

“NOT IN OUR TOWN”

PRETRIAL PUBLICITY,
PRESUMED PREJUDICE, AND
CHANGE OF VENUE IN ALASKA:
PUBLIC OPINION SURVEYS AS A
TOOL TO MEASURE THE IMPACT
OF PREJUDICIAL PRETRIAL
PUBLICITY

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With a view toward the characteristics that make Alaska unique for change of venue analysis, this Article reviews how the criminal justice system in general, and Alaska in particular, has addressed the impact of prejudicial pretrial publicity on the right of a criminal defendant to a fair trial by an impartial jury. It provides an overview of the development of the concept of “presumed prejudice,” as opposed to “actual prejudice” demonstrated in jury voir dire, and then explores why voir dire is never an appropriate tool for presumed prejudice review. This overview is followed by a critical look at the application of the principle of presumed prejudice in change of venue litigation in Alaska state courts.

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Next, the Article examines two Alaska federal criminal cases in which a public opinion survey supported a motion for change of venue. The Article argues that a valid public opinion survey is an invaluable measure of the real impact of prejudicial pretrial publicity on a potential jury pool and should be utilized in high-profile cases when juror prejudice is likely. However, recognizing that this tool may not always be a viable option, the Article suggests an alternative method for exposing possible juror prejudice, and concludes that, at a minimum, trial courts, especially those in Alaska, should carefully and independently weigh the concept of presumed prejudice when considering the proper venue for sensationalized criminal cases.

I. INTRODUCTION

In October 19, 1990, Raymond Cheely was driving on the Glenn Highway in Anchorage, Alaska with two friends, Doug Gustafson and George Kerr. Gustafson was holding an HK-91 semi-automatic assault rifle in the front seat.¹ After an incident with another car on the highway, Gustafson fired a shot at the other vehicle, killing a passenger.² This incident marked Anchorage's first "drive-by" shooting and sparked a great deal of publicity.³

Cheely filed a motion for a change of venue outside of Anchorage.⁴ In support of his motion, he submitted more than twenty-four newspaper articles that addressed the shooting, the arrests of the defendants, and the trial and conviction of co-defendant Gustafson.⁵ The coverage described Cheely as a lead troublemaker⁶ and group leader,⁷ and both men were labeled "gun nuts."⁸ Several articles stated that Cheely maneuvered the car so that Gustafson could get a clear shot, that police suspected Cheely hid the murder weapon, and that both men had threatened others not to testify against them.⁹ The articles also discussed a burglary and theft that the two men were suspected of committing.¹⁰ De-

1. Cheely v. State, 861 P.2d 1168, 1169 (Alaska Ct. App. 1993).

2. *Id.* at 1169-70.

3. *Id.* at 1170-73.

4. *Id.* at 1170.

5. *Id.*

6. *Id.* at 1171.

7. *Id.* at 1179.

8. *Id.* at 1171.

9. *Id.* at 1171-73.

10. *Id.* These newspaper articles were in addition to an earlier wave of publicity about Gustafson's trial, held two weeks prior to Cheely's trial. The testimony

spite this intense media coverage, the court ruled that a change of venue was not required.¹¹ Cheely was convicted of second-degree murder and sentenced to sixty years imprisonment.¹²

The struggle to protect criminal defendants charged with sensational crimes from exposure to “the media circus” can be traced in American jurisprudence back to the trial of Aaron Burr in 1807.¹³ The former Vice President had been charged with treason for planning the seizure of New Orleans and the invasion of Mexico in defiance of President Jefferson.¹⁴ The charge of treason against Colonel Burr was the focus of the media and saturated Virginia newspapers, which informed the jurors in great detail of events and proceedings leading up to the trial.¹⁵ The Virginia press described a purported grand plan of insurrection, where Burr would invade Mexico, detach the southwest from the United States, and form an empire stretching from the Mississippi Valley to Mexico City.¹⁶

Supreme Court Chief Justice John Marshall, who presided over Burr’s trial, had to confront the effect of pretrial publicity on the prospective jurors.¹⁷ The concern was and is that pretrial publicity will impair the Sixth Amendment guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”¹⁸ In his opinion, Chief Justice Marshall recognized the importance of an impartial jury:

The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind . . . Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision

at Gustafson’s trial and the testimony reported by the media echoed most of the prejudicial reports about Cheely. *Id.*

11. *Id.* at 1175–76.

12. *Id.* at 1169.

13. *United States v. Burr*, 25 F. Cas. 49 (Va. Cir. Ct. 1807) (No. 14,692g) [hereinafter *Burr I*].

14. *United States v. Burr*, 25 F. Cas. 201, 202–06 (Va. Cir. Ct. 1807) (No. 14,694a) [hereinafter *Burr II*].

15. *Id.* at 203–04.

16. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 38 (1994).

17. *Id.* at 43–44.

18. U.S. CONST. amend. VI.

of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. Is there less reason to suspect him who has prejudged the case, and has deliberately formed and delivered an opinion upon it? Such a person may believe that he will be regulated by testimony,¹⁹ but the law suspects him, and certainly not without reason.

While Chief Justice Marshall was clearly concerned about protecting the defendant's express rights under the United States Constitution, he also recognized that both procedural and substantive justice can be compromised by an underlying, immutable fact of human nature: the opinions of others can inform and direct the decisions of jurors, often in subtle ways impossible to detect in a public courtroom.²⁰ Acknowledgment of this fact is an inherent component of the court's duty to ensure overall justice.²¹ Otherwise, regardless of how fair the actual procedure and the subsequent results appear, the integrity of a jury verdict, and thus the judicial system, will always be questioned in an environment polluted by suspicions of bias.²² Consequently, Chief Justice Marshall also realized that the trial court has a duty to independently assess, and possibly presume, partiality, even in spite of a juror's denial of bias.²³ The Chief Justice began a rigorous voir dire of prospective jurors on August 3, 1807.²⁴ Forty-eight prospective jurors were examined the first day, and forty-four were excused after admitting to being influenced by the newspapers.²⁵ After two weeks of voir dire, the panel of prospective jurors was exhausted, and a second venire was summoned.²⁶

Chief Justice Marshall did not disqualify jurors for having information and opinions on the case, so long as the prepossession was a "light impression" that "may leave the mind open to a fair consideration."²⁷ This rule was applied both to views on the full case and views on an essential element of the charge.²⁸ Furthermore, regardless of what a juror claimed, it was up to the court to

19. *Burr I*, 25 F. Cas. at 50.

20. *Id.* at 50-51.

21. *See id.*

22. *See id.*

23. *See id.*

24. ABRAMSON, *supra* note 16, at 40.

25. *Id.*

26. *Id.* at 40-42.

27. *Burr I*, 25 F. Cas. at 51.

28. *Id.*

determine the degree of the juror's foregone conclusion of the defendant's guilt.²⁹

Unfortunately, Chief Justice Marshall's efforts to confront the bias of jurors did not distinguish between presumed and actual prejudice.³⁰ The only tool available to him to ferret out the impartiality of jurors was his own tenacious voir dire.³¹ However, the sole use of voir dire is antithetical to the presumption-of-prejudice analysis. If pretrial publicity has so permeated a community such that prospective jurors cannot accurately assess the depth to which editorial journalism³² has infiltrated their minds, voir dire of a jury panel from that community can be a futile exercise. Therefore, unless prejudice is presumed, the judge will be making a decision based upon information from untrustworthy sources and, as a result, the integrity of the process will be compromised.³³

Nevertheless, in 1878, the Supreme Court entirely removed the concept of presumed prejudice from the inquiry into juror impartiality. In *Reynolds v. United States*,³⁴ the Supreme Court established that a finding of juror bias must be based on actual evidence that a juror had clearly formed a biased opinion.³⁵

Eighty-eight years later, facing the "pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors," the Supreme Court in *Sheppard v. Maxwell*³⁶ accepted and clarified the notion of presumed prejudice.³⁷ The Supreme Court reversed the conviction of Doctor Sam Sheppard on the principle of presumed prejudice from publicity.³⁸ After a thorough review of the pretrial publicity and media coverage of the trial, the Supreme Court found that "the state trial judge did not fulfill his duty to protect Sheppard from the inherently

29. *Id.* at 50.

30. *Id.*

31. *Id.*

32. Editorial journalism is also called "emotional reporting," and is juxtaposed to "factual reporting." Judge Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls: A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 186-87 (1988); Vineet R. Shahani, *Change the Motion, Not the Venue: A Critical Look at the Change of Venue Motion*, 42 AM. CRIM. L. REV. 93, 102 (2005).

33. O'Connell, *supra* note 32, at 186-87; Shahani, *supra* note 32, at 102.

34. 98 U.S. 145 (1878).

35. *Id.* at 155-57. The court further held that findings of a trial court regarding juror bias would not be set aside by a reviewing court unless there was manifest error. *Id.* at 156.

36. 384 U.S. 333 (1966).

37. *Id.* at 362.

38. *Id.*

prejudicial publicity which saturated the community.”³⁹ The prejudice to the defendant was presumed even though all of the jurors asserted that they would not be influenced by outside sources of information during voir dire.⁴⁰ Despite the Court’s use of the concept of presumed prejudice in *Sheppard*, confusion still surrounds presumed and actual prejudice, even within the Supreme Court.

The premise of this Article is that Alaska courts have not been immune to the common mistakes made when dealing with potential juror prejudice. Alaskan communities are especially susceptible to pretrial publicity given the relatively small state population⁴¹ and the magnified impact of media outlets in the state. The Alaska Supreme Court has endorsed the idea of presumed prejudice by adopting the American Bar Association’s proposed standards that call for a change of venue whenever there is a “substantial likelihood” that a fair trial by an impartial jury cannot be had, without requiring a showing of actual prejudice.⁴² However, the guarantee of impartiality has been compromised in recent years in several high-profile state cases.⁴³ Even while the pervasiveness of modern communications has increased in Alaska, and criminal caseloads have dramatically expanded, venue changes have been infrequent.⁴⁴ Alaska state trial and appellate courts have blurred the distinction between presumed and actual prejudice.⁴⁵ Like trial courts throughout the nation, Alaska’s trial courts rely almost entirely on voir dire to ascertain the impact of pretrial publicity on jurors. Due to erroneous assumptions about the effects of pretrial publicity on the public, trial courts also rely upon other equally inadequate tools to mitigate against the use of prejudiced jurors.

