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Kate Early
Roger Williams University School of Law

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The Impact of Pretrial Publicity on an Indigent Capital Defendant's Due Process Right to a Jury Consultant

Kate Early*

INTRODUCTION

The presumption of innocence, the idea that every man is innocent until proven guilty, is deeply rooted within every American and central to our judicial system. However, it seems that the media conveniently forgets about this mantra when covering the most publicized crimes. Every so often, the media becomes preoccupied with certain criminal defendants, their stories, and their alleged crimes. The media begins by broadcasting the circumstances surrounding a gruesome crime in grave detail and, sooner or later, they center in on one person that is accused as being the assailant. The effects of this pretrial publicity can be detrimental to more than just the reputation of the accused.

Pretrial publicity may have an enormous impact on a criminal defendant's right to a fair trial. The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to an impartial jury.[1] Moreover, the Due Process Clauses in the Fifth and Fourteenth Amendments ensure the defendant is

* Juris Doctor, Roger Williams University School of Law, 2011; B.A. Quinnipiac University, 2008. I would like to thank the 2010 and 2011 editors of the Roger Williams University Law Review for their patience and guidance in the creation of this Comment. I would also like to thank my family and friends for their never-ending love and support. Last, but certainly not least, I would like to thank Michael Menard because his continuous devotion, encouragement, and comic relief made this Comment possible.

1. U.S. CONST. amend. VI.

accorded a fair trial.[2] Pretrial publicity, unless assuaged, contravenes these assurances.[3] There are several different remedial measures a trial judge may employ to moderate the impact of the publicity.[4] One of the more significant procedures to determine and eliminate biases is voir dire of prospective jurors.[5]

Effective jury selection is of vital importance, especially when pretrial publicity has occurred. Jury consultants can help to ensure an impartial jury is empanelled and, therefore, preserve the defendant's right to a fair trial.[6] As a result, jury consultants are being sought after and employed in an increasing number of cases.[7] However, wealthy defendants are at a significant advantage over their underprivileged counterparts, given that jury consultant services are pricey.

Indigent criminal defendants have the right to an expert under the fundamental fairness doctrine,[8] which is the principle underlying procedural due process.[9] Though originally recognized for psychiatric evaluations, this right has been expanded to other areas of expertise.[10] As a result, indigent defendants have argued that this right extends to jury consultant services.[11] Few have

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2. *See* U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1; *see generally* Steven C. Serio, Comment, *A Process Right Due? Examining Whether a Capital Defendant has a Due Process Right to a Jury Selection Expert*, 53 AM. U. L. REV. 1143, 1167-69 (2004).

3. *See infra* Part II.A.

4. *See infra* Part II.B.

5. *See infra* Part II.B.2.

6. *See infra* Parts I.C.2 and IV.

7. *Id.*

8. Ake v. Oklahoma, 470 U.S. 68, 74, 77 (1985) (holding that a defendant had a constitutional right to a state-appointed psychiatrist where he demonstrated that his sanity at the time of the offense was going to be a significant factor at trial). The fundamental-fairness doctrine is "[t]he rule that applies the principles of due process to a judicial proceeding. The term is commonly considered synonymous with *due process*." BLACK'S LAW DICTIONARY 697 (8th ed. 2006).

9. "Due process is the observance of that fundamental fairness which is essential to the very concept of justice; it rests on basic fairness of procedure and demands a procedure appropriate to the case and just to the parties involved." 16C C.J.S. *Constitutional Law* §1436 (2009).

10. *See infra* Part III.B (discussing the expansion of expert services to include forensic pathology, blood spatter, DNA, fingerprinting, intoxication and dentistry).

11. *See infra* Part IV.

been successful, but many others have not been so lucky.[12]

This Comment seeks to examine the problems presented by extensive pretrial publicity and the necessity of proficient jury selection in those cases. Moreover, this Comment recognizes the failure of the majority of courts to afford indigent defendants a jury consultant under the *Ake v. Oklahoma*[13] standard. This Comment further argues that an indigent capital defendant has a due process right to a jury consultant where the case has received substantial pretrial publicity.

Part I of this Comment explains the constitutional and statutory standards associated with jury selection. Part I also describes the jury consulting industry and how jury consultant services can moderate the effects caused by pretrial publicity. Part II begins by describing research evidencing the prejudicial effect pretrial publicity has on the potential jury pool. Then, Part II goes on to discuss the remedial measures courts may take to dispel bias caused by publicity and argues that voir dire plays a pivotal role in ensuring a fair trial. Part III outlines the continued expansion of the right to an expert with a detailed look at *Ake v. Oklahoma*.[14] Finally, Part IV applies the test formulated in *Ake* to evaluate whether a right to a jury consultant exists. This Comment asserts that courts should recognize a due process right to a jury consultant in capital cases where the case has received substantial publicity.

I. THE AMERICAN JURY

A. The Constitutional Standard

The role of the jury is firmly rooted within our society and, more importantly, within our Constitution.[15] Our forefathers found juries to be such an essential part of the criminal justice system that the right to a trial by jury was incorporated into the United States Constitution.[16] Not only does the Constitution guarantee a criminal defendant the right to a trial by jury, but it

12. *Id.*
13. 470 U.S. 68 (1985).
14. *Id.*
15. *See* U.S. CONST. amend. VI.
16. *See id.*

also requires that the jury be impartial.[17] This has been interpreted to include the right of having the pool of jurors drawn from a fair cross section of the community.[18] The jury that is actually selected is not required to precisely mirror the community, so long as the venire from which the jury is drawn is reasonably representative thereof.[19]

Furthermore, the Due Process Clauses of the Fifth[20] and Fourteenth[21] Amendments of the United States Constitution have been interpreted to require that the defendant have "a panel of impartial, indifferent jurors."[22] This requires that the jurors be unbiased. In trials involving defendants who have received substantial pre-trial publicity, this standard becomes a central issue in determining whether the defendant has been afforded his constitutional right to an impartial jury.

B. The Jury Selection Procedure

1. *The Venire*[23]

In accordance with the Constitution, federal law[24] imposes similar requirements on the jury venire. Federal law requires that the venire be chosen at random from a fair cross section of the community in the district where the court was committed.[25] Potential jurors are chosen through voter registration lists and called for service on a specified date.[26] Potential jurors must meet certain specifications in order to qualify as a juror;[27] furthermore, jurors may be excused or exempted from service based on a

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17. *Id.*
18. Smith v. Texas, 311 U.S. 128 (1940).
19. Based on this requirement, the Supreme Court has repeatedly held that state laws that systematically eliminate distinct classes from the jury venire are unconstitutional. *See id.*; *see also* Taylor v. Louisiana, 419 U.S. 522 (1975).
20. U.S. CONST. amend. V.
21. U.S. CONST. amend. XIV, § 1.
22. Irvin v. Dowd, 366 U.S. 717, 722 (1961).
23. The venire is the pool of potential jurors selected to be considered as part of the twelve-person-jury.
24. *See* The Federal Jury Selection and Service Act, 28 U.S.C. §§ 1861-66 (2006). States impose their own requirements on selecting their venire. *See e.g.* R.I. GEN. LAWS § 9-9-1 (2009).
25. The Federal Jury Selection and Service Act, 28 U.S.C. § 1861 (2006).
26. *Id.* § 1863.
27. *Id.* § 1865.

number of varying factors.[28] Persons that qualify and are not excused or exempted from service will be questioned during voir dire. The voir dire process permits the judge and attorneys to question the potential jurors in order to determine whether the jurors possess any biases or prejudices concerning the relevant parties and facts in the case.[29]

2. Challenging Prospective Jurors

Attorneys are permitted to utilize two types of challenges in their attempt to strike a potential juror: 1) challenges for cause and 2) peremptory challenges.[30] If it becomes clear during the voir dire process that a potential juror cannot be fair and impartial because of a particular opinion or belief, the attorney may challenge the juror for cause.[31] However, in order to be valid, the challenge for cause must be based on "narrowly specified, provable and legally cognizable basis of partiality."[32] Once a challenge is made, the trial judge has broad discretion to decide whether or not to excuse that juror.[33]

Peremptory challenges afford attorneys more flexibility since the strike can be utilized without cause or explanation.[34] The rationale underlying peremptory challenges is that they will aid in selecting a fair and impartial jury by allowing attorneys to strike potential jurors whose bias is less demonstrable.[35] Peremptory challenges are limited in accordance with the type of criminal charge involved.[36] Thus, in a capital case, each side is permitted twenty challenges;[37] while only three peremptory strikes are

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28. *Id.* § 1866.

29. *See* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 129-30 (2003).

30. The term "jury selection" seems to indicate that the attorneys are choosing which jurors should be empanelled. In reality, however, the attorneys are selecting who should not be empanelled by striking jurors from the venire.

31. *See* Wainwright v. Witt, 469 U.S. 412 (1985); *see also* JONAKAIT, *supra* note 29, at 134-35.

32. Swain v. Alabama, 380 U.S. 202, 220 (1965).

33. *See* JONAKAIT, *supra* note 29, at 135.

34. *See Swain*, 380 U.S. at 220.

35. *See id.*

36. *See* FED. R. CRIM. P. 24(b).

