Reducing the Impact of Juror Discrimination in Interracial Crimes: An Analysis of *Turner v. Murray*

Mark A. Jacobson*

I. Introduction

In December of 1979, Willie Lloyd Turner, a Black man, was tried in a Virginia state court for the murder of a white jewelry store owner.[1] The jury found him guilty and sentenced him to death.[2] On appeal, Turner argued that his due process rights were violated when the trial court judge refused the defense's request that the following question be asked of all prospective jurors during *voir dire*:[3] "The defendant, Willie Lloyd Turner, is a member

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* J.D. 1987, University of Minnesota.

1. Turner v. Commonwealth, 221 Va. 513, 518, 273 S.E.2d 36, 39 (1980), *cert. denied, 451 U.S. 1011 (1981). Turner was indicted in Southhampton County, Virginia, but was tried in Northhampton County, Virginia, after a motion for change of venue was granted. Turner v. Bass, 753 F.2d 342, 343 n.1 (4th Cir. 1985), rev'd sub nom.* Turner v. Murray, 106 S. Ct. 1683 (1986).

2. *Id.* at 517, 273 S.E.2d at 39. Virginia law provides that the jury may impose the death penalty if the defendant is found guilty of a capital offense and if the Commonwealth has proved beyond a reasonable doubt that there is a probability that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Va. Code Ann. § 19.2-264.4(C) (1983). The sentence is imposed by the same jury which determined guilt or innocence, *see id.* § 19.2-264.4(D), but a separate sentencing proceeding is held. *See id.* § 19.2-264.4(A). At the sentencing proceeding, the jury may consider the circumstances of the offense, the history and background of the defendant, and any mitigating facts admissible under the rules of evidence. *Id.* § 19.2-264.4(B). The jury always retains the right to reject the death penalty regardless of the evidence presented at the sentencing hearing. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979). If the jury recommends the death penalty, the court then orders a postsentence report. After considering the report, the court may set aside the death sentence and impose a sentence of life imprisonment if good cause is shown that the court should do so. Va. Code Ann. § 19.2-264.5.

3. Turner v. Commonwealth, 221 Va. at 522, 273 S.E.2d at 42. *Voir dire* is the process by which jurors are chosen. Prospective jurors, sometimes called veniremen, answer questions posed to them by the judge or the attorneys before trial. Prospective jurors may be excused by either of two methods: challenge for cause or peremptory challenge. Challenges for cause are based on a "narrowly specified, provable and legally cognizable basis of partiality." Swain v. Alabama, 380 U.S. 202, 220 (1965). Peremptory challenges, fixed in number by statute, are exercised solely

of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?"[4]

After losing his appeal to the Virginia Supreme Court,[5] Turner petitioned the United States District Court for a writ of habeas corpus.[6] The District Court denied the petition,[7] and Turner appealed. The United States Court of Appeals for the Fourth Circuit affirmed the denial of the petition, ruling that the trial court did not commit "constitutional error" by refusing to ask prospective jurors the requested *voir dire* question concerning racial bias.[8] The United States Supreme Court granted certiorari.[9] In a split decision, the Supreme Court ruled that trial judges are required to honor a defense request to ask a racial bias question in capital cases involving an interracial crime. The Court vacated Turner's death sentence, but refused to overturn his conviction.[10]

This comment will argue that the Supreme Court correctly vacated Turner's sentence because the trial judge improperly refused to question prospective jurors about potential racial bias. The Court, however, should have gone further. The Court should have reversed Turner's conviction and established a *per se* constitutional rule requiring both state and federal trial judges, when requested, to ask prospective jurors about racial bias in cases

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by the attorneys. They ordinarily do not require any explanation. *See id.* at 217, 220. *But see* Batson v. Kentucky, 106 S. Ct. 1712 (1986).

4. Turner v. Commonwealth, 221 Va. at 522 n.8, 273 S.E.2d at 42 n.8. The judge asked nine of the 15 questions requested by defense counsel.

5. *Id.* at 513, 273 S.E.2d at 36.

6. *See* Turner v. Bass, 753 F.2d 342, 343 n.1 (4th Cir. 1985), *rev'd sub nom.* Turner v. Murray, 106 S. Ct. 1683 (1986). Before petitioning the U.S. District Court, Turner had filed a state habeas corpus petition which was denied. The U.S. Supreme Court denied certiorari. Turner v. Morris, 462 U.S. 1112 (1983).

Turner filed his first petition for a federal writ of habeas corpus in the U.S. District Court for the Eastern District of Virginia on July 27, 1983. The petition was amended on March 20, 1984. *See* Turner v. Bass, 753 F.2d at 344.

7. The court denied the petition on May 23, 1984, and denied a motion to alter that judgment on July 19, 1984. The court then issued a certificate of probable cause, which allowed Turner to appeal to the Fourth Circuit Court of Appeals. *See* Turner v. Bass, 753 F.2d at 344.

8. *Id.* at 345-46. Turner raised a number of other claims on this appeal: that the trial court was wrong in its determination that a prospective juror was absolutely opposed to the death penalty and therefore subject to a challenge for cause; that his trial counsel was ineffective in presenting Turner's psychiatric defense during the sentencing phase of the trial; and that the vileness criterion of the Virginia capital punishment statute was unconstitutional as applied to Turner. The Fourth Circuit rejected all of Turner's claims. *See id.*

9. Turner v. Sielaff, 471 U.S. 1098 (1985).

10. Turner v. Murray, 106 S. Ct. 1683, 1688 (1986).

involving a minority defendant accused of committing a violent crime against a white victim.

II. Constitutional Background

In Virginia, as in the federal courts, the trial judge has discretion in deciding whether prospective jurors will be questioned by the judge, by the attorneys, or by both.[11] A judge who decides to conduct the entire *voir dire* alone usually asks counsel for each side to submit a list of questions to be asked of the prospective jurors. The judge often edits the questions, declining to ask some of them, changing the language of others, and accepting some verbatim. In the *Turner* case, the judge rejected five of the fifteen questions offered by the defense, including the question concerning potential racial prejudice.[12] On appeal, the Fourth Circuit considered whether the judge's refusal to ask a racial bias question violated Turner's right to be tried by an impartial jury and whether his right to due process under the sixth and fourteenth amendments had been violated.[13]

A. Ristaino v. Ross

In its analysis of the *Turner* case, the Fourth Circuit relied primarily upon *Ristaino v. Ross*, decided by the United States Supreme Court in 1976.[14] In *Ristaino*, the Court refused to require trial judges to question potential jurors about racial prejudice in every case in which a minority defendant is accused of a violent offense against a white victim.[15] Ross, a Black male, was tried by a jury in a Massachusetts state court for allegedly commit-

11. *See* Va. Sup. Ct. R. 3A.20(a); Turner v. Commonwealth, 221 Va. 513, 521, 273 S.E.2d 36, 41 (1980). *See also* Fed. R. Crim. P. 24(a). For a summary of *voir dire* practices in state courts, see Jon Van Dyke, Jury Selection Procedures 282-84 (1977).

The American Bar Association recommends that "[t]he trial judge should conduct a preliminary *voir dire* examination. Counsel should then be permitted to question panel members for a reasonable period of time." Standards Relating to Juror Use and Management Standard 7(b) (1983) [hereinafter Standards].

12. Turner v. Commonwealth, 221 Va. at 522 n.8, 273 S.E.2d at 42 n.8.

13. *See* Turner v. Bass, 753 F.2d 342, 344 (4th Cir. 1985), *rev'd sub nom.* Turner v. Murray, 106 S. Ct. 1683 (1986). The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. The right is a due process right and is therefore made binding on the states by the fourteenth amendment. *See* Irvin v. Dowd, 366 U.S. 717, 722 (1961). *See also* Duncan v. Louisiana, 391 U.S. 145 (1968).

14. 424 U.S. 589 (1976).

