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## Right to Inquire into Jurors' Racial Prejudices--Sixth Amendment: Turner v. Murray, 106 S. Ct. 1683 (1986)

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## SIXTH AMENDMENT—RIGHT TO INQUIRE INTO JURORS' RACIAL PREJUDICES

Turner v. Murray, 106 S. Ct. 1683 (1986).

### I. INTRODUCTION

The sixth amendment guarantees the "right to a speedy and public trial, by an impartial jury."<sup>1</sup> This right has been vigorously scrutinized in criminal proceedings involving the death penalty<sup>2</sup> and in situations where the defendant and the victim are of different races.<sup>3</sup> The Supreme Court recently examined these issues in *Turner v. Murray*<sup>4</sup> and held that a black defendant accused of murdering a white store owner was entitled to have prospective jurors questioned during the *voir dire* as to their possible racial biases.<sup>5</sup> The *Turner* Court ultimately vacated the defendant's death sentence<sup>6</sup> while upholding the jury's finding of guilt.<sup>7</sup>

This note analyzes earlier cases involving the establishment of *voir dire* standards in both capital and non-capital trials of interracial

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> Chief Justice Hughes wrote in 1931 that the "risk [of a racially biased jury] becomes most grave when the issue is of life or death." *Aldridge v. United States*, 283 U.S. 308, 314 (1931).

<sup>3</sup> In *Furman v. Georgia*, 408 U.S. 238 (1972), the United States Supreme Court held that the death penalty constituted cruel and unusual punishment. The Court used data reflecting the disproportionate application of the death penalty to minorities as support. *Id.* at 250 n.15, 364. Many works have also addressed the fact that black capital defendants receive the death penalty with disproportionately higher frequency than white capital defendants. See Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983) (analyzing inconsistent application of death penalty to white defendants and black defendants in South Carolina); Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119 (1973) (analyzing significant effect of racial discrimination in application of the death penalty); Note, *Capital Punishment in Virginia*, 58 VA. L. REV. 97 (1972) (in-depth examination of application of death penalty in 19th and 20th Century Virginia).

<sup>4</sup> 106 S. Ct. 1683 (1986).

<sup>5</sup> *Id.* at 1688. The Supreme Court recently stated that "without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

<sup>6</sup> *Turner*, 106 S. Ct. at 1688.

<sup>7</sup> *Id.* at 1689.

crimes,<sup>8</sup> the facts and the Supreme Court opinions in *Turner*,<sup>9</sup> and the effects of *Turner* on *voir dire* inquiries into the existing racial biases of jurors in future trials involving interracial crimes.<sup>10</sup>

## II. BACKGROUND: ORIGINS OF *VOIR DIRE* INQUIRY INTO RACIAL PREJUDICES IN INTERRACIAL CRIMES

An analysis of the *voir dire* criteria used in both interracial capital and non-capital criminal proceedings must begin with the Supreme Court's 1931 decision in *Aldridge v. United States*.<sup>11</sup> The trial judge in *Aldridge* disallowed the defense counsel's request to inquire into the racial prejudices of the prospective jurors which might arise because the defendant was black and the homicide victim was white.<sup>12</sup> The Supreme Court reversed the appellate court's affirmation of the defendant's conviction and death sentence.<sup>13</sup> Chief Justice Hughes, writing the majority opinion, acknowledged that cries of overprotection of black defendants would arise from the Court's decision to allow the questioning of jurors as to their racial prejudice.<sup>14</sup> He presented the following justifications for the Court's decision:

If in fact, sharing the general sentiment, [the jurors] were found to be impartial, no harm would be done in permitting the question; 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. Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry. And this risk becomes most grave when the issue is of life or death.<sup>15</sup>

Chief Justice Hughes' rationalization has subsequently been cited in numerous opinions.<sup>16</sup>

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<sup>8</sup> See *infra* notes 11-128 and accompanying text.

<sup>9</sup> See *infra* notes 129-224 and accompanying text.

<sup>10</sup> See *infra* notes 225-39 and accompanying text.

<sup>11</sup> 283 U.S. 308.

<sup>12</sup> *Id.* at 311. The victim was a member of the District of Columbia police force. *Id.* at 309.

<sup>13</sup> 283 U.S. 308, *rev'g* 47 F.2d 407 (D.C. Cir. 1931).

<sup>14</sup> *Aldridge*, 283 U.S. at 314.

<sup>15</sup> *Id.* (footnote omitted).

<sup>16</sup> See *infra* notes 46, 73, 104, 125-28, and 202 and accompanying text.

In the 1966 case of *King v. United States*, 362 F.2d 968 (D.C. Cir. 1966), the D.C. Circuit, which was reversed in *Aldridge*, found that *Aldridge* "is not limited to capital crimes or even to crimes of violence." *Id.* at 969. The black defendants in *King* were accused of assaulting a white person. At trial the judge refused to permit the defense to ask the prospective jurors if they would be biased by the interracial nature of the alleged offense. *Id.* In making his ruling, the trial judge replied:

We do not draw any color line in this courtroom. Now if you are going to start drawing the color line, before we swear the jury—of course once jeopardy com-

The *Aldridge* dissent, written by Justice McReynolds, addressed the overprotectionist arguments forecasted by Chief Justice Hughes.<sup>17</sup> Justice McReynolds rejected the majority's argument that black defendants could receive less equal treatment than their white counterparts in stating that

in a jurisdiction like the District of Columbia, where the colored race is accorded all the privileges and rights under the law, that are afforded the white race, and especially the right to practice in the courts, serve on the jury, etc., we are of the opinion that there was no abuse of discretion on the part of the trial court in refusing to permit the question to be answered by the jurors.<sup>18</sup>

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mences I cannot do anything about it—but I am going to continue the case and have other counsel appointed if you gentlemen intend to make a color issue here. You know, I believe in equal rights but I do not believe in preferential rights.

*Id.* On appeal, the circuit court reversed the defendant's subsequent conviction in light of *Aldridge*. *Id.*

The Sixth Circuit in *United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971), applied *Aldridge* to a non-capital case involving a black man accused of bank robbery. At trial, the judge disallowed defense counsel's attempt to explicitly inquire into the potential racial prejudices of the jurors. *Id.* at 1133. The Sixth Circuit held that this refusal constituted reversible error since "anything but a direct inquiry as to the presence of racial prejudice will fail to satisfy the essential demands of fairness necessary to ascertain whether or not a juror has a conscious or unconscious prejudice against a defendant because of his race or color." *Id.* at 1134-35. Herein, the court disregarded the prosecution's arguments that the record was void of evidence of a racially prejudiced jury panel. *Id.* at 1134.

The South Carolina Supreme Court narrowly defined the extent of the *Aldridge* holding in *State v. Brooks*, 235 S.C. 344, 111 S.E.2d 686 (1959), *cert. denied*, 365 U.S. 300 (1961). The *Brooks* defendant, a black man, was accused of raping a white woman in Greenville, South Carolina. *Id.* at 346-48, 111 S.E.2d at 688. At trial, the defense counsel requested the inclusion of several questions during *voir dire*. *Id.* at 349, 111 S.E.2d at 689. The judge allowed a general inquiry into the potential racial biases of the jurors. *Id.*, 111 S.E.2d at 689. The accepted question asked: "Would you have any prejudice against a defendant because of his color?" *Id.*, 111 S.E.2d at 689. The judge, however, disallowed explicit questioning about further prejudices arising from the fact that the crime charged was interracial rape. *Id.*, 111 S.E.2d at 689. The refused question was: "Would it take less evidence for you to render a verdict against a colored person charged with rape or assault with intent to ravish a white female than it would for you to render a verdict against a white person charged with rape or assault with intent to ravish a colored female?" *Id.*, 111 S.E.2d at 689. The South Carolina Supreme Court held that the trial court's refusal to allow the more specific question to be asked during *voir dire* was not an error for two reasons. First, the disallowed question was sufficiently included in the scope of the permitted inquiry into the potential racial prejudices of the jurors arising from the defendant's race. *Id.*, 111 S.E.2d at 689. Second, the court stated that "such examination of jurors, its nature and extent, are within the discretion of the trial judge." *Id.*, 111 S.E.2d at 689. *Brooks*, therefore, reflected the South Carolina Supreme Court's unwillingness to extend *Aldridge* to include mandatory inquiry into the particular racial biases of jurors which may arise from a crime such as interracial rape. See *infra* text accompanying notes 71-73 for Justice Marshall's arguments about the unique nature of interracial rape in his dissent from the 1976 certiorari denial of *Dukes v. Waitkevitch*, 536 F.2d 469 (1st Cir.), *cert. denied*, 429 U.S. 932 (1976).

<sup>17</sup> *Aldridge*, 283 U.S. at 315-18 (McReynolds, J., dissenting).

<sup>18</sup> *Id.* at 316 (McReynolds, J., dissenting).

Justice McReynolds argued that there was no evidence in the *Aldridge* trial record that prejudice affected any juror's decision.<sup>19</sup> In fact, it was "not even argued that considering the evidence presented there was room for reasonable doubt of guilt."<sup>20</sup>

The United States Supreme Court again emphasized the importance of *voir dire* inquiry into the racial prejudices of prospective jurors in the 1973 decision of *Ham v. South Carolina*.<sup>21</sup> The defendant in *Ham* was a black man accused of a non-capital, non-violent offense. Ham's trial, arising from a charge of marijuana possession in South Carolina, was seemingly aggravated by the fact that he was a well-known civil rights activist.<sup>22</sup> In an opinion written by Justice Rehnquist, the Court cited the due process clause of the fourteenth amendment<sup>23</sup> and reversed the South Carolina Supreme Court's holding that *voir dire* queries into racial prejudices were not required even if timely requested.<sup>24</sup>

The *Ham* Court, however, upheld the trial judge's denial of defense counsel's requested inquiry into the prospective jurors' prejudices against facial hair.<sup>25</sup> The Court cited *Aldridge* as representing "the traditionally broad discretion accorded to the trial judge in conducting *voir dire*"<sup>26</sup> in support of its denial of the facial

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<sup>19</sup> *Id.* at 317 (McReynolds, J., dissenting). See *infra* note 220 for Justice Powell's statement in his *Turner* dissent that the trial record was absent of detrimental racial biases.

