Penn State Law Review

Volume 126 | Issue 3 Article 7

3-1-2022

How Free is Free Speech: Media Bias, Pretrial Publicity, and Defendants' Need for a Universal Appellate Rule to Combat Prejudiced Juries

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How *Free* Is Free Speech: Media Bias, Pretrial Publicity, and Defendants' Need for a Universal Appellate Rule to Combat Prejudiced Juries

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ABSTRACT

The media is a prevalent, persuasive force in American society. Americans, on average, spend over twelve hours per day consuming both traditional and digital media. While most Americans recognize that the media they consume is biased, the media maintains its grip on the American psyche. The media's effects have also seeped into courtrooms. When a trial has received significant pretrial media attention, jurors become biased against criminal defendants. However, the Sixth Amendment guarantees every defendant the right to a trial by an impartial jury. The prevalence of pretrial publicity and its effects threaten jury impartiality, and therefore negates defendants' Sixth Amendment rights. Yet, the media itself also has a right to the freedom of press, guaranteed by the First Amendment.

The Federal Rules of Criminal Procedure offer defendants seven methods to remedy pretrial publicity's effects on their jury: change of venue, continuance, severance, waiver of jury trial, specific voir dire questions, sequestration, and judicial instructions. Unfortunately, none of these methods successfully insulate defendants' jury boxes from jurors who have been exposed to pretrial publicity. Since the 1870s, the United States Supreme Court has handed down inconsistent, vague opinions without giving clear guidance for lower courts to use when defendants appeal their convictions because pretrial publicity affected juror impartiality.

This Comment addresses biased media coverage affecting jurors and examines the intersection between the First and Sixth Amendments. Next, this Comment discusses Supreme Court precedent and the Court's current guidance for defendants' pretrial publicity-based appeals. Then, this

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Comment argues that a need exists for a universal rule that lower courts can apply fairly and equally to all defendants. Finally, this Comment uses current Supreme Court jurisprudence and the principles found in the First and Sixth Amendments to craft a universally applicable rule for all defendants.

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I. INTRODUCTION

In 1989, a jury convicted five young Black and Latino teenagers for the rape and murder of a white woman.[1] In hundreds of newspaper articles, the media[2] called the boys "bloodthirsty,"[3] "animals,"[4] "savages,"[5] "human mutations,"[6] a "wolf pack,"[7] and a "gang."[8] The jury sentenced each teenager to a maximum of thirteen years in prison.[9] However, all of the convictions were overturned when the true killer confessed to the crime.[10] In 1998, a jury convicted four LGBTQ+ women of Latin descent after the homophobic[11] media, town, and prosecutor[12] branded the women as "satanic child molester[s]."[13] The jury sentenced all four women to fifteen years in prison.[14] Then, the court fully exonerated the women in 2016.[15] In 2018, a jury convicted a white Chicago police officer for shooting and killing a Black 17-year-old named Laquan McDonald.[16] Between the shooting in 2014 and trial 2018, one media outlet alone published 122 news stories about the crime.[17] Because of the media's coverage, jurors admitted to being aware of aspects of the case[18] that did

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1. *See* Aisha Harris, *The Central Park Five: 'We Were Just Baby Boys,'* N.Y. TIMES (May 30, 2019), https://nyti.ms/2M9Apqx.

2. *See Media*, OXFORD DICTIONARY, https://bit.ly/36nIuOC (last visited Oct. 10, 2020) (defining the media as "[t]he main means of mass communication (broadcasting, publishing, and the internet) regarded collectively"). Specifically, this Comment refers to media as any news source available on television, in print, or online.

3. History.com Editors, *The Central Park Five*, HIST. (Sept. 23, 2019), https://bit.ly/2KVFJgH.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *See* Harris, *supra* note 1.

10. *See id.*

11. *See* Daniele Selby, *'We Were Made Out to Be These Horrible Monsters': How Homophobia Led to the Wrongful Conviction of Four Texas Women*, INNOCENCE PROJECT (June 1, 2021), https://bit.ly/2NI0aPb.

12. *See id.*

13. Chase Madar, *What It's Like to Be Falsely Branded a Satanic Child Molester*, VICE (Apr. 21, 2016, 11:15 AM), https://bit.ly/3KKpgFm.

14. *See* Selby, *supra* note 11.

15. *See id.*

16. *See Van Dyke Ends Effort to Overturn McDonald Murder Conviction*, ASSOCIATED PRESS NEWS (Oct. 9, 2020), https://bit.ly/3coaaHL [hereinafter *Van Dyke Ends Effort*].

17. *See* ABC 7 Chicago Digital Team, *COPA's Inability to Release Chicago Police Shooting Videos in Timely Manner Shows Broader Transparency Issues, BGA says*, ABC 7 (Sept. 19, 2020), https://abc7.ws/3v0rEld.

18. *See Jason Van Dyke Jurors Speak to Media After Verdict*, YOUTUBE (Oct. 5, 2018), https://bit.ly/3a894wN. One juror stated that "there were a lot of things going into

not come into evidence at trial. The former officer remains guilty of murder.[19]

All of those eleven defendants—regardless of race, gender, age, occupation, innocence, or guilt—were targets of a crime-obsessed media.[20] Media portrayals dramatize "already-traumatic" events.[21] These sensationalized portrayals serve the media's own interests to generate viewers, higher ratings, and advertising revenue, but mislead the public[22] because the media's pretrial depiction of crimes often has anti-defendant bias.[23] Anti-defendant bias negatively impacts jurors' perceptions of the defendants and positively impacts jurors' perceptions of the prosecution's evidence.[24] However, pretrial publicity triggers First Amendment protections for the media.[25] Pretrial publicity also triggers defendants' Sixth Amendment right to an impartial jury.[26] The Supreme Court has not provided clear guidance for defendants who allege that their jurors were not impartial because of pretrial publicity exposure.[27] Accordingly, this Comment discusses the need for a universal rule which gives all defendants an equal opportunity to appeal their convictions if pretrial publicity prejudiced their jurors.[28]

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this that I was aware of but wasn't brought up in evidence so I had to discipline myself not to consider that." *Id.*

19. *See Jason Van Dyke's Release from Prison Given Secrecy Not Afforded Most Inmates*, NBC 5 CHI. (Feb. 4, 2022, 4:58 AM), https://bit.ly/3uGdPrV. Former officer Van Dyke was released on parole on Feb. 3, 2022. *See id.*

20. *See* Matti Näsi et al., *Crime News Consumption and Fear of Violence: The Role of Traditional Media, Social Media, and Alternative Information Sources*, 67 CRIME AND DELINQ. 574, 575 (2020) (finding over 70% of news programs begin their shows with a story about a recent crime or upcoming trial).

21. *See* Zaria Gorvett, *How the News Changes the Way We Think and Behave*, BBC (May 12, 2020), https://bbc.in/3nAbABT (arguing that watching news coverage of events is more detrimental to humans' mental health than the reality of actually participating in or being present at the events because media's sensationalized portrayals exaggerate the stress of each event).

22. *See* Peter Vanderwicken, *Why the News is Not the Truth*, HARV. BUS. REV. (May–June 1995), https://bit.ly/33JKlNs.

23. *See* Shirin Bakhshay & Craig Haney, *The Media's Impact on the Right to a Fair Trial: A Content Analysis of Pretrial Publicity in Capital Cases*, 24 PSYCH. PUB. POL'Y AND L. 326, 335 (2018) (conducting a 26 year-long study of over 1,800 newspaper articles and finding that 75% of the articles (over 1,300) included some negative publicity about defendants including negative coverage that sensationalized the crime, made explicitly negative comments about a defendants' character, and made explicit references to community outrage about the crime).

24. *See id.*

25. *See* U.S. CONST. amend. I.

26. *See* U.S. CONST. amend. VI.

27. *See* discussion *infra* Section II.D.6.

28. *See, e.g.*, Bakhshay & Haney, *supra* note 23, at 328; Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 666–701 (1991); Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW AND HUM. BEHAV. 409, 409–

Part II of this Comment addresses how the media impacts American society, and more specifically, how pretrial publicity affects potential jurors.[29] While judicial methods[30] do exist to combat the effects of pretrial publicity, these methods are not usually successful.[31] Part II next introduces the relevant Supreme Court precedent on pretrial publicity and the Court's current guidance for when defendants can successfully appeal a conviction because of pretrial publicity.[32]

Part III explains how the current Supreme Court guidance for pretrial publicity-based appeals lacks clarity and effectiveness.[33] A new rule should be created for appellate courts to apply to all defendants who allege they were convicted by biased juries due to juror exposure to pretrial publicity.[34] Part III then suggests a universally applicable rule for all defendants[35] based on each defendant's unique procedural history in the courts below.[36]

II. BACKGROUND

Television, radio, and the internet provide the media with multiple platforms to broadcast information about criminal cases, defendants, victims, and witnesses before a trial even begins.[37] The Federal Rules of Criminal Procedure have created methods attempting to negate pretrial publicity's possible harm.[38] However, these methods are often unsuccessful[39]: pretrial publicity can still taint juror impartiality.[40]

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38 (1990); Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 LAW AND HUM. BEHAV. 453, 453–69 (1994); *see also* John C. Meringolo, *The Media, The Jury, And The High-Profile Defendant: A Defense Perspective On The Media Circus*, 55 N.Y.L. SCH. L. REV. 981, 982–1012 (2010); *Prejudicial Publicity in Trials of Public Officials*, 85 YALE L.J. 123, 124 n.6 (1975) [hereinafter *Prejudicial Publicity in Trials of Public Officials*]; Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing A Remedy for The Remediless Wrong*, 46 AM. U. L. REV. 39, 40–46 (1996) (discussing how pretrial publicity can prejudice jurors against defendants).

29. *See* discussion *infra* Section II.A.
30. *See* discussion *infra* Section II.C.
31. *See* discussion *infra* Section II.C.
32. *See* discussion *infra* Section II.D.
33. *See* discussion *infra* Section III.A.
34. *See* discussion *infra* Section III.A.
35. *See* discussion *infra* Section III.A.1.
36. *See* discussion *infra* Section III.A.2.
37. *See* Bakhshay & Haney, *supra* note 23, at 326.
38. *See generally* FED. R. CRIM. P. (establishing change of venue, continuance, severance, waiver of jury trial, specific voir dire questions, sequestration, and judicial instructions).
39. *See* Hardaway & Tumminello, *supra* note 28, at 46.
40. *See id.*

Supreme Court precedent determines when, if ever, defendants can appeal convictions based on pretrial publicity-generated juror bias.[41]

A. *The Trouble with Media Consumption: Prevalence, Bias, and the Effect on Potential Jurors*

Media is constantly present in Americans' everyday lives,[42] and media's prevalence goes beyond mere exposure.[43] Media consumption affects consumers—and jurors—in dangerous ways.[44] In 2020, over 70% of American news channels[45] began their programs with stories related to crime.[46] Because the most common topic for the media to discuss[47] is crime, millions of viewers each month are exposed to crimes that may be resolved by jury trial.[48]

Not only are media depictions of crime prevalent, but those media depictions of crime contain bias.[49] Media bias occurs when the media covers the news with an unjustifiable favoritism.[50] Importantly, a majority of Americans recognize that media coverage contains bias.[51] However, even recognizing bias did not stop American adults from consuming various media types for over twelve hours per day in 2020.[52]

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41. *See* discussion *infra* Section II.D.

