
I. Introduction

In the recent decision of Ristaino v. Ross the United States Supreme Court was called upon to clarify and delineate the scope of Ham v. South Carolina, in which the Court held that the due process clause of the fourteenth amendment required that the black defendant in Ham be allowed to have the voir dire examination of prospective jurors include questions on racial prejudice. The issue before the Court in Ristaino was whether Ham announced a constitutional right invoked "whenever there may be a confrontation in a criminal trial between persons of different races or different ethnic origins."  

Ristaino involved a black defendant who, along with two other blacks, was on trial for armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. The victim of the alleged violent crimes was a white man employed as a uniformed security guard by Boston University. Prior to the voir dire examination, each defendant, represented by separate counsel, requested that the trial judge ask the prospective jurors a specific question designed to elicit possible racial prejudice. The defendants also wanted the veniremen questioned about possible lack of impartiality because the victim was a quasi-policeman. The trial judge acknowledged both these concerns as problems. After some discussion between the judge and counsel, the judge agreed to ask the veniremen whether they or any of their relatives had done police work. However, the judge refused to pose a question directed specifically to racial prejudice. Yet, consistent with the judge’s announced concern about the problems caused by the racial differences, the trial judge carefully explained to the veniremen that their duty was to render a fair and impartial verdict based on the evidence, and that they must let the court know if they could not try the case impartially. The impaneled jury convicted Ross as well as the other two defen-

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1 96 S. Ct. 1017 (1976).
3 96 S. Ct. at 1018.
4 Id.
5 The question proposed by Ross was: "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" 96 S. Ct. at 1068 n.1.
6 Id. at 18.
dants. Defendant Ross brought direct\(^7\) and collateral attacks\(^8\) contending that his federal constitutional rights were violated by the denial of his request to question the jurors on racial prejudice.

The Supreme Court on review by writ of certiorari\(^9\) regarded the solution to the controversy in *Ristaino* as turning on the proper reading of *Ham*. Thus the court proceeded to delimit the scope of its 1973 decision. Specifically the Court held that *Ham* did not announce a broad constitutional right requiring that questions on racial prejudice be put to prospective jurors in all state criminal trials when the defendant is black or of any other racial minority.\(^10\) Additionally, it was ruled that Ross was not constitutionally entitled to require the asking of a question specifically directed to racial prejudice.\(^11\)

In deciding *Ristaino*, the Court could have adopted at least two other interpretations of *Ham*. The *Ham* decision, being highly controversial, had given rise to a minimum of three interpretations including a broad reading, an intermediate reading and a narrow reading. The narrowest reading, which the Supreme Court approved, had been fostered by the Massachusetts Supreme Judicial Court.\(^12\) That court held that the right to question jurors on racial prejudice existed only for criminal defendants in circumstances comparable to those in *Ham*. The intermediate construction had been set forth by the Court of Appeals for the First Circuit.\(^13\) This court extended the right to ask racial questions of jurors to criminal defendants when the totality of the circumstances indicated that the chance for a racially affected verdict was at least as great as it was in *Ham*. The expansive reading had been accepted by a number of state and federal courts across the country.\(^14\) According to these adherents, the *Ham* right was invoked

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\(^7\) Commonwealth v. Ross, 282 N.E.2d 70 (Mass. 1972) (Ross' contention was rejected). Ross then sought a writ of certiorari. While the petition was pending, the Supreme Court decided *Ham*. Ross' petition for certiorari was granted and the case was remanded for reconsideration in light of *Ham*, sub nom. Ross v. Massachusetts 410 U.S. 901 (1973). On remand the court reasoned that the facts in the case before the bench did not fall within the purview of the right created in *Ham*. Ross sought certiorari again, but the writ was denied. 414 U.S. 1080 (1973) (Marshall, Brennan, and Douglas, JJ., dissenting).

\(^8\) Ross sought a writ of habeas corpus from the district court which the court granted and the Court of Appeals for the First Circuit affirmed. Ross v. Ristaino, 508 F.2d 754 (1st Cir. 1974).


\(^10\) 96 S. Ct. at 1018.

\(^11\) *Id.*

\(^12\) Commonwealth v. Ross, 282 N.E.2d 70 (Mass. 1972).

\(^13\) Ross v. Ristaino, 508 F.2d 754 (1st Cir. 1974).

