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Sixth Amendment--The Right to an Impartial Jury: How Extensive Must Voir Dire Questioning Be

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SIXTH AMENDMENT—THE RIGHT TO AN IMPARTIAL JURY: HOW EXTENSIVE MUST VOIR DIRE QUESTIONING BE?

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

I. INTRODUCTION

In *Mu'Min v. Virginia*[1], the Supreme Court held that the Sixth Amendment right to an impartial jury and the Fourteenth Amendment right to due process of law do not require that prospective jurors be questioned regarding the specific nature of the pretrial publicity surrounding the case for which they are being selected as jurors. The majority opinion, by Chief Justice Rehnquist, held that the Sixth and Fourteenth Amendments do not dictate that voir dire establish that jurors be totally ignorant of the facts and issues involved in a case, but only that the jurors be without fixed opinions of guilt or innocence that would preclude them from judging the facts impartially.[2] The majority also emphasized that it is within the sole discretion of the trial judge to determine whether or not the voir dire questioning has accomplished this objective, and that the trial judge's decisions in this respect are to be afforded "special deference."[3] The *Mu'Min* Court thus rejected the contention that the defendant in a publicized case must be afforded the opportunity to examine in detail a prospective juror's knowledge of the case, specifically the precise nature of the knowledge imparted to him or her by the media, in order to assess the juror's claims of impartiality.[4]

In separate dissents, four justices argued that anything less than searching questions to the potential jurors as to the extent of their recollection of adverse pretrial publicity strips the defendant of his or her right to an impartial jury. Justice Marshall's dissent argued that the defendant bears the burden of proving juror partiality, but that it is impossible for a defendant to meet this burden without the

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

[2] *Id.* at 1908.

[3] The majority asserted that a trial judge's determination as to the adequacy of voir dire questioning will be reversed only for "manifest error." *Id.* at 1907.

[4] *Id.* at 1908.

aid of questions designed to elicit potential biases possessed by prospective jurors.[5] Justice Kennedy's dissent focused on the particular way in which the trial judge determined juror impartiality in the present case.[6] Justice Kennedy specifically emphasized the fact that the jurors in the *Mu'Min* case were requested to affirm their impartiality by silence.[7] According to Justice Kennedy, this method made it impossible for the trial judge to accurately assess the credibility of their claims of impartiality.[8]

This Note argues that the majority inappropriately used the *Mu'Min* case as a vehicle to focus on an abstract constitutional issue. As a result, the decision failed to address adequately the actual issue of whether the defendant's rights were compromised in this particular scenario. Furthermore, this Note proposes that the *Mu'Min* majority improperly balanced the considerations of a criminal defendant's Sixth Amendment right to an impartial jury with the trial judge's ability to accurately asses a juror's claims of impartiality. Finally, this Note examines the Supreme Court precedent on the issue of juror impartiality and concludes that the *Mu'Min* majority misrepresented and erroneously applied this precedent.[9]

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 22, 1988, prison officials transferred petitioner Dawud Majid Mu'Min, an inmate at the Virginia Department of Corrections' Haymarket Correctional Unit, to the Virginia Department of Transportation (VDOT) Headquarters in Prince William County and assigned him to a work detail supervised by a VDOT employee.[10] Mu'Min was serving a forty-eight year sentence for a 1973 first-degree murder conviction.[11] During the lunch break, Mu'Min crossed the fence surrounding the property and proceeded to walk a mile down Interstate Route 95 to Ashdale Plaza, a shopping center.[12] When he arrived at the shopping center, he entered Dale City Floors, a retail carpet store, and inquired about oriental carpets.[13] After an argument ensued between Mu'Min and Mrs. Gladys

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

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

7 *Id.* (Kennedy, J., dissenting).

8 *Id.* (Kennedy, J., dissenting).

9 In these latter two propositions, this Note strongly supports Justice Marshall's conclusions. *Id.* at 1913 (Marshall, J., dissenting).

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

11 *Id.*

12 Mu'Min carried with him a metal spike which he had sharpened that morning using a bench grinder. *Id.*

13 *Id.* at 890.

Napwasky, the store's owner, Mu'Min murdered Mrs. Napwasky.[14] He then discarded his bloody clothing and returned to the worksite, where his supervisors had not detected his absence.[15]

The murder and Mu'Min's subsequent arrest were highly publicized by the news media in the area, and the majority of the publicity was extremely prejudicial to Mu'Min.[16] The crime was the subject of at least fourty-seven articles in at least three different newspapers, one of which was the widely circulated Washington Post. These reports discussed various aspects of the case, including the details of the murder and the investigation.[17]

In addition, many of the newspaper articles discussed the problems with the Virginia prison work-crew system and argued for its reform, condemning the alleged laxity in the supervision of work gangs.[18] Some of the articles focused on the work detail from which Mu'Min had escaped and the gross negligence of the corrections officials responsible for overseeing the inmates at that facility.[19] The publicity surrounding the crime was particularly intensified by the fact that it occurred during the period following the rape and assault of a woman by Willie Horton, a Maryland prisoner, who committed his crime while on furlough. The Willie Horton incident became a highly publicized and widely debated issue in the 1988 presidential campaign.[20]

Many of the articles discussing the *Mu'Min* case appeared on

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14 *Id.*

15 *Id.*

16 Mu'Min v. Virginia, 111 S. Ct. 1899, 1901-02 (1991).

17 *Id.*

18 *Id.* at 1903. The Secretary of the Virginia Department of Transportation, Vivian Watts, made a widely reported public apology, on behalf of herself and the Governor, for the crime. Brief for Petitioner at 135, Mu'Min v. Virginia, 111 S. Ct. 1899 (1991) (No. 90-5193) [hereinafter Brief for Petitioner]. Lieutenant Governor Wilder expressed his "revulsion" that such a thing could happen. *Id.* The then-governor of Virginia, Governor Bailles, suspended the Virginia work-release and trusty programs. *Id.* All of these events, and many others, were widely reported by the media. *Id.*

19 *Mu'Min*, 111 S. Ct. at 1910 (Marshall, J., dissenting). It was reported, for example, that the facility where Mu'Min was stationed was poorly supervised, and that inmates had the opportunity to possess alcohol, drugs, and weapons. *Id.* Readers also learned that inmates had the opportunity to slip away from the work detail without detection. *Id.* In addition, it was reported that officials in charge of administering the corrections and highway programs had issued a public apology, and that added restrictions had been placed on prison work crews since the murder. *Id.*

20 *Id.* (Marshall, J., dissenting). The Willie Horton incident was the subject of a widely run television commercial sponsored by the Republicans in support of George Bush's campaign. A Chicago Tribune article stated that, "Judging by his television commercials, George Bush has two running mates, Dan Quayle and Willie Horton." Perspective, *Crime Should Be a Non-Issue in the Presidential Race*, CHI. TRIB., Oct. 26, 1988, at C23.

the front page of the local publications, and some of these articles provided particularly descriptive details of the crime itself. For example, some reported that Mrs. Napwasky was found in a pool of blood with her clothes pulled off and semen on her body. Other articles detailed Mu'Min's prior criminal record, including his 1973 arrest for the murder of a cab driver.[21] Some of the articles discussed the prior murder for which Mu'Min was serving his sentence at the time of Mrs. Napwasky's murder, and the fact that the death penalty had not been available when Mu'Min was convicted of the earlier murder.[22] In addition, a number of articles included accounts of Mu'Min's alleged confession to killing Mrs. Napwasky.[23]

Mu'Min presented forty-three of these articles to the trial judge approximately three months before trial in support of a motion for a change of venue.[24] The judge deferred ruling on this motion until after an attempt to seat a jury.[25]

Before the trial date, Mu'Min filed a motion for individual voir dire.[26] The trial court denied the motion and ruled that voir dire would begin with collective questioning of the venire, but if necessary, the venire would be split into panels of four to address issues of pretrial publicity.[27] The trial judge also denied both petitioner's

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21 One article reported that Mu'Min had been cited for twenty-three violations of prison rules and had been denied parole six times between 1973 and 1988, and another article reported that Mu'Min was a suspect in a recent prison beating. Brief for the Petitioner, *supra* note 18, at 133.

22 One year prior to Mu'Min's earlier murder conviction, the Supreme Court temporarily invalidated the death penalty in Furman v. Georgia, 408 U.S. 238 (1972). *Mu'Min*, 111 S. Ct. at 1911 (Marshall, J., dissenting).

23 *Mu'Min*, 111 S. Ct. at 1901. Much of the information contained in these articles was not admitted into evidence during either the guilt phase or the sentencing phase of the petitioner's trial. Brief for the Petitioner, *supra* note 18, at 133. The inadmissible information included the reports that Mu'Min was suspected of the prison beating, reports of the prison rule violations, reports of the parole rejections, details of the prior murder for which Mu'Min had been convicted, details of Mu'Min's juvenile record in New York and Virginia, and the suspicion that a rape may have been involved in the murder. *Id.*

24 *Mu'Min*, 111 S. Ct. at 1901. At the hearing on the Motion for Change of Venue, defense counsel pointed at that the publicity surrounding the petitioner's case had averaged one story per day. Brief for the Petitioner, *supra* note 18, at 136.

