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# Probing Racial Prejudice on Voir Dire: The Supreme Court Provides Illusory Justice for Minority Defendants

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# PROBING RACIAL PREJUDICE ON VOIR DIRE: THE SUPREME COURT PROVIDES ILLUSORY JUSTICE FOR MINORITY DEFENDANTS

## Rosales-Lopez v. United States, 101 S. Ct. 1629 (1981).

### I. INTRODUCTION

In *Rosales-Lopez v. United States*,[1] the Supreme Court in a plurality opinion[2] held that a trial judge's refusal to question prospective jurors about possible ethnic or racial prejudice toward Mexicans, where the defendant was of Mexican descent and specifically requested such inquiries, did not constitute reversible error given the circumstances of the case.[3] In so holding, the Court articulated a standard which not only erodes a minority defendant's right to an impartial trial, but also fails to provide federal trial judges adequate guidance as to when such inquiries are required. Furthermore, as Justice Stevens' vigorous dissenting opinion points out,[4] the Court's rejection of a per se rule requiring such inquiries when requested by a minority defendant interprets incorrectly the primary precedent, *Aldridge v. United States*.[5]

Instead of a per se rule, the plurality established a standard for federal courts[6] requiring voir dire inquiries about racial prejudice only where the circumstances of a case create a "reasonable possibility" that such prejudice might influence a jury.[7] Thus, courts must inquire about racial prejudice only where 1) the circumstances of a case involve a violent crime, and the defendant and the victim are of different racial or

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1 101 S. Ct. 1629 (1981).

2 Justice White delivered the Court's opinion, in which Justices Stewart, Blackmun, and Powell joined. Justice Rehnquist, who was joined by Chief Justice Burger, filed an opinion concurring in the result. Justice Stevens filed a dissenting opinion, in which Justices Brennan and Marshall joined.

3 101 S. Ct. at 1637.

4 *Id.* at 1640-41. *See* text accompanying notes 63-68 *infra*.

5 283 U.S. 308 (1931).

6 The Court reasoned that since racial prejudice was not bound up in the conduct of the *Rosales-Lopez* trial, there was no constitutional requirement for such voir dire. 101 S. Ct. at 1635-1636. The Court could require more of federal courts, however, through its supervisory authority.

7 *Id.* at 1636.

ethnic groups,[8] or 2) the total circumstances of a case create a "reasonable possibility" of racial prejudice.[9] Unfortunately, the plurality's standard fails to address the risk that a juror may harbor racial prejudice for reasons unrelated to the circumstances of a case. By depriving a minority defendant of the opportunity to probe for racial prejudice during voir dire, a court may select prejudiced jurors and thus deny him an impartial trial. Moreover, the "reasonable possibility" standard, which instructs the trial court to weigh intuitively the total circumstances of a case, affords trial courts little guidance.

The per se rule advocated by Justice Stevens in his dissenting opinion is preferable to the plurality's "reasonable possibility" standard. Only a per se rule would assure a minority defendant of the chance to uncover racial prejudices which are held for irrational reasons.[10] A per se rule would also provide trial courts with a clearer standard to apply. Hence, the dissenting view is persuasive not only under the circumstances of *Rosales-Lopez*, but also in any federal criminal trial of a minority defendant.

A jury in the District Court for the Southern District of California convicted Humberto Rosales-Lopez of participating in a plan by which three Mexican aliens illegally entered the United States.[11] At his trial, Rosales-Lopez did not testify but instead chose to challenge the credibility of the Government's witnesses: the Immigration and Naturalization Service agents who arrested him; the three aliens; David Falcon-Zavala,

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[8] *Id.* While Justice Rehnquist concurred in the plurality opinion's result, he rejected the first part of the two-part "reasonable possibility" rule because of its "*per se*" aspect. *Id.* at 1637.

[9] *Id.* at 1636. The trial court's evaluation of the total circumstances would be subject to case-by-case review by the appellate courts.

[10] *Id.* at 1638 (Stevens, J., dissenting).

[11] The defendant was charged with one count of conspiracy to conceal, harbor and shield, and illegally transport aliens, in violation of 18 U.S.C. § 371 and 8 U.S.C. § 1324; three counts of aiding and abetting the illegal transportation of aliens, in violation of 8 U.S.C. § 1324(a)(2) and 18 U.S.C. § 2; and three counts of concealing, harboring and shielding aliens, in violation of 8 U.S.C. § 1324(a)(3).

The Government's evidence at trial revealed that three aliens crossed the Mexican-American border on the night of December 10, 1978. Their guide took them to a car, which had been left for them on the American side, and drove them to the home of Mrs. Virginia Bowling in Imperial Beach, California, about eight miles inside the border. Rosales-Lopez, who had been living with Mrs. Bowling's nineteen-year-old daughter in her mother's house since July, 1978, let them into the garage of the house. Mrs. Bowling was an American, apparently Caucasian.