42. *See* Statista Research Department, *Media Use in the U.S. - Statistics & Facts*, STATISTA (Nov. 2, 2021), https://bit.ly/2Ikemex [hereinafter Statista Research Department, *Media Use in the U.S.*].

43. *See* sources cited *supra* note 28.

44. *See* Bakhshay & Haney, *supra* note 23, at 326–27.

45. *See* Näsi et al., *supra* note 20.

46. *See id.*

47. *See id.*

48. *See Cable News Fact Sheet*, PEW RSCH. CTR. (June 13, 2021), https://pewrsr.ch/3qO8y0j (finding that, in 2020, approximately 6.48 million viewers tuned in to one of three major news channels during prime time daily). News content is defined as "current events affecting public life . . . ." *State of the News Media Methodology*, PEW RSCH. CTR. (July 27, 2021), https://pewrsr.ch/3wQmc6F (focusing on 97 news outlet websites with news content including reporting and commentary). Further, the study found that digital news platforms receive more consumer traffic than the televised news channels, with "at least 10 million average monthly unique digital visitors" each quarter. *Id*; *see also Digital News Fact Sheet*, PEW RSCH. CTR. (July 27, 2021), https://pewrsr.ch/36S1pmo; Bakhshay & Haney, *supra* note 23, at 335.

49. *See* Statista Research Department, *Media Use in the U.S.*, *supra* note 42 (finding that depending on which news outlet a viewer watches, the media presents different biases).

50. *See* Lynda Lee Kaid & Christina Holtz-Bacha, *Media Bias*, ENCYCLOPEDIA OF POL. BIAS, https://bit.ly/2GTwnj1 (explaining that biased news reports "present viewers with an inaccurate, unbalanced, and/or unfair view of the world around them").

51. *See* ANTHONY R. DIMAGGIO, THE POLITICS OF PERSUASION: ECONOMIC POLICY AND MEDIA BIAS IN THE MODERN ERA, 19–20 (SUNY Press 2017) (finding that in 2013 76% of Americans believed that the media is biased, compared to 53% of Americans in 1985).

52. *See The Nielsen Total Audience Report: August 2020*, NIELSEN (Aug. 13, 2020), https://bit.ly/3dn4sEf.

The prevalence of media availability directly translates into the prevalence of media-created bias.[53] Because news coverage of crimes is so pervasive, defendants in criminal trials cannot escape pretrial publicity, and therefore, cannot escape the effects of media bias.[54] When media outlets depict crime, the depiction can be classified as either "[p]ro-prosecution pretrial publicity"[55] or "pro-defense pretrial publicity."[56] The pro-prosecution pretrial publicity in media portrayals of crime dehumanizes defendants and continually emphasizes the crime's details that support a guilty verdict.[57] In contrast, the media's pro-defendant pretrial publicity portrayals humanize the defendants by emphasizing the crime's guilt-mitigating factors.[58] Results from analyzing over 1,800 newspaper articles found that pro-defense pretrial publicity[59] appeared much less frequently in the media than pro-prosecution pretrial publicity.[60] Research conducted between 1991 and 2018 shows that exposure to media coverage has a "prejudicial impact on potential jurors' attitudes toward criminal defendants."[61]

Because pretrial publicity is usually pro-prosecution, in the adversarial system, pro-prosecution publicity is inherently anti-defendant publicity.[62] Pretrial publicity can give the prosecution a prejudicial "head start" at winning over jurors.[63] Anti-defendant media bias is often coupled with societal biases.[64] For example, media outlets are four times more likely to show a Black defendant's mug shot on the news than to show a white defendant's mug shot.[65]

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53. *See* Sarah Marie Staggs, *Evaluating the Effects of Pretrial Publicity On Mock-Jury Deliberations* 18–19 (2017), https://bit.ly/3jShcFh; *see also* Christine L. Ruva & Anthony E. Coy, *Your Bias Is Rubbing Off on Me: The Impact of Pretrial Publicity and Jury Type on Guilt Decisions, Trial Evidence Interpretation, and Impression Formation*, 26 PSYCH. PUB. POL'Y AND L. 22, 23 (2020).

54. *See* Bakhshay & Haney, *supra* note 23, at 335.

55. Staggs, *supra* note 53, at 18 (finding that pro-prosecution pretrial publicity occurs when media is "biased towards [the] guilt" of the defendant).

56. *Id.* at 19 (finding that pro-defense pretrial publicity occurs when media is biased towards a defendant's innocence).

57. *See id.* at 18–20.

58. *See id.*

59. *See id.* at 18–19 (finding that the pro-prosecution pretrial publicity dehumanizes defendants and continually emphasizes the details of the crime that support a guilty verdict).

60. *See id.* at 18.

61. Bakhshay & Haney, *supra* note 23, at 326–27 (finding reliance on prosecution sources, sensationalized descriptions of crime and defendant, and inclusion of "legally excludable material").

62. *See* Staggs, *supra* note 53, at 19; *see also* Robert M. Entman & Andrew Rojecki, The Entman-Rojecki Index of Race and the Media, UNIV. OF CHI. PRESS (2000), https://bit.ly/2FjqMlB.

63. *See* Entman & Rojecki, *supra* note 62.

64. *See id.*

65. *See id.*

The prevalence of anti-defendant media bias affects jurors' decisions.[66] Prejudice from exposure to anti-defendant pretrial publicity causes jurors to form negative impressions about defendants and possibly about victims and witnesses.[67] Pretrial publicity-generated prejudice[68] can be resistant to change[69] and manifests in jurors in various ways at trial.[70] Therefore, jurors who have been exposed to pretrial publicity will weigh and interpret the information that they learn in the courtroom about defendants, victims, and witnesses through an already-biased lens.[71] However, media companies do have First Amendment rights to publish information about upcoming cases.[72]

B. Intersection of Amendment Protection: The Relationship Between the First and Sixth Amendments and Pretrial Publicity

Pretrial publicity and defendants' rights to impartial juries create a clash between the media's First Amendment rights and defendants' Sixth Amendment rights.[73] A defendant's Sixth Amendment right to an impartial jury can be compromised by pretrial publicity.[74] However, neither the courts nor Congress have the power to create a rule forbidding the media from publishing information about defendants before a trial begins; such a rule would interfere with the First Amendment's freedom of the press guarantee.[75]

1. Media's Protection: The First Amendment

The First Amendment to the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[76] The Freedom of Speech Clause and Press Clause

66. *See* Bakhshay & Haney, *supra* note 23, at 327.

67. *See* Ruva & Coy, *supra* note 53, at 23, 30 (finding that juror exposure to pretrial publicity biases juror verdicts, juror interpretation of evidence presented at trial, and impressions of defendants and victims).

68. In this Comment, "pretrial publicity-generated prejudice" is the bias that scientific studies show results from jurors being exposed to pretrial publicity that informs their opinions of defendants before the trial even begins. *See id.* at 30; *see also* Bakhshay & Haney, *supra* note 23, at 327.

69. *See* Staggs, *supra* note 53, at 16, 23, 26.

70. *See* Bakhshay & Haney, *supra* note 23, at 327 (finding that anti-defendant pretrial publicity "significant[ly] impact[s] juror decision making").

71. *See id.*

72. *See* U.S. CONST. amend. I.

73. *See* discussion *infra* Sections II.B.1, II.B.2.

74. *See* U.S. CONST. amend. VI.

75. *See* U.S. CONST. amend. I.

76. U.S. CONST. amend. I.

specifically prohibit reducing the freedom of any citizen's speech or the press's ability to publish[77] opinions.[78]

As interpreted by the Supreme Court, the First Amendment also grants members of the press the implicit constitutional right to attend criminal trials.[79] The First Amendment's distinct addition of "or of the press"[80] recognizes "the critical role played by the press in American society."[81] The Supreme Court reasoned that the press's presence would ensure that judges, lawyers, and witnesses in criminal trials acted fairly throughout the entire proceeding.[82] The press also provides the community with a therapeutic outlet to explore criminal issues within society.[83]

When a case involving free speech or freedom of the press triggers a First Amendment analysis to determine the necessity of punishment for the press, the question becomes whether the words create a "clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[84] The First Amendment does not protect[85] media publications that direct, or are likely to direct, citizens to commit "lawless" actions.[86]

By allowing the press to attend criminal trials, the press's First Amendment right cooperates with defendants' Sixth Amendment right to receive a public trial.[87] Yet, because the press is not barred from publishing pretrial publicity,[88] the press's First Amendment right[89] does not cooperate with defendants' Sixth Amendment guarantee: the right to an impartial jury.[90]

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77. *See* Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (stating that the First Amendment protects speaking and writing as well as listening and reading).

78. The First Amendment bars both ex ante restraint of and ex post punishment of most speech. "Ex ante" restraint means that the court would forbid the media from publishing any content prior to trial. *See Amdt1.2.1 Freedom of Speech: Historical Background*, CONST. ANNOTATED, https://bit.ly/3MQ2QnJ (last visited Mar. 14, 2022). Conversely, "ex post" punishment means that the court could force the media to pay damages or grant another remedy against the media for its already published content. *See id.*

79. *See* Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 558 (1980).

80. U.S. CONST. amend. I

81. Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stewart, J., concurring).

82. *See Richmond Newspapers, Inc.*, 448 U.S. at 569.

83. *See id.* at 570.

84. Schneck v. U.S., 249 U.S. 47, 52 (1919).

85. *See* Geoffrey R. Stone & Eugene Volokh, *Freedom of Speech and the Press*, NAT'L CONST. CTR., https://bit.ly/38sV9SP (last visited Mar. 14, 2021) (explaining the six categories of unprotected speech).

86. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

87. *See* U.S. CONST. amend. VI.

88. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that freedom of speech and press protect even "vehement, caustic, and . . . unpleasantly sharp attacks" from media).

89. *See* U.S. CONST. amend. I.

90. *See* U.S. CONST. amend. VI.