<sup>20</sup> *Aldridge*, 283 U.S. at 317 (McReynolds, J., dissenting). The Second Circuit embraced Justice McReynolds' argument approximately forty years later in *United States v. Grant*, 494 F.2d 120 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974). The defendant in *Grant* was a black postal worker accused of stealing articles from the mail service. 494 F.2d at 121. Soon after her arrest, the defendant confessed to taking the items in question. During *voir dire*, the trial judge did not allow defense counsel to inquire into the possible racial biases of the prospective jurors. *Id.* In affirming the resulting conviction, the Second Circuit stated that "in view of the overwhelming evidence of appellant's guilt, the error here, if any, was harmless beyond a reasonable doubt." *Id.* at 122.

<sup>21</sup> 409 U.S. 524 (1973). Two of the *voir dire* inquiries proposed by the defense counsel related to possible racial prejudice against the defendant. The third request inquired into potential biases against men, like the defendant, who have beards. The fourth request inquired into potential biases arising from pretrial publicity. The trial judge denied all four requests. *Id.* at 525-26.

<sup>22</sup> *Id.* at 524-25.

<sup>23</sup> *Id.* at 527. The Court stated that

South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias.

*Id.*

<sup>24</sup> *Id.* at 529.

<sup>25</sup> *Id.* at 527-28.

<sup>26</sup> *Id.* at 528.

hair inquiry.<sup>27</sup>

Justices Douglas and Marshall partially concurred and partially dissented in *Ham*.<sup>28</sup> Both Justices concurred with the majority's holding that lack of inquiry into the potential racial biases of the prospective jurors constituted reversible error.<sup>29</sup> Justices Douglas and Marshall disagreed, however, with the majority's opinion that inquiry into juror prejudice arising from the defendant's hair-length was unnecessary. Justice Marshall acknowledged that hair length was a basis for unfair juror prejudice and stated:

It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict.<sup>30</sup>

Justice Marshall argued further that limitations on initial *voir dire* inquiries into juror bias may greatly prejudice counsel's effective use of challenges for cause.<sup>31</sup>

A major departure from *Ham* occurred in the Court's 1976 decision in *Ristaino v. Ross*.<sup>32</sup> Ross was one of several blacks convicted of attacking a white security guard in Boston.<sup>33</sup> The trial judge denied the defense counsel's request to inquire into the potential racial biases of the prospective jurors, and Ross was convicted by a

<sup>27</sup> *Id.* The Court stated that

[g]iven the traditionally broad discretion accorded to the trial judge in conducting *voir dire*, *Aldridge v. United States*, *supra*, and our inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices, we do not believe the petitioner's constitutional rights were violated when the trial judge refused to put this question.

*Id.*

<sup>28</sup> *Id.* at 529-34.

<sup>29</sup> *Id.* at 529 (Douglas, J., concurring in part and dissenting in part) and 530-31 (Marshall, J., concurring in part and dissenting in part).

<sup>30</sup> *Id.* at 531-32 (Marshall, J., concurring in part and dissenting in part).

<sup>31</sup> *Id.* at 532 (Marshall, J., concurring in part and dissenting in part).

In the 1964 case of *Swain v. Alabama*, 380 U.S. 202, 218-19 (1964), the Supreme Court acknowledged the crucial role of counsel's *voir dire* examination and its effects on later trial strategy. The Court stated: "The *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." *Id.* (footnote omitted). In *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981), the Supreme Court stated that "lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges. . . ." See *infra* notes 95-128 and accompanying text for a discussion of *Rosales-Lopez*.

<sup>32</sup> 388 F. Supp. 99 (D. Mass. 1974), *aff'd*, 508 F.2d 754 (1st Cir. 1974), *rev'd* 424 U.S. 589 (1976).

<sup>33</sup> "Petitioner was convicted in state court of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder." *Ross v. Massachusetts*, 363 Mass. 665, 296 N.E.2d 810, *cert. denied*, 414 U.S. 1080, 1080 (1973) (Marshall, J., dissenting).

jury in *Ross v. Massachusetts*.<sup>34</sup> On appeal, the United States Supreme Court vacated the Supreme Judicial Court's affirmation<sup>35</sup> and remanded the case "for further consideration in light of *Ham v. South Carolina*."<sup>36</sup>

On remand, the Supreme Judicial Court of Massachusetts upheld its prior ruling.<sup>37</sup> The court analyzed the *Ham* decision and distinguished its facts from those of *Ross v. Massachusetts*.<sup>38</sup> *Ham*, according to the court, did not mandate *voir dire* inquiry into possible racial prejudices "in all State criminal trials when the defendant is black (or from some other racial minority group), even when the defendant has requested such an inquiry and the statutory framework permits questioning to discover bias."<sup>39</sup> Rather, the court found *voir dire* inquiry necessary in *Ham* because Ham was a well-known civil rights leader who "would have been a prominent target for [juror] prejudice."<sup>40</sup> The court found that no similar heightened expectation of racial prejudice existed for the *Ross v. Massachusetts* defendant.<sup>41</sup>

The Massachusetts Supreme Judicial Court concluded its decision by announcing the standards to be used in future cases similar to *Ross v. Massachusetts*. The court stated:

The issue of racial prejudice may not be apparent at the outset of a case but may become evident during the trial. Therefore, when a defendant requests that the prospective jurors be questioned about their racial prejudice, the judge should make specific inquiries of counsel concerning the racial aspects of the case . . . . If it appears from such preliminary inquiries that the case might reasonably be expected to present factors involving possible racial prejudice, then the judge should question the prospective jurors in this area.<sup>42</sup>

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<sup>34</sup> The requested inquiry which was denied by the trial judge was: "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" *Commonwealth v. Ross*, 363 Mass. at 667 n.4, 296 N.E.2d at 812 n.4.

<sup>35</sup> *Commonwealth v. Ross*, 361 Mass. 665, 282 N.E.2d 70 (1972).

<sup>36</sup> *Ross v. Massachusetts*, 410 U.S. 901, 901 (1973).

<sup>37</sup> *Commonwealth v. Ross*, 363 Mass. 665, 296 N.E.2d 810.

<sup>38</sup> *Id.* at 666-67, 671-74, 296 N.E.2d at 811-12, 815-16.

<sup>39</sup> *Id.* at 671, 296 N.E.2d at 815.

<sup>40</sup> *Id.* at 672, 296 N.E.2d at 815.

<sup>41</sup> *Id.*, 296 N.E.2d at 816.

<sup>42</sup> *Id.* at 673, 296 N.E.2d at 816. In *United States v. Diggs*, 522 F.2d 1310 (D.C. Cir. 1975), *cert. denied sub nom. Floyd v. United States*, 429 U.S. 852 (1976), the D.C. Circuit closely followed the reasoning of the Massachusetts Supreme Judicial Court in *Ross v. Massachusetts*. See *supra* notes 37-42 and accompanying text for an analysis of the opinion of the Massachusetts Supreme Judicial Court in *Ross v. Massachusetts*. The *Diggs* defendant was a black man convicted of participating in a Washington, D.C. bank robbery. He appealed his conviction on several grounds, including the inadequate inquiry into the potential racial biases of the prospective jurors. 522 F.2d at 1317-18. The circuit court rejected this argument, stating that the defendant

The United States Supreme Court denied Ross' second petition for a writ of certiorari,<sup>43</sup> with Justice Marshall, who was joined by Justices Douglas and Brennan, dissenting.<sup>44</sup> Justice Marshall rejected the Massachusetts Supreme Judicial Court's reading of *Ham* as applying only to a fact situation similar to that of *Ham*.<sup>45</sup> Rather, argued Justice Marshall, *Ham* effectively affirmed the *Aldridge* Court's commitment to rid the system of racially biased jurors.<sup>46</sup>

*Ross v. Massachusetts* arose again as *Ristaino v. Ross* on a writ of habeas corpus<sup>47</sup> soon after the Supreme Court's 1973 denial of certiorari.<sup>48</sup> Both the District Court of Massachusetts and the First Circuit granted the writ, relying on *Ham*.<sup>49</sup> In 1976, the U.S. Supreme Court reversed the decisions below and denied Ross' habeas corpus writ.<sup>50</sup> In reversing, the Court stated that "[w]e think the Court of Appeals read *Ham* too broadly."<sup>51</sup>

The majority opinion in *Ristaino*, written by Justice Powell, repeatedly distinguished the facts of *Ham* in reaching the conclusion that inquiry into the potential racial biases of prospective jurors is necessary only in a limited number of cases.<sup>52</sup> Since *Ham* was a

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had made no effort whatever to establish any such factual situation as can be noted in *Aldridge* and *Ham*. Nothing was shown actually to cause the judge to inquire into possible prejudice against Floyd because he was black. It would seem that some development of a situation of that sort is essential . . . .

*Id.* at 1318. The *Diggs* dissent, written by District Judge Justice, rejected the majority's attempt to distinguish *Diggs* from *Aldridge* and *Ham*. *Id.* at 1331-32 (Justice, J., dissenting). Judge Justice applied the reasoning from *Aldridge* and *Ham* in stating that

we should not require a showing that a criminal defendant is a "special target of prejudice" before permitting his inquiry into jury bias. While the trial court should be free to exercise its broad discretion over the form and numbers of questions to be asked, it should not be permitted to preclude inquiry into racial bias when a criminal defendant evidences a desire to satisfy himself in this regard.

*Id.* at 1332 (Justice, J., dissenting) (footnote omitted).

<sup>43</sup> *Ross v. Massachusetts*, 414 U.S. 1080.

<sup>44</sup> *Id.* at 1080-85 (Marshall, J., dissenting).

<sup>45</sup> *Id.* at 1082 (Marshall, J., dissenting).

<sup>46</sup> *Id.* at 1083-85 (Marshall, J., dissenting). As Justice Marshall stated:

That petitioner was tried in Boston, Massachusetts, while Gene Ham was tried in Florence, South Carolina, is of no significance. Racial prejudice is a cultural malady that has shaped our history as a nation. It is a cancer of the mind and spirit which breeds as prolifically in the industrial cities of the North as in the rural towns of the South. And where, as here and in the strikingly similar circumstances of the *Aldridge* case, a Negro is being accused of an attack on a white policeman, it would be disingenuous at best to assert that he is not apt to be a particular target of racial prejudice.

*Id.* at 1085 (Marshall, J., dissenting) (footnote omitted).

<sup>47</sup> 388 F. Supp. 99, *aff'd*, 508 F.2d 754, *rev'd*, 424 U.S. 589.

<sup>48</sup> *Ross v. Massachusetts*, 414 U.S. 1080.