In the morning, Rosales-Lopez hid the three aliens and their guide in the trunk of an Oldsmobile, which Mrs. Bowling drove north, through the San Clemente checkpoint. Rosales-Lopez followed in another car, and after passing through the checkpoint, exchanged cars with Mrs. Bowling. While she drove back to Imperial Beach, he continued toward Los Angeles where he took the aliens and their guide to an apartment. Agents of the Immigration and Naturalization Service who had the apartment under surveillance arrested Rosales-Lopez when he left the apartment with one of the aliens.

another named smuggling principal who was arrested with Rosales-Lopez; and Mrs. Virginia Bowling, who also participated in the plan.[12]

Prior to the trial, defense counsel moved for permission to personally voir dire prospective jury members. At the same time, he filed a list of twenty-six questions which he requested the trial judge to pose if the court denied the first motion. The trial judge chose to conduct the voir dire himself, as permitted by Rule 24(a) of the Federal Rules of Criminal Procedure and as is the practice in the Southern District of California.

The judge asked general questions of the veniremen as a group,[13] and about half of the questions submitted by defense counsel. He did not ask the submitted question: "Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?"[14] He did, however, ask one of defense consel's questions about aliens, which he rephrased as: "Do any of you have any particular feelings one way or the other about aliens, or could you sit as a fair and impartial juror if you are called upon to do so?"[15] The court excused two prospective jurors based upon their responses to the question.[16] The voir dire ended with the question: "Does any reason occur to any one of you why you could not sit in this case as a fair and impartial juror, any reason whatsoever?"[17]

After the voir dire, defense counsel reiterated his request that several of the submitted but unasked questions be posed to the panel. He argued that the court must pose the question regarding racial prejudice since a federal court "must explore all racial antagonism against my client because he happens to be of Mexican descent,"[18] citing *Aldridge v. United States*[19] as authority. The trial judge denied the request.

The Court of Appeals for the Ninth Circuit affirmed the court's refusal to ask a voir dire question directed toward possible racial

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[12] *See* note 11 *supra*.

[13] The judge prefaced the voir dire by explaining to the panel: "In order that this defendant shall have a fair and impartial jury to try the charges against him, it is necessary that we address certain questions to the panel to make sure that there are no underlying prejudices, there are no underlying reasons why you can't sit as a fair and impartial juror if chosen to do so in this case." 101 S. Ct. at 1633. The general questions involved: knowledge of the participants in the trial; outside knowledge of the case; physical impairments that would interfere with their responsibilities as jurors; legal training; and possible disagreement with the principle that a criminal defendant is presumed to be innocent. Each juror was also required to state his/her name, occupation, and spouse's occupation. *Id.* at 1632-33 n.2.

[14] *Id.* at 1632.

[15] *Id.* at 1633.

[16] *Id.* at 1633 n.3.

[17] *Id.* at 1633.

[18] *Id.*

[19] 283 U.S. 308.

prejudice.[20] The Ninth Circuit analyzed the voir dire request according to the "special circumstances" rule, which requires a trial judge to pose such an inquiry only if there is some indication that the case is likely to have racial overtones.[21] The Court found no "special circumstances" to indicate that the defendant's race would be a factor in the trial.[22]

## II. BACKGROUND OF APPLICABLE LAW

The right to trial by an impartial jury is a fundamental element of American justice.[23] The Constitution protects the right to a "speedy and public trial, by an impartial jury"[24] in all criminal cases. Moreover, "[a] fair trial in a fair tribunal is a basic requirement of due process . . . quite separate from the right to any particular form of proceeding."[25] Voir dire is essential to securing an impartial jury. By subjecting a panel of prospective jurors to oral examination, a trial court seeks to identify and excuse those who demonstrate bias or preconceptions which would preclude an impartial decision.[26] Each party in a trial may challenge veniremen for cause based upon the voir dire responses. Even when the responses do not support a party's challenge for cause, they may help that party to decide against which jurors to exercise peremptory challenges.[27] The extent of the voir dire examination is therefore critical to the final composition of the jury since voir dire is the only method for a court and for the parties to ascertain the state of mind of each prospective juror.[28]

Since racial prejudice among jurors could deprive a minority defendant of a fair trial,[29] defense counsel may understandably wish to

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20 Rosales-Lopez v. United States, 617 F.2d 1349 (9th Cir. 1980).

21 Several of the circuits also followed this "special circumstances" rule. *See* United States v. Polk, 550 F.2d 1265 (10th Cir.), *cert. denied*, 434 U.S. 838 (1977); United States v. Floyd, 535 F.2d 1299 (D.C. Cir.), *cert. denied*, 429 U.S. 852 (1976); United States v. Perez-Martinez, 525 F.2d 365 (9th Cir. 1975). Most of the circuits, however, followed a per se rule requiring a federal judge to inquire into possible racial prejudice if requested to do so by a minority defendant in a criminal trial, or face reversal upon appeal. *See* United States v. Williams, 612 F.2d 735 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); United States v. Bowles, 574 F.2d 970 (8th Cir. 1978); United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977); United States v. Booker, 480 F.2d 1310 (7th Cir. 1973); United States v. Carter, 440 F.2d 1132 (6th Cir. 1971); Frasier v. United States, 267 F.2d 62 (1st Cir. 1959).

22 617 F.2d at 1354.

23 *See* Mima Queen and Child v. Hepburn, 11 U.S. (Cranch) 290 (1813).

24 U.S. CONST. amend. VI.

25 Peters v. Kiff, 407 U.S. 493, 501 (1972).

26 *See* Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493 (1975).