2. Defendant's Protection: Sixth Amendment

The Sixth Amendment to the United States Constitution states, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . ."[91] The Fourteenth Amendment's Due Process and Equal Protection Clauses, which apply to both state and federal criminal proceedings, further protect a defendant's right to a trial by an impartial jury.[92]

Two requirements are necessary for a jury to be deemed "impartial."[93] First, juries must be selected from a pool of people who are representative of, but not identical to, the community where the trial takes place.[94] Second, the selected jurors must assure the court that they are unbiased and able to render a verdict based solely on the facts of the case.[95] Nevertheless, after a jury has rendered its verdict, courts face difficulties determining the jury's impartiality.[96] Courts also face difficulties determining whether to provide legal remedies for defendants who claim their jury was not impartial[97] because Federal Rule of Evidence 606(b)(1) forbids jurors from testifying about their own or their fellow jurors' alleged biases after the verdict.[98]

However, because jury impartiality is a constitutional right, FRE 606 (b)(2) contains several exceptions to FRE 606(b)(1), and those exceptions assist courts in determining juror bias.[99] Jurors are permitted to testify about any "extraneous prejudicial information . . . improperly brought to

91. *Id.*

92. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (incorporating the First, Fourth, Fifth, and Sixth Amendments to apply as substantive law within the states). Originally, the Bill of Rights applied only to the federal government. *See id.* Incorporation occurs when the Supreme Court uses the Fourteenth Amendment to apply Amendments in the Bill of Rights to states. *See id*; *see also* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 552 (1976); *Amdt6.3.2.1.1 Right to An Impartial Jury: Current Doctrine*, CONST. ANNOTATED, https://bit.ly/3lfMtTp (last visited Mar. 15, 2022) [hereinafter *U.S. CONST. amend. VI, annotated*].

93. *See U.S. CONST. amend. VI, annotated*, *supra* note 92.

94. *See id.* (citing Taylor v. Louisiana, 419 U.S. 522, 528 (1975); Lockhart v. McCree, 476 U.S. 162, 173 (1986)) (finding that selecting jurors from a cross-section of the community is essential to the Sixth Amendment but that the actual jurors picked do not need to identically represent the community composition).

95. *See U.S. CONST. amend. VI, annotated*, *supra* note 92; *see also* discussion *infra* Section II.C.

96. *See U.S. CONST. amend. VI, annotated*, *supra* note 92.

97. *See id.*

98. *See* DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE FROM THE FEDERAL RULES TO THE COURTROOM 964 (4th ed. 2018). The Federal Rules of Evidence ("FRE") forbid a juror from testifying in court about any statement made during jury deliberations or any specific influence affecting deliberations. *See* FED. R. EVID. 606(b)(1).

99. *See* FED. R. EVID. 606(b)(2).

the jury's attention,"[100] and any "outside influence [that] was improperly[101] brought to bear on any juror."[102] Additionally, the Supreme Court created a Sixth Amendment-specific exception to FRE 606(b)(1): when jurors make "'clear statements' indicating that [jurors] relied on 'racial stereotypes or animus to convict a criminal defendant,'"[103] other jurors can testify about such statements to show that the jury was biased.[104] Because these exceptions only narrowly apply to juror testimony after a verdict,[105] the Federal Rules of Criminal Procedure instituted methods to combat juror impartiality before the verdict.[106]

C. *Mismanaged Media: The Current Methods to Combat Pretrial Publicity and the Methods' Limited Tangible Successes*

The interplay between the First and Sixth Amendments has led to the creation of seven methods available to defendants who allege that pretrial publicity possibly affected their right to an impartial jury.[107] Change of venue motions,[108] continuance,[109] severance motions,[110] waiver of jury trial,[111] specific voir dire questions,[112] sequestration,[113] and judicial instructions[114] are options for defendants both before and during trial. Nevertheless, these methods are not always effective in combating pretrial publicity's effect on potential jurors.[115]

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100. FED. R. EVID. 606(b)(2)(A).

101. *See* MERRITT & SIMMONS, *supra* note 98, at 965, 967. Jurors are permitted to testify about pretrial publicity that they or another juror discussed during jury deliberations because the media's influence occurred outside of the court room. *See id.*

102. FED. R. EVID. 606(b)(2)(B).

103. *U.S. CONST. amend. VI, annotated, supra* note 92 (quoting Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 890 (2017)).

104. *See* MERRITT & SIMMONS, *supra* note 98, at 972. Federal Rule of Evidence 606(b)(1) is Sixth Amendment-specific because this exception to FRE 606 directly protects defendants from prejudiced juries. *See id.*

105. *See* MERRITT & SIMMONS, *supra* note 98, at 964.

106. *See* discussion *infra* Section II.C.

107. *See* FED. R. CRIM. P. 21, 23, 24, 30, 31; Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174; *Prejudicial Publicity in Trials of Public Officials, supra* note 28, at 123–24.

108. *See* FED. R. CRIM. P. 21.

109. *See* 18 U.S.C. § 3161(h)(8).

110. *See Prejudicial Publicity in Trials of Public Officials, supra* note 28, at 123 n.6.

111. *See* FED. R. CRIM. P. 23(a).

112. *See* FED. R. CRIM. P. 24.

113. *See* FED. R. CRIM. P. 31.

114. *See Proposed Model Jury Instructions the Use of Electronic Technology to Learn or Communicate about a Case*, JUD. CONF. COMM. ON CT. ADMIN. AND CASE MGMT. (June 2020), https://bit.ly/3tfSNRr [hereinafter *Proposed Model Jury Instructions*].

115. *See* sources cited *supra* note 28.

Before trial begins, all defendants may move for a change of venue[116] and continuance,[117] and if there are multiple defendants, each can move for severance.[118] Additionally, defendants can waive their right to a jury trial,[119] or defendants' lawyers can prepare specific media-based questions for jury voir dire.[120] During the trial, defendants may request sequestration[121] and special judicial instructions for the jury.[122]

These seven methods are inadequate options to combat compromised jury impartiality.[123] Change of venue is only useful when pretrial publicity was limited[124] to the area where the crime was committed and when venue is then changed to an area not subjected to the localized pretrial publicity.[125] Further, judges are not required to grant change of venue motions, and the subjective standard used to determine whether the motion should be granted is vague.[126]

Additionally, no conclusive evidence exists as to continuances' effectiveness.[127] Studies show that continuances have no effect on anti-defendant bias caused by negative pretrial publicity.[128] Conversely, studies also reveal that continuances negated the effect of factual pretrial

116. *See* FED. R. CRIM. P. 21(a). Change of venue allows defendants to move their trial to another district. *See id.* The defendant has the burden to show the court that "so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial [in the current district]." *Id.*

117. *See* Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174; *see also* 18 U.S.C. § 3161(h)(7). Continuance is a delay in the proceeding. *See id.* The defendant has the burden to show that a continuance better serves "the ends of justice." *See* § 3161(h)(7)(A).

118. *See* FED R. CRIM. P. 8. Joinder occurs when two or more defendants are charged with the same or similar crimes. *See id.* When defendants' trials are joined, one or both defendants can move for severance, to separate their trials. *See* FED R. CRIM. P. 14. The defendant has the burden to prove that a joinder of the trials prejudices the defendant. *See id.* The court has no obligation to sever any trials. *See also* Zafiro v. United States, 506 U.S. 534, 545 (1993).

119. *See* FED. R. CRIM. P. 23(a). To waive their right to a jury, defendant needs to do so in writing, the government must consent, and the court must approve. *See id.*

120. *See* FED. R. CRIM. P. 24. Voir dire occurs when the court or attorneys question potential jurors generally and about bias and prejudice in order to exclude jurors who cannot be impartial. *See id.*

121. *See* United States v. Swainson, 548 F.2d 657, 664 (6th Cir. 1977). Juror sequestration occurs when the judge, who has sole discretion, requires jurors to be separated from all non-jurors and forbids exposure to media for the duration of the trial. *See id.*

122. *See Proposed Model Jury Instructions*, *supra* note 114. Judges can give judicial instructions to jurors and specifically require them not to consider any outside research of the current case on trial or the news when deliberating. *See id.*

123. *See* sources cited *supra* note 28.

124. *See* Hardaway & Tumminello, *supra* note 28, at 46. For example, if a crime has made national news before a trial begins, change of venue will not "lessen the impact of publicity . . . ." *Id.*

125. *See id.*

126. *See* Ruva & Coy, *supra* note 53, at 32; *see also* sources cited *supra* note 28.

127. *See* sources cited *supra* note 28.

128. *See* Meringolo, *supra* note 28, at 998–99.

publicity.[129] Potential jurors are more likely to forget the factual aspects of the case discussed before trial than to forget the anti-defendant bias portrayed by the media when continuances are granted.[130] Further, when a trial is delayed, the press is likely to give the trial renewed attention when the trial finally begins, completely negating the role of continuances in combating pretrial publicity's effect on jurors.[131]

Pretrial severances are only available in multi-defendant trials.[132] Because jurors are unlikely to change their pretrial publicity-created perceptions,[133] severance is only useful if one defendant has received negative pretrial publicity and one has not.[134] However, judges can use their discretion to deny a defendant's motion for severance.[135] Regardless of the number of defendants on trial, states provide different rules for when and how defendants can waive their right to a jury trial.[136] While some studies suggest that judges are less swayed by pretrial publicity than jurors, waiving a jury trial is not always an efficient, effective, or applicable avenue to combat pretrial publicity's impact.[137]

If defendants do not choose to waive a jury trial, defense lawyers can prepare voir dire questions before trial that specifically address whether media bias has affected potential jurors.[138] Nevertheless, research suggests that jurors are "more affected by media coverage than they would admit,"[139] and attorneys have a limited ability to successfully uncover juror bias through voir dire questioning.[140] Jurors themselves are also unlikely to truly know whether they have any biases or if they can set those biases aside.[141] Further, asking jurors to determine their own ability to provide a "fair verdict based solely on the evidence presented in court"[142] without media exposure affecting them "actually increases the damage of

129. *See* Bakhshay & Haney, *supra* note 23, at 334 (explaining that "factual" pretrial publicity refers to publicity that discusses factual elements of the case that are likely to be discussed during trial).

130. *See id.*

131. *See Prejudicial Publicity in Trials of Public Officials*, *supra* note 28, at 123; Meringolo, *supra* note 28, at 998–99.

132. *See supra* note 118 and accompanying text.

133. *See supra* notes 52–61 and accompanying text.

134. *See Prejudicial Publicity in Trials of Public Officials*, *supra* note 28, at 124 n.6.

135. *See supra* note 118 and accompanying text.

136. *See Prejudicial Publicity in Trials of Public Officials*, *supra* note 28, at 124 n.7.

137. *See id.* Judges are still possibly susceptible to pretrial-publicity's effect on viewers. *See id.*

138. *See* FED. R. CRIM. P. 24.

139. Meringolo, *supra* note 28, at 997.

140. *See* Ruva & Coy, *supra* note 53, at 32.

141. *See* Bakhshay & Haney, *supra* note 23, at 328.

