104 S.Ct. 1852, 1855, and n. 3, 80 L.Ed.2d 381 (1984). The string of consecutive summary victories for the prosecution now stands at 20. See *Massachusetts v. Upton,* 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984) (per curiam).
>
> Of much greater importance is our dedication to the principle that guilt or innocence of a criminal offense in our society is not to be decided by executive fiat or by popular vote. This is a principle that affords protection for every citizen in the United States. Justice Frankfurter stated this point in his concurrence in *Irvin v. Dowd:*
>
> > "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 crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him."
>
> 366 U.S., at 729, 81 S.Ct., at 1646 (concurring).
>
> I would affirm the judgment of the Court of Appeals.

467 U.S. at 1053-54 and n. 8 (Stevens, J., dissenting).

Mu'Min (1991)

The U.S. Supreme Court apparently further weakened the holdings in *Irvin* and *Sheppard* in the 1991 case of *Mu'Min.* The facts of the case are simple: Mu'Min was incarcerated in a Virginia state prison on a first-degree murder conviction. While on a work detail at the Virginia Department of Transportation, he escaped during a lunch break, and murdered the owner of a store in a nearby shopping center. There was intense publicity. Mu'Min's attorney proposed that voir dire include questions about the *content* of what potential jurors had seen, heard, or read about the case. The trial judge denied this request. Despite the fact that 8 of the 12 jurors had read pretrial publicity about the case, the trial judge refused to grant defendant's motion for a change of venue. Mu'Min was convicted and sentenced to death. The Virginia Supreme Court affirmed.[32] Mu'Min appealed to the U.S. Supreme Court, which, by a 5-to-4 vote, affirmed the conviction.[33]

The Virginia Supreme Court wrote:

> In advance of trial, defense counsel submitted for approval a list of questions designed, in part, to determine what a prospective juror had seen, read, or heard about the case. Such questions are of a type characterized at bar as "content questions". The trial court refused to allow counsel to propound such questions, and Mu'Min argues on appeal that the court's refusal constituted "a denial of due process of law" and a violation of his right to "trial by an impartial jury". [FN5]
>
> FN5. Mu'Min also argues that the court's ruling "violated the express mandate of Code 8.01-358". The defendant refers to the second paragraph of that statute which directs "[a] juror, knowing anything relative to a fact in issue, [to] disclose the same in open court." Construing that statute, we have said:
>
> > A party has no right, statutory or otherwise, to propound any question he wishes, or to extend *voir dire* questioning *ad infinitum.* The court must afford a party a full and fair opportunity to ascertain whether prospective jurors "stand indifferent in the cause," but the trial judge retains the discretion to determine whether the parties have had sufficient opportunity to do so.
>
> *LeVasseur v. Commonwealth,* 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), *cert. denied,* 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984).
>
> Sixteen of the 20 members of the jury panel had indicated on *voir dire* that they had acquired some information from the news media or from conversations with acquaintances. In reply to questions propounded, both by the court and by counsel during the course of an examination that consumed 172 pages of the transcript, all members of the panel attested, collectively and in groups of four, that they had not formed any opinion based upon the information they had acquired, were not sensible of any bias or prejudice, could enter the jury box with an open mind, and were able to render a fair and impartial verdict based upon the law and the evidence admitted at trial.
>
> We agree with the Attorney General that an opportunity to pose the kind of "content questions" the defendant proposed is not a matter of right. *See United States v. Haldeman,* 559 F.2d 31, 67-8 (D.C. Cir 1976) (en banc), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2641, 53

---

[32] *Mu'Min v. Commonwealth,* 389 S.E.2d 886 (Va. 1990).

[33] *Mu'Min v. Virginia,* 500 U.S. 415 (1991).

L.Ed.2d 250 (1977) (affirming trial court's rejection of "content questions" on *voir dire* related to pre-trial publicity). The information a person acquires about a case from others may or may not prove to be the facts of the case as developed by evidence admitted at trial. Such information may or may not induce a person to form an opinion before trial. Any opinion formed before trial may or may not affect a person's ability as a juror to reach a different conclusion at trial.

Of course, parties litigant may properly inquire whether a prospective juror has acquired information about the case before trial. It does not follow that litigants have a constitutional right to know what that information is. They are entitled to know only whether the prospective juror, in reliance upon the information acquired, has formed an opinion and, if so, whether the juror can yet "stand indifferent in the cause". Code 8.01-358; *L.E. Briley v. Commonwealth,* 222 Va. 180, 184-87, 279 S.E.2d 151, 154-55 (1981).

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. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Irvin v. Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961) (citations omitted). Quoting and applying this rule in a later case, the Supreme Court upheld the seating of a juror who had said on *voir dire,* "My experience of [the accused] is such that right now I would find him guilty." *Murphy v. Florida,* 421 U.S. 794, 802 n. 5, 95 S.Ct. 2031, 2037 n. 5, 44 L.Ed.2d 589 (1975).

Here, none of the members seated on the panel had formed an opinion based upon the information acquired before trial, and all had affirmed on oath that they could stand indifferent in the cause. We hold, therefore, that the trial court did not err in disallowing the content questions proposed by the defendant.

Mu'Min v. Commonwealth, 389 S.E.2d 886, 892-893 (Va. 1990).

The U.S. Supreme Court tersely described the pretrial publicity and the voir dire.

About three months before trial, petitioner submitted to the trial court, in support of a motion for a change of venue, 47 newspaper articles relating to the murder. [FN1] One or more of the articles discussed details of the murder and investigation, and included information about petitioner's prior criminal record, the fact that he had been rejected for parole six times, accounts of alleged prison infractions, details about the prior murder for which Mu'Min was serving his sentence at the time of this murder, a comment that the death penalty had not been available when Mu'Min was convicted for this earlier murder, and indications that Mu'Min had confessed to killing Gladys Nopwasky. Several articles focused on the alleged laxity in the supervision of work gangs,and argued for reform of the prison work-crew system. The trial judge deferred ruling on the venue motion until after making an attempt to seat a jury.

