ORIGINAL

In the

Supreme Court of the United States

THEODORE RISTAINO, et al.,

Petitioners,

vs. No. 74-1216

JAMES ROSS, JR.,

Respondent.

Pages 25 thru 42

Washington, D. C.
December 9, 1975

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v.	:	No. 74-1216
JAMES ROSS, JR., Respondent.	:	

Washington, D. C.

Tuesday, December 9, 1975

The above-entitled matter came on for argument at 10:11 o'clock a.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.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Ristaino against Ross.

Mr. West.

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

ON BEHALF OF THE RESPONDENT [Resuming]

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

Good morning. Just prior to yesterday's recess, I was discussing this Court's decision in Daniel v. Louisiana, which held Taylor v. Louisiana not retroactive, and in particular that part of the Daniel case dealing with the effect upon the criminal justice system if Taylor were to be held to be retroactive.

Ross's contention is that the retroactive application of Ham no doubt will have some effect on the criminal justice system within the Commonwealth of Massachusetts but not the calamitous effect urged on this Court by the Commonwealth.

We also su-gest that the decision of the First Circuit in Ross does not have the wide ramifications suggested by the Commonwealth. Yesterday I mentioned a couple of those limitations but one that I would like to mention now and what triggered the Ross doctrine in asking questions as to racial prejudice is that the defense counsel must submit questions to the trial judge to ask the prospective jurors. Failure to do

that and failure of the trial judge to refuse those questions or similar questions to the same effect will not bring the doctrine in Ham or Ross into existence.

Also as a practical matter, in order to challenge the once conviction based upon the Ham case, a criminal defendant probably would still have to be in jail. There have been 36 months that have passed since the Ham decision. Presumably all states except Massachusetts have followed the Ham decision. And even in Massachusetts in the second Ross decision, the Supreme Judicial Court, although affirming Ross's conviction, said that in future cases it is good policy to ask these questions as to racial prejudice although not constitutionally required. And in addition the legislature of Massachusetts has twice since the second Ross decision in May of 1973 revised the statute upon which this suit is predicated to now provide that the trial judge must ask or shall ask questions as to racial prejudice to the prospective jurors.

Q When is that duty triggered under the new statute, when any defendant asks for it?

MR. WEST: Yes.

Q No matter what the situation?

MR. WEST: Yes. And in addition it appears that the statute says, and it is on page 42 of my brief--

Q And whether or not there are any witnesses, you do not have to suggest who the witnesses are going to be?

MR. WEST: No, only if the court believes that there are possible preconceived opinions toward the credibility of certain classes of persons. They do not limit it to a racial prejudice.

Q What do you think the scope of the constitutional rule should be? Who is constitutionally entitled to the question?

MR. WEST: Certainly defendants of a racial minority are clearly covered, in my opinion. Also I would take the position of the defense in the Ham case, and that is that questions that rise to a serious nature of prejudices should also be included such as the beard in the Ham case, such as someone's religious preference.

Q What if the defendant is not a member of a minority group?

MR. WEST: It depends on the case, Your Honor. For example, if the case involved capital punishment, I think that it would be constitutionally required to ask.

Q I am talking about racial questions.

MR. WEST: Yes.

Q Suppose a defendant is not a member of a minority and he asks that the jury be interrogated about racial prejudice?

MR. WEST: I think in that case it is up to the trial judge to find out if there is any possible racial

prejudice in that case. For example, the victim or the defendant or the witness--

Q So, you say it is not limited to where the defendant is a member of the minority group.

MR. WEST: That is correct, and I think I answered that yesterday for Mr. Justice Rehnquist.

Q Where does it stop? Any defendant at any time, I take it, was constitutionally entitled to have the jury interrogated about racial prejudice if he asked for it.

MR. WEST: If he asked for it and if the nature of the case at all suggests that the question of black and white is part of that case, either if the defendant or the victim or a witness is of another racial minority. I think in those cases it is constitutionally required.

Q I gather then the judge on voir dire has to be acquainted with what may develop during the trial as to the identity of witnesses, would you not say?

MR. WEST: Yes.

Q There might be a white accused, but he may have a black witness.

MR. WEST: That is right.

Q The defense counsel has first to tell the judge this and then the judge has to make a preliminary determination, as I understand your brief, to question jurors who may have prejudices.

MR. WEST: That is right.