142. Meringolo, *supra* note 28, at 997.

pretrial publicity"[143] because the question draws jurors' attention to the negative publicity.[144]

During the trial, neither sequestration nor judicial instructions are effective at preventing pretrial publicity from affecting jurors.[145] Sequestration of jury members during the trial is not always "effectively applied."[146] When correctly applied,[147] sequestration "clearly does not remove the effects of prior publicity."[148] Judicial instructions are not only ineffective, but they can be harmful because instructions to avoid specific publicity during the trial can inadvertently call attention to that publicity.[149] Because the methods available to combat the impact of pretrial publicity are ineffective,[150] on appeal, defendants have challenged pretrial publicity's effect on jurors.[151]

D. Pretrial Publicity Precedent: The History of the Supreme Court's Decisions

Since the late 1800s, the United States Supreme Court has ruled on numerous cases that impact defendants' right to an appeal because of a prejudiced jury, caused by negative pretrial publicity. When appealing convictions because of potential pretrial publicity-caused juror bias, defendants must first argue that they have standing[152] under the Sixth and Fourteenth Amendments.[153] To determine if a defendant has standing to appeal on the grounds that pretrial publicity impacted jurors, one must look to the Court's precedent, which has an inconsistent history.[154]

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143. *Id.* (citing to Jonathan L. Freedman et al., *Pretrial Publicity: Effects of Admonition and Expressing Pretrial Opinions*, 3 LEGAL AND CRIM. PSYCH. 255, 255 (1998)).

144. *See* Meringolo, *supra* note 28, at 997.

145. *See* sources cited *supra* note 28.

146. *See Prejudicial Publicity in Trials of Public Officials*, *supra* note 28, at 124 n.8.

147. *See id.* To effectively apply sequestration, the court must fully separate jurors from any contact with non-jurors for the duration of trial and deliberation. *See id.*

148. *Id.*

149. *See id.* at 124 n.9.

150. *See* Ruva & Coy, *supra* note 53, at 32; Bakhshay & Haney, *supra* note 23, at 328; *Prejudicial Publicity in Trials of Public Officials*, *supra* note 28, at 124 nn.8–9.

151. *See* discussion *infra* Section II.D.

152. *See How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), https://bit.ly/3iO9rk6. To have standing in an appeal, a defendant must claim that a legal error occurred either procedurally or with the fact-finders' substantive interpretation of the facts. *See id.*

153. *See* U.S. CONST. amend. VI; U.S. CONST. amend. XIV.

154. *See* discussion *infra* Sections II.D.1, II.D.2, II.D.3, II.D.4, II.D.5.

1. Strict Standards: Pre-1960s Caselaw and Its Effect on Pretrial Publicity

The earliest case that determined whether defendants could appeal their verdicts because of pretrial publicity was decided in 1878.[155] In *Reynolds v. United States*,[156] the Supreme Court held that determining juror bias must be based on clear evidence that the juror formed a biased opinion and that the trial judge's decision would only be overturned on appeal if it led to "manifest error."[157] A manifest error[158] is an error that is indisputable, obvious, and completely disregards the facts of the case or evidence at issue.[159]

Currently, when appellate courts employ the manifest error analysis, which is deferential to the jury's decisions,[160] defendants must meet an extremely high burden.[161] If defendants move for judgment of acquittal during trial, appellate courts uphold the jury's verdict unless there is "no legally sufficient evidentiary basis for a reasonable jury to find as the jury did."[162] When defendants do not move for judgment of acquittal at trial, appellate courts are even more likely to uphold the jury verdict unless the verdict "results in a manifest miscarriage of justice."[163]

In 1952, almost one hundred years after the *Reynolds* decision, the Supreme Court decided *Stroble v. California*.[164] The defendant appealed his guilty verdict and claimed that the publicity before his trial rendered

155. *See* Reynolds v. United States, 98 U.S. 145, 155–56 (1878). A juror admitted to having formed an opinion about the case prior to hearing any evidence but also stated that he believed he could be impartial during the trial. *See id.* The trial court did not dismiss him. *See id.*

156. *See id.* at 155.

157. *See id.* at 155–56; Hardaway & Tumminello, *supra* note 28, at 49.

158. *Reynolds*, 98 U.S. at 155–56.

159. *See Manifest Error Law and Legal Definition*, USLEGAL, https://bit.ly/2U746ZJ (last visited Nov. 7, 2020).

160. *See Reynolds*, 98 U.S. at 155–56.

161. *See id.* The defendant's burden is high regardless of whether the defendant moved for a judgment of acquittal. *See id.* When defendants move for judgment of acquittal, they argue that the prosecution has failed to meet its prima facie case of each element of the crime and that no reasonable fact-finder could find in favor of the prosecution. *See* FED. R. CRIM. P. 29. If a judge grants a motion for judgment of acquittal, the defendant is acquitted of all charges. *See id.*

162. Madeleine Fischer, *A Detailed Look at Standard of Review*, JONES WALKER L.L.P. (Apr. 2008), https://bit.ly/32tFyyK.

163. *Id.* A manifest miscarriage of justice means that defendants' rights were violated. *See id.*

164. *See* Stroble v. California, 343 U.S. 181, 192 (1952) (regarding a defendant, convicted of killing a six-year-old girl, who was degraded by the media and was described as a "werewolf," "fiend," and "sex-mad killer"). The media also printed the defendant's confession and statements from the district attorney, who stated the defendant "was guilty and sane." *Id.*

jury impartiality impossible.[165] However, the *Stroble* Court held that the defendant failed to show that newspaper accounts aroused such prejudice against him within the community as to "necessarily prevent a fair trial."[166] Most important to the Court, the defendant did not make any "affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury."[167] However, the Court did not provide details on what an affirmative showing of community prejudice would entail.

The early doctrine of pretrial publicity-based appeals, established by *Reynolds* and *Stroble*, recognized two avenues for appeal, both implementing a very strict standard.[168] A defendant was not granted a new trial or an overturned conviction unless, first, the defendant made a motion for a judgment of acquittal and, second, no evidence, facts, or law supported the jury's conviction.[169] Additionally, the Court applied a higher burden to defendants who did not move for judgment of acquittal when determining whether a new trial or overturned conviction should be granted.[170] If the defendant could not show any evidence that the verdict resulted in a "clear" miscarriage of justice,[171] appellate courts would not grant the defendant a new trial or overturned conviction.[172] Finally, to determine whether evidence, facts, or law supported the conviction or to determine a clear miscarriage of justice, during appeal the defendant must have made some type of affirmative showing that pretrial publicity prejudiced the jury against the defendant.[173] Defendants have to "prove actual juror prejudice before a conviction can be reversed"[174] when all information that the media revealed was entered into evidence at trial.[175]

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165. *See id.*

166. *Stroble*, 343 U.S. at 193–95 (quoting Lisenba v. California, 314 U.S. 219, 290 (1941)) (finding that "most prominent feature[] of the newspaper [article]" was the defendant's confession which was introduced into evidence at trial). Because the confession became evidence, the pretrial publicity did not expose jurors to any extra-judicial information. *See id.* Additionally, though not dispositive, the defendant did not move for a change in venue. *See id.*

167. *Id.* at 195.

168. *See* Fischer, *supra* note 162; *see also* Reynolds v. United States, 98 U.S. 145, 155–56 (1878).

169. *See Reynolds*, 98 U.S. at 155–56.

170. *See Stroble*, 343 U.S. at 195.

171. *See* Thomas F. Burke & Lief H. Carter, *The Hand in the Brew: Judges and Their Communities*, 53 TULSA L. REV. 213, 216 (2018). The "clear" miscarriage of justice is subjectively determined by the appeals judge who decides the case. *See id.*

172. *See* Fischer, *supra* note 162; *see also Reynolds*, 98 U.S. at 155–56.

173. *See Stroble*, 343 U.S. at 195. The Court did not explain what type of affirmative showing would be enough to succeed on appeal. *See id.*

174. Hardaway & Tumminello, *supra* note 28, at 51. *But see* Marshall v. United States, 360 U.S. 310, 312–13 (1959) (holding that if evidence is revealed by the media that is inadmissible in court, a new trial can be granted).

175. *See* Hardaway & Tumminello, *supra* note 28, at 51.

2. Presumption of Prejudice: 1960s Caselaw and Its Effect on Pretrial Publicity

In the 1960s, the Court ruled on four separate cases: *Irvin v. Dowd*,[176] *Rideau v. Louisiana*,[177] *Estes v. Texas*,[178] and *Sheppard v. Maxwell*.[179] In *Irvin*, the Supreme Court held that "the proper inquiry [into the juror's reaction to pretrial publicity] is whether the 'nature and strength of the opinion formed' is such that the actual existence"[180] of bias "can be presumed"[181] even if jurors claim they are impartial.[182] The Court reasoned that a juror can be aware of the facts and issues of the case before the trial.[183] If that juror can render a verdict based on the evidence presented at trial, the juror will be "sufficiently impartial."[184] However, in reversing and remanding the defendant's case, the Court discussed that impartiality is a state of mind, and the Constitution does not provide any formula or tests to determine impartiality.[185] The Court relied on the defendant's forty-six exhibits to determine that "clear and convincing evidence"[186] proved that juror impartiality was nearly impossible because the exhibits showed "a pattern of deep and bitter prejudice"[187] present in the community.[188] Yet, the Court did not provide guidance for applying the clear and convincing evidence test to future cases.

In *Rideau*, the Court held[189] that the trial court violated the defendant's due process rights[190] when the court refused his motion for a

176. *See* Irvin v. Dowd, 366 U.S. 717 (1961). This case dealt with a press release from the prosecutor that the media widely publicized, more so than any other prosecutorial press release. *See id.* at 720–21. The press release stated that the defendant confessed to murdering six people in a small community in Indiana. *See id.*

177. *See* Rideau v. Louisiana, 373 U.S. 723 (1963). The defendant in this case confessed to a crime in a televised interview where his lawyer was not present. *See id.* at 724.

178. *See* Estes v. Texas, 381 U.S. 532 (1965).

179. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

180. Hardaway & Tumminello, *supra* note 28, at 51 (quoting *Irvin*, 366 U.S. at 723).

181. *Id.* at 53.

182. *See id.* at 61.

183. *See id.* at 53.

184. *Id.*

185. *See* Irvin v. Dowd, 366 U.S. 717, 724–25 (1961).

186. *Id.* at 725.

187. *Id.* at 727.

188. *See id.*

189. *See* Rideau v. Louisiana, 373 U.S. 723, 726 (1963). *Rideau* is a very narrowly applicable holding because it applies only to defendants who were not granted a change of venue motion and had their felony confessions, made without an attorney present, turned into a "moving picture film" which was "televised three times to tens of thousands of people in [the defendant's] parish." *Id.* at 723, 726.

190. *See id.* at 726–27. The defendant's right to due process of law was violated in this case because the televised confession only showed the sheriff and the defendant. *See id.* The defendant did not have a lawyer to advise him of his Fifth Amendment privilege against self-incrimination. *See id.*

change of venue after his confession was televised locally, and he did not have an attorney present during the confession.[191] The Court further held that, without granting a change of venue motion, local jurors possibly saw the televised confession and that possibility "was enough to create a presumption of juror bias . . . ."[192] The Court found that due process considerations require juries "to be drawn from a community of people who had not seen and heard the televised interview."[193] However, the *Rideau* Court did not specify whether having an attorney present would negate due process violations for televised confessions.[194]

In *Estes*, the Court held that the defendant's due process rights were violated because more than 100,000 viewers—potential jurors—tuned in to the live broadcasted pretrial hearings.[195] Therefore, the defendant's Sixth Amendment right to a fair trial was violated.[196] The Court reasoned that a due process violation "could be presumed from the procedures employed by the state during the adjudicative process"[197] because the state allowed the pretrial hearings to be televised.[198]

In *Sheppard*, the Court did categorize the pretrial publicity as "months [of] virulent publicity about [the defendant] and the murder [which] made the case notorious,"[199] but overturned the defendant's murder conviction because the media's behavior created a "carnival atmosphere"[200] during the trial.[201] Importantly, the *Sheppard* decision did not consider any publicity—focused on the case or on the defendant—*before* the trial.[202] Therefore, when determining whether a new trial should

191. *See id.*

192. Hardaway & Tumminello, *supra* note 28, at 53 (citing *Rideau*, 373 U.S. at 726–27).

193. *Rideau*, 373 U.S. at 727.