15. *See id.* at 597. For a lengthy discussion of U.S. Supreme Court cases concerning a trial court's refusal to question prospective jurors concerning racial prejudice, see Steven J. Fram, *Restricting Inquiry Into Racial Attitudes During Voir Dire*, 19 Am. Crim. L. Rev. 719 (1982).

ting armed robbery, assault and battery with a dangerous weapon, and assault and battery with intent to commit murder against a white security guard at Boston University.[16] Ross's defense counsel moved that the court ask prospective jurors about their racial biases and their possible relations with law enforcement personnel.[17] The trial court refused to ask the racial bias question. In fact, the trial court asked only the question concerning law enforcement and a customary, general question concerning bias or prejudice.[18]

Ross was convicted and appealed, alleging error in the trial court's refusal to question prospective jurors about racial bias. The Massachusetts Supreme Judicial Court rejected Ross's claim,[19] but the United States District Court granted a writ of habeas corpus and the First Circuit affirmed.[20]

The United States Supreme Court reversed.[21] The Court held that "the mere fact" that the victim of the alleged violent crimes was white and the defendant was Black was not enough to require that the trial court ask prospective jurors about racial bias.[22] Furthermore, the Court held that the circumstances of the case did not suggest a significant likelihood that racial prejudice might infect Ross's trial.[23] Thus, the trial court's refusal to ask about racial bias did not violate Ross's right to due process. Nonetheless, the Court stated in a footnote that, although state trial

16. *Ristaino*, 424 U.S. at 590.

17. *Id.* The actual question requested by Ross was: "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" *Id.* at 590 n.1 (citing Appellant's Brief at 23).

18. *Id.* at 592. The clerk of court, rather than the judge, actually put the questions to the panel. The questions were stated as follows:

> If any of you are related to the defendants or the victim, or if any of you have any interest in this case, or have formed an opinion or is sensible of any bias or prejudice, you should make it known to the court at this time.
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> . . . Are you presently, or have you in the past worked for a police department or a district attorney's office, or do you have any relative who is or was engaged in such work.

Id. at 592 n.3.

19. Following his conviction, Ross first appealed to the Massachusetts Supreme Judicial Court, which affirmed his conviction. Commonwealth v. Ross, 361 Mass. 665, 282 N.E.2d 70 (1972). The U.S. Supreme Court granted Ross's petition for writ of certiorari and remanded for reconsideration in light of Ham v. South Carolina, 409 U.S. 524 (1973). Ross v. Massachussetts, 410 U.S. 901 (1973). The Massachusetts Supreme Judicial Court again affirmed the conviction. Commonwealth v. Ross, 363 Mass. 665, 296 N.E.2d 810 (1973). Ross again sought certiorari, which the U.S. Supreme Court denied. Ross v. Massachussetts, 414 U.S. 1080 (1973).

20. Ross v. Ristaino, 388 F. Supp. 99 (D. Mass. 1974), *aff'd*, 508 F.2d 754 (1st Cir. 1974), *rev'd*, 424 U.S. 589 (1976).

21. 424 U.S. at 589.

22. *Id.* at 597.

23. *Id.* at 598.

courts were not constitutionally required to ask racial bias questions, the Court would exercise its supervisory power over the federal trial courts to require that the racial bias question be asked in federal cases involving interracial crimes.[24]

The Court thus laid down a minimal standard for jury selection in the state courts (based on the due process clause of the fourteenth amendment) and a more stringent rule for the federal courts (based on federal supervisory powers).[25] The Fourth Circuit decided *Turner* under the *Ristaino* state court standard, and held that the Virginia state court was not constitutionally required to ask potential jurors about racial prejudice just because Turner was Black and his alleged victim was white.[26]

B. Ham v. South Carolina

Turner argued that his case should be considered in light of *Ham v. South Carolina*,[27] a 1973 U.S. Supreme Court decision which reversed the conviction of a Black civil rights organizer because the trial court refused to ask prospective jurors about racial bias.[28] Ham was convicted of possession of marijuana in a South Carolina state court. He claimed that police officers had planted the marijuana on him in response to his civil rights work.[29] The Supreme Court overturned Ham's conviction, finding that the trial court's refusal to question prospective jurors about racial bias constituted a violation of Ham's right to due process.[30] In considering

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24. *Id.* at 597, 597 n.9.

25. The Supreme Court further discussed the federal rule in Rosales-Lopez v. United States, 451 U.S. 182 (1981). Rosales-Lopez, a Mexican resident alien, was tried in federal court on a charge of transporting illegal aliens. The Supreme Court upheld the trial court's refusal to ask prospective jurors the questions: "Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?" *Id.* at 185. Justice White, writing for the plurality, held that the circumstances of the case did not raise a "reasonable possibility" that racial or ethnic prejudice might influence the jury. One basis for White's opinion, however, was that a question concerning aliens, which was asked of all prospective jurors, must have been understood by the jurors to include Mexican aliens, if not all people of Mexican background. *Id.* at 192-93. Justice White, in dicta, added that a requested question on racial bias must always be asked in federal courts if the crime is a violent one involving a defendant and victim of different social or ethnic backgrounds. Such a question might also have to be asked in other cases where "external circumstances" indicate a reasonable possibility that racial or ethnic prejudice might taint the verdict. *Id.* at 192.

26. Turner v. Bass, 753 F.2d 342, 344-46 (4th Cir. 1985), *rev'd sub nom.* Turner v. Murray, 106 S. Ct. 1683 (1986).

27. 409 U.S. 524 (1973).

28. *Id.* at 529.

29. *See id.* at 525.

30. *Id.* at 529. Justice Rehnquist's majority opinion specifically limited the decision to the facts of the case, but failed to reveal which facts formed the basis for the

Turner's case, the Fourth Circuit interpreted *Ham* in light of the later *Ristaino* decision and concluded that Ham's civil rights activities had created "a fact specific situation in which racial issues were 'inextricably bound up with the conduct of the trial.' "[31] Therefore, the Fourth Circuit concluded that *Ham* was distinguishable from the *Turner* case because of the absence of specific facts which would have injected a racial element into Turner's trial.

C. Aldridge v. United States

The Fourth Circuit's *Turner* opinion did not cite *Aldridge v. United States*.[32] In *Aldridge*, a Black defendant was accused of murdering a white policeman in the District of Columbia in 1929. The trial judge refused to question prospective jurors about their racial attitudes.[33] Aldridge was convicted and sentenced to death. The Supreme Court, in an opinion by Chief Justice Hughes, reversed.[34] Hughes's opinion cited no federal case law or constitutional authority, and lower courts did not consider it an interpretation of the Constitution.[35] Nonetheless, the federal courts read it as a broad requirement that potential jurors be questioned about racial bias in any case involving a Black defendant and a white victim.[36] In 1973, the Eighth Circuit summarized the *Aldridge* rule by stating, "For more than four decades, it has been the rule in federal courts that a trial judge *must* inquire as to possible racial bias in the veniremen when the defendant is a member

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decision. For a short discussion of the ambiguous nature of the *Ham* opinion and the various interpretations of *Ham* by the state courts, see Fram, *supra* note 15, at 733-34.

31. Turner v. Bass, 753 F.2d 342, 345 (4th Cir. 1985), *rev'd sub nom.* Turner v. Murray, 106 S. Ct. 1683 (1986) (quoting Ristaino v. Ross, 424 U.S. 589, 597 (1976)).

32. 47 F.2d 407 (D.C. Cir. 1931), *rev'd*, 283 U.S. 308 (1931).

33. 47 F.2d at 408.

34. 283 U.S. at 308.

35. In fact, Aldridge was not cited as constitutional authority in any opinion until a South Carolina Supreme Court justice dissented in the *Ham* case. State v. Ham, 256 S.C. 1, 12-13, 180 S.E.2d 628, 631-32 (1971) (Bussey, J., dissenting), *rev'd sub nom.* Ham v. South Carolina, 409 U.S. 524 (1973).

