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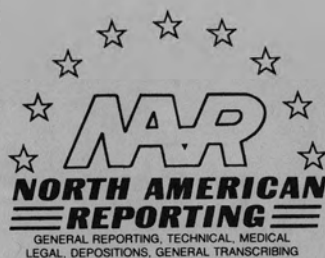
# Supreme Court of the United States

HUMBERTO ROSALES-LOPEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-6624
	)	
UNITED STATES,	)	
	)	
Respondent.	)	

Washington, D.C.  
January 12, 1981

Pages 1 through 45

ORIGINAL



IN THE SUPREME COURT OF THE UNITED STATES

HUMBERTO ROSALES-LOPEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

No. 79-6624

Washington, D.C.

Monday, January 12, 1981

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at  
11:10 o'clock a.m.

APPEARANCES:

JOHN J. CLEARY, ESQ., Federal Defenders of San Deigo,  
Inc., 225 Broadway, Suite 855, San Diego, California,  
92101; on behalf of the Petitioner

GEORGE W. JONES, ESQ., Office of the Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Respondent.

C O N T E N T S

ORAL ARGUMENT OF

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JOHN J. CLEARY, ESQ.,  
on behalf of the Petitioner

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GEORGE W. JONES, ESQ.,  
on behalf of the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Lopez against the United States.

I think you may proceed whenever you are ready, Mr. Cleary.

ORAL ARGUMENT OF JOHN J. CLEARY, ESQ.,

ON BEHALF OF THE PETITIONER

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

There may have been some doubt about the standing of the previous case before the Court, but I can assure you that the case now before you is certainly worthy of your consideration; it has been a long time coming.

In federal criminal cases, voir dire is seriously sick if unfettered judicial discretion may preclude any inquiry as to racial prejudice. Before this Court is both a constitutional question, we would contend, under the Sixth Amendment, the right to an impartial jury in the language of course, of Ham and Ristaino. But more importantly is the supervisory power -- and I'm directing your attention, of course, to the opinion of Chief Justice Hughes in the Aldridge case.

Unfortunately, in federal courts there has been caught up this sense of expeditious resolve of voir dire. It has become sometimes perfunctory, some have called it



1 -- commentators, even those working for the federal judicial  
2 center, calling it "routinized ritual". It is unfortunate,  
3 because it has strayed a long way from its original beginning.  
4 And of course, some of that must be laid to rest at the feet  
5 of counsel. The old days, and I think in this Court's opinion  
6 in Swain, there was reference to protracted voir dire that  
7 might exist in the state court system, but certainly not in  
8 the federal courts. My district, voir dire sometimes is 10  
9 or 15 minutes; in the instant case it was 6. The role of  
10 counsel, even in submitting written questions, is squelched.  
11 The role of counsel as an advocate, even implementing the  
12 Sixth Amendment, effective assistance of counsel is a mere  
13 nullity.

14           And what counsel has seen, and I must admit, as a  
15 trial lawyer that there has been, unfortunately, didactic,  
16 argumentative, repetitive voir dire by attorneys so as to  
17 bring in the judge to direct and control the inquiry as to  
18 voir dire. We feel that Rule 24 clearly permits counsel,  
19 as an advocate, to participate. Rule 24, when designed, even  
20 was -- permitted the defendant to inquire as to peers, as to  
21 any serious prejudice. And when you have a question as  
22 to racial prejudice and permit not one question on that issue,  
23 what is the impartial jury? Where did our American system go,  
24 about having one free of prejudice, the impartial jury.

25           I'd like to talk about first, the facts of this

1 case. It's a little case but it's got a big issue, concern-  
2 ing federal criminal practice -- little case, is an individual  
3 by the name of Humberto Rosales-Lopez, who's charged with  
4 alien smuggling, one of about six or seven, unfortunately he  
5 exercised his right to trial by jury and had that right  
6 accorded to him and was sentenced to 18 months confinement  
7 followed by a 30-year suspended sentence.

8 QUESTION: You lost me there a minute, Mr. Cleary.  
9 You say, unfortunately he elected to trial by jury?

10 MR. CLEARY: Yes, Your Honor, because in this case,  
11 if you look at the disposition of the other defendants, par-  
12 ticularly Virginia Bowling, who copped out and became the  
13 government witness against him, who owned and operated the  
14 drop house in southern California, she was given a misdemeanor  
15 with a recommended probation. And the other defendants in  
16 the case split up, the worst one did 90 days time, of all people,  
17 they didn't exercise the right to trial by jury. And I'm  
18 not saying, I'm not laying any blame anywhere, I'm just say-  
19 ing that those who didn't go to trial, no matter what their  
20 role in the enterprise was, max'd 90 days. A person who goes  
21 to trial by jury, 18 months followed by a 30 year suspended  
22 sentence. If there's a difference to be drawn there, I feel  
23 there is, others may not, but that's not the issue before the  
24 Court. The issue, though, is when a person asks for the  
25 trial by jury, what type of justice does he get? And I

1 think, in this case, it was a Mexican who was charged with  
2 an offense involving aliens. The critical government witness  
3 was a Virginia Bowling, whose 19-year-old daughter, an  
4 admitted junkie or heroin addict, by her mother's definition,  
5 potentially involved in the same transaction involving this  
6 alien smuggling venture, was mentioned throughout in the trial.

7 Now the Petitioner, defendant in lower court, was  
8 her lover, quasi-husband, whatever; living with this woman.  
9 This woman was clearly Caucasian, and counsel, sensitive to  
10 this issue, wanted the question asked about voir dire. What  
11 was important in this case was the effort one has to go to  
12 get a question asked about racial prejudice. Now this Court  
13 is very sensitive --

14 QUESTION: Do I gather the practice in that Court  
15 is the Judge often asks all the questions of the panel?

16 MR. CLEARY: That is correct. But in this case,  
17 Your Honor, it's even worse; it's a question of how far you'd  
18 even have to go to ask questions --

19 QUESTION: No, but I mean -- counsel have to submit  
20 questions to the Judge, and he either agrees or --

21 MR. CLEARY: That is --

22 QUESTION: -- refuses to ask them?

23 MR. CLEARY: That is correct, Your Honor. That is  
24 the procedure under Rule 24. And as the Court knows, it is  
25 done in over 75 percent of the jurisdictions, probably more



1 at the present time. The feeling is that the role of the  
2 lawyer is completely excluded on any type of voir dire, and  
3 I'm not here to suggest that you introduce them without  
4 limits, but I am suggesting that this Court today, in this  
5 case, do set some type of flexible guidelines to deal with  
6 federal criminal practice. And I can only emphasize that I'm  
7 not talking about state criminal practice.

