In the

Supreme Court of the United States

THEODORE RISTAINO, et al.,

Petitioners,

vs. No. 74-1216

JAMES ROSS, JR.,

Respondent.

Pages 1 thru 24

Washington, D. C.
December 8, 1975 -and-
December 9, 1975

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Monday, December 8, 1975

The above-entitled matter came on for argument at 2:30 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN,JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MISS BARBARA A. H. SMITH, Assistant Attorney General of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108; for the Petitioners.

MICHAEL G. WEST, J.D., 31 Elm Street, Springfield, Massachusetts 01103; for the Respondent, by appointment of the Court.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-1216, Ristaino against Ross.

Miss Smith, you may proceed whenever you are ready.

ORAL ARGUMENT OF MISS BARBARA A. H. SMITH

ON BEHALF OF THE PETITIONERS

MISS SMITH: Mr. Chief Justice, and may it please the Court:

I am Barbara A. H. Smith, Assistant Attorney General for the Commonwealth of Massachusetts. I represent the petitioners, Theodore Ristaino and Frank Caw in this case.

The procedural history of this case began in June, 1970 when James Ross and two co-defendants were brought to trial in the Superior Court of Massachusetts upon indictments charging armed robbery, assault and battery with a dangerous weapon and assault with intent to murder.

Prior to trial, counsel for the defendant James Ross, as well as counsel for the co-defendants, requested that the trial judge pose certain questions to the prospective jurors upon voir dire. One of the seven questions proposed by counsel for Ross touched upon the issue of possible racial bias. The question was, "Are there any of you who would believe that a white person is more likely to tell the truth than a black person?" The trial judge declined to pose any of these questions.

Following trial, at which the defendants did not testify nor offer a defense, they were convicted.

Q Were any questions propounded to the prospective jurors along these lines at all?

MISS SMITH: A general question as to whether the jurors were sensible of any bias or prejudice was propounded to the jurors. This was coupled with instructions as to the meaning of the first question to be posed by the trial judge. That is, the trial judge in this case, as opposed to the Ham case did not simply say or have the clerk ask the question, "Are you sensible of any bias or prejudice?" But in an effort to focus their attention on what this question meant, he did explain the instructions as each panel--

Q Where is that?

MISS SMITH: That begins on page 12 in my brief, Your Honor, and on 13 that is set out. The entire voir dire procedure is set out in the appendix.

Q Voir dire in Massachusetts is to the panel and not to individual members of the panel? The questions are put to the panel as a whole?

MISS SMITH: As a whole, Your Honor.

Q It is statutory too, I take it, which came as a surprise to me, coming from a western state where we will take a day or two picking a jury. There are just so many questions that are put, and they are prescribed in the statute?

MISS SMITH: Yes, Your Honor, and anything additional is left within the discretion of the trial judge.

If I may continue with the procedural history, following conviction, the Supreme Judicial Court affirmed that conviction. Ross then filed a petition for writ of certiorari in this Court, raising the issue of the refusal of the trial judge to ask the proposed question.

On January 22, 1973, this Court granted certiorari and summarily vacated the judgment of conviction and remanded the case to the Supreme Judicial Court for reconsideration in light of Ham v. South Carolina, which this Court had decided five days previously.

Upon remand, the Supreme Judicial Court addressed the issue of whether the Ham decision required reversal on the ground that the trial judge refused to ask prospective jurors questions concerning possible racial prejudice, and again they affirmed.

Ross then filed a second petition for writ of certiorari in this Court, which was denied, with Justices Marshall, Brennan, and Douglas dissenting.

In January of 1974, Ross filed a petition for writ of habeas corpus in the Federal District Court, District of Massachusetts. In June of 1974, the court ordered that the writ shall issue, based upon the failure of the trial judge to ask the proposed questions.

The respondent below, Ristaino, appealed to the First Circuit Court of Appeals, which affirmed, with Visiting Judge Moore from the Second Circuit dissenting.

A petition for certiorari on behalf of Ristaino was then filed in this Court and granted in May of 1975.

The principal issue in this case involves the conflicting interpretations accorded this Court's decision in Ham v. South Carolina by the Supreme Judicial Court of Massachusetts and the Federal District Court and the First Circuit Court of Appeals.

These interpretations involve the scope and the applicability of the Ham decision and the resulting retroactive or prospective application to be accorded that decision, given in fact the Federal Court's interpretation is correct.

