Constitutional Law: Minnesota'S First Anonymous Jury

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Trying an accused person by jury is an ancient practice,\textsuperscript{1} but the use of anonymous juries in criminal trials is a relatively new phenomen-
non. In State v. Bowles, an anonymous jury was impaneled for the first time in Minnesota. Bowles was convicted by that jury of murdering Minneapolis Police Officer Jerry Haaf in an assassination type slaying. The Minnesota Supreme Court held that the use of the anonymous jury did not infringe upon Bowles' right to an impartial jury or his right to be presumed innocent.

The Bowles court adopted a two-part test to reach the conclusion that an anonymous jury was warranted. This test considers the competing interests of society and the defendant. The court, however, did not conduct a sufficiently thorough analysis when it applied the test. A more complete analysis would better protect the rights of the defendant without jeopardizing the safety of the jurors.

This Note analyzes the use of an anonymous jury in State v. Bowles. In Part II, this Note reviews the advent of anonymous juries in the United States, and particularly in Minnesota. Part III discusses the facts of the Bowles case and the court's analysis. In Part IV, this Note supports the use of the two-part test applied by the Minnesota Supreme Court to determine whether the use of an anonymous jury was warranted. Also in Part IV, this Note advocates implementing a more thorough analysis of this two-part test to better protect the rights of accused persons.

II. BACKGROUND

A. Trial by Jury

Various forms of the jury trial have been used throughout the ages. The peoples of Denmark, Germany, Great Britain, Greece, Iceland, Italy, Norway, Scotland, and Sweden have implemented some form of trial by jury in their history. Before the United States began operat-
ing under the U.S. Constitution in 1789, jury trials in criminal cases had been used in England for several centuries.\(^7\)

Criminal defendants in the United States have had the right to a trial by jury since at least 1606, when James I guaranteed that right to English settlers.\(^8\) In 1774, the First Continental Congress’s Declaration of Rights promised the right to a jury trial.\(^9\) When the Constitution was ratified fifteen years later, it guaranteed that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”\(^10\) In 1791, the Sixth Amendment was ratified, which guarantees criminal defendants “the right to a speedy and public trial, by an impartial jury.”\(^11\)

In addition to the guarantee of an impartial jury, a criminal defendant has the right to be presumed innocent by the jury until proven guilty by the prosecution.\(^12\) No rule explicitly prohibits burdening the presumption of innocence to further a competing societal interest; courts have held that under extenuating circumstances actions may be taken which burden the defendant’s presumption of innocence provided no right of the defendant is violated.\(^13\) Holding
that the defendant's right to presumption of innocence may be burdened, however, is not the same as eliminating the right.

B. Use of Anonymous Juries

Anonymous juries are a relatively new phenomenon.\textsuperscript{14} They were originally impaneled primarily in federal cases where the defendant was suspected of being involved with organized crime or a terrorist group.\textsuperscript{15} Recently, anonymous juries have been used in notorious cases which do not involve organized crime or terrorist groups.\textsuperscript{16}

conduct himself properly, " even though these actions would probably burden the defendant's right to a presumption of innocence); Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir 1984) (stating that (1) allowing the jury to see the defendant in handcuffs and guarded by a large number of security personnel for a short period of time as the defendant was brought into the courtroom was reasonable and necessary because of some dangerous activity surrounding the trial, and (2) these actions did not deprive defendant of his constitutionally protected presumption of innocence); Billups v. Garrison, 718 F.2d 665, 668 (4th Cir. 1983) (deciding that under certain circumstances a defendant may be shackled in handcuffs during his trial in order to further the competing interests of others in the courtroom and society in general and that this does not deprive the defendant of his right to a fair trial), \textit{cert. denied}, 469 U.S. 820 (1984); Payne v. Smith, 667 F.2d 541, 544-45 (6th Cir. 1981) (finding that the defendant, who had been free on bond prior to appearing for trial, was not denied a fair trial simply because jurors may have seen him for a short time in a waist chain and handcuffs and because jurors may have overheard the trial judge telling the defendant that he should consider himself in custody), \textit{cert. denied}, 456 U.S. 992 (1983).