8 This case, the aggravation exists in the record  
9 throughout. First, it was a written request for voir dire by  
10 counsel, and counsel, as a humble supplicant, said I don't  
11 want open-ended voir dire, I know how federal judges feel  
12 about voir dire. This is a federal case, move it up, move  
13 it out. And I just said, can I have 15 to 30 minutes, voir  
14 dire, just to kind of get in there one minute per prospective  
15 juror -- denied. Written request. Would you ask the question,  
16 would you consider the race or Mexican descent of Humberto  
17 Rosales-Lopez in your evaluation of the case, how would it  
18 affect you? Not asked. You'd ask the judge, before voir  
19 dire, since this is a jury trial in federal court, we don't want  
20 to give them the feeling that it's supermarket justice, could  
21 you give a preliminary instruction about what their role is,  
22 what the jurors are going to do in their case? Denied. At  
23 side bar, after the judge asks, have you got any further  
24 questions, you step up to the side bar and the request is  
25 made. The trouble is, well I think the Court missed some;

1 I asked for six questions and the question I said, in this  
2 case, I feel that inquiry should be made as to racial pre-  
3 judice. I think the Court is compelled, this is my language,  
4 under Aldridge, a decision of this Court by Chief Justice  
5 Hughes, to ask the question.

6 QUESTION: Why? What does race have to do with  
7 this trial?

8 MR. CLEARY: Race have to do with this trial?

9 QUESTION: Yes sir.

10 MR. CLEARY: Your Honor, in this case, I think we  
11 have the defendant, who is Mexican, I think by his appearance  
12 it would be obvious. And that further, that the jurors in  
13 this case, would have before them, someone that they could  
14 have a bias. And that --

15 QUESTION: Half of the jurors were Mexican, weren't  
16 they?

17 MR. CLEARY: No, none of the jurors were Mexican  
18 or Mexican-American.

19 QUESTION: Are you sure?

20 MR. CLEARY: Positive.

21 QUESTION: How are you sure?

22 MR. CLEARY: Well because I included in my brief,  
23 their surnames of -- well, they might have had a -- on the  
24 non-named side, that is, --

25 QUESTION: I know a Mexican named McCarthy.

1 MR. CLEARY: Right. They might have been Mexican.

2 QUESTION: Oh sure.

3 MR. CLEARY: Your Honor is correct.

4 QUESTION: Sure. Why do you have to have race  
5 in this case?

6 MR. CLEARY: Your Honor, I can only state first,  
7 that when any defendant might be the object of racial pre-  
8 judice -- the defendant himself, in a federal criminal case --  
9 the issue may be asked. In a federal bank robbery case, --  
10 I was representing a Caucasian defendant charged with bank  
11 robbery, and I asked the judge would you ask as to any  
12 racial prejudice or antagonism, it's my client. The judge  
13 looked down over his glasses --

14 QUESTION: What's that got to do with this case?

15 MR. CLEARY: Your Honor --

16 QUESTION: What's that got to do with this case?

17 MR. CLEARY: In this case, the defendant was  
18 Mexican. The jurors, who was his tryers of fact, the ultimate  
19 arbiters of the facts, could have had a bias, they could have  
20 been bigoted against him in this particular case. Under this  
21 Court's analysis in Aldridge, there was a black defendant  
22 charged with the murder of a white policeman.

23 QUESTION: There you see race right there. One  
24 race murdered another race. But this Mexican, who did he --  
25 what did he do to anybody else?



1 MR. CLEARY: Okay. His relationship was unfor-  
2 tunately with the woman, a Caucasian, who was using her White-  
3 Anglo status to transport the Latin-appearing individuals  
4 in the trunk of her vehicle. As the record indicates, she  
5 used that appearance, or she could escape detection by going  
6 through the San Clemente checkpoint. That status and that  
7 person was a critical witness in this case. Her credibility  
8 was an issue.

9 QUESTION: Did you argue that to the judge?

10 MR. CLEARY: I, in fact, at this time, I didn't  
11 know whether or not --

12 QUESTION: Did you argue that to the judge?

13 MR. CLEARY: I only said that -- I just --

14 QUESTION: What did you tell the judge was the  
15 reason that you wanted this charge?

16 MR. CLEARY: I felt that the Court, under federal  
17 law, should permit a question as to racial prejudice when it's  
18 raised by counsel.

19 QUESTION: Pro se, pro se?

20 MR. CLEARY: That is correct, Your Honor. And I  
21 cited all --

22 QUESTION: But you have nothing beyond that?

23 MR. CLEARY: Well Your Honor, the Court notes --  
24 the Court didn't even permit me, the trial Court, to even  
25 finish the six questions that I had asked for and that -- my

1 limited role, it is very difficult. Second of all, it's  
2 difficult for counsel to project all of the evidence in the  
3 case to the trial judge who might not be familiar with it.  
4 And I think that one of the concerns here, it's a very serious  
5 concern, is there are trial court judges might not be privy  
6 to all the facts, terms or directions in which a case might  
7 go.

8 QUESTION: And it's your duty to see that he is  
9 acquainted with the facts, that's a part of your job.

10 MR. CLEARY: Yes, Your Honor. Your Honor is  
11 correct.

12 QUESTION: And here you didn't. You didn't give  
13 him all the facts.

14 MR. CLEARY: Your Honor, there are some times even  
15 trial lawyers know that you can't anticipate every move at  
16 trial. In this case --

17 QUESTION: One of these days I'm going to write an  
18 encyclopedia of 116 foot shelf of things that lawyers could  
19 have done that they thought of on their way home, after the  
20 hearing. You'll help me on that, won't you?

21 MR. CLEARY: Yes, Your Honor, I think I could  
22 probably --

23 QUESTION: That doesn't help me here, though,  
24 does it?

25 MR. CLEARY: No, I don't think it was pertinent

1 here, because the reason it wasn't, was that the daughter,  
2 Kim -- there was some question as to whether or not we were  
3 going to call her to testify. And as the record reflects in  
4 this case, I had subpoenaed Kim, the daughter, and that rela-  
5 tionship of the daughter vis a vis my client, would be an  
6 issue. Further, I think that it was pertinent in this case  
7 that she didn't ultimately testify because the government  
8 then subpoenaed her, and it was a question of who was going  
9 to use who for what purpose.

10 I think, further, that when you have a Mexican  
11 defendant charged in an alien smuggling case, in a community  
12 in the proximity of the border, that those facts alone jus-  
13 tify under Aldridge, an inquiry.

14 QUESTION: May I ask, Mr. Cleary, have we ever  
15 addressed the question whether discrimination against a  
16 Mexican is racial discrimination?

17 MR. CLEARY: Yes, Your Honor. It would be my feel-  
18 ing that the Courts decisions in, I believe it's the Texas  
19 case, the most recent one is Castaneda v. Partida, where the  
20 Court held that Mexican-Americans were a minority type of  
21 group.

22 QUESTION: Well minority, all right, but is the  
23 discrimination racial, that's what I mean, technically  
24 racial?