FN1. The articles had been published between September 26, 1988, and January 14, 1989. More than half of them appeared in the *Potomac News,* a daily paper with circulation of only 25,000, and the remainder were printed in the *Washington Post* and several other local newspapers.

Shortly before the date set for trial, petitioner submitted to the trial judge 64 proposed *voir dire* questions, [footnote omitted] and filed a motion for individual *voir dire.* The trial court denied the motion for individual *voir dire;* it ruled that *voir dire* would begin with collective questioning of the venire, but the venire would be broken down into panels of four, if necessary, to deal with issues of publicity. The trial court also refused to ask any of

> petitioner's proposed questions relating to the content of news items that potential jurors might have read or seen.

Mu'Min v. Virginia, 500 U.S. at 418-19 [citations to appellate briefs omitted].

The U.S. Supreme Court concluded the description of the voir dire:

> One of the 16 panel members who admitted to having prior knowledge of the case answered in response to these questions that he could not be impartial, and was dismissed for cause. Petitioner moved that all potential jurors who indicated that they had been exposed to pretrial publicity be excused for cause. This motion was denied, as was petitioner's renewed motion for a change of venue based on the pretrial publicity.
>
> The trial court then conducted further *voir dire* of the prospective jurors in panels of four. Whenever a potential juror indicated that he had read or heard something about the case, the juror was then asked whether he had formed an opinion, and whether he could nonetheless be impartial. None of those eventually seated stated that he had formed an opinion or gave any indication that he was biased or prejudiced against the defendant. All swore that they could enter the jury box with an open mind and wait until the entire case was presented before reaching a conclusion as to guilt or innocence.
>
> If any juror indicated that he had discussed the case with anyone, the court asked follow-up questions to determine with whom the discussion took place and whether the juror could have an open mind despite the discussion. One juror who equivocated as to whether she could enter the jury box with an open mind was removed *sua sponte* by the trial judge. One juror was dismissed for cause because she was not "as frank as she could [be]" concerning the effect of her feelings toward members of the Islamic Faith and toward defense counsel. One juror was dismissed because of her inability to impose the death penalty, while another was removed based upon his statement that upon a finding of capital murder, he could not consider a penalty less than death. The prosecution and the defense each peremptorily challenged 6 potential jurors, and the remaining 14 were seated and sworn as jurors (two as alternates). Petitioner did not renew his motion for change of venue or make any other objection to the composition of the jury. Of the 12 jurors who decided petitioner's case, 8 had at one time or another read or heard something about the case. None had indicated that he had formed an opinion about the case or would be biased in any way.

500 U.S. at 420-21 [citations to appellate briefs omitted].

The majority opinion of the U.S. Supreme Court distinguished the facts of *Mu'Min* from the facts of *Irvin.*

> In *Irvin,* news accounts included details of the defendant's confessions to 24 burglaries and six murders, including the one for which he was tried, as well as his unaccepted offer to plead guilty in order to avoid the death sentence. They contained numerous opinions as to his guilt, as well as opinions about the appropriate punishment. While news reports about Mu'Min were not favorable, they did not contain the same sort of damaging information. Much of the pretrial publicity was aimed at the Department of Corrections and the criminal justice system in general, criticizing the furlough and work-release programs that made this and other crimes possible. Any killing that ultimately results in a charge of capital murder will engender considerable media coverage, and this one may have engendered more than most because of its occurrence during the 1988 Presidential campaign, when a similar crime committed by a

> Massachusetts inmate became a subject of national debate.[34] But, while the pretrial publicity in this case appears to have been substantial, it was not of the same kind or extent as that found to exist in *Irvin.*

500 U.S. at 429-30.

Justice Marshall wrote a long dissenting opinion, which was joined by Justices Blackmun and Stevens. Again, I remind the reader that a dissenting opinion is *not* law. Justice Marshall began his dissent with a summary, followed by a review of the pretrial publicity.

> Today's decision turns a critical constitutional guarantee — the Sixth Amendment's right to an impartial jury — into a hollow formality. Petitioner Dawud Majid Mu'Min's capital murder trial was preceded by exceptionally prejudicial publicity, and at jury selection 8 of the 12 jurors who ultimately convicted Mu'Min of murder and sentenced him to death admitted exposure to this publicity. Nonetheless, the majority concludes that the trial court was under no obligation to ask what these individuals knew about the case before seating them on the jury. Instead, the majority holds that the trial court discharged its obligation to ensure the jurors' impartiality by merely asking the jurors whether *they* thought they could be fair.
>
> The majority's reasoning is unacceptable. When a prospective juror has been exposed to prejudicial pretrial publicity, a trial court cannot realistically assess the juror's impartiality without first establishing what the juror already has learned about the case. The procedures employed in this case were wholly insufficient to eliminate the risk that two-thirds of Mu'Min's jury entered the jury box predisposed against him. I dissent.
>
> The majority concedes that the charges against Mu'Min "engendered substantial publicity," *ante* [500 U.S. at 417], and that "news reports about Mu'Min were not favorable," *ante* [500 U.S. at 429], but seeks to minimize the impact of the pretrial publicity by arguing that it was not as extensive as in other cases that have come before this Court, *ibid.* The majority's observation is completely beside the point. Regardless of how widely disseminated news of the charges against Mu'Min might have been, the simple fact of the matter is that *two- thirds* of the persons on Mu'Min's jury admitted having read or heard about the case. While the majority carefully avoids any discussion of the specific nature of the pretrial publicity, it is impossible to assess fairly Mu'Min's claim without first examining precisely what was written about the case prior to trial.
>
> On September 22, 1988, Gladys Nopwasky was stabbed to death in the retail carpet and flooring store she owned in Dale City, Virginia. Several weeks later, Mu'Min, an inmate serving a 48-year sentence for first-degree murder, was indicted for murdering Nopwasky. Facts developed at trial established that Mu'Min had committed the murder after escaping from the site of a Virginia Department of Transportation work detail. See 239 Va. 433, 437-438, 389 S.E.2d 886, 889-890 (1990).
>
> The circumstances of the murder generated intense local interest and political controversy. The press focused on the gross negligence of the corrections officials responsible for overseeing the work detail from which Mu'Min had escaped. It was reported, for instance, that the facility to which Mu'Min was assigned had been enclosed by only a four-foot high fence, with a single strand of barbed wire across the top. It was also reported that the lax supervision at the facility allowed the inmates to have ready access to alcohol, drugs, and weapons and to slip away from the work detail for extended periods without detection.