14. Beginning in the late 1950's, the Ninth Circuit began to uphold decisions in which jurors' or potential jurors' names and addresses, or names and addresses, were concealed from defense counsel. \textit{See} \textit{Johnson v. United States}, 270 F.2d 721, 724 (9th Cir. 1959) (requiring each juror to state area of district in which she lives without revealing exact address), \textit{cert. denied}, 362 U.S. 937 (1960); \textit{Wagner v. United States}, 264 F.2d 524, 527 (9th Cir.) (requiring prospective jurors to "indicate the 'approximate community' where he or she resided"), \textit{cert. denied}, 360 U.S. 936 (1959); \textit{Hamer v. United States}, 259 F.2d 274, 276-80 (9th Cir. 1958) (withholding prospective jurors' names and addresses), \textit{cert. denied}, 359 U.S. 916 (1959).

15. \textit{See}, e.g., \textit{United States v. Barnes}, 604 F.2d 121, 130 (2d Cir. 1979) (explaining that Barnes "engag[ed] in continuing criminal enterprise"), \textit{cert. denied}, 446 U.S. 907 (1980); \textit{United States v. Rosado}, 728 F.2d 89, 91 (2d Cir. 1984) (stating that defendant was to testify regarding activities of a terrorist group seeking independence for Puerto Rico); \textit{United States v. Persico}, 621 F. Supp. 842, 850 (S.D.N.Y. 1985) (indicating that defendants were allegedly members of the Colombo Family of La Cosa Nostras, an organized crime "family").

16. In the trial of Lawrence M. Powell, one of the Los Angeles police officers accused of beating motorist Rodney King, Judge Kamins impaneled an anonymous jury. \textit{See} \textit{Transcript, People v. Powell}, No. BA035498 (L.A. Super. Ct. 1991). California Superior Court Judge John W. Ouderkirk granted the prosecution's motion for an anonymous jury in the trial of Antoine Miller, Damian Williams and Henry Watson, the African American defendants alleged to have beaten Reginald Denny in the riots following the acquittal of the officers accused of beating King. \textit{See} \textit{Transcript, People v. Williams}, No. BA058116 (L.A. Super. Ct. 1999). Ouderkirk stated that those people

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Despite this expanded implementation, restrictions on impaneling anonymous juries still exist. For example, anonymous juries may not be used in federal capital cases, and at least one New York judge has ruled that there is no authority under New York law to withhold the names of jurors from the parties.

The facts of each individual case determine whether impaneling an anonymous jury would violate any right of the defendant. Many courts have held that an anonymous jury is necessary when there is reason to believe the jurors need protection and prejudice to the defendant can be minimized. The court in United States v. Per-

who had strong feelings about the case would attempt to contact jurors if the jurors were not anonymous. Id.; Denny Jurors May Be Anonymous, U.S.A TODAY, Feb. 5, 1993 at 8A. The four men accused of bombing the World Trade Center also were convicted by an anonymous jury. Eleanor Randolph, 4 Guilty in Bombing of World Trade Center: Angry Outburst in Courtroom Follows Verdict, WASH. POST, Mar. 5, 1994, at A01.

17. 18 U.S.C. § 3432 (1994). At least three full days before commencement of trial, the prosecution must give to any defendant charged with a capital crime "a list of the veniremen...stating the place of abode of each venireman...except that such list of the veniremen...need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." Id. Compliance with the statute's requirement is mandatory, even if the defendant is acquitted of a capital charge and convicted of a lesser offense. Logan v. United States, 144 U.S. 263, 307-08 (1892). Even if the prosecution does not intend to seek the death penalty, failure to comply with the statutory requirement is "plain error." Amsler v. United States, 381 F.2d 37, 45 (9th Cir. 1967); United States v. Crowell, 442 F.2d 346, 347-48 (5th Cir. 1971).

18. See Maldonado, supra note 2 at 40 (explaining how the judge presiding over the trial of reputed mob boss John Gotti ruled that he lacked the authority under New York law to withhold the names of jurors, but that the judge could withhold the business and residential addresses of the jurors).

