

# Selecting Juries in High Profile Criminal Cases

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**O.J.** SIMPSON. Timothy McVeigh. The Menendez Brothers. We are all too familiar with the names, the crimes, and the trials of America's most recently famed criminals – as well we should be in light of the extraordinary press and public attention afforded these high profile criminal trials. As Americans we pride ourselves on the free flow of information that arises out of the rights of free speech and press protected under the First Amendment. But to what extent the First Amendment rights of the public press and private individuals rob criminal defendants of their constitutional right to a fair trial<sup>1</sup> and what remedies best protect criminal defendants' right to a fair trial without infringing upon freedom of the press are questions that have yet to receive a clear answer.

## THE PROBLEM: A FREE PRESS V. A FAIR TRIAL

Freedom of press is fundamental to our democracy. Freedom from government restrictions on the media's ability to report information to the public is one of the critical safeguards established to defend against an overbearing government.

The current era has not been referred to as the Information Age for nothing. Today's technology is a reflection not merely of our desire and demand for information, but of our public right to report and receive it. Information on crimes, those who commit them, and the punishment those individuals receive will always be at the forefront of public interest. Current technology allows reports of evidence and other trial-related information, as well as

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<sup>1</sup> For a more in-depth analysis of this issue please see Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial By Applying the Sheppard-Mu'Min Remedy*, 69 SO. CAL. L. REV. 1587 (1996).

the trial itself, to be broadcast instantaneously to a worldwide audience. But with more advanced means of reporting information on high profile criminal trials, attention has focused on whether the rights of the media are unjustly weighing more heavily on the scales of justice than the rights of criminal defendants in the limelight to receive a fair trial.

Although the United States Constitution does not require a perfect trial, it does require a fair one. Yet, the same Constitution also establishes the quintessential right of freedom of the press. Thus, courts are continuously faced with the difficult, yet critical, task of ensuring that high profile criminal defendants receive a fair trial without infringing on the media's First Amendment right of freedom of the press.

Various remedies, such as *voir dire*, jury sequestration, change of venue, and postponement have been implemented in attempts to mitigate the prejudicial effects of publicity on high profile defendants' right to a fair trial. However, as will be discussed, although these remedies are constitutionally sound, they have ultimately proved impractical and unworkable in light of their extreme costs and questionable value to preserving defendants' right to a fair trial.

In spite of the shortcomings and resulting failure of the aforementioned currently applied remedies, there need not be a "winner" and a "loser" in the tug-o-war between the media's right to free press and the criminal defendant's right to a fair trial. Rather, there exists an effective remedy that preserves an equitable balance among the competing interests. This resolution will be referred to as the *Sheppard-Mu'Min* remedy: the proper balance between free press and fair trial can be obtained by issuing a gag order on the trial

participants as recommended by the Supreme Court in *Sheppard v. Maxwell*<sup>2</sup> and by conducting *voir dire* in accordance with the guidelines set forth in *Mu'Min v. Virginia*.<sup>3</sup>

## PRIOR RESTRAINT: AN IMPERMISSIBLE REMEDY

Some of the constitutionally available remedies are ineffective and thus undesirable. One extremely effective remedy is to enjoin the press from publishing any information about a high profile case, but that remedy is prohibited because it is a prior restraint on expression. A discussion of the tension between free press and fair trial warrants an explanation as to why prior restraint constitutes a constitutionally unavailable remedy.

### Supreme Court Decisions

Although the trial judge has the discretion to take action to preserve the defendant's right to a fair trial, the question of which actions are permissible is determined by examining the action's fairness to the defendant and to the press. The Supreme Court has clearly stated that prior restraints are not permissible in open trial proceedings.

In *Nebraska Press Ass'n v. Stuart*,<sup>4</sup> the Supreme Court set forth a three-factor balancing test to determine whether it is constitutionally permissible for a judge to restrain press coverage through judicial order, that is, to place a "prior restraint" on the press, in a criminal trial setting: 1) the nature and extent of pretrial news coverage, 2) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity, and 3) how effectively a restraining order would operate to prevent the threatened danger. Under the second prong of this test, as long as there are

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<sup>2</sup> 384 U. S. 333 (1966).

<sup>3</sup> 500 U. S. 415 (1991).

<sup>4</sup> 427 U. S. 539 (1976).

alternative means available, prior restraints on media coverage will never be a constitutional option for protecting the defendant's right to a fair trial.