27 *Id.* The author stresses that voir dire is more useful for peremptory challenges than for challenges for cause. *Id.* at 1504-07.

28 *See* Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).

29 Note, *Exploring Racial Prejudice on Voir Dire: Constitutional Requirements and Policy Considerations*, 54 B.U. L. REV., 394, 404 (1974).

probe for such bias during voir dire. In *Aldridge v. United States*,[30] the Supreme Court established the right of a black defendant, charged with the murder of a white policeman, to have prospective jurors questioned about possible racial prejudice. The trial judge, who conducted the voir dire personally, denied defense counsel's request that the judge ask the panel a question regarding racial prejudice.[31] Chief Justice Hughes, writing for the Court, found that the "essential demands of fairness" required an inquiry into possible racial prejudice under the circumstances of the case.[32] The *Aldridge* decision cited numerous state cases[33] to support its result, yet it did not explicitly mention any constitutional basis for its holding.

Two Supreme Court rulings, *Ham v. South Carolina*[34] in 1973 and *Ristaino v. Ross*[35] in 1976, delineated the contemporary stature of *Aldridge*. Justice Rehnquist, writing for the *Ham* majority, noted that *Aldridge* was "not expressly grounded upon any constitutional requirement,"[36] yet "[t]he inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of *Aldridge*,"[37] among other sources. The *Ristaino* Court, through Justice Powell, resolved this seeming inconsistency: "While *Aldridge* was one factor relevant to the constitutional decision in *Ham*, we did not rely directly on its precedential force. . . . In light of our holding today, the actual result in *Aldridge* should be recognized as an exercise of our supervisory power over federal courts."[38]

Both *Ham* and *Ristaino* differed from *Aldridge* in that they involved

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30 283 U.S. 308.

31 The exchange between the trial judge and defense counsel was as follows:

MR. REILLY. At the last trial of this case I understand there was one woman on the jury who was a southerner, and who said that the fact that the defendant was a negro and the deceased a white man perhaps somewhat influenced her. I don't like to ask that question in public but—

THE COURT. I don't think that would be a proper question, any more than to ask whether they like an Irishman or a Scotchman.

MR. REILLY. But it was brought to our attention so prominently. It is a racial question—

THE COURT. It was not this jury.

MR. REILLY. No, but it was a racial question, and the question came up—

THE COURT. I don't think that is proper.

MR. REILLY. Might I, out of an abundance of caution, note an exception.

THE COURT. Note an exception.

*Id.* at 310.

32 *Id.*

33 The Court listed, among others: Pinder v. State, 27 Fla. 370, 8 So. 837 (1891); Hill v. State, 112 Miss. 260, 72 So. 1003 (1916). 283 U.S. at 311.

34 409 U.S. 524 (1973).

35 424 U.S. 589 (1976).

36 409 U.S. at 526.

37 *Id.* at 528.

38 424 U.S. at 598 n.10.

state, not federal, trial courts. While *Aldridge* set forth a supervisory rule binding only the federal courts, *Ham* and *Ristaino* announced constitutional standards to determine when a trial court must comply with a minority defendant's request to have a question directed toward possible racial prejudice posed during voir dire. The constitutional standards establish the minimum protection afforded such a defendant, while the states may opt to require further precautions, such as those the Supreme Court requires in its supervisory role over the federal courts.[39]

In *Ham v. South Carolina*,[40] the Supreme Court held that the defendant, a black man active in civil rights work, had a constitutional right to an inquiry regarding racial prejudice during voir dire. Ham's defense at trial was that law enforcement authorities were "out to get him" because he was well-known for civil rights activities, and that they framed him on a charge of marijuana possession.[41] Prior to the voir dire, defense counsel requested the court to ask the prospective jurors four questions, two of which concerned possible racial bias.[42] The judge declined to ask all four. Instead, he posed to the panel three general questions as required by South Carolina statute.[43] The Supreme Court declared that the fourteenth amendment mandated the inquiries concerning racial prejudice since the amendment's principal purpose was to prevent invidious discrimination against blacks, and also since the due process clause assures essential fairness.[44]

The Court indicated subsequently in *Ristaino v. Ross*[45] that the *Ham* decision was to be construed narrowly. Since Ham argued that he had been framed in retaliation for his civil right activities, "[r]acial issues therefore were inextricably bound up with the conduct of the trial."[46] In contrast, the defendant in *Ristaino* was a black man accused of a violent crime against a white security guard. The *Ristaino* Court reasoned that these facts were "less likely to distort the trial than were the special

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39 *Id.* at 597 n.9.

40 409 U.S. 524.

41 *Id.* at 525.

42 The two questions concerning racial prejudice were:

"1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?

"2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?"

The other two questions concerned prejudice against beards and pretrial publicity relating to the drug problem. *Id.* at 525 n.2.

43 S.C. CODE § 38-202 (1962). The questions, in substance, were: "1. Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham? 2. Are you conscious of any bias or prejudice for or against him? 3. Can you give the State and the defendant a fair and impartial trial?" 409 U.S. at 526 n.3.

44 *Id.* at 526-27.

45 424 U.S. 589.