37. FED. R. CRIM. P. 24(b)(1).

permitted where the charge is a misdemeanor.[38]

Traditionally, attorneys have been in control of challenging jurors during voir dire. However, an increasing number of attorneys are turning to jury consultants for their expertise in selecting a jury.[39]

C. The Jury Consulting Industry

1. Origin and Popularity of Jury Science and Jury Consulting

In 1971, "jury science"[40] and the jury consulting industry emerged during the prosecution of the "Harrisburg Seven."[41] A group of anti-Vietnam War activists were on trial for acts of civil disobedience; one act in particular involved a conspiracy to kidnap Henry Kissinger and to destroy draft records.[42] Harrisburg, Pennsylvania, a predominantly conservative district, was chosen to be the setting for trial.[43] The defense hired a team of social scientists who utilized telephone polls to collect information regarding the residents' perspectives on the war.[44] The consultants then analyzed the data to determine a profile of the type of juror who would most likely be sympathetic or unsympathetic to the defendants.[45] The defense selected a jury in accordance with the consultants' profile,[46] and the trial ended with a hung jury.[47]

Ever since the trial of the "Harrisburg Seven," scientific jury

38. FED. R. CRIM. P. 24(b)(3).

39. *See* Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, if Anything, to do About it*, 1999 WIS. L. REV. 441, 464 (1999).

40. The practice of using a scientific approach to jury selection. *See generally* Jeremy W. Barber, Note, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1230-39 (1994).

41. Strier & Shestowsky, *supra* note 39, at 444.

42. *Id.* at 444; United States v. Berrigan, 482 F.2d 171, 173 (3d Cir. 1973).

43. Strier & Shestowsky, *supra* note 39, at 444.

44. Rachel Hartje, Comment, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 CAL. W. L. REV. 479, 491-92 (2005).

45. *Id.*; Strier & Shestowsky, *supra* note 39, at 444.

46. Strier & Shestowsky, *supra* note 39, at 444.

47. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 157 (1994). The jurors voted 10-2 in favor of acquittal. *Id.*

selection has become increasingly popular.[48] The industry began to grow immediately, with criminal defendants employing jury consultants in the 1970s leading to a string of acquittals.[49] Not long after, large corporate defendants and high-profile figures turned to jury consultants in search of favorable results.[50] The American Society of Trial Consultants (ASTC) estimates that by 1994 there were at least 250 jury consultants in the United States.[51] By 1994, the industry had exploded to almost twelve times its size compared to eleven years earlier when there were only nineteen consultants.[52] Today, the ASTC Membership Directory lists 394 consultants, evidencing continuous growth in the industry.[53]

2. The Profession Today: What Do Jury Consultants Do?

Jury consultants offer a wide range of services that are derived from social science methods and can be useful to attorneys throughout the litigation process.[54] At the beginning of a case, services include assisting with jury selection by helping to determine the ideal juror.[55] Jury consulting services progress through trial as well by assisting in the development of a trial strategy and in determining how to present evidence.[56]

However, the most infamous services jury consultants offer are jury research and assistance with jury selection.[57] Jury consultants collect information and establish a profile of the ideal

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48. *See id.* at 148-49.
49. *Id.* at 148.
50. *Id.* at 149. Examples include: IBM, MCI, Pennzoil Company, Firestone, and the National Football League. *Id.* In addition, two of President Nixon's cabinet members hired jury consultants and were acquitted during the Watergate scandal in 1974. *Id.*
51. *Id.*
52. Barber, *supra* note 40, at 1234.
53. *See* American Society of Trial Consultants, Consultant Locator, http://www.astcweb.org (click "Consultant Locator" hyperlink on left; then follow "Locate Consultant" hyperlink).
54. *See* Hartje, *supra* note 44, at 493.
55. Barber, *supra* note 40, at 1234-36
56. *Id.* at 1237-38; ABRAMSON, *supra* note 47, at 151-153. Jury consultants also assist attorneys prepare their case for trial in what might be termed "scientific jury preparation. ABRAMSON, *supra* note 47, at 151.
57. *See* Hartje, *supra* note 44, at 493.

juror for a particular case.[58] Guided by this information, attorneys will strike those potential jurors who fail to meet the criteria described in the profile.[59]

Collecting the information for a profile can occur using various methods.[60] Primarily, jury consultants use opinion polls[61] (like those used in the trial for the "Harrisburg Seven") to construct their profiles.[62] Opinion polls are generally conducted over the telephone or in person, and they are used to uncover attitudes and biases of the residents of the jurisdiction.[63] The questions asked include general questions regarding the individual's attitudes relating to various factors, as well as specific questions relating to the case at hand.[64] In doing so, the consultant tries to "get a feel for local biases," and he will take this into account when constructing the profile.[65]

The consultants then analyze the data they have collected through the surveys and try to find correlations between desirable attitudes and an individual's characteristics.[66] Once the correlations are established, profiles of the most and least favorable jurors are constructed.[67] During voir dire, potential jurors are ranked in accordance with the profile constructed from the survey results.[68] Each potential juror is given a numeric value—for instance, one through five—based on the characteristics he possesses that correspond to the profiles.[69] The defense would then ideally strike the jurors labeled as a "five" (those least likely to be sympathetic to the defendant), and the

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58. Barber, *supra* note 40, at 1234-39.

59. Maureen E. Lane, Note, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U. L. REV. 463, 473 (1999).

60. *See* Barber, *supra* note 40, at 1234-36.

61. Hartje, *supra* note 44, at 493-94.

62. Barber, *supra* note 40, at 1235.

63. Lane, *supra* note 59, at 473 (citing Barber, *supra* note 40, at 1235-36).

64. Hartje, *supra* note 44, at 494.

65. Barber, *supra* note 40, at 1235 (quoting Robert F. Hanley, *Getting to Know You*, 40 AM. U. L. REV. 865, 871 (1990)).

66. Hartje, *supra* note 44, at 494. Characteristics include "a person's age, race, religion, sex, political affiliations, occupations, habits, and social standing." *Id.*

67. *Id.*

68. Barber, *supra* note 40, at 1235.

69. *Id.*

prosecution would presumably strike most of the "ones" (those most likely to be in favor of the defense).[70] Subsequently, those potential jurors tagged as a "two," "three," or a "four" are managed individually, while keeping the ranking in mind.[71] Thus, the goal is to determine and to remove those jurors most likely to be unsympathetic to your side based upon the characteristics they possess.[72]

Of course, attorneys have long utilized this method of ranking in selecting a jury.[73] However, the underlying technique for determining which jurors are more likely to be sympathetic has improved with the help of jury consultants.[74] Without the aid of a jury consultant, an attorney is merely speculating by relying on his instincts, or, at best, making an educated guess about the potential jurors' viewpoints.[75] Conversely, a jury consultant has researched the jury pool in advance and has ascertained correlations tending to show particular characteristics that correspond with viewpoints.[76] Thus, a ranking scale founded on data collected by a jury consultant is more likely to be accurate and less likely to be arbitrary.[77] Moreover, jury consultants have been found to be accurate in their ability to predict individual juror's attitudes based upon the ranking scales.[78]

Another way jury consultants assist during jury selection is through in-court assessment.[79] Jury consultants observe the jurors' non-verbal and verbal communication during voir dire and can analyze each juror's subtle gestures.[80] For instance, a juror who "sits rigidly and responds in a laconic tone with monosyllabic answers to the voir dire might be an 'authoritarian' personality and thus likely to side with the prosecution."[81] Moreover, jury

70. *Id.*
71. *Id.*
72. *See* Lane, *supra* note 59, at 473.
73. Barber, *supra* note 40, at 1235.
74. *Id.*
75. *See id.*
76. *Id.*
77. *Id*; Hartje, *supra* note 44, at 497.
78. *See* Jeffrey T. Frederick, *Social Science Involvement in Voir Dire: Preliminary Data on the Effectiveness of "Scientific Jury Selection,"* 2 BEHAV. SCI. & L. 375, 391 (1984).
79. Barber, *supra* note 40, at 1236.
80. *Id.*
81. *Id.*

consultants carefully word questions in order to elicit certain physical reactions and, therefore, ascertain jurors' attitudes.[82]

Attorneys have also used non-verbal and verbal cues to determine jurors' attitudes for a long time.[83] Just as with ranking scales, however, a jury consultant's assessment is likely to be more reliable than an attorney's educated guess.[84] A jury consultant's education and occupation revolves around studying and predicting human behavior.[85] Consequently, a jury consultant is likely to be better equipped to accurately assess a juror's verbal and nonverbal behaviors than an attorney.[86]

While jury selection is an important aspect of every jury trial, jury selection becomes even more critical where pretrial publicity has occurred. Pretrial publicity may taint the venire; therefore, being able to weed out the biased jurors from the impartial is essential.