This Article argues that, though historically the most popular approach, voir dire is neither an appropriate nor effective initial step in what must be a two-step inquiry into juror prejudice. First, prior to the jury selection process, trial courts need to examine carefully the possibility of presumed prejudice when the issue is raised. Second, if necessary, actual prejudice should be separately

39. *Id.* at 363.

40. *Id.* at 354 n.9.

41. The U.S. Census Bureau 2004 population estimate for Alaska was 655,435. U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/02000.html>.

42. *See* Mallott v. State, 608 P.2d 737, 748 (Alaska 1980) (citing ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS § 8-3.3(c) (2d ed. Tentative Draft 1978)).

43. *See* discussion *infra* pt. II.

44. *See id.*

45. *See id.*

explored during voir dire. This separate analysis for presumed and actual prejudice is especially critical in a state like Alaska.

In addition to voir dire, the Federal Defender Office for the District of Alaska has utilized another instrument to measure the impact of pretrial publicity in two high-profile federal cases.⁴⁶ That tool is a public opinion survey of the prospective jury pool conducted by a market research corporation using scientific marketing and survey techniques. In *United States v. Cheely (Cheely II)*,⁴⁷ that research persuaded the United States District Court for Alaska to grant a motion for a change of venue in a mail-bombing murder trial.⁴⁸ In *United States v. Maad*,⁴⁹ the district court declined to grant a change of venue based on prejudicial pretrial publicity that was supported by a public opinion survey. However, the Ninth Circuit Court of Appeals reversed the district court's holding.⁵⁰ In these two cases, public opinion surveys demonstrated bias in the communities from which jurors were drawn, even two years after the crime in *Cheely*,⁵¹ and despite the failure to show actual prejudice during jury selection in *Maad*.⁵²

Part II of this Article reviews the evolution of presumed prejudice from pretrial publicity doctrine, culminating in the *Sheppard v. Maxwell*⁵³ decision. Part III explains the ineffectiveness of traditional methods of maintaining a just judicial system when it comes to defendants' Sixth Amendment rights and focuses on the misapplication of the voir dire process to presumed-prejudice review. Part IV applies these principles to the evaluation of prejudice analysis by Alaska state courts. Part V describes the experience of the Alaska Federal Defender Office in utilizing a public opinion survey to support change of venue motions in the *Cheely* and *Maad* cases. The section hypothesizes why public opinion surveys would more accurately reflect community sentiment about a high-profile case, and, consequently, be more effective than voir dire in exposing juror bias. Part V also presents a viable alternative to a full-

46. Michael T. Nietzel & Ronald C. Dillehay, *Psychologists as Consultants for Changes of Venue: The Use of Public Opinion Surveys*, 7 LAW AND HUM. BEHAV. 309, 310-13 (1983).

47. 814 F. Supp. 1430 (D. Alaska 1992). *Cheely II* involved a criminal prosecution for a mail-bombing allegedly orchestrated by Cheely while in prison for the drive-by shooting. See discussion *infra* pt. V(A).

48. *Id.* at 1433.

49. 75 Fed. App'x 599 (9th Cir. 2003).

50. *Id.* at 601.

51. 814 F. Supp. at 1433.

52. *Maad*, 75 Fed. App'x at 601.

53. 384 U.S. 333 (1966).

scale public opinion survey, which utilizes a scientifically-designed jury questionnaire.

In conclusion, the authors suggest that principles of justice are threatened by the failure to differentiate between presumed and actual prejudice. They further argue that in an era of rapidly advancing methods of communication, Alaska trial courts must, at a minimum, give due consideration to the need for an independent analysis of presumed prejudice when deciding on the proper venue for high-profile criminal cases. *Voir dire* should never be the basis of a presumed-prejudice inquiry.

Lastly, when prejudice can be fairly presumed, trial courts should not hesitate to change venue. The large geographic expanse of Alaska offers many alternative sites where pretrial publicity would not be an issue. Trials moved between Anchorage, Fairbanks, and Juneau can avoid the influence of local media coverage. In rural communities, the courts have the option of other venues within the judicial district or larger cities outside the district.

II. THE EVOLUTION OF PRESUMED PREJUDICE IN AMERICAN CRIMINAL JURISPRUDENCE

A. Act One: The Curtain Opens on the Media Circus

The legal principle of the “impartial juror” has been severely tested by the twentieth-century media age. The specter of what has come to be known as the first “circus trial” leapt into the public spotlight in 1935.⁵⁴ The trial of Bruno Hauptmann for kidnapping the Lindbergh baby⁵⁵ generated such unprecedented media exposure that the American Bar Association (“ABA”) adopted Canon 35 of the Code of Judicial Conduct, prohibiting the photography of, and broadcast from, court proceedings,⁵⁶ out of fear of “the degrad[ation] [of] the court and . . . misconceptions with respect thereto in the mind of the public.”⁵⁷ The Federal Rules of Criminal Procedure codified this cannon shortly thereafter,⁵⁸ as well as the provision for a change of venue upon motion by the defendant if “so great a prejudice against the defendant exists . . . that the defendant cannot obtain a fair and impartial trial.”⁵⁹ In 1941, Su-

54. *New Jersey v. Hauptmann*, 180 A. 809 (N.J. 1935).

55. *Id.* at 813.

56. *Id.*

57. MODEL CODE OF JUDICIAL ETHICS Canon 35 (1937).

58. This type of media coverage is prohibited except as otherwise provided by statute. FED. R. CRIM. P. 53.

59. FED. R. CRIM. P. 21(a).

preme Court Justice Hugo Black summed up the issue in a statement often repeated in the jurisprudence of pretrial publicity: “Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”⁶⁰

In spite of Justice Black’s admonition, “trial by media” continued to plague the criminal justice system as information technology advanced into the second half of the twentieth century. The Supreme Court addressed the issue in *Stroble v. California*.⁶¹ There, the Court reviewed the conviction of Fred Stroble for the murder of a six-year-old girl in Los Angeles County in 1949.⁶² Under attention-grabbing headlines, the media coverage of Stroble’s arrest described his confession.⁶³

Stroble was convicted of first-degree murder and sentenced to death.⁶⁴ The Supreme Court of California unanimously affirmed the conviction and death sentence.⁶⁵ Although the United States Supreme Court acknowledged that the district attorney’s release of Stroble’s confession to the press for widespread distribution was prejudicial, the majority found that the petitioner had “failed to show that the newspaper accounts aroused against him such prejudice in the community as to necessarily prevent a fair trial.”⁶⁶ In dissent, Justice Frankfurter stated emphatically that

[p]recisely because the feeling of the outside world cannot, with the utmost care, be kept wholly outside the courtroom[,] every endeavor must be taken in a civilized trial to keep it outside. To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice.⁶⁷

By 1959, the Supreme Court decided to take action against “trial by media” in *Marshall v. United States*.⁶⁸ Howard Marshall was convicted of unlicensed dispensing of drugs in the United

60. *Bridges v. California*, 314 U.S. 252, 271 (1941).

61. 343 U.S. 181 (1952).

62. *Id.* at 183–84.

63. The confession was released to the press by the district attorney and the headlines proclaimed that the defendant was, among other things, a “werewolf,” “fiend,” and “sex-mad killer.” *Id.* at 192.

64. *Id.* at 183.

65. *Id.* at 184.

66. *Id.* at 193.

67. *Id.* at 201 (Frankfurter, J., dissenting).

68. 360 U.S. 310 (1959).

States District Court for the District of Colorado.⁶⁹ The Supreme Court reversed the conviction when, due to newspaper coverage, seven members of the jury learned of the defendant's criminal history of practicing medicine without a license despite the trial court's ruling that this evidence was inadmissible.⁷⁰ The Supreme Court held that "[t]he prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."⁷¹

In 1961, the Supreme Court vacated a defendant's conviction in *Irvin v. Dowd*,⁷² where the impact of prejudicial publicity was demonstrated in the voir dire of the jury.⁷³ The trial had become the *cause célèbre* of the small community with the local media covering the defendant's extensive criminal history and discussing his guilt and punishment.⁷⁴ The jury panel admitted to exposure to the detailed pretrial publicity and to opinions that reflected the publicity.⁷⁵ But under questioning by the trial judge, the final panel stated they could still maintain impartiality.⁷⁶ Thus, the Indiana courts found that Irvin did not establish "manifest" prejudice.⁷⁷

The Supreme Court, however, found that a review of the voir dire of prospective jurors demonstrated prejudice where ninety percent of questioned jurors expressed a presumption of guilt.⁷⁸ Justice Frankfurter, in a concurring opinion, summarized the state of "trial by media" at that time:

Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court.⁷⁹

69. *Id.* at 310.

70. *Id.* at 311–12.

71. *Id.* at 312–13.

72. 366 U.S. 717 (1961).

73. *Id.* at 728–29.

74. *Id.* at 725.

75. *See id.* at 725–29.

76. *See id.*

77. *See id.* at 724–25.

78. *Id.* at 727.

79. *Id.* at 730 (Frankfurter, J., concurring).

B. Act Two: Enter Presumed Prejudice

By 1963, the Supreme Court was ready to make the move to the concept of presumed prejudice. Before trial in *Rideau v. Louisiana*,⁸⁰ the local media televised an “interview” of the defendant, where he admitted with specificity to the commission of a robbery, kidnapping, and murder.⁸¹ The trial court refused to excuse three potential jurors for cause, even though they admitted to seeing Rideau’s televised confession.⁸² The jury convicted Rideau, and he was sentenced to death.⁸³

The Supreme Court had little difficulty presuming that Rideau had been denied a fair trial, finding the trial to be a “hollow formality.”⁸⁴ The Supreme Court reversed Rideau’s conviction and required a new trial in a different venue.⁸⁵

The doctrine of presumed prejudice was most clearly illustrated in 1966 in *Sheppard v. Maxwell*.⁸⁶ Dr. Sam Sheppard was charged with the murder of his wife.⁸⁷ The case was the ultimate spectacle.⁸⁸ Newspapers published many details and rumors never presented in court.⁸⁹ A coroner’s inquest was conducted in a school gymnasium to accommodate the press.⁹⁰ Trial jurors, who were not sequestered, were constantly exposed to this media coverage.⁹¹

80. 373 U.S. 723 (1963).