On remand, the Supreme Judicial Court of Massachusetts considered this case in the light of the Ham decision and held as to the scope of the Ham decision, "We do not believe that the Ham case announced a new broad constitutional principle requiring that questions designed to discover possible racial prejudice be put to prospective jurors in all state criminal trials when the defendant is black. Such questions are constitutionally required only when the defendant is a special target for racial prejudice."

As to complying with fundamental fairness, the Court found that the judge's questions and the instructions to the

prospective jurors were, under the circumstances of the Ross cose, commensurate with Fourteenth Amendment requirements.

However, the Federal District Court held that the petitioner Ross had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors under voir dire examination and on that basis ordered that the writ issue.

The First Circuit held in substance that where the defendant is black and charged with a violent crime against a white--in this particular case, a security officer--failure to ask specific questions is error of constitutional dimension requiring the release of a convicted defendant.

The petitioners submit that the Supreme Judicial Court's interpretation of the scope of Ham is correct for the following reasons.

In Ham this Court was presented with a very novel fact pattern. Gene Ham was a young bearded black civil rights activist. He was well known in the community of Florence, South Carolina, and he was well known for his civil rights activities. His sole defense was that he had been framed and that law enforcement officers were out to get him because of his civil rights activities. Thus, the Court was presented a case in which race was a consideration, in which the credibility of the black defendant was directly pitted against the white law enforcement officers who he maintained were out to

get him in Framingham.

Within this factual framework, the trial judge in Ham refused to pose the questions requested, nor did he give instructions as to the meaning of the general question as to bias or prejudice.

The majority opinion in Ham utilized very specific language. This Court held in this case, under the facts shown by this record, due process of the Fourteenth Amendment required this defendant be permitted to have the jurors interrogated on the issue of racial bias.

The petitioner suggests that this language is not to be dismissed as mere common judicial locutions, as did the Federal District Court, but this Court meant exactly what it said, that the Court traditionally uses such words of limitation when they are rendering a decision which is required by the particular fact pattern presented to them, when they are rendering a decision solely within the confines of the due process clause and fundamental fairness.

We would suggest that this Court neither held nor suggested that the Constitution conferred a right in every case to have the specific question addressed to possible racial prejudice put to prospective jurors.

We further suggest that by basing its decision on the Fourteenth Amendment rather than the Sixth Amendment right to an impartial jury, as urged by petitioner Ham in his petition for

certiorari and in a brief to this Court, that the Court indicated its intention to limit its decision to cases involving special circumstances as with the case in Ham.

Finally, we would suggest that this Court's action on Ross's initial petition for writ of certiorari indicates that its rule in Ham was in fact limited to a particular fact pattern and that no new per se constitutional rule was therein announced, but this Court vacated the Ross decision and remanded, it did not reverse outright. And we would suggest that the vacation was made so that the Supreme Judicial Court could consider the fact pattern in Ross within light of Ham.

The petitioners therefore suggest that the scope of the Ham decision is limited to those cases involving circumstances where the probability of prejudice is of sufficient dimension to require a deviation from the normal voir dire procedure which is traditionally left within the discretion of the trial judge.

We would suggest that the voir dire procedure employed in this case complied with fundamental fairness as required by the due process clause.

In course of the discussion between counsel and the trial judge as to whether these questions would be asked, the trial judge asked counsel for a co-defendant whether there was anything peculiar to the circumstances of this case. The

response was no, just that the victim is whate and the defendants are black. Counsel for Ross brought no peculiar or special circumstances to the attention of the trial judge.

Further, the trial judge indicated he would give preliminary instructions on the meaning of the first question to be asked by the clerk. In substance, that instruction was that each of the jurors must remember they were under oath, that they had an absolute duty to render a fair and impartial verdict based upon the evidence they heard in the courtroom, not on any extraneous factors, no bias or prejudice of any kind; that the clerk in asking the first question would be giving them an opportunity to inform the court if you cannot or if you have serious doubt that you can render a fair and impartial verdict. He directed them to examine all aspects of the case, quoting, "everything you know about the case both in the courtroom and from what I have said. If you have any doubt, you have the duty to inform the court by standing or raising your hand."

The defendants were then asked to stand. So, clearly the jurors were aware that they were in fact black.

In fact, a number of jurors did raise their hands and indicate their inability to render a fair and impartial jury. One for admitted racial prejudice, two for general prejudice, seven for a previously formed opinion, seven because of their relationship with law enforcement authorities, and one

because of employment at the university where the crime allegedly occurred.

Q Miss Smith, what does general prejudice mean? Is that a term under Massachusetts law?

MISS SMITH: General prejudice?

