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Beverly Petersen Jennison

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# TRIAL COURT DISCRETION IN CONDUCTING THE VOIR DIRE SUBJECTED TO MORE STRINGENT SCRUTINY: *CORDERO V. UNITED STATES*

The custom of subjecting potential jurors to an extensive and searching voir dire examination<sup>1</sup> has become virtually nonexistent in both the criminal and civil jury trial process in many areas of the United States.<sup>2</sup> This trend is presently accepted in the Superior Court for the District of Columbia<sup>3</sup> as well as in other judicial systems throughout the country. In most instances, judicial economy and a desire to assure speedy trials have placed the juror voir dire examination at the lowest level of priority in a trial.<sup>4</sup> In addition, many legal scholars have noted that, in reality, there is

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1. The French term voir dire, literally translates "to speak the truth." Within the context of trial practice, the phrase voir dire is used to denote the oral examination of prospective witnesses or jurors conducted by the court or by the attorneys for the litigating parties. The voir dire is conducted to provide an opportunity for objections to, *inter alia*, competency, conflicting interests, or prejudicial beliefs. BLACK'S LAW DICTIONARY 1412 (rev. 5th ed. 1979).

2. While the voir dire examination is an integral part of both civil and criminal jury trials, this Note focuses only on its use within the criminal context.

3. The District of Columbia Superior Court, as well as other courts throughout the nation, has conducted voir dire examinations as little more than a summary proceeding primarily because of the tremendous backlog of cases in the court system. *See generally* DISTRICT OF COLUMBIA COURT SYSTEM STUDY COMMITTEE OF THE D.C. BAR, REPORT OF THE DISTRICT OF COLUMBIA COURT SYSTEM STUDY COMMITTEE OF THE DISTRICT OF COLUMBIA BAR TO THE SENATE SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY AND THE DISTRICT OF COLUMBIA OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS, 98th Cong., 1st Sess. (Comm. Print 1983).

As a result, in those courts that use summary voir dire proceeding, only blatant prejudices and biases are brought to light. Their illumination facilitates the proper exercise of peremptory challenges and for cause challenges but allows little opportunity to delve into the realm of deep-seated prejudices which, in some situations, are critical to the trial's outcome. However, the prevailing attitude among trial lawyers and judges alike is that "*voir dire* should generally be restricted to pertinent and proper questions designed to test the fairness, capacity and competency of the prospective jurors." Jordan, *A Trial Judge's Observations About Voir Dire Examinations*, 30 DEF. L.J. 223, 228 (1981).

4. In many, if not most cases, voir dire is "conducted in a somewhat perfunctory, hurried fashion. This desire for speed often results in a haphazard, incomplete, and unsatisfactory voir dire examination." *See* Jordan, *supra* note 3, at 223. Nevertheless, the Criminal Rules of the Superior Court for the District of Columbia mandate a thorough voir dire examination. Rule 24(a) provides in relevant part:

no functional screening process that occurs in selecting a jury. Rather, the litigating parties reject or accept potential jurors with the hope that the best panel will emerge.<sup>5</sup> Thus, many practitioners and judges question the validity of the voir dire process as it exists within the present trial system.

In criminal cases, the sixth amendment to the United States Constitution guarantees the accused the right to trial by an impartial jury.<sup>6</sup> The United States Supreme Court has noted many times that the sixth amendment right to an impartial jury is inextricably intertwined with the right to challenge a potential juror.<sup>7</sup> In several notable cases,<sup>8</sup> the Court has stressed the importance of a meaningful voir dire of prospective jurors in ascertaining the effect of biases upon a trial's outcome.<sup>9</sup> To achieve such a result,

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(a) *Examination.* The Court may permit the defendant or his attorney and the prosecutor to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the Court shall permit the defendant or his attorney and the prosecutor to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper . . . .

In addition, Rule 24(b) sets out the number of peremptory challenges allowed in criminal cases. In capital cases, each side is entitled to 20 peremptory challenges. In felonies, each side has 10, while in misdemeanors, the rule provides for 3. There is no limit on the number of challenges for cause allowed in criminal trials. Counsel need only demonstrate a reason why a particular person should not serve on the jury.

5. Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry into Prejudice*, 48 U. COLO. L. REV. 525, 528 (1977); but see Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L.J. 959, 961 (1981) (the author endorses the voir dire examination as a tool for assuring the emergence of an impartial jury, which in turn will guarantee a fair and reasonable analysis of the evidence and a just determination of a defendant's guilt or innocence).

6. The sixth amendment to the United States Constitution provides in relevant part: "[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend VI.

7. See, e.g., *Ham v. South Carolina*, 409 U.S. 524, 532 (1973) (Marshall, J., concurring in part and dissenting in part) (the right to an impartial jury carries a corresponding responsibility to assure that the necessary means are utilized to impanel such a jury); see also *Swain v. Alabama*, 380 U.S. 202, 209-22 (1965) (discussing the jury challenge as a coefficient of the right to trial by a fair and impartial jury).

8. See, e.g., *Aldridge v. United States*, 283 U.S. 308 (1931); *Pointer v. United States*, 151 U.S. 396 (1894); see also *Lewis v. United States*, 146 U.S. 370, 376 (1892). In *Aldridge*, the Court reversed the murder conviction of a black defendant because a federal trial judge had refused to allow the defense attorney to question prospective jurors regarding racial prejudice during voir dire, thereby precluding a meaningful juror examination. 283 U.S. at 314-15.

9. As Justice Marshall noted in *Ham*, the Court frequently has reiterated its belief in providing criminal defendants with the opportunity to prove bias on the part of a potential juror. 409 U.S. at 532-33 (Marshall, J., concurring in part and dissenting in part). Demonstration of bias facilitates the removal of potential jurors through challenges for cause. Justice Marshall also pointed out that traditionally, the Court has considered the right to challenge potential jurors as one of the most significant rights accorded an accused. See

the voir dire examination should be conducted in a manner which will minimize the effect of juror bias.<sup>10</sup> In practice, however, jury selection very often results not in the exclusion of those jurors exhibiting prejudice, but rather, in the inclusion of a jury panel possessing a wide range of prejudices.<sup>11</sup> The voir dire examination cannot eliminate all biases and prejudices. Therefore, when conducting a voir dire, an attorney's goal should be to minimize the influence of bias by selecting a jury panel with a balanced representation of conflicting biases reflective of a cross section of the population in a particular area.<sup>12</sup>

The jury selection process is further complicated by the trial judge's influence during the voir dire. A trial judge may exercise his discretionary power during the voir dire by one of two methods.<sup>13</sup> The judge can control the scope of the voir dire questioning by limiting the number and content of questions posed by counsel for both sides. Alternatively, the judge may conduct the voir dire examination himself, limiting the role of counsel to the submission of questions for the veniremen which the judge may or may not utilize.

In criminal proceedings before the Superior Court for the District of Columbia, the voir dire is governed by Superior Court Criminal Rule 24.

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*generally id.* for an historical overview of Court decisions in this area; *see also* *Dennis v. United States*, 339 U.S. 162 (1950); *Morford v. United States*, 339 U.S. 258 (1950). In both *Dennis* and *Morford*, the defendants wished to elicit information from prospective jurors regarding their political connections. Those cases were brought during the "McCarthy era," at a time when government employees were required to abide by loyalty orders. Thus, during voir dire, the defendants sought to determine whether certain prospective jurors could offer impartial verdicts when they were employees of or affiliated with the federal government. In *Dennis*, the desired questions were permitted during the voir dire; in *Morford*, the questions were not permitted. 339 U.S. at 165, 259. The Court upheld the conviction in *Dennis*, but not in *Morford*, stating that the opportunity to prove actual bias is inextricably bound with a defendant's right to an impartial jury. *Id.* at 171-72, 259.

10. Gaba, *supra* note 5, at 528. Gaba noted that the questions posed to prospective jurors have a three-fold purpose: first, to determine if potential jurors meet statutory qualifications to serve; second, to elicit biases that would enable challenges for cause; third, to provide the necessary information to make a reasonable utilization of peremptory challenges. *Id.* at 531.