---

[34] This is a reference to remarks about how the Democratic party's presidential candidate, Dukakis, while governor of Massachusetts, had allowed William Horton, a convicted murder, to have weekend passes from prison. While out on a weekend pass, Horton fled to Maryland, where he raped a woman twice and stabbed her boyfriend 22 times. Horton was black, his victims were white.

Shortly after the charges against Mu'Min became public, the state official in charge of administering both corrections and highway programs issued a public apology. Not satisfied, a number of area residents wrote editorials demanding that all state officials responsible for the inmate work-release program be fired, and area leaders pushed for increased controls on inmate- release programs. Officials responded with the introduction of stiffer restrictions on prison work crews, and with the suspension of furloughs for inmates convicted of violent crimes. In explaining the new policies, the director of Virginia's Department of Corrections acknowledged that the explosive public reaction to the charges against Mu'Min had been intensified by the case of Willie Horton, whose rape and assault of a Maryland woman while on furlough became a major issue in the 1988 presidential campaign. " 'The world's in an uproar right now,' " the official was quoted as stating.

Naturally, a great deal of the media coverage of this controversy was devoted to Mu'Min and the details of his crime. Most of the stories were carried on the front pages of local papers, and almost all of them were extremely prejudicial to Mu'Min. Readers of local papers learned that Nopwasky had been discovered in a pool of blood, with her clothes pulled off and semen on her body. In what was described as a particularly "macabre" side of the story, a local paper reported that, after raping and murdering Nopwasky, Mu'Min returned to the work site to share lunch with other members of the prison detail.

Readers also learned that Mu'Min had confessed to the crime. Under the banner headlines, "Murderer confesses to killing woman," and "Inmate Said to Admit to Killing," the press accompanied the news of Mu'Min's indictment with the proud announcement of Virginia's Secretary of Transportation and Public Safety that the State had already secured Mu'Min's acknowledgment of responsibility for the murder. Subsequent stories reported that, upon being confronted with the charges, 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. However, according to these reports, Mu'Min eventually abandoned this story and confessed to having stabbed Nopwasky twice with a steel spike, once in the neck and once in the chest, after having gotten into a dispute with her over the price of Oriental rugs. One of these stories was carried under the front-page headline: "Accused killer says he stabbed Dale City woman after argument."

Another story reported that Mu'Min had admitted at least having contemplated raping Nopwasky. According to this article, Mu'Min had told authorities, " 'The thought did cross my mind, but I did not have sex with her.' " This item was reported as a front-page story, captioned by the headline: "Mu'Min Says He Decided against Raping Nopwasky."

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. One front-page story set forth the details of Mu'Min's 1973 murder of a cab driver. Another, entitled "Accused killer had history of prison trouble," stated that between 1973 and 1988, Mu'Min had been cited for 23 violations of prison rules and had been denied parole six times. It was also reported that Mu'Min was a suspect in a recent prison beating. Several stories reported that Mu'Min had strayed from the Dale City work detail to go on numerous criminal forays before murdering Nopwasky, sometimes stealing beer and wine, and on another occasion breaking into a private home. As quoted in a local paper, a Department of Corrections report acknowledged that Mu'Min " 'could not be described as a model prisoner.' " Contacted by a reporter, one of Mu'Min's fellow inmates described Mu'Min as a " 'lustful' " individual who did " 'strange stuff.' " " 'Maybe not this,' " the inmate was quoted as saying, " 'but I knew something was going to happen.' "

Indeed, readers 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. In a story headlined "Mu'Min avoided death for 1973 murder in Va.," one paper reported that but for

> this Court's decision a year earlier in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which temporarily invalidated the death penalty, the prosecutor at the earlier trial "would have had a case of capital murder." As reported in the press, the prosecutor who indicted Mu'Min for murdering Nopwasky concurred that the case underscored the need for " 'more and swifter capital punishment.' "
>
> Finally, area residents following the controversy were told in no uncertain terms that their local officials were already convinced of Mu'Min's guilt. 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" and demanded an explanation of the "decisions that allowed a person like Dawud Mu'Min to commit murder." 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." Assuring the public that the right person had been charged with the crime, the local police chief explained, " 'We haven't lost very many [murder cases] lately.... All of the evidence will come out at some point.' " Indeed, by virtue of the intense media coverage, that "point" was reached long before trial.

500 U.S. at 433-38 (Marshall, J., dissenting)[citations to brief at Virginia S.Ct. omitted].

Justice Marshall then states that he believes that "once a prospective juror admits exposure to pretrial publicity, content questioning must be part of the *voir dire* ...."