25 MR. CLEARY: Well the question is as to --



1 QUESTION: Of course, with Orientals, you have a  
2 different color than Caucasian, so are blacks. But are  
3 Mexicans?

4 MR. CLEARY: Well if I --

5 QUESTION: A different race?

6 MR. CLEARY: Well I think that even if a person  
7 were, say, a Mexican-American --

8 QUESTION: I don't suggest there may not--neverthe-  
9 less, be the kind of discrimination you are arguing for, but  
10 is it a racial discrimination?

11 MR. CLEARY: Status as a Mexican is not. And for  
12 example, I could be a Mexican citizen. And whether or not  
13 a jury is prejudiced against me because of my Mexican  
14 status, is irrelevant, because whether the person is a citizen  
15 -- could it be a Mexican-American, sitting in the courtroom --

16 QUESTION: Well there might be discrimination against  
17 the discreet minority of Mexicans --my brother Marshall has  
18 been suggesting -- is that necessarily a racial discrimination?  
19 And I don't know that it is.

20 MR. CLEARY: Well I think that in the context of  
21 this case there was inquiry as to alienage and to an alien  
22 problem. But I think that that doesn't direct itself spe-  
23 cifically to the point we're concerned with in this case, which  
24 is this antagonism.

25 To me, racism is an irrational belief in the

1 superiority of one's own racial or ethnic classification  
2 so that, many times it will determine or turn on who the  
3 particular object -- for example, a member of a minority  
4 group could be prejudiced against a minority group under this  
5 definition, and shouldn't you be allowed to probe that in a  
6 federal criminal case. In the context of this case, where  
7 we had some glancing questions as to alienage, think of  
8 what could happen in the penumbra of such an inquiry? First,  
9 that could be directed towards the offense itself. We have  
10 the response of one juror, when asked about aliens, what did  
11 that bring up to her mind when asked about aliens. Well  
12 there's -- that's the name they used about persons who  
13 transport prisoners -- I mean, persons who transport the aliens.  
14 That concept right there, itself, tells us a little bit about  
15 what that meant. To that person it meant something to do with  
16 people who move human flesh, which is an odious concern. That  
17 was not the nature of my inquiry. The nature of my inquiry  
18 was as to his racial descent, or racial background, or  
19 descent. And in my voir dire question to avoid the problem  
20 raised by both Mr. Justice Marshall and Mr. Justice Brennan,  
21 I asked as to Mexican race or descent because of the possible  
22 ambiguity in this area.

23 QUESTION: Mr. Cleary, I suppose it's an unspoken  
24 premise of your entire argument that when you put a question  
25 about ethnic or other prejudice that the person to whom the

1 question is addressed will immediately answer in good faith  
2 and fully and honestly?

3 MR. CLEARY: Yes, Your Honor. In fact, I believe  
4 that that is --

5 QUESTION: Do many people in the ordinary course  
6 of human experiences admit prejudices when they have them?

7 MR. CLEARY: My experience, it has been yes.  
8 And in the case of --

9 QUESTION: Yours is contrary to the human exper-  
10 ience reported in all the authorities who have undertaken to  
11 write on the subject.

12 MR. CLEARY: Well Your Honor, the one difficulty  
13 with that area is that there is -- if you put it as a ~~this~~  
14 rhetorical, you know, would you be raising prejudice against  
15 the defendant sitting here? The answer of course, no one  
16 would say no. And as I pointed out in one of the social  
17 science studies that I presented with my brief, that you  
18 sometimes have to approach it very indirectly. In this case,  
19 I tried to phrase it, would you consider it in the evaluation  
20 of your case? And I think that when jurors are sworn, and  
21 what is voir dire, to speak the truth; that if, someone asks  
22 me, I might have to think a bit about the question, and then  
23 would respond. The question might come as to school inte-  
24 gration, which might trigger a racial basis and what we're  
25 concerned with here is, what type of probing is necessary.



1 And to me, to think that the courts would permit no question  
2 to be asked because the fear is that the person wouldn't be  
3 truthful, would undermine our whole judicial system.

4 QUESTION: Mr. Cleary, let me call your attention  
5 to the Appendix at page 18. You've referred to a couple of  
6 questions, that whereas by the district court, as glancing,  
7 and I take it, one of them is the Court's question towards  
8 the top of that page, -- let me again ask the general question,  
9 do any of you have any particular feelings one way or the  
10 other about aliens or could you sit as a fair and impartial  
11 juror if you are called upon to do so, in the back row. And  
12 then Juror Skelly responds, Christine Skelly, and I have  
13 mixed feelings about it. I don't think I could be impartial.  
14 I have a tendency to feel my own feelings, I don't think I  
15 could be a fair juror. And then the judge goes ahead and  
16 excuses her.

17 Don't you think the judge did enough here to alert  
18 the jurors to the type of case and to the problems that they  
19 might face along the line that you've outlined?

20 MR. CLEARY: I don't think so, Justice Rehnquist,  
21 and I think in this case if you look at -- what the question  
22 was asked to measure the response, it could have been aliens  
23 or the alien problems, it could have been the feeling about  
24 the immigration laws, how a person feels about it. It could  
25 be a feeling about the poor, about the poor looking for a

1 better way of life when she says, my feelings which are  
2 undefined by the very nature of the question.

3 Third, I think that there's a question as to how  
4 do you feel about this individual sitting in this courtroom,  
5 specificity. Because rather than dealing with an abstraction  
6 there should have been some concrete direction or alerting  
7 of the jurors as to this possible bias.

8 QUESTION: Well didn't he have the defendant stand  
9 up?

10 MR. CLEARY: Yes, he did, he did have to stand.  
11 And I think that would only trigger the fact that his pre-  
12 sence as being a Latin, or one of the -- could have been the  
13 subject of racial bigotry, was even just presented in that  
14 fashion, and I think further, what's really critical about  
15 this case, is that the perfunctory nature of the question and  
16 further, after the voir dire, where counsel specifically  
17 requests that the inquiry -- that it had to be made.

18 I think also to --

19 QUESTION: Of course your trial judge here, un-  
20 fortunately, was from the District of Columbia, wasn't he?

21 MR. CLEARY: That is correct, Your Honor.

22 QUESTION: Are you making any point, however, that  
23 he did other than apply the current Ninth Circuit law?

24 MR. CLEARY: I think that, under the Ninth Circuit  
25 law, he could have followed it. However, I think that this

1 Court's decision in Aldridge and the language in Ristaino v.  
2 Ross clearly set a different standard that would -- have, by  
3 my interpretation of it, set aside the Ninth Circuit prece-  
4 dent. And I think that the question that Your Honor raises  
5 as to alienage as distinguished from race or nationality, this  
6 Court and Mr. Justice Marshall, in Espinoza v. Farah~~Manu~~-  
7 facturing, held that an employer who discriminated on the  
8 basis of alienage, that is to say, Mexicans, was not treading  
9 on the ground that I was trying to touch upon, that is, to  
10 say as to race or nationality, that there was a clear cut  
11 delineation in that area and that's what I was trying to  
12 assert here.