19. See United States v. Thomas, 757 F.2d 1359, 1364-65 (2d Cir. 1985) (holding that an anonymous jury was warranted where "[t]he defendants were alleged to be very dangerous individuals engaged in large-scale organized crime who had participated in several 'mob-style' killings and where defendants were accused of "attempts to interfere with the judicial process by murdering government witnesses"), cert. denied, 474 U.S. 819 (1985), and cert. denied, 479 U.S. 818 (1986). Within parameters, the decision whether or not to impanel an anonymous jury is left to the district court's discretion. See, e.g., United States v. Maldonado-Rivera, 922 F.2d 934, 971 (2d Cir. 1990) (stating that court has broad discretion to take steps to permit jury to work in atmosphere free from fear), cert. denied, 501 U.S. 1211, and cert. denied, 501 U.S. 1233, and cert. denied, 501 U.S. 1293 (1991).

20. See, e.g., United States v. Tutino, 883 F.2d 1125, 1132 (2d Cir. 1989) (stating two-part test regarding jury protection and minimization of prejudice to the defendants; holding that impanelment of anonymous jury was warranted where prosecution had strong evidence to show that jury tampering was likely), cert. denied, 493 U.S. 1081, and cert. denied, 493 U.S. 1082 (1990); United States v. Persico, 832 F.2d 705, 717-18 (2d Cir. 1987) (agreeing with district court's decision that an anonymous jury was necessary), cert. denied, 486 U.S. 1022, and cert. denied, 486 U.S. 1022 (1988); Thomas, 757 F.2d at 1365 (holding that where the defendants were alleged to be dangerous individuals with the means to tamper with the jury, an anonymous jury was warranted).
sico\textsuperscript{21} balanced the government's interest in protecting jurors with the defendant's interest in obtaining a fair trial.\textsuperscript{22} In performing this balancing test, the \textit{Persico} court considered the following factors:

(i) whether defendants are alleged to have engaged in "dangerous and unscrupulous conduct" with particular consideration of whether such conduct was part of a "large-scale organized" criminal enterprise, (ii) whether defendants have engaged in past attempts to interfere with the judicial process, and (iii) whether there has been a substantial degree of pretrial publicity such as to enhance the possibility that jurors' names would become public and thus expose them to intimidation by defendants' friends or enemies, or harassment by the public.\textsuperscript{23}

C. \textbf{Anonymous Juries in Minnesota}

In addition to federal law guarantees to criminal defendants,\textsuperscript{24} Minnesota law guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury."\textsuperscript{25} As under federal law,\textsuperscript{26} Minnesota law guarantees to criminal defendants the right to a fair and impartial jury of one's peers.\textsuperscript{27} Also, Minnesota practice rules require juror identity to be made public "unless the court determines in any instance that in the interest of justice this information should be kept confidential or its

\begin{itemize}
  \item \textsuperscript{21} 621 F. Supp. 842 (S.D.N.Y. 1985). \textit{Persico} involved fourteen defendants who were allegedly members of the Colombo Family of La Cosa Nostra. \textit{Id.} at 850.
  \item \textsuperscript{22} \textit{Id.} at 878. The court stated that it "must balance government's interest in safeguarding jurors against the defendants' interest in avoiding erosion of the presumption of innocence." \textit{Id.}
  \item \textsuperscript{23} \textit{Id.} (citations omitted).
  \item \textsuperscript{24} These guarantees include the right to a jury trial in criminal cases, to an impartial jury, and to a presumption of innocence. \textit{See supra} notes 8-11 and accompanying text.
  \item \textsuperscript{25} \textbf{MINN. CONST.} art. I, § 6. The Minnesota Constitution states: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. In all prosecutions of crimes defined by law as felonies, the accused has the right to a jury of 12 members. In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury have at least six members. The accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense. \textit{Id.}
  \item \textsuperscript{26} The Sixth Amendment guarantees to criminal defendants "the right to a speedy and public trial, by an impartial jury." \textit{See supra} note 11 and accompanying text.
  \item \textsuperscript{27} State v. Hamm, 423 N.W.2d 379, 385 (Minn. 1988) (stating the law provides protection from government oppression by providing an impartial jury).
\end{itemize}
use limited in whole or in part.”

Prior to *Bowles*, no Minnesota court had allowed a jury to remain anonymous. In one case, the trial court attempted to conceal juror identity by sealing the records containing juror information, but the Minnesota Court of Appeals granted a writ of prohibition preventing the trial court from enforcing this order. In its opinion, the appellate court noted that “individual preferences of jurors to remain anonymous are not sufficient to justify sealing the records” and “[t]he interest of the victim's family in contacting the jurors does not, without more, rise to the level of risk . . . sufficient to support a denial of access” to identifying juror information.