194. *See id.*

195. *See* Estes v. Texas, 381 U.S. 532, 540 (1965). In this case, media members who, with permission from the state, televised the pretrial hearings in the courtroom. *See id.* at 535–38.

196. *See* Hardaway & Tumminello, *supra* note 28, at 55 (citing *Estes*, 381 U.S. at 541).

197. Hardaway & Tumminello, *supra* note 28, at 55 (citing *Estes*, 381 U.S. at 541–44) (stating that in this situation, "a due process violation does not require the showing of actual, identifiable prejudice . . . .").

198. *See id.*

199. Sheppard v. Maxwell, 384 U.S. 333, 354 (1966). This case involved the trial of a defendant whose wife was bludgeoned to death at home. *See id.* at 335–36. The media sensationalized the case from the night of the wife's death, throughout the trial, and until the guilty verdict was rendered. *See id.* at 338–45.

200. *Id.* at 358. A "carnival atmosphere" is a disruptive atmosphere in the courtroom that distracts the jury from the proceedings. *See id.* Specifically, in *Sheppard*, newscasters, newspaper reporters, and photographers were loud and disruptive during the trial. *See id.* at 354.

201. *See id.*

202. *See id.*

be granted, the Court did not consider the prejudicial effects that pretrial publicity potentially had on jurors.[203] Instead, the Court introduced the totality of the circumstances test for defendants who appeal their convictions based on pretrial publicity juror interference.[204] The Court held that the trial judge's failure to protect the defendant in a murder prosecution "from inherently prejudicial publicity which saturated [the] community and [the judge's failure] to control disruptive influences in [the] courtroom"[205] denied the defendant his right to a fair trial.[206]

Throughout the 1960s, the Court implicitly[207] and then explicitly[208] employed a totality of the circumstances test.[209] The Court allowed presumption that there is a reasonable likelihood of prejudice influenced by publicity[210] without requiring the defendant to show that actual prejudice existed.[211] However, the 1960s decisions highlighted vague factors that lower courts could consider if defendants alleged their juries were exposed to pretrial publicity-generated prejudice.[212]

3. Contradicting Considerations: 1970s Caselaw and Its Effect on Pretrial Publicity

Three more cases decided in the 1970s focused on pretrial publicity: *Murphy v. Florida*,[213] *Nebraska Press Association v. Stuart*,[214] and *Gannett Company, Inc. v. DePasquale*.[215] During the 1970s, the Supreme Court continually emphasized that just because jurors may have been

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203. *See id.* at 354–55.

204. *See id.* at 352–53. The Court did not explicitly explain its shift to the totality of the circumstances test. *See id.*

205. *Id.* at 333.

206. *See id.*

207. *See* Irvin v. Dowd, 366 U.S. 717, 724–25 (1961); Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

208. *See Sheppard*, 384 U.S. at 358.

209. *See* Estes v. Texas, 381 U.S. 532, 550–52 (1965); *Rideau*, 373 U.S. at 727; *Sheppard*, 384 U.S. at 352–54.

210. *See Rideau*, 373 U.S. at 727. "Publicity" here refers not only to pretrial publicity, but also to publicity by the media throughout the trial and the media's presence in the courtroom. *See id*; *see also Estes*, 381 U.S. at 550–52; *Sheppard*, 384 U.S. at 354–55.

211. *See* Hardaway & Tumminello, *supra* note 28, at 53–58 (citing *Rideau*, 373 U.S. at 723–26; *Estes*, 381 U.S. at 538–44; *Sheppard*, 384 U.S. at 363).

212. *See Rideau*, 373 U.S. at 723–27; *Estes*, 381 U.S. at 538–44; *Sheppard*, 384 U.S. at 363.

213. *See* Murphy v. Florida, 421 U.S. 794 (1975). This case dealt with a defendant's highly publicized prior felony convictions. *See id.* at 796–97.

214. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976). This case discussed a district court judge who entered a court order restraining the media from publishing or broadcasting the defendant's confession until after the trial. *See id.* at 539–40.

215. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979). The U.S. Supreme Court held that trial judges are constitutionally required to minimize effects of prejudicial publicity. *See id.* at 400–03.

exposed to pretrial publicity, that exposure does not automatically mean that the defendant's due process rights were violated.[216] While the *Murphy* Court, like the *Sheppard* Court,[217] overturned the defendant's conviction because the "trial atmosphere [was] utterly corrupted by press coverage[,]"[218] the decision still provided further explanation for trial court and appellate court judges when defendants claim pretrial publicity affected their jury.[219]

Emphasizing that the *Murphy* decision does not stand for the proposition that any juror exposure to pretrial publicity presumably deprives defendants of due process,[220] the Court articulated a new test for determining prejudice against defendants.[221] Juror prejudice can be presumed when a court finds "apparent and flagrant departure from fundamental due process and decorum and an intrusion of external influences."[222] Further, the test directs a finding of compromised juror impartiality when defendants "indicat[e] in the totality of the circumstances that [a defendant's] trial was not fundamentally fair."[223]

To determine jury impartiality, the *Murphy* Court analyzed the record of voir dire, the community atmosphere when the trial happened, and the "length to which the trial court [went] to select impartial jurors . . . ."[224] The Court then determined that the jurors were sufficiently impartial.[225] However, in its decision, the Court did not cite any determinative factors about which part of the voir dire demonstrated impartiality.[226] The Court also did not cite any specific descriptions of the community's atmosphere or explanations of the trial court's process in selecting impartial jurors.[227]

The Supreme Court in *Nebraska Press Association* again echoed the *Murphy* decision when it held that even pervasive, concentrated, and

216. *See Murphy*, 421 U.S. at 799; *see also Gannett Co., Inc.*, 443 U.S. at 378–79.

217. *See Sheppard*, 384 U.S. at 358.

218. *Murphy*, 421 U.S. at 798. The Murphy Court did not focus on the presence of pretrial publicity possibly affecting juror impartiality. *See id.*

219. *See id.*

220. *See* Hardaway & Tumminello, *supra* note 28, at 60 n.177 (citing *Murphy*, 421 U.S. at 799).

221. *See Murphy*, 421 U.S. at 799.

222. *See* Hardaway & Tumminello, *supra* note 28, at 60 n.177 (citing People v. Manson, 132 Cal. App. 3d 102, 184 (Cal. Ct. App. 1976)).

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

224. *Id.*

225. *See id.* at 803.

226. *See id.*

227. *See id.*

adverse pretrial publicity[228] "does not inevitably lead to an unfair trial."[229] The Court reasoned that, instead of preemptively regulating the press and forbidding pretrial publicity to be published, there must be a "'clear and present danger' of actual prejudice or imminent threat" in order for judges to regulate the press during courtroom proceedings.[230] Therefore, the Court concluded that the trial court judge could have employed other options to protect the defendant's right to a fair trial.[231] The media's publications did not amount to a clear and present danger of prejudice, so the judge could not forbid the media from publishing pretrial publicity.[232]

As the Supreme Court continually emphasized throughout the 1970s, jurors' pretrial publicity exposure does not automatically create a due process violation.[233] Conversely, juror prejudice can be automatically assumed when media members are allowed in the courtroom[234] and the trial court judge does not act affirmatively to mitigate pretrial publicity's effects.[235] However, the Court stated that the judge's mitigation cannot go so far as to create a court order prohibiting media from publishing any pretrial publicity.[236] Instead, appellate courts need to examine the voir dire record,[237] the community atmosphere in general,[238] and the extent to which the trial court attempted to select impartial jurors to determine juror prejudice.[239] Yet, community atmosphere and "length to which the trial court [went] to select impartial jurors"[240] are vague considerations.[241] These considerations, coupled with the requirement that judges must help protect defendants from pretrial publicity without being able to

228. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 565 (1976). This case focused on the responsibility of the trial court judge to "mitigate the effects of pretrial publicity . . . ." *Id.* at 555. The judge in *Nebraska Press* acted affirmatively attempting to limit the possibility of pretrial publicity influencing prospective jurors. *See id.* at 565. The Court acknowledged that, in the multiple murder case committed in a town of 850 people, the judge "acted responsibly." *See id.* at 555. However, the Court still held that the First Amendment guarantees protections against ex ante restraint on speech. *See id.* at 565.

229. *Id.* at 554.

230. Gentile v. State Bar of Nev., 501 U.S. 1030, 1031 (1991) (citing *Neb. Press Ass'n*, 427 U.S. at 569).

231. *See Neb. Press Ass'n*, 427 U.S. at 570.

232. *See id.*

233. *See* Murphy v. Florida, 421 U.S. 794, 799 (1975).

234. *See id.* at 803.

235. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 373 (1979).

236. *See Neb. Press Ass'n*, 427 U.S. at 556.

237. *See Murphy*, 421 U.S. at 801–03.

238. *See id.* at 802–03.

239. *See id.*

240. *Id.*

241. *See* Hardaway & Tumminello, *supra* note 28, at 86.

affirmatively forbid media from publishing, also create ambiguity for trial court judges dealing with publicity-heavy cases.[242]

4. Discordant Decisions: The 1980s and 1990s Caselaw and Its Effect on Pretrial Publicity

Throughout the 1980s and 1990s, the Supreme Court decided two more cases focusing on pretrial publicity: *Patton v. Yount*[243] and *Mu'Min v. Virginia*.[244] The *Patton* Court regressed back to the standard used in 1879 in *Reynolds*: "manifest error."[245] The Supreme Court held that the trial court's determination that the jurors were impartial could only be overturned if the judge had committed a manifest error.[246] The *Patton* Court did not provide explicit reasoning for why it decided to return to the manifest error standard.[247]

In *Mu'Min v. Virginia*, the Supreme Court held that "[a] trial court's refusal to question prospective jurors about the specific contents of pretrial publicity which they had read or heard did not violate a defendant's Sixth Amendment right to an impartial jury, or Fourteenth Amendment right to due process."[248] The Court held that due process protections do not extend to specific questioning on voir dire; therefore, neither the defendant's Sixth nor Fourteenth Amendment rights were violated.[249] However, dissenting justices noted that "merely asking jurors if they can remain

242. *See Murphy*, 421 U.S. at 799; *Neb. Press Ass'n*, 427 U.S. at 554; *see also* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 379 (1979).