11. *See generally* Comment, *supra* note 5. Although the voir dire examination is an imperfect mechanism, when utilized thoroughly and properly, it furthers the goal of selecting an impartial jury panel. *Id.* at 959.

12. *See* Gaba, *supra* note 5, at 528. Gaba also noted that as a practical matter, most practitioners believe that an extensive voir dire examination is not justified economically. No matter how well it is conducted, the voir dire examination will always be time consuming and ineffective in achieving the goals for which it was designed. *Id.* at 532-33; *see also* Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 940-44, 955-56 (1971); Craig, Erickson, Friesen & Maxwell, *Voir Dire: Criticism and Comment*, 47 DEN. L.J. 465, 480 (1970).

13. Gaba, *supra* note 5, at 531.

The rule provides that the court has the discretion to allow defense and prosecution attorneys to conduct the voir dire. An alternate method under Rule 24 allows the trial judge to examine prospective jurors.<sup>14</sup>

The scope of the trial judge's discretion in the voir dire process was recently considered by the District of Columbia Court of Appeals in *Cordero v. United States*.<sup>15</sup> As the result of a disruptive political protest,<sup>16</sup> defendant Cordero was convicted of violating sections of the District of Columbia Code which regulate personal conduct in the United States Capitol building or the Capitol grounds.<sup>17</sup> At the commencement of trial, Cordero's counsel submitted thirty-eight questions for the voir dire, which were rejected by the trial court.<sup>18</sup> The proposed questions were designed to probe

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14. See *supra* note 4. Rule 24(a) allows either a defendant or his attorney and the prosecutor to conduct the examination of the veniremen, or, in the alternative, the trial judge may conduct the voir dire. However, the rule suggests that a thorough and searching examination should take place, even allowing supplemental examination of prospective jurors by counsel where the judge has conducted the juror examination.

15. 456 A.2d 837 (D.C. 1983).

16. Cordero shouted political statements from the Senate gallery. He also threw politically oriented leaflets into the air. *Id.* at 839-40.

17. Cordero was convicted of violating sections 9-123(4) and 9-124 of the District of Columbia Code. D.C. CODE ANN. §§ 9-123(b)(4), -124 (1973) (recodified as D.C. CODE ANN. §§ 9-112(b)(4), 9-113 (1981)). Section 9-123(b)(4) provided:

Unlawful conduct on Capitol Grounds or in buildings

.....

(b) It shall be unlawful for any person or group of persons willfully and knowingly—

.....

(4) to utter loud, threatening, or abusive language, or to engage in any disorderly or disruptive conduct, at any place upon the United States Capitol grounds or within any of the Capitol buildings with intent to impede, disrupt, or disturb the orderly conduct within any such building or any hearing before, or any deliberations of, any committee or subcommittee or the Congress or either House thereof.

Section 9-124 provided:

Parades or assemblages and displays forbidden in Capitol grounds.

It is forbidden to parade, stand, or move in processions or assemblages in said United States Capitol grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement, except as hereinafter provided in sections 9-128 and 9-129.

18. The questions which Cordero requested and upon which his appeal was based are presented in relevant part as follows:

20. The evidence in this case will show that Mr. Cordero is either a member of or a supporter of an organization known as Vietnam Veterans Against the War.

.....

(d) How many of you have heard or read about the Vietnam Veterans Against the War?

(3) [H]ow would this affect your ability to sit on this case . . .

21. (g) [Appellant] is accused of throwing leaflets into the Senate Gallery and making a speech which in essence denounced the United States and other countries for planning World War III. How many of you would characterize

attitudes of the veniremen toward persons who denounced the United States or who were members of political groups generally considered by most American citizens to be revolutionary or radical in nature.<sup>19</sup> Rather than posing these questions, the trial judge proceeded to conduct a summary and general voir dire examination.<sup>20</sup>

The central issue in *Cordero* was whether the voir dire examination should be designed to question jurors about, or at least alert jurors to, the political issues involved in a case in which the juror's political attitudes could affect their perceptions of the accused's involvement in a particular crime.<sup>21</sup> Cordero argued that the failure of the trial judge to alert the veniremen to potentially sensitive political issues prevented them from determining whether as jurors, they could act in a fair and impartial manner in considering the charges brought against Cordero.<sup>22</sup> He claimed that his sixth amendment right to a fair and impartial trial by jury had thereby been infringed<sup>23</sup> because politically biased jurors could not be identified and challenged for cause.