46 *Id.* at 597.

factors involved in *Ham*," and thus the need to examine prospective jurors about racial prejudice did not rise to constitutional dimensions.[47] Since *Ristaino* was a state case, it was not reversible error for the trial court to refuse defendant's request to pose inquiries concerning racial bias during voir dire.[48]

## III. Opinions of the Rosales-Lopez Court

Justice White, writing for the plurality, relied on the *Ham* and *Ristaino* precedents in holding that the constitution did not require that the *Rosales-Lopez* jurors be questioned about racial prejudice.

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.[49]

Justice White found that *Rosales-Lopez* did not contain "special circumstances" of a constitutional dimension since there were no indications that the trial would involve allegations of racial prejudice.[50]

Justice White next formulated a nonconstitutional standard to be applied to federal courts through the Court's supervisory power. He stated that the Court could not determine such a standard merely by weighing costs and benefits.[51] More importantly, he reasoned, the standard should balance conflicting perceptions of justice.

> On the one hand, requiring an inquiry in every case is likely to create the impression 'that justice in a court of law may turn upon the pigmentation of the skin [or] the accident of birth.' *Ristaino*, . . . at 596 n.8 . . . . Balanced against this, however, is the criminal defendant's perception that avoiding the inquiry does not eliminate the problem, and that his trial is not the place in which to elevate appearance over reality.[52]

While Justice White observed that "it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued,"[53] he declared that "[f]ailure to honor his request . . . will

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47 *Id.*

48 The Court added: "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. *See* Aldridge v. United States . . . ." *Id.* at 597 n.9.

49 101 S. Ct. at 1635.

50 *Id.* at 1636.

51 "These are likely to be slight: some delay in the trial versus the occasional discovery of an unqualified juror who would not otherwise be discovered." *Id.* at 1635.

52 *Id.*

53 *Id.*

only be reversible error where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury."[54] He enunciated a two-part test of whether the circumstances of a case would suggest a "reasonable possibility" of racial prejudice: 1) Circumstances involving a violent crime between members of different races carry such a "reasonable possibility." 2) Otherwise, a court may weigh the total circumstances to decide whether a "reasonable possibility" exists.[55]

Applying the two-part test, the plurality found that the circumstances of *Rosales-Lopez* created no "reasonable possibility" that racial or ethnic prejudice might influence the jury. First, the case did not involve a violent crime between members of different races; rather, the plurality characterized the smuggling of aliens as a victimless, nonviolent crime.[56] Secondly, the total circumstances did not otherwise suggest such a "reasonable possibility." Justice White considered the question regarding attitudes toward aliens sufficient to remove those jurors who might have harbored racial prejudice toward the defendant,[57] especially since the trial judge also asked them generally why they could not sit as fair and impartial jurors.[58] He further discounted the likelihood that Mrs. Bowling's testimony concerning the relationship between the defendant and her daughter[59] would exacerbate any latent racial antagonisms of the jurors. "[T]he racial or ethnic differences between the defendant and a key government witness did not create a situation meeting the ['reasonable possibility'] standard . . ."[60] since the three aliens and Falcon-Zavala corroborated Mrs. Bowling's testimony. Thus, Justice White

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54 *Id.* at 1635-36.

55 Justice White noted that since both the *Aldridge* and *Ristaino* cases carried a "reasonable possibility" that racial prejudice would affect the jury, they "imply that federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." *Id.* at 1636. He added, "[t]here may be other circumstances which suggest the need for such an inquiry, but the decision as to whether the total circumstances suggest a reasonable possibility that racial or ethnic prejudice will affect the jury remains primarily with the trial court, subject to case-by-case review by the appellate courts." *Id.*

56 *Id.*

57 "There can be no doubt that the jurors would have understood a question about aliens to at least include Mexican aliens. The trial court excused two jurors for cause, based on their responses to this question. Removing these jurors eliminated, we believe, any reasonable possibility that the remaining jurors would be influenced by an undisclosed racial prejudice toward Mexicans that would have been disclosed by further questioning." *Id.*

58 "We also note that the trial court asked generally whether there were any grounds which might occur to the jurors as to why they could not sit as 'fair and impartial' jurors. Coupled with the question concerning aliens, there is little reason to believe that a juror who did not answer this general question would have answered affirmatively a question directed narrowly at racial prejudice." *Id.* at 1636 n.8.

59 *See* note 11 *supra*.

60 101 S. Ct. at 1637.

concluded that neither constitutional nor nonconstitutional standards required voir dire on racial prejudice in *Rosales-Lopez*.

Justice Rehnquist, joined by Chief Justice Burger, concurred in the plurality's result, but disagreed with the first half of the two-part "reasonable possibility" standard. "In my view, it is inappropriate for us to decide that there is always a 'reasonable possibility' of prejudice solely because the crime is 'violent.' "[61] He suggested that a trial judge could well decide that such an inquiry might exacerbate any existing prejudice without revealing that prejudice.[62] Moreover, he predicted that the plurality's opinion would spawn new litigation over the terms "violent crime" and "different racial or ethnic groups."[63]

In a strong dissent joined by Justices Brennan and Marshall, Justice Stevens relied upon *Aldridge v. United States*[64] and its application by federal courts over a period of fifty years to argue that existing law supported a per se rule.[65] Such a rule would require all federal judges to permit some sort of inquiry concerning possible racial or ethnic bias during voir dire. While *Aldridge* itself involved "special circumstances,"[66] Justice Stevens pointed out that neither the reasoning of Chief Justice Hughes' opinion for the Court, nor the reasoning of the state court opinions cited in *Aldridge*, relied upon such "special circumstances."[67] He quoted the same passage of *Aldridge* referred to in the plurality opinion:

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that 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

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61 *Id.* (Rehnquist, J., concurring).