36. *See, e.g.*, United States v. Williams, 612 F.2d 735, 736-37 (3rd Cir. 1979) (reversing conviction for receiving firearms in interstate commerce), *cert. denied*, 445 U.S. 934 (1980); United States v. Booker, 480 F.2d 1310, 1311 (7th Cir. 1973) (reversing narcotics conviction); United States v. Powers, 482 F.2d 941, 944 (8th Cir. 1973) (affirming conviction for forgery and uttering worthless checks), *cert. denied*, 415 U.S. 923 (1974); United States v. Carter, 440 F.2d 1132, 1133-35 (6th Cir. 1971) (reversing bank robbery conviction); United States v. Gore, 435 F.2d 1110, 1113 (4th Cir. 1970) (reversing conviction for possession of stolen property); King v. United States, 362 F.2d 968, 969 (D.C. Cir. 1966) (reversing conviction for assault); Frasier v. United States, 267 F.2d 62, 66 (1st Cir. 1959) (vacating defendant's conviction for making false statements).

of a racial minority."[37] State courts, however, refused to embrace the broad *per se* rule which developed in the federal courts after *Aldridge*.[38]

In considering the *Turner* case, the Fourth Circuit thus began with the notion that, under *Ristaino*, a state trial court is not *per se* constitutionally required to ask potential jurors about racial bias in every case in which a Black defendant is accused of a violent crime against a white victim. The court presumed that such questioning was constitutionally required only when "special circumstances" suggested a significant likelihood that racial prejudice might infect the trial.[39]

Turner made two arguments under this "special circumstances" doctrine. First, he argued that a charge of capital murder constitutes a special circumstance in and of itself.[40] Alternatively, Turner argued that Blacks who murder whites are more likely than other defendants to be sentenced to death, and that the increased likelihood of the death penalty constitutes a special circumstance.[41] The Fourth Circuit rejected both arguments.[42]

III. *Turner v. Murray*—The U.S. Supreme Court Decision

The U.S. Supreme Court reversed the Fourth Circuit and accepted Turner's argument that the possibility of a death sentence creates a "special circumstance" under *Ristaino*.[43] The Court held that a defendant accused of an interracial capital crime is entitled to have prospective jurors questioned on the issue of racial bias if the defendant specifically requests such an inquiry.[44] The defendant is also entitled to have prospective jurors informed of the race of the victim before they answer a racial bias question.[45] In a split

37. *Powers*, 482 F.2d at 944 (emphasis in original).

38. *See* Fram, *supra* note 15, at 732, and cases cited therein. The federal rule has since been modified by Rosales-Lopez v. United States, 451 U.S. 182 (1981). Inquiry into racial prejudice is now required in federal courts if the case involves an interracial crime or if external circumstances indicate a reasonable possibility that racial or ethnic prejudice may influence the jury. *See supra* note 25.

39. Turner v. Bass, 753 F.2d 342, 345 (4th Cir. 1985), *rev'd sub nom.* Turner v. Murray, 106 S. Ct. 1683 (1986).

40. 753 F.2d at 345.

41. *Id.*

42. *Id.*

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

44. *Id.* at 1688.

45. Justice White notes in part I of his opinion that prospective jurors in this case were not informed that the victim was white before they were asked whether they could make an impartial judgement. Because the defendant was present during *voir dire*, his race was known to prospective jurors. *Id.* at 1685.

decision, the Court vacated Turner's death sentence. They refused, however, to overturn his conviction.

Four Justices joined both part I of Justice White's plurality opinion (which recited the facts and history of the case and announced reversal of the Fourth Circuit decision)[46] and part III of White's opinion (a paragraph announcing that a capital defendant in an interracial crime is entitled to demand that prospective jurors be asked about racial bias).[47] Three Justices joined White in part IV of his opinion, where he concluded that, although Turner's death sentence must be vacated, Turner's conviction could stand.[48] Chief Justice Burger concurred in the judgment but wrote no opinion.[49] Justices Brennan and Marshall each wrote opinions concurring in the decision to vacate the death sentence and dissenting from the decision to uphold the conviction.[50] Justice Powell, joined by Justice Rehnquist, filed a dissent.[51]

Burger's refusal to author a concurrence created a problem in defining the Court's majority opinion. Parts I and III of White's opinion were clearly majority rulings. The sentence in part IV of White's opinion which vacated Turner's sentence but upheld his conviction was also a majority ruling. The question is how much, if any, of the rest of White's writing in parts II and IV was a part of the majority ruling in this case. Burger's vote was critical in determining whether parts II and IV constituted part of the holding. To the extent that Burger believed that parts II and IV were part of "the judgment," his concurrence created a majority for White's position. Burger must have objected to at least some of White's writing in parts II and IV, however, or he would have joined in, rather than concurred in, White's opinion.

In parts II and IV, White wrote that vacating Turner's sentence was necessary because the discretion accorded the jury in the sentencing decision created "a unique opportunity for racial prejudice to operate but remain undetected,"[52] and because the fi-

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46. *Id.* at 1684.

47. *Id.* at 1688. The four Justices were Brennan, Blackmun, Stevens, and O'Connor.

48. *Id.* The three Justices were Blackmun, Stevens, and O'Connor.

49. *Id.* at 1689 (Burger, C.J., concurring).

50. *Id.* at 1689, 1692 (Brennan, J. & Marshall, J., concurring in part, dissenting in part). A total of seven Justices (White, Blackmun, O'Connor, Stevens, Burger, Brennan, and Marshall) voted to vacate the death sentence.

51. *Id.* at 1693 (Powell, J. & Rehnquist, J., dissenting). Although Powell dissented from the judgment of the Court, he clearly supported the majority opinion to the extent that it upheld Turner's guilty verdict. *Id.* at 1694. A total of seven Justices (White, Blackmun, O'Connor, Stevens, Burger, Powell, and Rehnquist) voted to uphold the verdict.

52. *Id.* at 1687.

nality of the death sentence made the risk of an incorrect verdict unacceptable. White specifically reaffirmed the Court's decision in *Ristaino* that the racial bias question need not be asked in noncapital interracial crimes.[53] It is impossible to tell whether these assertions commanded Burger's approval, and thus represented the opinion of the Court.

Justice Brennan would have overturned the conviction as well as the sentence. He rejected White's contention that racial prejudice was more likely to taint the sentencing decision.[54] Justice Marshall would have overruled *Ristaino* and established a *per se* rule requiring that the racial bias question be asked in any case involving an interracial crime.[55]

Justice Powell, writing in dissent, would have affirmed the Fourth Circuit's decision and let Turner's death sentence stand.[56] He argued that the record did not give any indication that racial bias tainted the sentencing proceeding. In his view, the Court's ruling amounted to a constitutional presumption that jurors in capital cases were biased. He believed that the requirement that jurors be questioned about racial bias would increase the number of habeas corpus petitions by death row prisoners and would inject the racial factor into capital trials. He felt that Virginia's procedural and statutory safeguards against arbitrariness were sufficient.[57]

IV. Analysis

A. Capital Punishment Creates a Likelihood of Racial Prejudice

Juries play a special role in death penalty cases because they determine whether the ultimate fate of the defendant will be life or death. In a trial to determine guilt, the issues are narrowly defined. The prosecution attempts to prove that the defendant is guilty of each specific element of the crime charged; the defense attempts to show that the state has failed to prove each of those elements beyond a reasonable doubt. Testimony is irrelevant if it

53. *Id.* at 1689. The Supreme Court has used its supervisory powers to require that the question be asked in federal courts in all cases involving interracial crimes, but have not extended the rule to the state courts. *See supra* note 25 and accompanying text.

54. *Id.* at 1690 (Brennan, J., concurring in part, dissenting in part).

55. *Id.* at 1692-93 (Marshall, J., concurring in part, dissenting in part). Brennan joined Justice Marshall's opinion.

56. *Id.* at 1696 (Powell, J., dissenting). Justice Rehnquist joined Powell's opinion.

