

The Burger Court Opinion Writing Database

Ristaino v. Ross

424 U.S. 589 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 27, 1976

✓

Re: 74-1216 - Ristaino v. Ross

Dear Lewis:

I join your proposed opinion of February 19.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

(P.S. for LFP only)

Your note 10, p. 9, relieves me that it gives vitality to our
"supervisory powers". Would that you could see this in
Geders! WEB

/

/

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 27, 1976

Re: 74-1216 - Ristaino v. Ross

Dear Lewis:

I join your proposed opinion of February 19.

Regards,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 19, 1976

RE: No. 74-1216 Ristaino v. Ross

Dear Thurgood:

Please join me in your dissenting opinion in
the above .

Sincerely,



Mr. Justice Marshall

cc: The Conference

✓ ✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 17, 1976

No. 74-1216 - Ristaino v. Ross

Dear Lewis,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

P. S.
✓

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 26, 1976

Re: No. 74-1216 - Ristaino v. Ross

Dear Lewis:

I would appreciate it if you would add at the foot of your opinion in this case the following:

Mr. Justice White concurs in the result on the ground that Ham v. South Carolina, 409 U.S. 524 (1973), announced a new constitutional rule applicable to federal and state criminal trials and that this rule should not be applied retroactively to cases such as this involving trials which occurred prior to the decision in Ham.

Sincerely,



Mr. Justice Powell

Copies to Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: FEB 19 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1216

Theodore Ristaino et al.,
Petitioners,
v.
James Ross, Jr. } On Writ of Certiorari to the
United States Court of Appeals for the First Circuit.

[February —, 1976]

MR. JUSTICE MARSHALL, dissenting.

In 1973, the Court refused to review the affirmance on direct appeal of Mr. Ross' conviction. 400 U. S. 1080. In dissenting from that refusal, I observed that "[t]o deny this petition for certiorari is to see our decision in *Ham v. South Carolina*, [409 U. S. 24 (1973)], stillborn and to write an epitaph for those 'essential demands of fairness' recognized by this Court 40 years ago in *Aldridge* [v. *United States*, 283 U. S. 308 (1931)]." *Id.*, at 1085. Today, in reversing the Court of Appeals' affirmance of the District Court grant of a writ of habeas corpus, the Court emphatically confirms that the promises inherent in *Ham* and *Aldridge* will not be fulfilled. For the reasons expressed in my dissent from the earlier denial of certiorari, I cannot join in this confirmation. Accordingly, I respectfully dissent.

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 23, 1976

Re: No. 74-1216 - Ristaino v. Ross

Dear Lewis:

Please join me.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: FFB 17 1976

Recirculated: .

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1216

Theodore Ristaino et al., Petitioners,
v.
James Ross, Jr. } On Writ of Certiorari to the
United States Court of Appeals for the First Circuit.

[February —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent is a Negro convicted in a state court of violent crimes against a white security guard. The trial judge denied respondent's motion that a question specifically directed to racial prejudice be asked during *voir dire* in addition to customary questions directed to general bias or prejudice. The narrow issue is whether, under our recent decision in *Ham v. South Carolina*, 409 U. S. 524 (1973), respondent was constitutionally entitled to require the asking of a question specifically directed to racial prejudice. The broader issue presented is whether *Ham* announced a requirement applicable whenever there may be a confrontation in a criminal trial between persons of different races or different ethnic origins. We answer both of these questions in the negative.

11

Respondent, James Ross, was tried in a Massachusetts court with two other Negroes for armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. The victim of the alleged crimes was a white man employed by Boston University as a uniformed security guard. The

pp. 6,8

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated:

Recirculated: FEB 19 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1216

Theodore Ristaino et al.,
Petitioners, } On Writ of Certiorari to the
v. } United States Court of Ap-
James Ross, Jr. } peals for the First Circuit.

[February —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent is a Negro convicted in a state court of violent crimes against a white security guard. The trial judge denied respondent's motion that a question specifically directed to racial prejudice be asked during *voir dire* in addition to customary questions directed to general bias or prejudice. The narrow issue is whether, under our recent decision in *Ham v. South Carolina*, 409 U. S. 524 (1973), respondent was constitutionally entitled to require the asking of a question specifically directed to racial prejudice. The broader issue presented is whether *Ham* announced a requirement applicable whenever there may be a confrontation in a criminal trial between persons of different races or different ethnic origins. We answer both of these questions in the negative.