Q Yes.

MISS SMITH: The question is, Are you conscious of any bias or prejudice?--not general.

Q And then the juror raises his hand?

MISS SMITH: And approaches the bench and states to the judge the reason he feels that he could not render an impartial verdict.

Q In the case of one juror we know he said he was racially prejudiced. Do we have any indication of what those whom you described as being excused for general prejudice said?

MISS SMITH: No, Your Honor, the language was vague--just that "I know enough about this case, I could not render an impartial verdict," something to that effect.

Q I suppose it might mean that he had a prejudice against people who were charged with killing or assaulting a policeman. That could be one of the general, I suppose.

MISS SMITH: Yes, Your Honor, I think that would be.

Q Did this offense get a great deal of publicity?

MISS SMITH: There was no allegation in this case of any extensive pre-trial publicity and nothing in the record

indicates that it was an extraordinary case in any way.

In one further dffort to keep the element of racial prejudice from the jurors the trial judge declined to use the Muslim names of the two co-defendants of James Ross.

Therefore, I submit that the procedure employed in this case complied with fundamental fairness, that Ham requires that nothing more than that the jurors' attention is focused on the possibility of bias or prejudice.

Therefore, if the voir dire proceeding complied with fundamental fairness, the court below erred in vacating the state conviction absent a demonstration of actual likelihood of prejudice flowing from the trial judges refusal to ask the proposed questions. This case came in the federal court on collateral review of a state court conviction pursuant to a petition for writ of habeas corpus. Therefore, the actual likelihood of prejudice must be dmonstrated. Those cases which have held to the contrary, I would suggest, involved in every instance circumstances which were such as to create a serious probability of unfairness. In the instant case no such circumstances have been demonstrated, and the petitioners submit that it was error for the federal court to void the state conviction merely upon speculation or the mere possibility of prejudice flowing from the refusal to ask just one question.

If, however, the Ham case did enunciate a new broad constitutional mandate or per se rule requiring that questions

specifically addressed to racial prejudice be posed in every instance in which the defendant is black, the question of the prospective or retrospective application to be accorded that rule must be answered. We submit that the First Circuit's resolution of this question is without support.

As I stated earlier, the First Circuit held that by vacating and remanding the Ross case for reconsideration this Court impliedly held the rule of Ham to be retroactive. We suggest that the only inference to be drawn from this Court's action is that Ham was limited to its facts and would require a case-by-case examination based on the particular factual pattern involved.

Q Miss Smith, You kind of try to have both pieces of the cake there, do you not, because earlier you say that by vacating and not reversing we indicated that we did not think this was directly applicable, and yet now you say that because we vacated, a kind of inconsistent consequence follows or that the First Circuit's view of an inconsistent consequence follows.

MISS SMITH: I believe that is consistent with what I said before, Your Honor. This Court's action in vacating indicates that it was limited to a particular fact pattern.

The First Circuit inferred that, one, the Court had enunciated an across-the-board per se rule and by vacating held this new rule to be retroactive.

Q I would suggest there is a possibility perhaps that is embraced neither by your view nor that of the First Circuit, and that is that when we have these holes, we just frequently vacate without quite that much fine tuning as to the result.

MISS SMITH: Under that circumstance, then, Your Honor, I would still say there is little support for the First Circuit's determination that you were making a ruling on retroactivity by your action on the first petition.

Q In any event, what we did then foreclosed you from acting, that Ham should only be prospective.

MISS SMITH: That is right, Your Honor, that is my position.

Q Sometimes we have vacated and remanded so that the lower court may first address the retroactivity question.

MISS SMITH: Yes, Your Honor, but I think in this--

Q Without our having decided it one way or another.

MISS SMITH: That is true, Your Honor.

If there is a new rule announced in this case, I would submit that it is a procedural rule only, that it is not a rule designed to guarantee the defendant a specifically enumerated constitutional right, that it was not a rule based on the Sixth Amendment right to an impartial jury but it is designed only to expand the voir dire procedure which

is not in itself constitutionally required.

Therefore, we submit there is no basis for granting more extensive application to a rule enunciated in Ham, if in fact the rule was so enunciated, than given to those decisions which did in fact rest upon the Sixth Amendment right to an impartial jury, and therefore that the decision on this question falls within the cases of DeStefano v. Woods, holding Duncan v. Louisiana and Bloom v. Illinois, granting the right to jury trial and the right to jury trial in serious criminal contempts, to be prospective only, and Daniel v. Louisiana, holding that Taylor v. Louisiana was not to be applied retroactively to convictions obtained by jurors empaneled prior to the date of that decision.