This Note discusses the impact of *Cordero v. United States* upon the voir dire process in the District of Columbia. After delineating the previous standard employed by the District of Columbia courts in evaluating the constitutional adequacy of the jury selection process, this Note will identify the stricter standard as set forth by the *Cordero* court. Finally, the Note will conclude that the stringent *Cordero* standard results in a more just and careful jury selection process, thereby guaranteeing the presence of fair and impartial tribunals in criminal cases.

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your own feelings as being in complete disagreement with those expressed in [appellant's] speech? . . . [H]aving those feelings, would it be difficult for you to be completely fair and impartial in sitting as a juror in this case?

. . . .

24. Have you read or heard anything about other protest activities of the Vietnam Veterans Against the War of [sic] the Revolutionary Communist Party[?]. If so, would anything you have heard or read come into play in your consideration of this case?

. . . .

32. Have any of you or any close friends, family members or associates ever been a member of any organization which has as one of its objectives opposition to Communism?

*Cordero*, 456 A.2d at 843-44.

19. *Id.* at 839.

20. *Id.*

21. *Id.* at 838-39.

22. *Id.* at 841, 845. Cordero asserted that not only had the trial judge improperly questioned the jurors, but that he had also failed to outline at the beginning of the voir dire the facts surrounding Cordero's alleged offense.

23. *Id.* at 841-42.

## I. THE EVOLUTION OF STRICTER VOIR DIRE STANDARDS

The effect of juror prejudice on the outcome of a trial has long been the subject of analysis by trial attorneys and trial judges alike.<sup>24</sup> Since the emergence of prejudice of the type highlighted in *Cordero*, courts have struggled with the impact of juror prejudice on trial outcome. The extent to which a court must probe potential jurors' biases and attitudes through particularized questioning prior to jury selection has been the subject of much controversy. The areas most often discussed as potentially problematic in juror attitudes and thus, appropriate for definitive and specific questioning, have included race, morality, religion, and nationality.<sup>25</sup> The Supreme Court decisions of the past decade concerning the constitutional requirement to provide a fair and impartial trial for an accused criminal defendant have defined the parameters of a judge's duty in assessing potential jurors.<sup>26</sup> The duty has been defined through a narrowing of the scope of the trial judge's discretion as it relates to the conduct of the voir dire examination.<sup>27</sup>

In *Ham v. South Carolina*,<sup>28</sup> a black civil rights worker was convicted by a state court of drug trafficking. He argued on appeal that his sixth amendment right to a fair trial was violated because the trial court failed to examine potential jurors concerning possible racial prejudice.<sup>29</sup> The Supreme Court agreed with Ham and held that the trial judge's refusal to probe potential jurors concerning potential racial prejudice constituted reversible error.<sup>30</sup> Such refusal denied Ham his sixth amendment right to trial by a fair and impartial jury.<sup>31</sup> Writing for the majority, Justice Rehn-

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24. See, e.g., Johnson, *Voir Dire in The Criminal Case: A Primer*, TRIAL, Oct. 1983, at 61-65.

25. See, e.g., *Ham v. South Carolina*, 409 U.S. 524 (1973) (necessity of inquiring into racial attitudes of potential jurors); *Kuzniak v. Taylor Supply Co.*, 471 F.2d 702 (6th Cir. 1972) (importance of determining juror attitudes about certain national or ethnic groups); *Casey v. Roman Catholic Archbishop*, 217 Md. 595, 143 A.2d 627 (1958) (failure to inquire regarding religious bias or prejudice of veniremen constituted reversible error).

26. See, e.g., *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (plurality opinion); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Ham v. South Carolina*, 409 U.S. 524 (1973).

27. The trial court's discretion traditionally has been limited by the "essential demands of fairness." *Aldridge*, 283 U.S. at 310.

28. 409 U.S. 524 (1973).

29. *Id.*

30. *Id.* at 527-28. The Court rejected the idea that veniremen should be questioned on their attitudes about facial hair, which the defendant had also argued as grounds for reversible error. *Id.* at 528.