81. *Id.* at 724–25.

82. *Id.* Rideau had exhausted his peremptory challenges.

83. *Id.*

84. *Id.* at 726.

85. *Id.* Rideau was twice tried in Baton Rouge, Louisiana and each time convicted and sentenced to death. *Rideau v. Whitley*, 237 F.3d 472, 476 (5th Cir. 2000). After more than ten years on Louisiana’s death row, his death sentence was vacated under the holding of *Furman v. Georgia*, 408 U.S. 238 (1972). *Id.* His conviction was vacated by the Fifth Circuit Court of Appeals in 2000, and Rideau was released from the Louisiana State Penitentiary in Angola after forty years. *Id.* at 489.

Rideau went on to become one of the best known prisoners in America and an award-winning journalist. See Wilbert Rideau, <http://www.wilbertrideau.com> (last visited Sept. 26, 2005). In 1992, he was recognized by *Life Magazine* as “The Most Rehabilitated Prisoner in America.” *Id.*

86. 384 U.S. 333 (1966); see discussion *supra* pt. I.

87. 384 U.S. at 335.

88. *Id.* at 337–49. The description of the media coverage from investigation through trial occupies thirteen pages of the *Sheppard* opinion. *Id.*

89. *Id.* at 356–57.

90. See *id.* at 339.

91. *Id.* at 345, 353.

Yet, the trial court did not grant the defendant's requests for a change of venue.⁹²

Reversing the conviction, the Supreme Court accurately predicted that both the trial and appellate courts would be facing increasingly more difficult challenges in protecting criminal defendants from pretrial publicity:

Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.⁹³

C. Act Three: Confusion Returns

During the final decades of the twentieth century, modern communications had expanded exponentially. Simultaneously, the courts struggled to maintain the balance between the competing constitutional guarantees of freedom of the press and the right to a fair trial.⁹⁴ In 1975, the Supreme Court modified the concept of presumed prejudice in the case of *Murphy v. Florida*.⁹⁵

Jack Murphy was arrested in 1968 in Dade County, Florida and charged with burglary and robbery of a Miami Beach home.⁹⁶ Murphy had previously been convicted of the 1964 theft of the Star of India sapphire and was referred to in the media as "Murph the Surf."⁹⁷ After being convicted of a murder in Broward County, Florida and pleading guilty to federal charges involving stolen securities, Murphy was convicted of robbery by a jury in Dade County in 1970.⁹⁸

Murphy argued in the Supreme Court that prejudice should have been presumed in his case since all of the jurors were aware of either the Star of India theft or the Broward County murder conviction.⁹⁹ The Court, however, distinguished this case from the "conceded circumstances"¹⁰⁰ of the earlier Supreme Court cases:

The proceedings in these [other] cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a

92. *Id.* at 352.

93. *Id.* at 362.

94. *See* Nietzel & Dillehay, *supra* note 46, at 310.

95. 421 U.S. 794 (1975).

96. *Id.* at 795.

97. *Id.*

98. *Id.*

99. *Id.* at 796, 798.

100. *Rideau v. Louisiana*, 373 U.S. 723, 725 (1963).

system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged¹⁰¹ alone presumptively deprives the defendant of due process.

The court then announced a new, albeit vague, standard for assessing presumed prejudice: "To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair."¹⁰² After reviewing the voir dire of the jurors, the Supreme Court was convinced that, in the totality of the circumstances, Murphy's trial was fundamentally fair.¹⁰³

In 1984, the Supreme Court decided *Patton v. Yount*.¹⁰⁴ Jon Yount had been convicted of murder and rape in a Pennsylvania state court in 1966 and sentenced to life imprisonment.¹⁰⁵ His conviction was reversed, and he was retried in 1970.¹⁰⁶ He was again convicted of first degree murder and sentenced to life.¹⁰⁷ Yount requested a change of venue multiple times before the second trial.¹⁰⁸

The Supreme Court granted certiorari "to consider, in the context of this case, the problem of pervasive media publicity that now arises so frequently in the trial of sensational criminal cases."¹⁰⁹ The Court found that the record in Yount's case did not "reveal the kind of 'wave of public passion' that would have made a fair trial unlikely by the jury that was empaneled as a whole."¹¹⁰ The court also noted that, while *Irvin* held "that adverse publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed,"¹¹¹ it also raised the standard of review for overturning the trial court's finding of impartiality, to the level of "manifest error."¹¹²

Murphy and *Yount* reinforce the concept that trial by an impartial, unbiased jury is a fundamental pillar of due process. Nevertheless, the conclusion of those two decisions sounded a retreat

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

102. *Id.*

103. *See id.* at 803.

104. 467 U.S. 1025 (1984).

105. *Id.* at 1027.

106. *Id.*

107. *Id.* at 1028.

108. *Id.* at 1027.

109. *Id.* at 1031.

110. *Id.* at 1040.

111. *Id.* at 1031.

112. *Id.*

by the Supreme Court from the standards of “presumed prejudice” established in *Rideau* and its progeny. The balance between freedom of the press and the impartial jury shifted dramatically toward acceptance of sensational media coverage, raising the bar of establishing presumed prejudice for criminal defendants.

III. THE WOEFUL INEFFECTIVENESS OF TRADITIONAL METHODS OF MITIGATING AGAINST JUROR PREJUDICE

In 1952, in *Stroble v. California*, Justice Frankfurter bemoaned that

[s]cience with all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in court.¹¹³

Thankfully, this is no longer true. There is a plethora of noteworthy empirical studies that demonstrate the impact of pretrial publicity on juror decision-making.¹¹⁴

This is important because the voir dire process has repeatedly been recognized as a woefully ineffective device for determining whether prejudice should be presumed.¹¹⁵ There are a number of possible explanations for why voir dire is not conducive to juror candor.

First, people are intimidated by the judicial system and the courtroom environment. The pressure of voir dire examination has actually caused some jurors to forget their own name.¹¹⁶

Second, people generally do not like to admit that they have been influenced by the media, gossip, or rumor.

113. 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting); see also discussion *supra* pt. II.A.

114. See generally O’Connell, *supra* note 32 (providing an overview of the latest studies done using both field and experimental methods); Shahani, *supra* note 32; Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense*, 3 PSYCHOL. PUB. POL’Y & L. 428 (1997).

115. See, e.g., Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965); O’Connell, *supra* note 32, at 173–74, 178; Shahani, *supra* note 32, at 104–05; Studebaker & Penrod, *supra* note 114, at 440–43; David L. Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 271 (1981); Hans Ziesel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 528–29 (1978).

116. O’Connell, *supra* note 32, at 183.

Third, there is a social stigma against those who have prejudged someone, and publicly acknowledging one's prejudice is difficult. Some jurors may be embarrassed or offended when asked probing questions about their personal feelings on a matter and will consequently repress their opinions.¹¹⁷

Fourth, some jurors might be unaware that they have formed an irrevocable bias.¹¹⁸ Furthermore, the point at which an impression is weak enough to be overcome, or too strong to be suppressed, is difficult to ascertain.¹¹⁹ In the words of Judge Peter O'Connell, asking a juror whether he or she can render a fair and impartial verdict is "a little like asking a practicing alcoholic if he has his drinking under control"¹²⁰ Moreover, once an undesirable thought is identified, keeping it out of one's mind becomes a formidable paradox.¹²¹ Thus, modified jury instructions and the deliberative process will have little positive impact on a prejudiced juror.¹²² In fact, studies have shown that deliberation and judicial admonitions actually further entrench bias in juries.¹²³

Fifth, some may doubt that an opinion is strong enough to cloud judgment permanently on a case, and any claim otherwise will be viewed as a veiled attempt to avoid jury duty or as a failure to take one's civic duty seriously. Last, some people will do anything to be involved in a high-profile case.¹²⁴

In addition to the use of modified jury instructions and an emphasis on the deliberative process, other approaches have been taken to combat the problems generated by high-profile cases, including the granting of continuances in the hopes that "the passage of time will dampen the effects of the prejudicial attitudes prevalent in the community."¹²⁵ However, not only do psychologists doubt this, but it assumes that the publicity will cease and not begin again once trial resumes.¹²⁶

117. *See id.*

118. Shahani, *supra* note 32, at 105; Studebaker & Penrod, *supra* note 114, at 449.

119. Shahani, *supra* note 32, at 100.

120. O'Connell, *supra* note 32, at 183.

121. Studebaker & Penrod, *supra* note 114, at 447.

122. *See id.* at 440-41

123. Shahani, *supra* note 32, at 105.

124. O'Connell, *supra* note 32, at 179 (citing Suggs & Sales, *supra* note 115, at 246).

125. O'Connell, *supra* note 32, at 177.

126. *Id.* at 177-78; Shahani, *supra* note 32, at 104-05; Studebaker & Penrod, *supra* note 114, at 439-40.

The ABA Standards for Criminal Justice suggest that individual examinations of each prospective juror take place in private¹²⁷ and recommend a lengthier voir dire with additional peremptory challenges when pretrial prejudice is likely.¹²⁸ However, this can make the process extremely time-consuming, and it presupposes that additional poking and prodding of jurors by judges and attorneys will expose prejudice that would otherwise have gone undetected. So far, research in the area has found that neither judges' nor attorneys' causal or peremptory challenges are related to conviction rates¹²⁹ and that "extended voir dire [is] no more effective at eliminating the biasing effect of pretrial publicity than . . . minimal voir dire."¹³⁰

IV. PRESUMED PREJUDICE IN ALASKA

Alaska has always taken pride in having state constitutional protections that often go beyond those of the national constitution and in zealously protecting the right to a jury trial. The Alaska Supreme Court has consistently given the right to a jury trial under the Alaska Constitution a more expansive interpretation than the United States Supreme Court has under the Sixth Amendment of the United States Constitution.¹³¹ Not surprisingly, the Alaska Constitution specifically guarantees the right to an impartial jury.¹³² This right was supported by Alaska Statute 22.10.040, enacted at the time of statehood in 1959, which authorized the superior court to change the place of trial "when there is reason to believe that an impartial trial cannot be had."¹³³ Yet, Alaska trial and appellate courts have been increasingly reluctant to presume prejudice.