<sup>49</sup> *Ristaino v. Ross*, 424 U.S. at 594.

<sup>50</sup> *Id.* at 598.

<sup>51</sup> *Id.* at 594.

<sup>52</sup> *Id.* at 596-98.

black civil rights activist who claimed that he was framed by the local police,<sup>53</sup> the Court concluded that “[r]acial issues . . . were inextricably bound up with the conduct of the trial.”<sup>54</sup> The two specific circumstances of Ham’s occupation and his defense, therefore, necessitated *voir dire* inquiry into racial prejudice when requested in *Ham*.<sup>55</sup> The Court concluded that such circumstances suggested the need for a special *voir dire* inquiry into racial prejudice more than did the circumstances in *Ristaino*,<sup>56</sup> as the latter “did not suggest a significant likelihood that racial prejudice might infect Ross’ trial.”<sup>57</sup> In addition to its strict factual adherence to *Ham*, the Court ardently rejected the adoption of a *per se* inquiry into the racial prejudices of prospective jurors in all criminal actions involving a defendant and a victim of different races.<sup>58</sup>

The *Ristaino* majority, however, conceded a major point in a footnote.<sup>59</sup> After repeating the *Ristaino* holding, Justice Powell noted that “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.”<sup>60</sup> Therefore, if *Ristaino* had arisen in federal district court the Supreme Court would have reached the opposite result.

Justice Marshall’s dissent in *Ristaino* was succinct. After quoting from his dissent in the *Ross v. Massachusetts* denial of certiorari,<sup>61</sup> the Justice stated that the *Ristaino* majority opinion “emphatically confirms that the promises inherent in *Ham* and *Aldridge* will not be

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<sup>53</sup> *Id.* at 596-97.

<sup>54</sup> *Id.* at 597.

<sup>55</sup> *Id.* The Court stated that such *voir dire* questioning, when requested, was “necessary to meet the constitutional requirement that an impartial jury be impaneled.” *Id.*

<sup>56</sup> *Id.* at 597-98. The circumstances in *Ristaino* cited as important by the First Circuit included the fact that the victim was white and the defendants were black and the fact that the victim was a security guard. *Id.* at 597.

<sup>57</sup> *Id.* at 598. See *supra* notes 38-41 and accompanying text for an analysis of the Supreme Judicial Court’s attempt to distinguish *Ham* in *Ross v. Massachusetts*.

<sup>58</sup> *Ristaino*, 424 U.S. at 596 n.8. In its rejection of the use of a *per se* rule, the Court used the following analysis:

We note that such a *per se* rule could not, in principle, be limited to cases involving possible racial prejudice. It would apply with equal force whenever *voir dire* questioning about ethnic origins was sought, and its logic could encompass questions concerning other factors, such as religious affiliation or national origin. In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.

*Id.* (citations omitted).

<sup>59</sup> *Id.* at 597 n.9.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 599 (Marshall, J., dissenting).

fulfilled."<sup>62</sup>

Similar arguments arose in the United States Supreme Court's 1976 denial of certiorari in *Dukes v. Waitkevitch*.<sup>63</sup> The *Dukes* defendant, who was black, was accused of interracial rape, armed robbery, kidnapping, and assault with a deadly weapon.<sup>64</sup> The *Dukes* trial judge refused to allow specific *voir dire* inquiry into the potential racial biases of the prospective jurors.<sup>65</sup> The state appellate court upheld the resulting conviction, and the defendant's appeal request was, in turn, denied by the Massachusetts Supreme Judicial Court.<sup>66</sup> The federal district court subsequently granted the defendant's habeas corpus writ,<sup>67</sup> and the First Circuit, which the Supreme Court had recently reversed in *Ristaino*,<sup>68</sup> reversed.<sup>69</sup> In its reversal, the First Circuit rejected the defendant's attempts to distinguish the interracial assault charge at issue in *Ristaino* from the interracial rape charge at issue in *Dukes*.<sup>70</sup>

Justices Marshall and Brennan dissented from the Supreme Court's subsequent denial of certiorari.<sup>71</sup> Justice Marshall, in distinguishing the facts of *Ristaino* from the facts of *Dukes*, discussed the unique nature of a charge of interracial rape, "especially in a city [Boston] where racial conflict is close to the surface . . . ."<sup>72</sup> In its certiorari denial, stated Justice Marshall, "the Court empties of meaning the promise of *Aldridge* and of our recent decision in *Ham v. South Carolina* . . . . That promise is the fundamental guaranty of a fair trial before an impartial jury."<sup>73</sup>

Three circuit court cases arising after *Ristaino* and *Dukes* reflect the great amount of discretion consistently granted the trial judge in the *voir dire* process. The Eighth Circuit decided two cases in 1978 which appeared to establish the rule that post-*Ristaino* trial courts have few limits on the amount of discretion exercised in the conduct

<sup>62</sup> *Id.* (Marshall, J., dissenting).

<sup>63</sup> 429 U.S. 932 (1976).

<sup>64</sup> *Dukes v. Waitkevitch*, 536 F.2d 469, 469 (1st Cir.), *cert. denied*, 429 U.S. 932 (1976).

<sup>65</sup> 536 F.2d at 469. The judge told the jurors the following: the crimes charged, the fact that the accused was black and the victims were white, and that the race of either party was not to be considered. *Id.* at 469-70.

<sup>66</sup> *Id.* at 470.

<sup>67</sup> *Id.*

<sup>68</sup> See *supra* notes 47-62 and accompanying text for an analysis of *Ristaino*.

<sup>69</sup> *Dukes*, 536 F.2d at 471.

<sup>70</sup> *Id.* at 470. The First Circuit stated that "while interracial rape may be a classic catalyst of racial prejudice, the prejudice inheres in the identities of parties and victims and not in the specific issues." *Id.* at 471.

<sup>71</sup> *Dukes*, 429 U.S. at 932-33 (Marshall, J., dissenting).

<sup>72</sup> *Id.* at 933 (Marshall, J., dissenting).

<sup>73</sup> *Id.* (Marshall, J., dissenting) (citation omitted).

of the *voir dire*. In *United States v. Bell*,<sup>74</sup> the Eighth Circuit upheld the trial court's conviction of a black defendant accused of illegally transporting sawed-off shotguns.<sup>75</sup> The defendant challenged the decision on the grounds that the trial court's refusal to allow specific *voir dire* inquiries about race requested by the defendant constituted reversible error.<sup>76</sup> The trial court included some questions concerning racial bias in the *voir dire*,<sup>77</sup> and, according to the Eighth Circuit, these inquiries satisfied the district court's "*non-constitutional* duty to inquire as to possible racial bias on the jury panel when the defendant is a member of a racial minority group."<sup>78</sup> The circuit court referred to an earlier Supreme Court case in stating that "as in *Ristaino*, the issue of race was not 'inextricably bound up with the conduct of the [Bell] trial'. . . . Consequently, the district court was under no *constitutional* obligation to probe prospective jurors for signs of racism."<sup>79</sup>

Two weeks after deciding *Bell*, the Eighth Circuit ruled on a second case involving the *voir dire* process in the trial of a black defendant.<sup>80</sup> In *United States v. Bowles*, the district court found the defendant guilty of distributing the drug phencyclidine.<sup>81</sup> During the *voir dire*, defense counsel requested inclusion of a question about the effect of the defendant's race on the jurors' opinions.<sup>82</sup> The trial judge refused.<sup>83</sup> The Eighth Circuit cited *Bell*<sup>84</sup> in support of the

<sup>74</sup> 573 F.2d 1040 (8th Cir. 1978).

<sup>75</sup> *Id.* at 1041-46.

<sup>76</sup> *Id.* at 1042.

<sup>77</sup> The following questions were included in the *voir dire*:

Do any of you have any prejudices about giving a fair trial to a person of a minority race? Have any of you had any untold experiences with black people, any experiences that would be unusual of any kind that might shade your thinking in a situation of this kind? Do any of you think that you might give more credibility to the testimony of a witness who was white than to a witness who was black?

*Id.*

<sup>78</sup> *Id.* at 1043 (emphasis in original).

<sup>79</sup> *Id.* (quoting *Ristaino*, 424 U.S. at 597)(emphasis in original)(citation omitted).

<sup>80</sup> *United States v. Bowles*, 574 F.2d 970 (8th Cir. 1978).

<sup>81</sup> *Id.* at 971. Phencyclidine is more commonly referred to as "PCP" or "Angel Dust." *Id.*

<sup>82</sup> *Id.* at 972. No specific inquiry into the effects of racial bias on the jurors' decision-making was formulated by defense counsel. *Id.*

<sup>83</sup> *Id.* The trial judge told defense counsel:

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.*

<sup>84</sup> 573 F.2d 1040; see *supra* notes 74-79 and accompanying text for an analysis of *Bell*.

proposition that *voir dire* conduct is within the judge's discretion.<sup>85</sup> Limits on this discretion exist, however, since "it by no means follows that where, as here, the defendant is a Negro, the district judge may with impunity refuse to make appropriate inquiry of the jury panel as to possible racial bias, and then justify such refusal by asserting the exercise of discretion."<sup>86</sup>

In *United States v. Williams*,<sup>87</sup> the Third Circuit reversed the district court's conviction of a black man for violating a federal law prohibiting "convicted felons from receiving firearms shipped in interstate commerce."<sup>88</sup> The district court did not allow defense counsel to inquire as to "whether or not the fact that the defendant is black would in any way affect their [the jury panel's] judgment in the case or cause some difficulty to return a fair verdict?"<sup>89</sup> The Third Circuit relied on its 1973 decision in *United States v. Robinson*<sup>90</sup> to hold that *Ristaino* did not control.<sup>91</sup> Specifically, the Third Circuit stated:

[I]n *Ristaino*, the constitutional propriety of a *state* criminal proceeding was in question, and while the Court refused to rule that a *voir dire* question similar to the one at issue here was constitutionally mandated, it nevertheless made it clear that had it been reviewing a *federal* proceeding, in the exercise of its supervisory powers it would have required that the racial-bias question be asked 'if requested by the defendant.'<sup>92</sup>

The Third Circuit held that the trial court erred in disallowing *voir dire* inquiry into racial prejudice for two reasons. First, *Williams*, unlike *Ristaino*, arose in the federal court system.<sup>93</sup> Second, *Robinson* mandated a racial prejudice inquiry when requested at *voir dire*.<sup>94</sup>

The United States Supreme Court partially clarified the ambiguities arising from *Ristaino* and its incongruity with *Ham* in the 1981 decision of *Rosales-Lopez v. United States*.<sup>95</sup> As in *Ham* and *Ristaino*, *Rosales-Lopez* involved a non-capital charge. The defendant, who was of Mexican descent,<sup>96</sup> was convicted of illegally transport-

<sup>85</sup> *Bowles*, 574 F.2d at 972.