57. *Id.* at 1693-96.

does not tend to prove or disprove a specific element of the crime charged. Most importantly, evidence concerning the defendant's character is generally excluded unless the defendant "opens the door" to his private history by testifying at trial.[58] Evidence of the defendant's character is excluded precisely because of the likelihood that it will prejudice the jury. Although relevant to the determination of guilt, evidence of the defendant's character is likely to overwhelm other evidence and result in a jury verdict based largely on the jury's reaction to the defendant as a person, rather than the jury's consideration of evidence that a crime was committed and the defendant was the perpetrator.[59] The creators of the rules of evidence balanced the usefulness of character evidence against the possibility that it would prejudice the jury. They excluded character evidence for two reasons: it is not highly relevant in determining whether the defendant committed this particular crime, and it is prejudicial because the jury is likely to give too much weight to the character evidence, thus overwhelming more relevant information.[60]

1. The jury's sentencing decision is largely subjective.

During the sentencing phase of a capital trial, however, the defendant's character is at issue. Under the Virginia statutes which governed *Turner*, for example, the jury may consider the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense.[61] The death sentence may be imposed if the Commonwealth proves beyond a reasonable doubt that there is a probability, based on the circumstances of the crime and the de-

58. *See, e.g.*, Fed. R. Evid. 404.

59. *See* 1A John H. Wigmore, Evidence § 58.2 (Peter Tillers rev. 1983).

60. *See* Fed. R. Evid. 403-04 advisory committee's notes.

61. Va. Code Ann. § 19.2-264.4(B) (1983). Statutes of this kind are sometimes referred to as "guided discretion" statutes. The U.S. Supreme Court declared state death penalty statutes unconstitutional in 1972, in large part because they allowed the jury unguided discretion in determining which defendants should be put to death. Furman v. Georgia, 408 U.S. 238 (1972). In 1976, after states rewrote their statutes, the Court rejected mandatory death penalties because they do not provide for "individualized" justice. Woodson v. North Carolina, 428 U.S. 280, 303 (1976). The Court, however, approved statutes which guided the jurors' discretion by requiring that they consider aggravating and/or mitigating circumstances. Gregg v. Georgia, 428 U.S. 153, 206-07 (1976).

For an argument that the "guided discretion" statutes have failed to correct the arbitrary nature of capital punishment decisions, see William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 Crime & Delinq. 563 (1980). For an analysis of the types of limits various states have placed upon their sentencing authorities, see Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690 (1974).

fendant's prior history, that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.[62] Alternatively, the death penalty may be imposed if the Commonwealth proves that the offense was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim."[63] Even if one or more of these conditions is proven beyond a reasonable doubt, however, the jury is still at liberty to impose life imprisonment rather than the death penalty.[64]

Essentially, a defendant convicted of a capital offense must throw himself upon the mercy of the jury. As stated above, the jury considers the circumstances of the offense, the history and background of the defendant, and any evidence of mitigating factors presented by defense counsel.[65] The Virginia capital punishment statute gives juries no guidance as to the weight they should give each of these considerations. Although the statute encourages the jury to look at the circumstances of the crime and the defendant's background, the jury's ultimate task is to answer a very subjective question: Is there a probability that this defendant will endanger the community by committing violent crimes in the future? If it answers that question in the affirmative, or if it finds that the offense was "outrageously or wantonly vile, horrible or inhuman," the jury presumably must ask itself another subjective question: Is death the appropriate penalty for this defendant?[66]

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62. Va. Code Ann. § 19.2-264.4(C) (1983).

63. *Id.*

64. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979).

65. Defense counsel's presentation of evidence is subject to the admissibility provisions of the Virginia rules of evidence. Va. Code Ann. § 19.2-264.4(B) (1983).

66. Although this question is never actually put to the jury, it is raised by the structure of the Virginia capital punishment statute. A jury which finds that the defendant would endanger the community by committing future acts of criminal violence may nonetheless give life imprisonment rather than death. *See Smith*, 219 Va. at 479, 248 S.E.2d at 151. The jury must decide whether to be lenient in spite of the evidence. In addition, the jury is confronted with a logical problem. If they find that the defendant will be a continuing danger to the community, the obvious solution is to separate the defendant from the community by imprisoning him for life. There are only three theories which rationally support the use of the death penalty to separate the defendant from society. The first is the possibility that the defendant will escape or will be paroled, and will thereby reenter society. The second is that the defendant will commit violent crimes against fellow prisoners. The third is that death and life imprisonment are functionally equivalent (both separate the defendant from society), and death is preferable because it saves society the cost of life imprisonment. While the first theory may be a valid consideration, the jury is given no information on the frequency of escape or parole, and is therefore unable to make an intelligent decision. The third theory, in the author's view at least, is patently unacceptable in any modern democracy.

The decision necessarily relies heavily on the jury's evaluation of the moral worth, or potential, of the defendant as a person. The jury evaluates the defendant's capacity to improve himself and balances that capacity (if they find that it exists at all) against society's interest in retribution, incapacitation of the defendant, and deterrence of future crime.[67] This determination is likely to be profoundly influenced if jurors hold significant racial biases.[68] The determination raises issues which cut to the heart of racial prejudice: the relative importance of separating the (Black) defendant from (the predominantly white) society, the inhumanity of the killing of this (white) victim by this (Black) defendant,[69] the existence of an intellectual and moral ability within the (Black) defendant to understand that (white) society's values are correct,[70] and the willingness of the (Black) defendant to reject his connections with the (Black) criminal underclass in order to accept the values of (white) society. When the defendant is Black and has more often than not grown up in an environment which is poor

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67. The theory of general deterrence holds that punishment inflicted on a criminal will deter others from committing crimes in the future. Wayne LaFave & Austin Scott, Jr., Criminal Law 24 (2d ed. 1986). The theory of particular, or specific, deterrence aims to deter the criminal himself from committing future crimes. *Id.* at 23.

68. The same can be said of biases based on religion, gender, etc.

69. In their famous study, The American Jury, Harry Kalven and Hans Zeisel questioned 1,191 juries throughout the United States and found that the juries were sympathetic to 22% of white defendants, but were sympathetic to only 13% of Black defendants. Conversely, juries had highly unfavorable reactions to 20% of Black defendants, while only 16% of white defendants created unfavorable impressions. Harry Kalven & Hans Zeisel, The American Jury 211 (1971). Sympathy is a major factor in jury leniency. *Id.* at 212, 343-44. *See also infra* notes 73-75, 84-90 and accompanying text.

70. Kalven and Zeisel quote the observations of judges who are trying to explain jury verdicts with which they disagree:

> Negroes are not held to the same moral responsibility as white people. . . . Community regards the law as too severe for some Negro cases because of the lack of moral sense.
>
> . . . .
>
> Our juries are loathe to hold colored people to as high standards as white people.
>
> . . . .
>
> [The lenient jury verdict was] [p]robably because of the fact that defendant and his wife were illiterate Negroes and the jury did not feel like holding the defendant to the same responsibility as it would a white man under the circumstances.

Kalven & Zeisel, *supra* note 69, at 340-41.

This condescending view of the moral and intellectual abilities of Blacks is not confined to juries. One judge explained that a jury's finding of first degree murder was fully supported by the evidence, but that he would have found only second degree murder because "[t]he ancestors of this defendant came from the jungle of Africa only a few generations ago. Society expected too much from him. He killed the woman because he had insufficient intelligence to solve his problem any other way." *Id.* at 343.

and Black, and the jurors are predominantly white, jurors are likely to have difficulty envisioning the defendant as a viable part of society.[71]

If jurors assume that the alternative to the death sentence is life imprisonment, and that the defendant is unlikely to escape or be paroled, they must then ask themselves whether the defendant could live a worthwhile life in jail, and must balance the potential for a worthwhile life against society's interests. The jury will also ask itself whether "good people" (like themselves) should have to pay the cost of imprisoning for life a defendant who will almost certainly never make any positive contribution to society. In essence, the jury is asked to balance the moral worth of a Black criminal, who is likely to be both poor and uneducated, against, among other things, the extent to which society demands retribution for a violent crime against a white victim and deterrence of similar offenses.