Q But defense counsel has a burden, does he not?

MR. WEST: That is right. And failure of the defense counsel to submit any questions automatically does not trigger either the Ham doctrine apparently or the Ross doctrine of the First Circuit.

Q Why do you limit the right to a member of a minority? I suppose you would say any defendant, white or black, could have the instruction.

MR. WEST: That is right.

Q How about the prosecution?

MR. WEST: Yes, I believe so.

Q But the defense, I gather, just does not get it by asking for it. As I understand what your brief says, you do not quote the full statute, but the judge has to be satisfied that some jurors may have prejudices.

MR. WEST: That is right, and that is exactly the Ross case because there was not only one question submitted by Ross, but co-defendant's counsel submitted approximately 30 questions.

Q What I am getting at is, as I understand this statute, there is a burden on defense to persuade the judge that this is a situation and this trial would involve situations where jurors may have prejudices.

MR. WENT: That is right.

Q And until he persuades him of that, the judge has no duty, as I understand it, to permit these questions.

MR. WEST: That is right.

Q Is that right?

MR. WEST: Yes. In fact, I think there is a further burden not only to submit that and convince the judge that there is a possibility of prejudice, but in the Ross case I think the judge was sort of convinced of that, that there may be some prejudice, except he felt that asking these questions would not be helpful.

Q To persuade the judge, you would say you would not have to show any more than that a witness is black?

MR. WEST: Yes.

Q That is all you have to show?

MR. WEST: I would think so, Your Honor, and I think--

Q If you had to show any more, I take it, you would question the constitutionality of the statute under Ham

MR. WEST: That is right, and that is exactly what we are doing here.

Q That is almost a per se rule then, as I understand you. All you have to say to the judge is that the defense is going to have a black witness, and then he must permit the questions to be asked of the panel.

MR. WEST: Yes.

Q On that basis I do not know why you would not say

that as long as the jury is mixed, you must ask the jury this question because witnesses are either going to be white or black.

MR. WEST: Yes. I think those questions are constitutionally required, particularly however, in cases of violent crimes. At the moment I am prepared to limit my per se rule to violent crimes because those apparently are crimes in which racial prejudice most stands out.

Q Incidentally, the full text of that statute is not in the papers here, is it?

MR. WEST: I do not believe so. And I do not think it is in the appendix, either.

Q Why do you limit it to violent crime?

MR. WEST: First of all, the First Circuit limited it to violent crimes.

Q But you are taking the position here that it should be limited to violent crimes.

MR. WEST: Yes. My personal preference would be for all crimes. But for purposes of this argument, I think I would limit it to violent crimes because those have the most potential for racial prejudice.

Q How about demonstrations, convictions for disturbing the peace. Those have no violent overtones, and yet certainly during the sixties there were occasional racial implications in those cases.

MR. WEST: Yes. As I say, my personal preference would be to have it for all crimes. The Ham case was certainly not a violent crime, possession of marijuana.

Q The statute, as I understand you, satisfies your personal preference.

MR. WEST: Which statute, Your Honor?

Q This new statute. Apparently the new statute is not limited to cases of prosecution for violent crimes, is it?

MR. WEST: It is not. It does not satisfy me, however, because when reading the new statute, it has to be triggered by the judge, meaning the judge has to be persuaded that there are some factors. And I would like to take that discretion from the judge and trigger this question.

Q I do not understand. You told us earlier that it is a per se rule. Once you say we have a black witness or, as you suggested to Justice White, if you have a mixed jury, black and white, then automatically the judge has to ask the question. He has no discretion.

MR. WEST: No, he has to ask the question if defense counsel requests it.

Q You would want him to ask him without a request from defense counsel?

MR. WEST: No, I would limit that to only when defense counsel asked those questions. I think that is a strategy

decision of defense counsel, whether to inject that issue into the trial.

Q Does that go for any witness?

MR. WEST: Yes, in my opinion,it would.

Q If it was just a purely technical witness--suppose the witness was a ballistics expert.

MR. WEST: I think those technical witnesses have their impacts on juries, and I would certainly include that type of witness in my discussion.

Q A witness that brought in a birth certificate.

MR. WEST: I would not even do it in that case because the birth certificate may well be a crucial issue in the case.

Q But the man that brings it has nothing to do with the certificate, does he?

MR. WEST: I understand that.