<sup>86</sup> *Id.*

<sup>87</sup> 612 F.2d 735 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

<sup>88</sup> *Id.* at 736.

<sup>89</sup> *Id.* The trial court during a motion for a new trial deemed relevant the fact that three jurors and one prosecution witness were black. *Id.*

<sup>90</sup> 485 F.2d 1157 (3d Cir. 1973). See *infra* note 202 for an analysis of *United States v. Robinson*.

<sup>91</sup> *Williams*, 612 F.2d at 736-37.

<sup>92</sup> *Id.* at 737 (quoting *Ristaino*, 424 U.S. at 597 n.9)(emphasis in original).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 736-37.

<sup>95</sup> 451 U.S. 182.

<sup>96</sup> *Id.* at 184.

ing Mexican aliens into the United States.<sup>97</sup> At trial, the court denied the defense counsel's request to inquire into the possible racial or ethnic prejudices of the prospective jurors.<sup>98</sup>

On appeal, the Supreme Court analyzed the doctrines emerging from *Ristaino* and *Ham* and applied them to the facts of *Rosales-Lopez*.<sup>99</sup> The Court distinguished *Ham* from *Ristaino*, arguing that issues of racial prejudice were inseparable from Ham's trial alone.<sup>100</sup> Therefore, only in *Ham* was it reversible error for the trial court to fail to examine the prospective jurors about potential racial biases.<sup>101</sup> When a case contains racial issues which are separable from the trial, as in *Ristaino*, then it is within the trial court's discretion to decide whether to require an inquiry into racial prejudice.<sup>102</sup> The Court, however, acknowledged the major concession made in footnote nine of *Ristaino* by stating that "[i]n the federal court system, we have indicated that under our supervisory authority over the federal courts, we would require that questions directed to the discovery of racial prejudice be asked in certain circumstances in which such inquiry is not constitutionally mandated."<sup>103</sup>

In affirming the defendant's conviction, the Court rejected the use of the cost-benefit approach to racial bias *voir dire* inquiry used by Chief Justice Hughes in *Aldridge*.<sup>104</sup> Chief Justice Hughes argued that the benefits of a more highly scrutinized jury panel far outweighed the potential costs of a longer *voir dire* process.<sup>105</sup> After

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<sup>97</sup> *Id.* at 184-85.

<sup>98</sup> *Id.* at 185. The denied *voir dire* inquiries were: "Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?" *Id.* Instead, the trial judge asked the prospective jurors more general questions about bias during the *voir dire*. *Id.* at 186-87. He stated at the beginning of the *voir dire*:

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.

*Id.* at 186. The other questions asked by the judge included: "Do any of you have any feelings about the alien problem at all?"; "Do any of you have any particular feeling 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?"; "Does any reason occur to you why you could not sit in this case as a fair and impartial juror, any reason whatsoever?" *Id.*

<sup>99</sup> *Id.* at 189-92.

<sup>100</sup> *Id.* at 189.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 190.

<sup>103</sup> *Id.* See *supra* notes 59-60 and accompanying text for an analysis of this concession made by the *Ristaino* majority.

<sup>104</sup> See *supra* note 15 and accompanying text for an analysis of this approach used by Chief Justice Hughes in *Aldridge*.

<sup>105</sup> *Id.*

discussing this approach, the Court said that the major concern should be "the appearance of justice in the federal courts."<sup>106</sup> The Court stated further that *voir dire* inquiry into racial prejudice does not need to be granted "where there is no rational possibility of racial prejudice. But since the courts are seeking to assure the appearance and reality of a fair trial, if the defendant claims a meaningful ethnic difference between himself and the victim, his *voir dire* request should ordinarily be satisfied."<sup>107</sup>

In *Rosales-Lopez*, the Supreme Court also analyzed rulings of various circuit courts.<sup>108</sup> The Court acknowledged a split between the circuit courts, with some courts adopting a *per se* rule<sup>109</sup>—"requiring reversal whenever the trial judge fails to ask a question on racial or ethnic prejudice requested by a defendant who is a member of a minority group"<sup>110</sup>—and other courts rejecting a *per se* rule—wherein "a trial judge is required to pose such a question only where there is some indication that the particular case is likely to have racial overtones or involve racial prejudice."<sup>111</sup>

The Supreme Court in *Rosales-Lopez* expressly rejected the *per se* rule in favor of a three-part standard implied from its earlier holdings in *Aldridge* and *Ristaino*.<sup>112</sup> The Court contended that inquiry into the possible prejudices of the prospective jurors is necessary: 1) "when requested by a defendant";<sup>113</sup> 2) when the defendant has been accused of a violent crime; and 3) when "the defendant and the victim are members of different racial or ethnic groups."<sup>114</sup>

<sup>106</sup> *Rosales-Lopez*, 451 U.S. at 190.

<sup>107</sup> *Id.* at 191 n.7.

<sup>108</sup> *Id.* at 187-88.

<sup>109</sup> See *supra* note 58 and accompanying text for the Court's opinion of the *per se* rule in *Ristaino*.

<sup>110</sup> *Rosales-Lopez*, 451 U.S. at 187. In the opinion of the *Rosales-Lopez* majority, the *per se* circuits are the Eighth, Third, Sixth, Fourth, and First Circuits. *Id.* at 187. Rulings reflecting the application of the *per se* rule include: *United States v. Bowles*, 574 F.2d 970 (8th Cir. 1978)(see *supra* notes 80-86 and accompanying text for an analysis of *Bowles*); *United States v. Robinson*, 485 F.2d 1157 (3d Cir. 1973)(see *infra* note 202 for an analysis of *Robinson*); *United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971)(see *supra* note 16 for an analysis of *Carter*); *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *Frasier v. United States*, 267 F.2d 62 (1st Cir. 1959).

<sup>111</sup> *Rosales-Lopez*, 451 U.S. at 187-88. In the opinion of the *Rosales-Lopez* majority, the non-*per se* circuits are the Tenth and Ninth Circuits. Rulings reflecting the rejection of the *per se* rule include: *United States v. Polk*, 550 F.2d 1265 (10th Cir.), *cert. denied*, 434 U.S. 838 (1977), and *United States v. Perez-Martinez*, 525 F.2d 365 (9th Cir. 1975). See also *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979)(see *infra* note 219 and accompanying text for an analysis of *Barnes*).

<sup>112</sup> *Rosales-Lopez*, 451 U.S. at 190, 192.

<sup>113</sup> *Id.* at 192.

<sup>114</sup> *Id.* The Court stated further:

There may be other circumstances which suggest the need for such an inquiry, but

In affirming the trial court's denial of *voir dire* inquiry into the racial or ethnic prejudices of the prospective jurors, the *Rosales-Lopez* Court focused on the fact that the defendant had never "argued that the matters at issue in his trial involved allegations of racial or ethnic prejudice . . . ." <sup>115</sup> The Court applied two parts of its espoused three-part standard <sup>116</sup> in pointing out that the alleged offense in *Rosales-Lopez* was not violent and did not involve a perpetrator and a victim of different races or ethnic groups. <sup>117</sup>

Justice Rehnquist, joined by Chief Justice Burger, concurred. <sup>118</sup> Justice Rehnquist interpreted the majority's three-part standard "as creating a *per se* rule requiring reversal of any criminal conviction involving a violent crime' between members of different racial or ethnic groups if the district court refused to *voir dire* on the issue of racial prejudice." <sup>119</sup> Justice Rehnquist was most disturbed by the Court's use of ambiguous terms such as "violent crime" and "different racial or ethnic groups." <sup>120</sup> Justice Rehnquist also stated that he would give more discretion to the trial court in determining the appropriateness of *voir dire* inquiry into racial prejudice. <sup>121</sup>

Justice Rehnquist concluded his opinion by implying that increases in judicial discretion may lead to more equitable results. <sup>122</sup>

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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.*

The Court fashioned a different standard in response to the question of when racial prejudice inquiries at *voir dire* should be required in cases involving non-violent crimes perpetrated by defendants on victims of the same racial or ethnic group. Using for support the denial of such inquiries in *Ristaino*, which involved a violent crime, the Court stated that "[o]nly 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." *Id.* at 190. The Court further explained this standard in stating that the defendant should make

the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued. Failure to honor his request, however, will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.

*Id.* at 191 (footnote omitted).

<sup>115</sup> *Id.* at 192. The Court in this statement seems to ignore the distinction between the existence of racial or ethnic prejudice during the commission of a crime and the presence of such prejudice during a trial.

<sup>116</sup> See *supra* notes 112-14 and accompanying text for an explanation of this three-part standard.

<sup>117</sup> *Rosales-Lopez*, 451 U.S. at 192.

<sup>118</sup> *Id.* at 194-95 (Rehnquist, J., concurring).

<sup>119</sup> *Id.* at 194 (Rehnquist, J., concurring).

<sup>120</sup> *Id.* at 194-95 (Rehnquist, J., concurring).

<sup>121</sup> *Id.* at 195 (Rehnquist, J., concurring).

<sup>122</sup> *Id.* (Rehnquist, J., concurring).

He stated that "[i]t seems to me quite conceivable that a thoroughly competent and fairminded district court judge could conclude that the asking of such questions, or the devotion of a substantial amount of time to the inquiry, could well exacerbate whatever prejudice might exist without substantially aiding in exposing it."<sup>123</sup>

Justice Stevens dissented in *Rosales-Lopez* and was joined by Justices Brennan and Marshall.<sup>124</sup> Following his rejection of the "special circumstances" approach used by the majority, Justice Stevens discussed the applicability of *Aldridge*.<sup>125</sup> Justice Stevens argued that the *Aldridge* result was strengthened by the fact that it was supported by decisions in state cases which arose prior to *Aldridge*.<sup>126</sup> Furthermore, *Aldridge* expressly applied to all races and ethnic groups, not just blacks.<sup>127</sup> As Justice Stevens noted, the *Aldridge* Court held that "[t]he right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character."<sup>128</sup>

### III. FACTS AND PROCEDURAL HISTORY OF *TURNER V. MURRAY*

Willie Lloyd Turner, a black man, entered a Franklin, Virginia jewelry store on July 12, 1978 with a sawed-off shotgun.<sup>129</sup> W. Jack Smith, Jr., the store's owner, another store employee, and two customers were present in the store when Turner entered.<sup>130</sup> Smith, a white man, set off a silent alarm as he gathered together the jewelry and money demanded by Turner.<sup>131</sup> The alarm signal was picked

<sup>123</sup> *Id.* (Rehnquist, J., concurring).