13 QUESTION: That was a statutory case, was it not?

14 MR. CLEARY: It was, but it was dealing with the  
15 terms we're dealing with here, and the bias of prejudice.  
16 The Congress gave protection as to bias as to race or nation-  
17 ality. It did not give protection as to alienage, and as to--  
18 what I was trying to probe at was the protected area, that  
19 is to say, discrimination against race or ethnic or nation-  
20 ality classification.

21 QUESTION: Well, Mr. Cleary, was the basis of your  
22 concern that there exists in your community a bias against  
23 Mexicans, or is it a bias against Mexicans engaged in bringing  
24 in illegal aliens?

25 MR. CLEARY: No, my concern is not as to the offense,



1 at all. My concern is do any of these prospective jurors  
2 have any type of bias against my client because of his  
3 Mexican race or descent?

4 QUESTION: Well that's what -- is there any -- are  
5 you suggesting that in the community generally there is a  
6 bias against Mexicans, that they are looked down upon as a  
7 minority, or something?

8 MR. CLEARY: I think the history and tradition of  
9 California is overwhelming in that respect, starting back  
10 from the Californio days to studies now in California history  
11 teachers -- they get a period of -- of rebuke --of the  
12 Mexicans within the culture, originally California was a part  
13 of Mexico.

14 QUESTION: It doesn't matter that the offense was  
15 importing the illegal aliens, it could have been any offense?

16 MR. CLEARY: It could have been any offense, but  
17 I think that it brings out the racial characteristic, because  
18 you're going to have other individuals involved in it, and  
19 again, the fact, the exploitation of people who themselves  
20 might be Mexicans, might be another aggravating factor that  
21 would be considered.

22 I would like to point out that the relief sought  
23 here is no more than a simple standard that Aldridge be  
24 complied with, that there the thought that -- and again, the  
25 language of Chief Justice Hughes that someone who might

1 have a bias beyond the jury, the trier of fact, cannot allow  
2 this Court to stand. Further, in Peters v. Kiff, you have a  
3 long line of the cases where a white defendant was allowed to  
4 assert the fact that members of the -- blacks were not in-  
5 cluded in a prospective panel.

6 The Court held that --

7 QUESTION: Mr. Cleary, would your rule apply to a  
8 Mexican-American charged with murdering a Mexican-American?

9 MR. CLEARY: Yes, Your Honor, it would.

10 QUESTION: I thought so.

11 QUESTION: I thought your primary or first argument,  
12 is that a trial judge is obligated to ask this question of a  
13 prospective juror whenever defense counsel requests that he  
14 ask the question?

15 MR. CLEARY: Right. That was my --

16 QUESTION: Regardless of what may be a court as  
17 a Sunday morning quarterback would see as a possibility of  
18 racial prejudice in a particular case, either by the reason  
19 of the charge in the case or the race of the defendant.  
20 I mean possibly the defendant might be a Caucasian. And the  
21 offense might be a bank robbery, of a white owned and operated  
22 bank. Nonetheless, if you have -- I thought your initial  
23 submission was that if defense counsel asks that this question  
24 be asked to the jury that it must be asked?

25 MR. CLEARY: That is my submission. Your Honor, and

1 the point I --

2 QUESTION: Provided the defendant is a Mexican?

3 QUESTION: No, no.

4 MR. CLEARY: No. No, what I'm trying to say,  
5 Justice Stewart, you hit the nail on the head. My position,  
6 basically, is that race can go any direction, not just against  
7 minorities --

8 QUESTION: By a whole Negro jury, who are just  
9 prejudiced against Whiteys?

10 MR. CLEARY: Precisely. And the answer is --

11 QUESTION: And the all Negro jury is opposed against  
12 Negroes?

13 MR. CLEARY: There --

14 QUESTION: You could have that.

15 MR. CLEARY: Well I think that a person --

16 QUESTION: Is there any way -- is there any end to  
17 this?

18 QUESTION: No, no. No end at all.

19 MR. CLEARY: Your Honor, I think that when you deal  
20 with racial prejudice, we're dealing with such a touchy and  
21 very sensitive area, that if counsel who hopefully are not  
22 incompetent, seriously want the inquiry made, for the  
23 Court to deny it, I think, would be improper.

24 QUESTION: Well what about religion?

25 MR. CLEARY: That's not before the Court. The



1 religious issue might be -- either way, is how the Court  
2 would construe Connors, it didn't allow political inquiry.  
3 Religion may, in the terms of the particular case, be appro-  
4 priate, but what I'm suggesting basically, is the race.

5 I would like to reserve --

6 QUESTION: Mr. Cleary, before you sit down, let  
7 me be sure I understand -- I may not have caught the full  
8 thrust of your argument. Suppose this trial was in Alaska  
9 or Maine, and there aren't any -- haven't been any Mexicans  
10 in the state for 100 years, and the crime has nothing to do  
11 with Mexicans, you mean to say the trial judge had the duty  
12 to ask a question about prejudice against Mexicans?

13 QUESTION: If requested by the defendant?

14 MR. CLEARY: There is no --

15 QUESTION: Suppose he has to ask a) Mexicans, b)  
16 Negroes, c) Catholics, d) what -- made a list of 100. Would  
17 he have to ask them all?

18 MR. CLEARY: No, in fact, I think what is the pur-  
19 pose is, one, it shouldn't be sua sponte. Two, it must be  
20 upon the request of counsel --

21 QUESTION: I understand. But I'm having counsel  
22 ask, he doesn't know, maybe the -- man has a great uncle who  
23 was French, he wants to know is there any prejudice for or  
24 against French?

25 MR. CLEARY: I think it has to be in the context of

1 the particular case.

2 QUESTION: It has to be one of the defendants.

3 QUESTION: But that's different now.

4 MR. CLEARY: No, I'm saying only as to the defen-  
5 dant, but as to any particular case. Meaning, I'm not saying,  
6 if he comes in and asks prejudice about blacks, whatever, I  
7 think that as to anything, any hostility of the prospective  
8 jurors towards the racial or ethnic classification of any  
9 particular defendant, any particular defendant, not just  
10 Mexican defendants.

11 QUESTION: Well I understand, but need not -- you're  
12 not even arguing that the defendant in the case in which the  
13 request is made has to be of the racial or national origin  
14 to which the question pertains?

15 MR. CLEARY: No. No, I think you have to ask -- I  
16 could not ask if -- in my case, are you prejudiced against  
17 blacks, because my client was Mexican.