> It is simply impossible to square today's decision with the established principle that, where a prospective juror admits exposure to pretrial publicity, the trial court must do more than elicit a simple profession of open-mindedness before swearing that person into the jury.
>
> To the extent that this Court has considered the matter, it has emphasized that where a case has been attended by adverse pretrial publicity, the trial court should undertake "*searching* questioning of potential jurors ... to screen out those with fixed opinions as to guilt or innocence." *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 564, 96 S.Ct. 2791, 2805, 49 L.Ed.2d 683 (1976) (emphasis added); accord, *id.,* at 602, 96 S.Ct., at 2823 (Brennan, J., concurring in judgment). Anything less than this renders the defendant's right to an impartial jury meaningless. See *Ham v. South Carolina, supra,* 409 U.S., at 532, 93 S.Ct., at 853 (MARSHALL, J., concurring in part and dissenting in part). As this Court has recognized, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States,* 339 U.S. 162, 171-172, 70 S.Ct. 519, 523, 94 L.Ed. 734 (1950). The fact that the defendant bears the burden of establishing juror partiality, see, *e.g., Wainwright v. Witt,* 469 U.S. 412, 423, 105 S.Ct. 844, 851, 83 L.Ed.2d 841 (1985); *Irvin v. Dowd, supra,* 366 U.S., at 723, 81 S.Ct., at 1643, makes it all the more imperative that the defendant be entitled to meaningful examination at jury selection in order to elicit potential biases possessed by prospective jurors.
>
> In my view, once a prospective juror admits exposure to pretrial publicity, content questioning must be part of the *voir dire* for at least three reasons. First, content questioning is necessary to determine whether the type and extent of the publicity to which a prospective juror has been exposed would disqualify the juror as a matter of law. Our cases recognize that, under certain circumstances, exposure to particularly inflammatory publicity creates so strong a presumption of prejudice that "the jurors' claims that they can be impartial should not be believed." *Patton v. Yount, supra,* 467 U.S., at 1031, 104 S.Ct., at 2889; see *Murphy v. Florida,* 421 U.S., at 798-799, 95 S.Ct., at 2035-36. For instance, in *Irvin v. Dowd, supra,* we concluded that a capital defendant was constitutionally entitled to a change of venue because *no one* who had been exposed to the inflammatory media descriptions of his crime

and confession could possibly have fairly judged his case, and because this publicity had saturated the community in which the defendant was on trial.[35] See *id.,* 366 U.S., at 725-729, 81 S.Ct., at 1644- 46. Similarly, in *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), we presumed community prejudice mandating a change in venue when petitioner's filmed confession obtained during a police interrogation was broadcast on local television over three consecutive days. See *id.,* at 724, 726-727, 83 S.Ct., at 1418, 1419-20. An individual exposed to publicity qualitatively akin to the publicity at issue in *Irvin* and *Rideau* is necessarily disqualified from jury service no matter how earnestly he professes his impartiality. [FN2] But unless the trial court asks a prospective juror exactly *what* he has read or heard about a case, the court will not be able to determine whether the juror comes within this class. Cf. *Murphy v. Florida, supra,* 421 U.S., at 800-802, 95 S.Ct., at 2036-37 (performing careful analysis of content of pretrial publicity to which jurors had been exposed before rejecting impartiality challenge); *Sheppard v. Maxwell,* 384 U.S., at 357, 86 S.Ct., at 1519 (observing that jurors had been exposed to prejudicial publicity during trial and criticizing trial court's failure to ask the jurors "whether they had read or heard specific prejudicial comment about the case"). [FN3]

FN2. This Court has recognized that other types of extra-judicial influences also will automatically require a juror's disqualification. See *Turner v. Louisiana,* 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) (jurors placed in custody of deputy sheriffs who were key prosecution witnesses presumed incapable of rendering impartial verdict); *Leonard v. United States,* 378 U.S. 544, 84 S.Ct. 1696, 12 L.Ed.2d 1028 (1964) (*per curiam*) (prospective jurors who heard trial court announce defendant's guilty verdict in first trial presumed incapable of rendering impartial verdict on second trial on similar charges).

FN3. The majority suggests that content questions will be necessary only when a community has been saturated by a " 'wave of public passion,' " as in *Irvin.* See *ante,* at 1907. The majority's argument misses the point of *Irvin.* That case stands for the proposition that when a community has been subject to unrelenting prejudicial pretrial publicity the *entire community* will be presumed both exposed to the publicity and prejudiced by it, entitling the defendant to a change of venue. See *Irvin v. Dowd,* 366 U.S. 717, 727-728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1961). In this case, however, Mu'Min does not argue that the pretrial publicity was extensive enough to create a presumption of *community* prejudice. Rather, he argues that the publicity was prejudicial enough to create a presumption of prejudice on the part of any *individual* juror who actually read it.

Second, even when pretrial publicity is not so extreme as to make a juror's exposure to it *per se* disqualifying, content questioning still is essential to give legal depth to the trial court's finding of impartiality. One of the reasons that a "juror may be unaware of" his own bias, *Smith v. Phillips,* 455 U.S., at 222, 102 S.Ct., at 948 (O'CONNOR, J., concurring), is that the issue of impartiality is a mixed question of law and fact, see *Irvin v. Dowd,* 366 U.S., at 723, 81 S.Ct., at 1643, the resolution of which necessarily draws upon the *trial court's* legal expertise. Where, as in this case, a trial court asks a prospective juror merely whether he can be "impartial," the court may well get an answer that is the product of the juror's own confusion as to what impartiality is. [footnote omitted] By asking the prospective juror in addition to identify what he has read or heard about the case and what corresponding impressions he has formed, the trial court is able to confirm that the impartiality that the juror professes is the same impartiality that the Sixth Amendment demands.