\(^14\) See Cochran v. State, 505 S.W.2d 520 (Ark. 1974) (black defendant prosecuted for assaulting an officer during an assemblage or riot entitled to question jurors on racial preju-
whenever a criminal defendant's membership in a racial or ethnic group might subject him to prejudice. Each of these interpretations involved a different conception of the circumstances that invoke the right to pose questions on racial prejudice to jurors.

The purpose of this case note is to examine and critique the three possible readings of Ham that the Court could have adopted in Ristaino and to determine the adequacy of the adopted reading. This analysis will focus on the general role of voir dire, the need for racial questioning on voir dire, and the circumstances that are most properly indicative of the need to question jurors on racial prejudice.

II. GENERAL ROLE OF Voir Dire Questioning

Trial by an impartial jury is a fundamental element of the American criminal justice system. The Constitution guarantees the right to a "speedy and public trial, by an impartial jury" in all criminal prosecutions. Most states grant this same right in their constitutions, and it is recognized that voir dire is the mechanism that protects this right. Voir dire is the process of oral examination of prospective jurors to determine whether they should serve as jurors in the particular case. The goal of this process is to select competent, disinterested and unbiased jurors who are capable of rendering an impartial verdict, thereby protecting the parties' rights to a fair and impartial trial.

The actual procedures for conducting voir dire vary among jurisdictions. According to the state law voir dire may be done by a judge, by the attorneys, or by both, and prospective jurors may be exam-
ined collectively or individually. Variation also exists as to whether or not jurors are sworn in before being examined. All jurisdictions, however, recognize that questioning on voir dire is intended to uncover information that will enable the attorneys to exercise their peremptory challenges and will assist the trial court in ruling on challenges for cause, both types of challenges being devices to reject prospective jurors suspected of being biased.

Generally the trial courts have control over the scope of voir dire, and they usually permit a wide breadth of examination. Flexible guidelines are viewed as the best means for insuring that the litigants have a reasonable opportunity to ascertain whether a juror has biases that make him unsuitable for jury duty in the particular case. Factors such as the distinctiveness of the particular case and the uniqueness of the parties involved can trigger a variety of prejudices which a broad questioning framework can detect. The justification for these liberal judicial attitudes is the fact that voir dire is the tool which protects the constitutional right to a fair trial.

III. PROPRIETY OF RACIAL QUESTIONING ON Voir Dire

Courts have generally recognized that any prejudice which affects the ability of a juror to give an impartial judgment so as to
assure a fair trial in the particular case is a fair ground for *voir dire* inquiry. It is usually held that *voir dire* may explore racial, religious, economic, social or political prejudices. For over forty years, the leading Supreme Court case on the propriety of racial questioning on the *voir dire* examination was *Aldridge v. United States*. That case held that a black defendant on trial for killing a white man is entitled to have prospective jurors asked whether they have any racial prejudices which may prevent them from rendering a fair and impartial verdict. *Aldridge* itself was based on a well settled rule in many states that a trial judge's refusal to allow racial questioning pursuant to a black defendant's request is prejudicial error. Thus the *Aldridge* holding did not set forth a new doctrine for many courts. Neither was the *Aldridge* doctrine binding on the state courts. In deciding *Aldridge* the Supreme Court attached no explicit constitutional underpinnings to its holding. Rather, the holding was based solely upon the Court's supervisory power over the federal court system. Yet regardless of the breadth of *Aldridge*, most state courts have adopted its holding.

With the *Ham* decision the propriety of racial questioning on the *voir dire* acquired a constitutional dimension. In *Ham* the defendant was a young, bearded, black civil rights worker who had never previously been convicted of a crime. The charge against the defendant was possession of marijuana, and his basic defense was that the police officers had framed him on the drug charge because they opposed his (the defendant's) civil rights activities. Prior to the trial judge's *voir dire* examination, the defendant's counsel sought to have the judge ask two questions on racial prejudice. The trial judge refused the request and proceeded to ask only two questions on prejudice in general as specified by the South Carolina law.

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29 283 U.S. 308 (1931).
31 *Id.* at 527.
33 409 U.S. at 527.
34 *Id.* at 525-26. Petitioner's counsel requested that four questions relating to possible prejudice against petitioner be asked. The first two questions dealt with racial prejudice. The third question dealt with prejudice against bearded persons. The fourth question dealt with pretrial publicity relating to the drug problem.
35 S.C. CODE ANN. § 38-202 (1962). The three questions actually asked of all prospective jurors in this case were the following:

1. Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?
dant was convicted and subsequently was granted a writ of certiorari by the Supreme Court. Justice Rehnquist, in his opinion for the Court, reasoned that the requirements of the due process clause of the fourteenth amendment and the statutory framework created by South Carolina's laws for jury selection dictate that under the facts of Ham the racial questions should have been asked.