31. *Id.* at 527; see *supra* note 6 for text of the relevant portion of the sixth amendment. Because the case had originated at the state level, the *Ham* Court couched its holding in the due process language of the fourteenth and not the sixth amendment. The sixth amendment right to a fair trial was made applicable to the states by the fourteenth amendment due

quist acknowledged the broad discretion of the trial court regarding the questions asked during the voir dire. However, the Court required that, at a minimum, the trial judge make a broad inquiry of the panel in order to elicit the racial prejudices of potential jurors.<sup>32</sup>

In 1976, the Supreme Court limited *Ham*'s reach. In *Ristaino v. Ross*,<sup>33</sup> a black defendant was convicted of violent crimes against a white security guard. Although the trial judge questioned the jury panel generally about bias and prejudice, he did not address exactly the issue of racial prejudice.<sup>34</sup> On appeal, Ristaino argued that *Ham* mandated that veniremen be questioned specifically regarding racial prejudice. The Court dismissed Ristaino's appeal, reasoning that the case was factually distinguishable from *Ham*.<sup>35</sup> Noting that the constitutional right to a fair and impartial jury does not always require particular questions to be posed during the voir dire,<sup>36</sup> the Court concluded that specific examination regarding racial prejudices is necessary only when "special circumstances" are present.<sup>37</sup> In so holding, the *Ristaino* Court limited *Ham* to its particular facts.<sup>38</sup>

The Court next considered the voir dire issue within the context of inquiries concerning prejudices against individuals of particular national origin. In *Rosales-Lopez v. United States*,<sup>39</sup> a defendant of Mexican descent requested a question during the voir dire designed to elicit any potential juror prejudices against Mexicans. The trial judge, while refusing to specifically inquire about prejudice against Mexicans, did ask the prospective jury a general question about prejudices against aliens.<sup>40</sup> After being convicted of smuggling illegal aliens into the country, Rosales-Lopez appealed on the basis that this general inquiry made by the trial judge was not sufficient to enable identification of jurors holding prejudices against Mexi-

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process clause through the use of selective incorporation. See generally *Duncan v. Louisiana*, 391 U.S. 145 (1968).

32. *Ham*, 409 U.S. at 527. Although the Court acknowledged that the South Carolina legislature had enacted a statutory scheme for the selection of juries, the Court nevertheless thought that essential fairness and due process dictated that, under the facts of *Ham*, the voir dire questions regarding racial prejudice were necessary and proper. *Id.*

33. 424 U.S. 589 (1976).

34. *Id.* at 591-93. The trial judge denied Ristaino's motion that a question specifically directed to elicit racial prejudice be asked during the voir dire.

35. *Id.* at 594-95, 598.

36. *Id.* at 594 (citation omitted).

37. See generally *id.* at 595-97. In *Ham*, the defendant was a civil rights worker. Presumably, the special circumstances of his political and occupational leanings coupled with his race required a particular inquiry into racial prejudice of the potential jurors.

38. *Id.* at 596-97.

39. 451 U.S. 182 (1981).

40. *Id.* at 185-86, 193.

cans. He argued that this limited inquiry prevented his counsel from challenging jurors for cause.<sup>41</sup> In affirming, the Court pointed to the trial judge's determination that a juror's prejudice toward aliens might affect the fair and impartial nature of the jury decisionmaking process.<sup>42</sup> The Supreme Court noted that the trial judge had inquired during the voir dire regarding the attitudes of prospective jurors toward aliens in general. The judge, in fact, had removed two jurors for cause based upon their responses to the broad question concerning alienage and nationality.<sup>43</sup> The Court stressed that the trial judge had excluded successfully those jurors whose presence would result in a circumvention of the sixth amendment guarantee of a fair and impartial trial.<sup>44</sup> As a result, the Court held that there was no reasonable possibility that racial or ethnic prejudice had tainted the jury's deliberations.<sup>45</sup>

Justice Stevens dissented.<sup>46</sup> Although acknowledging that the voir dire examination was adequate to determine a general prejudice against aliens, he nevertheless maintained that as a matter of law, the voir dire was inadequate to elicit particular prejudices against Mexican-Americans.<sup>47</sup> Justice Stevens emphasized that in order for there to be a fair trial, the jury must be impartial.<sup>48</sup> Thus, he stressed that effective inquiry into a juror's potential bias is absolutely essential before that juror is permitted to judge the

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41. *See id.* at 187. Counsel for Rosales-Lopez requested that a specific question regarding prejudice toward Mexican-Americans be asked. The trial judge, both prior to the commencement of the voir dire and at its completion, denied this request. *Id.* at 185-86.