A. The Application of Presumed Prejudice to High-Profile Cases by the Alaska Supreme Court

In *Alvarado v. State*,¹³⁴ the Alaska Supreme Court emphasized the importance of an impartial jury as related to the judicial system:

127. ABA Standards for Criminal Justice § 8-3.5(a) (3d ed. 1992).

128. *Id.* § 8-3.5(c).

129. Studebaker & Penrod, *supra* note 114, at 441.

130. *Id.* at 442.

131. See generally *RLR v. State*, 487 P.2d 27 (Alaska 1971); *State v. Browder*, 486 P.2d 925 (Alaska 1971); *Baker v. Fairbanks*, 471 P.2d 386 (Alaska 1970).

132. ALASKA CONST. art. I, § 11.

133. ALASKA STAT. § 22.10.040(1) (2004).

134. 486 P.2d 891 (Alaska 1971).

The jury, like the right to vote, is fundamentally preservative of ideals which are essential to our democratic system. When the impartiality of jurors is neglected, the injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts. For this reason, we must be ever militant to protect the notion of our juries as bodies truly representative of the community.¹³⁵

Nearly a decade later, the Alaska Supreme Court decided two cases that helped define the standards in Alaska for presumed prejudice within the context of prejudicial pretrial publicity. In *Mallott v. State*,¹³⁶ the court recognized the inherent difficulty in establishing prejudice through the voir dire process:

[T]he voir dire process is not an infallible Geiger counter of juror prejudice, and to rely excessively on its efficacy in uncovering “actual prejudice” places an unrealistic burden on a defendant. Where there has been intensive pre-trial publicity, and a substantial number of venirepersons appear to have been prejudiced by the publicity, the probability that similar prejudices are shared by, but have not been extracted from, impaneled jurors cannot be ignored.¹³⁷

The court went on to adopt an ABA draft standard that encourages a change of venue without the requirement of a showing of actual prejudice where there is a “substantial likelihood” that a trial by an impartial jury cannot be had.¹³⁸

Soon after the *Mallott* decision, in *Oxereok v. State*,¹³⁹ the Alaska Supreme Court applied the ABA proposal and reversed a murder conviction based on a denial of a defendant’s motion for change of venue.¹⁴⁰ The court found that “[t]he record of the voir dire examination of Oxereok’s jury panel [did] not reveal that any of the impaneled jurors were in fact predisposed to convict him.”¹⁴¹

135. *Id.* at 904 (internal quotation and citation omitted); see *Browder*, 486 P.2d at 937 (“[T]he right to jury trial holds a central position in the framework of American justice [T]he accused’s right to fair trial [must be accorded primacy] against considerations of convenience or expediency to the state.”).

136. 608 P.2d 737 (Alaska 1980).

137. *Id.* at 748.

138. “A motion for change of venue or continuance shall be granted whenever it is determined that, because of the dissemination of potentially prejudicial material, there is a substantial likelihood that, in the absence of such relief, a fair trial by an impartial jury cannot be had A showing of actual prejudice shall not be required.” *Id.* (citing ABA Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press § 8-3.3(c) (2d ed. Tentative Draft 1978)).

139. 611 P.2d 913 (Alaska 1980).

140. *Id.* at 919.

141. *Id.*

However, the court, relying on *Mallott*, also concluded that because of the inflammatory nature of pretrial publicity, a showing of actual prejudice was not required.¹⁴²

The Alaska Supreme Court has not addressed the issue of presumed prejudice from pretrial publicity since 1980. The Alaska Court of Appeals, however, has applied the *Mallott* decision to numerous high-profile criminal cases over the past twenty-five years. In only one case has the court of appeals reversed a conviction based on the failure of the trial court to grant a change of venue.¹⁴³

B. The Application of Presumed Prejudice to High-Profile Cases by the Alaska Court of Appeals

1. *Newcomb v. State*.¹⁴⁴ In 1987, Gary Newcomb was charged with shooting two Anchorage police officers who were attempting to arrest him.¹⁴⁵ Newcomb had escaped from the Wildwood Correctional Center in Kenai where he was imprisoned for robbery, and had been on the lam for five months.¹⁴⁶ During Newcomb's attempted arrest, he grabbed one of the officer's service revolvers and shot both officers.¹⁴⁷ He escaped again, only to be arrested by Anchorage police later that night.¹⁴⁸ Newcomb repeatedly moved for a change of venue,¹⁴⁹ relying on the "*Mallott* standard" of presumed prejudice,¹⁵⁰ but the trial court denied each motion.¹⁵¹

The court of appeals recognized that Newcomb's crimes received intensive pretrial publicity.¹⁵² At least thirty-three articles relating to the case appeared in Anchorage newspapers prior to trial.¹⁵³ Additional newspaper articles appeared during jury selection in Anchorage, and the trial garnered significant attention in

142. *Id.*

143. *See* *Nickolai v. State*, 708 P.2d 1292, 1293 (Alaska Ct. App. 1985).

144. 800 P.2d 935 (Alaska Ct. App. 1990).

145. *Id.* at 937.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. "The normal rule requiring a showing of actual prejudice must be relaxed, however, when a case generates 'intensive pretrial publicity' that results in 'a substantial number of venirepersons [who] appear to have been prejudiced . . .'" *Id.* at 938 (citing *Mallott v. State*, 608 P.2d, 737, 748 (Alaska 1980)).

151. *Newcomb*, 800 P.2d at 937.

152. *Id.* at 938.

153. *Id.*

the broadcast media.¹⁵⁴ Of the seventy-eight venirepersons questioned during voir dire, twenty-eight were excused for cause due to exposure to pretrial publicity or familiarity with various aspects of the case.¹⁵⁵ The court found that twenty-eight disqualified panel members qualified as a “substantial number of venire persons” in order to apply the “*Mallott* standard.”¹⁵⁶

The court went on to examine the factors that would be relevant in gauging the likelihood of “unrevealed jury prejudice” necessary to compel a change of venue.¹⁵⁷ The first factor was the “precise nature of the pretrial publicity.”¹⁵⁸ The court stated that “[t]he potential for unrevealed jury prejudice can be expected to increase when publicity is inherently prejudicial or inflammatory.”¹⁵⁹ The examples cited by the court included media reports of confessions and “other significant evidence that is suppressed or otherwise inadmissible”; details that will be disputed by the defendant at trial; and “emotionally charged editorials,” including accounts of the defendant’s criminal history or character.¹⁶⁰

The second factor considered by the court was the timing of pretrial publicity.¹⁶¹ The court felt that even when jury voir dire establishes that many prospective jurors have been exposed to “highly inflammatory publicity,” such “exposure will be entitled to less weight if it appears that the passage of time has blunted its impact on the panel.”¹⁶²

The third factor was the nature of the community in which the trial is conducted.¹⁶³ The *Newcomb* court’s greatest concern was the possibility of unrevealed jury prejudice for crimes tried in small communities.¹⁶⁴

Using these factors, the court of appeals concluded that the trial court had not abused its discretion in denying a change of

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 939.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* See *Oxereok v. State*, 611 P.2d 913 (Alaska 1980) (tried in Nome, Alaska); *Jerrel v. State*, 756 P.2d 301 (Alaska Ct. App. 1988) (tried in Homer, Alaska); *Nickolai v. State*, 708 P.2d 1292 (Alaska Ct. App. 1985) (tried in Dillingham, Alaska).

venue.¹⁶⁵ The court found that little of the pretrial publicity was “particularly inflammatory or inherently prejudicial.”¹⁶⁶ The bulk of the pretrial publicity concerning Newcomb’s case occurred “well before trial.”¹⁶⁷ Moreover, the court found it significant that the trial was held in Anchorage, “a relatively large community in which even extensive pretrial publicity can be expected to have limited impact.”¹⁶⁸

Several aspects of this case and its tripartite test are noteworthy. First, the presumed prejudice analysis was based in large part on the voir dire record.¹⁶⁹ Second, the judge assumed that the passage of time eroded the harmful effects of pretrial publicity, which does not appear to have been the case.¹⁷⁰ Third, the court was especially reluctant to acknowledge the impact of pretrial publicity in Anchorage.¹⁷¹ Despite being Alaska’s largest city, the population of the Anchorage Borough was only 225,170,¹⁷² which, relative to jurisdictions in other states, is a small jurisdiction, and, therefore, more likely to be affected by pretrial publicity.¹⁷³ Overall, the court’s dubious premises, which are built into its multi-step test, resurface in all of the state cases that follow.

2. *Cheely v. State*.¹⁷⁴ At Cheely’s trial for second-degree murder in Anchorage’s first “drive-by” shooting, twenty of the seventy potential jurors were excused for cause because they had formed opinions about the case based on media coverage.¹⁷⁵ The appellate court felt that Cheely’s motion for a change of venue should have been analyzed under the “*Mallott* standard,” using the factors laid

165. *Id.* at 940.

166. *Id.* at 939.

167. *Id.* The trial was nine months after Newcomb’s escape from Wildwood and four months after the shootout and his arrest in Anchorage.

168. *Id.* at 940.

169. *See id.* at 939–40.

170. *See* O’Connell, *supra* note 32, at 177–78; Shahani, *supra* note 32, at 104; Studebaker & Penrod, *supra* note 114, at 439–40.

171. *See Newcomb*, 800 P.2d at 940.

172. U.S. Census Bureau, Population Estimates and Population Distribution Branches, *Intercensal Estimates of the Resident Population of States and Counties 1980–1989* (Mar. 1992), <http://www.census.gov/popest/archives/1980s/e8089co.txt>. According to the most recent data from the U.S. Census Bureau, the projected population of Anchorage in 2004 is 272,687. U.S. Census Bureau, Population Estimates Program, *2004 Population Estimates, Anchorage Municipality, Alaska*, <http://factfinder.census.gov>.

173. Shahani, *supra* note 32, at 114.

174. 861 P.2d 1168 (Alaska Ct. App. 1993); *see* discussion *supra* pt. I.