II. PRETRIAL PUBLICITY

A. Pretrial Publicity Impacts a Juror's Ability to Remain Fair and Impartial

While it may be true that the majority of criminal cases do not receive much media attention, unique crimes and circumstances produce cases with which the media becomes preoccupied. Once the story breaks, the media keeps the public up-to-date with the facts surrounding the crime, the investigation, the potential suspect(s), and the victim(s). A recent example of this includes Phillip Markoff, otherwise known as the "Craigslist Killer." Markoff, a twenty-three year old medical student, was indicted for brutally attacking three unsuspecting women he met through Craigslist.[87] He was also accused of murdering one of them.[88]

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82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *See id.*
87. *See* Matt Collette, *Charges Expand in Hotel Killing 'Craigslist' Suspect Indicted on 7 Counts: 'Craigslist' Case Adds Gun Counts*, THE BOSTON GLOBE, June 22, 2009, *available at* 2009 WLNR 11894542.
88. *Id.* The author does not intend to downplay the severity of these accusations, nor does she mean to suggest that Markoff was, in fact, innocent. Nonetheless, Markoff was entitled to receive a fair trial and to remain "innocent until proven guilty," but the media's portrayal contravened these

The media kept the public informed about Markoff, even before he was arrested.[89] They also leaked crucial information regarding the crime, including some incriminating evidence.[90] Of course, the media is entitled to publish these stories and keep the public informed;[91] however, making this information readily available to the public can potentially contaminate the jury pool.[92]

Pretrial publicity has been shown to have various psychological effects causing the juror to be biased, even inadvertently, in their decision.[93] Pretrial publicity, especially negative pretrial publicity, causes jurors to create a negative impression of the defendant, which consequently causes jurors to view the defendant as less credible.[94] This can have severe impacts where his defense hinges on his credibility. Moreover, jurors do not lay aside or forget the information that they learned through the media as they are told to do.[95] Rather, the jurors are prone to source-memory errors,[96] where the jurors view the information they learned through the media as if it had been presented as evidence at the trial because they forget the source of the information.[97] In this way, the pretrial publicity may have a direct effect on the outcome of the trial because the information is

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assurances. Tragically, Markoff committed suicide in prison on August 15, 2010, so he will never receive a fair trial or have the chance to clear his name. *See* Maria Cramer, *Markoff an apparent suicide*, THE BOSTON GLOBE, Aug.16, 2010, *available at* http://www.boston.com/news/local/massachusetts/articles/2010/08/16/accused_craigslist_killer_an_apparent_suicide_in_boston_jail_cell/.

89. *See* FOX NEWS.COM, POLICE HUNTING FOR BOSTON 'CRAIGSLIST' KILLER (Apr.16, 2009), http://www.foxnews.com/story/0,2933,516695,00.html; *see also* Greta Van Susteren, *Craigslist Killer?*, FOX ON THE RECORD WITH GRETA VAN SUSTEREN, April 16, 2009, *available at* 2009 WLNR 7178914.

90. *See* ANOTHER HEARING IN CASE OF SUSPECTED 'CRAIGSLIST KILLER' (June 23, 2009), http://multimedia.boston.com/m/23171917/another-hearing-in-case-of-suspected-craigslist-killer.htm

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

92. *See* Christine L. Ruva & Cathy McEvoy, *Negative and Positive Pretrial Publicity Affect Juror Memory and Decision Making,* 14 J. EXPERIMENTAL PSYCHOL.: APPLIED 226 (2008).

93. *Id.*

94. Christine Ruva, Cathy McEvoy & Judith Becker Bryant, *Effects of Pre-Trial Publicity and Jury Deliberation on Juror Bias and Source Memory Errors*, 21 APPLIED COGNITIVE PSYCHOL. 45 (2007) [hereinafter Ruva et al.].

95. Ruva & McEvoy, *supra* note 92 at 234.

96. *Id.*

97. *Id.*

being used as if it were evidence, which it is not.

During voir dire, the jurors are asked whether they can be fair and impartial and are asked to lay aside any extraneous information that may cause the juror to be biased.[98] However, research shows that jurors are unable to be fair and impartial after being exposed to pretrial publicity, even when asked to lay aside any information they have heard about the trial.[99] Because the juror experiences source-memory errors and have already formed a negative impression of the defendant, they are likely to remain biased regardless of their promise to be fair and impartial.[100] Thus, instructions to lay aside information learned of outside of the courtroom are ineffective in cases where pretrial publicity is an issue.[101]

Moreover, jurors who have been exposed to pretrial publicity are also biased in the way that they view the evidence.[102] After hearing the negative pretrial publicity about the defendant, jurors are more likely to have a built-in pro-prosecution bias where they will evaluate the prosecution's case more favorably.[103] In addition, the jurors may evaluate testimony and evidence in a distorted manner to favor the prosecution.[104] Thus, even evidence that is seemingly pro-defense may be distorted into being pro-prosecution in the eyes of the biased juror.[105]

Regardless of a juror's promise to remain impartial and the judge's admonition to overlook the news stories, jurors might involuntarily decide the defendant's fate in a partial manner.[106] Therefore, once a potential juror learns what the media is saying about the defendant, that juror is essentially tainted. Most importantly, these biases are mostly inadvertent and even unknown to the juror(s);[107] therefore, it is likely that it will be

98. JONAKAIT, *supra* note 29, at 129.
99. *See* Ruva & McEvoy, *supra* note 92 at 234.
100. *See id.*
101. *See id.*
102. Lorraine Hope, Amina Memon & Peter McGeorge, *Understanding Pretrial Publicity: Predecisional; Distortion of Evidence by Mock Jurors*, 10 J. EXPERIMENTAL PSYCHOL.: APPLIED 111 (2004) [hereinafter Hope et al.].
103. *Id.*
104. *Id.*
105. *See id.*
106. *See* Ruva & McEvoy, *supra* note 92 at 234.
107. *Id.*

difficult for an attorney, acting alone, to detect these biases during voir dire.

B. Procedural Remedies for Pretrial Publicity

Courts are equipped with a variety of procedural tools that may be used in order to combat pretrial publicity.[108] These techniques include gag orders, continuances, sequestration, jury instructions, and change of venue.[109] Although judges and prosecutors generally have the opinion that these remedies are effective in ensuring a fair and impartial trial,[110] many of the procedures have serious inadequacies that make employing them onerous and that fail to adequately protect the defendant's rights.[111] On the other hand, it has been said that many judges believe voir dire is an appropriate and sufficient remedy for weeding out prejudiced jurors from the venire.[112] In addition, the United States Supreme Court has consistently emphasized the importance of voir dire in selecting an impartial jury in cases where extensive pretrial publicity has occurred.[113]

1. The Inadequacies of Current Procedural Remedies

a. Gag Orders

A court may issue a gag order in order to curtail information leaks from trial participants in an attempt to protect the defendant's right to a fair trial.[114] Gag orders may be issued

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108. *See* Sheppard v. Maxwell 384 U.S. 333, 356-62 (1966) (recommending procedures the lower court should have employed to reduce the effects of pretrial publicity).

109. *See generally* Jaime N. Morris, Note, *The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases,* 44 B.C. L. REV. 901, 906-15 (2003).

110. John S. Carroll, Norbert L. Kerr, James J. Alfini, Frances M. Weaver, Robert J. MacCoun & Valerie Feldman, *Free Press and Fair Trial: The Role of Behavioral Research,* 10 LAW & HUM. BEHAV. 187, 192 (1986) [hereinafter Carroll et al.].

111. *See infra* Part II.B.1.

112. Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll & James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study,* 40 AM. U.L. REV. 665, 667 (1991) [hereinafter Kerr et al.].

113. *See infra* Part II.B.2.

114. Morris, *supra* note 109, at 906-07.

where "there is a reasonable likelihood that prejudicial publicity may prevent a fair trial."[115] An appeals court may reverse a trial court that fails to issue a gag order where a defendant's right to a fair trial is threatened by pretrial publicity.[116] For this reason, it seems that gag orders are believed to be an effective means of protecting a defendant's right to a fair trial consistent with due process.

Standing alone, a gag order will not shield the jury from learning of pretrial publicity. This is because gag orders are most often requested after the pretrial publicity has begun.[117] Thus, gag orders protect prospective leaks from occurring, but fail to remedy leaks that have already occurred. Furthermore, gag orders do not prohibit the media from reporting regarding the case,[118] but merely silence their well-informed sources.[119] The media's constant desire to "get the story" combined with a lack of knowledgeable non-gagged sources leads to printing rumors and misinformation.[120] Thus, gag orders are independently

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115. *Id.* at 906. For instance, in the highly publicized prosecution of Providence Mayor Vincent A. Cianci Jr. for corruption, U.S. District Court Judge Ernest C. Torres issued a gag order. Tracy Breton, *Operation Plunder Dome: Judge Acts to Silence All Talk in Case,* PROVIDENCE J., May 16, 2001, at 1A. The mayor, his five co-defendants, their lawyers, the prosecutors, all potential witnesses, law-enforcement officials, and court personnel were all prohibited from making any extrajudicial statements concerning information outside of the public record and from making any comments about the case in general. *Id.* Judge Torres noted that "[t]he purpose of [the gag] order is to protect the rights of both the defendants and the United States to a fair trial before an impartial jury by prohibiting the kinds of extrajudicial statements and disclosures that, if widely disseminated, would be likely to threaten those rights and the integrity of the trial process." *Id.*

116. *See e.g.* Sheppard v. Maxwell, 384 U.S. 333, 361 (1966). The defendant, a prominent doctor, was accused of beating his pregnant wife to death while she was asleep in their home. *Id.* at 335-36. The media became preoccupied with this tragedy from day one, publishing stories regarding evidence not presented at trial and information that blatantly incriminated Sheppard. *Id.* at 356-57. The Supreme Court held that the trial court should have employed precautions that would have protected Sheppard's right to a fair trial, including the issuance of a gag order. *Id.* at 361.