42. *Id.* at 193.

43. *Id.* Although affirming Rosales-Lopez's conviction, the Court took judicial notice of the critical importance of the voir dire in preserving a defendant's sixth amendment right to an impartial jury. *Id.* at 188.

44. *See id.* at 193. The Court noted that "[t]here can be no doubt that the jurors would have understood a question about aliens to at least include Mexican aliens." *Id.*

45. *Id.* at 194. Because the trial judge had questioned the veniremen about prejudice toward aliens in general, the plurality felt that any possible prejudice toward Mexicans had been taken into consideration in the voir dire process. *Id.* at 193. Further, the Court considered the "special circumstances" rule as set forth in *Ham* and *Ristaino*, and rejected its application to *Rosales-Lopez*. *Id.* at 189-92; *see supra* notes 32-38 and accompanying text.

46. 451 U.S. at 195 (Stevens, J., dissenting, joined by Brennan, J. and Marshall, J.).

47. *Id.* at 202. Justice Stevens stated that the voir dire was inadequate as it ignored the fact that the defendant was a Mexican-American being tried in the Southern District of California, where a large number of Mexican-Americans reside. Therefore, Justice Stevens saw an inherent possibility of irrational prejudice against Mexican-Americans, particularly due to the existence of local animosity toward Mexican-Americans. *Id.*

48. *Id.* at 196. The dissent suggested that there are two distinct categories of bias that should be identified in potential jurors. First, there may be a bias arising from the particular facts of the case. Second, there may be a special prejudice against an individual. The dissent stressed the importance of determining whether either type of bias exists to assure the accused's right to a fair trial. *Id.* at 196, 202.

actions of another.<sup>49</sup>

The standard of appellate review applied in the District of Columbia for evaluating a trial judge's exercise of discretion in conducting the voir dire examination traditionally has been the "substantial prejudice" test as enunciated in *Khaalis v. United States*.<sup>50</sup> *Khaalis* involved the occupation by Hanafi Muslims of three buildings in the District of Columbia. The various defendants were convicted in the District of Columbia Superior Court of murder, kidnapping, assault, and conspiracy.<sup>51</sup> They appealed the convictions on several grounds, including the manner in which the voir dire examination was conducted.<sup>52</sup> In scrutinizing the voir dire process as it transpired in *Khaalis*, the appellate court reiterated the established rule in the District of Columbia that the trial court has broad discretion in its conduct of the voir dire. That rule has provided that absent a clear abuse of discretion by the trial judge and substantial prejudice to the accused, the actions of the trial court should be affirmed.<sup>53</sup>

## II. THE *CORDERO* STANDARD: STRICTER SCRUTINY OF VOIR DIRE EXAMINATIONS

### A. A Farewell to *Perfunctory Voir Dire* in Criminal Cases

Although the Supreme Court has scrutinized the voir dire process and its relationship to the sixth amendment right to a fair and impartial jury trial over the past decade, the District of Columbia Court of Appeals had no occasion to reevaluate its voir dire standard as enunciated in *Khaalis*.<sup>54</sup>

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49. *Id.* at 196.

50. 408 A.2d 313 (D.C. 1979). The "substantial prejudice" test provides that absent an obvious abuse of discretion by the trial judge accompanied by substantial prejudice to the accused, the trial court decision will be upheld. *Id.* at 335.

51. *Id.* at 319. Although the jury found the defendants each guilty of multiple offenses, each defendant was also acquitted on a number of charges. *Id.* at 319 n.2.

52. *Id.* at 344.