18 QUESTION: Exactly.

19 MR. CLEARY: My question was, precisely only  
20 antagonisms as towards Mexicans.

21 QUESTIONS: Well all right. But then, I didn't  
22 understand your answer I guess.

23 QUESTION: Well but what about witnesses? I mean,  
24 if you have a white client but plan to call a Mexican witness  
25 and a black witness, or -- and an Armenian witness and a

1 Swedish witness and a Finnish witness, presumably you vir-  
2 tually need a textbook on anthropology in order to conduct  
3 voir dire.

4 MR. CLEARY: The witness would not be on trial.

5 QUESTION: Well, the witness may not be on trial,  
6 but the fact that the jury were prejudiced against the  
7 testimony of the witness might seriously impair the fairness  
8 of the trial.

9 MR. CLEARY: That is a possible thing, but we're  
10 dealing with the unfettered --

11 QUESTION: Mr. Cleary, suppose the defendant is  
12 a blond, blue-eyed Mexican or Negro. Would you have to  
13 give it then?

14 MR. CLEARY: I think in that particular case you'd  
15 have to give both, the --

16 QUESTION: You'd have to --

17 MR. CLEARY: The antagonism towards -- three,  
18 Mexican, black or a group of a group of --

19 QUESTION: Bear in mind now, I'm going to -- well,  
20 I wanted to warn you that I was going to ask you why.

21 MR. CLEARY: The answer, I think, in that case is  
22 that I think a person who might have those exhibits might  
23 trigger off some hostility, which it could be -- sensitively  
24 inquiry --

25 QUESTION: Trigger hostility, they wouldn't even



1 know he was a Negro.

2 MR. CLEARY: Well, I think that counsel has to make  
3 an informed judgment; if he thought the individual might be  
4 acceptable and the --

5 QUESTION: So counsel is going to run the government?

6 MR. CLEARY: No, I --

7 QUESTION: Whenever counsel makes up his mind that--  
8 this is your position, is it not -- that whenever counsel makes  
9 up his mind, that that charge is necessary, the judge must  
10 give it. Isn't that where you end up?

11 MR. CLEARY: In the inquiry as to racial prejudice,  
12 that is correct, Your Honor.

13 QUESTION: I have one other question, if I may. Now,  
14 this is -- how, this follows up with what Justice Brennan  
15 asked you, how significant is -- in your argument, is the  
16 factor of race? Supposing you had a student who was shown to  
17 be an Iranian, and -- an Iranian citizen, would you, under  
18 your argument, be entitled to ask the jury if -- could they  
19 give a fair trial to an Iranian student?

20 MR. CLEARY: Excuse me. The question as to student  
21 status might not be pertinent; but to being Iranian, I think  
22 that that would be correct.

23 QUESTION: So that the racial aspect is not critical.  
24 Rather, it's some characteristic of the defendant that you think  
25 might give rise to some prejudicial reaction?

1 MR. CLEARY: Race is a difficult term to define,  
2 but it usually includes not only physical characteristics,  
3 but certain ethnic delineations that have certain physical  
4 characteristics with it. And so, it has the physical char-  
5 acteristics -- in my case, brown skin, a certain appearance,  
6 dark hair -- that then, the inquiry must be made.

7 But I think maybe between certain European  
8 stock, as to whether such -- that might depend upon the cir-  
9 cumstances. I think --

10 QUESTION: Why would that be different? I mean,  
11 if you have neighborhoods in big cities where there are pre-  
12 judices -- the German neighborhood right across the street  
13 from a neighborhood of -- say, a Polish neighborhood, why  
14 wouldn't you have the same right there?

15 MR. CLEARY: Because I think, and again, I'm not  
16 trying to get into anthropology, I think the classifications  
17 would not define all of those -- I don't think you could call  
18 -- say, Germans, and French different races.

19 QUESTION: Well but what difference does it make  
20 whether -- why is race significant to your argument at all?  
21 I think the -- I thought the touchstone would be potential  
22 prejudice?

23 MR. CLEARY: Well I think --

24 QUESTION: If you've got a group of people who may  
25 be the object of prejudice within a community, why does it

1 make any difference whether they are black or Iranian, I  
2 just don't understand?

3 MR. CLEARY: Mr. Justice Stevens, you are correct.  
4 However, given the context of this case, I would like to  
5 reach that position. But as a minimum fall-back position,  
6 I'll stick with race. I think you're absolutely correct.  
7 I think --

8 QUESTION: See, you're suggesting an irrational  
9 distinction. Race and other kinds of prejudice.

10 MR. CLEARY: Well, no, I'm trying to say that  
11 this Court has ruled in the area of racial prejudice, that  
12 I have asked for in this case. I think that voir dire has  
13 to probe for any serious prejudice; in this case, it didn't  
14 probe for any serious prejudice at all, and are not before  
15 the Court on any issue other than as to racial prejudice.

16 QUESTION: How about people with beards? Supposing  
17 ~~you~~ defendant ~~no~~ had a beard, and ~~that's~~ ~~on~~ a middle class,  
18 all white, jury, with clean-shaven faces?

19 MR. CLEARY: Well, I don't want to get into the dissent  
20 of the majority in Ham v. South Carolina, my feeling is as  
21 to the beards, if it would be a serious prejudice in the  
22 case. And my position would be that, on voir dire, that  
23 should clearly be explored, if counsel would give some  
24 feeling that these individuals might represent some threat to  
25 the jurors that should be explored by the judge. However,



1 the position I'm saying is that what constitutes a serious  
2 prejudice has to be defined by cases. In that case, we're  
3 reviewing a state of criminal proceedings, you have before you  
4 a federal criminal proceeding and to me, minimum due process  
5 fairness requires exploration as to any serious prejudice or --

6 QUESTION: Well, suppose we disagree with you on  
7 your -- what I'll call a per se approach, that any time  
8 counsel asks the question must be -- do you lose this case,  
9 then?

10 MR. CLEARY: No, Your Honor, I don't.

11 QUESTION: You think there are special circumstances  
12 that -- in any event, in this case the question should have  
13 been asked?

14 MR. CLEARY: Right. In this case, I think that the  
15 relationship of the defendant to the --

16 QUESTION: But you've lost on that in every other  
17 Court?

18 MR. CLEARY: Because the feeling on that one as to  
19 the issue was that they didn't really think the question had  
20 to be asked in the first instance. If this Court held that  
21 the question had to be asked, then we won't reach harmless  
22 error. In this particular case where the racial polarization,  
23 the white, Caucasian, and the defendant going with a 19-year-  
24 old daughter who may be in the alien smuggling venture, who  
25 may be a junkie, who the jury -- could figure that this

1 defendant corrupted this young flower, this woman who is a  
2 witness for the government, in the case where the issue turns  
3 solely on credibility. There's no overwhelming --

4 QUESTION: But you argued to the -- this is from  
5 the Ninth Circuit, is it?

6 MR. CLEARY: That's correct, Your Honor.

7 QUESTION: Did you argue this -- that even if there  
8 isn't a general rule about it, at least in the circumstances  
9 of this case the question should have been asked?