25 *Mu'Min*, 111 S. Ct. at 1902. The trial judge stated that it was his "considered opinion that we can get a fair and impartial jury." He also remarked on other occasions that "I've heard it said that in this particular area in spite of the volume of papers that you can get a fair jury for anything that you want to," and that "I think sometimes media people think that their stories get a whole lot more publicity than so." Brief for the Petitioner, *supra* note 18, at 136.

26 This motion proposed that potential jurors be questioned individually. Joint Appendix, Mu'Min v. Virginia, 111 S. Ct. 1899 (1991) (No. 90-5193), at 43 [hereinafter Joint Appendix].

27 *Mu'Min*, 111 S. Ct. at 1901. In his denial of this motion, the trial judge reasoned

motion for additional peremptory challenges and petitioner's motion for sequestering the jury during trial.[28] In addition, the defendant submitted sixty-four proposed voir dire questions, including questions relating to the content of news items to which potential jurors might have been exposed. However, the trial judge refused to ask any of the proposed questions that related to the content of the publicity.[29]

Of the twenty-six prospective jurors questioned as to whether they had acquired any information regarding the accused or the alleged offense from the news media or any other source, sixteen responded that they had.[30] The court then asked the following questions:

> "Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?"
>
> "Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?"
>
> "Considering what the ladies and gentlemen have answered in the affirmative have heard or read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?
>
> "In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a juror, enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?"[31]

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that with individual voir dire, jurors are brought into a courtroom "where they are by themselves and the only person at which four attorneys are staring in the court, and a number of witnesses, not to mention other personnel, [and this situation] obviously puts those individuals in a position of where they may well feel that they're the ones that are on trial." Joint Appendix, *supra* note 26, at 43.

[28] Brief for the Petitioner, *supra* note 18, at 137.

[29] *Mu'Min*, 111 S. Ct. at 1902. The following questions were refused by the trial court:

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

Id., n.2.

[30] *Id.* at 1902.

[31] *Id.*

Only one of the jurors who claimed to have prior knowledge of the case responded that he could not be impartial, and the court dismissed that juror for cause.[32] Mu'Min then moved that all jurors who had admitted exposure to pretrial publicity be excused for cause and renewed his motion for a change of venue. The trial judge denied both motions.[33]

The judge then conducted further voir dire in panels of four. Any juror who had been exposed to any of the publicity surrounding the case, or had heard anything about it, was then asked whether he or she had formed an opinion and whether he or she could remain impartial.[34] In addition, any juror who admitted to having had any discussions with anyone regarding the case was asked follow-up questions regarding where and with whom the discussions had taken place, and whether or not he or she could nonetheless remain impartial.[35] Eventually, the judge seated fourteen jurors.[36] Although eight of these jurors had admitted exposure to some or all of the pretrial publicity, all of the jurors seated swore that they had an open mind and could wait until the close of all evidence before reaching an opinion as to guilt or innocence.[37]

Pursuant to the trial, the jury found Mu'Min guilty of capital murder, and recommended that he be sentenced to death.[38] The trial judge accepted this recommendation, and Mu'Min was so sentenced.[39] Mu'Min then appealed, asserting that he was entitled to a new trial due to the trial judge's failure to permit the proposed voir dire questions as to the specific exposure of each juror to media reports about the case. Mu'Min maintained that this failure violated his constitutional right to an impartial jury.[40] The Supreme Court of Virginia, by a divided vote, affirmed the conviction and sentence, holding that although jurors in a criminal trial could be asked whether they had previously acquired any information about the case, the defendant does not have a constitutional right to explore the specifics of that information.[41] The Supreme Court of Virginia further held that a defendant is entitled only to a determination of whether the jurors could remain impartial in light of any previously

32 *Id.*
33 *Id.*
34 *Id.* at 1903.
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*

obtained information.[42]

The United States Supreme Court granted certiorari to determine whether a criminal defendant has a constitutional right to ask potential jurors specific questions concerning the extent of their exposure to pretrial publicity.[43]

III. Supreme Court Opinion

A. The Majority Opinion

The Supreme Court upheld the Supreme Court of Virginia's decision. Writing for the majority, Chief Justice Renquist began by explaining that while the Supreme Court has supervisory powers over the voir dire requirements of cases tried in federal courts, the Court's authority over the voir dire requirements of state court trials is limited to enforcing constitutional requirements.[44] Thus the first question addressed by the majority was whether there was any basis for finding that the Constitution requires that a defendant be allowed to ask potential jurors questions about the content of the pretrial publicity to which they have been exposed.[45]

The majority began its analysis of this issue by examining the present case in light of the Supreme Court precedent dealing with racially or ethnically biased jurors.[46] In cases involving the issue of voir dire questions as to racial or ethnic bias, the Court had previously determined that the possibility of racial bias against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that the trial court question potential jurors as to their racial bias.[47] However, the majority stressed that these cases also emphasized another important principle: that the trial court retains enormous latitude in determining the content and extent of voir dire questions.[48] The majority asserted that it strongly supported this principle of placing primary reliance on the judgement of the trial court.[49] It reasoned that as the trial judge sits in the locale which the pretrial publicity affected, the trial judge brings his or her own impressions of the

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42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 1904.
47 *Id. See* Turner v. Murray, 476 U.S. 28 (1986) (in a capital case involving a charge of murder of a white person by a black defendant, potential jurors must be asked questions as to their racial biases).
48 *Mu'Min*, 111 S. Ct. at 1904.
49 *Id.* at 1906.

degree of influence such publicity might have to the determination of the scope of questioning.[50]

The Court then proceeded to explain its reasoning for rejecting Mu'Min's argument that the Fourteenth Amendment requires a more extensive voir dire examination with respect to pretrial publicity than it does with respect to racial or ethnic prejudice.[51] Although Mu'Min claimed that such "content" questions would materially assist in obtaining a jury less likely to have been influenced by pretrial publicity, the majority determined that even if this contention held true, it did not compel the finding of a constitutional requirement.[52]

In its argument on this issue, the Court first addressed the issue of "content" questions in the context of peremptory challenges.[53] Chief Justice Renquist admitted that were the defendant permitted to watch individual jurors respond to questions regarding exactly what they had read or heard, "a better sense of the juror's general outlook on life might be revealed, and such a revelation would be of some use in exercising peremptory challenges."[54] However, he pointed to the fact that the Constitution does not require peremptory challenges, and determined that this likelihood alone was insufficient to create such a constitutional requirement.[55] The majority also dismissed, as speculative, Mu'Min's theory that content questioning would force jurors to re-evaluate their decisions as to whether such publicity would affect their impartiality.[56]

The majority next argued that posing specific content questions to jurors grouped in panels of four might cause more harm than good.[57] The majority reasoned that each individual juror would necessarily communicate his or her specific descriptions of the content of media reports to the other three jurors.[58] As a result, the ability of these remaining jurors to remain impartial might be compromised by listening to such details.[59] In addition, the majority rejected Mu'Min's argument that the trial court erred in denying him individual interrogation, concluding that such a procedure

50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.* at 1905. *See* Ross v. Oklahoma, 487 U.S. 81, 88 (1988).
56 *Mu'Min*, 111 S. Ct. at 1905.
57 *Id.*
58 *Id.*
59 *Id.*

"might make the jurors feel that they themselves were on trial."[60]

Although the Court recognized that such specific "content" questioning would undoubtedly be helpful in the trial judge's determination of a juror's credibility when he or she asserts impartiality, it stressed that to be violative of the Constitution, the trial court's failure to ask these questions must render the defendant's trial "fundamentally unfair."[61] However, based on the facts of the present case, the majority determined that the trial court's failure did not lead to a "fundamentally unfair" trial.[62]

Next, the majority addressed the Supreme Court precedent dealing with substantial pretrial publicity. Although no previous Supreme Court case had addressed the exact issue of the extent of voir dire questioning regarding pretrial publicity, the majority focused on two cases addressing pretrial publicity in the context of a motion for change of venue.[63] The first case, *Irvin v. Dowd*[64], was a capital trial in which the Court held that the defendant was entitled, as a matter of constitutional law, to a change of venue because pretrial publicity had influenced the jury pool to such a degree as to preclude their impartiality.[65] In the second case, *Patton v. Yount*[66], the Court had held that pretrial publicity was not so extensive as to compel a finding that the jury as a whole was not impartial.[67]

Although in *Irvin*, the Court had found that the pretrial publicity surrounding the case warranted a change of venue[68], the majority in the present case was able to distinguish the *Mu'Min* facts from the *Irvin* facts on three grounds. First, the Court distinguished *Irvin* by pointing to the fact that the media campaign directed against the *Irvin* defendant was so extensive that it was determined to have reached ninety-five percent of the population of the county in which it was tried.[69] Furthermore, the Court stressed that the area in which the *Irvin* case was tried was much smaller than the area in which the present case was tried.[70] As a result, the majority contended, the impact on the *Irvin* community of each individual crime

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60 *Id.*

61 *Id.* at 1905.

62 *Id.* at 1908.

63 *Id.* at 1906.

64 366 U.S. 717 (1961).

65 *Mu'Min*, 111 S. Ct. at 1906 (citing *Irvin*, 366 U.S. at 728).

66 467 U.S. 1025 (1984).