After the *Bowles* decision, the Minnesota Supreme Court upheld the conviction of two other defendants who were tried in front of anonymous juries for crimes arising from the same set of facts as those in the *Bowles* case. A fourth defendant, also convicted of crimes related to the Haaf murder, was tried in front of a non-anonymous jury after the trial judge denied the state's request for an anonymous jury.

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28. MINN. R. GEN. PRACT. 814(a). Rule 814 of the Minnesota General Rules of Practice for District Courts reads in full:

(a) The names of qualified prospective jurors drawn and the contents of juror qualification questionnaires completed by those prospective jurors must be made available to the public upon specific request to the court, supported by affidavit setting forth the reasons for the request, unless the court determines in any instance that in the interest of justice this information should be kept confidential or its use limited in whole or in part.

(b) The contents of juror qualification questionnaires must be made available to lawyers upon request in advance of voir dire. The court may restrict access to addresses of the prospective jurors.

(c) The jury commissioner shall make sure that all records and lists are preserved for the length of time ordered by the court. The contents of any records or lists not made public shall not be disclosed until one year has elapsed since preparation of the list and all persons selected to serve have been discarded, unless a motion is brought under Rule 813.


30. Id.


III. THE STATE v. BOWLES DECISION

A. The Facts

On Friday, September 25, 1992, between 1:30 and 2:00 a.m., Minneapolis Police Officer Jerry Haaf was sitting at the “officers’ table” in the Pizza Shack restaurant in Minneapolis. Officer Haaf was in uniform and on duty. Two or three African American males entered the restaurant. Two of the males approached Officer Haaf from the rear, pulled out handguns, and shot Officer Haaf in the back. He died soon after the shooting.

Police arrived at the Pizza Shack immediately after the shooting and began investigating. Before 3:30 a.m., police officers went to the home of Ed Harris, a member of the Vice Lords street gang. Harris consented to a police search of his home. Ironically, someone shot Harris to death two weeks after Officer Haaf’s murder.

Police investigators speculated that other Vice Lords gang members were being tried for crimes connected with the Haaf murder and that the trial judge denied the State’s request for an anonymous jury because “the other participants in the murder are in prison and public interest in the case essentially has been nonexistent”;

Margaret Zack, Fourth Man Convicted in Murder of Jerry Haaf: On Sept. 25, 1992, the Police Officer was Shot in the Back and Killed in a Minneapolis Pizza Shack, STAR TRIB. (MINNEAPOLIS), November 1, 1995, at B1, (stating that Willis was found guilty of two counts of first-degree murder and one count of attempted first-degree murder).

Witness testimony differed as to whether there were two or three males.

Gerald Lubarski and Margaret Hapsch were sitting at the table with Officer Haaf. Lubarski was shot in the arm and Hapsch was not physically injured.

Ed Harris and his wife, Loverine Harris, lived one block from the Pizza Shack.

The Vice Lords gang was originally from Chicago. See Ned Seaton, Gangs Sprout, Grow in Fertile U.S. Heartland, NEW ORLEANS TIMES-PICAYUNE, Feb. 25, 1993, at A2. Vice Lords are gang members who “have a social structure and colors and get into turf disputes with other gangs.” Doug Grow, Police try to regain lost ground in the war on crack, STAR TRIB. (MINNEAPOLIS), July 28, 1995, at B3.

The prosecution theorized that Shannon Bowles and Mwati McKenzie shot Officer Haaf and ran to the Harris home. The prosecution believed that Bowles and McKenzie then changed their shirts, shoes and hats at the Harris home and discarded their guns there.

Police again searched the Harris’ home after the murder of Ed Harris. During this search police found two pairs of sneakers, a baseball cap and some ammunition. One pair of the sneakers was very close to the size shoe worn
members killed Harris because these gang members suspected that Harris was talking to police about the Haaf murder.  