I

Respondent, James Ross, was tried in a Massachusetts court with two other Negroes for armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. The victim of the alleged crimes was a white man employed by Boston University as a uniformed security guard. The

P 10

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

FEB 26 1976
Recirculate: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1216

Theodore Ristaino et al.,
 Petitioners, } On Writ of Certiorari to the
 v. } United States Court of Ap-
 James Ross, Jr. } peals for the First Circuit.

[February —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent is a Negro convicted in a state court of violent crimes against a white security guard. The trial judge denied respondent's motion that a question specifically directed to racial prejudice be asked during *voir dire* in addition to customary questions directed to general bias or prejudice. The narrow issue is whether, under our recent decision in *Ham v. South Carolina*, 409 U. S. 524 (1973), respondent was constitutionally entitled to require the asking of a question specifically directed to racial prejudice. The broader issue presented is whether *Ham* announced a requirement applicable whenever there may be a confrontation in a criminal trial between persons of different races or different ethnic origins. We answer both of these questions in the negative.

I

Respondent, James Ross, was tried in a Massachusetts court with two other Negroes for armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. The victim of the alleged crimes was a white man employed by Boston University as a uniformed security guard. The

March 16, 1976

Case Held for RISTAINO v. ROSS, No. 74-1216

MEMORANDUM TO THE CONFERENCE:

No. 75-5329, Bell v. United States, is the only case being held for Ristaino. Petitioner was convicted of armed bank robbery and illegal possession of an unregistered firearm. The evidence showed that a heavily armed group of black men robbed the bank, most of whose employees were white, and that an off-duty white policeman was shot during the robbery - allegedly by petitioner. In addition to these defendant-victim racial factors, other aspects of the case may have emphasized the racial characteristics of the case. There was testimony that the police had had petitioner and others under surveillance previous to the bank robbery (because of militant activities), and petitioner acted obstreperously during trial. Petitioner asserts that these two factors suggested to the jury that petitioner was a black militant. Finally, there was expert testimony about facial features common to blacks in connection with the introduction of bank photos of the robbery. The trial judge refused to pose questions directed specifically to racial prejudice during voir dire.

CA 9 (Tuttle, Browning, Hufstedler) held that the refusal to question the veniremen about racial prejudice was error. It held, however, that the error was harmless in light of the overwhelming evidence on identity, which

2.

was the only issue at trial.

Petitioner contends that the refusal to question violated the due process requirements of Ham, the Sixth Amendment guaranty to trial by an impartial jury, and the supervisory rule announced in Aldridge. He also contends that such error cannot be harmless. In the latter connection he relies principally on Tumey v. Ohio, 273 U.S. 510, where the Court held that the concept of harmless error did not apply when a defendant had been tried by a mayor who received a "cut" of the fines he imposed. Petitioner also argues that the harmless error ruling conflicts with United States v. Booker, 480 F. 2d 1310 (CA 7 1973)(Stevens, J.), which arose in the Ham-Aldridge context.

If I read Booker correctly, John's opinion for CA 7 did not address the harmless error question but rather the question whether specific prejudice must be identified in order to establish a violation of the Ham-Aldridge "rule." Thus there is no Circuit conflict. I also find the Ham-Aldridge-Ristaino situation distinguishable from Tumey because there is a less significant likelihood of the decisionmaker's actually being biased. I therefore conclude that Bell is not in conflict with Tumey.

I will vote to Deny.

L.F.P., Jr.

LFPjr/gg

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 18, 1976

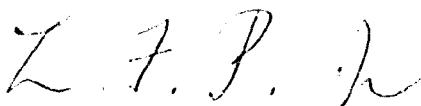
Case Held for Ristaino v. Ross, No. 74-1216

MEMORANDUM TO THE CONFERENCE:

I write to supplement my memorandum of March 16, with respect to No. 75-5329, Bell v. United States, being held for Ristaino.

I was in error in saying (p. 2 of my prior memo) that there was no Circuit conflict as to the applicability of the harmless error doctrine. John's opinion for CA7 in Booker does conflict with CA9's holding in Bell. I think, however, that the Ham-Ristaino-Aldridge situation is distinguishable from Tumey because there is less likelihood of the decision-maker's actually being biased. I therefore do not think that Bell is in conflict with Tumey.

Accordingly, I am inclined to deny.



L.F.P., Jr.

ss

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 20, 1976

Re: No. 74-1216 - Ristaino v. Ross

Dear Lewis:

Please join me.

Sincerely,

✓
W

Mr. Justice Powell

Copies to the Conference