243. *See* Patton v. Yount, 467 U.S. 1025 (1984). This case dealt with a defendant who was convicted of murder and rape but had his original sentence overturned for separate constitutional issues. *See id.* at 1027–31. Before his new trial, he moved for a change of venue because of pretrial publicity surrounding the second trial. *See id.* at 1027–28. The motion was denied, and the defendant was convicted. *See id.* at 1028–29.

244. *See* Mu'Min v. Virginia, 500 U.S. 415 (1991). In this case, the defendant was charged with murder after escaping a prison work detail. *See id.* at 418. The defendant moved for individual voir dire in order to question the prospective jurors about the pretrial publicity surrounding the case. *See id.* at 418–19. The judge denied the motion, and the defendant was convicted by a jury comprised of 8 out of 12 members who admitted they had been exposed to the publicity. *See id.* at 419–20.

245. *See Patton*, 467 U.S. at 1031.

246. *See id.* The Court also reasoned that because four years passed between the first and second trials, "[this] passage of time between the first and second trials clearly rebutted any presumption of partiality or prejudice that existed at the time of the initial trial." *See id.* at 1026.

247. *See id.* at 1031.

248. Karen A. Cusenbary, *Constitutional Law-Voir Dire-A Trial Court's Refusal to Question Prospective Jurors About the Specific Contents of Pretrial Publicity Which They Had Read or Heard Did Not Violate a Defendant's Sixth Amendment Right to an Impartial Jury, or Fourteenth Amendment Right to Due Process*, 23 ST. MARY'S L.J. 541, 542 (1991) (citing *Mu'Min*, 500 U.S. at 415).

249. *See id.* The Court did not explain why specific voir dire questions are not included in due process protections. *See id.* at 541–42.

impartial is not enough[]"[250] to protect a defendant's constitutional rights.[251] Justice Kennedy acknowledged that voir dire is an important tool to determine whether jurors can "lay aside"[252] any opinion and render a verdict based on evidence presented at trial.[253]

During the 1980s and 1990s, the Court moved both backward and forward with its rulings, creating more confusion for the lower courts.[254] The standard for overturning a conviction and granting a new trial returned to manifest error.[255] Yet, the Court also added new factors to the totality of the circumstances test to determine whether pretrial publicity has influenced jurors enough to amount to a manifest error;[256] now, appellate courts should analyze the amount of time between the original publicity and the trial.[257] The 1980s and 1990s rulings also clarified the 1970s discussion of voir dire.[258] As of 1991, courts are explicitly *not* required to allow specific pretrial publicity-based questions on voir dire,[259] even if the defendant requests that line of questioning.[260]

5. Regressed Reasoning: Most Recent Caselaw and Its Effect on Pretrial Publicity

The Supreme Court decided the most recent case on this issue, *Skilling v. United States*,[261] in 2010. The *Skilling* Court held that "[p]rominence does not necessarily produce prejudice, and juror impartiality . . . does not require ignorance[]"[262] because a presumption of juror prejudice only occurs in extreme cases.[263] The Court distinguished *Skilling* from *Rideau*: the pretrial publicity in *Rideau* was localized,

250. *Id.* at 553 (Marshall, J., dissenting) (citing *Mu'Min*, 500 U.S. at 444–45).

251. *See* Mu'Min v. Virginia, 500 U.S. 415, 449 (1991) (Kennedy, J., dissenting).

252. Cusenbary, *supra* note 248, at 555.

253. *See Mu'Min*, 500 U.S. at 449 (Kennedy, J., dissenting). Justice Kennedy proposed a new test for defendants claiming that pretrial publicity caused a lack of juror impartiality. *See id.* Justice Kennedy's test is different than asking whether jurors can be impartial because jurors are not always aware of their own biases or prejudices caused by pretrial publicity. *See id.*

254. *See id.* at 415–16; Patton v. Yount, 467 U.S. 1025, 1031 (1984).

255. *See Patton*, 467 U.S. at 1031.

256. *See id.* at 1031–32.

257. *See id.* at 1032–34.

258. *See id.* at 1031–34.

259. Courts are not required to allow any voir dire questioning that deviates from the standard questionnaire. *See Mu'Min*, 500 U.S. at 415–16.

260. *See id.*

261. *See* Skilling v. United States, 561 U.S. 358 (2010). The defendant, a former CEO at Enron, was charged with twenty-five counts of insider trading, and was subsequently denied a change of venue twice. *See id.* at 368–73 The defendant was then convicted on 19 counts. *See id.* at 375.

262. *Id.* at 381.

263. *See id.*; *see also* Rideau v. Louisiana, 373 U.S. 723, 727 (1963).

pervasive, and occurred in the same year as the trial.[264] While the Court found that the defendant in *Skilling* could have proven actual prejudice, the Court was not clear on what a showing of actual prejudice would include.[265] Instead, the Court held that the defendant did not establish any actual prejudice through voir dire or another method.[266] The Court emphasized the fact that the defendant was not convicted of all of his charges, creating a new factor for lower courts' consideration.[267]

While *Skilling* attempts to clarify the Court's ruling from *Rideau*,[268] the Court again regressed to its pre-1960s reasoning where a defendant must establish actual juror prejudice.[269] Additionally, the *Skilling* Court seemingly contradicts its ruling in *Mu'Min*.[270] Though courts are not required to allow attorneys to question the potential jurors on topics not included in the standard voir dire questionnaire, the trial court refused to grant the defendant in *Skilling* a new trial when he did not establish actual prejudice through voir dire.[271] The *Skilling* Court reiterated the deference that the *Mu'Min*[272] Court gave to trial courts: in reviewing juror bias claims, findings of jury impartiality can only be overturned by showing manifest error.[273]

6. Condensed Caselaw: A Summary of the Supreme Court's Current Pretrial Publicity Appeals Doctrine

The Supreme Court has yet to provide clear guidance on how defendants accomplish the necessary showing of pretrial publicity prejudice to be granted a new trial or overturned conviction through their appeals.[274] Courts do not guarantee the ability of defendants to question

264. *See Rideau*, 373 U.S. at 725–27. Because Skilling's trial occurred in Houston, a large city, four years passed between the media coverage and his trial, no confession like Rideau's was publicized, the trial judge took appropriate steps to mitigate damages, and Skilling was not convicted of all charges against him. *See Skilling*, 561 U.S. at 382–85. The Court distinguished Skilling from Rideau, whose pervasive pretrial publicity only occurred in a small town. *See Rideau*, 373 U.S. at 726.

265. *See id.* at 726–27.

266. *See id.*

267. *See Skilling*, 561 U.S. at 383–85.

268. *See Rideau*, 373 U.S. at 726–27; *see also Skilling*, 561 U.S. at 384. Courts can make a presumption of prejudice to overturn a conviction, but only in the most extreme cases. *Skilling*, 561 U.S. at 381–84.

269. *See* Stroble v. California, 343 U.S. 181, 195 (1952). Before *Skilling*, the Court had not addressed the actual prejudice showing since 1952 because it had moved forward with the presumption of prejudice determined by a totality of the circumstances. *See* discussion *supra* Section II.D.4.

270. *See* Mu'Min v. Virginia, 500 U.S. 415, 415–16 (1991) (holding that lower courts are not required to allow specific pretrial publicity-based questions on voir dire).

271. *See Skilling*, 561 U.S. at 375–76.

272. *See Mu'Min*, 500 U.S. at 428.

273. *See Skilling*, 561 U.S. at 396.

274. *See id.*

potential jurors about exposure to pretrial publicity during voir dire.[275] However, the Court suggests that defendants must show either manifest error[276] or actual prejudice[277] in all but the most extreme cases to receive a new trial or overturned conviction.[278]

Still, the Court has never explicitly overturned any caselaw finding that lower courts can presume juror prejudice in specific instances.[279] Additionally, the Court never clarified whether reasonable jurors could debate trial courts' factual determinations during a defendant's first appeal.[280] Moreover, throughout various decisions,[281] the Court discusses multiple, vague[282] factors that defendants can introduce for appellate courts to consider when determining whether to grant a new trial or overturn a conviction.[283] The Court introduces fact-specific factors,[284]

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275. *See Mu'Min*, 500 U.S. at 415–16.

276. *See* Patton v. Yount, 467 U.S. 1025, 1031 (1984).

277. *See* Stroble v. California, 343 U.S. 181, 195 (1952). Actual juror prejudice must be affirmatively proven by an undefined showing that pretrial publicity prejudiced jurors. *See id.*

278. *See Skilling*, 561 U.S. at 384–85; *see also* Hardaway & Tumminello, *supra* note 28, at 51.

279. The *Skilling* Court did not explicitly overturn *Irvin*, *Rideau*, or *Murphy*. *See Skilling*, 561 U.S. at 382–85; Irvin v. Dowd, 366 U.S. 717, 724–25; Rideau v. Louisiana, 373 U.S. 723, 726 (1963); *see also* Murphy v. Florida, 421 U.S. 794, 798–99 (1975) (finding that presumption of prejudice can be used as the standard of review in specific instances).

280. *See* Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018) (holding that, after a writ of habeas corpus was denied, reasonable jurors could debate whether the defendant showed the state court's factual determination on juror bias was wrong, in order to grant defendant an application for Certificate of Appealability). The Court stated that reasonable jurors "could debate whether Tharpe [had] shown by clear and convincing evidence that the state court's factual determination was wrong." *Id.* The Court did not clarify whether this standard applied only after a writ of habeas corpus has been denied or whether reasonable jurors could debate trial courts' factual determinations during a defendant's first appeal. *See id.* While the Rule proposed by this Comment applies specifically to first appeals, this Rule incorporates the *Tharpe* court's holding. *See* discussion *infra* III.A.2.

281. *See* discussion *supra* Sections II.D.1, II.D.2, II.D.3, II.D.4, II.D.5.

282. *See* Hardaway & Tumminello, *supra* note 28, at 86.

283. *See* Marshall v. United States, 360 U.S. 310, 312–13 (1959); Stroble v. California, 343 U.S. 181, 194–95 (1952); *Rideau*, 373 U.S. at 726; *Murphy*, 421 U.S. at 799; *Skilling*, 561 U.S. at 384–85; Reynolds v. United States, 98 U.S. 145, 155–56 (1878); *Irvin*, 366 U.S. at 724–25; Neb. Press Ass'n v. Stuart, 427 U.S. 539, 565 (1976).

