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Abstract

Defendant Ross was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to commit murder.

KEYWORDS: minority, racial, prejudice
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Defendant Ross was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to commit murder. Ross was black; the victim, a security guard at Boston University, was white.

At trial, Ross's counsel asked the judge to question the prospective jurors about any possible racial prejudices they might have against the defendant. The trial judge refused to ask specific questions but asked the prospective jurors general questions concerning bias or prejudice.1

On appeal to the Supreme Judicial Court of Massachusetts,2 Ross's convictions were upheld. The United States Supreme Court granted certiorari,3 vacated the judgment, and remanded the case for reconsideration. The Court based its decision upon the results reached in Ham v. South Carolina.4 In Ham, the Court held that the defendant was constitutionally entitled to have questions asked of prospective jurors about potential racial bias.5 The Supreme Court of Massachusetts reconsidered Ross and again affirmed,6 holding that Ham did not affect the result reached in its earlier deliberation because Ham involved "special circumstances";7 Ham had claimed he was arrested as a result of

2. Id.
4. 409 U.S. 524 (1973). In Ham, defendant was convicted of possession of marijuana and sentenced to 18 months confinement. Certiorari was granted by the United States Supreme Court to determine if the trial judge's refusal to examine jurors on voir dire about possible prejudice violates defendant's federal constitutional rights. Ham was a young bearded Black who was well known locally for his work in civil rights activities. His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge.
5. Id.
7. "Special circumstances" have been interpreted to exist when a defendant is arrested allegedly because of his race or minority status. Ristaino v. Ross, 424 U.S. 589 (1976).
his civil rights activities. In contrast, the defendant in *Ross* did not present any special circumstances resulting in his arrest, but was an ordinary black person accused of a crime against a white person.

Ross's second petition for certiorari to the United States Supreme Court was denied. Following this denial, Ross filed a petition in the United States District Court of Massachusetts seeking a writ of habeas corpus. In granting the writ, the district court held that the petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of prospective jurors on voir dire examination.

The State appealed this decision to the United States Court of Appeals for the First Circuit, which affirmed the granting of the writ. However, the United States Supreme Court reversed the lower court and held that the need to question jurors specifically about racial prejudice did not rise to constitutional dimensions without the presence of "special circumstances."

The first case to deal with the issue of questioning racial bias at voir dire examination was *Aldridge v. United States*, in which a black man was tried and convicted for the murder of a white police officer. During the voir dire examination, the judge did not ask the prospective jurors any questions specifically relating to racial prejudice, although such questions were requested by defense counsel. Based on this infirmity, the United States Supreme Court reversed, holding that it is better to question prospective jurors about racial prejudice than to allow the possibility that a juror might sit on a case with a disqualifying state of mind.

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9. *Ross v. Ristaino*, 388 F. Supp. 99 (D. Mass. 1974). In a recently decided case, Stone v. Powell, 96 S.Ct. 3037 (1976), the Supreme Court put an end to this type of habeas corpus action, noting: "[W]here the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at the trial." The Court noted that it would "deny federal habeas jurisdiction (as sought by *Ross*) over claims of Fourth Amendment brought by state prisoners." *Id.* at 3052.
13. *Id.* at 597.
15. *Id.*
16. *Id.* at 315. The Court noted: "If in fact, sharing the general sentiment, they
Many courts have since relied on *Aldridge* in upholding a minority defendant's right to question jurors on voir dire about potential racial prejudice. These courts have held that refusal to ask the questions when propounded by the defense constitutes reversible error. In one such case, a black man was convicted of raping a white woman. In this case, questions designed to reveal racial prejudice were not allowed to be asked of prospective jurors. The Supreme Court of Connecticut reversed, stating:

It appears from the remarks made by the [trial] court that its ruling was based upon the ground that in a court of justice no distinction should be made between Negro and white persons and that, therefore, the very thought that it was possible for a juror to be so prejudiced against Negroes that he would be less apt to believe their testimony should be carefully kept from the minds of prospective jurors.

We cannot be blind to the fact that there may still be some who are biased against the Negro race and would be more easily convinced of a Negro's guilt than of a white man's guilt.

So long as race prejudice exists, even in a relatively few persons, there is substantial chance that one of those few will appear in court as a venireman.

Until 1973, when *Ham* was decided, *Aldridge* was steadily interpreted as setting a broad rule that a minority defendant has a right to have prospective jurors questioned about racial prejudice. In *United States v. Robinson*, the United States Court of Appeals for the Third Circuit noted unequivocally: "[A]ny doubts as to the mandatory requirements of the *Aldridge* rule were dispelled by . . . *Ham* . . . ."
A Michigan case, *People v. Wray*, also dealt with *Ham* and considered it solid support for a defendant’s right to ask questions concerning possible racial bias of jurors. In its opinion, the Court of Appeals noted:

The outcome of the instant appeal is squarely controlled by a recent decision of the United States Supreme Court [*Ham v. South Carolina*. . . [I]n reversing the defendant’s conviction, the Supreme Court [in *Ham*] unanimously held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment imposed a duty upon the trial court to question jurors on the subject of racial prejudice.