Unfortunately, the Ham decision raised at least as many questions as it answered. Significantly, Justice Rehnquist failed to delimit the parameters of the right created by the decision. No clear guidelines were given so that trial judges could know when the right to question jurors on racial prejudice was invoked. Justice Rehnquist carefully limited his discussion of the constitutional violation to the facts "in this case" or to the "facts shown by this record." Justice Rehnquist's use of this language could have been taken to mean that the Ham holding was applicable only to a defendant in circumstances analogous to those in Ham. However, Rehnquist relied heavily on Aldridge, making such an intended reading questionable. Justice Rehnquist noted that "the inquiry as to racial prejudices derives its constitutional stature from the firmly established precedent of Aldridge, and the numerous cases upon which it relied..." Aside from the fact that both cases involved black defendants on trial for criminal charges, Aldridge lacked any similarity to the other facts present in Ham. Moreover, Aldridge itself relied upon state decisions...

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2. Are you conscious of any bias or prejudice for or against him?
3. Can you give the State and the defendant a fair and impartial trial?" Id. at 526 n.3.
31 Justices Marshall and Douglas concurred in part and dissented in part. Both concurred with the part of the opinion which held that the trial judge was constitutionally compelled to inquire into the possibility of racial prejudice on voir dire. The majority also held that the petitioner's constitutional rights were not violated by the trial judge's refusal to question the jurors on prejudice against beards. Both dissents agreed that the trial judge abused his discretion by preventing questioning on prejudice against beards. Both dissents agreed with the majority that the trial judge was not required to pose questions on pretrial publicity. 409 U.S. at 529-34.
32 Id. at 527.
33 Id.
40 Id. at 528.
41 Aldridge involved a black man on trial for murdering a white policeman. The defendant and his brother had been taken into custody by a police officer as suspects for burglarizing a drug store. While the defendant and his brother were in custody in the police car, a shot was heard from within the vehicle. Then the defendant and his brother jumped from the police car and ran. The wounded officer shot defendant's brother, who subsequently died, and defendant was arrested two days later. Defendant's only defense was that his brother had fired the shot which killed the police officer. Aldridge v. United States, 47 F.2d 407 (1931). Ham, on the other
sions which had none of the circumstances common to *Ham*.2 In light of the precedents upon which *Ham* relied and the scope which has been attached to them, and in light of the constitutional principles upon which the decision was based, a broader reading of *Ham* was feasible. The broader possible reading was that the *Ham* mandate applied to all criminal defendants against whom racial prejudices may be directed.3 The ambiguities of the *Ham* decision proved to be fertile ground for the growth of other interpretations of its holding. At least three different interpretations of its holding emerged.

IV. DIFFERENT INTERPRETATIONS OF *Ham*

A. The Narrow Interpretation

In Massachusetts the traditional position on *voir dire* examination is that any inquiry beyond the statutory questions is a matter of the trial judge's discretion.4 Commitment to this policy is exemplified by the fact that the Massachusetts appellate courts have never found error in the trial judge's refusal to question prospective jurors on racial prejudice.5 This history may begin to explain why the Massachusetts Supreme Judicial Court read *Ham* very narrowly. Further justification for this narrow reading of *Ham* lies in a strong belief of Massachusetts' judges that questioning veniremen about racial prejudices is highly unlikely to lead to affirmative responses.6

In *Commonwealth v. Ross*7 the Massachusetts Supreme Judicial Court enunciated its unique reading of *Ham* for the first time. Chief Justice Tauro, writing for the court, stated:

> We do not believe the *Ham* case announced a new broad constitutional principal requiring that questions, designed to cover possible racial prejudice, be put to prospective jurors in all State

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2 *See* Pinder *v.* State, 27 Fla. 370, 8 So. 837 (1891); Hill *v.* State, 112 Miss. 260, 72 So. 1003 (1916); State *v.* Sanders, 103 S.C. 216, 88 S.E. 10 (1916).


4 *See* text accompanying note 14 supra.


criminal cases 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.48

Rather, Ham was interpreted to mean that specific questioning to pinpoint racial prejudices among jurors is constitutionally required only when the circumstances of the case indicate that the defendant is a special target for racial prejudice, as was the defendant in Ham.49 Each time the question of the applicability of Ham to a case before the bench has arisen, this reading of Ham has been adopted.50

The supreme judicial court addressed the issue of the circumstances that qualify a defendant as a special target for racial prejudice. The formulated test contains three elements. As was true in Ham, racial bias stemming from the defendant’s activities must allegedly be the sole cause and foundation for the prosecution. Racial bias must also be the heart of the defense. The jurors must also be aware of this activity-related racial bias against the defendant.51 While this test is unrefined, it is clear that the supreme judicial court is looking for more than a black defendant to trigger the right established by Ham.