Q I am just wondering if you are not painting with a pretty broad brush.

MR. WEST: I think I am, and I think that in issues of racial prejudice one must paint with a broad brush because of the Fourteenth Amendment and the purpose behind the Fourteenth Amendment, to stop invidious discrimination. And I think that when you give judges discretion in this area, you wind up with cases like the Ross case limited to special circumstances or when one is a special target for racial

prejudice. And I think that I would rather err on the side of being broader in this area than being limited and restricted as I think the Supreme Judicial Court was.

Q It is your position, but you are not sure we are going to take that position, are you?

MR. WEST: I cannot be sure.

Q Mr. West, you continue to talk in terms of racial prejudice. There can be all sorts of prejudice disassociated with race. It was not that many years ago that a Republican in Mississippi was not the most popular fellow. Or today a member of the Irish Republican Army might find himself unwelcome in some communities. Would extend the constitutional rule to any situation in which arguably there might be prejudice against a particular defendant or a particular witness in the case?

MR. WEST: Yes, I would. And the decision of yours in Ham approves those state cases upon which Aldridge relied. And some of those state cases deal with--I remember one of them dealt with a political party, the Know Nothing Party. I am not sure of the name of the case. And that case was approved by this Court, which included that one must ask questions as to prejudice against--

Q Mr. West, I wrote Ham, and we did not approve those cases. We cited them, and we made it quite clear in Ham the principle was based on the equal protection clause and

the racial implications of the Fourteenth Amendment.

MR. WEST: As I recall in your decision, Mr. Justice Rehnquist, you said that you relied on Ham and all those state cases upon which Ham relied. And I took that as you approved or reaffirmed Aldridge and you also reaffirmed those state cases upon which Aldridge relied.

Q How then would you explain our rejection of the voir dire request with respect to beards?

MR. WEST: I think that what you were saying was that the beard controversy did not rise to a serious level. That did not rise to a constitutional right, although certainly the one as to race you were very careful to limit it to because of the Fourteenth Amendment.

Q In so limiting it, I do not see how you can say that the case itself stands for anything more than that.

MR. WEST: It was just from your language, Mr. Justice Rehnquist, that I assumed that you were affirming those state cases. In fact, I am trying to find that--

Q Here is the language. In referring to Aldridge, it says the Court's opinion relied upon a number of state court holdings throughout the country to the same effect, but it was not expressly grounded upon any constitutional requirement. I take it that some of the state cases were grounded in a constitutional requirement, were they not?

MR. WEST: Yes, Sixth Amendment.

Q So, Aldridge could not possibly itself have approved those cases because it did not rest on a constitutional ground expressly.

MR. WEST: Yes, except the language that I have quoted in some papers in front of me says that the Ham conviction was relying on the firmly established precedent in Aldridge and in numerous state cases upon which it relied, and I took that to mean--

Q Where did you get that language?

MR. WEST: It was from the Ham case itself. If I could have a moment later on, if you would like, I could find that exact language.

Q Never mind.

MR. WEST: If I could continue, the point that I was trying to make is that this Court does not have to reach the issue of the impact on the criminal justice system to Massachusetts or the good faith reliance on prior precedent, because the issue in hand goes precisely to the truth finding function of the jury and renders suspect Ross's conviction. And therefore, according to the Williams' case would invoke the retrospective application of Ham without regard to good faith reliance and effect on the criminal justice system.

We are here dealing not with an exclusion of evidence case or an illegal search and seizure case, which this Court has generally not held to be retroactive. We are dealing

with a case which shows the possibility, the probability, the likelihood that the Ross jury acted in an arbitrary way, not based upon the evidence but rather based upon the race of Mr. Ross and the conviction resulting therefrom.

The purpose of applying Ham retroactively would be to guarantee an accused a totally fair and impartial tribunal and to protect the integrity and dignity of the judicial process from any hint of bias or prejudice. Ross was not afforded either of these protections. The duty that the courts of the Commonwealth of Massachusetts owes to James Ross, Jr. requires no less.