The only factual similarities between *Ham* and *Wray* were that both defendants were black; both were denied requests to question prospective jurors about racial bias; and both defendants’ counsel did not object to the trial court’s refusal. The defense in *Wray* did not establish “special circumstances,” as had been established in *Ham*.

*Robinson* and *Wray* interpreted *Ham* as indicating that a black defendant is entitled to propound questions about racial prejudice to prospective jurors without establishing “special circumstances.” However, *Ristaino v. Ross* greatly narrowed the interpretation of *Ham* by confining its constitutional holding to situations where “racial issues . . . were inextricably bound up with the conduct of the trial.”

In *Commonwealth v. Ross*, the Supreme Court of Massachusetts held that the factual circumstances of *Ross*, in contrast to the special circumstances of *Ham*, did not give rise to constitutional scrutiny. In *Ristaino v. Ross*, the Supreme Court determined *Ham* to be controlling. However, this produced an internal inconsistency, since *Ham* was based on *Aldridge*, and *Aldridge* was a much broader ruling, giving defendants an unconditional constitutional right to question potential jurors about racial bias. Noting this, the Court concluded: “In light of...

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23. *Id.* at 345, 212 N.W.2d at 79.
24. 424 U.S. 589. The Court noted that *Ham* did not require universal applicability, but required assessment as to the “likelihood that absent questioning about racial prejudice, the jurors would not be as ‘indifferent as [they stand] unsworne. . . .'” *Id.* at 596. The Court found that the circumstances of questions of Ham’s being a civil rights activist were sufficient to include specific questions regarding racial prejudice. *Id.* at 598.
25. *Id.* at 597.
27. 424 U.S. 589.
our holding today, the actual result in *Aldridge* should be recognized as an exercise of our supervisory power over the federal courts.  

The similar facts of *Aldridge, Ham,* and *Ristaino* cannot be reconciled with their inconsistent holdings. In *Ham,* the defendant was a black civil rights worker, who claimed that his civil rights work was the cause of his arrest for possession of marijuana. In *Ristaino,* the defendant was black, and the victim was a white security guard. The Supreme Court's opinion in this case seemed to indicate that a black man arrested for possession of marijuana is entitled to have jurors specifically questioned as to racial prejudice, but a black man arrested for crimes of violence against a white security officer is not entitled to the same rights. This distinction seems to hinge on the nature of the special circumstances of *Ham*—specifically, the sensitive issue of civil rights work. The defendant in *Ristaino* faced a harsher sentence than the defendant in *Ham.* However, he appears to have been given less constitutional protection, owing to the application of the "special circumstances" principle.

Another apparent inconsistency in the holdings is that the circumstances of the crime in *Aldridge* and *Ross* are very similar. In *Aldridge,* a black man was convicted of the murder of a white policeman. In *Ross,* the defendant, also a black man, was convicted of the commission of violent crimes against a white security officer.

Attempting to reconcile the differences between *Ross* and *Ham,* the Court of Appeals for the First Circuit stated, in *Ross v. Ristaino:*  

In *Ham,* the defendant was a civil rights leader, while in this case the black defendant is for the purpose of this inquiry an ordinary black citizen. But in this case, the charges against the defendant involved violence against a white, not a victimless crime like possession of marijuana. Moreover the white victim, a security officer at Boston University, had a status close to that of a police officer. In addition, the eyewitness testimony of a white gas station attendant, was a major part of the state's case against Ross. . . . On these facts the District Court was not in error.

28. *Id.* at 598, n. 10. *Aldridge* originated in a federal court because the defendant was a federal prisoner, whereas *Ristaino,* which involved a state prisoner, originated in a state court. Therefore, to clarify an apparently inconsistent decision, the Court in *Ristaino* interpreted its *Aldridge* holding as an exercise of its supervisory power over the federal courts rather than as a broad constitutional requirement.

29. 283 U.S. 308 (1931).
31. 508 F.2d 754 (1st Cir. 1974).
in concluding that the likelihood of infection of the verdict [by racial prejudice] was at least as great as it was in *Ham*. In effect, the [District] Court held that a black defendant charged with violent crimes against a white security officer would be likely to be a special target of racial prejudice."

The Supreme Court in *Ristaino v. Ross* rejected the court of appeals treatment of the case by highlighting the factual distinction between *Ristaino* and *Ham*, and by finding a crucial absence of special circumstances. The Court felt that the lower court read *Ham* "too broadly" by finding the facts to require special questioning about racial prejudice.