117. Mark J. Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials,* 39 LOY. L.A. L. REV. 1167, 1182 (2006).

118. *See id.* at 1182-83. The First Amendment of the United States Constitution protects freedom of speech; thus, the courts cannot prohibit the media from reporting on trials. *See* U.S.CONST. amend. I.

119. *See* Geragos, *supra* note 117, at 1182-83.

120. *Id.* at 1183.

insufficient and inadequate to protect a defendant's right to a fair trial.

b. Continuances

Continuances are a procedural tool that courts use in a variety of circumstances, including in cases where pretrial publicity has occurred.[121] In an effort to preserve the defendant's rights, judges may postpone trial until the publicity subsides.[122] By definition,[123] continuances delay the trial, and any delay can undoubtedly be detrimental to both parties.[124] Because delays can be detrimental to both sides, continuances are by no means a perfect remedy for pretrial publicity. Moreover, continuances may not be very successful in ameliorating bias because the publicity may be reborn once the trial starts up again.

c. Sequestration

Sequestering the jury is another remedial measure that the court may utilize in order to protect the defendant's right to a fair trial.[125] Sequestration involves isolating the jury from extrajudicial information, thereby keeping publicity from penetrating the jury box during trial.[126] Of course, this does not prevent the jury from being tainted by publicity that occurs prior to trial.[127] More importantly, sequestration thrusts an enormous burden on the jurors by isolating them from their everyday life for

121. *See* Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do To Ensure a Fair Trial in the Face of a "Media Circus,"* 26 SUFFOLK U. L. REV. 1063 (1992).

122. *See e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (discussing the failure of the lower court to take appropriate measures to protect the defendant's right to a fair trial, namely failing to grant a continuance until the publicity abated).

123. "The adjournment or postponement of a trial or other proceeding to a future date." BLACK'S LAW DICTIONARY 141 (3d pocket ed. 2006).

124. *See e.g.* Morris v. Slappy, 461 U.S. 1, 15 (1983).

125. *See e.g.* Charles H. Whitebread & Darrel W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard-Mu'Min Remedy*, 69 S. CAL. L. REV. 1587, 1612-15 (1996); *see also Sheppard*, 384 U.S. at 363 (noting that the trial court should have ordered sequestration sua sponte).

126. Morris, *supra* note 109, at 912.

127. Whitebread & Contreras, *supra* note 125, at 1612.

considerable periods of time.[128] Sequestration is not only ineffective at shielding the jurors from pretrial publicity, it is also an inconvenient and extreme procedure; thus, sequestering the jury is a defective remedy.

d. Jury Instructions

Judges may provide the jury with instructions admonishing them not to consider any information relevant to the case that is not presented at trial, such as information exposed by the media.[129] Through the instructions, the judge reminds the jurors that they must remain impartial throughout the trial in an attempt to remedy any information learned prior to trial.[130] Judge Learned Hand criticized these instructions and pronounced them to be a "recommendation to the jury of a mental gymnastic[,] which is beyond, not only their powers, but anybody[] else['s]."[131] Indeed, research confirms that Judge Hand's assessment is correct; jury instructions in this situation are virtually useless.[132]

e. Change of Venue

A trial judge is permitted to relocate a trial from an area, which has been saturated with pretrial publicity to a district that has not been exposed to such publicity.[133] Nevertheless, under the Federal Rules of Criminal Procedure, a court cannot transfer a case sua sponte.[134] Where a criminal case has received

128. *See* Commonwealth v. Hayes, 414 A.2d 318, 348 (Roberts, J., dissenting) (sequestration is extremely burdensome because it is expensive and inconvenient).

129. *See e.g.* Newton N. Minnow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 648 (1991).

130. Morris, *supra* note 109, at 911.

131. Nash v. U.S., 54 F.2d 1006, 1007 (1932).

132. *See e.g.* Ruva & McEvoy, *supra* note 92, at 234.

133. *See e.g.* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). The Supreme Court has yet to rule on the constitutionality of a change of venue; however, the Court has noted that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should ... transfer it to another county not so permeated with publicity." *Id.*

134. *See* FED. R. CRIM. P. 21. Presumably, this is because under the Constitution, the defendant has a right to be tried in the district where the crime was committed, and a change of venue may deprive the defendant of this right. *See e.g.*, Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U.

substantial pretrial publicity, the defendant may move for a change of venue.[135] If the motion is granted, the case will be transferred to another district that has not encountered substantial pretrial publicity.[136] The underlying rationale for change of venue is that by relocating the trial to a district where the pretrial publicity is not as pervasive,[137] the jury will be able to render a fair verdict because they have not been exposed to as much publicity.[138] Change of venue is a great remedy where the publicity is localized and the trial is moved to a place outside of the publicity radius. On the other hand, where cases receive pervasive nationwide publicity, a change of venue would be a futile remedy.

2. Voir Dire: The Traditional Remedy for Juror Bias

Voir dire is a remedy for juror bias; thus, it is also viewed as a remedy for pretrial publicity. During voir dire,[139] the potential jurors are questioned in an effort to determine their competence and whether they are harboring any potentially damaging biases.[140] Questions concern the "potential juror's occupation,

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CHI. L. REV. 729, 731-34 (1985).

135. FED. R. CRIM. P. 21(a). The defendant must convince the court that the prejudice against him is so great in the district where the prosecution is pending that he would be unable to obtain a fair trial there. *Id.* Many times, the evidentiary support of prejudice is only found following the completion of voir dire, thus it is a strategic decision about when to raise. Vineet R. Shahani, Comment, *Change the Motion, Not the Venue: A Critical Look at the Change of Venue Motion*, 42 AM. CRIM. L. REV. 93, 107-08 (2005). Once the court is "satisfied that so great a prejudice against the defendant exists," the court must transfer to another district. FED. R. CRIM. P. 21(a).

136. *See* Whitebread & Contreras, *supra* note 125, at 1604.

137. Many times, this will mean a different district within the same state; however, courts have transferred prosecutions to a different state entirely. *See e.g.* U.S. v. McVeigh, 918 F.Supp. 1467 (W.D. Okla. 1996) (upholding the change of venue for the trial of Timothy McVeigh from Oklahoma to Colorado following the infamous bombing in Oklahoma City). Moreover, instead of moving the entire trial, a trial court may be permitted to bring in a jury from another district. *See e.g.* State v. Harris, 660 A.2d 539 (N.J. Super. Ct. 1995) (trial court brought in a jury from another county to remedy localized pretrial publicity).

138. *See* Whitebread & Contreras, *supra* note 125, at 1604.

139. Voir dire is French for "to speak the truth." BLACK'S LAW DICTIONARY 746 (3d pocket ed. 2006).

140. *See* Morris, *supra* note 109, at 910.

family, education, prior convictions, and knowledge of the case."[141] The answers to the questions theoretically provide the attorneys with the information necessary to decide whether or not to strike a particular juror.[142] The underlying principle of voir dire lies within the Sixth Amendment,[143] in guaranteeing criminal defendants the right to a trial by an impartial jury.[144]

Over two hundred years ago, in *United States v. Burr*, the Circuit Court for the District of Virginia was first confronted with the issue of juror bias as a result of the media.[145] The court noted that, in judging juror impartiality, the focus should not be on the extent of knowledge possessed by the juror; rather, "[t]he question must always depend on the strength and nature of the opinion which has been formed."[146] Thus, the court placed an emphasis on discovering biases during voir dire, underscoring their belief in the efficacy and importance of voir dire. That belief was reaffirmed seventy years later in *Reynolds v. United States*,[147] when the U.S. Supreme Court held that impermissible juror bias occurs when media coverage leads a juror to form an opinion prior to deliberation.[148] The Court reasoned, "a juror who has formed an

141. *Id.*

142. *See* Whitebread & Contreras, *supra* note 125, at 1600.

143. U.S. CONST. amend. VI.

144. Whitebread & Contreras, *supra* note 125, at 1600.

145. *See* United States v. Burr, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14, 692g). Aaron Burr was accused of treason after he stepped down from his position as vice president and planned to conquer territories in the west. 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, 48 (1996). Given his prominence and the circumstances surrounding the offense, Burr's case received a lot of media attention. *Id.* Burr claimed that the jurors who had previously learned the facts of the case through the media should be disqualified in order to avoid any prejudice. Whitebread & Contreras, *supra* note 125, at 1601. The Court, led by Chief Justice John Marshall, held that the jurors were not automatically disqualified because they learned about the case through the media since knowledge is not entirely dispositive of a juror's ability to act impartially. *Id.*

146. *Burr*, 25 F.Cas. at 51.

147. *See* Reynolds v. United States, 98 U.S. 145 (1878).