Narrowing the *Nebraska Press Ass'n* decision, the Supreme Court in *Gannett Co. v. DePasquale*<sup>5</sup> upheld the closing of a pretrial suppression hearing to the public and the press. The Court reasoned that, "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."<sup>6</sup> However, after contradictory interpretations of *Gannett* and increasing criticism of the decision, the Court changed its position in *Richmond Newspapers, Inc. v. Virginia*,<sup>7</sup> stating affirmatively that the Constitution does guarantee the right of the public and the press to attend criminal trials. Chief Justice Burger's opinion distinguished *Gannett* on the basis that it involved a pretrial suppression hearing, not a criminal trial. Furthermore, he concluded that, "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated."<sup>8</sup>

Subsequent cases have upheld and expanded the public's and the media's rights of access to criminal trials. For example, in *Press-Enterprise Co. v. Superior Court*,<sup>9</sup> the Supreme Court held that a courtroom may be closed for a pretrial proceeding only by establishing both that there is a substantial probability that the defendant will suffer prejudice from an open proceeding and that reasonable alternatives to closure will not preserve the accused's right to

an unbiased jury.

When one reviews the Supreme Court decisions, it becomes clear that closing the courtroom to the press and public generally is not a permissible remedy for a high profile criminal defendant. As a practical matter, the three factors established in *Nebraska Press Ass'n* as necessary for a prior restraint will rarely be satisfied. Consequently, courtrooms are not likely to be closed to the press and public.

### Restricting Television Coverage

Although the issue has never been addressed directly, it appears that banning television cameras from a courtroom would not constitute an unconstitutional prior restraint. The case *Chandler v. Florida*<sup>10</sup> established that states are free to permit electronic media to cover criminal trials and that doing so does not in and of itself deny the defendant the right to a fair trial. However, *Chandler* did not create an affirmative right to televise trials. The Supreme Court further held in *Chandler* that the trial judge could remove television cameras from the courtroom where the defendant could show that media coverage of his case would unduly prejudice him by compromising the ability of the jury to judge him fairly.<sup>11</sup> Thus, this decision supports the contention that states have the authority to fashion rules determining whether or not televised coverage is permitted.

California, for example, has enacted Rule 980, which states in part: "The court may refuse, limit, or terminate film or electronic media coverage in the interests of justice to protect the rights of the parties and the dignity of the court, or to assure the orderly

5 443 U. S. 368 (1979).

6 *Id.* at 391.

7 448 U. S. 555 (1980).

8 *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 655, 681 (1972)).

9 478 U.S. 1 (1986).

10 449 U.S. 560 (1981).

11 *Id.*

conduct of the proceedings.”<sup>12</sup> This rule is phrased in terms of protecting the criminal defendant’s right to a fair trial and not whether restrictions on television coverage of trials constitute an unconstitutional prior restraint on the media. The rule seeks to protect the criminal defendant’s right to a fair trial, but the rule does not address the impact on the public’s right to see the trial. The constitutionality of a rule that does not even attempt to balance those competing rights is doubtful.

The issue of television cameras in federal courtrooms has been more clearly resolved. Television cameras have always been forbidden in federal courtrooms. This position was most recently reaffirmed by the Judicial Conference in 1994.

In sum, although prior restraints on the media constitute an impermissible remedy for high profile criminal defendants seeking to preserve their right to a fair trial, general federal and state restrictions on televising criminal trials do not appear to fall within the scope of impermissible restraints. Consequently, restrictions on televised coverage may be a proper means, in some circumstances, to mitigate the prejudicial effects of publicity on a high profile defendant’s right to a fair trial.

### CONSTITUTIONALLY SOUND REMEDIES THAT FALL SHORT OF AN EFFECTIVE SOLUTION

There are a number of alternatives to prior restraint available to high profile criminal defendants that do not run afoul of the First Amendment. These remedies include *voir dire*, jury sequestration, change of venue, and postponement. However, these remedies suffer from a variety of shortcomings and ultimately

prove unworkable. Moreover, the costs incurred from the use of these remedies often significantly outweigh their ability to mitigate the prejudicial impact of high publicity on a defendant’s right to a fair trial.