67 *Mu'Min*, 111 S. Ct. at 1907 (citing *Patton*, 467 U.S. at 1040).

68 *Id.* at 1906 (citing *Irvin*, 366 U.S. at 728).

69 *Id.* at 1906-1907.

70 The area in which *Irvin* was tried also had a substantially smaller population than Prince William County had at the time of Mrs. Napwasky's murder. *Id.*

was far more substantial than in the *Mu'Min* case.[71] The Court reasoned that as the media in Prince William County covered a greater number of violent crimes, each individual account was less memorable.[72]

In addition, in the *Irvin* case, two-thirds of the jurors actually seated had formed an opinion that the defendant was guilty, and had acknowledged familiarity with material facts and circumstances of the case.[73] In the present case, however, although eight jurors had indicated that they had been exposed to the publicity, none of those indicated either that they had formed an opinion as to guilt or that the information they possessed would affect their ability to be impartial.[74]

Finally, the majority emphasized the difference between the nature of the media coverage in *Mu'Min* and *Irvin*. While the media campaign in *Irvin* contained numerous opinions as to the defendant's guilt and as to the appropriate punishment, and as such was significantly damaging to the *Irvin* defendant, the news reports in the present case were aimed at the Prince William County Department of Corrections and the criminal justice system in general.[75] Although the Court admitted that Mrs. Napwasky's murder may have spurred more media coverage than other murders, it reasoned that the extensive nature of the coverage was probably due to the fact that the crime was committed during the time that the Willie Horton incident was a subject of national debate.[76] Thus, the Court concluded, the publicity concerning the murder of which Mu'Min was accused was not of the same kind or extent as that concerning the crime committed in the *Irvin* case.[77]

The majority also addressed the *Patton* case[78]. In *Patton*, the Court held that the Sixth and Fourteenth Amendments require only that voir dire establish that the jurors do not have a fixed opinion of the guilt or innocence of the defendant such that they cannot judge the facts impartially.[79] Moreover, the Court stressed that under the

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71 *Id.*

72 *Id.*

73 *Id.* at 1907.

74 *Id.*

75 *Id.* The Court referred specifically to the reports that criticized the furlough and work release programs of the type that Mu'Min was a participant when this crime was committed. *Id.*

76 *Id.*

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

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

79 The Court specifically noted, under *Patton*, "the relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions

constitutional standard, jurors need not be totally ignorant of the facts and issues involved in the case.[80] Applying this standard to the present case, the majority concluded that since the Constitution does not require that jurors be ignorant about the facts of the case, answers to questions about the content of their information or the extent of their exposure would be insufficient to disqualify a juror.[81] Therefore, it reasoned, the Constitution does not require such questions.[82]

In its conclusion, the majority emphasized the principle that trial judges are to be afforded a heightened degree of deference. The majority reasoned that if the trial judge had determined that voir dire interrogation revealed that any of the jurors was incapable of impartiality, he could have decided to question those jurors more extensively.[83] Although the Court then went on to qualify this holding by suggesting that a mere pro forma attempt to determine impartiality would be inappropriate, it concluded that in this case, the nature of the questions asked of the potential jurors regarding the effect of the pretrial publicity on their ability to judge the facts impartially was "by no means perfunctory."[84]

B. THE O'CONNOR CONCURRENCE

In her concurrence, Justice O'Connor stressed the special deference given to the trial judge in directing voir dire, and noted that trial court decisions will only be reversed in the event of manifest error.[85] She underscored that the primary issue in this case is whether the trial judge erred in believing that the potential jurors' affirmations that they could render an impartial verdict were

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that they could not judge impartially the guilt of the defendant." *Mu'Min*, 111 S. Ct. at 1908 (citing *Patton*, 467 U.S. at 1035).

80 *Id.* at 1908 (citing *Irvin*, 366 U.S. at 722).

81 *Id.*

82 *Id.* The majority also examined the STANDARDS FOR CRIMINAL JUSTICE promulgated by the American Bar Association and cited by the petitioner. These standards require the questioning of each individual juror with respect to what that juror has read and heard about the case "if there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material." *Id.* at 1907-1908. However, the majority held that the ABA standards are far stricter than what was held to be constitutionally required in *Patton*, and thus were not binding on the Court. *Id.* at 1908. These standards are based on a substantive rule which renders a potential juror subject to challenge for cause regardless of his state of mind if that juror has been exposed to and remembers "highly significant information" or "other incriminating matters that may be inadmissible in evidence." *Id.*

83 *Id.*

84 *Id.*

85 Justice O'Connor relied on *Patton* for both of these propositions. *Id.* at 1909 (O'Connor, J., concurring).

credible.[86]

In support of the majority's decision, Justice O'Connor emphasized the fact that although the trial judge did not know precisely what information the potential jurors possessed, he was "undeniably aware" of the full extent of the media coverage surrounding the case.[87] As a result, he was aware of all the potential prejudicial information to which they could have been exposed.[88] Although Justice O'Connor admitted that "content" questions might have been helpful to the trial judge in determining impartiality, she concluded that this possibility was not strong enough to compel the Sixth Amendment to require them.[89]

C. THE MARSHALL DISSENT

Justice Marshall, joined by Justices Blackmun and Stevens[90], asserted that the decision of the majority "turns a critical constitutional guarantee - the Sixth Amendment's right to an impartial jury - into a hollow formality."[91] Justice Marshall asserted that in cases which engender as substantial an amount of pretrial publicity as did the present case, a trial judge cannot realistically asses juror impartiality without first establishing what the juror already knew about the case.[92] The dissent further argued that 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 carrying a bias against the defendant.[93]

Justice Marshall began his dissenting argument by reviewing the wave of publicity that surrounded the case.[94] He pointed to the intense political controversy channeled through the press and media, and detailed the public outcry against the gross negligence of the corrections officials responsible for overseeing the work detail from which Mu'Min had escaped.[95] Although Justice Marshall noted that the media coverage was partially focused on criticizing

86 *Id.* (O'Connor, J., concurring).
87 *Id.* (O'Connor, J., concurring).
88 *Id.* (O'Connor, J., concurring).
89 *Id.* (O'Connor, J., concurring).
90 Justices Blackmun and Stevens did not join in Part IV of Justice Marshall's dissent, in which Justice Marshall advocated vacating Mu'Min's death sentence and reasserted his view that the death penalty, in all circumstances, constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.* at 1917 (Marshall, J., dissenting).
91 *Id.* at 1909 (Marshall, J., dissenting).
92 *Id.* at 1910 (Marshall, J., dissenting).
93 *Id.* (Marshall, J., dissenting).
94 *Id.* (Marshall, J., dissenting).
95 *Id.* (Marshall, J., dissenting).

the criminal justice system in Virginia in general, he stressed that a great deal of this coverage was devoted to the details of the crime.[96] Accordingly, Marshall criticized the majority's determination that the pretrial publicity was not sufficiently harmful to the defendant.[97]

Justice Marshall also strongly disagreed with the majority's reasoning that to impose a requirement that trial courts engage in "content" questioning would be unduly burdensome on the court system.[98] He emphasized that the danger that exposure to pretrial publicity may interfere with the defendant's Sixth Amendment right to an impartial jury far outweighed any such burden.[99] Furthermore, he argued that while the majority relied upon the principle that "special deference" should be afforded trial judges, the Court has never defined the type of voir dire that the trial court must engage in order to merit this "special deference." [100]

Justice Marshall supported this assertion by stressing that the issue involved in the present case is one of first impression for the Court. Thus, the majority's reasoning that no greater voir dire requirements exist in pretrial publicity cases than exist in cases dealing with potential racial biases is irrelevant, as there has never been an inquiry into the extent of voir dire questioning as to racial biases.[101] Rather, the only issue that the Court has addressed is whether any inquiry into possible racial biases is required.[102]

The dissent also emphasized that it has been recognized by both the Supreme Court and the Seventh Circuit that a juror, when confronted with questions as to whether he or she could remain impartial, is far more inclined to answer in the affirmative than in the negative.[103] The reasons for this may be simply that the juror is

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96 *Id.* at 1910-1911 (Marshall, J., dissenting).

97 *Id.* at 1911 (Marshall, J., dissenting). It was reported, among other things, that Mu'Min had confessed to the murder. *Id.* (Marshall, J., dissenting). Furthermore, not only did readers also learn the details of Mu'Min's prior murder in the context of certain articles advocating "more and swifter capital punishment," but they also learned that local officials were already convinced of Mu'Min's guilt. *Id.* at 1912 (Marshall, J., dissenting). For example, the local congressman made a public statement that he was "deeply distressed by the news that my constituent Gladys Napwasky was murdered by a convicted murderer serving in a highway department work program," and called for an explanation as to the "decisions that allowed a person like Dawud Mu'Min to commit murder." *Id.* (Marshall, J., dissenting).