284. *See Marshall*, 360 U.S. at 312–13. First, fact-specific factors affecting juror impartiality can include whether pretrial publicity revealed extra-judicial information. *See id.*; *see also Stroble*, 343 U.S. at 194. Second, fact-specific factors can include whether a confession was televised. *See Rideau*, 373 U.S. at 726. Third, fact-specific factors can include the voir dire record. *See Murphy*, 421 U.S. at 799. Fourth, fact-specific factors can include the atmosphere throughout the community at the time of trial. *See id.* Fifth, fact-specific factors can include the unspecified length to which trial court had to go to select impartial jurors. *See id.* Sixth, fact-specific factors can include whether the defendant was convicted of every charge. *See Skilling*, 561 U.S. at 359.

procedure-based factors,[285] and pretrial publicity-based factors that affect a defendant's due process rights.[286] Then, the appellate courts' analysis of these factors must reach one of four conclusions.[287] However, the Supreme Court has not provided the necessary guidance for lower courts to apply the suggested factors in a fair and universal way.[288]

III. ANALYSIS

The Supreme Court should discern a universally applicable rule that provides a remedy for defendants who allege that pretrial publicity unfairly prejudiced their jurors.[289] The Supreme Court has not yet provided such a rule and maintains that even pervasive, concentrated, and adverse pretrial publicity does not automatically lead to an unfair trial.[290] Instead, trial courts must navigate the vague, non-comprehensive fact-based factors during voir dire[291] to determine jurors' impartiality.[292] When defendants appeal their convictions, appellate courts must navigate the trial court's fact-based determinations of the factors while giving extreme deference to the trial court's findings.[293] Additionally, appellate courts

285. *See Reynolds*, 98 U.S. at 155–56. Procedural factors for appellate courts to consider can include whether the defendant moved for a judgment of acquittal at trial and whether the court denied defendant's motion for a judgment of acquittal. *See id.* Procedural factors for appellate courts to consider can also include whether defendant moved for change of venue before trial. *See Stroble*, 343 U.S. at 194. Finally, procedural factors for appellate courts to consider can include whether change of venue motion was denied. *See Rideau*, 373 U.S. at 726.

286. *See* Estes v. Texas, 381 U.S. 532, 541–44 (1965). Due process factors include televised pretrial hearings and media presence in the courtroom that creates a disruptive, carnival atmosphere. *See* Sheppard v. Maxwell, 384 U.S. 333, 354 (1966). Due process factors also include a judge's failure to mitigate pretrial publicity's effect on jurors. *See id.*; *Neb. Press Ass'n*, 427 U.S. at 555, 565; Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 373 (1979).

287. *See Stroble*, 343 U.S. at 194. Appellate courts must find that the defendant made an affirmative showing that (1) community prejudice existed and (2) that prejudice affected the jury deliberation in some way. *See id.* First, appellate courts could find no affirmative showing of community or juror prejudice. *See id.* Second, appellate courts could find that defendant showed by clear and convincing evidence that "deep and bitter prejudice was prevalent in the community." *See Irvin*, 366 U.S. at 724–25. Third, appellate courts could find that defendant showed by clear and convincing evidence "apparent and flagrant departure from due process and decorum combined with an intrusion of external influences[]" which made the defendant's trial fundamentally unfair. *See* Hardaway & Tumminello, *supra* note 28, at 60; *see also Murphy*, 421 U.S. at 799. Fourth, appellate courts could find that defendant showed manifest error. *See Skilling*, 561 U.S. at 359.

288. *See* discussion *infra* Part III.

289. *See* Hardaway & Tumminello, *supra* note 28, at 53.

290. *See Neb. Press Ass'n*, 427 U.S. at 555, 565.

291. *See* discussion *supra* Section II.D.6; *see also* discussion *infra* Section III.A.2.

292. *See* sources cited *supra* note 28.

293. *See* sources cited *supra* note 28. Trial courts do not need to consider any harmless errors—errors that do not affect the defendant's constitutional right. *See* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court

must consider the case's non-comprehensive procedural and due process factors.[294]

The lack of Supreme Court guidance causes lower court judges to apply inconsistent rules that allow some defendants the chance to appeal their jury verdict but not others.[295] A universal rule that courts can fairly apply to *all* defendants would eliminate this inconsistency among the lower courts. Because the Supreme Court highlighted different procedure-based factors[296] for appellate courts to consider when reviewing each defendant's pretrial publicity-generated claim, the universal rule should include different applications for each procedural scenario.[297]

A. Clarity is Needed: The Call for a New, Universal Rule for Granting a New Trial or Overturning a Conviction

The application of this Comment's proposed rule begins with the Universal Appellate Rule for Combating Pretrial Publicity[298] for all defendants and then divides the Rule into Part 1, Part 2, and Part 3—to be applied in light of specific procedural factors affecting each individual defendant's case.[299] Each section of the Rule contains numbered steps that the appellate courts must apply, followed by further guidance[300] to aid determinations at each step.

1. The Universal Appellate Rule for Combating Pretrial Publicity: Applicable to Every Defendant Affected by Pretrial Publicity

All defendants can trigger the Universal Rule when their appeals allege that pretrial publicity caused juror prejudice. Due process violations are threshold issues for all appeals, so appellate courts must consider due process violations[301] caused by pretrial publicity before considering a

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shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

294. *See* sources cited *supra* note 28.

295. *See* sources cited *supra* note 28. Because no clear guidance exists from the Supreme Court, lower courts can use any number of fact-based, procedure-based, or due process factors to determine whether defendants can appeal their convictions. *See* sources cited *supra* note 28.

296. *See* discussion *infra* Section III.A.1.

297. *See Prejudicial Publicity in Trials of Public Officials*, *supra* note 28, at 123; Meringolo, *supra* note 28, at 998–99.

298. The rule created in this Comment, which remedies the effects of pretrial publicity, is called the Universal Appellate Rule for Combating Pretrial Publicity. This rule will be referred to as the "Universal Rule."

299. *See* discussion *infra* Section III.A.1; *see also* discussion *supra* Section II.D.6.

300. The further guidance is formatted with bullet points. *See* discussion *infra* Sections III.A.1, III.A.2.

301. *See* sources cited *supra* note 28.

defendant's arguments about the pretrial publicity's effects.[302] Additionally, appellate courts must determine whether pretrial publicity revealed any extrajudicial information because courts must presume that anti-defendant juror prejudice exists if that situation occurred.[303] The Universal Rule's text follows.

Universal Appellate Rule for Combating Pretrial Publicity: Due Process Violations and Extrajudicial Information

1) Appellate courts should automatically review all defendants' records for due process violations[304] using the totality of the circumstances analysis[305] if:[306]

- The media televised the pretrial hearings;[307]
- Media members present in the courtroom created a disorderly atmosphere during the trial;[308] or
- Another fact from the record[309] reveals an apparent and flagrant departure from due process or decorum, making the defendant's trial fundamentally unfair.[310]
    - A new trial should be granted if some evidence, facts, or law supported the jury's conviction.[311]
    - Defendant's conviction should be overturned if no evidence, facts, or law supported the jury's conviction.[312]

2) Using the totality of the circumstances analysis, appellate courts should presume prejudice for extrajudicial information[313] revealed during

302. *See* sources cited *supra* note 28.

303. *See* Murphy v. Florida, 421 U.S. 794, 799 (1975); Irvin v. Dowd, 366 U.S. 717, 725 (1961).

304. Due process violations are acceptable issues for defendants to have standing to argue that their trial was fundamentally unfair. *See* Estes v. Texas, 381 U.S. 532, 541–44 (1965); Sheppard v. Maxwell, 383 U.S. 333, 354 (1966). Because Supreme Court precedent has emphasized situations where media caused due process violations, appellate courts should automatically look for analogous situations when defendants appeal their conviction and argue that they did not have impartial jurors. *See Estes*, 381 U.S. at 541–44; *Sheppard*, 384 U.S. at 354.

305. *See* discussion *supra* Section II.D.2.

306. *See Sheppard*, 384 U.S. at 354.

307. *See Estes*, 381 U.S. at 541–44.

308. *See Sheppard*, 384 U.S. at 354.

309. *See* discussion *supra* Section II.D.2.

310. *See* Murphy v. Florida, 421 U.S. 794, 799 (1975).

311. *See* Reynolds v. United States, 98 U.S. 145, 155–56 (1878).

312. *See id.*

313. *See* Stroble v. California, 343 U.S. 181, 193–95 (1952); *see also Extrajudicial*, OXFORD LEARNER'S DICTIONARY, https://bit.ly/36eoP4b (last visited Jan. 21, 2021). Extrajudicial information is information that jury members were exposed to through sources, like the media, outside of the evidence presented at trial. *See id.*

pretrial publicity.[314] If a defendant shows, through clear and convincing[315] evidence during appeal,[316] that pretrial publicity revealed extra-judicial information, then the appellate court must grant the defendant a new trial.[317]

3) If the appellate court does not find a due process violation,[318] or defendant has not presented clear and convincing evidence of extrajudicial information revealed though pretrial publicity,[319] the appellate court should determine which standard and analysis to apply based on defendant's procedural history:

- If the defendant moved for both a judgment of acquittal and change of venue, Part 1 applies;
- If the defendant only moved for a judgment of acquittal or only moved for change in venue, Part 2 applies; or
- If the defendant did not move for a judgment of acquittal or for change of venue, Part 3 applies.

2. Scenario-Specific Rules: Applicable to Individual Defendants Based on Their Case's Procedural History

Because appellate courts must consider several different procedural factors when determining whether to grant a new trial or overturn a conviction, the best practice for creating a rule that can be fairly applied to all defendants is to have different applications of the rule for each procedural situation.[320] After appellate courts consider the Universal Rule, the first procedural scenario is triggered if a defendant moved for both a judgment of acquittal and for change of venue during trial. The text of Part 1 follows.

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314. *See Murphy*, 421 U.S. at 799.

315. *See* FED. R. EVID. 606(b)(2)(A), (B). For the purposes of presuming prejudice for extrajudicial information, clear and convincing evidence of extrajudicial pretrial publicity can include, but is not limited to, affidavits of prior jury members stating they viewed the extra-judicial information before or during the trial, or testimony of pretrial publicity showing information about the case that was not included in the record. *See id.*; *see also* Irvin v. Dowd, 366 U.S. 717, 724–25 (1961).

316. *See Irvin*, 366 U.S. at 724–25. The Court did not specify what amounts to clear and convincing evidence but used this standard when weighing whether extra-judicial information was revealed by pretrial publicity. *See id.* This Comment attempts to provide clearer guidance for defendants while remaining deferential to the current applicable caselaw.

317. *See* Marshall v. United States, 360 U.S. 310, 312–13 (1959); Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018). Double jeopardy is not at issue here because the defendant was charged, appealed the conviction, and then the appellate court remanded the case back to the trial court as the chosen remedy for the error. *See How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), https://bit.ly/3iO9rk6.

318. *See* Estes v. Texas, 381 U.S. 532, 541–44 (1965); Sheppard v. Maxwell, 383 U.S. 333, 354 (1966).

319. *See* Stroble v. California, 343 U.S. 181, 194 (1952).

320. *See* sources cited *supra* note 28.