#### *Voir Dire*

The term refers to the routine questioning of potential jurors in order to gauge their competence and potential bias. The theory behind *voir dire* is that any prejudice can be eliminated from the jury pool once elicited by the defense counsel’s questions. If a potential juror demonstrates bias, either the defense or prosecution may challenge that juror “for cause.” Furthermore, counsel on both sides may exercise a limited number of peremptory challenges, which they can use to disqualify potential jurors without any legal basis, sometimes relying on information elicited during *voir dire*.

The complexity of addressing and eliminating jury bias in high profile cases has been illustrated by the varying standards announced by the Supreme Court on how to deal with the issue. In *Irvin v. Dowd*,<sup>13</sup> the Court established the Fourteenth Amendment “presumption of prejudice test.” This two-part test requires a court to assess both the environment surrounding the trial for evidence that the entire community is tainted by the media, and the *voir dire* testimony to determine if the empaneled jurors as a group harbor prejudice. Subsequently, in *Murphy v. Florida*,<sup>14</sup> the Supreme Court issued the Sixth Amendment “totality of the circumstances” test. Pursuant to this test, a trial court must look for “any indications in the totality of the circumstances that the petitioner’s trial was not fundamentally fair.”<sup>15</sup>

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<sup>12</sup> CAL. R. CT. 980(b) (1995).

<sup>13</sup> 366 U.S. 717 (1961).

<sup>14</sup> 421 U.S. 794 (1975).

<sup>15</sup> *Id.* at 799.

The problem with attempting to eliminate jury bias in high profile cases through *voir dire* is that, as it is currently used, the goal becomes to empanel jurors who have absolutely no knowledge or have formed no opinion of the case. Consequently, the process of *voir dire* in high profile cases has evolved into countless hours of content-based questioning, in an attempt to eliminate potential jurors based on which media reports and how much press they have been exposed to and whether or not they have already formed opinions about the case. The time and effort spent on this type of questioning is insane. In a high profile criminal case at the center of a mass media frenzy, finding a citizen with no knowledge of the case is next to impossible, not to mention highly undesirable. And what breathing, conscious human being does not form some opinion following a news report involving a heinous crime?

Even if it were possible to locate individuals who had not heard the publicized reports and formed an opinion, such individuals, acting as ostriches with their heads buried in the sand, should not be on a jury at all. The fundamental aspect of a jury is that it represents the conscience of the community within the judicial process. People who have not been impacted by high profile news reports would fall so far out of the mainstream of American life that they are incapable of bringing the community perspective to the courtroom.

Thus, in high profile criminal cases too much time and effort is wasted during the *voir dire* process seeking the unachievable, that is, ignorant, as opposed to impartial, jurors. In addition, a high profile defendant receives little benefit in terms of preserving his right to a fair trial by painstakingly focusing questioning during *voir dire* on locating jurors who have not been exposed to media reports or who have not formed any opinion. Moreover, em-

paneling an ignorant juror could even further disadvantage a defendant seeking to receive a fair trial because the jury will fail to serve the representative function we count upon it to perform.

### Jury Sequestration

Sequestering a jury involves restricting the jurors' access to extra-judicial information in the hopes that the jury will reach a verdict based solely on the evidence presented at trial.

However, jury sequestration is a prime example of a remedy whose costs almost always outweigh the potential for reducing prejudice to the defendant. The fiscal costs of sequestration include room, board, and entertainment for the jurors. In trials extending over a long period of time, these costs can be exorbitant. For example, sequestering the jury in the Simpson case for 266 days cost Los Angeles County \$2,985,052.<sup>16</sup>

Furthermore, sequestration imposes tremendous burdens, both practical and emotional, on jurors by taking them away from their homes, families, and friends for an extended period of time. One juror in the Charles Manson case, after being sequestered through the 1970 winter holiday, attempted suicide. A juror in the Simpson case sought dismissal due to the tremendous toll sequestration was taking on her; two days after her dismissal she had a seizure. The possibility of facing these burdens significantly reduces the number of potential jurors who are willing to serve on juries. Also, frustrated and deprived jurors can be driven to hurry through deliberations or give up altogether, resulting in hasty judgments or a mistrial. Consequently, sequestration can decrease the potential for a fair trial.