The state charged Shannon Noah Bowles with the murder of Officer Haaf. The state charged Shannon Noah Bowles with the murder of Officer Haaf.\(^4\) Basing the verdict on witness testimony rather than on a recovered murder weapon, an anonymous Hennepin County jury convicted Bowles.\(^4\) Bowles appealed, contending that his right to a fair trial was violated by the impaneling of an anonymous jury.\(^4\) He also argued that the evidence presented at trial was insufficient to sustain his convictions.\(^4\) Finally, he claimed that the trial court erroneously refused to reconsider his motion for a new trial.\(^4\)

**B. The Court’s Analysis**

The *Bowles* court held that the impaneling of an anonymous jury at the trial was not inherently prejudicial.\(^5\) Therefore, the court reasoned, it had to determine on a case-by-case basis whether the use of an anonymous jury was actually prejudicial.\(^5\) The court implemented a two-part test to determine whether Bowles suffered actual prejudice at trial from the use of an anonymous jury.\(^5\)

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by Bowles. *Id.* Larry Jerome Flournoy, a member of the Vice Lords, was convicted of the first-degree murder of Ed Harris. *State v. Flournoy*, 535 N.W.2d 354, 356-57 (Minn. 1995).

43. *Bowles*, 530 N.W.2d at 526.

44. Brief for Appellant at 1, State v. Bowles, 530 N.W.2d 521 (Minn. 1995). The Complaint, which was filed on November 16, 1992, charged Bowles with two counts of first degree murder under Minnesota Statutes § 609.185(1), (4) and Minnesota Statutes § 609.05. *Id.* On December 16, 1992 the Complaint was dismissed and an indictment was filed, charging the defendant with two counts of first degree murder and one count of attempted first degree murder under Minnesota Statutes §§ 609.185(1), 609.185(4), 609.05, 609.17. *Id.*

45. The gun used to murder Officer Haaf was never recovered. *Bowles*, 530 N.W.2d at 526. Detectives found a .22 caliber bullet in the Pizza Shack, but they could not ascertain from what type of gun it came. *Id.* at 526 n.5. Other evidence from the medical examiner and from forensic tests led officials to believe that the murder weapon(s) was a revolver which used a larger caliber ammunition consistent with that of a .38 and .357. *Id.* at 526.

46. *Id.* at 525. Bowles was convicted of premeditated first-degree murder under Minnesota Statutes § 609.185(1), first-degree murder of a peace officer under Minnesota Statutes § 609.185(4), and attempted first-degree murder under Minnesota Statutes § 609.17. *Id.* The attempted first-degree conviction resulted from the shooting of Lubarski. *Id.* Bowles was sentenced to two concurrent terms of life imprisonment and a consecutive imprisonment term of 180 months. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 530.

51. *Id.* (stating that "our review of the use of anonymous juries shall be for actual prejudice to the defendant").

52. *Id.* at 580-82.
stated that an anonymous jury should not be impaneled unless there is strong reason to believe that the jury needs protection and unless precautions are taken to minimize prejudice to the defendant.\textsuperscript{55}

The court held that the use of the anonymous jury was not actually prejudicial to Bowles because there was strong reason to believe that the jury needed protection and precautions had been taken to minimize prejudice to Bowles.\textsuperscript{54} The court also held that the evidence presented at trial was sufficient to sustain Bowles' convictions, and that the trial court did not abuse its discretion when it refused to reconsider Bowles' motion for a new trial.\textsuperscript{55} Finally, the court remanded the case to determine whether jury misconduct had occurred.\textsuperscript{56}

IV. ANALYSIS

The \textit{Bowles} court used a two-part test to determine whether to impanel an anonymous jury.\textsuperscript{57} In applying the test, however, the \textit{Bowles} trial court did not adequately consider the rights of the defendant.\textsuperscript{58} Moreover, prejudice to the defendant was not minimized.\textsuperscript{59} When determining whether to impanel an anonymous jury, Minnesota courts should apply a comprehensive set of factors that adequately consider the rights of the defendant without compromising juror safety.

A. The Test Adopted and Applied by the Bowles Court

The test adopted by the \textit{Bowles} court to determine when to impanel an anonymous jury focused on providing the jury with protection, if needed, and minimizing the prejudice to the defendant.\textsuperscript{60} This test addresses both the rights of the defendant and the societal need to keep the jurors safe. Nevertheless, the court should have done a more thorough analysis when applying the test.