A predominantly white jury is unlikely to be able to put itself in the shoes of a Black defendant who may have committed crimes throughout his life, especially if individual jurors harbor any prejudices against Blacks in general.[72] On the other hand, the jury may find it very easy to put itself in the place of the white victim of the violent crime, and may be able to "feel," to a much greater extent, the suffering of the victim, the effect of the crime on the victim's friends and relatives, and the fear engendered in the community that similar crimes might be directed against them.[73] The jury's empathy for the white victim of a violent crime may lead

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71. The President's Commission on Law Enforcement and Administration of Justice, in a study of the courts conducted in the middle 1960's, concluded that

> many defendants are not understood by and seem threatening to the court and its officers. Even such simple matters as dress, speech, and manners may be misinterpreted. Most city prosecutors and judges have middle-class backgrounds and a high degree of education. When they are confronted with a poor, uneducated defendant, they may have difficulty judging how he fits into his own society or culture. They can easily mistake a certain manner of dress or speech, alien or repugnant to them but ordinary enough in the defendant's world, as an index of moral worthlessness.

Task Force on Admin. of Justice, President's Commission on Law Enforcement & Admin. of Justice, Task Force Report: The Courts 50 (1967). Certainly jurors experience similar problems in evaluating defendants. If jurors are unable to determine how well the defendant fit into his past environment, they will also have trouble predicting the likelihood that the defendant would be able to adopt and follow the values of the majority society.

72. *See supra* note 69.

73. Kalven and Zeisel suggest that juries may tend to be more lenient to the defendant in cases where the victim is Black because they may believe that violent crime is more normal (and therefore more acceptable) in minority communities. Kalven & Zeisel, *supra* note 69, at 341.

them to impose the death sentence without giving full and fair consideration to the defendant.[74] At the very least, it may lead juries to impose the death penalty more frequently when the victim is white (regardless of the race of the defendant), because they have more empathy for a white victim than for a Black victim.[75] Similarly, juries may impose the death penalty more frequently against Black defendants (for whom they have less understanding) than against white defendants.[76]

2. Evidence shows that racial bias affects the sentencing decision in capital cases.

The Supreme Court was correct in concluding that racial bias is more likely to infect the sentencing phase of the trial than the verdict phase.[77] Justice Brennan was wrong to argue to the contrary.[78] The sentencing decision is highly subjective and, therefore, highly likely to be influenced by unexpressed (and perhaps even unacknowledged) racial prejudices.[79]

In his appeal to the Fourth Circuit, Turner claimed that Blacks who kill whites are more likely to be sentenced to death, and that this fact creates a "special circumstance."[80] The Fourth Circuit rejected that contention, specifically holding that "the fact that a larger percentage of white victims' assailants are executed

74. The U.S. Supreme Court has stated that the personal characteristics of the victim and the emotional impact of the crime are irrelevant to the capital sentencing decision. Accordingly, the Court has struck down the use of victim impact statements in capital sentencing because the statements create "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Booth v. Maryland, 107 S. Ct. 2529, 2533 (1987).

75. Kalven and Zeisel quote a judge's explanation for a jury's decision not to impose the death penalty for the murder of a Black woman: "A Negro killing a Negro, that is, the jury did not attach enough importance to the value of a human life due to race." *Id.* at 442. Another judge, asked to give an explanation for a not guilty verdict in a homicide case, responded: "None, except the parties were both Indians and jurors can't get excited about the fact one Indian kills another Indian." *Id.* at 341. A third judge explained a not guilty verdict this way: "If [the victim] had been a white man he would have been convicted. Negroes [defendants] in cases of this type receive more than equal rights; juries seem to think it's okay for them to cut, if it's another colored person that is cut." *Id.* at 341.

76. *See supra* note 69. *See also* Samuel R. Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. Davis L. Rev. 1275, 1281 (1985).

77. Turner v. Murray, 106 S. Ct. 1683, 1688-89 (1986).

78. *See id.* at 1690 (Brennan, J., concurring in part, dissenting in part).

79. This Comment will argue, moreover, that the likelihood of racial prejudice at the *verdict* stage of trial is also sufficient to justify a *per se* rule requiring that the racial bias question be asked in all cases of interracial crime.

80. Turner v. Bass, 753 F.2d 342, 345 (4th Cir. 1985), *rev'd sub nom.* Turner v. Murray, 106 S. Ct. 1683 (1986).

than are other races is not a special circumstance."[81] The Supreme Court, having already decided to vacate Turner's sentence, did not reach the issue.[82]

During earlier argument before the Virginia Supreme Court, Turner introduced a study indicating that Blacks who kill whites are more likely to be given the death penalty. Because the study was based on statistics from states other than Virginia, the Virginia court found that it was not useful to show potential prejudice in this case.[83]

Two recently published studies by Professors David Baldus, Charles Polaski, and George Woodworth support Turner's position and confirm the fear that capital juries are generally biased against Black defendants who kill whites.[84] The Procedural Reform Study covered 594 defendants convicted of murder and sentenced to death in Georgia between March 1973 and June 1978.[85] The Charging and Sentencing Study covered 1066 homicide prosecutions in Georgia between 1973 and 1980.[86] Both studies accounted for more than 200 variables which might affect both verdicts and sentences, and the Charging and Sentencing Study also accounted for the effects of plea-bargaining and convictions for the lesser included offense of manslaughter.[87] Thus, the studies demonstrate general prejudice without regard for the details of particular cases. The studies found that killers of whites were 4.3 times as likely to be sentenced to death as killers of Blacks.[88] The studies also found evidence of discrimination based on the race of the defendant.[89] A number of other studies by different researchers using a variety of techniques have reached similar results.[90]

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81. *Id.*

82. Turner v. Murray, 106 S. Ct. at 1689 n.11.

83. Turner v. Commonwealth, 221 Va. 513, 523 n.9, 273 S.E.2d 36, 42 n.9 (1980), *cert. denied, 451 U.S. 1011 (1981).*

84. David Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983) [hereinafter Charging & Sentencing Study]; David Baldus, Charles Pulaski & George Woodworth, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. Davis L. Rev. 1375 (1985) [hereinafter Procedural Reform Study]. For an extensive judicial discussion of the Baldus studies, see McCleskey v. Kemp, 107 S. Ct. 1756 (1987). *See also* Gross, *supra* note 76, at 1275.

85. McCleskey v. Zant, 580 F. Supp. 338, 353-55 (N.D. Ga. 1984), *rev'd on other grounds sub nom.* McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc), *aff'd*, 107 S. Ct. 1756 (1987).

86. *Id.*

87. *Id.*

88. McCleskey v. Kemp, 753 F.2d at 897.

89. Gross, *supra* note 76, at 1281.

90. *See Murderers of Whites More Likely to be Put to Death, Paper Says*, Minneapolis Star & Trib., Nov. 17, 1985, at 10B, col. 1. In 25 of the 32 states which have

The Fourth Circuit focused on the particular circumstances of the *Turner* case. Under *Ristaino*, prospective jurors must be asked about racial prejudice if special circumstances suggest a significant likelihood that racial prejudice might infect the trial.[91] By restricting their inquiry to the circumstances of the offense, the Fourth Circuit justified its decision denying Turner relief by pointing out that racial motivations were not involved in the commission of the murder itself or in Turner's arrest.[92] The Supreme Court correctly concluded that the Fourth Circuit's restricted inquiry was inadequate.[93] The real issue was whether there were special circumstances inherent in the *trial* which injected a racial element into the case. Special circumstances may be the result of a racial element in the circumstances of the crime itself, a defense which involves a racial issue,[94] or a racial disparity resulting from the operation of the judicial process. The prosecution did not claim that the killing Turner was accused of committing was racially motivated, and Turner did not argue a defense which involved race. Rather, Turner claimed that the judicial process itself was tainted because jurors are more likely to give the death sentence to Blacks accused of killing whites than to other defendants. The alleged Black-against-white capital crime, in and of itself, cre-

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a death penalty (including Virginia), the *Dallas Times Herald* found that a consistent pattern existed whereby those who killed whites were nearly three times as likely to be sentenced to death as those who killed Blacks. When Blacks are accused of killing white victims, the disparity is even greater. The most extreme example is Texas, where a white who kills a white is 12 times more likely to be sentenced to death than a white who kills a Black. Of the current death row inmates whose crimes were committed between January 1977 and December 1984, 1,265 killed whites and 212 killed Blacks. Since the United States Supreme Court reaffirmed the constitutionality of the death penalty in 1976, no white has been executed for killing a Black. Thirteen Blacks have been executed for killing whites. The *Times Herald* study seems to indicate that racial disparity in capital sentencing is the result of general racial prejudice among the jurors who make the sentencing decision. The *Times Herald* study involved all murders between January 1977 and December 1984 in states which have a death penalty. The study probably underestimates the effect of racial bias because it counts Hispanics as white in order to conform with FBI data prior to 1980.