48 Id. at 815.
49 Upon defendant’s request that the jurors be questioned about racial prejudice the judge should inquire about the racial aspects of the case. If these preliminary inquiries reveal that the case involves possible grounds for racial prejudice among jurors the judge should question the jurors on this subject. The judge will determine the format for the questions. Id. at 816.
51 Commonwealth v. Lumley, 327 N.E.2d. 683, 685-89 (Mass. 1975). The court outlines the test by enumerating the factors that were present in Ham that made the defendant a specific target for racial prejudices.

Racial issues infected the entire Ham trial. The issues were inescapably and powerfully before the jurors. Bias formed the heart of the defense. The defendant rightfully contended that bias, official and covert, was the sole cause and foundation for the prosecution. The defendant fought bias in his civil rights activities, undoubtedly known to the jurors drawn from the locality. Any latent bias harbored by the jurors would likely have been activated by the case and would have defeated the defendant’s efforts to achieve acquittal. When the racial issues were so salient and Ham, himself, was a special target for prejudice, the due process clause plainly entitled Ham to have the judge examine jurors for racial prejudices.

Id. at 685. Then in evaluating whether a defendant in a case before the bench was a special target for racial prejudice the court said the case did not present vivid racial issues sufficient to infect the trial. The court went on to evaluate the grounds for prosecution and the actual defense, and concluded that racial issues played no part in either. The court inferred that the facts were not sufficient to elicit any biases harbored by the jurors. The court then concluded that the defendant was not a special target.
B. The Intermediate Interpretation

A broader interpretation of Ham was set forth by the Court of Appeals for the First Circuit. Like the Massachusetts Supreme Judicial Court, the court of appeals viewed the Ham mandate as being invoked when the circumstances of the case indicate that the defendant is a special target for racial prejudice.\textsuperscript{52} The court of appeals, however, had a different idea of the circumstances that qualify a defendant as a target for racial prejudice. According to this federal court, when "the likelihood of infection of the verdict [by racial prejudice] is at best as great as it was in Ham"\textsuperscript{53} the defendant's right to question the jurors on racial prejudice exists. In making this determination consideration should be given to the defendant's civil rights involvements, the nature of the crime (victim or victimless), the race of the victim, and the status of the victim.\textsuperscript{54} Thus the court of appeals looked more to the totality of the circumstances rather than to the racial aspects of the grounds for prosecution and the grounds for defense. By this test a defendant with no civil rights involvements who was indicted for violent crimes against a white security officer was considered to be as likely a target for racial prejudice as was the defendant in Ham. The same defendant was not a special target by the Massachusetts state court test.\textsuperscript{55}

C. The Expansive Interpretation

The most popular interpretation of Ham was an even broader reading than those given by the Massachusetts Supreme Judicial Court and the Court of Appeals for the First Circuit. By this viewpoint the fact that a defendant is black,\textsuperscript{56} special target or not, is

\textsuperscript{52} Ross v. Ristaino, 508 F.2d 754 (1st Cir. 1974).
\textsuperscript{53} Id. at 756.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 755. The same defendant for whom the applicability of Ham was decided in Commonwealth v. Ross, was before the bench in Ross v. Ristaino. After Ross was decided the United States Supreme Court granted certiorari, vacated the judgment and remanded the case for further consideration in light of Ham, sub nom. Ross v. Massachusetts, 410 U.S. 901. On remand the Supreme Court held that Ham was inapplicable to the facts of Ross. A second writ of certiorari was denied. Ross v. Massachusetts, 414 U.S. 1080 (1973). Ross then sought a writ of habeas corpus from the district court, which was granted. The district court found Ham applicable and the case was then appealed to the court of appeals.

\textsuperscript{56} Some courts have extended this interpretation to defendants of any groups that are victims of racial prejudice, including American Indians and Italian Americans. This discussion will be limited to black defendants. See People v. Rubicco 42 A.D.2d 719, 345 N.Y.S.2d 624 (App. Div. 1973) and United States v. Bear Runner, 502 F.2d 908 (8th Cir. 1974).
sufficient to invoke the *Ham* rule. This interpretation of *Ham*, adopted by many state courts and federal courts, is well documented.\(^7\) In the jurisdiction that adhered to this interpretation of *Ham* the mere fact of the defendant's race triggered the right to question the prospective jurors on racial prejudice and no other circumstances needed to be considered. Thus this reading of *Ham* is significantly broader than the two other interpretations previously discussed.