The \textit{Bowles} court had reason to believe the jury might need protection. A witness, Ed Harris, was killed, allegedly by fellow gang members who thought he was talking to the police about the Haaf

\begin{itemize}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.} at 532.
\item \textsuperscript{55} \textit{Id.} at 524-25.
\item \textsuperscript{56} \textit{Id.} at 524.
\item \textsuperscript{57} \textit{Id.} at 530-31. The test requires a trial court to determine that a jury needs protection before impaneling an anonymous jury, and to take precautions to minimize prejudice to the defendant. \textit{Id.}
\item \textsuperscript{58} \textit{See infra} part IV.B for a discussion of a test which would have more thoroughly considered Bowles' rights.
\item \textsuperscript{59} \textit{See infra} part IV.A for a discussion of prejudice to the defendant.
\item \textsuperscript{60} \textit{Bowles}, 550 N.W.2d at 530-31.
\end{itemize}
murder. In deciding whether this murder warranted juror protection, the court looked to several cases in other jurisdictions where anonymous juries had been impaneled. For example, in one case a court decided that jurors were in danger because the defendant faced severe penalties if convicted, evidence indicated that one defendant had been murdered by co-defendants, government witnesses had received anonymous threats, the defendants were members of organized crime, and the press had covered pre-trial activities extensively. After reviewing several additional cases, the Bowles court held that the jurors had been in danger. In light of the murder of Ed Harris and because of the gang affiliation of the defendant, it is conceivable that the jurors very well may have been in danger.

The Bowles court also determined that the prejudice to the defendant was minimized. To reach this conclusion, the court noted that during voir dire the trial court allowed both the state and Bowles

61. For a description of the facts surrounding Harris' murder, see supra notes 39-43 and accompanying text. See also Bowles, 530 N.W.2d at 521, 525-26.
62. Bowles, 530 N.W.2d at 530.
63. Id. (citing United States v. Paccione, 949 F.2d 1183, 1192-93 (2d Cir. 1991), cert. denied, 112 S.Ct. 3029 (1992)).
64. The Bowles court also reviewed the fact patterns of the following cases: United States v. Crockett, 979 F.2d 1204, 1216 (7th Cir. 1992), cert. denied, 113 S.Ct. 1617 (1993), where defendants were members of a violent criminal organization, there was evidence of witness tampering, and there was significant pre-trial publicity; United States v. Vario, 943 F.2d 236, 240 (2d Cir. 1991), cert. denied, 502 U.S. 1036 (1992), where the defendant had been charged with obstruction of justice related to the case, and there was extensive pre-trial publicity; United States v. Thomas, 757 F.2d 1359, 1364 (2d Cir.), cert. denied, 479 U.S. 818 (1986), where the defendants were affiliated with organized crime and were charged with the murder of government witnesses; and United States v. Scarfo, 850 F.2d 1015, 1025 (3d Cir.), cert. denied, 488 U.S. 910 (1988), where the jury would hear testimony that might make them fear for their safety or that of their families. Bowles, 530 N.W.2d at 530.
65. Bowles, 530 N.W.2d at 531.
66. See supra notes 49-53 and accompanying text; see also Bowles, 530 N.W.2d at 525-26.
67. Bowles, 530 N.W.2d at 526.
68. Bowles, 530 N.W.2d at 531.
69. Another name for voir dire is jury selection. BLACK'S LAW DICTIONARY 1575 (6th ed. 1990). Voir dire is a process by which parties in a trial attempt to learn about potential juror members. See, e.g., J.E.B. v. Alabama, 114 S.Ct. 1419, 1429 (1994) (stating that properly conducted voir dire provides parties with important information about the jury, including juror bias); Nebraska Press Assn. v. Stuart, 427 U.S. 539, 602 (1976) (Brennan, J., concurring in the judgment) (stating that voir dire "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover facts that would dictate disqualification for cause"); United States v. Whitt, 718 F.2d 1494, 1497 (10th Cir. 1983) (recognizing that "[w]ithout an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges").
to question the potential jurors on their ability to remain impartial, their belief in the presumption of innocence, and the effect of their anonymity.70 Here, the court erred in its decision. The very fact that the jurors were anonymous may create a presumption in the jurors' minds that the accused is guilty.71

The trial court told the jurors that their anonymity was to shield them from "the media or anyone else during the jury selection process, during the trial or after the trial."72 Of course, the real impetus for