Before *Commonwealth v. Ross* was decided, *Ham* was not interpreted narrowly. As previously mentioned, *United States v. Robinson* and *People v. Wray* discussed, interpreted, and applied *Ham*. However, neither indicated that *Ham* was a limiting ruling, especially since these cases, which followed *Ham*, involved ordinary circumstances and not the special circumstances which are now required. The narrow, limiting effect of *Commonwealth v. Ross* has been applied in recent cases. The Supreme Court of Massachusetts has consistently followed its holding in *Ross* by not allowing "ordinary" black defendants to question prospective jurors about potential racial bias.

Regretfully, it appears that *Ristaino v. Ross* will have a severe impact on the effectiveness of the voir dire examination by inhibiting the defense counsel's ability to determine if any jurors are prejudiced against his or her client. Amendment VI of the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district

32. *Id.* at 756.
33. 424 U.S. 589.
34. *Id.* at 594.
36. See text accompanying notes 20 and 22, supra.
37. 485 F.2d 1157 (3d Cir. 1973).
42. 424 U.S. 589.
wherein the crime shall have been committed..."

The holding in *Ristaino v. Ross* will make the constitutional right to an impartial jury a truly uncertain and theoretical one. By so limiting the scope of the voir dire examination, it is highly possible that a strongly biased individual could sit as juror in a criminal case with no chance of being discovered. It is not likely that any harm would result from questioning prospective jurors about possible racial bias. However, there is no doubt that great harm could occur from not asking these questions. Voir dire examination is a vital part of the jury selection process, and it should be exercised to its fullest potential.

In *Aldridge*, the Supreme Court looked to the value of an effective voir dire examination and said:

If in fact, sharing the general sentiment, [the jurors] were found to be impartial, no harm would be done in permitting the question [as to racial bias]; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit.\(^4\)

The *Ristaino* Court made a seemingly inconsistent comment in a footnote stating:

Although we hold that voir dire questioning directed to racial prejudice was not constitutionally required the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here. The states also are free to allow or require questions not demanded by the constitution...\(^4\)

Thus, even though the Supreme Court believed it might have been wiser to have asked the requested questions, the Court refused to find that this right had constitutional dimensions. The Court's reasoning is

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43. U.S. Const. amend. VI.
44. 424 U.S. 589.
45. 283 U.S. 308, at 314 (1931). The Court went on to say:
   We think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.
   Id. at 315.
46. 424 U.S. 589, 597 n. 9 (citations omitted).
not clear. This lack of clarity is magnified by the Court’s statement that “under our supervisory power we would have required as much of a federal court faced with the circumstances here.”47 In effect, this means a defendant in a federal court might, under the Supreme Court’s supervisory power, be entitled to have questions about racial bias asked of a potential venireman, but a defendant in a state court would have no such right, and would have to rely solely on the discretion of the particular judge.

By basing their analysis on the existence or absence of “special circumstances,” the Court has missed a crucial point in determining whether a defendant is entitled to question potential veniremen about racial bias. The Court makes it appear that the only time one is subjected to racial prejudice is when his or her race has been a cause of the arrest.48

Three Supreme Court Justices disagreed with the majority’s treatment of Ross v. Massachusetts.49 Justice Marshall’s dissent, in which Justice Douglas and Justice Brennan joined, pointed out that the Aldridge Court was not concerned with the popularity of the defendant “but rather with the potential racial bias of the particular jurors who are to try the accused.”50 The dissent further pointed out: “The principle that fairness demands such [voir dire] inquiry is, if anything, far more pervasive today than it was when Aldridge was decided, in both federal and state courts.”51 A defendant runs the risk of facing biased jurors regardless of the specific crime for which he is being tried. A juror does not have to hear facts of a case intertwined with racial overtones to have biased views toward certain minorities.

The dissenting justices ended their opinion by stating:

To deny this petition for certiorari is to see our decision in Ham v. South Carolina stillborn at birth and to write an epitaph for those “essential
demands of fairness" recognized by this Court forty years ago in *Aldridge*. I fear that we "bring the processes of justice into disrepute" not only by sanctioning the denial of a right required by "essential demands of fairness" but also in failing to compel compliance by the court below with a precedent of this Court [*Ham*] barely a year since decided.42

It appears that, as a result of the decision in *Ristaino v. Ross*,52 the future of the impartiality of state juries will depend solely upon the trial judge's discretion. As *Ristaino* illustrates, the Supreme Court has chosen to narrow its review of state cases involving a defendant's right to have specific questions asked of prospective jurors. Viewing the instant case along with *Stone v. Powell*,44 it appears that the Supreme Court has initiated a trend toward narrowly limiting its review of claims made by state defendants of violations of their constitutional rights. One cannot help wondering why the Supreme Court is abdicating its role as the protector of a state prisoner's constitutional rights.

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52. *Id.* Justices Marshall and Brennan dissented from the decision in the instant case for the same reasons stated in *Ross v. Massachusetts*, 414 U.S. 1080 (1973) (dissenting opinion).


54. 96 S.Ct. 3137 (1976).