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

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

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

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

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

103 In support of this proposition, Justice Marshall cited Irvin v. Dowd, 366 U.S. 717, 728 (1961) ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before

unaware of his or her own biases or that he or she may assert impartiality out of pride.[104] This inclination, combined both with the fact that it is the defendant's burden to show juror partiality and with the fact that the defendant's right to do so is an integral part of his or her right to an impartial jury, requires that a defendant be given the opportunity to conduct a meaningful examination of potential jurors in order to elicit potential biases.[105]

Justice Marshall then identified three reasons why "content" questions are a necessary element of voir dire inquiry. First, he asserted that such questions are necessary to establish whether the publicity to which the particular juror was exposed was so extreme that any claims of impartiality could not on their face be believed.[106]

Second, Justice Marshall argued that even in cases in which the pretrial publicity was not so extensive and damaging that any exposure to it would necessarily disqualify a juror, "content questioning still is essential to give legal depth to the trial court's finding of impartiality."[107] Because impartiality is not a clear-cut issue, and in fact combines determinations of both fact and law, it is necessary for the trial court, rather than the individual juror, to make that decision based on the extent of the juror's exposure. Therefore, the trial judge must be in a position to accurately evaluate the juror's claims of impartiality in terms of the Sixth Amendment's requirement of impartiality.[108] Justice Marshall stressed that a potential juror's personal assessment of the definition of impartiality may differ significantly from the definition demanded by the Sixth Amendment.[109]

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one's fellows is often its father."); United States v. Dellinger, 472 F.2d 340, 375 (CA7 1972) ("Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial."); Smith v. Phillips, 455 U.S. 209, 221-22 (1982) ("[A] juror may have an interest in concealing his own bias . . . [or] may be unaware of it."); Murphy v. Florida, 421 U.S. 794, 800 (1975) ("[A juror's own] assurances that he is equal to the task cannot be dispositive of the accused's rights."). *Mu'Min*, 111 S. Ct. at 1913 (Marshall, J., dissenting).

104 *Mu'Min*, 111 S. Ct. at 1913 (Marshall, J., dissenting). *See supra* note 103.

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

106 *Id.* at 1913-14 (Marshall, J., dissenting). In support of this, Justice Marshall pointed to *Irvin* and to Rideau v. Louisiana, 373 U.S. 723 (1963), cases in which it was determined that the publicity was so intense as to effect any juror exposed to it regardless of any claims of impartiality. *Mu'Min*, 111 S. Ct. at 1914 (Marshall, J., dissenting).

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

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

109 Justice Marshall gave, as an example of this confusion, the questioning of a particular juror during the voir dire in a robbery and murder trial:

> "Q: When you said that you have only read about what [the defendant] has done, what do you mean by that?
>
> "A: Well, we all know what she has done. You know, we all know what she has done. So it is now up to the court to see if she is guilty or innocent, but you have to

Finally, Justice Marshall asserted that "content" questions are necessary solely to determine the credibility of a juror's assertion of impartiality.[110] Without precise information as to the content of the publicity to which the juror was exposed, accurate factfinding as to his or her actual ability to remain impartial is impossible.[111] The particular ferocity of the publicity in this case, Justice Marshall asserted, made "content" questions all the more imperative.[112] Therefore, he determined, without such questions, the trial court was in no position to judge the credibility of juror claims of impartiality.[113]

Justice Marshall concluded by emphasizing the import of juror impartiality in our criminal justice system, in which "only the jury may strip a man of his liberty or his life."[114] By refusing "content" questioning in this case, he asserted, the court made only a "pro forma attempt" to see that the jurors discharged their responsibilities.[115]

D. THE KENNEDY DISSENT

In a short but directed opinion, Justice Kennedy focused his remarks on the particular methods used to assess juror impartiality in this case.[116] Justice Kennedy argued that the fact that the jurors were required only to remain silent in order to indicate their impartiality deprived the trial judge of the "opportunity to assess the demeanor of each prospective juror in disclaiming bias."[117] Justice Kennedy stressed that this opportunity to assess a juror's credibility was the crucial factor in the logic underlying the substantial defer-

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go through the whole trial, you can't just read something in the paper and say that girl is guilty, you know. You understand?

"Q: Well, I am not sure. I am not sure what you mean when you say we all know what she has done.

"A: Well, we all know that the girl went in and held up the bank and the policeman was shot there."

The juror was subsequently excused. *Id.* at 1914, n.4 (Marshall, J., dissenting).

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

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

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

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

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

115 *Id.* (Marshall, J., dissenting). Justice Marshall also attacked Justice O'Connor's argument that the trial judge was entitled to greater deference because he too had been exposed to the pretrial publicity. *Id.* (Marshall, J., dissenting). Rather, Justice Marshall asserted, the fact that the trial judge was aware of the potential damage done to the potential jurors who had been exposed to the publicity made it "even more inexcusable" that jurors had been seated without such "content" questions. *Id.* (Marshall, J., dissenting).

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

117 *Id.* (Kennedy, J., dissenting).

ence afforded to the decisions of the trial judge.[118] Thus, although Justice Kennedy agreed that the trial judge should be accorded substantial discretion in directing voir dire inquiry, he concluded that there can be no discretion where all opportunity to evaluate the jurors' claims of impartiality is rendered impossible.[119]

IV. Analysis

The opinion of the majority rests upon two major lines of argument. First, it explores the issue of whether the Constitution requires that trial judges allow potential jurors to be asked questions regarding the content of the media coverage surrounding the case to which they have been exposed.[120] The majority concludes that the Constitution does not require such content questions, and that it is solely within the discretion of the trial judge to refuse or allow such questioning.[121] Second, the majority seeks to explain why the *Mu'Min* case does not require an application of the Court's prior holdings that significant pretrial publicity implies juror bias and thus creates a constitutional requirement for a change of venue.[122]

The majority's opinion is flawed in several respects. To begin with, its reasoning that content questions are not a constitutional requirement is subject to criticism. Furthermore, by concentrating, in the abstract, on the issue of whether the Constitution requires content questions in every state case involving pretrial publicity, the majority's analysis is misfocused. Only after the majority has concluded that the Constitution does not compel content questioning does it even address the facts of the case at hand.[123] And at that point, the majority distinguishes the facts in the present case from the facts in prior Supreme Court decisions even though these prior cases would seem to compel the contrary finding.[124] In structuring its opinion in this manner, the Court avoids the more pressing question of whether the denial of the opportunity to pose content questions in this particular case deprived Mu'Min of his constitutional right to an impartial jury.

Moreover, the majority's emphasis on unqualified deference to the trial judge's decisions on the extent of voir dire questioning is

118 *Id.* (Kennedy, J., dissenting).
119 *Id.* (Kennedy, J., dissenting).
120 *Id.* at 1905.
121 *Id.* at 1906, 1908.
122 *Id.* at 1907.
123 After explaining the procedural history of the present case, the majority spends all but the final two pages of its opinion explaining its decision that content questioning is not constitutionally required. *Id.* at 1903-07.
124 *Id.* at 1907.

inappropriate. In *Mu'Min*, deference to the trial judge meant that the members of the jury were asked only if they felt that they could remain impartial in the face of pretrial publicity.[125] Furthermore, the jurors were told that if they felt that they could remain impartial, they should remain silent.[126] As such, the trial judge was unaware of and thus unable to evaluate the specific factors that went in to the jurors' decisions on their ability to be impartial, and he therefore did not have the opportunity to judge the credibility of the jurors' claims based on their demeanor in professing their impartiality. As a result, it was left to the jurors themselves, rather than the trial judge, to determine whether *Mu'Min*'s jury was made up of unbiased men and women as required by the Constitution.[127]

Because of both the inevitable difference in potential jurors' definitions of impartiality and the distinct possibility that jurors may harbor unconscious biases derived from their exposure to media coverage, allowing a juror to make the determination as to his or her own ability to be impartial results in inadequate protection of the defendant's Sixth Amendment rights. Although in principle it may be justifiable to afford some degree of deference to the trial judge in these matters, the majority should have qualified its holding by requiring that in order to be accorded this deference, the trial judge must be adequately informed or at the very least have the opportunity to observe the jurors' demeanor.

Finally, the majority not only inaccurately applied the existing Supreme Court precedent on the subject of pretrial publicity cited in support of its position, but it also conspicuously ignored other relevant Supreme Court cases on this issue. The holdings of these cases, as this Note will explain, considerably weaken the *Mu'Min* Court's holding.

A. THE CONSTITUTIONAL ISSUE

Rather than deciding the constitutional question before the court according to the facts of the case at hand, the majority seemed to be attempting to justify a predetermined conclusion. Because the majority attempted to use this case as a vehicle for deciding issues well beyond the scope of the facts of the case at hand, the majority in fact eclipsed the actual issues involved in the *Mu'Min* case. While the question before the court was whether or not a criminal defendant has the constitutional right to inquire as to the content of the

125 *Id.* at 1903.
126 *Id.* at 1919 (Kennedy, J., dissenting).
127 *Id.* at 1913 (Marshall, J., dissenting).

publicity to which each prospective juror was exposed, the majority instead focused on the abstract question of whether content questions are constitutionally required in all cases involving pretrial publicity.[128]

Furthermore, even assuming that the majority's approach was flawless, the reasoning behind it's conclusion that the Constitution does not require content questions is not sound. To begin with, while the majority was correct to point out that the mere fact that potential jurors were somewhat knowledgeable about the facts of the case would not be sufficient to disqualify them,[129] it does not necessarily follow that for that reason, content questions are never constitutionally required. The central question is not whether a potential juror is aware of certain facts about the case, but whether or not that potential jurors' knowledge of these facts makes him or her biased.[130] This distinction is especially important because by the nature of pretrial publicity, the amount of possible juror knowledge will differ greatly depending both on the amount and content of the media coverage. Thus, potential juror bias will vary widely in any given case.