---

[35] Justice Kennedy suggested that Justice Marshall “misreads our precedents”. *Mu’Min,* 500 U.S. at 448-450 (Kennedy, J., dissenting). See my discussion of presumed vs. actual prejudice in my companion essay, *Pretrial Publicity Prevents a Fair Trial in the USA.*

> Third, content questioning facilitates accurate trial court factfinding. As this Court has recognized, the impartiality "determination is essentially one of credibility." *Patton v. Yount,* 467 U.S., at 1038, 104 S.Ct., at 2892. Where a prospective juror acknowledges exposure to pretrial publicity, the precise content of that publicity constitutes contextual information essential to an accurate assessment of whether the prospective juror's profession of impartiality is believable. If the trial court declines to develop this background, its finding of impartiality simply does not merit appellate deference.
>
> In my view, the circumstances of this case presented a clear need for content questioning. Exactly *two-thirds* of the persons on Mu'Min's jury admitted having been exposed to information about the case before trial. As I have shown, see *supra,* at 1910-1912, the stories printed prior to trial were extraordinarily prejudicial, and were made no less so by the inflammatory headlines typically used to introduce them. Much of the pretrial publicity was of the type long thought to be uniquely destructive of a juror's ability to maintain an open mind about a case — in particular, reports of Mu'Min's confession, see *Nebraska Press Assn. v. Stuart,* 427 U.S., at 541, 563, 96 S.Ct., at 2794, 2804; *id.,* at 602, 96 S.Ct., at 2823 (Brennan, J., concurring in judgment); *Rideau v. Louisiana, supra, Irvin v. Dowd, supra,* 366 U.S., at 725-726, 81 S.Ct., at 1644; statements by prominent public officials attesting to Mu'Min's guilt, see *Nebraska Press Assn. v. Stuart, supra,* 427 U.S., at 602, 96 S.Ct., at 2823 (Brennan, J., concurring in judgment); *Sheppard v. Maxwell, supra,* 384 U.S., at 340, 349, 86 S.Ct., at 1511, 1515; and reports of Mu'Min's unsavory past, see *Irvin v. Dowd, supra,* 366 U.S., at 725-726, 81 S.Ct., at 1644. Because of the profoundly prejudicial nature of what was published in the newspapers prior to trial, any juror exposed to the bulk of it certainly would have been disqualified as a matter of law under the standards set out in *Irvin* and *Rideau.* Indeed, the single story headlined "Murderer confesses to killing woman," or alternatively the story headlined "Accused killer says he stabbed Dale City woman after argument," in my opinion would have had just as destructive an effect upon the impartiality of anyone who read it as did the filmed confession in Rideau upon the members of the community in which it was broadcast. At minimum, without inquiry into what stories had been read by the eight members of the jury who acknowledged exposure to pretrial publicity, the trial court was in no position to credit their individual professions of impartiality.

500 U.S. at 440-45 (Marshall, J., dissenting) [citations to briefs at Virginia S.Ct. omitted].

Justice Kennedy wrote a short opinion that agreed with some of the majority position, but then dissented:

> I fail to see how the trial court could evaluate the credibility of the individuals seated on this jury. The questions were asked of groups, and individual jurors attested to their own impartiality by saying nothing. I would hold, as a consequence, that when a juror admits exposure to pretrial publicity about a case, the court must conduct a sufficient colloquy with the individual juror to make an assessment of the juror's ability to be impartial. The trial judge should have substantial discretion in conducting the *voir dire,* but, in my judgment, findings of impartiality must be based on something more than the mere silence of the individual in response to questions asked en masse.

500 U.S. at 452 (Kennedy, J., dissenting).

Timothy McVeigh (1998)

Timothy McVeigh was accused of detonating a truck full of explosives that destroyed the federal building in Oklahoma City and killed 168 people on 19 April 1995. The federal district court in Oklahoma City granted McVeigh's motion for a change of venue and the judge ordered the trial moved to Denver, Colorado.

Initially, national media coverage of the explosion was extremely comprehensive. Dramatic pictures of the Murrah Federal Building were shown nationwide immediately after the explosion. There was intensive coverage of the rescue efforts. The immediate reactions of the President, the Attorney General, and an FBI spokesman were broadcast across the nation. There were extensive interviews with injured victims, members of the families of the dead and missing persons, rescue and relief workers, and residents of Oklahoma City. The Governor of the State of Oklahoma was a continual presence in the media coverage, providing strong leadership and articulating the needs and spirit of the entire state.

The arrest of Timothy McVeigh on April 21 in Perry, Oklahoma as a bombing suspect produced film showing him in restraints and clad in bright orange jail clothing being led into a van while surrounded by a very vocal and angry crowd. Some bystanders could be heard shouting "murderer" and "baby killer." This footage was seen nationwide and was widely used in later television broadcasts about other developments in the government's investigation. There was widespread publicity about a search for another suspect described as John Doe #2. The arrest of Terry Nichols and a search of his brother's farm in Michigan were other subjects of national publicity.

As time passed, differences developed in both the volume and focus of the media coverage in Oklahoma compared with local coverage outside of Oklahoma and with national news coverage. These differences were discussed in the testimony of Russell Scott Armstrong, an expert in news media analysis. In the weeks following the explosion, there was less media coverage of the explosion outside of Oklahoma. Developments in the government investigation were reported, but such reports were primarily factual in nature. Oklahoma coverage, in contrast, remained focused on the explosion and its aftermath for a much longer period of time. Television stations conducted their own investigations, interviewing "eyewitnesses" and showing reconstructions and simulations of alleged events. Such "investigative journalism" continued for more than four months after the explosion. Perhaps most significant was the continuing coverage of the victims and their families. The Oklahoma coverage was more personal, providing individual stories of grief and recovery. As late as December 1995, television stations in Oklahoma City and Tulsa were broadcasting special series of individual interviews with family members and people involved in covering the explosion and its aftermath. (See McVeigh Exhibit M-11B).