See also Marvin Wolfgang & Marc Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 Am. J. Orthopsychiatry 658 (1975); Rupert Koeninger, *Capital Punishment in Texas 1924-1968*, 15 Crime & Delinq. 132 (1969); Bowers & Pierce, *supra* note 61, at 563.

91. Ristaino v. Ross, 424 U.S. 589, 598 (1976).

92. *See* Turner v. Bass, 753 F.2d 342, 345 (4th Cir. 1985), *rev'd sub nom.* Turner v. Murray, 106 S. Ct. 1683 (1986).

93. The Supreme Court broadened the inquiry to include a circumstance of the trial itself: the higher level of discretion exercised by the jury in the sentencing portion of the trial. Turner v. Murray, 106 S. Ct. at 1687.

94. In Ham v. South Carolina, for instance, Ham alleged as a defense that he was framed by the police because of his civil rights activities. 409 U.S. 524, 525 (1973).

ates a special circumstance. Studies confirming that Blacks who kill whites are far more likely to be put to death than other defendants suggest, at the very least, that there is "a significant likelihood that racial prejudice might infect (defendant's) trial."[95]

Faced with evidence that the jury selection process, a function of the judicial system itself, creates serious inequities in the area of capital cases involving cross-racial crime,[96] courts bear a special responsibility to remedy this flaw in the system. The courts' exalted standing in United States society flows directly from the notion that decisions are made by impartial fact-finders. Fundamental fairness is the highest attribute of our legal system and the justification for its continued existence. When the fairness of a legal process is called into question, the courts must do all that is reasonable to assure both actual fairness and the appearance of fairness. Racial bias, like perjury and tampering with a witness, taints the entire judicial process with the possibility of an erroneous verdict.[97]

The justification for the requirement of special circumstances is the belief that a racial motive or a race-related defense are likely to bring to the surface any hidden bias within the jury.[98] The studies which chart the sentencing disparity in Black-against-white capital crimes strongly suggest that latent racial biases affect the trial even in the absence of a race-related motive or race-related defense.[99] Because of that disparity, "special circumstances" are inherent in any capital case involving a Black defendant and a white victim. In such a case, a judge should always grant a defense

95. Ristaino v. Ross, 424 U.S. at 598. *But see* McCleskey v. Kemp, 107 S. Ct. 1756 (1987) (likelihood of racial prejudice shown by the Baldus studies did not rise to the constitutional measure of an unnacceptable risk of racial prejudice).

96. *See, e.g.*, Bowers & Pierce, *supra* note 61, at 563. Bowers and Pierce studied capital punishment in Florida, Georgia, Texas, and Ohio, the states which were responsible for approximately 70% of the death penalties imposed in the five years following the 1972 *Furman* decision. The study found that

> there are gross differences in the treatment of potentially capital offenders by race of offender and victim and by judicial circuits within states. These are (1) independent of aggravating felony-related circumstances, (2) present at both presentencing and sentencing stages of the criminal justice process, (3) uncorrected by the postsentencing appellate review process, (4) unaltered by the form and restrictiveness of capital statutes among states, and (5) remarkably similar to the best documented patterns of differential treatment by race of offender and victim under pre-*Furman* capital statutes, now ruled unconstitutional.

Id. *See also* Charging & Sentencing Study, *supra* note 84, at 661; Procedural Reform Study, *supra* note 84, at 1375. *But see McCleskey*, 107 S. Ct. at 1756.

97. *See* Aldridge v. United States, 283 U.S. 308 (1931).

98. *See* Ham v. South Carolina, 409 U.S. 524 (1973). For further discussion of *Ham*, see Ristaino v. Ross, 424 U.S. at 596-97.

99. *See supra* notes 84-90 and accompanying text. *See also supra* note 96.

request that jurors be questioned about racial bias. Therefore, the Supreme Court's decision to invalidate Turner's death sentence was unassailably correct.

B. The Supreme Court Should Have Adopted a Per Se *Rule Requiring Trial Courts to Grant Defense Requests for Questioning About Racial Bias in All Cases Involving a Minority Defendant and a White Victim.*

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.[100]
>
> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.[101]

The purpose of *voir dire* is the selection of an impartial jury. Juries are expected to make their decisions solely on the basis of the evidence presented at trial. For this reason, courts zealously protect juries against outside influences such as television news shows and comments by bailiffs. Juries are admonished not to talk about the case with others and not to undertake any independent investigation of the facts of the case. To guard against possible contamination of the verdict by extrinsic information, courts may lock juries in deliberation rooms, house jurors together in a hotel overnight, and assign bailiffs to make sure that jurors have no contact with outside influences.[102]

The elimination of prejudicial intrinsic influences presents courts with a tougher chore. *Voir dire* is designed to expose intrinsic influences—biases contained within the minds of potential jurors—which may unfairly prejudice the outcome of the trial. Thus, jurors are commonly excused if they believe all defendants are guilty or if they believe that particular punishments (e.g., the death penalty) are never appropriate.[103]

Racial discrimination is a more subtle form of intrinsic bias than those mentioned above, but it is every bit as likely to affect the jury's eventual verdict. Potential jurors who refuse to accept the "rules of the game"—the presumption of innocence, the assign-

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100. Strauder v. West Virginia, 100 U.S. 303, 309 (1880).

101. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

102. *See generally* 75 Am. Jur. 2d *Trial* §§ 945-1010 (1974). *See also* Mattox v. United States, 146 U.S. 140, 149-50 (1892).

103. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968).

ment of certain penalties to certain crimes, etc.—are discovered relatively easily and dismissed for cause. Furthermore, those few who may slip through *voir dire* are reminded during the trial of their solemn duty to follow the law as given to them by the judge in the instructions. Judges include such admonitions in jury instructions after the presentation of evidence,[104] and attorneys often use them in closing statements.

Racial bias, on the other hand, is generally a subject which can only be addressed during *voir dire*. Courts are sometimes reluctant to instruct juries not to be swayed by racial prejudice in reaching their decision.[105] A defense attorney runs the risk of bringing out latent racial prejudice among jurors if he specifically addresses the problem of potential racial prejudice in his closing statement. Thus, the trial court has a special duty to discover and eliminate racially biased jurors precisely because racial prejudice among jurors is a problem which cannot effectively be minimized by jury instructions or closing arguments.

The conceptual basis for the "special circumstances" requirement is the notion that a potential juror's racial bias will be brought into play by the circumstances of the case. This view of jury behavior presumes that there is little chance that a juror's racial bias will affect the verdict unless the catalyst of "special circumstances" is present to taint the decision-making process. As Justice Stevens has pointed out, however, racial bias may be a special prejudice against the defendant which is not dependent on the facts of the case.[106] A KKK member may be as likely to convict a Black for shoplifting as to convict a Black for shooting a white man to death.

The Supreme Court has been unwilling to lay down a *per se* rule requiring judges to question potential jurors concerning racial prejudice for fear of injecting a racial element into a case where race should not be a factor.[107] According to this theory, a question from the judge regarding racial bias might be interpreted by prospective jurors as a signal that race should be a factor in their consideration of the case. Thus, well-intentioned trial judges might

104. *See, e.g.*, Committee on Federal Jury Instructions of the Seventh Circuit, Federal Criminal Jury Instructions of the Seventh Circuit 1.01 (1980); 10 Minn. Practice 3.01 (2d ed. 1985) (Criminal Jury Instructions).