Voir dire is one method of helping a defendant to obtain a jury that is not biased against him. See, e.g., Abraham Abramovsky, Juror Safety: The Presumption of Innocence and Meaningful Voir Dire in Federal Criminal Prosecutions—Are They Endangered Species?, 50 FORDHAM L. REV. 30, 40 (1981) (stating that "it is no secret that during voir dire both sides attempt to select the most partial jurors available"). During voir dire, to request that a specific juror not be allowed to serve on a jury, a party may either challenge the juror for cause or issue a peremptory challenge. A party issuing a peremptory challenge does not have to state a reason for the challenge. BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). A party challenging a juror for cause must state a specific cause or reason why the juror should not be allowed to serve on the jury. BLACK'S LAW DICTIONARY 290 (6th ed. 1990) (defining "challenge for cause").

Common reasons for challenge for cause include a blood relationship between a party and the prospective juror, a potential juror's pecuniary interest in the outcome of the case, a potential juror has served as a juror in a related case or an the grand jury that indicted the defendant, or prejudice by the prospective juror against a party. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 143 (1977). The purpose of a cause challenge is to eliminate potential jurors who show actual or implied prejudice and the purpose of peremptory challenges is to remove potential jurors whom a party believes would be an undesirable juror. Toni M. Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. REV. 501, 520 (1986). For a summary of voir dire procedures and techniques, V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS §§ 8.0-10.0 (1985).

Many attorneys believe that the outcome of a trial is determined largely during jury selection. See, e.g., I. OWEN, DEFENDING CRIMINAL CASES BEFORE JURIES: A COMMON SENSE APPROACH 92, 109 (1973) (stating that "[a] few authors actually rate [voire dire as] the most important element in trial preparation"). But see, ROGER HAYDOCK & JOHN SONSTENG, TRIAL THEORIES, TACTICS, TECHNIQUES § 6.1 (1991) (stating that due to the limited time available for voir dire, the most an attorney can hope to accomplish during the voir dire process is enough knowledge to make a reasonable judgment about the potential jurors). Because of the belief that jury selection is a crucial factor in the outcome of a trial, attempts to limit voir dire often are seen as burdens on the Sixth Amendment's guarantee of an impartial jury. See, e.g., Abramovsky, supra, at 30-31 (stating that by ordering potential jurors to conceal their identities, and by further limiting inquiry about juror identity during voir dire, a judge "dealt a devastating blow to the presumption of innocence before a scintilla of evidence was introduced against the defendant at trial").

70. Bowles, 550 N.W.2d at 531.
71. For example, the jurors could have known that an anonymous jury is a rarity and factored this information into their beliefs about the defendant's guilt or innocence.
72. Bowles, 550 N.W.2d at 528.
the anonymity was to protect the jurors. If only one juror was aware of the rarity of jury anonymity, that juror might share this knowledge with the other jurors and cause them to become suspicious of the real reason for the anonymity. The court addressed this issue by noting that there is no "evidence in the record that suggests in any other way that the impaneled jury was not impartial or presumed Bowles to be guilty." The court also noted that "Bowles concedes there is no 'concrete evidence' of any jurors inferring from their anonymity that they were in any danger from him or that he was guilty." In drawing this conclusion, however, the court ignored that the thoughts of the jurors during the course of the trial likely would not be made a part of the record.

The trial court erred by concluding that the use of an anonymous jury is not an inherently prejudicial practice. The practice is inherently prejudicial, but the prejudice may be warranted in certain cases if the use of an anonymous jury would further the competing interests of society. If the practice were not prejudicial, it could be used in every case. The logical extreme of such a practice would be trials by juries with no accountability to the defendant, the criminal justice system, or society at large.

The court inferred too much when it decided that juror anonymity was warranted. It is one thing for the Vice Lords gang members to seek revenge on a fellow gang member who they believe is betraying their gang affiliation. It is quite another to expect these same gang members to seek out jurors with whom they have no other contacts and harm them. The Vice Lords may have sought out the jurors. If the court thought this a possibility, however, many measures less extreme than impaneling an anonymous jury could have been used. The jury could have been sequestered, or the identity of the jurors could have been revealed to the defendant, but not to the media. The court brushed off these options without explanation simply by stating that they would not be adequate.