In the first instance, we suggest that the purpose behind the Taylor rule and the Duncan rule goes no further than the rule announced in Ham. In Taylor the Court stated its purpose was to prevent arbitrariness and repression on the part of the prosecution. There is no greater purpose founded for the rule in the Ham case.

Second, the reliance factor is equally as great as in the above-cited cases. The sole precursor of this rule is found in Aldridge v. United States, which was decided solely within this Court's jurisdiction over the lower federal courts over 44 years ago. Since that time there has been no indication that the Constitution mandated the interjection of the racial

prejudice issue into a procedure traditionally resting within the discretion of the trial judge.

Q What has been the attitude of the Supreme Judicial Court of Massachusetts in treating voir dire? Does it encourage trial judges to go outside of the statutory questions or does it leave it completely up to their discretion?

MISS SMITH: Since these cases have arisen, it has indicated to the courts that the better practice is to allow the question to be put if the defendant so requests.

Q How about before that for purposes of retroactivity analysis?

MISS SMITH: Before that it was traditionally very limited to the three specified questions that are set out in my brief, that it was a very rare instance when the trial judge went outside of that and then only when shown that a particular circumstance involved in the case required that these questions be asked.

Q Where are these three statutory questions set out?

MISS SMITH: They are set out at page 12 of my brief. Whether he was related to either party or has any interest in the case or has expressed or formed an opinion or is sensible of any bias or prejudice.

Q In footnote four there.

MISS SMITH: Yes, Your Honor.

Q How about footnote five on the next page?

MISS SMITH: That is an additional question that the trial judge did agree to put in this case at the request of counsel because the victim had been a white security guard. He did agree to ask the jurors if they were involved with law enforcement authorities.

Q So that in this case was a non-statutory additional question.

MISS SMITH: Yes, Your Honor, because of the circumstances of having a quasi-law enforcement official being victim.

Q Right. Does the clerk ask these questions?

MISS SMITH: The clerk asks the questions, yes, Your Honor.

Q Not the judge?

MISS SMITH: No, Your Honor.

Q And never counsel?

MISS SMITH: No, never, to my knowledge.

Q The judge is in the courtroom on the bench when the questions are put?

MISS SMITH: Yes, he is. First, in this case, he gave the general instructions and rather specific instructions as to the duty of the jurors. Then the clerk reads the questions. Then if a juror wants to respond, he raises his hand and comes up to the bench for a bench conference.

Q Do any judges ever ask the questions themselves or do they always have the clerk do it, do you know?

MISS SMITH: To my knowledge, it is always the clerk who does it.

Q Are the panels very large or does that differ?

MISS SMITH: That differs. In this case, some of the panels were rather small because there were at least, I believe, five panels questioned.

Q I suppose a judge would not be violating the statute if he put the questions himself, would he?

MISS SMITH: No, I do not believe he would, Your Honor.

Q How long had this group served as jurors? Does the record show that?

MISS SMITH: It shows that some of the jurors had sat on previous cases.

Q Yes, I thought so.

MISS SMITH: And in a number of instances they were then excused because they had been locked up and it was a lock-up situation in this case. I cannot say definitely how long.

Q Do you know what the term for petit jurors is in Massachusetts or in this county?

MISS SMITH: Your Honor, I do not know in this county what the term is.

I would just like to make one other point, and that is the effect that a retroactive application would have would be substantial on the administration of justice in the Commonwealth, and in fact the Chief Justice himself has stated in the case of Commonwealth v. Lumley that it would be calamitous indeed.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. West.

ORAL ARGUMENT OF MICHAEL G. WEST, J.D.,

ON BEHALF OF THE RESPONDENT

MR. WEST: Mr. Chief Justice, and may it please the Court:

My name is Michael West, and by appointment of this Court I represent the respondent, James Ross, Jr., in these proceedings.

If I may before formal argument, there are two misprints in my brief, and I would like to bring those to the attention of the Court. The first is on page 4 under the statement of the case, where it indicates that James Ross was convicted and received terms, it says, of 18 to 20 years in the state prison. It actually was 18 to 30 years.

And, lastly, on page 42, the second line; it refers to Chapter 234, Section 228. It is actually Section 28.

Q I do not have a 41 or 42 of your brief. Did anybody else have that problem?

MR. WEST: Your Honor, this was printed by authority of the Court, by your own printers.

MR. CHIEF JUSTICE BURGER: The Government simply pays for the printing of your brief. It is not the Court's printer, so far as I am aware. It does not have the capability of printing this material.