Another example from the Simpson case of the failure of sequestration as a remedy was the jury revolt. Thirteen of the eighteen jurors

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<sup>16</sup> *Simpson Trial Record*, USA TODAY, Oct. 4, 1995, at 1A.

refused to go to court on their 101st day of sequestration. Jury revolts are an example of how lengthy sequestration can distract from the trial and focus attention on the social dynamics of the jurors' confinement.

Thus, jury sequestration is an impractical remedy due to the enormous financial and social costs it imposes on the jurors, which in turn, decrease a defendant's chance for a fair trial.

### Change of Venue

The goal of a change of venue is to move the trial to a location outside the area in which it has received the most publicity, where un-biased jurors may be located. However, due to technological advances, specifically instantaneous telecasts and widespread coverage, the likelihood of finding unbiased jurors in an alternate venue is diminished. Moreover, as with jury sequestration, the costs imposed by moving a trial to an alternative venue can be extreme, and many times are not offset by a reduction of the prejudicial impact of pretrial publicity.

For example, the trial of the four Los Angeles police officers for the beating of Rodney King was moved from Los Angeles to Simi Valley with the hope that the change of venue would result in a pool of potential jurors not affected by the publicity. However, this hope became impractical in light of the worldwide media attention and commentary given to the incident.

The trial of Timothy McVeigh for the Oklahoma City bombing is another example of instantaneous and widespread media coverage diminishing the utility of change of venue as a remedy in a high profile case. After McVeigh was arrested for the bombing, the media publicized that powder residue was found on McVeigh's clothing, that descrip-

tions from witnesses at the Ryder truck rental agency in Kansas resembled McVeigh, and that McVeigh's fingerprint was found on a receipt for the purchase of ammonium nitrate fertilizer.<sup>17</sup> Therefore, the change of venue from Oklahoma City to Denver did little if anything to significantly reduce whatever pretrial prejudice may have existed.

Furthermore, pursuant to a 1990 federal victims' rights law, the Justice Department is responsible for ensuring victims of the crime access to the criminal trial. Thus, federal funds were expended to transport victims to Denver and provide for their room and board. Also, the city of Denver incurred substantial costs in preparing for traffic, security, accommodations and courthouse logistics.

These costs could perhaps have been justified if the trial had been moved to a location where the residents were in fact unaware of the crime. But, since most high profile crimes of today capture public attention worldwide, such costs substantially outweigh the questionable value of change of venue as it concerns the defendants' right to a fair trial.

### Postponement

The theory behind postponement is that the publicity surrounding a high profile case will dissipate with the passage of time. However, postponement raises constitutional concerns over whether it violates a defendant's Sixth Amendment right to a speedy trial. Also, a delay in the proceedings can diminish the accuracy and reliability of the witnesses' testimony. Moreover, practically speaking, a delay may not be able to negate the effects of prejudicial publicity or quell the media's interest in the case.

Furthermore, postponement inevitably results in a backlog of cases. Even in regions where the number of high profile cases is

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17 David Jackson & Lee Hancock, *Trail of Evidence: Officials Mount Forensic Case in Oklahoma Bombing*, DALLAS MORNING NEWS, May 22, 1995, at 1A.

small, postponing a trial will still cause a backlog of cases in that jurisdiction. Moreover, the threat of backlog is even greater in counties such as Los Angeles, where it seems as though all cases are high profile media events.<sup>18</sup>

Thus, the costs associated with postponement, as well as the unsupported nature of the notion that time will fade the effects of pretrial publicity, almost always justify eliminating postponement as a remedy for defendants in high-publicity cases.

### THE SOLUTION:

#### THE SHEPPARD-MU'MIN REMEDY

The attempts to mitigate the adverse effects of pretrial publicity through the aforementioned alternative methods have not been effective. Although these alternative methods may be imposed without the threat of infringing upon the freedom of the press, their concurrent costs are often too high. Thus, the *Sheppard-Mu'Min* remedy is the best solution for striking the proper balance between the defendant's interest in a fair trial and the media's interest in informing the public. Under this remedy, trial courts impose a gag order on the trial participants from the beginning of the proceedings, and conduct *voir dire* in conformity with the standards set forth in *Mu'Min v. Virginia*.

#### Gag Order on Trial Participants:

##### *Sheppard v. Maxwell*

Gag orders on trial participants are a type of prior restraint, yet they do not violate freedom of the press because these gag orders restrict what the trial participants may say, not what

the press can report.