In fact, the most pressing constitutional issue in this case is whether the jury eventually selected was able to lay aside any preconceived notions and enter the jury box impartial.[131] The only logical way to determine this issue is to ask the potential juror content questions. Thus, if it is determined by the trial judge that "content" questions are required to determine a potential juror's ability to judge the facts and evidence impartially, it necessarily follows that, in such a situation, "content" questions are a constitutional requirement.

The *Mu'Min* majority supports its conclusion that content questions are not constitutionally required by reasoning that peremptory challenges are not constitutionally required. However, the emphasis on peremptory challenges is irrelevant. The majority reasons that because peremptory challenges are not a constitutional requirement, they cannot be used as a basis for making content questions a constitutional requirement.[132] Nevertheless, while peremptory challenges are not a constitutional requirement, an impartial jury *is*

128 *Id.* at 1904.

129 *Id.* at 1908.

130 The majority recognized this fact in its opinion when it cited Connors v. United States, 158 U.S. 408, 413 (1895): "[A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried." *Mu'Min*, 111 S. Ct. at 1903.

131 *See supra* note 130.

132 *Mu'Min*, 111 S. Ct. at 1905.

constitutionally required.[133] Because the significance of content questions is not in the ability of such questions to give defense counsel a vehicle for peremptory challenges, but rather to show prejudicial influence and therefore the inability of jurors to be impartial,[134] the issue of content questioning is unrelated to the issue of peremptory challenges.

Moreover, the majority's expression of concern regarding the implications of individualized voir dire is unacceptable. The majority implies that individualized voir dire questioning is too large a burden to place on our court system.[135] However, the administration of justice in this country is nothing if not complex and time-consuming. The majority does not set forth a justification for its implicit conclusion that, while other constitutional rights demand protection regardless of the burden such protection places on the courts, the right to an impartial jury does not demand such protection.[136]

Furthermore, the weight that the majority gives its apparent concern that individualized questioning will cause the jurors to feel that they themselves are on trial[137] is inconsistent with many of the measures routinely taken by courts with respect to the treatment of a jury. The majority fails to acknowledge the fact that other judicial safeguards, such as the sequestering of a jury, could potentially have the same effect. The majority's argument ignores the basic tenet that the cornerstone of our justice system is the balance of the rights of the accused with the rights of the accuser.[138] To destroy this bal-

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133 The Sixth Amendment requires that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherin the crime shall have been committed . . . ." U.S. CONST. amend. VI.

134 Justice Marshall recognized this in his dissent when he stated that, "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.'" *Mu'Min*, 111 S. Ct. at 1913 (Marshall, J., dissenting) (citing Nebraska Press Association v. Stuart, 427 U.S. 539, 564 (1976)).

135 The majority opinion states that: "Acceptance of petitioner's claim would require that each potential juror be interrogated individually . . . ." *Mu'Min*, 111 S. Ct. at 1905. Justice Marshall recognized the majority's implication, and stated that: "I reject the majority's claim that content questioning should be rejected because it would unduly burden trial courts." *Id.* at 1916 (Marshall, J., dissenting).

136 *Id.* at 1905.

137 *Id.*

138 Justice Marshall implies this in his dissent when he quotes Justice Hughes' opinion in Aldridge v. United States, 283 U.S. 308 (1931), a case dealing with the issue of questioning potential jurors as to their racial or ethnic prejudices: "The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the Courts of the United States to allow questions as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that

ance in the interest of the "feelings" of the perspective jurors seems both irrational and unconvincing.[139]

B. JUDICIAL DEFERENCE

The most striking inconsistency in the majority's decision is its treatment of the role of the trial judge.[140] The majority asserts that the trial judge is entitled to great latitude in determining the questions necessary to discern juror bias,[141] implying that this latitude should be unlimited. However, as the majority points out, the trial judge's duty goes beyond merely eliciting the potential juror's response to the question of whether he or she can be impartial; the trial judge must also determine whether or not claims of impartiality can be believed.[142] The majority stresses the fact that the trial judge, sitting in the locale where the prejudicial publicity had its most dangerous effects, was in the best position to evaluate jurors' claims of lack of bias.[143] In support of this position, the majority cites language from its decision in *Rosales-Lopez v. United States*,[144] which stresses the role of the trial judge in evaluating the demeanor

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persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inequities designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the process of justice into disrepute." *Mu'Min*, 111 S. Ct. at 1916 (Marshall, J., dissenting) (citing *Aldridge*, 283 U.S. at 314-315).

139 In his dissent, Justice Marshall implicitly reaches this conclusion when he stated that, "[T]he majority's solicitude for administrative convenience is wholly gratuitous. Numerous Federal Circuits and States have adopted the sorts of procedures for screening juror bias that the majority disparages as being excessively intrusive . . . In short, the majority's anxiety is difficult to credit in light of the number of jurisdictions that have concluded that meaningful steps can be taken to insulate the proceedings from juror bias without compromising judicial efficiency." *Mu'Min*, 111 S. Ct. at 1916 (Marshall, J., dissenting).

140 Holding unequivocally that content questions are never constitutionally required is wholly inconsistent with the majority's theory that it is within the purview of the trial judge to determine potential jurors' ability to be impartial. The sole reason for the trial judge's responsibility for voir dire questioning is in order to protect the constitutional right of the accused to an impartial jury. The judge is thus obligated to take whatever measures he deems appropriate in order to ensure such an impartial jury. The majority recognizes this when it states: "Because the obligation to empanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perception, federal judges have been accorded ample discretion in determining how best to conduct voir dire." *Id.* at 1904 (citing Rosales-Lopez v. United States, 101 S. Ct. 1629, 1634 (1981)). Thus the majority implicitly recognizes that if the trial judge deems them necessary, content questions would be a constitutional requirement. However, the majority contradicts itself by explicitly providing that in no situation are content questions constitutionally required. *Id.* at 1908.

141 *Id.* at 1906.

142 *Id.*

143 *Id.*

144 451 U.S. 182, 188 (1981).

of the potential jurors when professing their impartiality.[145]

In the *Mu'Min* case, however, as Justice Kennedy noted in his dissent, the trial judge did not require the jurors to respond verbally to questions as to their impartiality.[146] Rather, as long as they remained silent, the trial judge interpreted their silence as an indication of impartiality.[147] This is a significant fact that deprives the majority's holding of its full force. It is arguably impossible for a trial judge to assess demeanor when there is no demeanor to assess, only silence.

The importance of ensuring that the trial judge has an opportunity to scrutinize a juror's demeanor when professing impartiality cannot be overemphasized. With respect to this issue, the extent of the trial judge's knowledge of the pretrial publicity bears little importance. The trial judge, with his or her particular experience with remaining impartial in the face of a highly emotional or macabre scenario, will likely have a greater ability than the average juror to remain unprejudiced while being exposed to sensationalized or biased media coverage. While a judge can fairly asses the ability of someone in his or her particular position to remain impartial in the face of such publicity, it does not necessarily follow that such a judge, armed only with the knowledge of the content of the existing publicity, can accurately asses the ability of the average layperson to remain free from bias.[148]

In addition, as the Court has recognized, there are any number of reasons that a perspective juror might desire to conceal his or her bias.[149] There also exists the possibility that the potential jurors themselves may be unaware of their own prejudices.[150] Thus, in order to be able to accurately asses a juror's claim of impartiality, the trial judge must have the opportunity to observe the demeanor of the juror while that juror verbally answers questions.

Furthermore, although requiring jurors to verbally answer

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145 The majority states that "[t]he trial judge's function at this point in trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions." *Mu'Min*, 111 S. Ct. at 1904 (citing *Rosales-Lopez*, 451 U.S. at 188).

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

147 *Id.* (Kennedy, J., dissenting).

148 This view, as does Justice Marshall's dissent, rejects Justice O'Connor's contentions as expressed in her concurence. *Id.* at 1901 (O'Connor, J., concurring).

149 Justice Marshall pointed out that it was Justice O'Connor, in Smith v. Phillips, 455 U.S. 209, 221-222 (1982), who stated that "[a] juror may have an interest in concealing his own bias . . . [or] may be unaware of it." *Mu'Min*, 111 S. Ct. at 1913 (Marshall, J., dissenting).