MR. WEST: Since apparently it is this Court's practice, when presented with a case dealing with both retroactivity and the application of a constitutional principle, to deal with the retroactivity issue first, I shall do that in my argument dealing with the retrospective application of Ham v. South Carolina to the Ross situation.

The test as stated by counsel for the Commonwealth is found in Stovall v. Denno, and that sets out a three-pronged test, setting out the purpose to be served by the new standards, the effect upon the reliance of the old standards, and the effect upon the administration of justice.

I believe this test was further clarified in Desist v. United States in that of the three-pronged test, the first prong--and that is the purpose to be served by the new rule--is to be given foremost importance.

And then in Williams v. United States this Court said that if the major purpose of the constitutional rule goes to the truth-finding function and substantially affects the accuracy of the guilty verdicts, then would the rule be given

completely retroactive application without regard to the effect on the administration of justice or the good faith reliance by the court below.

It is interesting to note that the issue of retroactivity of Ham was never raised by the Commonwealth in either the second Supreme Judicial Court case after remand by this Court or by the First Circuit in the First Circuit Court of Appeals or in the United States District Court for the District of Massachusetts based on petition for habeas corpus. It was raised in the First Circuit only as an aside and never briefed by the Commonwealth. I think what this indicates is that the Commonwealth, first of all, assumed retroactivity of the Ham case and, second, I think it dilutes their claim of the calamitous effect on the administration of justice because that issue was never raised, never briefed, in any of the courts except this one.

In fact, the Supreme Judicial Court for the Commonwealth in the recent case of Commonwealth v. Lumley states that they believe the limited rule announced by Ham is to be given complete retroactive application. Ross believes that the denial of the impartial jury or even the likelihood of an impartial jury or the denial of an impartial jury goes to the heart of the truth-finding function and so affects the accuracy of guilty verdicts that Ham should be given complete retrospective application.

The Commonwealth relies on two cases in this regard. One is Daniel v. Louisiana and the second is DeStefano v. Woods to establish the argument that Ham is not to be given retrospective application.

The question presented in Daniel was the retrospective application of Taylor v. Louisiana. This Court denied retroactive application of Taylor, saying that until Taylor no case has held that the exclusion of women from a jury deprived a defendant of the Sixth Amendment right to an impartial trial. That is not true here. There was no previous case. This Court said that reliance on past decisions of this Court such as Hoyt v. Florida precluded retroactive application. Here there is no previous decision to the contrary.

In fact, the previous decision to Ham, Aldridge v. United States, is supportive of the Ross claim.

You also said in Taylor that the substantial impact on the administration of justice would cause enormous burdens for the state. The Commonwealth in its brief on page 9 says that "Therefore, the retroactive application of the Ham case would require reversal of every case in the Commonwealth involving a defendant who is a member of the minority class." That is just not correct.

In this regard, the First Circuit decision in Ross is much narrower than the Commonwealth asserts. First, it only applies to black defendants. Second, only black defendants who

are convicted of a violent crime. Third, it only applies to jury trials. Fourth, it only provides for an application where the judge or the court asks questions, not where counsel does. It is my research that affects approximately 17 states. And only when the defendant's counsel has submitted a question as to racial prejudice and the court has denied that question.

Q And only when the victim is white or of a different race from the defendant?

MR. WEST: It does not say that, but certainly that is the Ross case, and only of a violent crime.

Q What about a witness being black, say, in a white community or being white in a largely black community?

MR. WEST: That in fact is the Ross case, Mr. Justice Rehnquist. The only witness against Ross was not the victim. He could not identify Ross at all. He was only a white gas station attendant who was the witness against Ross. And so I think the First Circuit decision would certainly apply in that circumstance.

Q What if you have though, say, a white defendant in a largely white community but the white defendant proposes to call a black witness?

MR. WEST: I think that would still apply, Your Honor. I think decisions of your Court have indicated that the color of the petitioner does not affect the decision whether to allow or not allow the questions to be asked or a challenge to the

jury.

Q If it is an absolute rule, as you suggest, then it is not just limited to cases of black defendants.

MR. WEST: You are right, Your Honor. But it would certainly be limited to, at least the First Circuit, to violent crime.

MR. CHIEF JUSTICE BURGER: We will resume there at 10:00 in the morning, Mr. West.

[Whereupon, at 3:00 o'clock p.m. the Court was adjourned until the following day, Tuesday, December 9, 1975, at 10:00 o'clock a.m.]

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