According to Armstrong, these differences in media coverage reflect the different needs of the Oklahoma media market compared to the nationwide media market. He observed that, as a national story of great importance, people across the country wanted to know the "who, what, where, why, and when" of this event. The nation was interested in the human story of suffering and renewal, but in a more general sense. In contrast, because this was a crime that occurred in their state, Oklahomans wanted to know every detail about the explosion, the investigation, the court proceedings and, in particular, the victims.

Armstrong opined that the greater informational needs of Oklahomans resulted from a perception that Oklahomans are united as a family with a spirit unique to the state. Indeed, the "Oklahoma family" has been a common theme in the Oklahoma media coverage, with

> numerous reports of how the explosion shook the entire state, and how the state has pulled together in response. The political leadership of the state has repeatedly and consistently emphasized the bonds tying all Oklahomans together as family and proclaiming to the nation and the world that the survival and recovery from this tragedy is "Oklahoma's story." (Nichols Exhibit HA, Epilogue to In Their Name). ....

U.S. v. McVeigh, 918 F.Supp. 1467, 1470-71 (W.D.Okla. 1996).

> The intensity of the humanization of the victims in the public mind is in sharp contrast with the prevalent portrayals of the defendants. They have been demonized. The videotape footage and fixed photographs of Timothy McVeigh in Perry have been used regularly in almost all of the television news reports of developments in this case. All of the Oklahoma television markets have been saturated with stories suggesting the defendants are associated with "right wing militia groups." File film shows people in combat fatigues firing military style firearms to illustrate the suggested association. That theme has particularly been emphasized with Terry Nichols and his brother. These films have also been shown in Denver and on national news programs but not with the frequency of the use by broadcast outlets in Oklahoma.
>
> New film showing the defendants in restraints and body armor was taken in the sally port of the jail in Oklahoma City when they were being brought to court for hearing these motions. It was shown nationally and locally in connection with reports of the court proceedings.
>
> The possible prejudicial impact of this type of publicity is not something measurable by any objective standards. The parties have submitted data from opinion surveys done by qualified experts who have given their opinions about the results and their meaning. The government places heavy reliance on this evidence to support the position that a fair and impartial jury can be selected in the Northern District of Oklahoma for a trial in Tulsa. Such surveys are but crude measures of opinion at the time of the interviews. Human behavior is far less knowable and predictable than chemical reactions or other subjects of study by scientific methodology. There is no laboratory experiment that can come close to duplicating the trial of criminal charges. There are so many variables involved that no two trials can be compared regardless of apparent similarities. That is the very genius of the American jury trial.
>
> The expert witnesses who have studied in this area have suggested that voir dire of the jury panel is the only technique available to minimize the effects of pre-trial publicity and that most jurors develop fixed opinions by the conclusion of lawyers' opening statements. While those opinions may be justified by the research done, consisting largely of simulated trials, this view is inconsistent with this court's long experience with jury trials both as lawyer and judge. That experience fortifies a faith that a properly conducted trial with competent counsel on both sides with adequate resources available to them will reveal the historical facts relevant to the charges and that jurors who have adequate protection from external influences will reach a just verdict according to the law and evidence.
>
> Extensive publicity before trial does not, in itself, preclude fairness. In many respects media exposure presents problems not qualitatively different from that experienced in earlier times in small communities where gossip and jurors' personal acquaintances with lawyers, witnesses and even the accused were not uncommon. Properly motivated and carefully instructed jurors can and have exercised the discipline to disregard that kind of prior awareness. Trust in their ability to do so diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.

Mcveigh, 918 F.Supp. at 1472-73.

> Upon all of the evidence presented, this court finds and concludes that there is so great a prejudice against these two defendants in the State of Oklahoma that they cannot obtain a fair and impartial trial at any place fixed by law for holding court in that state. The court also finds and concludes that an appropriate alternative venue is in the District of Colorado. Denver, Colorado meets all of the criteria that have been cited by past cases as relevant when selecting an alternative venue.
>
> In reaching this ruling, the court is acutely aware of the wishes of the victims of the Oklahoma City explosion to attend this trial and that it will be a hardship for those victims to travel to Denver. .... The interests of the victims in being able to attend this trial in Oklahoma are outweighed by the court's obligation to assure that the trial be conducted with fundamental fairness and with due regard for all constitutional requirements.

Mcveigh, 918 F.Supp. at 1474-75.

The trial court in Denver found McVeigh guilty and sentenced him to death. Mcveigh appealed. The U.S. Court of Appeals recognized the extensive pretrial publicity, and specifically noted that some journalists had apparently invaded the offices of McVeigh and published confidential information regarding alleged confessions by McVeigh to his attorneys.