175. *Id.* at 1174.

out in *Newcomb*.¹⁷⁶ However, not only did the court fail to address the “precise nature” and timing of the pretrial publicity, the analysis done by the court was primarily based on the record of jury selection.¹⁷⁷ The trial court allowed the use of an extensive juror questionnaire and individual voir dire.¹⁷⁸ The court of appeals concluded that the trial court “could reasonably conclude that pre-trial publicity had made jury selection more difficult but not impossible, and that the jurors ultimately selected did not harbor unrevealed prejudices against Cheely.”¹⁷⁹ Once more, the court emphasized the trial’s venue: “One fact that emerged from this individual questioning was that, in a large community such as Anchorage, many residents do not follow media coverage of events.”¹⁸⁰ A public opinion survey would later call these assumptions into question.¹⁸¹

3. *Woodard v. State*.¹⁸² In June 1992, Jon Woodard was charged with felony murder.¹⁸³ In support of his motion for a change of venue, Woodard cited twelve newspaper articles and forty-five television news reports covering his case.¹⁸⁴ The trial court refused to grant the motion before voir dire and denied the request without prejudice.¹⁸⁵

The trial court did, however, allow a juror questionnaire and individualized voir dire.¹⁸⁶ The jury questionnaire indicated that ninety-five percent of the prospective jurors had been exposed to some pretrial publicity.¹⁸⁷ During jury selection of the fifty-six prospective jurors, twenty-four were excused for cause, and of those, only three were excused due to their exposure to pretrial publicity.¹⁸⁸ Of the thirty-two who were not excused for cause, “all but one had heard something about the case and fifteen had heard or seen something about Woodard in the media.”¹⁸⁹ All thirty-two

176. *Id.* at 1174–75.

177. *Id.* at 1175.

178. *Id.* at 1173.

179. *Id.* at 1175–76.

180. *Id.* at 1175.

181. See discussion *infra* pt. V(A).

182. Nos. A- 5187, 3933, 1998 WL 849246 (Alaska Ct. App. Dec. 9, 1998).

183. *Id.* at *1.

184. *Id.* at *10.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at *11.

189. *Id.*

prospective jurors “assured the court that they could hear the case without bias.”¹⁹⁰

The court of appeals, applying the “more liberal standard adopted by *Mallott*,” concluded that the record of jury selection supported the trial court’s refusal to grant a change of venue.¹⁹¹ The appellate court found that pretrial publicity was not inherently prejudicial or inflammatory, even though that publicity referenced Woodard’s criminal history (his prior arrest on federal drug and weapon charges), other possible robberies police believed Woodard had committed, and reports of Woodard having an “arsenal” of weapons and paramilitary literature.¹⁹² According to the court, the fact that most of the publicity occurred several months before trial lessened its impact on prospective jurors.¹⁹³ Moreover, since the trial was held in Anchorage, it was “reasonable to believe that the publicity in the case was of ‘limited impact.’”¹⁹⁴

4. *Stavenjord v. State*.¹⁹⁵ The latest example is the murder trial of Paul Stavenjord in Palmer, Alaska in 1998. Stavenjord was arrested after a month-long manhunt and charged with a double homicide.¹⁹⁶ Over fifty television and more than a dozen published newspaper stories reported the manhunt during the summer of 1997.¹⁹⁷ Pretrial hearings in October of that year were similarly covered by the media.¹⁹⁸

Media coverage disclosed information inadmissible at trial, including Stavenjord being expelled from school for using racial epithets, a juvenile arrest and two-year sentence for robbery, an escape from juvenile prison and high speed car chase, and a 1971 armed bank robbery motivated by drugs.¹⁹⁹

Jury selection (after prospective jurors completed written questionnaires) lasted two weeks and included individual voir dire.²⁰⁰ Of 184 prospective jurors, sixty were accepted for jury selection.²⁰¹ Forty-seven were excused for case-related reasons, and

190. *Id.*

191. *Id.* at *12–*14.

192. *Id.* at *13.

193. *Id.*

194. *Id.* (citation omitted).

195. 66 P.3d 762 (Alaska Ct. App. 2003).

196. *Id.* at 767.

197. *Id.*

198. *Id.*

199. *Id.* at 768.

200. *Id.* at 768–69.

201. *Id.* at 768.

the balance were excused for reasons unrelated to the case.²⁰² Of the sixty initially accepted, another twenty-six were excused because of exposure to pretrial publicity, and eleven were excused “because of exposure to publicity and other factors.”²⁰³ An additional juror was excused during trial after she recalled “reading or hearing something about Stavenjord’s robbery conviction.”²⁰⁴

The court of appeals examined the record of voir dire of the twelve jurors and four alternates who heard the case.²⁰⁵ The court concluded that those jurors knew only the bare details of the crimes charged, and none of the information recalled was inflammatory or prejudicial.²⁰⁶ In addition, all of the jurors and alternates “expressed confidence that they could be impartial.”²⁰⁷ Although the court recognized that there was substantial pretrial publicity, it also considered that the trial was conducted eight months after the manhunt and that “in an area as physically large as the Matanuska-Susitna area, considering the size of its population, many people were not influenced by the media coverage.”²⁰⁸

The appellate court consistently relies on the trial judge’s evaluation of “unrevealed prejudices” due to pretrial publicity, and the *Stavenjord* case was no different. The court concluded that it would “affirm the superior court’s denial of the motion for change of venue unless [the court is] convinced, after [the court’s] own independent review of the record, that the superior court abused its discretion.”²⁰⁹

5. *Summary.* The Alaska Supreme Court has broadly expanded the right to a jury trial under the Alaska Constitution.²¹⁰ It has adopted the ABA standard that recognizes “presumed prejudice” as a basis for a change of venue separate from proof of “actual” prejudice during the voir dire process.²¹¹ The courts in *Mallott*

202. *Id.*

203. *Id.* at 769.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* The population of the Matanuska-Susitna Borough, of which Palmer is part, was 53,920 in 1997. U.S. Census Bureau, Population Estimates Program, *County Population Estimates and Demographic Components of Population Change: Annual Time Series, July 1, 1990 to July 1, 1999* available at http://www.census.gov/popest/archives/1990s/co-99-08/99C8_02.txt.

209. *Stavenjord*, 66 P.3d at 770.

210. *See infra*, pt. IV.

211. *Mallott v State*, 608 P.2d 737, 748 (Alaska 1980).

and *Oxereok* held that where intensive pretrial publicity has influenced a community, the probability that prejudices are “shared by, but have not been extracted from, impaneled jurors, cannot be ignored.”²¹² Nonetheless, the application of these principles to high-profile cases in Alaska has been marginal. The court of appeals has blurred the line between presumed and actual prejudice. In applying the “*Mallott* standard,” the court has relied heavily on the record of jury selection and the discretion of the trial judge. Furthermore, unacceptable assumptions have been made when applying the three-part *Newcomb* test, when used at all. The failure to critically analyze the nature and impact of prejudicial publicity on the community called upon to decide the guilt or innocence of a criminal defendant prior to the jury selection process jeopardizes the concept of an impartial jury, impugns the integrity of a jury verdict, and endangers justice in general. None of these results should be tolerated in light of the availability of scientific public opinion surveys that have been able to measure the impact of publicity on a community.

V. THE PUBLIC OPINION SURVEY AS AN INSTRUMENT TO MEASURE THE IMPACT OF PRETRIAL PUBLICITY

As mass communication has spread throughout the country, and prejudicial media coverage saturates communities at ever increasing rates, courts have struggled to strike a balance between the Sixth Amendment’s guarantee of an impartial jury and the First Amendment’s protection of freedom of the press.²¹³ Legal scholars have characterized this balance to be between the “impartial” juror and the “empty mind.”²¹⁴ However, to a defendant on trial in such an environment, it is a matter of the presumption of innocence versus the presumption of guilt and the right to a just trial untainted by outside influences.

The concept of presumed prejudice, and not merely actual prejudice, is a useful weapon in the fight against “trial by newspaper.” Therefore, when a criminal defendant is charged in a high-profile case and requests a change of venue, three factors are critical in evaluating the issue. The first factor is the existence of knowledge about the case in the community of jurors. This includes awareness of facts or rumors that would not be admissible or are going to be contested by the defendant at trial. The second factor is the “opinion of guilt” that exists within the community. Fi-

212. *Id.*; accord *Oxereok v. State*, 611 P.2d 913, 919 (Alaska 1980).

213. See U.S. CONST. amend. I, VI.

214. See ABRAMSON, *supra* note 16, at 45–55.

nally, the third factor is the strength of such opinion. That is, whether prospective jurors in the community, in the words of Chief Justice Marshall, have a “strong,” as contrasted with a “light,” bias against a defendant.²¹⁵

Trial courts have traditionally relied on the voir dire process to measure the extent of juror bias. However, empirical studies have demonstrated that the voir dire process is not effective in uncovering significant biases and prejudices that jurors may bring to a courtroom after exposure to pretrial publicity.²¹⁶ A public opinion survey, properly conducted, can directly address the critical factors of the impact of pretrial publicity prior to the voir dire process. Such a survey must employ the highest level of scientifically-accepted standards for the market research industry, including skilled practitioners in survey design, “best practices” techniques for unbiased inquiries, and ethical considerations throughout the research process. For this reason, though not frequently used, public opinion polling has been recognized as an important tool in assessing the need for a change of venue in high-profile cases since at least the 1970s.²¹⁷ Fairly recently, these surveys have proven to be a critical tool in evaluating motions for change of venue in high-profile cases in federal district court in Alaska.²¹⁸

A. *United States v. Cheely (Cheely II)*²¹⁹

In 1992, the Federal Defender for the District of Alaska was appointed to represent Raymond Cheely in a high-profile federal murder prosecution.²²⁰ Cheely, Doug Gustafson, Craig Gustafson, and Peggy Gustafson-Barnett were charged with conspiracy to mail a package bomb that caused the death of one and seriously injured another.²²¹

215. *Burr I*, 25 F.Cas. at 51.

216. See Broeder, *supra* note 115, at 505–21; Suggs & Sales, *supra* note 115, at 271; Ziesel & Diamond, *supra* note 115, at 528–29.