V. NEED FOR RACIAL QUESTIONING ON *Voir Dire*

While courts have different interpretations of the circumstances that permit racial questioning on *voir dire*, they accept the assumption that some need for racial questioning on *voir dire* does exist. How valid is this assumption? The existence of racial prejudice in this country has been recognized and repeatedly documented.\(^8\) Within the context of the criminal justice system, the existence of racial prejudice takes on a special significance. A juror's role is to view objectively all the evidence which has been presented and, through a process of weighing the evidence, come to a verdict based solely on that evidence.\(^9\) When a juror's beliefs include racial prejudices, the actual role the juror plays can deviate from the ideal.\(^10\) Racial prejudice can make a juror unable or unwilling to objectively analyze the testimony and the other evidence brought out at the trial. Such a juror may overly scrutinize the evidence and testimony brought out by the defense and may hastily accept the truth of the evidence and testimony brought out by the prosecution.\(^11\) Furthermore, juror preconceptions\(^2\) may come to bear on a case's resolution whenever motive or intent is at issue. The biased juror may decide the question of motive or intent even before hearing all the evidence.\(^3\) Witness credibility\(^4\) is also the prey of racial prejudices. In determining what weight to attach to a witness' testimony, prejudiced jurors may use the race of

\(^{19}\) Id. at 315.
\(^20\) Id. at 316.
\(^{21}\) Id. at 316-18.
\(^{22}\) Id.
\(^{23}\) Id. at 318.
the witness as a controlling factor to discredit a witness. The dangers of juror bias are particularly troublesome in cases involving identification testimony. Such testimony can be overly weighted by a juror whose racial biases have already determined that the defendant is guilty.

The assumption of a need for racial questioning on the voir dire is apparently well justified. Racial prejudice is a real threat to the constitutional right to a fair and impartial trial. If this constitutional right is to be more than illusory, every effort must be made to prevent racially prejudiced persons from being on the jury. Adequate voir dire questioning must be allowed so that racially prejudiced jurors can be identified and removed through the use of challenges for cause and peremptory challenges. To the extent that the trial court, in its discretionary control over the scope of voir dire, fails to permit sufficient racial questioning, the right to an impartial trial is undermined.

This need for voir dire questioning sufficient to focus on racial prejudices was recognized by the Ham court. The unanswered question, however, was under what circumstances does the need demand that racial questions be asked. The different interpretations of Ham have attempted to answer this question. Yet how consistent is each interpretation with the actual need involved?

The Massachusetts Supreme Judicial Court assumes that in only a very limited set of circumstances, duplicative of Ham, is there a need for racial questioning on voir dire. This point of view, however, overlooks the nature of the danger of racially prejudiced jurors. Essentially, the court denies that defendants charged with crimes that have types of racial overtones different from those of Ham are likely to be judged by jurors whose racial attitudes dictate the verdict. Thus it denies the possibility that many situations are equally likely and some are more likely to arouse racial prejudices than would be situations duplicative of the facts of Ham. Furthermore, this interpretation overlooks the observation that many times the facts are unimportant to the jurors in reaching a verdict while race is of primary importance. This Massachusetts Supreme Judicial Court viewpoint, then, is unrealistic in its assessment of the need for racial questioning on voir dire.

This state court position also necessitates a distorted viewpoint of the voir dire process. It limits the amount of information that can

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64 Id. at 319.
65 See text accompanying notes 44-51, supra.
be elicited from the prospective jurors. Challenges are forced to be exercised from an incomplete index of the juror's attitudes. Therefore, in many situations where racial biases are present, they will go undetected.

At the polar extreme of the Massachusetts Supreme Judicial Court's need analysis is the thinking of the courts that render the most popular reading of *Ham*. In the eyes of these courts racial prejudice is a menace to the criminal justice system whenever a black defendant is on trial. This assumption has received a great deal of support. In one study investigating juror bias, results indicated that jurors are less sympathetic to black defendants than to white defendants; less sympathetic jurors are more likely to convict. Legal scholars have repeatedly observed that the defendant's race can often be the ultimate determinant of the defendant's guilt or innocence. Often jurors find race more convincing than the facts. Long before the *Ham* or *Aldridge* decisions, state courts accepted as truth the notion that racial bias interferes with the administration of criminal justice.