62 *Id.* at 1637-38 (Rehnquist, J., concurring).

63 *Id.* at 1637 (Rehnquist, J., concurring). "We cannot, in the nature of things, always lay down 'bright line' rules, but we should try to avoid definitions that do not define or clarify and hence invite litigation." *Id.* (Rehnquist, J., concurring).

64 283 U.S. 308.

65 Justice Stevens noted: "For more than four decades, it has been the rule in federal courts that a trial court *must* inquire as to possible racial bias of the veniremen when the defendant is a member of a racial minority. Aldridge v. United States, 283 U.S. 308 . . . (1931)." United States v. Powers, 482 F.2d 941, 944 (8th Cir. 1973), *cert. denied*, 415 U.S. 923 (1974) (emphasis in original), *noted in* 101 S. Ct. 1629, 1638 n.1 (Stevens, J., dissenting).

66 Justice Stevens uses the term "special circumstances" to refer to those which create a "reasonable possibility" that racial prejudice may influence the jurors; they are to be distinguished from the "special circumstances" discussed in the plurality opinion, which trigger a *constitutional* right to voir dire prospective jurors about possible ethnic or racial prejudice.

67 In a footnote, Justice Stevens referred to United States v. Gore, 435 F.2d 1110, 1111-12 (4th Cir. 1970), which examined several of the state cases cited in *Aldridge* and found that they contained no racial overtones whatsoever. 101 S. Ct. at 1641 n.7 (Stevens, J., dissenting).

disrepute.[68]

Justice Stevens, however, like the "overwhelming majority of Federal Circuit Judges who have confronted the question presented in this case . . . interpreted *Aldridge* as establishing a firm rule entitling a minority defendant to some inquiry of prospective jurors on *voir dire* about possible racial or ethnic prejudice unrelated to the specific facts of the case."[69]

He criticized the plurality's "reasonable possibility" standard and two-part test because the holding of *Aldridge* was not confined to its facts, and thus did not require such a limited test. The two-part test, like the voir dire in *Rosales-Lopez*, "wholly ignored the risk that potential jurors in the Southern District of California might be prejudiced against the defendant simply because he is a person of Mexican descent."[70] Because a potential juror might harbor an irrational prejudice whenever a criminal defendant is a member of a minority, Justice Stevens would not require the evaluation of "special circumstances" to determine a "reasonable possibility" of prejudice; he would instead grant such voir dire requests on demand. He would thus give greater weight to a defense counsel's perception of a risk of irrational prejudice than to the plurality's fear that citizens might perceive that justice depends upon one's race.

## IV. ANALYSIS

The division of opinion within the Supreme Court in *Rosales-Lopez* reflects the division of opinion generally over the efficacy of voir dire, and of inquiries into racial prejudice in particular.[71] The plurality has created a two-part test for federal courts which requires such inquiries only in circumstances which create a "reasonable possibility" that the jury may be influenced by racial or ethnic bias. This formulation attempts to prevent the presumption of racial prejudice in the federal courtroom, and to prevent the accompanying loss of confidence in the American criminal justice system. The concurring justices share the same goals but would extend even greater discretion to a trial judge

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68 101 S. Ct. at 1640 (Stevens, J., dissenting) (citing Aldridge v. United States, 283 U.S. 308, 314-15).

69 101 S. Ct. at 1640 (Stevens, J., dissenting).

70 *Id.* at 1641 (Stevens, J., dissenting).

71 In addition to the split among the Circuits over the per se rule, there is scholarly disagreement over the usefulness of voir dire in general, and in the context of racial prejudice in particular. Broeder, for example, illustrates the difficulty of obtaining honest answers on voir dire. *See* Broeder, *supra* note 28. *See also* Begam, *Who Should Conduct Voir Dire? The attorneys*, 61 JUDICATURE 71 (1977); Stanley, *Who Should Conduct Voir Dire? The judge*, 61 JUDICATURE 70 (1977); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493 (1975).

presiding over a case that under the plurality's test would require voir dire regarding racial prejudice. Conversely, the dissenting justices would require all federal judges to permit voir dire concerning racial bias, granting them discretion as to the form and extent of such questioning. While it does not directly address the plurality's concern that such a per se rule might create a presumption of racial prejudice in the courts, the dissenting opinion argues that *not* permitting voir dire into possible racial prejudice might produce both a presumption and a reality of racially prejudiced jurors.

The dissenting opinion takes a far better position on the issue than do the plurality and concurring opinions. Not only does the dissent interpret *Aldridge* more consistently than the plurality opinion, but it also sets forth a simpler and more equitable standard than the plurality's two-part rule. Most importantly, the dissent draws upon a persuasive set of assumptions about voir dire on racial prejudice.