217. Stephen J. Arnold & Alan D. Gold, *The Use of Public Opinion Poll on a Change of Venue Application*, 21 CRIM. L.Q. 445 (1979); Nietzel & Dillehay, *supra* note 46, at 309; Arthur J. Pollock, *The Use of Public Opinion Polls to Obtain Changes of Venue and Continuances in Criminal Trials*, 1 CRIM. JUST. J. 269 (1977); Neil Vidmar & John W. Judson, *The Use of Social Science Data in a Change of Venue Application: A Case Study*, 59 CAN. B. REV. 76, 79–92, 100 (1981).

218. *E.g.*, *United States v. Cheely*, A92-073 CR (JKS) (D. Alaska 1992); *United States v. Maas*, A01-0174 CR (JKS) (D. Alaska 2001).

219. A92-073 CR (JKS) (D. Alaska 1992).

220. *United States v. Cheely*, 790 F. Supp. 901, 902–06 (D. Alaska 1992).

221. *United States v. Cheely*, 814 F. Supp. 1430, 1433 (D. Alaska 1992).

Cheely and Doug Gustafson first entered the public eye in 1990, when they were charged and convicted of a highway shooting.²²² George Kerr was the third passenger in the car with Cheely and Doug Gustafson, and testified against the two at trial.²²³ The state murder trial against Cheely and Doug Gustafson had received a great deal of publicity.²²⁴ Both were convicted, and Cheely received a sixty-year prison sentence.²²⁵

That publicity increased with the federal indictment of Cheely and Doug Gustafson for masterminding the mailing of a bomb to Kerr's home.²²⁶ The package was opened by Kerr's parents, killing his father and seriously injuring his mother.²²⁷ Media coverage following the mail-bomb investigation was intense. The defense attempted to demonstrate that prejudice was induced by that publicity. The Federal Defender Office hired Craciun & Associates to conduct a public opinion survey to assess the bias and prejudice in the pool of prospective jurors.²²⁸

Craciun & Associates ("CRG"),²²⁹ an applied marketing research firm based in Anchorage, had conducted more than one hundred public opinion surveys nationally and many in the Anchorage area, primarily for businesses, governmental agencies, and political campaigns.²³⁰ CRG's research design included a quantitative methodology whereby professionally trained interviewers conducted telephone surveys of a representative sample of the target audience.²³¹

CRG randomly selected the survey sample from a list of registered voters residing in the Anchorage Division of the Federal District Court.²³² Anchorage, the Mat-Su Valley, the Kenai Peninsula, the Aleutians and Western Alaska, Kodiak, Cordova, and Valdez,

222. *Cheely v. State*, 861 P.2d 1168 (Alaska Ct. App. 1993); *see also* discussion *supra* pt. I.

223. *Cheely*, 861 P.2d. at 1172–73.

224. *Id.* at 1170–73.

225. *Id.* at 1169.

226. *United States v. Cheely*, A92-073 CR (JKS) (D. Alaska 1992).

227. *United States v. Cheely*, 36 F.3d 1439 (9th Cir. 1994).

228. CRACIUN & ASSOCIATES, PUBLIC OPINION STUDY CONDUCTED FOR THE FEDERAL PUBLIC DEFENDERS OFFICE: IS RAYMOND CHEELY GUILTY OR NOT? (1992) [hereinafter CRACIUN 1992 CHEELY POLL].

229. This firm is now known as Craciun Research Group, Inc.

230. Craciun Research Group, Inc., <http://www.craciun.com/> (last visited Sept. 27, 2005). Although Jean Craciun, a sociologist, had conducted surveys similar to this one, CRG had not. *See id.*

231. CRACIUN 1992 CHEELY POLL, *supra* note 228, at 3.

232. *Id.* at 4.

Alaska were all located within the sample area.²³³ The sample also reflected the proportion of registered voters in the State House districts that constitute the Anchorage Division.²³⁴ According to the sample size of 608, if researchers had interviewed every registered voter meeting juror requirements in the Anchorage District, the findings would differ from these survey results by no more than 4.1 percentage points in either direction.²³⁵ Thus, the margin of error was +/- 4.1%.²³⁶

CRG meticulously designed questions to assess respondents' awareness and perceptions of the case details.²³⁷ Their survey instrument identified topics for inquiry, such as media habits, knowledge about case elements, feelings about the defendants' guilt or innocence, knowledge of the defendants' earlier crimes, and demographic information.²³⁸ The CRG interviewers sought to keep non-response to a minimum, accurately record responses to all questions, answer frequently-asked questions, and use vocabulary relevant to the study.²³⁹ The final report included summaries and relevant frequency tables of the various responses.²⁴⁰

The survey results indicated that pretrial publicity concerning Cheely had significantly influenced the jury pool.²⁴¹ In response, Cheely and Doug Gustafson filed a motion for a change of venue in the District Court of Alaska.²⁴² To support their motion, they attached the survey results²⁴³ and presented an analysis of the newspaper articles appearing in the *Anchorage Daily News* relating to Cheely or Gustafson for a period of twenty-two months prior to the federal mail-bomb conspiracy indictment.²⁴⁴

After a review of the news articles and the public opinion survey results, United States District Court Judge James M. Fitzgerald concluded that the defendants had met the burden of establishing

233. *Id.*

234. *Id.*

235. *See id.* at 5.

236. *Id.* Note that for subgroups the sampling error is larger.

237. *Id.* at 3.

238. *Id.*

239. *Id.* at 4.

240. *Id.* at 6.

241. *Id.*

242. *United States v. Cheely*, No. A92-073 CR (JKS) (D. Alaska Nov. 13, 1992) (order granting transfer of venue).

243. *Id.* at 34–35.

244. *Id.* at 9.

“presumed prejudice” and ordered a transfer of venue under Federal Rule of Criminal Procedure 21(a).²⁴⁵

Judge Fitzgerald’s decision summarized the primary factors to be examined in evaluating a claim of presumed prejudice due to pretrial publicity,²⁴⁶ including the nature, frequency, and timing of coverage by the media.²⁴⁷ The court noted that in analyzing the nature of pretrial publicity, the court should distinguish between “factual reporting of the charges and reporting that proclaims the defendant’s guilt or focuses on inadmissible evidence.”²⁴⁸ Other variables identified that may influence a determination of presumed prejudice include the jury pool’s size and sophistication, the nature of the crimes, and the victims’ anonymity.²⁴⁹ The final factor was polling data that “may show the extent to which pretrial publicity had a prejudicial effect on the jury pool community.”²⁵⁰

The court reviewed sixty-four newspaper articles concerning Cheely and Gustafson published in the *Anchorage Daily News* in the period between October 19, 1990 and August 14, 1992.²⁵¹ The court noted that publicity concerning the defendants had substantially continued from the time of the bombing through the time that the change of venue motion was filed, but more important than the frequency of the articles was their nature and substance.²⁵² The court stated that intense media coverage was “partially due to the understandable public interest in a fatal mail bombing allegedly directed from jail towards a witness in a criminal trial.”²⁵³ The articles consistently reported “what is said to be the facts of the case, the identities of the defendants, along with the details of their participation in the mail bombing and the other charges set out in the indictment.”²⁵⁴

As to the prejudicial nature of the coverage, the court found that the news media reported a number of crimes that were attributed to the defendants prior to the charges in the indictment, in-

245. *Id.* at 39.

246. *Id.* at 5.

247. *Id.* (citing *United States v. Engleman*, 489 F. Supp. 48, 51 (E.D. Mo. 1980)).

248. *Id.* (citing *United States v. Dischner*, Nos. 89-30333-4, slip op. at 11415 (9th Cir. Sept. 11, 1992)).

249. *Id.* (citing *Hart v. Stagner*, 935 F.2d 1007, 1015 (9th Cir. 1991)).

250. *Id.* at 6 (citing *United States v. Bailleaux*, 685 F.2d 1105, 1109 (9th Cir. 1982)).

251. *See id.* at 9.

252. *Id.* at 27.

253. *Id.* at 28.

254. *Id.* at 28–29.

formation that would probably not be admissible at trial.²⁵⁵ Additionally, much of the publicity tended to establish the defendants' guilt by linking them to well-known confessions of alleged co-conspirators and statements attributed to the defendants.²⁵⁶

However, it was the survey that confirmed the prejudicial impact of the publicity.²⁵⁷ Polling data demonstrated detailed and prejudicial knowledge of the case.²⁵⁸ Sixty-seven percent of the respondents were able to give details of the victims, and seventy-four percent identified revenge as the motive of the crime.²⁵⁹ Thirty-five percent volunteered the names of one or both defendants, unprompted.²⁶⁰ Twenty-one percent recalled that the defendants had committed previous crimes other than the highway shooting, including rape, burglary, assault, and a prior bombing.²⁶¹ The most critical survey result was that seventy percent of these prospective jurors polled felt that the defendants were either guilty or probably guilty.²⁶² Judge Fitzgerald concluded:

The Craciun survey shows that the public in the present case has more than a general awareness of the defendants' crimes. Large portions of the public know specific and prejudicial types of information, such as the identity of the victims, the motive, and prior crimes that may not be admissible at trial. The survey shows that the public knowledge of the defendants bears directly on their guilt or innocence. I find that the survey conducted by Craciun & Associates supports the finding and conclusion reached that there is a substantial prejudice against the defendants within the prospective juror pool.²⁶³

Interlocutory appeals delayed the *Cheely* trial for another two years.²⁶⁴ In February 1993, Joseph Ryan was indicted as a co-conspirator in the mail bombing for allegedly providing the explo-

255. *Id.* at 29.

256. *Id.* at 29–30.

257. *See* CRACIUN 1992 CHEELY POLL, *supra* note 228, at i (indicating that 67% of respondents gave details of the case as it was reported in the media and that “[t]he more knowledgeable respondents were of the crime, the more often they handed a guilty verdict to both defendants”).

258. *See id.*

259. *Id.* at 12–13.

260. *Id.* at 14.

261. *See* United States v. Cheely, No. A92-073 CR (JKS), at 32, 36, 42 (D. Alaska Nov. 13, 1992) (order granting transfer of venue).

262. CRACIUN 1992 CHEELY POLL, *supra* note 228, at 25.

263. *Cheely*, No. A92-073 CR (JKS), at 38 (order granting transfer of venue).