<sup>124</sup> *Id.* at 195-203 (Stevens, J., dissenting). Justice Stevens began his opinion with an attack on the majority's use of the *Ristaino* "special circumstances" test. *Id.* at 196 (Stevens, J., dissenting). Justice Stevens argued:

Before any citizen may be permitted to sit in judgment on his peers, some inquiry into his potential bias is essential. Such bias can arise from two principal sources: a special reaction to the facts of the particular case, or a special prejudice against the individual defendant that is unrelated to the particular case. Much as we wish it were otherwise, we should acknowledge the fact that there are many potential jurors who harbor strong prejudices against all members of certain racial, religious, or ethnic groups for no reason other than hostility to the group as a whole. 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.

*Id.* at 196-97 (Stevens, J., dissenting) (footnote omitted).

<sup>125</sup> *Id.* at 197-200 (Stevens, J., dissenting).

<sup>126</sup> *Id.* at 197-99 (Stevens, J., dissenting).

<sup>127</sup> *Id.* at 199-200 (Stevens, J., dissenting).

<sup>128</sup> *Id.* at 199 (Stevens, J., dissenting)(quoting *Aldridge*, 283 U.S. at 313).

<sup>129</sup> *Turner v. Murray*, 106 S. Ct. at 1684.

<sup>130</sup> *Id.* at 1685 n.1.

<sup>131</sup> *Id.* at 1684-85.

up by the police,<sup>132</sup> and, when Officer Alan Bain arrived at the jewelry store to investigate, he was disarmed by Turner.<sup>133</sup> Turner then fired a shot towards the rear of the store and threatened to shoot the store's occupants if any other police officers arrived.<sup>134</sup> Without warning, Turner shot Smith in the head after a police siren sounded.<sup>135</sup> Turner then shot Smith in the chest twice, killing him.<sup>136</sup> Bain subsequently disarmed Turner and placed him in custody.<sup>137</sup>

Turner was indicted on "charges of capital murder, use of a firearm in the commission of a murder, and possession of a sawed-off shotgun in the commission of a robbery."<sup>138</sup>

In preparation for the *voir dire*, Turner's counsel submitted several statements and questions to the trial judge, including: "The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?"<sup>139</sup> The judge refused to ask this question,<sup>140</sup> choosing less precise inquiries such as: "Do any of you know any reason whatsoever why you cannot render a fair and impartial verdict in this case, either for the defendant or for the Commonwealth of Virginia?"<sup>141</sup> When the

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<sup>132</sup> *Id.* at 1685.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* In response to the defense's objection to this refusal, the trial judge stated that a question into racial prejudice such as the one requested "has been ruled on by the Supreme Court. I'm not going to ask that." Petition for Certiorari, Joint Appendix, *Turner v. Sielaff*, No. 84-6646 (1985) (LEXIS, Genfed library, Briefs file).

<sup>141</sup> 106 S. Ct. at 1695 (Powell, J., dissenting). Other questions asked by the trial judge were:

Are you related by blood or marriage to either of the attorneys in this case, to the defendant or to the alleged victims, either Alan Bain or W. Jack Smith, Jr.? . . . Do you know anything about this case? . . . Are you related by blood or marriage to any person who is employed as a police officer or any other law enforcement agency? . . . Have you or any members of your family been a victim of any crime? . . . Do you have any religious or conscientious scruples or objections against the imposition of a sentence of death? . . . Do any of you know any reason whatsoever why you should not sit as a member of the jury in this case?

Petitioner's Reply Brief, *Turner v. Sielaff*, No. 84-6646 (November 25, 1985) (LEXIS, Genfed library, Briefs file).

Rule 24 of the Federal Rules of Criminal Procedure provides, in relevant part:

The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney

judge asked his questions, the prospective jurors were unaware that Smith was white.<sup>142</sup> The final jury, which consisted of eight whites and four blacks,<sup>143</sup> convicted Turner of all three charges.<sup>144</sup> In a separate hearing, the same jury recommended the death penalty for Turner,<sup>145</sup> and the trial judge accepted the jury's recommendation.<sup>146</sup>

Turner appealed his conviction and death sentence to the Virginia Supreme Court, which upheld the trial court's rulings.<sup>147</sup> The state supreme court cited its 1977 decision in *Lewis v. Common-*

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and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

FED. R. CRIM. P. 24(a). The two state statutes governing *voir dire* procedure which were in effect during Turner's trial give substantial discretion to the trial judge. Section 8.01-358 of the Code of Virginia provided:

The court and counsel for either party may examine under oath any person who is called as a juror therein and may ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

A juror, knowing anything relative to a fact in issue, shall disclose the same in an open court.

VA. CODE ANN. § 8.01-358 (1950) (amended 1977). Former Rule 3A:20 of the Code of Virginia, in effect at the time of Turner's trial, provided, in relevant part, the following guidelines for the conducting of *voir dire*:

(a) *Examination.* — After the prospective jurors are sworn on the *voir dire*, the court shall question them individually or collectively to determine whether anyone:

- (1) Is related by blood or marriage to the accused or to a person against whom the alleged offense was committed;
- (2) Is an officer, director, agent or employee of the accused;
- (3) Has any interest in the trial or the outcome of the case;
- (4) Has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect his impartiality in the case;
- (5) Has expressed or formed any opinion as to the guilt or innocence of the accused;
- (6) Has a bias or prejudice against the Commonwealth or the accused; or
- (7) Has any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

Thereafter, the court, or counsel with permission of the court, may examine on oath any prospective juror or may ask any question relevant to his qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

VA. CODE ANN. § 3A.20(a) (1972) (amended 1979).

<sup>142</sup> *Turner*, 106 S. Ct. at 1685.

<sup>143</sup> *Id.* The foreman of the jury was black. *Id.* at 1695 (Powell, J., dissenting).

<sup>144</sup> *Id.* at 1685; see *supra* note 138 and accompanying text for a list of the three charges against Turner.

<sup>145</sup> 106 S. Ct. at 1685. See *infra* notes 168-73 and accompanying text for an analysis and the language of the statutes enabling the jury to sentence Turner to death.

<sup>146</sup> 106 S. Ct. at 1685.

<sup>147</sup> *Turner v. Commonwealth*, 221 Va. 513, 531, 273 S.E.2d 36, 48 (1980).

*wealth*<sup>148</sup> which established the rule that "[t]he mere fact that a defendant is black and that a victim is white does not constitutionally mandate" an inquiry into the potential racial biases of the prospective jurors.<sup>149</sup> The court also concluded that no abuse of the large amount of discretion given to the trial judge occurred during Turner's trial.<sup>150</sup> The United States Supreme Court denied the resulting petition for a writ of certiorari.<sup>151</sup>

Turner filed a writ of habeas corpus on July 27, 1983 in the United States District Court for the Eastern District of Virginia.<sup>152</sup> The subsequent denial of habeas corpus relief was appealed to the United States Court of Appeals for the Fourth Circuit following the district court's issuance of a certificate of probable cause.<sup>153</sup>

The Fourth Circuit denied Turner's habeas corpus petition in *Turner v. Bass*.<sup>154</sup> The circuit court interpreted the post-*Ristaino* standard as stating that "voir dire on racial prejudice was not constitutionally mandated."<sup>155</sup> The court rejected Turner's arguments that *Ham* mandated *voir dire* inquiry into racial prejudice when special circumstances exist and that such circumstances existed since

<sup>148</sup> 218 Va. 31, 35-36, 235 S.E.2d 320, 323 (1977).

<sup>149</sup> *Turner v. Commonwealth*, 221 Va. at 523, 273 S.E.2d at 42.

<sup>150</sup> *Id.*, 273 S.E.2d at 42. The Virginia Supreme Court stated:

With the exception of seven questions, all of which were asked in this case, Rule 3A:20(a) makes voir dire questioning entirely discretionary with the trial court. Unless the refusal to ask a question amounts to a denial of due process or otherwise impinges upon the right to a fair and impartial jury, the present wording of Code § 8.01-358 and Rule 3A:20(a) empowers a trial court to use its discretion in determining whether to ask questions proposed by either the Commonwealth or the defendant.

*Id.*, 273 S.E.2d at 42 (citation omitted).

<sup>151</sup> 106 S. Ct. at 1693 n.1 (Powell, J., dissenting). The denial of certiorari is located at 451 U.S. 1011 (1981). It is interesting to note that Justice White failed to mention this earlier certiorari denial in the majority and plurality opinions. In a footnote outlining the procedural history of *Turner*, Justice Powell mentioned this certiorari denial in his dissenting opinion. 106 S. Ct. at 1693 n.1 (Powell, J., dissenting).

<sup>152</sup> *Turner v. Bass*, 753 F.2d 342, 344 (4th Cir. 1985). This petition was amended but still denied in May of 1984. *Id.* The subsequent motion to alter or amend the judgment was denied two months later. *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 354.