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73. See id.
74. Id.
75. Id. at 528 n.13.
76. See id. at 530.
77. See supra note 12 and accompanying text for a discussion of the presumption of innocence.
78. When jurors are anonymous during and after trial, no one can question them or their decisions. Scrutiny by the public of a jury's decision will likely have no impact on the fate of the defendant. A jury which knows that others will examine its decision, however, might feel more societal pressure to render a fair verdict.
80. See Bowles, 530 N.W.2d at 532.
B. A Better Implementation of the Test

When applying the two-part test used to determine whether to impanel an anonymous jury, Minnesota courts should consider the factors presented in *Persico*. That is, the court should: (1) consider defendant's past conduct, especially whether the defendant was part of large-scale organized crime, (2) consider evidence of the defendant's past attempts to interfere with the judicial process, and (3) consider the level of pretrial publicity which might result in harassment of the jurors. If after analyzing these factors the court decides that an anonymous jury is warranted, the court should do whatever possible to minimize the prejudice to the defendant.

Applying these factors to the *Bowles* decision, the court should look first to Bowles' past conduct. Bowles allegedly was a member of the Vice Lords street gang. However, membership in a gang, without more, is not a crime. The court would have to review Bowles' history using whatever evidence was available to the court.

Next, the court should consider whether Bowles has attempted to interfere with the judicial process. If the murder of Ed Harris could be tied to the Vice Lords, this would militate a finding that Bowles had interfered with the judicial process. The fact that Bowles personally may not have had anything to do with the murder is not the most relevant point. If there are people who are not in custody and who are willing to kill those who might testify against Bowles, they might attempt to interfere with the judicial process in other ways.

Finally, the court should consider the level of pre-trial publicity surrounding the case. The *Bowles* court addressed this by noting that Bowles admitted that pre-trial publicity could put pressure on the jurors to convict. The court also concluded that the jurors might feel that they would be subject to harassment from the public if they

82. Id. (citing United States v. *Borelli*, 336 F.2d 376, 392 (2d Cir.), cert. denied, 379 U.S. 960, and cert. denied, 379 U.S. 960 (1965)).
83. *Bowles*, 530 N.W.2d at 532. Bowles argued that he was not a member of the Vice Lords, or that if he was a Vice Lord, his position was so inconsequential that he could not have influenced the gang's activities. *Id.* at 531.
84. Minnesota law does not forbid membership in a gang. Gang related activities, however, sometimes have special legal consequences. For example, crimes committed on behalf of a gang have a longer statutory maximum sentence than identical crimes that are not committed on behalf of a gang. See Minn. Stat. § 609.229 (1994); see also 18 U.S.C. § 521 (1994).
85. *Bowles*, 530 N.W.2d at 531.
acquitted Bowles.\textsuperscript{86} If a court undertakes the thorough analysis of considering the three factors presented in \textit{Persico}, it furthers the societal goals of providing criminal defendants with fair process and with a just outcome. If the \textit{Bowles} court had analyzed these three factors, it still might have come to the conclusion that an anonymous jury was warranted. By coming to this conclusion after completing a thorough review of the circumstances, however, the integrity of the process is enhanced. Application of the \textit{Persico} test also increases the likelihood of a fair outcome. When analyzing whether to impanel an anonymous jury, a court must consider the risk of prejudice to the defendant and the risk of harm to the jurors. After considering the three \textit{Persico} factors, a court would be better able to determine whether the threat of harm to jurors is sufficient to warrant taking action which might prejudice the defendant.

\section*{V. CONCLUSION}

Impaneling an anonymous jury is an extreme measure and should be done only under extenuating circumstances. If a less extreme action can accomplish the same goal as that sought by impaneling an anonymous jury, the less extreme measure should be taken. The \textit{Bowles} trial court adopted a sound two-part test to use when determining whether the impaneling of an anonymous jury is warranted. The test considers the sometimes-competing interests of the defendant and society. The \textit{Bowles} court erred by not considering all of the relevant factors when applying the test. A more thorough analysis would increase the likelihood that the jurors would remain safe while minimizing the prejudice to the defendant.

\textit{Jodene Jensen}

\textsuperscript{86} \textit{Id.} The court noted that jurors in the "highly public and emotional" Robert Guevera trial experienced harassment from the public and the media. \textit{Id.} at 531 n.15.