Notwithstanding the support that has been accorded this assumption, there are conceivably situations where the fact of a defendant's race should not trigger the right to racial questioning on *voir dire*. For example, if a case involved a black defendant and an all black jury there is no justification for treating this defendant any differently from a white defendant.

This broad reading of *Ham* gives full import to the role of *voir dire*. The defendant's constitutional right to a fair trial is optimally protected because jurors are questioned on racial bias, and they are removed if prejudice is manifested in the examination. Questioning may occur in instances where there may be no grounds for suspecting racial biases even though the defendant is black. The error will be in allowing too much latitude in asking questions. Yet, in situations bearing racial overtones, the Supreme Court has stated that excessively intensive examination is preferred over the risk of inadequate questioning that fails to ferret out the racially partial.

The intermediate position on the reading of *Ham* and on the necessity for racial questioning on *voir dire* inquiry is voiced by the

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68 Boykin v. People, 22 Colo. 496, 45 P. 419 (1896).
Court of Appeals for the First Circuit. The unstated assumption here is that racial prejudice is not always a problem when a criminal case involves a black defendant. From this assumption is derived the court's position that the defendant's request to question jurors on racial prejudice is granted only in certain circumstances. Proper circumstances exist when the totality of the circumstances indicate that "the likelihood of infection of the verdict is at least as great as it was in Ham."\(^7\) The assumption here is a fair one. It recognizes the threat posed by having racially prejudiced jurors judge a black defendant, and it acknowledges the reality that racial prejudice is not a threat to all black defendants. At the same time, however, the reading of Ham ignores the extraordinary situation where the circumstances do not indicate that racial prejudice threatens to infect the verdict, but the extremely biased person goes undetected for lack of racial inquiry.

The *voir dire* goal is fairly well carried out by the practice of the Court of Appeals for the First Circuit. In situations that suggest the black defendant as a target for racial prejudice, *voir dire* inquiry is permissible and constitutionally mandated. Because of the nature of the test here, the number of defendants who will be granted the right to racial *voir dire* questioning will be between the number permitted by the Massachusetts Supreme Court viewpoint and the broadest viewpoint. To the extent that circumstances of a case are reliable indicators that racial bias will play a role in the outcome, the constitutional right to a fair trial is protected. To the extent that circumstances are not proper indices, the right is violated. While this position offers assurance of a fair and impartial trial for many, if not most black defendants, it also affords some risk of an "infected verdict."

VI. THE *Ham* INTERPRETATION ADOPTED IN *Ristaino*

Of the three possible readings of *Ham* that were before the Court in *Ristaino*, Justice Powell, writing for the Court, chose to adopt the interpretation of the Massachusetts Supreme Judicial Court.\(^2\) The rationale underlying this decision is that the Constitution does not require that *voir dire* address every matter that might prejudice jurors against a defendant, and that the required scope of *voir dire* should normally be determined by the state legislatures and judiciar-

\(^7\) Ross v. Ristaino, 508 F.2d 754, 756 (1st Cir. 1974).
\(^2\) 96 S. Ct. at 1020-22.
ies. Thus *Ristaino* recognizes a tension between the defendant's need to question on *voir dire* and the state's interest as sovereign in controlling criminal procedure in its courts and resolves this tension in the state's favor in most cases, with the exception of a set of circumstances comparable to *Ham*. The Court's approach to resolving the conflict between these important interests is sound; however, its view of the circumstances which indicate an overriding need for racial questioning on *voir dire* is short sighted.

As previously discussed, the goal of *voir dire* is to select competent, disinterested, and unbiased jurors who are capable of rendering an impartial verdict thereby protecting the parties' constitutional rights to a fair and impartial trial. The goal of *voir dire* may not be fully realized under the law of *Ham* as interpreted in *Ristaino*. Where the trial judge does not perceive racial prejudice as a threat to the defendant's fair trial, he may properly use his discretion to prohibit inquiry on racial prejudice of the jurors. To the extent that the trial judge is incorrect in his perceptions of the presence of racial prejudice, *voir dire* will not serve to identify biased jurors who are incompetent to render a fair and impartial verdict. Under *Ristaino* racial questioning is constitutionally required in only the limited circumstances of the *Ham*-type case. Absent those special circumstances the court is free in its discretion to prescribe the scope of *voir dire*.