<sup>155</sup> *Id.* at 345. The court stated further that the United States Supreme Court in *Ristaino* "concluded that the mere fact that the victim was white and the defendant was black was less likely to distort the trial than were the special factors present in *Ham*." *Id.* Furthermore, *Ristaino* represented a refusal by the Supreme Court "to create a per se rule requiring voir dire on racial prejudice in any case where the defendant is of a different race from the victim." *Id.*

The Fourth Circuit also analyzed *Rosales-Lopez* as support for their decision in *Turner v. Bass* that the interracial nature of a crime alone is not sufficient to mandate *voir dire* inquiry into the racial prejudices of the prospective jurors. *Id.* Instead, the trial court should analyze the probability of whether the jurors in a specific case will be racially or ethnically prejudiced. *Id.*

the charge was capital murder.<sup>156</sup> Turner also contended that a defendant convicted of murdering a white person receives the death penalty with more frequency, "and therefore a special circumstance is created by this likelihood."<sup>157</sup> In response, the Fourth Circuit stated:

We are of opinion that the nature of the crime or punishment itself is not a special circumstance. Nor is the fact that the victim is white and the defendant black, as *Ristaino* specifically so held. We are also of opinion that the fact that a larger percentage of white victims' assailants are executed than are other races is not a special circumstance.<sup>158</sup>

Judge Phillips specially concurred in the court's holding.<sup>159</sup> While he expressly agreed with the result, Phillips disagreed strongly with the majority's refusal to delineate as "special circumstances" conditions which would have enabled Turner to demand *voir dire* questioning into the possible racial biases of the potential jurors.<sup>160</sup> Phillips concluded that "not only specific racial issues in the particular case but a demonstrated likelihood of racial prejudice affecting the particular jury, irrespective of specific issues, may invoke the constitutional right"<sup>161</sup> to question prospective jurors about their potential racial biases.<sup>162</sup> Furthermore, Phillips indicated that "scientifically sound statistical evidence related to community attitudes as reflected in jury performance in sufficient samples of comparable cases" could be useful.<sup>163</sup>

#### IV. THE SUPREME COURT OPINIONS

A bitterly divided Court decided *Turner v. Murray*. Justice White wrote the Court's majority and plurality opinions, with which Chief Justice Burger concurred.<sup>164</sup> Justices Brennan and Marshall each wrote a separate opinion, concurring in part and dissenting in part. Justice Powell, joined by Justice Rehnquist, dissented.

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* See *supra* note 3 for references to studies directed to the high percentage of blacks receiving the death penalty.

<sup>158</sup> 753 F.2d at 345.

<sup>159</sup> *Id.* at 354-55 (Phillips, J., concurring).

<sup>160</sup> *Id.* (Phillips, J., concurring).

<sup>161</sup> *Id.* at 355 (Phillips, J., concurring).

<sup>162</sup> *Id.* (Phillips, J., concurring).

<sup>163</sup> *Id.* (Phillips, J., concurring).

<sup>164</sup> Justices Blackmun, O'Connor, Stevens, and White constituted a plurality in two parts of the Court's opinion. Justice Brennan's vote in the remaining two parts of the opinion gave the Court an actual majority.

## A. THE MAJORITY AND PLURALITY OPINIONS

The Court stated that it granted certiorari to analyze the Fourth Circuit's holding that no constitutional guarantee of a *voir dire* inquiry into the potential racial prejudices of the prospective jurors existed at Turner's trial.<sup>165</sup> The Court began its analysis by reviewing the *Ristaino* standard: that a black defendant accused of an interracial crime is not necessarily guaranteed *voir dire* inquiry into the racial prejudices of the prospective jurors.<sup>166</sup> The Court distinguished *Ristaino* from *Turner* by focusing on the fact that, unlike the defendant in *Ristaino*, Turner was accused of a capital offense.<sup>167</sup>

The Court also discussed the substantial amount of discretion given to capital sentencing juries under Virginia law.<sup>168</sup> By statute, Virginia courts must comply with a three-step process prior to giving a death sentence.<sup>169</sup> First, the jury must find a "probability"<sup>170</sup> that the defendant will continue to commit crimes of violence or that the defendant's conduct in the crime at issue was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."<sup>171</sup> Second, the jury must analyze all evidence offered by the defendant as possible mitigation of the crime.<sup>172</sup> Finally, the jury must recommend

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<sup>165</sup> 106 S. Ct. at 1686.

<sup>166</sup> *Id.* at 1686-87. See *supra* notes 47-62 and accompanying text for a discussion of *Ristaino v. Ross*.

<sup>167</sup> 106 S. Ct. at 1687.

<sup>168</sup> The cited statutes are from the Annotated Code of Virginia. Section 19.2-264.2 states:

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

VA. CODE ANN. § 19.2-264.2 (1983). Section 19.2-264.4(B) states, in relevant part:

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include . . . [the fact that] at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. . . .

*Id.* at § 19.2-264.4(B) (1983).

<sup>169</sup> 106 S. Ct. at 1687.

<sup>170</sup> Va. Code Ann. § 19.2-264.2.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at § 19.2-264.4.

the death sentence in order for it to be imposed.<sup>173</sup>

The Court viewed this three-step process—which appeared to establish conditions making it more difficult to impose the death penalty—as “a unique opportunity for racial prejudice to operate but remain undetected.”<sup>174</sup> The first step of the process could be affected by the fact that “a juror who believes that blacks are violence-prone or morally inferior”<sup>175</sup> may too easily find the relevant aggravating factors present in the defendant’s actions.<sup>176</sup> Second, a biased juror could be less willing to accept the mitigating evidence offered by the defendant.<sup>177</sup> Finally, the Court acknowledged that “[f]ear of blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.”<sup>178</sup> The plurality qualified its impressions, however, by stating that the Court did “not retreat from [its] holding in *Ristaino*. The fact of interracial violence alone is not a special circumstance’ entitling the defendant to have prospective jurors questioned about racial prejudice.”<sup>179</sup>

The Court focused on the presence of two factors—its perception of potentially unbridled juror discretion and “the complete finality of the death sentence”<sup>180</sup>—to find “the risk that racial prejudice may have infected petitioner’s capital sentencing unacceptable in light of the ease with which that risk could have been minimized.”<sup>181</sup> As a result, the Court held that the trial judge’s refusal to inquire into the potential racial biases of the prospective jurors resulted in a failure “to adequately protect petitioner’s constitutional right to an impartial jury.”<sup>182</sup>

The majority held that “a capital defendant accused of an inter-

<sup>173</sup> *Id.* at § 19.2-264.2. But see *infra* notes 215-17 and accompanying text for Justice Powell’s interpretation of these statutes.

<sup>174</sup> 106 S. Ct. at 1687.

<sup>175</sup> *Id.* Such prejudices could also affect the following two steps of the death sentencing process.

<sup>176</sup> *Id.* These aggravating factors arise if the defendant’s “conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.” VA. CODE ANN. § 19.2-264.2(1).

<sup>177</sup> 106 S. Ct. at 1687. See *supra* notes 168 & 172 and accompanying text for the statutory basis of this requirement.

<sup>178</sup> 106 S. Ct. at 1687. See *supra* notes 168 & 173 and accompanying text for the statutory basis of this requirement.

<sup>179</sup> 106 S. Ct. at 1687 n.7. See *supra* notes 47-62 and accompanying text for a discussion of *Ristaino*.

<sup>180</sup> 106 S. Ct. at 1688.

<sup>181</sup> *Id.* (footnote omitted). This language is very similar to that of Chief Justice Hughes in *Aldridge* fifty years earlier. See *supra* text accompanying note 15.

<sup>182</sup> 106 S. Ct. at 1688 (footnote omitted).

racial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.”<sup>183</sup> The Court placed two limitations on the application of this rule. First, the Court, embracing *Ham*,<sup>184</sup> gave the trial judge “discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively.”<sup>185</sup> Second, the Court expressly placed the burden of requesting such a *voir dire* inquiry on the defendant.<sup>186</sup>

The Court, acting in plurality, next applied its holding to the specific facts in *Turner*.<sup>187</sup> Due to “[t]he inadequacy of *voir dire*”<sup>188</sup> at trial, the Court vacated Turner’s death sentence.<sup>189</sup> This inadequate *voir dire* resulted in “an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*.”<sup>190</sup> In reaching this conclusion, the Court analyzed three elements of Turner’s case:<sup>191</sup> (1) the interracial and violent nature of the crime in question; (2) the large amount of jury discretion under the Virginia death penalty statutes; and (3) “the special seriousness of the risk of improper sentencing in a capital case.”<sup>192</sup>

The Court did not, however, vacate the jury’s conviction of Turner.<sup>193</sup> Citing *Ristaino* as support, the Court concluded that “[at] the guilt phase of petitioner’s trial, the jury had no greater discretion than it would have had if the crime charged had been non-capital murder.”<sup>194</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> 409 U.S. 524.

<sup>185</sup> 106 S. Ct. at 1688.

<sup>186</sup> *Id.* The Court reiterated this condition in a connected footnote, stating that “[s]hould defendant’s counsel decline to request *voir dire* on the subject of racial prejudice, we in no way require or suggest that the judge broach the topic *sua sponte*.” *Id.* at n.10.

<sup>187</sup> *Id.* at 1688-89.

<sup>188</sup> *Id.* at 1688.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* (emphasis in original).

<sup>191</sup> *Id.* at 1689.

<sup>192</sup> *Id.* The Court carefully qualified the scope of its inquiry into the third element, noting that “[we] find it unnecessary to evaluate the statistical studies which petitioner has introduced in support of the proposition that black defendants who kill whites are executed with disproportionate frequency.” *Id.* at n.11.

<sup>193</sup> *Id.* at 1688-89.

<sup>194</sup> *Id.* at 1689. It is important to analyze two footnotes in the Court’s opinion which seek to explain the reasoning behind the plurality’s affirmation of the trial court’s finding of guilt. In response to Justice Brennan’s arguments in his partial concurrence, partial dissent, *see infra* notes 200-03 and accompanying text, Justice White wrote that

[w]e are unpersuaded by Justice Brennan’s view that “the opportunity for racial prejudice to taint the jury process is . . . equally a factor at the guilt [and sentencing] phase[s] of a bifurcated capital trial . . . .” As we see it, the risk of racial bias at sentencing hearings is of an entirely different order, because the decisions that sen-

## B. JUSTICE BRENNAN'S PARTIAL CONCURRENCE, PARTIAL DISSENT

Justice Brennan agreed with the Court's holding that Turner's death sentence should be vacated.<sup>195</sup> He conditioned his agreement, however, by arguing for a more inclusive standard as to when *voir dire* questioning into the racial prejudices of the prospective jurors should occur.<sup>196</sup> Justice Brennan, relying on Justice Marshall's dissent in the 1973 *Ross v. Massachusetts* certiorari denial, argued that *voir dire* inquiry into possible racial biases should be guaranteed "whenever a violent interracial crime has been committed."<sup>197</sup> In contrast, the *Turner* majority held that such an inquiry is appropriate only in a situation involving "a capital defendant accused of an interracial crime."<sup>198</sup> Justice Brennan justified his inclusion of non-capital defendants accused of interracial crimes in stating:

The reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent.<sup>199</sup>

Justice Brennan argued further that the Court should vacate

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tencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence.