148. *Id.* at 155. Thus, a finding of bias must be based upon evidence that the juror formed an opinion prior to deliberation; however, the reviewing court should only set aside the finding of bias if the error is manifest. *Id.* at 156.

opinion cannot be impartial."[149]

Almost a whole century later, the U.S. Supreme Court, in *Irvin v. Dowd*, further shaped the standard of juror impartiality by recognizing the presumption of prejudice.[150] In holding that the defendant was deprived of due process, the Supreme Court noted "the right to [a] jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors."[151] Impartiality is satisfied so long as the juror can lay aside his opinion.[152] However, the juror's promise to be impartial is not dispositive, and the defendant must show "the actual existence of such an opinion on the mind of the juror as will raise the presumption of partiality" in order for the juror to be set aside.[153]

In determining juror bias, the Supreme Court employed a two-pronged test considering both the media saturation in the community and voir dire.[154] First looking at the setting, the Court considered the fact that it was a small, rural community and that the publicity was fairly substantial, even extending into the neighboring county.[155] Second, the statements the jurors made on voir dire, taken as a whole, convinced the Court that the jury was not impartial.[156] Given that two-thirds of the jury admitted to presuming the defendant's guilt before hearing any of the testimony, the Supreme Court found the jurors to be prejudiced to

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149. *Id.*

150. *See* Whitebread & Contreras, *supra* note 125, at 1601; *see also* Irvin v. Dowd, 366 U.S. 717 (1961). The defendant faced considerable pretrial publicity concerning the six murders he was accused of committing. *Id.* at 721. The media attention included an intensively publicized press release issued by the prosecutor and police officials announcing that the defendant had confessed to all six murders. *Id.* at 719-20. The motion for a transfer of venue was granted; however, the case was transferred to the adjacent county, which had also been exposed to the inflammatory publicity. *Id.* at 720. The defendant's subsequent motions for a change of venue were denied. *Id.* Following a conviction, the defendant instituted habeas corpus proceedings arguing that he was denied a fair trial and, therefore, denied due process. *Id.* at 719.

151. *Irvin*, 366 U.S. at 722. The jurors do not need to be completely ignorant of the events and issues surrounding the defendant's arrest; rather, they need to be impartial. *Id.*

152. *Id.* at 723.

153. *Id.*

154. *See* Whitebread & Contreras, *supra* note 125, at 1601; *see also Irvin*, 366 U.S. at 717.

155. *Irvin*, 366 U.S. at 725-26.

156. *Id.* at 726-28.

a degree that rendered a fair trial impossible.[157] Once again, the Supreme Court emphasized the value of voir dire.

In *Rideau v. Louisiana* the Supreme Court held that the publicity surrounding the trial was pervasive and, therefore, was sufficient to give rise to a presumption of prejudice.[158] Consequently, the Court did not inspect the voir dire transcript for actual prejudice.[159] However, this analysis was subsequently abandoned just ten years later in *Murphy v. Florida*.[160] The Supreme Court articulated another test to determine juror bias, looking for "any indications in the totality of the circumstances that the petitioner's trial was not fundamentally unfair."[161] In looking at the totality of the circumstances, the Court considered: (1) the voir dire transcript in search of any juror hostility; (2) the general atmosphere in the community or courtroom at the time of the trial; and (3) the length to which the trial court had to go in order to choose impartial jurors.[162]

In *Murphy*, the Supreme Court looked to the totality of the circumstances in determining whether the jury was impartial, identifying one of the factors as the voir dire transcript.[163]

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157. *Id.* at 728.

158. 373 U.S. 723, 1420 (1963); Whitebread & Contreras, *supra* note 125, at 1601.

159. *See* Cheryl A. Waddle, Note, *Mu'Min v. Virginia: Sixth and Fourteenth Amendments Do Not Compel Content Questions in Assessing Juror Impartiality*, 25 AKRON L. REV. 479, 483 (1991); *see also Rideau*, 373 U.S. at 1420.

160. *See* 421 U.S. 794, 795 (1975). The defendant, a notorious jewel thief, was convicted of breaking and entering of a home and of assault with intent to commit robbery. *Id.* The defendant appealed his conviction arguing that the jury had learned of his prior convictions through the media and therefore he was denied a fair trial. *Id.* at 799. Although the Supreme Court held that the publicity surrounding Murphy's trial was pervasive, the Court held that the judicial control over the outside influences was sufficient to deny the presumption of prejudice. *Id.*

161. *Id.*

162. Hardaway & Tumminello, *supra* note 145, at 61; *Murphy*, 421 U.S. at 800-03. After considering these factors, the Court found no due process violation because the jurors were sufficiently impartial. *Id.* at 803. Although there was pretrial publicity causing some jurors to become aware of the defendant's prior convictions, the Supreme Court found that these jurors were impartial because they were able to put aside any personal impressions or opinions and render a verdict based on the evidence in court. *Id.* at 800. "We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him." *Id.*

163. *Id.* at 800.

Specifically, the Supreme Court noted they were looking for any indication that the empanelled jurors demonstrated a hostility that "suggest[ed] a partiality that could not be laid aside."[164] Thus, it is clear that eliciting such hostility during voir dire is a significant factor in determining impartiality, but just how that hostility could be elicited was unclear after *Murphy*.

Subsequently, in *Mu'Min v. Virginia*, the Supreme Court established the standard for uncovering potential juror bias during voir dire.[165] Following substantial pretrial publicity and a conviction, the defendant appealed arguing that he had a constitutional right to question the jurors about the content of the news reports that they heard or read and, therefore, the trial judge erred in prohibiting defendant from engaging in such questioning.[166] The Supreme Court held that the due process clause does not require potential jurors to be questioned regarding the amount and content of news reports to which they have been exposed where there has been extensive pretrial publicity.[167] In order for content questions to be considered required by due process, the defendant must show that "the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."[168]

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164. *Id.*

165. *See* 500 U.S. 415 (1991). While Dawud Majid Mu'Min was serving his forty-eight year sentence for first-degree murder, he committed a second murder during a prison furlough program. *Id.* at 418. The media extensively covered the homicide and most of the media accounts were fairly prejudicial to the defendant. *Id.*

> One or more of the articles discussed details of the murder and investigation, and included information about petitioner's prior criminal record, the fact that he had been rejected for parole six times, accounts of alleged prison infractions, details about the prior murder for which Mu'Min was serving his sentence at the time of this murder, a comment that the death penalty had not been available when Mu'Min was convicted for this earlier murder, and indications that Mu'Min had confessed . . .

Id. The potential jurors were questioned during voir dire regarding whether they had read or heard the publicity regarding the case and whether the information from outside sources would affect their ability to be impartial. *Id.* at 419-20. Eight of the twelve empanelled jurors admitted during voir dire to either having read or heard something about the case from an outside source, but none admitted to forming an opinion about the case. *Id.* at 421.

166. *Id.* at 419, 421.

167. *Id.* at 425.

168. *Id.* at 425-26. Chief Justice Rehnquist noted that questioning the

The focus should be on whether the potential juror has formed an opinion that would impair the juror's ability to be impartial.[169] Only where unfavorable pretrial publicity saturates a community to the extent that a presumption of prejudice is established, should a juror's pledge to be impartial be questioned.[170] The trial judge has broad discretion in determining the extent of questioning during voir dire,[171] but it is evident that, after *Mu'Min,* a defendant is only entitled to question a potential juror regarding whether he or she can remain impartial in spite of being exposed to pretrial publicity.[172] While content questions are not necessarily prohibited during voir dire, a trial judge is well within his right to deny a defendant the chance to ask such questions.

In fashioning a standard for determining jury bias, it seems the Supreme Court has put much emphasis on voir dire and jury selection. Indeed, a trial court is to determine impartiality during voir dire and an appellate court is to look at the totality of the circumstances, including the voir dire transcript.[173] The Court in *Murphy* paid close attention to the voir dire transcript to determine whether any jurors were biased.[174] Moreover, *Mu'Min* made it clear that establishing impartiality occurred during voir dire and not by asking content questions.[175] Thus, it is clear that jury selection plays a central role in the criminal trials where there has been considerable pretrial publicity.

Traditionally, judges and attorneys have completed jury selection; however, attorneys are turning to jury consultants with increasing frequency.[176] Indigent defendants have requested the expertise of jury consultants under the due process right to expert

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jurors regarding the content of the publicity might be helpful, but that helpfulness is insufficient to establish a constitutional compulsion. *Id.* at 425.

169. *Id.* at 430 (citing Patton v. Yount, 467 U.S. 1025, 1035 (1984)). "The relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Id.*

170. *Id.* at 429.

171. *See* Mu'Min v. Virginia, 500 U.S. 415, 428 (1991) (relying on *Patton,* 467 U.S. at 1031).

172. *Id.* at 431-32.

173. *See* Murphy v. Florida, 421 U.S. 794, 800 (1975).

174. *Id.*

175. *See Mu'Min,* 500 U.S. at 431-32.