The most compelling distinction between the plurality opinion and the dissenting opinion is the disagreement over possible sources of racial or ethnic prejudice. The plurality opinion assumes that such prejudice arises from or is exacerbated by the circumstances of the case. It suggests that a trial court must weigh these sources—the nature of the crime, the witnesses, the arguments—in order to gauge whether there is a "reasonable possibility" that racial or ethnic prejudice may influence a juror. The dissenting opinion, while recognizing that those factors may exacerbate existing biases, assumes that biases are irrational and can be held by any juror against any minority defendant regardless of the circumstances. As Justice Stevens aptly argued: "Even when there are no 'special circumstances' connected with an alleged criminal transaction indicating an unusual risk of racial or other group bias, a member of the Nazi Party should not be allowed to sit in judgment on a Jewish defendant."[72]

There is ample support for the dissent's assumption that pervasive irrational prejudices persist among jurors, and that there is an accompanying need for voir dire to uncover them. For example, the National Jury Project found that

> [t]he judgments that jurors make about the guilt or innocence of a defendant are strongly influenced by the race of the defendant and key witnesses. Despite legal and social changes of the last twenty-five years, most whites still believe that blacks, chicanos, Native Americans, and other minorities have lower moral character than whites, are more naturally prone to violence, and are held back in climbing the success ladder only by their own lack of initiative.
>
> Because most people learn to conceal these beliefs, even from them-

[72] 101 S. Ct. at 1638 (Stevens, J., dissenting).

selves, voir dire on racial prejudice is very difficult. However, it must be ventured because having several racists on a jury greatly increases the odds of conviction for non-white defendants.[73]

Courts and scholars have come to view racial prejudice as "one of those 'recognized classes' of prejudice for which 'there is a constant need for a searching voir dire examination.' "[74]

Because it places so much emphasis on the circumstances of a case as the source of racial prejudices, the plurality relies heavily upon the discretion of the trial court to prevent such prejudice. This reliance effectively discourages voir dire. Under the two-part rule, a trial judge need not evaluate the risk that jurors may harbor prejudice against a minority defendant simply because he is a minority member. A trial judge may be uncomfortable about asking such questions,[75] even if he recognizes that voir dire provides the only means for probing such prejudice. He may also rationalize his refusal to probe by doubting whether anyone would admit to racial prejudice if asked.[76] A judge may conceivably harbor racial prejudices of his own which may color his consideration of all the circumstances.[77]

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73 NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES 178 (1979).

74 United States v. Robinson, 475 F.2d 376, 381 (D.C. Cir. 1973). Scholars have also noted that

> [c]ertain groups within our society have been subject to systematic and invidious discrimination. The Supreme Court, in interpreting the equal protection clause, has recognized the existence of such 'stereotyped prejudice,' and has given a high degree of scrutiny to governmental action affecting the victimized groups. In the trial context, there is a danger that veniremen with stereotypical notions will not articulate or even be fully aware of them. In order to maintain the integrity and impartiality of the trial process, courts must be willing to allow defendants who can be perceived to be members of groups victimized by systematic discrimination every opportunity to select jurors least likely to be influenced by stereotypes.

Note, *Voir Dire Limitations as a Means of Protecting Jurors' Safety and Privacy*, 93 HARV. L. REV. 782, 791 (1980).

75 For example, the following exchange between defense counsel and the trial judge in United States v. Bowles, 574 F.2d 970 (8th Cir. 1978), typifies this reaction:

> MR. BRADSHAW: And secondly, I forgot to include among my voir dire questions a question concerning whether the fact that the defendant is a member of the Negro race—
>
> THE COURT: I am not going to ask that. I just feel that I—I may be unfair to you, but I feel that would put undue emphasis on it. I have told them to weigh their own conscience and I believe if they are racially prejudice[d] they ought to come forth and say it; and if they are, they are not going to respond if I ask them. That is just the way I feel about it. I understand your concern but I feel it is better for you.

*Id.* at 972.

76 *See* text accompanying notes 79-80 *infra*.

77 An extremely blatant example of such prejudice caught the attention of Senator Montoya:

> Judge Gerald S. Chargin in the Superior Court of California on September 2, 1969, at the sentencing of a 17-year-old juvenile defendant [remarked]:
>
> 'Mexican people, after thirteen years of age, think it is perfectly all right to go out and act like an animal. . . . We ought to send you out of the country—send you back to Mexico. You belong in prison for the rest of your life for doing things of this kind. You

The dissent's per se rule would not only curb potential judicial abuse of discretion but would also provide greater opportunities to uncover racial prejudice than pessimistic trial judges might think. A tactful, probing voir dire may induce potential jurors to recognize and admit racial prejudices.[78] While it is true that many jurors will refuse to admit openly to harboring racial prejudices, a juror's use of language and physical expression in responding to such an inquiry may provide counsel with clues about the juror's racial attitudes.[79] Counsel may then exercise peremptory challenges more intelligently than he might in the absence of such questioning.

In contrast, general questions will probably not extract any meaningful responses about racial prejudices. As the Seventh Circuit observed:

> We disagree . . . [with the government's] assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices. Thus it is essential to explore the backgrounds and attitudes of the jurors . . . .[80]

If asked generally whether he is biased, a juror will probably not acknowledge any prejudices, racial or otherwise. More specific questioning may reveal that the juror prefers not to live in the same neighborhood as blacks, or believes that Mexicans have lower moral

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ought to commit suicide. That's what I think of people of this kind. You are lower than animals and haven't the right to live in organized society—just miserable, lousy, rotten people. . . . Maybe Hitler was right. The animals in our society probably ought to be destroyed because they have no right to live among human beings.'