Part 1: If Defendant Moved for Both Judgment of Acquittal and Change of Venue[321]

1) Appellate courts should use the presumption of juror prejudice standard[322] and affirmative showing of community prejudice analysis.[323] Appellate courts should presume that a defendant's Sixth Amendment right to an impartial jury was violated[324] if the defendant provides an affirmative showing that community prejudice existed and affected the jury deliberations in any way.[325] An affirmative showing of community prejudice that affected the jury deliberations in any way can include, but is not limited to:

- The defendant's presentation of affidavits from community members, which provide examples of pretrial publicity affecting the community's opinions about the defendant's alleged crime;[326]
- The defendant's presentation of affidavits from relevant community members providing examples of the actual effect that the defendant's crime had on the community;[327]
- The defendant's presentation of affidavits from jury members expressing that jurors discussed any pretrial publicity before or during jury deliberations;[328]
- The trial court denied motion for change of venue;[329]
- The media televised the defendant's confession;[330]
- The trial court judge did not allow questioning about pretrial publicity exposure on juror voir dire;[331]
- Analysis of the voir dire record[332] provided affirmative showing of prejudice;[333]

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321. *See* Reynolds v. United States, 98 U.S. 145, 155–56 (1878); *see also* Irvin v. Dowd, 366 U.S. 717, 727 (1961) (citing *Stroble*, 343 U.S. at 194).

322. The presumption of prejudice standard allows the court to presume that there is a reasonable likelihood of juror prejudice, influenced by pretrial publicity. *See* discussion *supra* Section II.D.2.

323. *See Stroble*, 343 U.S. at 194; *see also* sources cited *supra* note 28.

324. *See* U.S. CONST. amend. VI.

325. *See Stroble*, 343 U.S. at 194.

326. While this factor was not explicitly listed as acceptable in any court case, the most successful defendant who proved actual juror prejudice by clear and convincing evidence had more that 40 affidavits from community members. *See Irvin*, 366 U.S. at 727 (citing *Stroble*, 343 U.S. at 194); *see also* discussion *supra* Section II.D.2.

327. *See supra* note 326 and accompanying text.

328. *See supra* note 326 and accompanying text.

329. *See supra* note 326 and accompanying text.

330. *See* Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

331. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 373 (1979); Mu'Min v. Virginia, 500 U.S. 415, 415–16 (1991); Skilling v. United States, 561 U.S. 358, 384–85 (2010).

332. *See* Murphy v. Florida, 421 U.S. 794, 799 (1975).

333. *See id.*

- The length to which the trial court went to find impartial jurors;[334]
- Evidence of the statistical probability that jurors consumed the pretrial publicity;[335]
- Evidence of a clear and present danger of actual prejudice or imminent threat against the defendant in the courtroom during defendant's trial;[336]
- Jury convicted the defendant on all charges; or[337]
- Any other fact from the record establishing an affirmative showing that community prejudice existed and affected the jury deliberation in any way.[338]

2) A new trial should be granted if some evidence, facts, or law could have supported the defendant's conviction by jury,[339] or if the court believes that reasonable jurors could debate whether defendant showed by clear and convincing evidence that a trial court's factual determination of juror impartiality was wrong.[340]

3) Defendant's conviction should be overturned if no evidence, facts, or law supported the jury's conviction.[341]

After appellate courts consider the Universal Rule, the second procedural scenario is triggered if a defendant moved for either a judgment of acquittal or for change of venue during trial. Defendants in this procedural scenario face a higher standard of review on appeal because they did not move for both judgment of acquittal and for change of venue.[342] The text of Part 2 follows.

Rule Part 2: If Defendant Moved for Either a Judgment of Acquittal or for Change in Venue[343]

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334. *See id.*

335. *See Rideau*, 373 U.S. at 726.

336. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 555, 565 (1976); *Gannett Co., Inc.*, 443 U.S. at 373.

337. *See Skilling*, 561 U.S. at 383–85. While guilty on all counts is the most persuasive situation, the court can use its discretion and find in favor of the defendant for this factor if the defendant was not guilty on all charges, but the overall percentage of guilty charges substantially outweighs the not guilty charges. *See id.*

338. These examples of affirmative showings will best help appellate courts find evidence of juror prejudice caused by pretrial publicity. *See* Irvin v. Dowd, 366 U.S. 717, 724–25 (1961); Stroble v. California, 343 U.S. 181, 194 (1952). The harmless error doctrine will not apply to this Rule. *See* 28 U.S.C. § 2111.

339. *See* Reynolds v. United States, 98 U.S. 145, 155–56 (1878).

340. *See* Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018)

341. *See id.*

342. *See Reynolds*, 98 U.S. at 155–56.

343. The Supreme Court offered the same standard of review (presumption of prejudice) to defendants who made one motion but not the other, regardless of which motion the defendants made. *See Reynolds*, 98 U.S. at 155–56; *see also* Murphy v. Florida, 421 U.S. 794, 799 (1975).

1) Appellate courts should use the presumption of prejudice standard[344] and totality of the circumstances analysis[345] to determine whether prejudice can be presumed.[346] Appellate courts should presume that a defendant's Sixth Amendment right to an impartial jury was violated[347] if a defendant establishes presumed juror prejudice[348] through the totality of the circumstances[349] if:

- The trial court denied the defendant's motion for change of venue;[350]
- The media televised the defendant's confession;[351]
- The trial court judge did not allow questioning about pretrial publicity exposure on voir dire;[352]
- The defendant presents exhibits, including media posts, or affidavits from community members or jurors that provide examples that a "deep and bitter prejudice was prevalent in the community:"[353]
- The length to which the trial court went to find impartial jurors;[354]
- Evidence of the statistical probability that jurors consumed the pretrial publicity;[355]
- The defendant was convicted of all charges;[356] or
- Any other fact from the record that establishes presumed juror prejudice.[357]

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344. *See Murphy*, 421 U.S. at 799; *see also* Hardaway & Tumminello, *supra* note 28, at 74 n.289 (providing examples for presumption of prejudice).

345. *See id.*

346. *See* sources cited *supra* note 28.

347. *See* U.S. CONST. amend. VI.

348. *See* Skilling v. United States, 561 U.S. 358, 384–85 (2010).

349. *See Murphy*, 421 U.S. at 799.

350. *See* Irvin v. Dowd, 366 U.S. 717, 724–25 (1961).

351. *See* Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

352. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 441 (1979); Mu'Min v. Virginia, 500 U.S. 415, 415–16 (1991); *Skilling*, 561 U.S. at 384–85.

353. While this is a difficult and unclear standard to meet, the defendant in *Irvin* was able to accomplish that showing in the Court's opinion by providing over 46 exhibits "indicat[ing] that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial." *Irvin*, 366 U.S. at 725.

354. *See Murphy*, 421 U.S. at 799.

355. This circumstance was created to reflect the Supreme Court's calculation that the number of times the confession was aired and the number of viewers of each televised confession was so great that it was likely members of the juror pool saw the confession, creating a presumption of prejudice. *See Rideau*, 373 U.S. at 726; *see also* Estes v. Texas, 381 U.S. 532, 540 (1965).

356. *See* Skilling v. United States, 561 U.S. 358, 383–85 (2010); *see also supra* note 337 and accompanying text.

357. *See supra* note 338 and accompanying text.

2) A new trial should be granted if any evidence, facts, or law could have supported the jury's conviction.[358]

3) The defendant's conviction should be overturned if no evidence, facts, or law supported the jury's conviction.[359]

After appellate courts consider the Universal Rule, if the defendant did not move for either a judgment of acquittal or for a change of venue during trial, then those circumstances trigger the third procedural scenario.[360] Defendants with this procedural scenario face the highest standard of review on appeal because they did not make either motion during trial.[361] The text of Part 3 follows.

Rule Part 3: If a Defendant Did Not Move for A Judgment of Acquittal or for Change in Venue[362]

1) Appellate courts shall use the manifest error standard.[363] Appellate courts should determine whether a manifest error occurred when defendant's Sixth Amendment right to an impartial jury was violated[364] if defendant establishes actual juror prejudice by clear and convincing evidence.[365]

2) A new trial should be granted if some evidence, facts, or law could have supported the jury's conviction.[366]

3) Defendant's conviction should be overturned if no evidence, facts, or law supported the jury's conviction.[367]

Because determining whether juror prejudice existed is a fact-based, procedure-specific inquiry, no rule could list every piece of evidence that

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358. *See* Reynolds v. United States, 98 U.S. 145, 155–56 (1878).

359. *See id.*

360. *See* Stroble v. California, 343 U.S. 181, 194 (1952); *Reynolds*, 98 U.S. at 155–156; Patton v. Yount, 467 U.S. 1025, 1031 (1984).

361. *See Reynolds*, 98 U.S. at 155–56; *Patton*, 467 U.S. at 1031 (applying the manifest error standard of review to those defendants who did not move for either judgment of acquittal or for change of venue).

362. *See Stroble*, 343 U.S. at 194.

363. *See Reynolds*, 98 U.S. at 155–56; *Patton*, 467 U.S. at 1031.

364. U.S. CONST. amend. VI.

365. *See* Skilling v. United States, 561 U.S. 358, 382–85 (2010); Marshall v. United States, 360 U.S. 310, 312–13 (1959); Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018). For the purposes of showing actual juror prejudice, clear and convincing evidence of actual juror prejudice caused by pretrial publicity can include evidence that the trial court judge did not allow questioning about pretrial publicity exposure on voir dire. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 373 (1979); Mu'Min v. Virginia, 500 U.S. 415, 415–16 (1991); *Skilling*, 561 U.S. at 359. Showing actual juror prejudice can also include providing media posts or affidavits from community members or jurors that a deep and bitter prejudice was prevalent in the community. *See* Irvin v. Dowd, 366 U.S. 717, 725 (1961). This showing can also include evidence that a defendant was convicted of all charges. *See Skilling*, 561 U.S. at 359. This showing can also include, but is not limited to, another fact from the record that establishes actual juror prejudice. *See supra* note 355 and accompanying text.

366. *See Reynolds*, 98 U.S. at 155–56.

367. *See id.*

a defendant could introduce to prove an affirmative showing of prejudice.[368] However, the Court must implement clear guidance, like the Universal Rule suggested by this Comment, so defendants can have an equal opportunity to remedy convictions by juries prejudiced by pretrial publicity.

IV. CONCLUSION

The First Amendment allows media outlets to publish stories about defendants before trial,[369] and the Sixth Amendment gives defendants the right trial by impartial jurors.[370] However, defendants whose cases were hounded by publicity before they even went to trial, like the five Black and Latino boys, the four Latinx, LBGTQ+ women, and the white former officer, have no universally applicable means to appeal their convictions.[371]

While the Federal Rules of Criminal Procedure provide methods for combating the impact of pretrial publicity, these methods lack efficacy in reality.[372] Additionally, the Court's current precedent does not provide lower courts with the necessary guidance: defendants have no universal direction to appeal convictions from juries who were affected by pretrial publicity-generated prejudice.[373] Therefore, the Court should articulate a new rule that provides defendants and lower courts with clear guidance for handling the friction between defendants' rights to a fair trial and the media's right to freedom of the press.

368. *See* discussion *supra* Section II.D.
369. *See* discussion *supra* Section II.B.1.
370. *See* discussion *supra* Section II.B.2.
371. *See* discussion *supra* Section II.D.6; *see also* discussion *supra* Section III.A.
372. *See* discussion *supra* Section II.C.
373. *See* discussion *supra* Section II.A.