176. Strier & Shestowsky, *supra* note 39, at 464.

assistance; unfortunately, most requests have been denied.[177]

III. THE CONSTITUTIONAL RIGHT TO EXPERT ASSISTANCE

A. The Foundations of *Ake v. Oklahoma*

Under the Fourteenth Amendment's Due Process Clause, the United States Supreme Court has found that a criminal defendant is entitled to certain procedures and protections.[178] This is often termed the fundamental fairness doctrine.[179] Fundamental fairness requires that a capital defendant be appointed counsel to ensure that the defendant is afforded a fair trial.[180] This right has since been extended to state court proceedings,[181] and to misdemeanor cases that are punishable by imprisonment.[182]

Although the objective of the right to counsel is to ensure criminal defendants a fair trial, assistance by counsel alone may not always guarantee a fair trial.[183] The majority of criminal defendants are indigent.[184] Combine this statistic with the fact that most trials necessitate expert assistance,[185] and it becomes evident why the right to counsel alone may not be enough to guarantee a fair trial.[186] Thus, the Supreme Court has progressively recognized that indigent defendants require greater procedural protections than simply the right to appointed counsel.[187] In accordance with this progression, the Supreme

177. *See infra* Part IV.
178. Serio, *supra* note 2, at1167-69.
179. *See* BLACK'S LAW DICTIONARY, 306 (3d 2006).
180. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932).
181. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
182. *See* Argersinger v. Hamlin, 407 U.S. 24, 37 (1972).
183. Serio, *supra* note 2, at 1168.
184. *See* MYRON MOSKOVITZ, CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE COURTROOM 779 (4th ed. 2004) (estimating that over 90% of criminal defendants are indigent).
185. *See* Serio, *supra* note 2, at 1168-70.
186. "The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e.g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist . . . In such circumstances, if the government does not supply the funds, justice is denied the poor-and represents but an upper bracket privilege." United States v. Johnson, 238 F.2d 565, 572 (1956) (Frank, J., dissenting).
187. See *e.g.* Griffin v. Illinois, 351 U.S. 12, 17 (1956) (holding that an

Court established the right to expert assistance in *Ake v. Oklahoma.*[188]

B. *Ake v. Oklahoma* and the Subsequent Expansion of the Right to an Expert

Glen Burton Ake, an indigent defendant, was charged with capital murder.[189] Ake raised an insanity defense and could not afford to pay for a psychiatrist; thus, his court-appointed attorney filed a motion requesting that the trial court appoint a psychiatrist or provide funds that would enable Ake to obtain a psychiatrist.[190] Despite Ake's arguments that the Constitution required the court to provide him with the assistance of a psychiatrist when that assistance is necessary for his defense, the court refused to provide a state funded psychiatric evaluation.[191] Ake was tried, convicted, and sentenced to death.[192] On appeal, Ake argued that the trial court erred in failing to appoint a psychiatrist.[193] The United States Supreme Court reversed the conviction, holding that the Constitution required the trial court to provide a psychiatrist's assistance because the defendant had demonstrated that his sanity at the time of the offense was likely to be a significant factor at trial.[194]

In writing the opinion for the Court, Justice Marshall based the holding on "the Fourteenth Amendment's due process guarantee of fundamental fairness."[195] At the outset of the opinion, Justice Marshall summarized the Court's expansion of

indigent defendant is entitled to a copy of his trial transcript because he has the right to adequate appellate review); *see also* Douglas v. California, 372 U.S. 353, 357-58 (1963) (holding that the Fourteenth Amendment requires states to provide an indigent defendant with the means to raise a meaningful appeal because indigent defendants should have an equal opportunity as that possessed by a wealthy defendant). In addition, an indigent defendant is entitled to effective assistance of counsel to ensure an adequate defense. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984); *see also* McMann v. Richardson, 397 U.S. 759, 771 (1970).

188. *See* 470 U.S. 68, 74 (1985) (holding that the denial of a state funded psychiatrist deprived the defendant of due process).

189. *Id.* at 70.

190. *Id.* at 72.

191. *Id.*

192. *Id.*

193. *Id.* at 73.

194. Ake v. Oklahoma, 470 U.S. 68, 74 (1985).

195. *Id.* at 76.

indigent defendants' rights over the previous thirty years.[196] Justice Marshall went on to note that a state must ensure that the defendant is afforded "an adequate opportunity" to present a defense.[197] To implement this policy, the state must supply the indigent defendant with the "basic tools of an adequate defense or appeal."[198] In order to determine whether a psychiatric evaluation was a basic tool necessary for Ake's defense, the Court applied the three-factor test from *Matthews v. Eldridge.*[199] The *Matthews* test considers: (1) the private interest that will be affected by the action of the state; (2) the governmental interest that will be affected if the protection is provided; and (3) the probable value of the additional or substitute procedural protections sought and the risk of an erroneous deprivation should the protections be withheld.[200]

In applying the factors, the Court found that a criminal defendant's interest in potentially losing his life or liberty was "uniquely compelling."[201] Moreover, the Court found the state's asserted fiscal interest to be unpersuasive and "not substantial."[202] The discussion regarding the third factor, however, was not as concise as the first two factors, which the Court had answered summarily.[203] The Court weighed the probable value of the psychiatric assistance sought against the

196. *Id.* (citing Griffin v. Illinois, 351, U.S. 12 (1956) (right to receive trial transcript if necessary for appeal); Evitts v. Lucey, 469 U.S. 387 (1985) (assistance of counsel must be effective); Strickland v. Washington, 466 U.S. 668 (1984) (same); McMann v. Richardson, 397 U.S. 759 (1970) (same); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to assistance of counsel); Douglas v. California, 372 U.S. 353 (1963) (right to assistance of counsel on first direct appeal); Burns v. Ohio, 360 U.S. 252 (1959) (right to appeal without paying a filing fee).

197. *Ake*, 470 U.S. at 77.

198. *Id.* (quoting Britt v. North Carolina, 404 U.S. 226 (1971)).

199. *Id.*; Matthews v. Eldrige, 424 U.S. 319 (1976).

200. *Ake*, 470 U.S. at 77 (citing *Matthews*, 424 U.S. at 335).

201. *Id.* at 78.

202. *Id.* at 78-79. The State argued that providing psychiatric assistance in this case would be an overwhelming financial burden. *Id.* The Court rejected this argument as to indigent defendants in general and as to Ake in light of the compelling interest. *Id.*

203. *See id.* at 79-83; *see also* John M. West, Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326, 1333 (1986).

risk of erroneous deprivation should the assistance be denied.[204] The Court determined that supplying the defendant with the psychiatric assistance would "dramatically enhance[]" the jury's accuracy in the determination of guilt and sentencing.[205] An evaluation by a psychiatrist was central to the defendant's insanity defense; thus, the Court declared that psychiatric assistance was a "significant factor."[206] Accordingly, the Supreme Court held that Ake was entitled to a state funded expert.[207]

Although the opinion in *Ake* dealt exclusively with an indigent criminal defendant's right to an appointed psychiatrist,[208] many courts have read *Ake*'s language broadly, thereby extending the right of expert assistance to include other types of experts.[209] For instance, the Eighth Circuit held that a defendant's right to a fair trial was violated when the state failed to provide him with a hypnosis expert.[210] The Eighth Circuit noted that *Ake* does not require drawing a decisive line between a psychiatric expert and a non-psychiatric expert because the focus ought to be on the necessity of the expert.[211] Many other courts have followed suit by providing experts in other areas, such as: forensic pathology,[212] blood spatter,[213] DNA,[214] fingerprinting,[215] intoxication[216] and dentistry.[217] Rather than confining *Ake* to the

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204. *Ake*, 470 U.S. at 79.

205. *Id.* at 83.

206. *Id.* "[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.*

207. *Id.*

208. *See id.*

209. Serio, *supra* note 2, at 1172.

210. *See* Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. 1987).

211. *Id.* at 1243. "There is no principled way to distinguish between psychiatric and nonpsychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given." *Id.* In fact, the Eighth Circuit noted that there should be no distinction between a capital and noncapital crime because a liberty interest is compelling of due process as well. *Id.* at 1243-44.

212. *See e.g.*, Ray v. State, 897 S.W.2d 333, 342 (Tex. Crim. App. 1995).

213. *See e.g.*, James v. State, 613 N.E.2d 15, 21 (Ind. 1993).

214. *See e.g.*, *Ex parte* Dubose, 662 So.2d 1189, 1194 (Ala. 1995).

215. *See e.g.*, State v. Bridges, 385 S.E.2d 337, 390 (N.C. 1989).

216. *See e.g.*, State v. Coker, 412 N.W.2d 589, 593 (Iowa 1987).

psychiatric experts discussed in the opinion, these courts read the opinion as a means for ensuring defendant is provided with the "basic tools to an adequate defense."[218] Accordingly, this comment argues that *Ake* should be extended to jury consultants as well.