105. Some judges seem to feel that a court, in raising the possibility that racial bias may be present, unneccesarily undermines confidence in our system of justice by injecting the racial bias issue into the trial. *See, e.g.*, Ristaino v. Ross, 424 U.S. 589, 596 n.8 (1976); Rosales-Lopez v. United States, 451 U.S. 182, 190-91 (1981). *See also* Fram, *supra* note 15.

106. *Rosales-Lopez*, 451 U.S. at 196, 197 (Stevens, J., dissenting).

107. *See supra* note 105 and accompanying text.

refuse to ask a racial bias question because they conclude that it is likely to inject, rather than exclude, racial bias as a factor in the jury's decision.[108]

The flaw in this reasoning is obvious. The question concerning racial bias need not be asked unless it is requested by the defense counsel. Without a defense request, the trial judge need not decide whether the question is constitutionally required. Defense counsel will not request that the judge ask the *voir dire* question unless counsel believes that the question will serve the defendant's interest. If defense counsel decides that the chances of uncovering a biased juror are slim and that the racial element may be injected into the case to the defendant's detriment, counsel will simply not request that the judge ask the question. Surely the decision should rest with the defense counsel, whose sole function is to protect the interests of the defendant at trial. Defense counsel is in a better position to represent the defendant than the trial judge.[109]

Another argument against a *per se* rule is that the rule amounts to a constitutional presumption that jurors are racially biased.[110] The concern is not prejudice against the defendant, but rather the danger that acknowledging the possibility that racial bias may influence verdicts will undermine confidence in the courts. The argument overemphasizes the importance of the *appearance* that courts are fair, and de-emphasizes the importance of *actual* fairness to the defendant. The U.S. Supreme Court's discussion of "fairness" in *Aldridge v. United States*[111] clearly states the proper balance between the court's interest in its image and its responsibility to insure the defendant a fair trial:

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.[112]

A third argument against a *per se* rule is that trial judges are traditionally given broad discretion in conducting *voir dire*.[113]

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108. *See Rosales-Lopez*, 451 U.S. at 190-91.

109. *See* Turner v. Murray, 106 S. Ct. 1683, 1688 n.10 (1986).

110. *Id.* at 1697 (Powell, J., dissenting); Ristaino v. Ross, 424 U.S. 589, 596 n.8 (1976).

111. 283 U.S. 308 (1931).

112. *Id.* at 314-15, *quoted in Rosales-Lopez*, 451 U.S. at 191.

113. *See, e.g.*, Ham v. South Carolina, 409 U.S. 524, 527 (1973). The federal appeals courts will not overturn a guilty verdict absent both an "abuse of [the judge's]

This broad discretion is said to be justified by the trial judge's opportunity to observe the demeanor of potential jurors. The decision whether to ask about racial bias, however, is based on the circumstances of the case, not the responses or demeanor of individual jurors. Therefore, under a "special circumstances" rule, the theory justifying broad judicial discretion breaks down.

Presumably, the existence of "special circumstances" is determined by the facts of the case. The trial judge must review the facts of the case with an eye toward factors which might inject a racial element into the trial: whether the crime is committed by a member of one race against a victim of another race; whether the circumstances include any expression of racial hatred by the defendant or victim; whether racial enmity is an element of a defense or justification (e.g., heat of passion); and whether defendant has engaged in race-related activities which are in some way connected to the charge or the defense.[114]

In reviewing the facts of a case which he has not yet heard, the trial judge is necessarily constrained by the information available to him. He has not yet heard witnesses and does not have the benefit of observing their demeanor. His knowledge of physical evidence, exhibits, confessions and admissions, other crimes allegedly committed by the defendant, and evidence of defense or justification is limited to his exposure to that evidence during pretrial hearings on admissibility. In a jurisdiction where pretrial hearings are routinely heard by a judge other than the trial judge, the trial judge may have very little knowledge of the facts of the case at the time of *voir dire*. Most important, the trial judge may know very little about defense strategy, which may change during the trial.

The appellate court, on the other hand, can use the trial transcript in determining whether "special circumstances" injected a racial element into the case.[115] Given the fact that a judge may

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broad discretion, and a showing that the rights of the accused have been substantially prejudiced thereby." United States v. Robinson, 475 F.2d 376, 380 (D.C. Cir. 1973). Under *Robinson*, trial judges are said to abuse their discretion if they refuse to ask requested questions concerning prejudice which is common in the community. *Id.* at 381. Is this standard adequate? Should a defendant be denied an opportunity to discover a biased juror simply because the community, taken as a whole, does not share that bias? *See* People v. Williams, 29 Cal. 3d 392, 413-14, 628 P.2d 869, 881, 174 Cal. Rptr. 317, 328-29 (1981) (Bird, C.J., concurring).

114. The best example of the last factor is Ham v. South Carolina, 409 U.S. at 525. Ham claimed that the police framed him in retaliation for his civil rights activities.

115. The argument can be made that an appellate standard of review which does not accord broad discretion to the trial judge would result in a greater number of verdicts overturned because of juror bias. One must remember, however, that the remedy in these cases is a new trial. The present system provides for greater pre-

know very little about the case before trial begins, it seems reasonable to allow the appellate court to use the full trial court record as a basis for review of the necessity for asking a question concerning racial bias.

Fourth, some courts have argued that the racial bias question is unnecessary because general questions, which ask prospective jurors whether any specific attitudes or knowledge they hold may prevent them from rendering a fair verdict based solely on the evidence, will bring out any potential for racial prejudice. The Supreme Court accepted this argument in *Ristaino v. Ross*.[116] Ironically, however, the Court noted that there was no indication from the record that all potential jurors in that case even knew that the defendants were Black.[117] Potential jurors, who have little knowledge of the facts of the case and none of the legal experience necessary to predict possible trial tactics, should not be expected to recognize that their biases may become relevant as the case develops at trial.[118]

Perhaps the most significant problem with a severely limited

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dictability because the jury's verdict is unlikely to be overturned: The price for that greater predictability is the strong possibility that some defendants are convicted partly on the basis of juror prejudice. Clearly that is too high a price to pay. The practical effect of an appellate standard which gives less weight to the trial judge's discretion is that judges would ask the racial bias question in any case where there is a reasonable possibility that a racial element will come out at trial. That is exactly the result which justice requires.

116. 424 U.S. 589, 592 n.4, 598 (1976).

117. *Id.* at 593 n.5.

118. In People v. Williams, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981), the California Supreme Court pointed to the facts of Donovan v. Davis, 558 F.2d 201 (4th Cir. 1977), as an illustration of jurors' inability to recognize and identify prejudice in response to a general question:

> [E]ven if a juror is aware that he holds a particular attitude or knows of certain facts that would make it difficult for him to be evenhanded, questions about his general ability to be fair may not bring them to mind. *Donovan v. Davis* provides a striking example of the inability of jurors to adequately assess their own potential for partiality in the absence of inquiry focused on specific sources of bias. There, defendant was charged with attempted rape. Seven of the jurors in that case had also served on a jury that had tried defendant one week earlier on the unrelated charge of unauthorized use of a motor vehicle. At the earlier trial evidence was adduced that tended to portray defendant as a "putative Don Juan," including references to wife "chasing" and various excursions with different women. Nonetheless, when asked whether they would be influenced at the second trial by anything they witnessed in the first, each of the jurors remained silent.
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> In reversing the conviction, Judge Winter of the Fourth Circuit commented, "The *voir dire* was conducted before any evidence was presented at the second trial and the members of that venire were not told what issues the case would present. The members could quite honestly remain silent in response to a question about whether they would be influenced in arriving at a verdict at the second trial by what they had previously heard—thereby indicating that they would not be

voir dire is that potential jurors may not recognize that they hold any prejudices at all.[119]

> Our courts have become increasingly aware that bias often deceives its host by distorting his view not only of the world around him but also of himself. Hence although we must presume that a potential juror is responding in good faith when he asserts broadly that he can judge the case impartially . . . further interrogation may reveal bias of which he is unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome.[120]

Because jurors will not be stricken for cause unless there is a clear indication that their bias will prevent them from rendering an impartial verdict,[121] it is difficult to challenge potential jurors who refuse to recognize their own prejudices or assert that they are able to put them aside. As a practical matter, peremptory challenges are the best way to significantly limit racial prejudice in the jury.[122] Additional questions concerning racial bias are necessary if defense counsel is to use peremptory challenges intelligently.[123]

Peremptory challenges were considered an important procedural right under English common law, and the practice was explicitly adopted by the U.S. Congress.[124] By 1870, most states had followed suit.[125] Denial or impairment of the right to peremptory challenges is reversible error even without a showing of preju-

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affected—and yet be influenced when the attempted rape case was submitted to them."