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

questions as to their impartiality would give the trial judge a basis to evaluate a juror's credibility, such a requirement alone would not be sufficient. Initially, it would seem axiomatic that the greater the depth of the questions, the greater the opportunity to observe demeanor and the greater the quantum of information available to enable the trial judge to make an accurate assessment of credibility. Moreover, although it is crucial that the trial judge have this opportunity, it is equally crucial that the trial judge be aware of precisely what prejudicial information the juror has read or seen. Although a judge, by virtue of his or her experience and position, may be presumed to have an understanding of the concept of impartiality as required by the Sixth Amendment, the average layperson may not have that understanding. As Justice Marshall noted, it is quite possible that average jurors will differ greatly in their understanding of this concept, and that the many jurors' definitions of impartiality may be inconsistent with the Constitution's impartiality requirement. Without the trial judge's knowledge of what information the perspective juror was exposed to, the judge has no understanding of the factors which that potential juror considered in assessing his or her ability to be impartial. When a trial judge allows the individual jurors to apply their own definition of impartiality to their assessment of their state of mind, the protection of the defendant's constitutional right to an impartial jury is, in effect, left in the hands of the jurors themselves. As Justice Marshall stated when writing for the majority in *Murphy v. Florida*[151], "[t]he juror's assurances that he is equal to the task cannot be dispositive of the accused's rights . . ."[152]

Moreover, as recognized by Justice Marshall in his dissent, the fact the trial judge sits in the locale where the publicity was focused bears only a tenuous relationship to his or her ability to assess juror claims of impartiality.[153] For example, in a case which has drawn extensive media coverage of both a prejudicial and a non-prejudicial nature, it is possible that a juror has been exposed only to the non-prejudicial publicity. Or perhaps the total media coverage of a particular case contained, on the whole, an equal balance of pro-defendant and anti-defendant information and sentiment, but a particular juror was exposed to an overwhelmingly greater amount of anti-defendant coverage. In either situation, the fact that the trial judge is aware of the total extent of the media coverage cannot assist him or her in the assessment of that juror's claim of impartiality.

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151 421 U.S. 794 (1975).

152 *Mu'Min*, 111 S. Ct. at 1913 (Marshall, J., dissenting) (citing *Murphy*, 421 U.S. at 800).

153 *Id.* at 1915-16 (Marshall, J., dissenting).

Thus, as Justice Marshall concludes, without specific information as to what the potential juror already knew about the case, a trial judge cannot realistically assess impartiality.[154]

C. THE BREAK WITH PRECEDENT

The majority spends a significant portion of its opinion discussing the ramifications of the cases involving the issue of whether or not a trial court is constitutionally required during voir dire examination to ascertain whether potential jurors harbor a racial or ethnic bias in cases where the defendant and the victim are of different racial or ethnic backgrounds.[155] It is interesting that the Court acknowledges that, in these cases, its practical concern was whether the failure to ask such questions was an infringement on the defendant's right to an impartial jury.[156] However, the Court fails to apply this concern to the facts of the *Mu'Min* case.

The majority's treatment of the racial bias cases also illustrates the second important flaw in the *Mu'Min* opinion: the significant break with precedent that the *Mu'Min* decision represents.[157] Although the majority used these cases to support its argument that the Constitution does not require content questions[158], a closer examination of the racial bias cases which the majority cited reveals that these cases actually support Mu'Min's position that he was deprived of his constitutional right to an impartial jury.

The Court cites the racial and ethnic bias cases to represent the proposition that the trial judge is to be given tremendous latitude and discretion in determining what sort of inquiry is required to ensure that potential jurors can evaluate the evidence brought out at

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

155 *Id.* at 1904-1906. The Court points to Aldridge v. United States, 283 U.S. 308 (1931) (in a case where the defendant was a black man charged with the murder of a white man, the trial court's refusal to permit examination of prospective jurors as to whether they had any racial prejudice which would prevent their giving an impatrial verdict was error and required reversal); Rosalas-Lopez v. United States, 451 U.S. 182 (1981) (an inquiry of prospective jurors as to racial or ethnic prejudices need be made only in cases where the defendant was accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups); Ham v. South Carolina, 409 U.S. 524 (1973) (in a case where the defendant was a black man, the trial court's refusal to make any inquiry of the jurors as to racial bias denied defendant a fair trial in violation of the Equal Protection Clause of the Fourteenth Amendment); Turner v. Murray, 476 U.S. 28 (1986) (in a capital case involving a charge of murder of a white person by a black defendant, questions as to racial bias must be asked).

156 *Mu'Min*, 111 S. Ct. at 1904.

157 *See supra* note 155.

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

trial with complete impartiality.[159] However, the manner in which the majority uses these cases is not fully representative of their holdings. It is true that the majority admits that these cases are also representative of the precedent that the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is "sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice" during voir dire examination.[160] However, the majority stresses as the more important principle to be derived from these cases that the trial judge's decisions regarding the scope of voir dire inquiry are entitled to great deference.[161]

A closer look at these cases demonstrates that they also represent two important themes which forecast the concerns of the pretrial publicity cases: first, that the court has traditionally been concerned that jurors who believed themselves to be impartial and unprejudiced might nevertheless hold less conscious biases which could compromise their ability to judge the cases solely on the facts elicited at trial[162]; and second, that such biases are more likely to surface in cases where the defendant has a high profile in the community[163].

While the *Mu'Min* majority includes a perfunctory mention of *Turner v. Murray*[164] to stand for the proposition that a trial judge in a capital murder case involving a black defendant and a white victim is constitutionally required to question potential jurors about their possible racial prejudices, the holding in *Turner* actually goes further. In *Turner*, the defendant was a black man who was convicted and sentenced to death for fatally shooting the white proprietor of a jewelry store during the course of a robbery.[165] The trial court refused petitioner's request to question prospective jurors on whether or not they held racial biases.[166] The Supreme Court reversed and remanded the sentencing portion of the case.[167] The Court held

159 The majority points particularly to Rosales-Lopez v. United States, 101 S. Ct. 1629, 1634 (1981), to support this proposition. *Mu'Min*, 111 S. Ct. at 1904.

160 *Mu'Min*, 111 S. Ct. at 1904.

161 *Id.*

162 Turner v. Murray, 476 U.S. 28, 34 (1986) ("More subtle, less consciously held racial attitudes could also influence a juror's decision . . .").

163 Ham v. South Carolina, 409 U.S. 524 (1973) (In a case where the defendant was a black man and a well-known civil rights activist, the trial court's refusal to make any inquiry of the jurors as to racial bias denied defendant a fair trial in violation of the Equal Protection Clause of the Fourteenth Amendment.).

164 476 U.S. 28 (1986). *See supra* notes 155, 162.

165 *Turner*, 476 U.S. at 30.

166 *Id.* at 31.

167 *Id.* at 38.

that in a capital murder case, there is a "unique opportunity for racial prejudice to operate but remain undetected. . . . More subtle, less consciously held racial attitudes could also influence a juror's decision in this case."[168]

The majority in *Turner* stressed that a juror's profession of impartiality without specific questioning on the source of possible biases was insufficient in a capital murder case to preserve the defendant's constitutional right to an impartial jury.[169] Specifically, the *Turner* Court emphasized that the danger to the defendant was from "less consciously held" biases.[170] By holding that the trial court must question potential jurors on the possibility of these biases, the *Turner* Court necessarily implies that it is the responsibility of the trial judge to determine, from the demeanor of the potential jurors, whether they held such unconscious racial biases and whether their professions of impartiality could be believed. While the *Mu'Min* majority does discuss, in the context of pretrial publicity, the importance of the role of the trial judge in determining whether or not a juror's professions of impartiality are to be believed[171], it does not touch upon the specific aspect of the *Turner* decision which focuses upon the possibility of latent biases held by potential jurors. Such latent biases have the possible effect of depriving the defendant of his or her constitutional right to an impartial jury.

It is significant that the majority failed to address the issue of latent biases, as the danger of latent biases would seem to be just as great, if not greater, in cases dealing with possible biases formed as a result of pretrial publicity. This stems from the fact that the concept of racial or ethnic bias is generally understood in today's society; indeed, it is somewhat of a societal stigma to harbor racial or ethnic biases. However, having formed an opinion with respect to a set of facts based on what one has read in a newspaper or seen on television attaches no comparable societal stigma, and in fact may not be considered by many to be a "bias" at all. As the definition of "bias" in the context of pretrial publicity is likely to be less understood and less recognized than the concept of racial bias, there is a greater opportunity for confusion about this definition to affect potential jurors' responses to the question of their ability to remain impartial.

The majority also failed to deal, in the context of racial bias,

168 *Id.* at 35.
169 *Id.* at 36.
170 *Id.* at 35.
171 Mu'Min v. Virginia, 111 S. Ct. 1899, 1904 (1991).

with the issue of how a defendant's reputation affects potential jurors' ability to remain impartial. While the *Mu'Min* Court gave perfunctory mention to *Ham v. South Carolina*[172], the Court relied upon the holding in this case to support the proposition that the trial judge is to be given significant deference in determining the necessity of such questioning during voir dire. However, the majority only barely touched upon the most significant holding of the *Ham* case: that a defendant is constitutionally entitled to have the potential jurors questioned as to their racial biases.[173]

The petitioner in *Ham*, a well known civil rights activist in the area, was convicted of possession of marijuana in violation of state law.[174] During voir dire, his counsel requested that two questions be asked regarding potential racial prejudices, fearing that his reputation as a civil rights activist would necessarily elicit such biases if they existed.[175] The Court recognized that the defendant's concern was an important and substantial one, and held that the trial court was constitutionally required to have the jurors interrogated on the possibility of racial biases.[176]

It is quite significant that the *Ham* Court acknowledged that the petitioner's high profile in the community was "likely to intensify any prejudice that individual members of the jury might harbor."[177] Thus, although the *Mu'Min* Court did eventually concede that a petitioner who had been the subject of pretrial publicity and thus had a high profile in the community was in danger of being judged by a biased jury lest appropriate measures be taken during voir dire to ascertain the juror's impartiality[178], it is notable that the majority neglected to emphasize this facet of the *Ham* decision.