IV. UNDER THE *AKE* STANDARD, INDIGENT CAPITAL DEFENDANTS SHOULD BE AFFORDED A JURY CONSULTANT WHERE THERE HAS BEEN EXTENSIVE PRETRIAL PUBLICITY

Since courts have further expanded the right to expert assistance across the country, indigent defendants have attempted to obtain the assistance of jury consultants under this fundamental fairness analysis. Defendants are rarely successful in obtaining a jury consultant;[219] however, defendants have been successful in a few cases.[220] Most of these requests fail because the court finds that the defendant has failed to establish the "significant factor" requirement asserted in *Ake v. Oklahoma*.[221] However, it seems that many times these decisions fail to account for the compelling factor of pretrial publicity. Moreover, these decisions have been inconsistently decided and have been based upon language that is curiously absent from the *Ake v. Oklahoma* opinion.[222] Jury consultants satisfy the *Matthews* three-factor test

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217. *See e.g.*, Thornton v. State, 339 S.E.2d 240, 241 (Ga. 1986).

218. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

219. *See e.g.*, Moore v. Johnson, 225 F.3d 495, 502-03 (5th Cir. 2000) (holding that the defendant was not entitled to a state-funded jury consultant); *see also* Jackson v. Anderson, 141 F.Supp.2d 811, 854 (N.D. Ohio 2001) (holding that defendant was not denied a fair trial because he was not afforded a jury consultant). Judge Diane Kottmyer refused to grant defendant Neil Entwistle a jury consultant because "it had never been done before, so she didn't have to do it now. She never addressed the actual merits of affording . . . this procedural protection . . ." Scott H. Greenfield, The Indigent Defendant's Right to a Jury Consultant, http://blog.simplejustice.us/2008/06/05/the-indigent-defendants-right-to-a-jury-consultant.aspx (June 05, 2008, 17:20 EST).

220. *See e.g.*, Corenevsky v. Superior Court, 682 P.2d 360,369 (Cal. 1984) (indigent defendant granted a jury consultant because of excessive pretrial publicity). "In a recent highly publicized capital murder case here, the two defendants in the so-called Cemetery Case each received court-appointed attorneys, private investigators, jury consultants, psychologists and mitigation specialists." Lawrence Buser, *Indigents' Plea for Experts Stirs Issues of Cost, Fairness*, THE COMMERCIAL APPEAL (Memphis, Tenn.), Feb. 4, 1996, at A1.

221. Serio, *supra* note 2, at 1177-79.

222. *See id.*

incorporated in the *Ake v. Oklahoma* test, and they should also satisfy the "significant factor" requirement if pretrial publicity is taken into account.

A. The *Matthews* Factors

The first factor looks to the private interest affected by the state's action.[223] A criminal defendant charged with a felony faces potential jail time, which is an undeniable liberty interest. Furthermore, a criminal defendant charged with a capital crime faces much worse than a mere loss of liberty. Thus, it is easy to see why Justice Marshall deemed a capital defendant's interest to be "uniquely compelling."[224] It is doubtful that a capital defendant would fail to overcome this first prong,[225] given that his interest is "obvious and weighs heavily in [the] analysis."[226] Therefore, jury consultants would surely surpass the first prong of the analysis where the defendant is charged with a capital crime.

The second factor of the test considers the state's interest that will be affected should the jury consultant be provided.[227] In *Ake*, the Court considered the State's fiscal interest to be unpersuasive, given that many states already provided expert assistance for indigent defendants.[228] The Court reasoned that these states clearly have not found the financial burden to be so great that assistance is precluded entirely.[229] The state merely has to provide a competent expert, not the best available.[230] Furthermore, the state's interest in achieving a fair and accurate verdict is, at most, equivalent with the defendant's interest.[231] Jury consultants would certainly be an added cost for the state.

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223. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

224. *Id.* at 78.

225. *See* Moore v. Kemp, 809 F.2d 702, 741 (11th Cir. 1987) (Johnson, C.J., concurring in part and dissenting in part) (asserting that a defendant's interest in a capital case almost certainly assure that he will pass the first prong of the *Ake* analysis).

226. *Ake*, 470 U.S. at 78.

227. *Id.* at 77.

228. *Id.* at 79 n.4 (citing several state statutes that make expert assistance available to indigent criminal defendants).

229. *Id.* at 78-79.

230. *Id.*

231. *Id.* (asserting that a state's interest in a fair and accurate verdict is greater than a state's interest in winning at trial); Moore v. Kemp, 809 F.2d 702, 741 (11th Cir. 1987).

However, cases receiving extensive pretrial publicity occur periodically, but not incessantly. States would not be required to provide jury consultants to every indigent defendant. Rather, only certain indigent defendants would be entitled to a jury consultant—those defendants whose cases demand, in fairness, that the effects of excessive pretrial publicity be assuaged. Thus, states would not be unduly burdened, especially in comparison with a capital defendant, who faces a trial by a jury of biased peers. Moreover, given the analysis in *Ake*,[232] it is unlikely that a state's fiscal interest will outweigh a capital defendant's life and liberty interests. Although a jury consultant would be an added financial burden on states, it seems that jury consultants meet the second prong of the *Ake* analysis.

The third prong requires an analysis of the probable value of the assistance of a jury consultant as compared with the risk of erroneous deprivation absent that assistance.[233] In *Ake*, the Court analyzed this prong by considering the importance of psychiatry in criminal proceedings and determined that psychiatric assistance "has come to play a pivotal role in criminal proceedings."[234] While jury consultants are often employed for services extending beyond jury selection, a jury consultant's services often revolve around jury selection.[235] Furthermore, jury selection is a significant factor in capital cases because the jury determines whether or not to request the death penalty.[236]

Jury selection is even more critical where excessive pretrial publicity has occurred.[237] Where the community has been exposed to pretrial publicity, voir dire is an essential way to weed out any biases.[238] Although there are other remedial measures for pretrial

232. *See Ake*, 470 U.S. at 79.
233. *Id.* at 77.
234. *Id.* at 79.
235. *See* Strier & Shestowsky, *supra* note 39, at 455-56 (discussing that when consultants reported an estimate of how much time they spend providing each type of service, voir dire questions/strategy was ranked second highest).
236. *See* Serio, *supra* note 2, at 1174.
237. *See supra* Parts II.A and II.B.2 (discussing the psychological impacts on pretrial publicity and the significance of voir dire where pretrial publicity is pervasive).
238. *See* Ruva et al., *supra* note 94, at 61; *see also* Kerr et al., *supra* note 112, at 667.

publicity, they are inadequate in protecting a defendant's right to a fair trial.[239] Moreover, lawyers and judges believe voir dire to be a vital remedy for biases, including those resulting from pretrial publicity.[240] If potential jurors are biased because of pretrial publicity, they may contaminate the jury, unless they are struck during voir dire. Thus, the potential jurors must be closely examined for impartiality during voir dire.

In *Ake*, Justice Marshall noted that the assistance of a psychiatrist was necessary to achieve a fair and accurate verdict.[241] The Court focused on the consequence of erroneously sentencing the defendant to death, which they considered to be a considerable risk that substantially outweighed the slight burden on the state.[242] Therefore, the Court found appointing a psychiatrist was mandated by fundamental fairness.[243] Psychiatry was crucial in ensuring the defendant a fair trial in *Ake*.[244] Likewise, jury selection is a vital part of ensuring fundamental fairness in every case,[245] but especially so in capital cases where pretrial publicity has occurred. Pretrial publicity creates biases that may even be unknown to the juror himself[246] and, therefore, they can be difficult for an attorney to detect during voir dire. However, jury consultants can assist the attorney and make uncovering biases more likely. Jury consultants are experienced in reading the body language and responses given by jurors during voir dire.[247] Moreover, jury consultants rely on more than just the facts in front of them during voir dire; they rely on empirical evidence that may provide insight into the jurors' minds.[248] Thus, jury consultants reduce

239. *See supra* Part II.B.1.
240. *See* Carroll et al., *supra* note 110 at 192.
241. Ake v. Oklahoma, 470 U.S. 68, 82 (1985).
242. *Id.* at 84.
243. *Id.*
244. *See id.*
245. *See* Debra Sahler, Comment, *Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule*, 6 ALB. L.J. SCI. & TECH. 383, 396 (1996) "Voir dire, or jury selection exists to ensure that the jury is comprised of competent jurors who will weigh the evidence, decide the facts, and assess a witness' credibility without bias, prejudice, or partiality." *Id.*
246. *See* Ruva et al., *supra* note 94, at 61.
247. *See* Strier & Shestowsky, *supra* note 39, at 454.
248. *See id.* at 452-53.

the risk of having a biased jury, thereby protecting fundamental fairness.

Jury consultants are more likely than attorneys to be able to select an impartial jury.[249] Although the actual beneficial value of jury consultants is hard to calculate in experiments, efficacy is likely improved where jury consultants are employed.[250] Merely because the precise valuation of their efficacy is difficult to determine, their beneficial value cannot be dismissed.[251] Jury consultants' scientific methods of selecting a jury are certainly superior to that of an attorney relying merely on his own gut-instinct and stereotypes.[252]

A consultant's methods are specific to each case and location by surveying the specific community from which the jury pool is selected.[253] By contrast, an attorney relying on instincts may be case specific, but is not necessarily location specific. An attorney may consider the relevant facts of the case when considering whom he intuitively presumes will be sympathetic to his client. However, considering the location at the time of the trial is likely to be difficult for an attorney, unless he were to survey the community himself. Jury consultants survey the community at the time of the trial in order to gauge the local biases, which may only be present temporarily, as a result of the defendant's alleged acts. Attorneys acting alone, on the contrary, can only guess how the community feels. Jury consultants collect this data because it is important to consider the community's attitudes during jury selection. Without this important information, an attorney selecting a jury on his own is certainly at a disadvantage.