264. *See, e.g.*, United States v. Cheely, 36 F.3d 1439 (9th Cir. 1994).

sives used in the bomb.²⁶⁵ When the case was remanded for trial, the government moved for a ruling vacating the order granting change of venue, and even submitted its own public opinion survey by the Dittman Research Corporation.²⁶⁶ Cheely commissioned a second survey by CRG.²⁶⁷

The case was assigned to the Honorable James M. Burns, Senior District Court Judge of Oregon, who refused to vacate Judge Fitzgerald's order granting change of venue: "Based on the results of the three public opinion polls and the testimony of Mr. Dittman and Ms. Craciun, I am satisfied that the same circumstances which led Judge Fitzgerald to find presumed prejudice in November 1992 continue to prevail."²⁶⁸ Judge Burns found that the polling data established that the prejudice had not dissipated over the two-year period:

I am satisfied that neither the reduction in coverage nor the purported qualitative changes in the nature of the media coverage of this case have resulted in significant loss of memory or change of opinion among the population of prospective jurors.

This conclusion is supported and reflected in the public opinion surveys. The second Craciun survey and the Dittman survey show very high community awareness of the details of the mail bombing event and the allegations against defendants, including the identity of the defendants and their alleged motive.²⁶⁹

The trial of Cheely and Ryan was moved to Tacoma, Washington.²⁷⁰ Cheely was convicted and Ryan was acquitted of all charges, except for one count of possession of an unregistered explosive device.²⁷¹ A trial before a jury tainted by pretrial publicity was avoided. The same could not be said of the trial of Nezar "Mike" Khaled Maad in Anchorage in February 2002.

265. *United States v. Cheely*, No. A92-073 CR (JKS), at 1 (D. Alaska Dec. 14, 1994) (order denying motion to vacate Judge Fitzgerald's order changing venue).

266. *Id.* at 2.

267. *See* CRACIUN & ASSOCIATES, 1993 CHANGE OF VENUE STUDY CONDUCTED FOR THE FEDERAL PUBLIC DEFENDERS OFFICE: IS RAYMOND CHEELY GUILTY OR NOT? (1993) [hereinafter CRACIUN 1993 CHEELY POLL].

268. *United States v. Cheely*, No. A92-073 CR (JKS), at 4 (D. Alaska Dec. 14, 1994) (order denying motion to vacate Judge Fitzgerald's order changing venue).

269. *Id.* at 5.

270. *Id.* at 6.

271. *See United States v. Cheely*, No. 95-30248, 1997 U.S. App. LEXIS 11882 (9th Cir. May 19, 1997).

B. *United States v. Maad*²⁷²

The *Maad* case presents a different challenge regarding adverse pretrial publicity. The *Cheely* case involved publicity related directly to the issue of guilt, much of which would not have been admissible at trial.²⁷³ In the case of Nezar “Mike” Khaled Maad, publicity concerning sensational allegations of uncharged, reprehensible conduct in the immediate aftermath of September 11th created extreme prejudice in the community for a completely unrelated fraud trial.²⁷⁴

Maad was born and raised in Damascus, Syria.²⁷⁵ He immigrated to the United States in 1976, at the age of eighteen, with the dream of becoming an airplane pilot.²⁷⁶ Years later, his decision to enter flight school in the United States would turn out to be unfortunately significant. Maad married, started a family, and was unable to finish flight school. He moved to Alaska in 1981, became a naturalized United States citizen, and started his own printing business in Anchorage.

Within hours after the terrorist attacks on the United States on September 11, 2001, the Editorial Director of the *Anchorage Daily News* contacted Bridge Builders Incorporated,²⁷⁷ a neighborhood strengthening organization that promotes tolerance and understanding between the diverse ethnic communities of Anchorage. The *Anchorage Daily News* was trying to locate an Arab-American Anchorage resident who might be willing to write an appeal for tolerance in the community in the wake of the terrorist attacks. The executive director of Bridge Builders contacted Maad, who was then the Vice President of the organization and had earned a reputation as a small businessman with many community contacts. After consulting with his family and employees, Maad agreed to write a letter to the community for publication in the editorial page of the *Anchorage Daily News*. Maad’s letter appeared in the paper on September 13, 2001, and was entitled *Don’t Blame All Arabs for Actions of a Few*.²⁷⁸ Maad wrote: “On behalf of my family and local

272. No. A01-0174 CR (JKS) (D. Alaska 2001).

273. *United States v. Cheely*, No. A92-073 CR (JKS), at 29 (D. Alaska Nov. 13, 1992) (order granting transfer of venue).

274. *See United States v. Maad*, 75 F. App’x 599 (9th Cir. 2003).

275. Zaz Hollander, *Vandals Trash Print Shop*, ANCHORAGE DAILY NEWS, Sept. 23, 2001, at A1.

276. The majority of the following statements are based on the author’s interactions with Mr. Maad in the author’s capacity as Mr. Maad’s attorney.

277. Bridge Builders of Anchorage, <http://www.bridgebuilders.ak.org> (last visited Sept. 25, 2005).

278. Editorial, ANCHORAGE DAILY NEWS, Sept. 13, 2001, at B6.

members of the Arab-American community, I express our overwhelming sadness and disbelief that such a horrible act of violence could be committed here in the United States, or for that matter, anywhere in the world.”²⁷⁹

Soon after the *Anchorage Daily News* ran Maad’s letter, the Maad family began receiving harassing and threatening phone calls.²⁸⁰ Nine days after the publication, the Maads’ printing business was vandalized during the night.²⁸¹ The print shop was broken into, hundreds of thousands of dollars of equipment was destroyed, and anti-Arab remarks were scrawled on the walls.²⁸² Anchorage police quickly concluded that the vandalism was a hate crime and called in the FBI to assist in the investigation.²⁸³ Over the next several months, the FBI was unable to identify any suspects.²⁸⁴

During that time, the Anchorage community responded to help the Maads and to decry the vandalism and anti-Arab backlash.²⁸⁵ Bridge Builders oversaw a “Not in Our Town” campaign to raise funds to support the Maads and the print shop employees.²⁸⁶ A \$10,000 reward was offered for information concerning the unidentified vandals.²⁸⁷ Within ten weeks, the “Not in Our Town” campaign had raised a total of \$57,715.²⁸⁸

Within the highly emotional environment following September 11th, the print shop vandalism and the community’s reaction received a great deal of local media attention. That attention escalated when the FBI investigation, unsuccessful in finding the vandals, turned the focus of the investigation to Mike Maad. On December 11, 2001, Maad was arrested by the FBI on a bank fraud indictment concerning a Small Business Administration loan on behalf of the printing business.²⁸⁹ During the bail hearing, and without relation to the bank fraud charge, the government an-

279. *Id.*

280. *See* Hollander, *supra* note 275, at A1.

281. *Id.*

282. *Id.*

283. *Id.*

284. *See* United States v. Maad, 75 F. App’x. 599, 600 (9th Cir. 2003) (noting that the investigation was dropped on December 11, 2001).

285. *Id.*

286. Lisa Demer & Lucas Wall, *Donors Open Wallets for Print Shop*, ANCHORAGE DAILY NEWS, Sept. 29, 2001, at A1.

287. *Id.*

288. Lisa Demer, *Not in Our Town Fund Frozen*, ANCHORAGE DAILY NEWS, Dec. 12, 2001, at A1.

289. Lucas Wall, *Feds Charge Owner of Print Shop*, ANCHORAGE DAILY NEWS, Dec. 12, 2001, at A1.

nounced to the media that Maad and his wife were suspects in the destruction of his print shop.²⁹⁰

The public reaction was predictable. The public view of Maad immediately changed from that of a courageous spokesperson for tolerance to a traitorous scoundrel willing to use the terrorist tragedy for personal gain. Defense counsel for Maad in the bank fraud prosecution faced a daunting challenge: How could the defense address the heated public reaction to the allegation that Maad vandalized his own shop and accepted public donations for his loss in a completely unrelated trial? Once again, the Federal Defender Office commissioned a public opinion survey by CRG.²⁹¹

A telephone survey was conducted from late December 2001 to early January 2002.²⁹² The survey reflected that Maad had quickly become a public figure in the Anchorage community.²⁹³ Seventy-six percent of those polled were aware that Maad had been arrested.²⁹⁴ When questioned about their opinion as to guilt or innocence, fifty-five percent were willing to say Maad was “guilty or probably guilty” of bank fraud, while thirty-five percent went so far as to say that he was “guilty or probably guilty” of the vandalism.²⁹⁵ This time, when the prejudicial media reports and public opinion survey were presented to the District Court, the court refused to change venue.²⁹⁶ The court rejected the argument that prejudice could be presumed and relied on jury voir dire to measure the prejudicial impact of the publicity on the jury venire.²⁹⁷

The pretrial proceedings of Maad’s fraud trial began in January, 2002, a little more than four months after the vandalism at the print shop.²⁹⁸ Although a carefully conducted voir dire by the trial judge revealed little evidence of actual prejudice, the polling data reflected a contrary public sentiment.²⁹⁹ Maad was convicted, and

290. *Maad*, 75 F. App’x. at 600.

291. CRACIUN RESEARCH GROUP, INC., FEDERAL PUBLIC DEFENDER DISTRICT OF ALASKA: CHANGE OF VENUE STUDY (2002) [hereinafter CRACIUN 2002 MAAD POLL].

292. *Id.* at 5.

293. *Id.* at 3 (indicating that 58% of respondents identified Maad or the shop owner as being involved in the vandalism incident).

294. *Id.* at 3.

295. *Id.* at 4.

296. *United States v. Maad*, A01-0174 CR, 5 (JKS), at 5 (D. Alaska Jan. 16, 2002) (report and recommendation denying change of venue).

297. *Id.* at 2–4.

298. *Id.* at 5.