Id. at 400 n.3, 628 P.2d at 873 n.3, 174 Cal. Rptr. at 321 n.3 (citations omitted).

119. The comments to Standard 7 of the ABA Standards Relating to Juror Use and Management specifically state that the purpose of *voir dire* is "to discover conscious *or subconscious* preconceptions and biases." Standards, *supra* note 11, at Standard 7 commentary at 68.

At least one authority suggests that the accuracy of a person's estimation of his own fairmindedness is likely to be inversely proportional to the depth of his actual prejudices. Alfred Friendly & Ronald Goldfarb, Crime and Publicity 103 (1967), *cited in Williams*, 29 Cal. 3d at 400 n.2, 628 P.2d at 873 n.2, 174 Cal. Rptr. at 321 n.2.

120. *Williams*, 29 Cal. 3d at 402, 628 P.2d at 873, 174 Cal. Rptr. at 321.

121. *See supra* note 3.

122. *Id.*

123. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1980). *See also* Standards, *supra* note 11, at Standard 7 commentary at 68.

124. *See* Swain v. Alabama, 380 U.S. 202, 212-15 (1965).

125. *Id.* at 215-16. For state cases affirming the notion that questioning directed primarily toward the use of peremptory challenges is a proper function of *voir dire*, see Shelby County v. Baker, 269 Ala. 111, 118, 110 So. 2d 896, 902 (1959); People v. Williams, 29 Cal. 3d 392, 407, 628 P.2d 869, 877, 174 Cal. Rptr. 317, 323 (1981); Lamb v. State, 241 Ga. 10, 12, 243 S.E.2d 59, 61 (1978); State v. Altergott, 57 Hawaii 492, 498, 559 P.2d 728, 733 (1977); Hart v. State, 265 Ind. 145, 151, 352 N.E.2d 712, 716 (1976); Gossett v. Commonwealth, 426 S.W.2d 485, 487 (Ky. 1968); People v. Harrell, 398 Mich. 384, 388, 247 N.W.2d 829, 830 (1976); State v. Anderson, 30 Ohio St. 2d 66, 71-72, 282 N.E.2d 568, 571 (1972); Wallis v. State, 546 S.W.2d 244, 249 (Tenn. Crim. App. 1976); Emanus v. State, 526 S.W.2d 806, 808 (Tex. Crim. App. 1975).

dice.[126] In fact, the Supreme Court recognizes that the right to peremptory challenges is "one of the most important of the rights secured to the accused."[127] Without an adequate *voir dire*, the defendant cannot have the full benefit of the right to exercise peremptory challenges.[128]

Consequently, because of the difficulty of proving racial prejudice and because of the reluctance of potential jurors to recognize and admit their own racial prejudices, peremptory challenges are especially important in eliminating racial prejudices from the jury's deliberations.

> While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.[129]

Admittedly, no *voir dire* can be expected to eliminate all possibility of juror prejudice. Peremptory challenges are widely allowed precisely because of the difficulty of exposing prejudice where it seems to exist. Racial prejudice can be reduced simply by taking the time to ask prospective jurors a few questions. Defense counsel must have information concerning the jurors' racial prejudices if he or she is to use peremptory challenges to insure the greatest possible measure of fairness in the jury.[130] Therefore, it is imperative that potential jurors be questioned about racial prejudice.

V. Conclusion and Recommendation

The Supreme Court correctly overturned Turner's sentence and required that a trial judge grant a defense request that prospective jurors be questioned about racial bias in any capital case involving an interracial crime. Under the "special circumstances"

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126. *Swain*, 380 U.S. at 219. Some commentators believe that peremptory challenges are the most important means of securing an impartial jury. David Suggs & Bruce Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. 245, 246 (1981). Jurors are generally unwilling to admit prejudice. In those cases where jurors do admit prejudice, they are usually unwilling to admit that they are unable to put their prejudices aside and judge the case impartially. *Id.* *See also supra* note 119 and accompanying text.

127. *Swain*, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1893)). *But see* Batson v. Kentucky, 106 S. Ct. 1712, 1728-29 (1986) (Marshall, J., concurring).

128. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1980).

129. Hayes v. Missouri, 120 U.S. 68, 70 (1886), *cited in Swain*, 380 U.S. at 220.

130. The American Bar Association Standards for Criminal Justice require that *voir dire* be used to establish a basis for the intelligent use of peremptory challenges as well as establishing a basis for challenging for cause. Standards Relating to Trial by Jury § 2.4 (1968).

doctrine laid down by the Supreme Court in *Ham v. South Carolina* and *Ristaino v. Ross*, the trial court was constitutionally required to grant defendant's request that prospective jurors be questioned about racial bias. A capital murder case involving a Black defendant and a white victim necessarily falls within the *Ristaino* standard because it involves a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as [they stand] unsworn.' "[131] The sentencing determination, a subjective decision by the jury based in large part on its estimation of the moral worth of the defendant and of the degree of retribution befitting the specific act against this specific victim, is likely to bring any latent racial bias to the surface of the jury's deliberations. Courts bear a special responsibility to protect a defendant's right to due process in a capital case, where society takes on the awesome responsibility of deciding whether to take the life of a fellow human being.

The Supreme Court erred when it reaffirmed *Ristaino* and refused to overturn Turner's conviction. The Court should dispense with the *Ristaino* "special circumstances" doctrine and replace it with a *per se* rule requiring that trial judges grant a defense request that potential jurors be questioned about racial bias in *any* case involving an allegation of a violent crime by a minority defendant against a white victim. The Court has already laid down such a *per se* rule for federal trial courts under its federal supervisory power.[132] There is no good reason why the Court should not extend that requirement to state courts under the fourteenth amendment.[133] The rule would foster both the appearance and reality of fundamental fairness in our criminal justice system, and would require very little sacrifice of courtroom efficiency.

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131. *See* Ristaino v. Ross, 424 U.S. 589, 596 (1976) (citing Coke on Littleton 155b (19th ed. 1832)).

132. *See Rosales-Lopez*, 451 U.S. at 192.

133. The Court expressed concern in *Ristaino* that such a requirement could not logically be restricted to racial prejudice, but would apply with equal force to bias based on national or ethnic origin or on religious affiliation. *Ristaino*, 424 U.S. at 596 n.8. In fact, the Court was correct. The Court addressed that concern in *Rosales-Lopez*:

> [S]ince the courts are seeking to assure the appearance and reality of a fair trial, if the defendant claims a meaningful ethnic difference between himself and the victim, his *voir dire* request should ordinarily be satisfied.

451 U.S. at 191 n.7.

> Even when there are no "special circumstances" connected with an alleged criminal transaction indicating an unusual risk of racial or other group bias, a member of the Nazi Party should not be allowed to sit in judgment on a Jewish defendant.

Id. at 197 (Stevens, J., dissenting).

Trial courts do not "inject" racial prejudice into a trial by questioning jurors about their racial biases any more than they "inject" the notion that all defendants are guilty when they question jurors on the presumption of innocence. The court can effectively perform its basic function—an objective determination of the case based solely on the merits—only if it directly accepts responsibility for protecting minority defendants from possible racial prejudice among jurors.