> As with the bombing itself, news of McVeigh's arrest received a great deal of attention in the media, and was ubiquitously reported on television, radio, and in print. The image of McVeigh being led, wearing orange jail clothing, through an angry crowd into a van by authorities appeared in print and electronic media nationwide. *See United States v. McVeigh,* 918 F.Supp. 1467, 1471 (W.D.Okla. 1996). In its ruling granting McVeigh's motion for change of venue the district court noted that it had considered the alternative of moving the trial to Tulsa, Oklahoma, but because of the intensity of the emotional impact of the bombing, and its attendant publicity, on all Oklahomans, it would be impossible for McVeigh to receive a fair jury trial anywhere in the State of Oklahoma. *See id.* at 1470-74. The district court decided to move the trial to Denver, a large metropolitan area where a "large jury pool is available." *See id.* at 1474. In this ruling the district court implicitly found that the Denver jury pool was not as intensely affected by the bombing or the subsequent publicity as was the Oklahoma jury pool.
>
> On February 14, 1997, the district court sent out jury summons to hundreds of people living in the Denver area, notifying them that they had been randomly selected as potential jurors for the McVeigh trial. The notification admonished its recipients to avoid publicity concerning the case that might interfere with their ability to remain impartial. The notification advised the potential jurors that "[t]here have been many things written and said about the explosion in Oklahoma City. Much of it may be speculation, rumor and incorrect information." The notification further stressed the need for all potential jurors to be impartial and willing to base their decision solely on the law and the evidence. The notification concluded with a short, preliminary questionnaire which included a question asking if "there is any ... reason that would prevent you from serving on this jury."
>
> Two weeks later, on February 28, the *Dallas Morning News* published an article on its Internet home page claiming that it was in possession of internal, confidential defense documents that revealed McVeigh had confessed to his own lawyers that he had indeed bombed the Murrah Building in Oklahoma City. *See* Pete Slover, *McVeigh saw 'body count' as best way to make statement in Oklahoma City bombing, defense reports state,* (visited Feb. 28, 1997) <http:// www.dallasnews.com/texas-south-west/tsw72-NF.htm>. This story was picked up and reported by both the national and Denver news media. According to the reports, McVeigh had told his lawyers that he deliberately set off the bomb during the daytime in order to obtain a higher "body count"; that he had committed the bombing out of a desire

to make a point to the federal government, presumably that the government mishandled the 1993 siege of the Branch Davidian compound near Waco, Texas; and that he was assisted in the bombing by Terry Nichols, with whom McVeigh had participated in a number of robberies in order to obtain money and supplies needed to create the bomb. *See id.*

On March 4, a chambers conference was held at which the court and parties discussed this development and whether the trial date, originally set for March 31, should be delayed. At this conference, McVeigh's counsel told the court that McVeigh did not want a continuance, but rather desired to go forward with voir dire and seating a jury. [FN2]

FN2. McVeigh's counsel, Stephen Jones, told the court, "Just so the record is clear, our position is that we think that the Court should proceed; that we'll do the voir dire, and if we can seat a jury, then we seat a jury — That will be [the] acid test."

On March 11, *Playboy Magazine* published on its Internet web site an article that claimed to contain information from documents "lawfully obtained" from McVeigh's counsel. See Ben Fenwick, *The Road to Oklahoma City* (visited March 11, 1997) <http://www.Playboy.com/mcveigh/index.html>. This article differed from the *Dallas Morning News* article mainly in the scope of detail with which it describes McVeigh's alleged activities during the time leading up to the bombing and the alleged motivation for the crime. *See id.* As with the *Dallas Morning News* story, information contained within the *Playboy* article was widely disseminated in the national media, as well as in the Denver media. Soon after this, McVeigh filed a motion to dismiss the indictment or, in the alternative, to postpone the trial for a minimum of one year, due to the "presumed effects of recent publication ... of stories" that McVeigh had made incriminating statements. *United States v. McVeigh,* 955 F.Supp. 1281, 1281 (D.Colo. 1997). The district court dismissed this motion, holding that "fair- minded persons" would not be "so influenced by anything contained in this recent publicity" that they could not remain impartial. *Id.* at 1283.

On March 19, 352 prospective jurors were summoned to the Jefferson County Fairgrounds to fill out an extended questionnaire. Before filling out the questionnaire the court commented that news reports of events are often inaccurate, that most people remain skeptical about such reports, and admonished the potential jurors to set aside all publicity surrounding the case as well as any "impressions or opinions" that they may have formed based upon media reports. The court also observed that the constitutional right to a fair trial "depends on the willingness of citizens to decide the case based entirely on the evidence that they see and hear at the trial.... That requires a commitment to set aside any preconceived impressions or opinions." After the potential jurors had completed the questionnaires, the court informed them that from that moment on they were required to follow "the same instructions that will be given to the jury selected in this case." The court ordered the prospective jurors "beginning right now to avoid any news reports of any kind or any communication or publication of any kind that concerns any issues related to the charges in this case."

U.S. v. McVeigh, 153 F.3d 1166, 1179-81 (10th Cir. 1998), *cert. den.,* 526 U.S. 1007 (1999).

The U.S. Court of Appeals reviewed the applicable law on “presumed prejudice” and concluded:

> Indeed, despite the proliferation of the news media and its technology, the Supreme Court has not found a single case of presumed prejudice in this country since the watershed case of *Sheppard.*

> McVeigh's claim of presumed prejudice fails to clear this high hurdle. The circumstances that led the [U.S. Supreme] Court to presume prejudice in *Sheppard, Estes,* and *Rideau* simply do not exist in this case. First, McVeigh's attempt to show presumed prejudice is substantially weakened by the fact that, unlike the defendants in *Sheppard* and *Rideau,* he did receive a change in venue, removing his trial from the eye of the emotional storm in Oklahoma to the calmer metropolitan climate of Denver. Second, mere television images of the defendant in prison garb being led through an angry crowd do not come close to the type of inflammatory publicity required to reach the disruptive force seen in *Sheppard, Estes,* and *Rideau.* For this reason, we focus, as does McVeigh in his briefs before this court, mainly on the prejudicial effect on the Denver jury pool of the publication of reports that McVeigh confessed the crime to his attorneys. [footnote omitted]

McVeigh, 153 F.3d at 1182.