106 S. Ct. at n.12 (quoting *id.* at 1691 (Brennan, J., concurring in part, dissenting in part)).

In Part Two of the Court's opinion, the plurality responded to the dissent, noting:

Notwithstanding Justice Powell's attempt to minimize the significance of the discretion entrusted to the jury at a capital sentencing hearing, . . . we are convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding. This, together with the special seriousness with which we view the risk of racial prejudice influencing a capital sentencing decision, are what distinguish this case from *Ristaino*.

*Id.* at 1688 n.8; see *infra* notes 214-17 and accompanying text for an analysis of Justice Powell's arguments to the contrary.

<sup>195</sup> 106 S. Ct. at 1689 (Brennan, J., concurring in part, dissenting in part). Accordingly, Justice Brennan stated his belief that the death sentence qualifies as cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Id.* (Brennan, J., concurring in part, dissenting in part). The eighth amendment to the Constitution states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The fourteenth amendment, in relevant part, states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

<sup>196</sup> 106 S. Ct. at 1689 (Brennan, J., concurring in part and dissenting in part).

<sup>197</sup> *Id.* (Brennan, J., concurring in part, dissenting in part); see *supra* notes 44-46 and accompanying text for an analysis of Justice Marshall's dissent in the *Ross v. Massachusetts* certiorari denial.

<sup>198</sup> 106 S. Ct. at 1688.

<sup>199</sup> *Id.* at 1689 (Brennan, J., concurring in part and dissenting in part). See *supra* notes

Turner's conviction.<sup>200</sup> Relying on the plurality's warnings of the dangers of racially biased jurors in capital sentencing hearings,<sup>201</sup> Justice Brennan stated that "the Court never explains why these biases should be of less concern at the guilt phase than at the sentencing phase."<sup>202</sup> Justice Brennan further challenged the plurality by stating that:

[a] racially biased juror sits with blurred vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make in the course of a trial. To put it simply, he cannot judge because he has prejudged. This is equally true at the trial on guilt as at the hearing on sentencing.<sup>203</sup>

#### C. JUSTICE MARSHALL'S PARTIAL CONCURRENCE, PARTIAL DISSENT

Justice Marshall, joined by Justice Brennan, also concurred in

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44-46 and accompanying text for an analysis of the similar language used by Justice Marshall in his dissenting opinion in the *Ross v. Massachusetts* certiorari denial.

<sup>200</sup> 106 S. Ct. at 1691 (Brennan, J., concurring in part and dissenting in part). In reaching this conclusion, Justice Brennan stated that "the Court disavows the logic of its own reasoning in denying petitioner Turner a new trial on the issue of his guilt." *Id.* at 1690 (Brennan, J., concurring in part, dissenting in part). Furthermore, Justice Brennan argued that "the distinction between the jury's role at a guilt trial and its role at a sentencing hearing is a distinction without substance in so far as juror bias is concerned . . . ." *Id.* (Brennan, J., concurring in part, dissenting in part).

<sup>201</sup> *Id.* at 1691 (Brennan, J., concurring in part, dissenting in part). See *supra* notes 174-78 and accompanying text for the plurality's language.

<sup>202</sup> 106 S. Ct. at 1691 (Brennan, J., concurring in part and dissenting in part). Justice Brennan furthered his argument by asking the plurality the following rhetorical questions:

[M]ight not [a racially prejudiced] juror be influenced by those same prejudices in deciding whether, for example, to credit or discredit white witnesses as opposed to black witnesses at the guilt phase? Might not those same racial fears that would incline a juror to favor death not also incline a juror to favor conviction? . . . Does the Court really mean to suggest that the constitutional entitlement to an impartial jury attaches only at the sentencing phase? Does the Court really believe that racial biases are turned on and off in the course of one criminal prosecution?

*Id.* at 1691-92 (Brennan, J., concurring in part, dissenting in part).

The Third Circuit in *United States v. Robinson* also addressed the critical importance of an unbiased jury throughout the trial process. 485 F.2d 1157. The *Robinson* defendant, who was black, was accused of failing to comply with the requirements of the 1967 Selective Service Act. *Id.* at 1158. The trial judge refused to allow defense counsel to ask the prospective jurors whether they would give equal credibility to witnesses of different races. *Id.* The Third Circuit found this refusal in error, stating:

The government contends that *Aldridge* and *Ham* are not controlling in this case because the specific question suggested by counsel dealt with credibility of witnesses based upon their race rather than with prejudice against the defendant as such based upon his race. Aside from the fact that the district court's reaction to the question effectively put an end to any exploration of the area of racial prejudice, we think any such fine distinction between prejudice against witnesses based upon race and prejudice against the defendant based upon race would be pettifoggish.

*Id.* at 1159.

<sup>203</sup> 106 S. Ct. at 1691 (Brennan, J., concurring in part and dissenting in part).

the Court's vacating of Turner's death sentence and dissented from the decision to affirm the jury's conviction.<sup>204</sup>

In analyzing the internal conflicts of the *Turner* plurality's holding, Justice Marshall focused on the actual application of the Court's decision. Specifically, he noted that post-*Turner* defendants accused of interracial capital crimes will be entitled to demand *voir dire* questioning into the potential racial biases of the jury panel members.<sup>205</sup> If the same jury rules on conviction and sentencing, then the probability of a racially unbiased jury throughout the entire proceeding increases.<sup>206</sup> This guarantee of a bias-free jury was not applied in *Turner*, however, since the Court chose to vacate only Turner's death sentence,<sup>207</sup> and Turner's conviction, which was decided by a possibly racially biased jury, was affirmed.<sup>208</sup> As a result, Justice Marshall concluded that the *Turner* result is "incongruous and fundamentally unfair."<sup>209</sup>

#### D. THE DISSENTING OPINION

Justice Powell, joined by Justice Rehnquist, dissented in *Turner v. Murray*.<sup>210</sup> Justice Powell criticized the majority's decision to allow capital defendants charged with interracial crimes "to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."<sup>211</sup> Justice Powell argued that such a result was "certain to add to the already heavy burden of habeas petitions filed by prisoners under sentence of death without affording any real protection beyond that provided by our decisions in *Ham v. South Carolina* . . . and *Ristaino v. Ross*."<sup>212</sup> Justice Powell further stated that *Turner* represented a significant departure from *Ham*, *Ristaino*, and *Rosales-Lopez*.<sup>213</sup>

The dissent viewed the *Turner* holding as creating a *per se* rule

<sup>204</sup> *Id.* at 1693 (Marshall, J., concurring in part and dissenting in part).

<sup>205</sup> *Id.* (Marshall, J., concurring in part and dissenting in part).

<sup>206</sup> *Id.* (Marshall, J., concurring in part and dissenting in part).

<sup>207</sup> *Id.* (Marshall, J., concurring in part and dissenting in part).

<sup>208</sup> *Id.* (Marshall, J., concurring in part and dissenting in part).

<sup>209</sup> *Id.* (Marshall, J., concurring in part and dissenting in part).

<sup>210</sup> *Id.* at 1693-97 (Powell, J., dissenting).

<sup>211</sup> *Id.* at 1693 (Powell, J., dissenting) (quoting the majority opinion, *id.* at 1688).

<sup>212</sup> *Id.* at 1693 (Powell, J., dissenting) (footnote omitted) (citation omitted).

<sup>213</sup> *Id.* at 1697 (Powell, J., dissenting). Though little explanation is offered by Justice Powell in regards to the Court's departure from its ruling in *Ham*, he wrote:

The decision today cannot be reconciled with the reasoning of *Ristaino* and *Rosales-Lopez* in which we expressly held that the Constitution does not require *voir dire* questioning on racial bias unless the defendant proves additional circumstances beyond the fact that the case involves an interracial crime. Moreover, those two cases rejected any constitutional presumption that jurors are racially biased.

*Id.* at 1697 n.10 (Powell, J., dissenting).

which was unacceptable in light of what Justice Powell viewed as the minimal amount of discretion exercised by jurors in the sentencing process.<sup>214</sup> Referring to the same state statutes which the plurality used to highlight the large amount of juror discretion allowed in Virginia,<sup>215</sup> as well as another statute not mentioned in the majority or plurality opinions,<sup>216</sup> Justice Powell stated that such "significant limitations on the jury's exercise of sentencing discretion illustrates why the Court's *per se* rule is wholly unfounded."<sup>217</sup>

Justice Powell also embraced the reasoning, though not the result, of Justice Brennan's attack on the plurality's double standard in vacating only Turner's death sentence and not his conviction.<sup>218</sup> Justice Powell stated that

[j]ust as there is no reason to presume racial bias on the part of jurors who determine the guilt of a defendant who has committed a violent crime against a person of another race, there is no reason to constitutionalize such a presumption with respect to the jurors who sit to recommend the penalty in a capital case.<sup>219</sup>

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<sup>214</sup> *Id.* at 1693, 1695-97 (Powell, J., dissenting).

<sup>215</sup> *Id.* at 1696 (Powell, J., dissenting). See *supra* notes 168-73 and accompanying text for an explication of statutes.

<sup>216</sup> Va. Code Ann. § 18.2-31 (1982). This statute states, in relevant part: "The following offenses shall constitute capital murder, punishable as a Class I felony: . . . (d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon." *Id.*

<sup>217</sup> 106 S. Ct. at 1696 (Powell, J., dissenting). Justice Powell analyzed the statutes as follows:

Under Virginia law, murder is a capital offense only if it is "willful, deliberate and premeditated" and is committed while the perpetrator is engaged in another crime or under specified aggravating circumstances. VA. CODE § 18.2-31 (1982). As in any criminal prosecution, of course, the State carries the burden of proving all elements of the capital offense beyond a reasonable doubt. Following a sentencing hearing, the death sentence may not be imposed unless the State proves beyond a reasonable doubt statutorily defined aggravating factors. Virginia law recognizes only two aggravating factors: whether, based on the defendant's criminal record, there is a probability that he would commit future crimes of violence, and whether the defendant's crime was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." VA. CODE §§ 19.2-264.2, 19.2-264.4 (1983). The jury also is required to consider any relevant mitigating evidence offered by the defendant.

. . . Just as the trial judge's charge at the guilt phase instructs the jurors that they may consider only the evidence in the case and that they must determine if the prosecution has established each element of the crime beyond a reasonable doubt, the charge at the penalty phase directs the jurors to focus solely on considerations relevant to determination of appropriate punishment and to decide if the prosecution has established beyond a reasonable doubt factors warranting imposition of death.

*Id.* at 1696 (Powell, J., dissenting).