Therefore, although the majority used *Turner* and *Ham* to support the proposition that the trial court should be given significant discretion in directing voir dire and determining juror impartiality[179], these cases actually undermine the majority's position and give considerable support to the propositions asserted by Mu'Min.

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172 *Id.* at 1904 (citing Ham v. South Carolina, 409 U.S. 524 (1973)).

173 *Ham*, 409 U.S. at 527.

174 *Id.* at 524.

175 *Id.* at 525-26. The defendant also asked that one question be asked regarding potential prejudices against persons, such as the petitioner, who wore beards. The *Ham* Court rejected the contention that potential jurors were required to be questioned as to their prejudices against bearded persons. *Id.*

176 *Id.* at 527.

177 This was pointed out by the majority in Ristaino v. Ross, 424 U.S. 589, 597 (1976).

178 This conclusion is implicit in the majority's discussion of Irvin v. Dowd, 366 U.S. 717 (1961). Mu'Min v. Virginia, 111 S. Ct. 1899, 1907 (1991).

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

First, *Ham* suggests that in cases where the defendant is likely to have a high degree of recognition in the community, the danger is greater that he or she will be deprived of the right to an impartial jury.[180] In addition, *Turner* implies that in any case involving the possibility of juror bias, there exists the possibility of latent or unconscious biases and that it is the responsibility of the trial court to uncover such biases.[181]

Moreover, the possibility of latent biases has been recognized by the Court in the specific context of pretrial publicity. As Justice Clark stated in writing for the majority in *Irvin v. Dowd*,[182] "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. . . . 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."[183]

Another crucial factor which was not acknowledged by the *Mu'Min* majority, as Justice Marshall emphasized in his dissent, is the established precedent that the defendant's right to an impartial jury necessarily includes the opportunity to prove juror bias.[184] This principle was reaffirmed as recently as 1981, in *Chandler v. Florida*.[185] In *Chandler*, the defendants were convicted of various theft crimes at a jury trial, which was partially televised.[186] The petitioner claimed that as a result of the television broadcast, his right to an impartial jury was compromisied.[187] The Court held that "the appropriate safeguard against such prejudice is the defendant's right

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180 This suggestion is implied by the *Ham* decision by the fact that in its opinion, the Court pointed to the fact that the petitioner was "well known locally for his work in . . . civil rights activities . . . ." *Ham*, 409 U.S. at 525.

181 *See* Turner v. Murray, 476 U.S. 28, 35 (1986) ("More subtle, less consciously held racial attitudes could also influence a juror's decision in this case . . . By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury.").

182 366 U.S. 717 (1961) (In a case which engendered significant pretrial publicity, it must be established that each juror can lay aside his impression or opinion and render a verdict based solely on the evidence presented at trial.).

183 *Id.* at 728.

184 "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Mu'Min v. Virginia, 111 S. Ct. 1899, 1913 (1991) (Marshall, J., dissenting) (citing Dennis v. United States, 339 U.S. 162, 171-172 (1950)). *See also* Murphy v. Florida, 421 U.S. 794, 800 (1975): " [I]t 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,' " (citing *Irvin*, 366 U.S. at 723).

185 449 U.S. 560, 575 (1981).

186 *Id.* at 568.

187 *Id.* at 567.

to demonstrate that the media's coverage of his case - be it printed or broadcast - compromised the ability of the particular jury that heard the case to adjudicate fairly."[188]

Furthermore, the majority's treatment of the cases involving the issue of pretrial publicity represents a notable break with precedent. The primary support for the majority's denial of the constitutional requirement of content questioning lies in their assessment that the trial judge, who sits in the locale where the publicity had its strongest effect, is uniquely qualified to evaluate any juror's claims of impartiality in light of his own perception of how that publicity might influence a juror, and thus should be afforded significant discretion in directing voir dire inquiry.[189] Based on this principle, the majority addresses precedent set by the Court which deals with the issue of voir dire requirements in cases which engendered significant pretrial publicity.[190] To make the determination that the trial judge was correct in his determination that content questions were not required in the *Mu'Min* trial, the majority examines the decisions in *Irvin v. Dowd*[191] and *Patton v. Yount*[192]. However, the decisions in *Patton* and *Irvin*, upon closer examination, do not fully support the majority's decision.

In *Irvin*, the petitioner was convicted of murder and sentenced to death.[193] The murder was one of six murders committed in a small Indiana community during a two year period, and was surrounded by a considerable amount of media coverage, including press releases by the police stating that the petitioner had confessed to the murders.[194] Due to the publicity, the defendant's motion for a change of venue was granted, but only to the adjoining county.[195]

On appeal to the Supreme Court, the petitioner asserted that the statute had deprived him of his constitutional right to an impartial jury.[196] The Court admitted that in modern society, with its

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188 *Id.* at 575.

189 Mu'Min v. Virginia, 111 S. Ct. 1899, 1906 (1991).

190 *Id.*

191 366 U.S. 717 (1961). *See supra* note 182.

192 467 U.S. 1025, 1031 (1984) ("[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.").

193 *Irvin*, 366 U.S. at 718.

194 *Id.* at 720.

195 *Id.* This county had also been exposed to significant pretrial publicity, and although the defendant requested another change of venue, his motion was denied due to an Indiana statute which permitted no more than one change of venue. *Id.* Eight of the jurors eventually seated had already formed an opinion as to the petitioner's guilt. *Id.* at 728.

196 *Id.* at 719.

widespread and diverse methods of communication, it would be unrealistic to expect that potential jurors be completely insulated from pretrial publicity.[197] However, the Court reversed the conviction, holding that in cases involving pretrial publicity, it must be established that the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.[198] The Court emphasized that "the test is whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality."[199] Finally, the *Irvin* Court stressed the grave nature of the jury's duty in capital murder trials, concluding that "[w]ith 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 . . . ."[200]

The *Mu'Min* majority ignores the similarities between the two cases, and concludes only that "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*."[201] However, there are significant similarities between *Irvin* and *Mu'Min*. In both cases, the publicity was intensified by special circumstances surrounding the murder. In *Irvin*, the situation was particularly macabre, as the murder was one of six murders committed by the defendant, and several of the victims had been members of the same family.[202] Similarly, in *Mu'Min*, because of the publicity surrounding the Willie Horton incident and the 1988 presidential campaign, the case became a highly politicized issue, as it came to be seen as representative of the evils associated with the furlough program in Virginia.[203] While the shock and horror of the *Irvin* case contributed to the likelihood that it would remain embedded in the minds of potential jurors, the fact that the *Mu'Min* case came to represent a larger political issue contributed to the same likelihood.[204]

Oddly, the majority cites *Patton v. Yount*[205] to stand for the proposition that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that

197 *Id.* at 722.

198 *Id.* at 723.

199 *Id.*

200 *Id.* at 728.

201 Mu'Min v. Virginia, 111 S. Ct. 1899, 1907 (1991).

202 *Irvin*, 366 U.S. at 726.

203 *Mu'Min*, 111 S. Ct. at 1910 (Marshall, J., dissenting).

204 Indeed, the case became the subject of heated local debate, involving several local authorities and administrators. *Id.* at 1912 (Marshall, J., dissenting).

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

they can be impartial should not be believed."[206] However, the majority goes on to assert that while such a presumption was clearly created in *Irvin*, it was not created in *Mu'Min*.[207] It is interesting that the majority neglected to discuss the *Patton* case in detail, as it is a case in which substantial pretrial publicity was held not to have effected the juror's impartiality. A closer look at *Patton*, however, demonstrates that the majority ignored significant aspects of that decision which support Mu'Min's position.

The defendant in *Patton*, a high school mathematics teacher, was convicted of the murder of one of his students, a young girl.[208] The case engendered a great deal of sensationalized pretrial publicity.[209] The conviction was overturned, however, because the police had given the defendant inadequate notice of his right to an attorney prior to his confession.[210] On remand, four years later, the defendant requested a change of venue due to the publicity.[211] The trial court denied this request, and the defendant was found guilty of murder.[212] On appeal, the defendant asserted that because the request for a change of venue was not granted, he was denied an impartial jury.[213] The Supreme Court upheld the trial court's decision, reasoning that the bulk of the publicity, which it admitted had been substantial, had faded in the minds of the community and of the potential jurors, and thus no longer posed a danger of biasing jurors.[214]

The clear implication of the *Patton* holding is that had the second trial been closer in time to the crime and thus to the force of the publicity, the jurors' claims of impartiality would have been less credible. Thus, the defendant would have been deprived of his constitutional right to a fair trial. In *Mu'Min*, however, there was no such time lapse,[215] and therefore no such opportunity for the softening of community sentiment. Moreover, even if there had been such a time lapse, the highly politicized nature of the publicity surrounding the *Mu'Min* case might have caused some of the prejudicial information contained in it to remain in the minds of the

206 *Mu'Min*, 111 S. Ct. at 1907 (citing *Patton*, 467 U.S. at 1031).
207 *Id.*
208 *Patton*, 467 U.S. at 1027.
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.* at 1028.
214 *Id.* at 1032.
215 Mu'Min v. Virginia, 111 S. Ct. 1899, 1901 (1991).

community longer than that information contained in reports about other murder cases.