On the other hand, *Ham* as clarified in *Ristaino* does acknowledge the states' control over questions to be allowed on *voir dire*. The Court implies that while the constitution does not require that black defendants be allowed to pose racial questions on *voir dire*, the states are free to make such demands.73 This position should be well received by all states since states as sovereigns have an interest in making their own laws and policies.

Furthermore, *Ristaino* reasserts that trial judges do have broad discretion over *voir dire*.74 This discretion coupled with the fact that "the Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him"75 suggests that in reality some biased individuals may well sit as jurors.

The interpretation of *Ham* presented in *Ristaino* does not take a proper accounting of the need for racial questioning on *voir dire*.

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73 Id. at 1022 n.9.
74 Id. at 1022.
75 Id.
This viewpoint assumes that the threat posed by racial prejudices which should be a concern of the courts is manifested only in circumstances comparable to those in *Ham*. This assumption ignores the fact that the threat of racial prejudice is capable of existing in circumstances very different from *Ham*. This viewpoint is not only naive, but also totally unrealistic. The pervasiveness of racial prejudices in this society is well documented. Jurors, as members of the society bear such prejudices, and these prejudices are not left behind as the jurors observe the evidence and attempt to reach a verdict. Thus racial prejudices play a role, and possibly a significant role, in reaching a verdict in criminal cases where the defendant is black. An assumption more realistic than that posed by the Court is that racial prejudice poses a threat to justice in most criminal trials involving a black defendant.

Rebuttal to this argument can be made. Courts operate on legal principles. Psychological, sociological or other indicators of prejudice may be relevant to the legal system in that they serve to keep the legal profession abreast of current developments and in tune to society. However, the integrity of the legal system demands that it operate independently of other systems. Legal conclusions about when prejudice exists must not be solely dependent upon standards of other disciplines.\(^{76}\)

In *Ristaino* the court-sanctioned circumstances that invoke the defendant's right to question jurors on racial prejudice are too narrow.

The circumstances in *Ham* strongly suggested the need for *voir dire* to include specific questioning about racial prejudice. Ham's defense was that he had been framed because of his civil rights activities. His prominence in the community as a civil rights activist, if not already known to veniremen, inevitably would have been revealed to the members of the jury in the course of his presentation of that defense. Racial issues therefore were inextricably bound up with the conduct of the trial. Further, Ham's reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor. In such circumstances we deemed a *voir dire* that included questioning specifically directed to racial prejudice, when sought by Ham, nec-

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\(^{76}\) See note 58 supra.

necessary to meet the constitutional requirement that an impartial jury be impaneled.\textsuperscript{78}

Thus the circumstances looked to by the Court included the defense, the defendant's status in the community, and the fact that these factors bound together were likely to intensify any prejudices the jurors harbored. Again, these circumstances are so narrow that they suggest that a situation comparable to \textit{Ham} must exist before the Court invokes the right to question jurors on racial prejudice. A more realistic set of circumstances would also look to racial differences between the accused and the victim since this factor has wide support as being a stimulus for the elicitation of racial prejudices.\textsuperscript{79} Racial aspects of past convictions, charges, and indictments against the defendant should also be considered.\textsuperscript{80} If such information were brought out at trial it would likely serve not merely to destroy the defendant's credibility but also to bring racial prejudices into the judgmental process. The present feelings in the community against defendant's race should be considered.\textsuperscript{81} Where racial incidents and concerns are prevalent in the community racial prejudices are likely to be more readily transferred to a judgmental process that involves racial differences. The nature of the charge against the defendant should be considered,\textsuperscript{82} since stereotypes of blacks may make it easier for jurors to resolve any doubts in the evidence in favor of convicting the defendant committing a certain crime. Circumstances including the above factors would not extend the \textit{Ham} right to every black defendant. However an assessment of the above factors would be a more realistic indicator of when the right to question jurors on racial prejudice should be extended to a defendant.

\textit{Ristaino} arguably catches the Court in a conservative swing. The five justices in the majority asserted that \textit{Ristaino} does reflect the intended scope of the right created in \textit{Ham}.\textsuperscript{83} Three justices, however, believe that \textit{Ristaino} is a significant erosion of the right created in \textit{Ham}. This belief is outlined in the dissenting opinion filed by Justice Marshall in which Justice Brennan joined.\textsuperscript{84} Justice Marshall