<sup>218</sup> *Id.* (Powell, J., dissenting). See *supra* notes 200-03 and accompanying text for an analysis of Justice Brennan's reasoning.

<sup>219</sup> 106 S. Ct. at 1696 (Powell, J., dissenting). The Second Circuit expressed similar frustration in *United States v. Barnes* in response to the defendant's objection to the trial judge's refusal to allow *voir dire* inquiry into the prospective jurors' religions, identi-

The dissenting Justices also focused on the actual trial proceedings in *Turner*, concluding that the potential racial biases of the prospective jurors were not at issue.<sup>220</sup> Justice Powell found two facts significant in reaching this conclusion. First, he focused on the importance of the fact that the twelve person jury consisted of four blacks, one of whom served as foreman.<sup>221</sup> Second, he emphasized that the statistical evidence presented by defense counsel did not contain specific data for the state of Virginia.<sup>222</sup> This data asserted that more black defendants accused of murdering whites are sentenced to death than are non-white capital defendants.<sup>223</sup>

Thus, by looking at the result of the majority's decision and disregarding its reasoning, Justice Powell concluded that "the [*Turner*] rule is based on what amounts to a constitutional presumption that jurors in capital cases are racially biased."<sup>224</sup>

## V. ANALYSIS.

The United States Supreme Court's decision in *Turner v. Murray* represents a severe undermining of *Ristaino*. The Court established a *per se* rule for post-*Turner* capital defendants accused of interracial crimes which guarantees *voir dire* examination into the racial biases of the prospective jurors when requested.<sup>225</sup> The creation of such a *per se* rule directly counters the *Ristaino* Court's belief that "[i]n our heterogeneous society, policy as well as constitutional considera-

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ties, and ethnicity. 604 F.2d 121, 133-40 (2d Cir. 1979). The *Barnes* defendants were accused of narcotics violations. *Id.* at 130. In approving the trial court's conduct of *voir dire* as reflecting the large amount of discretion granted trial judges, the court stated:

It is not, after all, the prospective jurors who are on trial in the cases that come before the courts. It can be imagined that, as counsel seek more and more information to aid in filling the jury box with persons of a particular type whom they believe to be well disposed toward their clients, prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed.

*Id.* at 140.

<sup>220</sup> 106 S. Ct. at 1694-97 (Powell, J., dissenting). Justice Powell summarized this view, stating that "[t]here is nothing in the record of this trial that reflects racial overtones of any kind." *Id.* at 1695 (Powell, J., dissenting).

<sup>221</sup> *Id.* (Powell, J., dissenting). In contrast, the Seventh Circuit in the 1973 case of *United States v. Booker*, 480 F.2d 1310 (7th Cir. 1973), found irrelevant the fact that the jury which convicted a black defendant of violating a federal narcotics law consisted of seven white jurors and five black jurors. The court stated: "We think it equally plain that the presence of some black jurors does not cure the errors committed during the *voir dire*. For if even one member of the jury harbors racial prejudice against the accused, his right to trial by an impartial jury is impaired." *Id.* at 1311.

<sup>222</sup> 106 S. Ct. at 1695 (Powell, J. dissenting).

<sup>223</sup> *Id.* at 1694-95 (Powell, J., dissenting).

<sup>224</sup> *Id.* at 1697 (Powell, J., dissenting).

<sup>225</sup> *Id.* at 1688.

tions militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin . . . .”<sup>226</sup> In establishing the new rule, the Court acknowledged the fact that racial prejudice may affect the constitutional guarantee of an impartial jury.<sup>227</sup> The Court’s limited standard, furthermore, resembles the *Aldridge* Court’s heightened concern with protecting the sixth amendment rights of capital defendants.<sup>228</sup>

The Court, however, refused to delineate race as a “special circumstance” which unconditionally guarantees *voir dire* inquiry into racial prejudice.<sup>229</sup> Such a refusal is reflected in the Court’s limited application of its *per se* rule to defendants accused of interracial capital offenses. No application of the espoused *per se* inquiry into racial bias was mandated in cases of non-capital interracial crimes, such as interracial rape, which has traditionally evoked such prejudice.<sup>230</sup> Furthermore, the limited holding does not encompass either intraracial capital crimes or intraracial non-capital crimes where the racial bias of a white juror towards a black defendant could remain unaffected regardless of the fact that the victim is black.

In addition to its very limited scope, another major downfall of the *Turner* holding is its inconsistent application. All post-*Turner* defendants accused of interracial capital crimes are guaranteed *voir dire* examination into the potential racial biases of prospective jurors if they so request. *Turner*, however, did not receive this guarantee since the Court refused to vacate his conviction. The plurality seemingly ignored the fact that the same potentially racially biased jury which sentenced *Turner* to die had also found him guilty of capital murder. Justice White attempted to use the large amount of statutorily granted juror discretion in the sentencing phase to argue that racial bias was more likely in *Turner*’s sentencing procedure than during the conviction phase of his trial.<sup>231</sup> True racial prejudice, however, could easily withstand the smallest grant of juror dis-

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<sup>226</sup> *Ristaino*, 424 U.S. at 596 n.8 (citation omitted). The value of statistical data showing the inordinate numbers of black defendants executed each year remains unknown after *Turner*, since the Supreme Court chose not to address this issue.

<sup>227</sup> Justice White wrote that “[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.” *Turner*, 106 S. Ct. at 1687.

<sup>228</sup> *Aldridge*, 283 U.S. at 314. See *supra* notes 11-20 and accompanying text for an analysis of *Aldridge*.

<sup>229</sup> See *supra* notes 52-58 and accompanying text for a comparison of the Court’s use of race as a “special circumstance” in *Ham* and *Ristaino*.

<sup>230</sup> See *supra* notes 63-73 and accompanying text for an analysis of *Dukes v. Waitkevich*, an interracial rape case which was denied certiorari by a split Supreme Court in 1976.

<sup>231</sup> *Turner*, 106 S. Ct. at 1687-88.

cretion allowed by law, especially when such biases remain wholly unchallenged during the *voir dire*. Therefore, it is direct questioning, rather than an institutional reliance on statutorily limited juror discretion, which will produce racially unbiased juries.

The *Turner* Court followed the *United States v. Booker* rule of ignoring the racial make-up of the jury in determining whether racial prejudice actually affected *Turner's* trial proceedings.<sup>232</sup> It is apparent, therefore, that the sixth amendment guarantee of an impartial jury does not include the right to have jurors from the same racial or ethnic group as the defendant on the jury panel.<sup>233</sup>

Post-*Turner* trial judges continue to have substantial discretion in cases involving interracial capital crimes. The *Turner* Court refused to place limitations on the number of questions about racial prejudice that the prospective jurors should be asked, the wording of such questions, and whether such inquiries should be made on a collective or an individual basis.<sup>234</sup> This large amount of discretion will enable trial judges to limit dramatically the scope of *voir dire* inquiry into racial prejudice in all interracial capital cases.<sup>235</sup> Since the *per se* inquiry required by *Turner* is limited to defendants accused of interracial capital crimes, even less protection from the trial judge's discretion will be provided for non-capital defendants and intraracial capital defendants.

Additionally, the *Turner* Court directly undermined its 1981 decision in *Rosales-Lopez* by altering one portion of the three-part standard announced in that case.<sup>236</sup> After *Turner*, a defendant must still request *voir dire* inquiry into racial prejudice and must also be accused of an interracial crime to be guaranteed such inquiry.<sup>237</sup> The defendant, however, must now be accused of a capital offense, not just a violent crime, as required in *Rosales-Lopez*.<sup>238</sup> Justice Rehnquist forecasted this distinction in his *Rosales-Lopez* concurrence.<sup>239</sup>

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<sup>232</sup> See *supra* note 221 for an analysis of *Booker*.

<sup>233</sup> *Lockhart v. McCree*, 106 S. Ct. 1758, 1764-65 (1986); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

<sup>234</sup> 106 S. Ct. at 1688.

<sup>235</sup> A single inquiry asked by the trial judge to the prospective jurors collectively as to whether any of them would be prejudiced in any way against a black defendant would scarcely elicit a response from even the most overt racist. Yet, such a minimal inquiry would be permissible in interracial capital cases after *Turner*.

<sup>236</sup> See *supra* notes 112-14 and accompanying text for a discussion of this three-part standard in *Rosales-Lopez*.

<sup>237</sup> These conditions fulfill the first and third parts of the *Rosales-Lopez* standard. See *supra* notes 112-14 and accompanying text.

<sup>238</sup> See *supra* notes 112-14 and accompanying text.

<sup>239</sup> See *supra* notes 119-20 and accompanying text for an analysis of Justice Rehnquist's opinion on this issue.

The resulting *Turner* standard will effectively eliminate the right of defendants who are accused of interracial crimes which are violent, but not capital, to demand *voir dire* inquiry into the racial biases of the prospective jurors. Furthermore, no protection from juror bias is afforded black defendants accused of intraracial capital or intraracial non-capital offenses. Such a result will protect the constitutional guarantee of an impartial jury only if it can be shown that a white juror who would be racially prejudiced against a black defendant accused of an interracial capital offense would not also harbor a similar bias against the same black defendant accused of an interracial non-capital offense or an intraracial capital or non-capital offense.

## VI. CONCLUSION

The *per se* rule established by *Turner* is wholly inadequate to guarantee an impartial jury for defendants who are not protected by the decision's limited scope. The Supreme Court's narrow holding implies that only defendants accused of interracial capital crimes deserve sixth amendment protection. In turn, the racial prejudices affecting the juries at the trials of defendants accused of interracial non-capital crimes and all intraracial crimes remain unchallenged.

It cannot be effectively argued that less potential for a racially prejudiced jury exists in crimes not covered by the *Turner* decision. The Court implies, however, that the results of a trial affected by racial prejudice will be less severe in a case other than one involving an interracial capital crime. Yet, as Chief Justice Hughes stated fifty-five years prior to the *Turner* decision, if the jurors "were found to be impartial, no harm would be done in permitting the question; 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."<sup>240</sup>

The finality of the death penalty demands that heightened care be exercised to guarantee a fair trial for capital defendants. Yet, an established mandate is necessary to guarantee the existence of an impartial jury for each defendant whose sixth amendment guarantee of a fair trial will be superseded by jurors whose racial prejudices remain unchallenged.

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<sup>240</sup> *Aldridge*, 283 U.S. at 314.