In 1966, in the case of *Sheppard v. Maxwell*,<sup>19</sup> the Supreme Court ruled that the trial judge's failure to protect Sheppard from prejudicial pretrial publicity denied him his right to a fair trial. The Court stated that the trial judge could have mitigated the prejudicial impact of the pretrial publicity by:

proscrib[ing] extrajudicial statements by any lawyer, party, witness or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or to take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.<sup>20</sup>

In spite of these restrictions, the press would remain free to report on any courtroom events.

Because in high profile cases both the defense and prosecution have incentives to address the media and circulate information favorable to their side, trial courts should impose a gag order restricting the communications of the trial participants immediately upon commencement of the proceedings. Accordingly, prosecutors, defense attorneys, police officers, court personnel and witnesses would be prohibited from discussing any aspect of the case with the media.

Imposing a gag order immediately after the defendant is taken into custody will significantly reduce the threat of media reports on "collected evidence," thereby preserving the defendant's right to a fair trial.

Because the First Amendment has been interpreted to grant the press free access only to

18 In the recent past, Los Angeles County has tried the Simpson case, two Menendez cases, the Heidi Fleiss case, the case of the "L.A. Four" beating of Reginald Denny, the case of the four Los Angeles police officers accused of beating Rodney King, the Night Stalker (Richard Ramirez) case, the Charles Keating (Savings and Loan Scandal) case, the John DeLorean case, and Christian Brando's murder trial.

19 384 U.S. 333 (1966).

20 *Id.* at 361.

the trial, and not to the trial participants, a gag order on the trial participants is the best way to stem the flow of prejudicial information without infringing upon the freedom of the press.

### Conducting *Voir Dire* With a New Focus: *Mu'Min v. Virginia*

The second half of the *Sheppard-Mu'Min* remedy imposes a more efficient method of conducting *voir dire* that will also result in a more representative jury.

The Supreme Court set forth a new standard for *voir dire* in *Mu'Min v. Virginia*.<sup>21</sup> In *Mu'Min*, the Court addressed whether a defendant has a constitutional right to ask content questions during *voir dire*. The Court ruled 5 to 4 that the Sixth Amendment does not require a judge in a well-publicized case to inquire about the amount and content of the media reports that each potential juror may have observed. Rather, it is sufficient that the trial judge ask potential jurors whether they have formed an opinion because of the reports from outside sources. Unless the adverse publicity and media justify a presumption of prejudice, the juror's declarations of impartiality may be believed.

Prior to the decision announced in *Mu'Min*, courts in high profile cases spent much time and effort trying to find a pool of potential jurors who had either not been exposed to media reports on the case, or who had not formed an opinion based on the information they had received about the case. However, as discussed earlier, not only is a sanitized jury not constitutionally required, it should not be sought because the jurors will be so far out of the mainstream that they cannot perform the representative function of juries.


Rather, *Mu'Min* focuses the decision to empanel a potential juror on whether or not that person maintains during *voir dire* that he

or she is able to render a fair verdict in spite of the external information he or she may have been exposed to. The *Mu'Min* standards speed up the process of *voir dire* since extensive questioning on the content and amount of publicity to which the potential juror was exposed becomes irrelevant.

The jury system in this country is founded upon trust. Members of the jury pool are trusted to answer questions regarding their potential prejudices truthfully and jurors are trusted to deliver verdicts based on the evidence presented at trial. Is it not a breach of that trust to believe that unless jurors are insulated from all media publicity they will be unable to render a verdict based solely on the evidence presented at trial? If society afforded more trust to the empaneled jury, the need for sequestration and its resulting costs would be eliminated, and the pool of potential jurors would be increased.

## CONCLUSION

The balance between the media's right to free press and the defendant's right to a fair trial is critical, but not impossible. Some constitutionally sound remedies are available but highly undesirable due to their high costs and trivial, if not non-existent, value in preserving a defendant's right to a fair trial.

The necessary and sufficient solution to maintaining the proper balance between the competing interests of the media and defendants in high profile cases is the *Sheppard-Mu'Min* remedy. This remedy directs trial courts to impose a gag order on trial participants immediately after the defendant is taken into custody, and to focus *voir dire* questioning on whether the potential juror could render a fair verdict in spite of the outside evidence to which he or she has been exposed, or the opinion which he or she has already formed. 

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<sup>21</sup> 500 U.S. 415 (1991).