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\item[78] 96 S. Ct. at 1021-22.
\item[79] See note 14 supra.
\item[81] United States v. Bear Runner, 502 F.2d 908 (8th Cir. 1974).
\item[82] This factor was a part of the Massachusetts Supreme Judicial Court's test in Commonwealth v. Ross, but it was not enumerated in Ristaino v. Ross.
\item[83] Powell, J. Burger, C.J. and Stewart, Blackman, and Rehnquist, J.J. were in the majority in \textit{Ristaino}. 96 S. Ct. at 1017.
\item[84] Id. at 1022.
\end{enumerate}
stated that the *Ham* decision was rendered stillborn by *Ristaino* and that the promises inherent in *Ham* would never be fulfilled. Justice White shared the belief of Justices Marshall and Brennan that *Ham* rendered a constitutional mandate broader than that delimited in *Ristaino*. Justice White stated that *Ham* "announced a new constitutional rule applicable to federal and state criminal trials." Yet he concurred in the result reached by the majority because he believed that the principle should not be applied retroactively to cases involving trials held prior to *Ham*. Justice Stevens took no part in the decision.

If *Ristaino* is not a retraction of the principle laid down in *Ham*, it is at least a conservative statement of that principle. In making this statement the Court criticized the assumption that in crimes of violence involving black defendants, jurors are *per se* racially prejudiced. The Court stated that "in our heterogeneous society policy as well as constitutional considerations militate against this 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. . ."

Thus the Court chose to ignore the threat of racial prejudices to the defendant's right to a fair and impartial trial. Next, the Court expressed concern for keeping the scope of *voir dire* within the control of the state. Justice Powell stated that "the States also are free to allow or require questions not demanded by the Constitution." Consequently the Court backed away from expanding federal constitutional rights in favor of recognizing states' rights to control the scope of *voir dire*. Lastly, the Court approved a broader reading of *Ham* that applied only to the federal courts.

Although we hold that *voir dire* questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here. See *Aldridge v. United States*.

Thus the *Ristaino* decision focuses on a conservative side of the Supreme Court's personality.

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85 *Id.*
86 *Id.*
87 *96 S. Ct. at 1021 n.8.*
88 *Id. at 1022 n.9.*
89 *Id.*
VII. Conclusion

_Voir dire_ is the mechanism for protecting the constitutional right to a fair and impartial trial. This process of questioning prospective jurors provides information to enable the use of challenges to remove incompetent jurors. The goal of _voir dire_ is to eliminate all but the disinterested and impartial jurors who are capable of rendering an impartial verdict. While variations exist across jurisdictions as to the exact procedures for conducting _voir dire_, extensive questioning on _voir dire_ is the general policy. Racial prejudices have generally been regarded by courts as fair grounds for _voir dire_ inquiry. The threat posed by racial prejudices is that biased jurors will allow their prejudices to play a role in reaching the verdict, thus denying the defendant a fair trial.

The Supreme Court in its supervisory power over federal courts recognized that questioning on racial biases must be allowed when the request is made by a criminal defendant. This position was given limited constitutional underpinning in _Ham v. South Carolina_ which held that it was a violation of the due process clause of the fourteenth amendment to refuse a black defendant's request to question the jurors on racial prejudice when the defendant was a black civil rights worker charged with possession of marijuana. The _Ham_ decision proved to be controversial, giving rise to at least three distinct interpretations. Each interpretation differed on the set of circumstances that invoke the right laid down in _Ham_. Each interpretation also necessitated a different perspective on the role of _voir dire_ questioning. The narrowest reading of _Ham_ posited that a black defendant acquires the right to question jurors on racial prejudice only when the facts in the case are very similar to the facts in _Ham_.

In _Ristaino v. Ross_ the Supreme Court held that _Ham_ did not announce a new broad constitutional requirement that questions, designed to detect racial prejudices, be put to prospective jurors when a criminal defendant is black. The Supreme Court adopted the reading of _Ham_ put forth by the Massachusetts Supreme Judicial Court and rejected the two broader readings. Essentially the reading adopted is that, absent circumstances comparable in significance to those in _Ham_, _voir dire_ examination of jurors on racial prejudice is not a constitutional right.

In deciding _Ristaino_, the Court expressed an interest in retaining the states' legislative control over the scope of _voir dire_ and the judge's discretionary control over _voir dire_. These interests, the Court believed, outweighed the need for an unlimited _voir dire_ and for racial
questioning on *voir dire*. In these respects *Ristaino*’s narrow reading of *Ham* is based on a legitimate policy. However, this narrow interpretation of *Ham* does not take a realistic view of the circumstances that should give rise to the defendant’s right to question the jurors on racial prejudice.

_Cheryl Blackwell Bryson_