115 CONG. REC. 32358 (1969).

[78] In United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980), a case involving alleged narcotics trafficking by blacks,

> [s]pecific questions concerning attitude toward blacks were addressed to each juror as well. The court first asked what the prospective juror's 'general attitude toward blacks' was; to further probe, the court then asked whether the prospective juror had ever moved to a different area because he/she had been disturbed by changing conditions. The court asked whether the prospective jurors had had any experience with persons of other races, creeds, or colors resulting in civil or criminal confrontations, or whether he/she had ever had any experiences with persons of different races arising out of employment, residence, or school situations, which might make the juror feel that he/she could not fairly judge such persons . . . Several admitted that they had moved because of 'changing conditions' in their neighborhoods. . . . Several admitted some prejudice against blacks. . . . These were excused. Further, after the panel was sworn, and before the alternates were selected, juror No. 5 told the court that he had been mugged on his way home the previous night by a black person, and he admitted that he could no longer be fair to black persons. . . . In sum, the court conducted a *voir dire* which resulted in the selection of a panel whose background was fully explored, and whose state of mind with respect to the racial 'question' was probed as well.

*Id.* at 136.

[79] NATIONAL JURY PROJECT, *supra* note 73, at 179.

[80] United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

standards than do other ethnic groups. Thus, "[t]he *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted."[81] An extensive voir dire may also provide a basis for challenges for cause.[82]

The plurality, on the other hand, reasoned that the trial court's general questions, in addition to one question regarding aliens, adequately explored possible racial prejudice against Rosales-Lopez. In

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81 Swain v. Alabama, 380 U.S. 202, 218-19 (1964).

82 For example, defense counsel in the trial of Huey Newton conducted a sufficiently extensive voir dire to support a challenge for cause with respect to a juror who refused initially to admit any biases:

[BY DEFENSE COUNSEL]: We are trying to give you an opportunity to speak so that we will be able to tell whether there is [*sic*] some hidden crevices in your mind that may be an interference in the proper evaluation of that case as the evidence unfolds. You understand that?

A. Yes.

Q. Now, it's a fact, is it not, that you already had an opinion before you came here about this case?

A. Well, to a certain extent, yes.

Q. All right. Now, is your opinion that you had about this case before you got here such that it would take the tremendous amount of evidence to overcome that opinion?

A. No. It wouldn't. If—what evidence will show, that I will evaluate and see who is right and who is wrong.

Q. It's not a question so much as to who is right and who is wrong. As you sit there, . . . in your opinion, right now while you are sitting there this minute, is Huey P. Newton guilty or not guilty?

A. Well, I don't know for sure whether he shot the officer or not, but the officer is dead.

Q. And by that same standard, just because the officer is dead, you are going to say that Huey Newton did it; is that right?

A. Well, that's got to be proven.

Q. Well, my question is: As you sit there right now, do you believe that Huey Newton shot and killed, stabbed, whatever it was, Officer Frey?

A. I don't know whether he shot him or not. That I can't say.

THE COURT: . . . you see, under our law there is a presumption of innocence to start with. When you start the case the defendant is presumed to be innocent, and it is up to the People, the prosecution, to prove to you beyond a reasonable doubt that the defendant is guilty. Do you understand that?

THE JUROR: Yes.

THE COURT: So, now, not having heard any evidence, you must start with a presumption of innocence. Do you know what I mean by presumption? You must say, 'As far as I know the man is innocent.' Do you understand that?

THE JUROR: Yes.

THE COURT: 'And it is up to the prosecution to prove to me that he is guilty. Do you understand that?

THE JUROR: Yes.

THE COURT: So, therefore, as it stands right now, do you believe he is guilty before you hear any evidence? . . .

THE JUROR: No. . . .

THE COURT: 'All right. Go ahead. . . .

Q. Is there any evidence as far as you are concerned right now that Mr. Newton is guilty of anything?

A. No.

Q. The fact that there has been a charge here, that is that he is charged with

light of the foregoing, this is an unrealistic, albeit optimistic, appraisal. Neither juror who was excused because of her response to the alien question exhibited a racial prejudice against Mexicans, but rather a strong predisposition concerning the crime of smuggling aliens.[83] Hence, the question probed attitudes toward the crime, not toward the defendant's ethnicity.[84]

On a practical level, trial judges could apply the per se rule much more easily than the plurality's two-part "reasonable possibility" standard. The plurality admits that the second part of the standard—*i.e.*, weighing the total circumstances—will involve case-by-case review. Justice Rehnquist points out that the first part of the standard also engenders uncertainty because it offers "definitions that do not define or clarify and hence invite litigation."[85] The "reasonable possibility" of racial prejudice is likewise a definition that does not define. A trial court judge weighing circumstances such as those in *Rosales-Lopez* might

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murder, assault, and kidnapping, is that, as far as you are concerned, evidence that he is guilty of anything?

A. No. That isn't evidence, no.

Q. As far as you are concerned, what is evidence?

A. What I am going to hear here in Court.

Q. Is that going to come from witnesses, as far as you are concerned?

A. From witnesses, yes. . . .

THE COURT: You may examine further, Mr. Garry.