10 MR. CLEARY: Your Honor, in the brief, I think I  
11 presented almost all the points. I don't -- I can't give you  
12 exactly the wording --

13 QUESTION: Well, you presented it and it was rejected,  
14 that's a sort of a factual inquiry.

15 MR. CLEARY: I felt, my feeling was even under the  
16 factual circumstances of the case, should have been heard --  
17 there should have been inquiry as to --

18 MR. CHIEF JUSTICE BURGER: Mr. Jones.

19 ORAL ARGUMENT OF GEORGE W. JONES, ESQ.,

20 ON BEHALF OF THE RESPONDENT

21 MR. JONES: Mr. Chief Justice, and may it please  
22 the Court:

23 After explaining that the defendant in this case  
24 was charged with smuggling illegal aliens into the United  
25 States, and that the purpose of voir dire was to uncover

1 any underlying prejudices, the trial court specifically asked  
2 the jurors whether any of them had any feelings about aliens,  
3 or the illegal alien problem. It seems to us highly unlikely  
4 that any of the jurors in this case assumed that the trial  
5 court's questions excluded Mexican aliens, or any strong  
6 feelings they might have had about the Mexican illegal alien  
7 problem, particularly in light of what Petitioner refers to  
8 as his obvious Mexican appearance.

9 QUESTION: Are we to assume that you -- that the  
10 United States thinks the, if the question about aliens hadn't  
11 been asked there would have been error here?

12 MR. JONES: We don't believe that circumstances of  
13 this case provide any substantial basis for asking any more  
14 than what the trial court --

15 QUESTION: I know. But what if he hadn't asked  
16 about aliens?

17 MR. JONES: The question was about illegal aliens.

18 QUESTION: Was there enough -- was this the kind of  
19 a case where some kind of a question about alienage or Mexican  
20 Americans should have been asked?

21 MR. JONES: Well if the trial court hadn't asked  
22 either the question about aliens or illegal immigration, it  
23 would be a much closer case. But since the trial court did  
24 ask those questions, the issue in this case is essentially  
25 whether petitioner's proposed question would have been



1 significantly more effective in uncovering bias against  
2 Mexicans than the question the trial court did ask.

3         This Court's cases don't suggest that questions  
4 about racial bias or racial prejudice, need to be put in any  
5 particular form, in Ham this Court specifically disclaimed  
6 any intention --to impose such a requirement. The Court's  
7 questions in this case were more than adequate to satisfy  
8 both the constitutional rule and the federal common law rule.

9         A panel of jurors drawn from the Southern District  
10 of California could hardly have failed to understand the  
11 trial judge's questions to include bias against Mexican  
12 aliens and any strong feelings they might have had about  
13 the illegal alien problem, illegal Mexican alien problems.  
14 The only bias that wasn't covered by the questions the trial  
15 court asked, only conceivable bias that wasn't covered is  
16 bias against Americans with Mexican ancestry. Petitioner of  
17 course, was not an American, and there's no reason at all to  
18 assume that the jurors in this case would have been biased  
19 against Mexican Americans but not Mexican aliens.

20         Throughout the proceedings in the Courts below, the  
21 Petitioner -- and in fact, in this Court as well -- Petitioner  
22 argues that the trial court was obliged to ask this additional  
23 question only because this Court's decisions required it.  
24 Neither Ham nor Aldridge nor any other decision of this Court  
25 purported to establish a per se rule to be applied without

1 regard to the facts of the case. Ristaino, of course, makes  
2 it plain that the constitutional rule is -- the constitutional  
3 rule is triggered only if race or racial bias is inextricably  
4 bound up with the issues at trial, that simply wasn't the  
5 case here. The federal common law rule announced in Aldridge  
6 requires the questions specifically directed to racial bias  
7 or at least something more than a general question only when  
8 the nature of the offense or the facts of the case suggest  
9 that there is a strong or substantial likelihood that racial  
10 bias will affect the jury's deliberations. The decision in  
11 Aldridge does not rest on the assumption that only a question  
12 specifically mentioning race is sufficient to uncover racial  
13 bias. Nor does it rest on the assumption that a question  
14 that does not mention race is necessarily insufficient.

15 QUESTION: Mr. Jones, can I interrupt for a prelim-  
16 inary question? In the procedure that was followed by the  
17 trial judge here, was the government given an opportunity to  
18 object to the questions proposed by defense counsel to be  
19 asked by the Court? And if so, did the government object  
20 to this particular question?

21 MR. JONES: The questions were submitted in writing,  
22 prior to trial, and therefore the government of course had an  
23 opportunity to object. There's no indication that the govern-  
24 ment did object, however. Immediately prior to --

25 QUESTION: So you wouldn't know -- the government

1 doesn't take the position that there would have been anything  
2 wrong with the judge asking the question, it's just that it  
3 wasn't necessary to do so?

4 MR. JONES: Right. And there was particularly  
5 nothing wrong with asking the question in light of the ques-  
6 tions that were asked, but in addition to that, the federal  
7 common law rule that Petitioner relies on does not at all  
8 suggest that the question should be asked whenever the De-  
9 fendant requests it, but only when the likelihood that racial  
10 bias will affect the jury's deliberations is substantial.  
11 In Ristaino, this Court made it fairly clear that something  
12 more than a general question was required, but the rule is  
13 only required because the facts indicate a need for it. And  
14 the additional protection provided by asking more specific  
15 questions was thought necessary. The facts of both Ristaino  
16 and Aldridge underscore the point.

17 QUESTION: Mr. Jones, let me ask one other question.  
18 Supposing this had been a black defendant and the request had  
19 been framed in terms of racial prejudice specifically. Would  
20 you say that -- and the crime had actually nothing to do with  
21 a black/white problem -- would you say that the judge would  
22 have had a duty to ask the questions?

23 MR. JONES: Certainly not. As I said, the federal  
24 common law rule adopted in Aldridge, or announced in Aldridge,  
25 only requires a question more specific than a general question



1  
2 when the facts or the circumstances surrounding the case  
3 suggest there is some particularly substantial likelihood  
4 that racial bias will be a factor in the case or influence  
5 the jury's deliberations. There's simply -- in both  
6 Ristaino and Aldridge, black defendants were charged with  
7 crimes of violence directed at white law enforcement officers.  
8 In Aldridge the defendant was charged with murder, and in  
9 Ristaino, assault with intent to murder. In cases involving  
10 crimes of interracial violence, the danger that racial pre-  
11 judice will affect the deliberations of the jury, is partic-  
12 ularly substantial for some of the jurors are likely to  
13 identify with the victim and view the case as us against them,  
14 and of course, crimes of violence are inherently more likely  
15 to evoke strong emotional reactions in jurors than most non-  
16 violent crimes.