299. *See* CRACIUN 2002 MAAD POLL, *supra* note 291, at 3–4.

he appealed his conviction exclusively on the theory of presumed prejudice.³⁰⁰

The United States Court of Appeals for the Ninth Circuit agreed with Maad that a change of venue should have been granted.³⁰¹ A panel of judges found that the nature and frequency of the media coverage concerning Maad was highly prejudicial:

The Maads were subject to a cascade of publicity. From the date their store was vandalized through the period preceding the trial, the four Anchorage television stations broadcast 124 news accounts that related to vandalism of Maad's print shop, the Anchorage community's initial sympathy and support for Maad and his wife, the governments [sic] criminal charges of bank fraud against Maad, the government's termination of the hate crime investigation, and the government's statement at Maad's bail hearing that the Maads were suspects of the vandalism at the print shop. And the only daily newspaper in Anchorage, *The Anchorage Daily News*, ran regular front-page stories on the print shop vandalism, the outpouring of community support, the government's charges and accusations against Maad, and the community's negative reaction toward Maad after he was named a suspect in the vandalism to his store.³⁰²

The Ninth Circuit held that prejudice would be presumed, in spite of the record of jury selection that uncovered little evidence of bias by the individual jurors questioned:

At issue here is a claim of presumptive prejudice rather than actual prejudice. . . . Given the confluence of the extraordinary events described above, the district court abused its discretion and we reverse the district court's denial of Maad's motion for a change of venue to a federal court outside of Anchorage. Those events, viewed in their entirety, precluded Maad from obtaining a fair trial in Anchorage.³⁰³

C. Why Public Opinion Surveys Work

Why was there such a drastic discrepancy in the results of the public opinion survey and the voir dire in the *Maad* case?³⁰⁴ Moreover, which was the more accurate gauge of the impact of pretrial publicity on the jury? There are clearly two schools of thought on which method is the better measure of prejudice. One perspective was articulated by the United States Court of Appeals for the District of Columbia:

300. *United States v. Maad*, 75 F. App'x. 599, 601 (9th Cir. 2003).

301. *Id.*

302. *Id.* at 600–01.

303. *Id.* at 601.

304. *See supra* notes 298–300 and accompanying text.

It is our judgment that in determining whether a fair and impartial jury could be empanelled [sic] the trial court did not err in relying less heavily on a poll taken in private by private pollsters and paid for by one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel pursuant to procedures, practices and principles developed by the common law since the reign of Henry II.³⁰⁵

That approach sacrifices the concept of “presumed” prejudice and puts all of the eggs of fairness and due process in the “actual” prejudice basket.³⁰⁶

We, on the other hand, would argue that the emphasis should be placed on a scientifically valid public opinion survey that can detect bias outside of the pressurized atmosphere of a courtroom. It is exactly because public opinion surveys are “conducted in an atmosphere free from the pressure and regimentation of the jury selection process”³⁰⁷ that “[t]he results of properly conceptualized and administered surveys provide courts with the best and most interpretable data concerning how the community has internalized and responded to information about the crime and the defendant.”³⁰⁸ People are much more inclined to be honest when questioned by unthreatening, unnamed, and relatively unintrusive, neutral researchers, in the comfort of their home, and where there is no “wrong” answer that will lead to “dismissal.” In a professionally conducted survey, the fact that the research is administered or financed by one party should not influence responses.

D. The Cost: Wishful Thinking?

We recognize that the expense of a scientifically designed and professionally administered public opinion survey can be prohibitive and beyond the reach of many criminal defendants, public defender agencies, and court-appointed counsel. However, in those few exceptional cases that draw the glare of relentless media coverage, the cost of such research may well be justified. A public opinion survey could be less expensive than lengthy and intensive jury voir dire procedures, and certainly would be less expensive than the costs of an appellate reversal and retrial.

The other question Alaska courts should consider is: What is the price of justice? If a public opinion survey is the best way to

305. *United States v. Haldeman*, 559 F.2d 31, 64 n.43 (D.C. Cir. 1976).

306. *See id.*

307. O’Connell, *supra* note 32, at 183.

308. Thomas Beisecker, *The Role of Change of Venue in an Electronic Age*, 4 KAN. J.L. & PUB. POL’Y 81, 86 (1995).

analyze the impact of pretrial publicity on the jury venire, as independent studies have shown, should the court system automatically reject the information a survey could provide in those few cases in which pretrial publicity is of substantial concern? The jurisprudential value of a jury verdict that the public can believe was based on evidence presented in a courtroom to a neutral and unbiased jury far outweighs the cost of a scientifically based, unbiased market research study.

Nevertheless, there potentially exists a less expensive alternative. A professional public opinion survey is carefully designed to elicit honest responses from a representative sample of the jury pool. The same methodology could possibly be used to create a questionnaire designed for the specific venire summoned for a trial. The questionnaire could accompany the mailed summonses and would be completed prior to arrival at the courthouse. The written responses would be evaluated by skilled researchers in the same way as those gathered from the general public. Such an alternative would not only properly place the focus on “presumed,” rather than “actual” prejudice, it would also be less expensive than a full public opinion research project, since it would only be aimed at the actual jury panel.

VI. CONCLUSION

This Article suggests that three lessons can be gleaned by Alaska courts from the *Cheely* and *Maad* cases. The first is that in order to protect the defendant’s right to an impartial jury, the change-of-venue analysis must be a two-step process that independently analyzes both types of prejudice. This approach acknowledges two realities of our modern world and the criminal justice system. First, information that is questionable or inadmissible at trial but widely disseminated in the community can infect the minds of jurors and subvert the principle of an impartial jury.³⁰⁹ Second, demonstrating the true impact of pretrial publicity on prospective jurors in a courtroom setting is a difficult and perhaps insurmountable task for defendants.

The second lesson of *Cheely* and *Maad* arises from the surveys conducted in those cases. A scientifically conducted public opinion survey is a vital instrument for gauging the impact of prejudicial pretrial publicity.³¹⁰ As was made blatantly evident in the *Maad* case, the true effects of extrajudicial media sources on the prospective jurors can be better measured by scientifically based research

309. *See id.*

310. *See, e.g.,* CRACIUN 2002 MAAD POLL, *supra* note 291, at 3–4.

than by the artificial and restrictive process of voir dire.³¹¹ A valid public opinion survey of the prospective jury pool can measure the community's knowledge of facts and rumors that would be contested by the defense at trial or would not be admissible as evidence, assess the prevalent opinion in the community as to the guilt of the defendant, and calculate the strength of that opinion.³¹² With this information, the trial court can determine with confidence whether prejudice of the prospective jurors should be presumed.³¹³

The juxtaposition of the two *Cheely* prosecutions, state and federal, also demonstrates the value of a public opinion survey. In *Cheely v. State*, the court of appeals concluded that “[o]ne fact that emerged from this individual questioning was that, in a large community such as Anchorage, many residents do not follow media coverage of events.”³¹⁴ The public opinion surveys conducted in *Cheely* proved quite the contrary.³¹⁵ A majority of people polled for the federal trial could recall details from the media publicity: 67% could recount information about the victims, and 74% identified revenge as the motive.³¹⁶ Moreover, 31% volunteered the defendants’ names, unprompted; 21% knew about the defendants’ prior crimes; and 71% believed that *Cheely* was guilty, or probably guilty, before he entered a courtroom.³¹⁷

Furthermore, while the Alaska courts have consistently declared that a delay of months between pretrial publicity and trial “blunts” the impact of that publicity, the second public opinion survey in the *Cheely II* case, conducted over a year later, showed that the prejudicial impact on the Anchorage community survived several years after the alleged crime.³¹⁸ The focus of the presumed prejudice analysis should be on the nature and extent of the media coverage and its actual prevalence in the minds of prospective jurors, in addition to the immutability of their subsequent conclusions about the defendant’s guilt or innocence. It is unrealistic to assume that a delay of a few months between publicity and trial will automatically mitigate the impact of prejudicial media coverage.³¹⁹

311. See *supra* notes 298–300 and accompanying text.

312. See, e.g., CRACIUN 2002 MAAD POLL, *supra* note 291, at 3–4.

313. See, e.g., *Maad*, 75 F. App’x. at 601.

314. 861 P.2d 1168, 1175 (Alaska Ct. App. 1993).

315. See CRACIUN 1992 CHEELY POLL, *supra* note 228, at 12–13.

316. *Id.*

317. *Id.* at 14, 32, 42, 25.

318. CRACIUN 1993 CHEELY POLL, *supra* note 267, at i (“As in 1992, the combined answers, guilty or probably guilty, add to 71%”).

319. See *id.*

The third lesson of these cases is that expressed by Justice Thomas Clark almost forty years ago: “[W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.”³²⁰ Accurately ascertaining the bias in a community, and moving venue in the few cases that require it, is not only economical but also minimizes the damage of appellate reversals to all facets of justice.

Alaska courts can revitalize the rights to a fair and impartial jury trial, as guaranteed by the Alaska Constitution, by reevaluating the application of the *Mallott* standard of presumed prejudice.³²¹ The focus should be on the honest recognition of the tremendous impact the media can have, even on large communities, in a state with such a small population. Moreover, the best way to measure that impact accurately is through a valid public opinion survey. The same type of scientifically based market research information that explores, assists, and explains commercial, governmental and political decision-making at all levels of our community should certainly be an acceptable tool in the decision-making process of a trial judge. And, if use of this “gold standard” in evaluating the impact of pretrial publicity for purposes of presumed prejudice analysis is not practical, a possible alternative is to employ the same methodology used in scientifically based surveys to elicit honest, uninfluenced, and uninhibited responses to a pre-trial juror questionnaire. This questionnaire should be provided to prospective jurors in the privacy of their homes prior to their appearance for jury duty, and the results should be analyzed for the parties and the court by experienced researchers.

If, however, Alaska courts still rely on the jury selection process to measure the impact of pretrial publicity on jurors, they must, at a minimum, be cognizant of the presumed prejudice and actual prejudice dichotomy and that this bifurcation of prejudice review provides separate, and equally vital, safeguards of the right to an impartial jury. Furthermore, in those few cases where jury bias is a concern, the trial courts should at least be receptive to extensive in-court written questionnaires and individual voir dire, perhaps even in chambers where jurors can feel more comfortable revealing personal views that have been irreparably influenced by unsanctioned sources. The alternative is that criminal defendants who have been “tried” in the press will walk into a courtroom with a presumption of guilt rather than innocence.

320. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

321. *See Mallott v. State*, 608 P.2d 737, 748 (Alaska 1980).