BY MR. GARRY: . . . again I ask you that same question which you have answered three times to me now—

THE COURT: No. Please ask the question without preface.

MR. GARRY: As Huey Newton sits here next to me now, in your opinion is he absolutely innocent?

A. Yes.

Q. But you don't believe it, do you?

A. No.

THE COURT: Challenge is allowed.

MINIMIZING RACISM IN JURY TRIALS 90-94 (A. Ginger ed. 1969).

[83] The question concerning aliens and the responses were as follows:

THE COURT: Now, this case, as I have already announced, involves aliens alleged to be illegally in the United States. Do any of you have any feelings about the alien problem at all? Is there anything about it that would cause you to—yes ma'am?

JUROR ROSA: My name is Palos De La Rosa. It is just a name that they use for the people to transport illegal aliens and to place them intentionally—

THE COURT: Very well. You may be excused. Would you return to the jury lounge, please.

. . .

THE COURT: . . . Let me ask the general question: Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so? In the back row?

JUROR SKELLY: Kristine Skelly, and I have mixed feelings about it. I don't think I could be impartial. I have a tendency to feel—my own feelings, I don't think I could be fair juror.

THE COURT: Very well, you will be excused. Would you return to the jury lounge, please?"

Brief of the Petitioner at 4-5, Rosales-Lopez v. United States, 101 S. Ct. 1629 (1981).

[84] There is no indication in the facts that Rosales-Lopez was an alien.

[85] 101 S. Ct. at 1637 (Rehnquist, J., concurring).

determine that an immigration offense "reasonably" raises the possibility of racial prejudice. Taking a negligible amount of additional time[86] to pose such questions during voir dire could save much more time by eliminating numerous appeals for failure to ask.

Furthermore, a per se rule need not infringe unreasonably upon the broad discretion of trial judges in conducting voir dire. The plurality opinion cited *Aldridge* as authority for broad discretion,[87] yet the result in *Aldridge* removed a trial judge's discretion to refuse to ask voir dire questions about racial prejudice. A per se rule would also leave intact much of a trial judge's discretionary power: he would still be able to conduct voir dire personally, and more importantly, he would be able to formulate the questions. All that a per se rule would require is that some inquiry about racial prejudice be made. The requirement would also be limited to this particularly invidious and pervasive form of prejudice, just as the Court has limited the "strict scrutiny" requirement of equal protection analysis. In many instances, counsel may decide not to probe racial prejudice because such a probe might exacerbate such biases,[88] thus providing an inherent curb to unwise use of the per se rule. In any case, the attorneys are in the best position to gauge the need for such questioning as they have the strongest stake in deciding whether to explore racial prejudice.

Finally, a per se rule would increase the confidence of citizens in the fairness of the jury trial, rather than foster a damaging presumption of racial prejudice, as the plurality opinion feared could result. A per se rule would satisfy defendants and jurors alike that racial prejudice, as well as other kinds of bias routinely probed during voir dire, would have no place in court. As Chief Justice Hughes declared in *Aldridge*,

> 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.[89]

## V. CONCLUSION

*Rosales-Lopez v. United States* articulated a new federal court supervi-

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86 The voir dire in Rosales-Lopez lasted approximately six minutes. Brief of the Petitioner at 5, Rosales-Lopez v. United States, 101 S. Ct. 1629 (1981). "The median estimated duration for criminal case examinations was 52 minutes with oral participation [of counsel] and 51 minutes without [*i.e.*, by the judge alone]." Bermant, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 14 n.20 (Federal Judicial Center 1977).

87 101 S. Ct. at 1634.

88 NATIONAL JURY PROJECT, *supra* note 73, at 179.

89 283 U.S. at 315.

sory rule regarding voir dire on racial prejudice. The plurality opinion subordinated a minority defendant's right to an impartial jury trial to the plurality's concern for the appearances of justice in our federal courts. By setting forth a narrow, two-part "reasonable possibility" standard, the Court not only effectively discouraged trial courts from posing questions about racial prejudice during voir dire, but it also failed to provide adequate guidance to determine when such "reasonable possibilities" of prejudice exist. The result of *Rosales-Lopez* may effectively damage the appearance of justice in federal court.

The dissenting opinion vigorously advocated a per se rule requiring that inquiries about racial prejudice be made whenever a minority defendant requested such voir dire. This per se rule would accurately follow the *Aldridge* holding, without undermining the more recent decisions in *Ham* and *Ristaino*. The dissent's per se rule better reflects the need for voir dire regarding racial prejudice, since all cases involving minority defendants encompass the risk of purely irrational prejudice, unrelated to the circumstances of a case. It also presents a more workable, equitable standard.

The primary flaw of the plurality opinion, aside from the vague standard it articulates, is its refusal to recognize the pervasive risk of racial prejudice. A rule which leaves to the trial judge the decision of whether to ask questions about racial prejudice reduces the opportunities for jurors to recognize and admit any racial biases. Thus, for compelling ideological and pragmatic reasons, the Court should have adopted the view shared by the dissenting justices and most circuit court judges, and required all federal criminal courts to probe the possibility of racial prejudice during voir dire if requested to do so by a minority defendant.

LINDA MAR