Moreover, instead of simply relying on guesswork and intuitions, a jury consultant relies upon objective data and

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249. *See e.g.* Reid Hastie, Comment, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 719-20 (1990) (describing research showing that jury consultants' scientific jury selection produces slightly better results than attorneys relying on instincts); *see also* Strier & Shestowsky, *supra* note 39, at 459-60 (arguing that the research surrounding jury consultants is very pessimistic and fails to recognize the value of the modest increase in performance).

250. *See* Strier & Shestowsky, *supra* note 39, at 464.

251. *Id.*

252. *See id.* at 465-66.

253. *Id.* at 466.

statistical analyses.[254] An attorney's instincts could be correct, but they could also be based upon some inherent stereotype.[255] Jury consultants have made a career out of determining and predicting human behavior. Through their relevant educational background and experience, they learn how to collect and analyze data in order to accurately evaluate the potential jurors.[256] Thus, their selection choices are rooted in neutral statistics, rather than mere speculation, and should be accorded more weight.

In determining the relevant value of a jury consultant, it is important to consider the value that society accords it.[257] Indeed, it is argued "it would betray great naiveté to ignore the fact that law firms and in-house counsel look increasingly to consultants for pretrial preparation [and] jury selection . . . notwithstanding both the absence of any guarantee of victory and the immoderate cost of the services."[258] The substantial amount of money attorneys are willing to pay for a jury consultant is a fairly compelling indication that jury consultants are effective.[259] The cost alone reveals that there is value in the service. Presumably, people do not throw away enormous sums of money for a worthless, ineffective service they could have done better themselves. Moreover, some argue, "over time the free market should weed out the less effective consultants leaving attorneys with a product of increasingly higher quality."[260] Regardless of the fact that there is little conclusive data on the efficacy of jury consultants, the increasing number of attorneys who rely on, and are willing to pay for, their services indicates that there is considerable value in

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254. *Id.*

255. *See* Hartje, *supra* note 44, at 497-501 (arguing that jury consultants can help attorneys conform to Constitutional standards by decreasing the use of stereotypes and racism during voir dire).

256. In fact, the use of surveys to compile data and predict the attitudes of individuals in the venire has been found to be fairly effective and accurate. Frederick, *supra* note 78, at 391.

257. Strier & Shestowsky, *supra* note 39, at 464-65 (arguing that the value of a jury consultant can be estimated by looking at the market value of the service).

258. *Id.* at 464.

259. *Id.* (arguing that attorneys would not waste $50 to $375 per hour on an ineffective service).

260. *Id.* (quoting Dennis P. Stolle et al., *The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation*, 20 LAW & PSYCHOL. REV. 139, 146 (1996)).

their assistance.[261]

Without a jury consultant, a capital defendant who has incurred extensive pretrial publicity is certainly at a high risk of erroneous deprivation. "[S]tudies reveal that juries wrongfully convict and sentence to death an inordinate number of capital defendants."[262] Thus, a capital defendant faces a high risk of erroneous deprivation to begin with;[263] the national rate of error was sixty-eight percent between 1973 and 1995.[264] Furthermore, those studies were not constricted to just cases with pretrial publicity,[265] which likely increases the risk of wrongful conviction. Pretrial publicity substantially affects a juror's ability to remain fair and impartial.[266] The juror may create a negative impression of the defendant,[267] experience source-memory errors,[268] and distort the evidence because of the pretrial publicity.[269] Consequently, a biased juror may vote to convict in a case that lacked sufficient evidence to prove guilt beyond a reasonable doubt. Thus, capital defendants whose cases receive extensive pretrial publicity likely have a high risk of erroneous deprivation. That risk, however, could be reduced with the assistance of a jury selection expert.

B. The "Significant Factor" Requirement

The Court in *Ake* noted that defendant's "sanity was a significant factor at trial."[270] This language has largely become the usual reason for which indigent defendants are denied a jury consultant.[271] It is argued; however, that these courts have

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261. Strier & Shestowsky, *supra* note 39, at 464-65.

262. Serio, *supra* note 2, at 1144 (citing Dirk Johnson, *Illinois Citing Faulty Verdicts, Bar Executions*, N.Y. TIMES, Feb. 1, 2000, at A1).

263. *See id.* In Illinois, 85 people were found to be wrongly convicted and were released. Dirk Johnson, *Illinois Citing Faulty Verdicts, Bar Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

264. James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000).

265. *See id.*

266. *See infra* Part II.A.

267. Ruva & McEvoy, *supra* note 92, at 234.

268. *Id.*

269. Hope et al., *supra* note 102, at 117.

270. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

271. Serio, *supra* note 2, at 1177-78; *see* cases cited *supra* note 219.

analyzed the "significant factor" requirement inconsistently.[272] These rigid interpretations contravene what the U.S. Supreme Court envisioned concerning a defendant's right to expert assistance.[273] Additionally, courts fail to adequately account for the necessity of a jury consultant in light of excessive pretrial publicity.

There are three different ways this language has been analyzed and throughout all of them the focus is on the necessity of a jury consultant to the defense.[274] Some courts interpret this language to mean the defendant must show a "particularized need" or a "substantial need" for the expert assistance he requests.[275] Others courts construe it to require defendants to establish that there is a reasonable probability that the jury a consultant would assist in his defense and that a denial of this assistance would result in an unfair trial.[276] Additionally, other courts believe the language demands that the assistance constitute a "basic tool of an adequate defense."[277] However, these supplementary phrases are curiously absent from the opinion in *Ake*,[278] as is any indication that defendants must demonstrate their need for an expert.

A more flexible *Ake* standard should be applied, rather than the varying, rigid standards applied by the aforementioned courts. A minority of courts have taken this accommodating approach.[279] Applying a more flexible *Ake* standard bolsters the U.S. Supreme Court's view of how expert assistance should be for defendants.[280] Capital cases should not be comprised by such rigid jurisprudence

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272. Serio, *supra* note 2, at 1177-80.

273. *See* Moore v. Kemp, 809 F.2d 702, 741 (11th Cir. 1987) (Johnson, C.J., concurring in part and dissenting in part).

274. Serio, *supra* note 2, at 1177-80.

275. *Id.* at 1178; *see e.g.*, State v. Dellinger, 79 S.W.3d 458, 469 (Tenn. 2002).

276. Serio, *supra* note 2, at 1178; *see e.g.*, State v. Williams, 565 S.E.2d 609, 634 (N.C. 2002).

277. Serio, *supra* note 2, at 1178; *see e.g.*, Moore v. Johnson, 225 F.3d 495, 503 (5th Cir. 2000).

278. *See* Serio, *supra* note 2, at 1178-81.

279. *See e.g.*, Corenevsky v. Superior Court, 682 P.2d 360 (Cal. 1984); *see also* Grayson v. State, 806 So. 2d 241, 255 (Miss. 2001).

280. *See* Moore v. Kemp, 809 F.2d 702, 741 (11th Cir. 1987) (Johnson, C.J., concurring in part and dissenting in part).

because malleable standards suit capital cases better.[281] Indeed, it has been urged that trial courts should view motions for jury consultants with "considerable liberality."[282] The rigid standards that the majority of courts have implemented make it near impossible for a defendant to be afforded the assistance of a jury consultant. However, jury consultants would pass the "significant requirement" language under a less rigid interpretation of *Ake*. Additionally, jury consultants likely satisfy the rigid standards where there has been excessive pretrial publicity, since this factor should qualify as rising to the level of a "particularized need."

However, in following the rigid application of the *Ake* "significant factor" requirement, courts have failed to adequately consider pretrial publicity. Courts requiring a defendant to show the necessity for a jury consultant should consider the impact of pretrial publicity on a defendant's right to a fair trial. If a capital defendant can show that there has been excessive pretrial publicity, he should be able to meet this strict necessity standard. Pretrial publicity increases the chance of a biased venire,[283] and a jury consultant is more likely to be effective in weeding out biased jurors during voir dire than an attorney. Thus, capital defendants subject to such pretrial publicity necessitate the assistance of a jury consultant in order to preserve the defendant's right to an impartial jury. Jury consultants help to effectively choose an impartial jury, which preserves fundamental fairness.

CONCLUSION

At least one court has granted an indigent defendant a jury consultant to assuage the effects of pretrial publicity.[284] However, several others have denied the defendant's request and forced him to face the biased venire alone. Fundamental fairness demands that jury consultants be appointed to indigent capital defendants where pretrial publicity is pervasive. This is especially true with defendants charged with capital crimes, as it is literally a matter of life or death. Until courts begin to recognize this, defendants in

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281. *Id.*
282. People v. Shannon, No. E029170, 2002 WL 973198 at *6 (Cal. App. 4th May 13, 2002).
283. *See generally* Ruva & McEvoy, *supra* note 92.
284. Corenevsky v. Superior Court, 682 P.2d 360, 368 (Cal. 1984).

these circumstances will be denied due process.