17         The Petitioner's attempt in this Court and in his  
18 brief to rely on the relationship with Bowling's daughter,  
19 is -- well, comes about three years too late. In the District  
20 Court, Petitioner said nothing, absolutely nothing to the  
21 District judge about the possibility that this relationship  
22 with Bowling's daughter would be mentioned at trial. And as  
23 Justice Marshall pointed out, it's the duty of counsel to point  
24 out the facts which will support a request for a specific ques-  
25 tion. Having failed to do that, he should not be allowed to

1 rely on it now. But even if Petitioner had raised the point  
2 in the District Court, refusal to ask the question in this  
3 case would not have constituted an abuse of discretion.

4 QUESTION: Well it would have in some other circuits,  
5 wouldn't it?

6 MR. JONES: Well, there's no discretion in some  
7 other circuits.

8 QUESTION: That's what I -- so it's not, you would  
9 even get to the discretion problem?

10 MR. JONES: That's right.

11 QUESTION: So you would be losing this case in other  
12 circuits?

13 MR. JONES: That's right. And on the facts of this  
14 case we might be petitioning in this case. But --

15 QUESTION: You would have lost this case before now  
16 in other circuits?

17 MR. JONES: That's right.

18 QUESTION: But as the Petitioner points out, every  
19 defendant belongs to one race or another, and --

20 MR. JONES: That's right.

21 QUESTION: -- and potentially at least, there can  
22 be racial prejudice against any race?

23 MR. JONES: As Petitioner also points out --

24 QUESTION: And his claim is, as you know, that  
25 whenever defense counsel asks about -- asks the jury -- requests

1 that the jury be asked about racial prejudice, every potential  
2 juror -- that it's the judge's obligation to ask these  
3 questions.

4 MR. JONES: Rules 24 suggests the contrary, Your  
5 Honor. The Rule provides that the Court may allow counsel  
6 to conduct voir dire, may itself conduct voir dire, if the  
7 Court conducts voir dire it should allow counsel to ask sup-  
8 plemental questions or submit supplemental questions that  
9 it deems proper.

10 QUESTION: Right. Every case it says may.

11 MR. JONES: Right. Except that, it says shall  
12 permit counsel to submit supplemental questions.

13 QUESTION: And there was no denial of that?

14 MR. JONES: That's right. And in each case, the  
15 trial judge as Rule 24 suggests, should be allowed to look  
16 at the circumstances of the case and determine whether there's  
17 any particular need for the kinds of questions or whether as  
18 the trial judge did in this case, questions other than spe-  
19 cific questions posed by counsel were sufficient.

20 QUESTION: Mr. Jones, supposing you had an ordinary  
21 burglary trial, had no racial overtones, and about a week  
22 after the Pearl Harbor bombing, and the defendant was a  
23 Japanese. Would he have had a right to have this kind of  
24 question asked about potential prejudice against Japanese?

25 MR. JONES: Certainly.



1 QUESTION: Well why?

2 MR. JONES: Because under the circumstances, it  
3 would be very likely that jurors would find his -- his  
4 status as Japanese --

5 QUESTION: Fact that he's Japanese.

6 MR. JONES: -- somewhat offensive, or at least  
7 be very sensitive.

8 QUESTION: You're really moving out, now. What  
9 about the Germans?

10 MR. JONES: Excuse me?

11 QUESTION: What about Germans and Italians?

12 MR. JONES: At that point, it seems to me that  
13 these two questions underscore the need to allow the trial  
14 judge and the district courts to look at the circumstances  
15 of the case and determine whether a specific question is  
16 necessary or not.

17 QUESTION: Well then, Mr. Jones, you are saying no  
18 more, I take it, than that it might be an abuse of dis-  
19 cretion to decline to ask the question Justice Stevens  
20 suggested to you, not a constitutional per se rule?

21 MR. JONES: That's right.

22 QUESTION: You weren't suggesting that there should  
23 be a constitutional rule on this?

24 MR. JONES: No.

25 QUESTION: Well, of course, nobody's arguing

1 the constitutional rule.

2 MR. JONES: Excuse me?

3 QUESTION: Nobody's arguing the constitutional  
4 rule. It's a question of supervisory power.

5 MR. JONES: I'm not entirely sure that Petitioner  
6 isn't arguing for constitutional --

7 QUESTION: Well he's arguing for either alternative.

8 QUESTION: My question was in the disjunctive  
9 constitutional or per se rule. Per se rule, under supervisory  
10 power. That isn't what you were conceding?

11 MR. JONES: No. It seems to us that --

12 QUESTION: Well excuse me, finish with the Chief  
13 Justice.

14 MR. JONES: The per se rule is, under the circum-  
15 stances, unnecessary in this area. And it would cause as  
16 many problems as it would resolve, since you have questions  
17 like --

18 QUESTION: Well Mr. Jones, you may understand  
19 what I'm talking about, whether it's a constitutional rule or  
20 a supervisory rule, it would end up in being a per se rule?  
21 Is that what they're arguing for?

22 MR. JONES: I think they are arguing that there is  
23 a per se rule, at least as to supervisory power, and that --

24 QUESTION: So there is no difference; they  
25 just want a per se rule either way?

1 QUESTION: That's right.

2 QUESTION: That's the way I -- am I right, Mr. Jones?

3 MR. JONES: I think that's -- I am inclined to agree  
4 with your interpretation.

5 QUESTION: Would you think that would be equally  
6 applicable as to the need, now, the need from the defendant's  
7 point of view, if the defendant has a substantial criminal  
8 record but may want to take the stand? Would such a rule  
9 that we're talking about that's being advocated, indicate  
10 that the question would be required, would you as a juror  
11 be biased against a person if it developed that he had four  
12 criminal convictions?

13 MR. JONES: Well there are constitutional impli-  
14 cations to that question that I am not prepared to deal  
15 with at present. But it seems to me that too is a case where  
16 there is no need for a per se rule, and a per se rule would  
17 be completely unnecessary, or inappropriate. The trial  
18 judge, looking at the case -- the defendant says well, I may  
19 or may not want to testify. The trial judge may have reser-  
20 vations about asking questions but if the defendant can have  
21 his conviction reversed because the trial court refused to  
22 ask the question under those circumstances, it seems to us  
23 that the rule is charged with causing more problems than it  
24 is eliminating.

25 QUESTION: Well what do you suggest, Mr. Jones,



1 should be the standard by which, if it's not a per se rule,  
2 the trial judge should decide whether they will or won't ask  
3 the question that the defense counsel requests?

4 MR. JONES: The standard should be and I think, is,  
5 that only when the facts of the case or the nature of the  
6 charge suggest that there is some substantial likelihood that  
7 racial bias will intrude on the deliberations of the jury.

8 QUESTION: Well counsel here had suggested to the  
9 judge, one of the reasons I'd like that question asked in this  
10 case is that it's likely to come out during the trial a  
11 relationship between this young lady and the defendant --  
12 in that circumstance, ~~and~~ had ~~he~~ done so and  
13 the judge still refused to ask the question, would you have  
14 thought that was the question?