> The disclosure and publication of information obtained from documents purporting to contain confidential communications between an individual and his attorneys indicates a lack of self-restraint and ethical compass on the part of those individuals responsible for doing so. However, the fact that McVeigh's attorneys denied the validity of the confessions gave rise to publicly aired doubts of the accuracy of the reports, a fact that somewhat lessened the reports' prejudicial impact on the public mind. Indeed, the *Dallas Morning News* Internet article includes in its headline the following words: "Suspect's attorney disputes reliability of documents." Unlike *Rideau,* here there was no video taped broadcast of an actual confession. Nor was there a reproduction of a printed confession signed by McVeigh. In short, the publicity here did not contain an actual confession but only the second-hand or perhaps even third-hand or more unattributed hearsay report of a confession. Such an indirect report of a confession will have far less impact than the situation where the actual confession is broadcast. *Cf. Mu'Min,* 500 U.S. at 418, 430-31, 111 S.Ct. 1899 (press reports of "indications that [defendant] had confessed" did not preclude seating of an unbiased jury); *Patton,* 467 U.S. at 1029, 1040, 104 S.Ct. 2885 (same). The hearsay nature of the reports of McVeigh's confession, the publicized denial of the accuracy of those reports, the strong admonitions given by the court both before and after the publicity about the purported confession, the fact that a large number of the venirepersons summoned were not even aware of the reports of McVeigh's alleged confession, and the change of venue, all persuade us that the pretrial publicity of which McVeigh complains in this case did not "manifest [ ] itself so as to corrupt due process." *Cooper,* 464 F.2d at 655. Thus, it does not warrant a presumption of prejudice. [footnote omitted]

McVeigh, 153 F.3d at 1182-83.

Having dismissed Mcveigh's allegations of "presumed prejudice", the U.S. Court of Appeals then considered his allegations of "actual prejudice" of jurors at his trial.

> Impartiality does not mean jurors are totally ignorant of the case. Indeed, it is difficult to imagine how an intelligent venireman could be completely uninformed of significant events in his community. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* (quoting *Irvin v. Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)). What we must decide here is whether the district court abused its discretion in determining that the seated jury could disregard the adverse pretrial publicity and render an impartial verdict. [footnote omitted]

We do not believe that the district court abused its discretion. Here, the district court went to great lengths to admonish all potential jurors to ignore the publicity surrounding the issues of the case. In fact, McVeigh does not argue that the district court failed to take strong measures to ensure juror impartiality, but rather takes the position that the district court's admonitions had the unintended effect of increasing the jury pool's interest in publicity about the case and informed potential jurors of the answers that would be expected of them if they hoped to get on the jury. The assertion that the court's admonitions had the unintended effect of increasing the venirepersons' interest in publicity may be tested by asking if an abnormally large number of venirepersons indicated having knowledge of the alleged confession. To the contrary, a significant number of venirepersons indicated that they had not heard the news of McVeigh's alleged confession, suggesting that the court's earlier admonitions to avoid publicity associated with the case had the desired effect. [FN6] McVeigh's claim that the court's admonitions served to instruct already prejudiced would-be jurors how to mask that prejudice in order to get onto the jury calls for pure speculation. We could equally speculate that the court's admonitions — that it is normal for people to be affected by publicity, and that a "good juror" is expected to put any conclusions based upon that publicity aside — might encourage those who had formed an opinion based upon pretrial publicity to disclose that fact without fear of shame and to encourage them to agree to set those opinions aside. McVeigh's claim fails.

FN6. According to the government, only forty out of the ninety-nine venirepersons reported hearing about the alleged confession. McVeigh does not dispute this calculation.

Moreover, each of the seated jurors in this case was asked if he or she could put aside media reports and decide the case only on evidence presented in court. Each responded that he or she could. Voir dire was by no means a hurried affair; each seated juror's voir dire accounted for an average of forty-eight transcript pages, or a period of an hour or so. The members of the jury pool were subjected to two screening questionnaires, individual questioning by the court, and questioning by counsel for both the government and McVeigh. Questioning by the court and the parties goes a long way towards ensuring that any prejudice, no matter how well hidden, will be revealed.

Finally, each of the four seated jurors who mentioned having heard something about McVeigh confessing also unequivocally stated that he or she nonetheless could keep an open mind about the case and would adjudicate it on its merits. Granted, the fact that potential jurors declare that they can remain impartial in the face of negative pretrial publicity is not always dispositive of the question. *See Irvin,* 366 U.S. at 727-28, 81 S.Ct. 1639. [footnote omitted] However, we give due deference to jurors' declarations of impartiality and the trial court's credibility determination that those declarations are sincere. *See Mu'Min,* 500 U.S. at 420-21, 431-32, 111 S.Ct. 1899; *Patton,* 467 U.S. at 1036-40, 104 S.Ct. 2885; *Stafford,* 34 F.3d at 1567-68; *Abello-Silva,* 948 F.2d at 1177-78; *Cummings v. Dugger,* 862 F.2d 1504, 1510 (11th Cir. 1989). Unlike an appellate court, the trial court has the opportunity to make a first-hand evaluation of a juror's demeanor and responsiveness to voir dire questions in deciding impartiality issues. *See Rosales-Lopez v. United States,* 451 U.S. 182, 188-89, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) (plurality opinion).

Because the district court repeatedly stressed the importance of avoiding the pretrial publicity concerning the case, because each of the seated jurors was individually questioned about his or her ability to set aside the effects that any exposure to pretrial publicity may have had, because each juror declared that he or she could remain impartial and decide the case on its merits, and because the district court was satisfied that each juror seated was sincere in that

> declaration, we hold that the district court did not abuse its discretion in determining that this jury could and would decide the case in a fair and impartial manner.

McVeigh, 153 F.3d at 1183-84.

End

go to my essay, *Pretrial Publicity Prevents a Fair Trial in the USA,* at http://www.rbs2.com/pretrial.pdf

---

This document is at **www.rbs2.com/pretrial2.pdf**
My most recent search for court cases on this topic was in December 2003
revised 24 Dec 2003

return to my homepage at http://www.rbs2.com/