If I can move on to the issue of the applicability of Ham to Ross--Ham, as you know, was a case involving the possession of marijuana. The trial judge was asked to ask prospective jurors two questions. He refused to do so and asked only those general questions provided in the South Carolina statute. This Court said that the missing element in the Ham decision was that the court did not focus the attention of the prospective jurors as to any racial prejudice they might entertain. And I would suggest to this Court that that is also the missing element in the Ross case. The Ham case and the Ross case are mot similar. Each involved a black defendant. In each the principal witness was a police officer or a quasi-police official. In the Ross case he was a security officer dressed in the Boston patrolman's uniform patrolling

Boston University.

In order to be found guilty, both Ham and Ross needed a unanimous verdict. Each final jury was composed of ten whites and two blacks. The statutes upon which each state operates is almost identical, asking the same questions. The procedure in each state is the same. It has given wide discretion to the trial judge. And in each case two jurors were excused because of racial prejudice, in the Ham case and the Ross case.

And, finally, each question that was presented to this Court for decision in the cert petitions filed by Ross and Ham were almost identical.

Aldridge was a case whose facts are strikingly similar to Ross. The Ham case relied, I think, heavily on Aldridge and affirmed Aldridge, and I think that the significance of the Ham case was that it reaffirmed Aldridge and gave it explicit constitutional underpinnings.

Ross asserts that the trial judge failure to ask specific questions as to racial prejudice is not only constitutional error but requires reversal, without the need to show actual prejudice. It is twisted logic, as the Commonwealth asserts, that on the one hand Ross was not entitled to have these questions asked but, on the other hand, he must show actual prejudice. One wonders how a criminal defendant can show actual prejudice without being able to ask questions of

prospective jurors.

Q You said reverse when you meant affirmance.

MR. WEST: I mean affirmance of the reversal of his conviction and affirmance of the Court of Appeals decision.

Can the Commonwealth assure James Ross that any error here was harmless beyond a reasonable doubt? Can the Commonwealth assure this Court that not one of the jurors chosen harbored any prejudice against Ross because of his race? We cannot, especially beause of the conclusion reached by the Kerner Commission and the recent events concerning racial segregation and integration in Boston. Even if one of the 12 jurors were prejudiced against Ross, his right to a fair trial was impaired.

Seemingly in recognition of the difficulty of criminal defendants to show actual prejudice, this Court on several occasions has dispensed with this requirement. In Aldridge and in Ham, in Peters v. Kiff, the Court said, "Moreover, if there is no showing of actual bias in the tribunal, this Court has held due process is denied by circumstances that create the likelihood or the appearance of bias." The same result in Taylor v. Louisiana. The defendant there did not allege that the failure to have women on the jury was actually prejudicial.

In conclusion, in summary, although Massachusetts

abolished slavery in 1783, racism is still part of American life, so much so that the Kerner Commission report stated in 1968 that race prejudice has shaped our history decisively in the past and now threatens to do so again. One cannot doubt the validity of that part of the Kerner Commission report. Certainly this Court in both Aldridge and Ham have recognized that problem and Ross asks that you do so again.

Failure to afford James Ross a new trial after struggling for five years and seven appellate hearings is, as stated so eloquently by Mr. Justice Marshall,"to see this Court's decision in Ham v. South Carolina stillborn and to write an epitaph for those essential demands of fairness recognized by this Court over 40 years ago in Aldridge."

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. West.

Do you have anything further, Miss Smith?

REBUTTAL ARGUMENT OF MISS BARBARA A. H. SMITH

ON BEHALF OF THE PETITIONERS

MISS SMITH: Yes, Your Honor. I would just like to address the Court on the new statute which Mr. West has referred to. That statute requires that the trial judge make a determination whether the circumstances of the case require that the questions be posed.

Q Has a procedure been developed for the administration of the statute at trial?

MISS SMITH: Not to my knowledge.

Q In answer to his question, we were told that the statute itself is not here in the papers. But is it paraphrased anywhere or described?

MISS SMITH: Mr. West, I believe, has referred to it in his brief.

MR. WEST: On page 42.

Q On page 42 of respondent's brief.

MR. WEST: Of my brief.

Q It is not in full though.

MR. WEST: No.

Q Mr. Chief Justice, could we get a copy from somebody?

MR. CHIEF JUSTICE BURGER: Will you supply us a copy.

MR. WEST: I would be very happy to send a copy to the Court.

MISS SMITH: That was the only further comment that I had.

MR. CHIEF JUSTICE BURGER: Very well, thank you. The case is submitted.

[Whereupon, at 2:33 o'clock p.m. the case was submitted.]

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