15 MR. JONES: A closer question, Your Honor. But  
16 still a question of judgment, and one that the district court  
17 who has seen the answers of all the jurors to the questions  
18 asked before, is in a much better position to answer than I  
19 am.

20 QUESTION: Well isn't it true, counsel, that in a  
21 case such as this involving illegal smuggling of aliens,  
22 people of entirely Caucasian background might have quite  
23 different feelings; some might be very sympathetic to someone  
24 who is smuggling illegal aliens because they could use them  
25 for labor on -- in agri-business, and that sort of thing,

1 whereas others might feel that, you know, we just don't want  
2 any people like that in this state. I mean the prejudice can  
3 extend in any direction.

4 MR. JONES: That's absolutely true, Your Honor. It  
5 seems to us that it makes absolutely no sense to assume that  
6 all people of one race have identical feelings about any  
7 particular question and --

8 QUESTION: Mr. Jones, you're not -- when you conduct  
9 voir dire, you're not assuming that everybody has -- you're  
10 trying to find that one rare person who may have the prejudice  
11 and you want to get him off the jury. And you -- I doubt if  
12 you would suggest that it's totally fantastic to assume that  
13 without regard to what the facts of the case might have been,  
14 there probably are some people in San Diego or Los Angeles  
15 who are prejudiced against Mexicans and --

16 MR. JONES: And they would have been --

17 QUESTION: -- what's wrong with trying to find out  
18 who they are?

19 MR. JONES: Okay. And they would have been iden-  
20 tified by the questions that were asked and --

21 QUESTION: There's no question about Mexicans were  
22 asked. Questions about illegal smuggling and all that, I  
23 suppose everybody's against illegal smuggling.

24 MR. JONES: Illegal -- whether the jurors had any  
25 feelings about illegal alien problems, that would prevent

1 them from serving --

2 QUESTION: But some of these people, I'm hypothe-  
3 sizing, may actually be out there, are people who are not  
4 concerned about illegal aliens but they just don't like  
5 Mexicans, period; legal, illegal, citizen, whatever they are.  
6 There are such people, you know, who are prejudiced.

7 MR. JONES: Your Honor -- for sure, I have no doubt  
8 that there are, Your Honor, but --

9 QUESTION: And what's wrong with trying to find out  
10 who they are before you let them sit on the jury?

11 MR. JONES: They could have found out who they were  
12 by asking the questions about aliens. Since, virtually any-  
13 body in California, or in southern California, especially in  
14 San Diego County which borders Mexico -- 170 miles of border  
15 between Mexico -- and as this Court pointed out, a few years  
16 back, the government had estimated that 85 percent of the  
17 illegal aliens in the country were Mexicans. And it seems to  
18 me highly unlikely that anybody living, particularly in San  
19 Diego County could conceivably have thought that this question  
20 about illegal aliens doesn't really reach my bias against  
21 Mexicans.

22 QUESTION: Mrs. Bowling lived in Imperial Beach, did  
23 she not?

24 MR. JONES: That's right.

25 QUESTION: Which is about what, 8-10 miles from the



1 border?

2 MR. JONES: Right. And the trial took place in  
3 San Diego.

4 QUESTION: What you're saying is that no juror  
5 -- intellectually qualified to sit on the jury would have  
6 thought they were talking about Finlanders or Swedes or South  
7 Africans, but only about illegal Mexicans?

8 MR. JONES: Or, not even only about illegal Mexicans,  
9 but at least including illegal Mexicans. As the Petitioner  
10 again -- to return to the Petitioner's reliance on the rela-  
11 tionship with Bowling's daughter -- it seems that the trial  
12 court's questions were at least, at least as effective in  
13 identifying the jurors, prospective jurors who might have  
14 found the relationship objectionable as the question about  
15 whether or not the jurors would have --

16 QUESTION: Mr. Jones, just to emphasize one point,  
17 the government's position would be precisely the same as far  
18 as the bottom line is concerned if none of these other  
19 questions had been asked about illegal smuggling, as I under-  
20 stand you? You just don't have to ask a question that is  
21 merely related to the race or national origin of the person  
22 even though the community might harbor prejudice against  
23 that particular race or minority. That's your bottom line,  
24 as I understand it, Mr. Jones?

25 MR. JONES: Our position would be the same in the

1 sense that the legal analysis would be the same. We might  
2 say that in a particular case it was error for failure to  
3 ask some other questions, but not that there's some different  
4 legal standard to be applied.

5 MR. CHIEF JUSTICE BURGER: We'll reflect further  
6 on that during the noon hour and we will resume at one  
7 o'clock.

8 (lunch recess)

9 MR. CHIEF JUSTICE BURGER: Mr. Jones, we've used  
10 about five minutes of your time but we won't charge it to you;  
11 you have ten minutes remaining.

12 MR. JONES: Thank you. Mr. Chief Justice and may  
13 it please the Court:

14 In further response to Mr. Justice Stevens' question  
15 at the close of the last session, the government doesn't  
16 believe that there is any harm in asking a question or two  
17 concerning potential racial bias, provided that the question-  
18 ing is not interminable. But under Rule 24(a), Federal  
19 Rules of Criminal Procedure, whether a particular question  
20 should be asked in light of all of the surrounding circum-  
21 stances and if so, in what form, is left to the trial court's  
22 discretion subject to appellate review for abuse of discretion.  
23 Petitioner's suggestion that this Court in the exercise of  
24 its supervisory power ought to restructure the federal voir  
25 dire system is flatly contrary to Rule 24(a). Similar

1 suggestions were made and implicitly rejected at the time  
2 Rule 24 was initially considered. If the rule is to be  
3 amended it should be amended by the rulemaking or rule  
4 amending procedures set up for that purpose.

5 In conclusion, a jury verdict based on virtually  
6 overwhelming evidence should not be reversed solely because  
7 the trial court failed to mention the obvious. The questions  
8 asked by the trial court were sufficiently specific to  
9 uncover any racial bias or any bias against Petitioner because  
10 of his Mexican ancestry, and there is no reason to believe  
11 that the proposed question could have been any more effective  
12 to that end. The judgment of the Court of Appeals should be  
13 affirmed.

14 MR. CHIEF JUSTICE BURGER: Thank you gentlemen,  
15 the case is submitted.

16 (Whereupon the case in the above matter was  
17 submitted at 1:07 o'clock p.m.)  
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19  
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CERTIFICATE

North American Reporting hereby certifies that the  
attached pages represent an accurate transcript of electronic  
sound recording of the oral argument before the Supreme Court  
of the United States in the matter of:

No. 79-6624

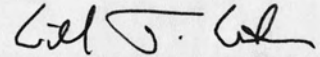
Humberto Rosales-Lopez

v

United States

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BY:



William J. Wilson

Received

1/19/81