Not only does the majority misrepresent the holdings of the cases it cites which involve voir dire in highly publicized cases, but it also conspicuously ignores two other relevant Supreme Court decisions which deal with this issue, *Sheppard v. Maxwell*[216] and *Rideau v. State of Louisiana*[217]. Both of these cases are highly inconsistent with the *Mu'Min* facts and decision.

In *Rideau*, the defendant was accused of murder, kidnapping, and armed robbery.[218] On the day after the defendant was apprehended for the murder, an "interview" of the defendant was conducted by the sheriff.[219] During this interview, the defendant admitted to the kidnapping, the robbery, and the murder.[220] The interview was filmed, and broadcast on television each day for the next three days.[221] It was estimated that at the very least, one third of the population of the community in which the crime took place saw the broadcast.[222] However, the trial court denied the defendant's request for a change of venue.[223] The defendant was then tried and found guilty.[224] The *Rideau* court, in reversing the conviction, held that the defendant had a right to be tried in a community which had not been exposed to the repeated television broadcast of his confession.[225] Specifically, the court stressed that the defendant had the right not to be subjected to "trial by ordeal."[226]

Although there was no repeated television broadcast of an incriminating interview in the *Mu'Min* case, it was reported in the press that Mu'Min had confessed to the murder, even though he had not actually done so.[227] To compound this irresponsible journal-

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216 384 U.S. 333 (1966) (the failure of a state trial judge in a murder prosecution to protect the defendant from inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom deprived the defendant of his constitutional right to a fair trial).

217 373 U.S. 723 (1963) (a trial court's refusal of a request for a change of venue was a denial of due process in a case where a movie was made of an interview in jail between the sheriff and the defendant in which the defendant, in which the defendant, in response to leading questions, admitted to murder and other crimes, and the movie was televised several times to tens of thousands of people).

218 *Id.* at 724.

219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.* at 726.

226 *Id.*

227 It was reported in an article in the WASHINGTON POST that,

ism, it was also widely reported that high ranking city and state officials were convinced of his guilt.[228] However, the only mention of this fact in the majority opinion was that the press reported "indications" that Mu'Min had confessed to the murder.[229]

The *Mu'Min* majority emphasized that the circulation of the newspapers in which many of these articles appeared was limited[230]. However, as the trial court did not allow content questions to be posed to the potential jurors, it was never determined whether the jurors eventually seated had read these articles. Furthermore, while the majority acknowledged that many of the prejudicial articles appeared in the Washington Post, a national newspaper with a significant circulation, it blatantly ignored that as such, there existed a

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Dawud Mu'Min, 36, who has been charged with capital murder in the Sept. 12 beating and stabbing of Gladys K. Napwasky of Woodbridge, said he stabbed her 'and had gotten blood on his clothing and hands,' according to an affidavit for a search warrant filed in the case.

Pierre Thomas, *Inmate Said to Admit to Killing Convict Charged in Fatal Stabbing of Dale City Storekeeper* , WASHINGTON POST, Oct. 7, 1988, at C3. Another WASHINGTON POST article reported the following:

Dawud Mu'Min, the convicted murderer accused of killing a Woodbridge woman last September after walking away from his highway department job, told Prince William County police that he stabbed the woman, according to court documents made public yesterday.

"I stabbed her twice," Mu'Min, who was in a prison program for trustworthy inmates, told investigator David Watson, according to a transcript of the interview filed in Circuit Court by county prosecutors.. . .

In the Sept. 30 interview with Watson, Mu'Min, also known as David Michael Allen, at first said he had walked into Napwasky's store as someone else was assaulting her, but after repeated questioning in which Watson termed that scenario "unbelievable," Mu'Min said he had stabbed her.

"I started asking her questions," Mu'Min, 36, said near the end of the interrogation. "She got insulted because I told her that the prices were stupid. She started calling me names . . . and then I stabbed her twice."

John F. Harris, *Suspect Describes Fatal Dale City Stabbing*, WASHINGTON POST, Dec. 7, 1988, at A9.

228 It was reported by the United Press International that Prince William Commonwealth's Attorney Paul Ebert stated that " '[i]t's almost inconceivable that a convicted murderer would be left alone or at least unguarded in this jurisdiction, or any other jurisdiction . . . and be able to commit a crime of this nature or any other crime.' " *Inmate Indicted in Dale City Murder*, U.P.I., Oct. 3, 1988, Regional News.

It was also reported by the United Press International that "[o]n Sept. 22, police said a convicted murderer slipped away from his job and raped and murdered a Dale City businesswoman." The report went on to name Mu'Min. *Virginia News Briefs*, U.P.I. Oct. 19, 1988, Regional News.

The Washington Post, in an article about the case, reported that Ebert stated that: "[t]o put a person who has committed a violent crime in a position where he can commit another crime of violence is almost unheard of . . . Some people aren't going to be rehabilitated." Pierre Thomas, *Virginia Inmate Charged in Store Slaying; Convicted Killer Was in Trusty Program*, WASHINGTON POST, Oct. 4, 1988, at B1.

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

230 The majority opinion pointed out that more than half of the articles about the Mu'Min case appeared in the Potomac News, a newspaper with a circulation of only 25,000. *Id.* at 1901, n.1.

substantial probability that a large percent of the potential jurors had been exposed to these articles.[231] Moreover, as the defendant's motion for a change of venue was denied, the probability that potential jurors had been exposed to these articles was greatly increased.

Another significant case ignored by the majority involving the effect of pretrial publicity on potential jurors is *Sheppard v. Maxwell*.[232] In *Sheppard*, the defendant was a prominent physician in the community who was accused of the murder of his wife.[233] The case was surrounded by a barrage of prejudicial publicity, and the trial itself was extensively reported in the media.[234] In fact, every juror seated, with the exception of one, testified to having been exposed to this publicity.[235] The defendant was found guilty and convicted of murder.[236] In reversing the conviction, the *Sheppard* Court held that the trial judge had failed to perform his duty to protect the defendant from the "inherently prejudicial publicity which saturated the community."[237] The Court stressed that "[t]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."[238]

It is interesting to note that in *Sheppard*, defense counsel requested that the jurors be asked whether they had heard or read specific prejudicial comment about the case, and the trial court denied that request.[239] The *Mu'Min* court was no doubt aware of the facts of *Sheppard*, if only for the fact that the case was cited in the petitioner's brief.[240] Yet even so, *Sheppard* was not mentioned in the *Mu'Min* majority opinion.

Thus, the *Mu'Min* decision represents a significant break with precedent regarding both voir dire inquiry into juror bias and the possible prejudicial effects of pretrial publicity.

V. Conclusion

The *Mu'Min* decision gives an enormous degree of latitude to the trial judge in directing voir dire and ensuring an impartial panel of jurors. The specific danger that results from this is that trial

231 *Id.*
232 384 U.S. 333 (1966).
233 *Id.* at 335.
234 *Id.* at 338-340.
235 *Id.* at 345.
236 *Id.* at 349.
237 *Id.* at 363.
238 *Id.*
239 *Id.* at 348-349.
240 Brief for Petitioner, *supra* note 18, at 140.

judges are given no guidance whatsoever on the issue of what type of inquiry is appropriate when dealing with jurors' exposure to pretrial publicity. At the very least, the majority could have imposed a requirement that the jurors verbally proclaim their ability to be impartial. Such a requirement would ensure that a trial judge be given the opportunity to observe a juror's demeanor. Thus, the trial judge would have a basis on which to form a belief as to the credibility of such a juror's claims. However, the *Mu'Min* Court failed to impose even this minimal requirement. As a result, the potential for abuse in this area is significantly increased.

The determination in this case that content questioning is not constitutionally required is a serious blow to a defendant's constitutional right to prove juror bias and to be tried by an impartial tribunal. Given the abundance of publicity surrounding the *Mu'Min* case and its particularly harsh prejudicial nature, the Court's use of this case as a vehicle for the denial of content questioning is improper. It is clear, based on precedent, that Mu'Min's constitutional rights were compromised. The fact that in today's age of modern communication it is impractical to hope for a panel of jurors who are completely unexposed to information about a highly publicized crime makes it all the more imperative that extensive measures be taken to safeguard the requirement that a defendant be judged only on the facts and evidence presented at trial. While it is impractical and unconstitutional to attempt to control the spread of information through the media, content questioning would seem to provide a practical way to balance both important considerations.

However, it would seem unnecessarily intrusive to require content questioning in every case which has been surrounded by any measure of pretrial publicity. With the widespread availability of news and television media, it is unlikely that any crime, let alone any murder, will be insulated from media coverage, even if that coverage is minimal. The question that must be answered in every case is whether that media coverage has reached the point where it is likely to have the effect of biasing potential jurors. The majority's refusal to impose a constitutional requirement of content questions in every case engendering publicity may have been a practical way of dealing with administrative overcrowding; however, its unequivocal denial of that right in every case is a blatant infringement on a criminal defendant's constitutional right to an impartial jury. It is imperative that a compromise be reached on this issue, and that realistic guidelines be set forth to determine at which point pretrial publicity becomes a danger to the defendant's constitutional rights. It is clear,

however, that in the *Mu'Min* case, that danger point was not only reached, but significantly surpassed.

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