53. *Id.* at 335; see also *infra* note 54. For a general examination of the broad scope of trial court discretion, see *Evans v. United States*, 392 A.2d 1015 (D.C. 1978); *Davis v. United States*, 315 A.2d 157 (D.C. 1974); *Harvin v. United States*, 297 A.2d 774 (D.C. 1972).

54. Although both the *Cordero* majority and dissent referred only to *Khaalis*, the test of determining whether the voir dire examination meets the essential demands of fairness had been set forth previously by the courts of the District of Columbia. See, e.g., *Coleman v. United States*, 379 A.2d 951, 954 (D.C. 1977). The test of essential fairness was first articulated by the Supreme Court in *Aldridge v. United States*, 283 U.S. 308, 310-11 (1931). *Aldridge's* "essential fairness" test provided that when the right to question a potential juror during the voir dire examination is infringed upon, and such infringement results in unfairness to the defendant, the trial court has committed reversible error. *Id.* The United States Court of Appeals for the District of Columbia Circuit has employed this test to evaluate the fairness of the voir dire. See generally *United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974); *United States v. Robinson*, 475 F.2d 376 (D.C. Cir. 1973).

In *Cordero v. United States*, however, the court was faced with the consideration of that very standard.<sup>55</sup> Specifically, the court determined the appropriate test for evaluating the fairness of the voir dire examination within the context of criminal proceedings.

In *Cordero*, the trial judge proceeded through a general voir dire examination of the jury panel that was devoid of any questions designed to elicit possible political prejudices.<sup>56</sup> As a part of the voir dire process, the trial judge also summarily apprised the jury of the circumstances of the case, describing the defendant's offenses generally as disorderly conduct.<sup>57</sup> In contrast, the trial presentation of Cordero's offenses, and of his political affiliations, was much more vivid. The prosecution questioned at length an officer of the Capitol police force who had observed the occurrence that led to Cordero's arrest. In addition, the politically radical leaflet that Cordero allegedly had thrown about in the Senate gallery was introduced into evidence.<sup>58</sup> Cordero was found guilty of disrupting Congress and sentenced to thirty days' imprisonment and fined \$300.<sup>59</sup>

On appeal, Cordero charged that his sixth amendment rights had been violated because the voir dire examination had not been designed to elicit the political prejudices of potential jurors in a case which turned largely on political issues.<sup>60</sup> The District of Columbia Court of Appeals reversed holding that the voir dire examination had been unfair. While acknowledging that the trial court conducted the voir dire pursuant to the procedural provisions of Superior Court Criminal Rule 24,<sup>61</sup> the appellate court nevertheless found that the judge had violated the spirit of the sixth

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55. 456 A.2d 837 (D.C. 1983).

56. The voir dire examination consisted of the following questions:

(1) whether any of the potential jurors had heard or read about the incident; (2) whether the jurors were familiar with either of the attorneys, the defendant, or the witnesses; (3) whether any of the prospective jurors or their close relations had ever been charged with disturbing the peace or a similar offense; (4) whether any of the veniremen or their close relations were engaged in law enforcement as an occupation at the present time or in the past; (5) whether any members of the jury panel felt they would accord greater or lesser weight to testimony of someone who was a law enforcement officer because of their position; (6) whether any of the veniremen had ever served on a grand jury; (7) whether any members of the prospective jury panel had any legal training; and (8) whether a potential juror felt he or she could not render a fair and impartial verdict in the case.

*Cordero*, 456 A.2d at 839.

57. *Id.*

58. *Id.* at 840.

59. *Id.*

60. *Id.* at 841.

61. *See supra* note 4.

amendment through his methodology in conducting the examination.<sup>62</sup> The *Cordero* court emphasized that in denying the questions specifically requested by Cordero's counsel, the trial court ignored the very real possibility that Cordero's political views and associations could trigger strong feelings on the part of potential jurors.<sup>63</sup> Although the trial court need not have framed the questions exactly as Cordero's counsel had requested,<sup>64</sup> the appellate court found that the lower court had abused its discretion in failing to incorporate the substance of those questions into the voir dire examination.<sup>65</sup> The court held that if substantial prejudice to the accused's rights has occurred, the standard of essential fairness cannot be met.<sup>66</sup> It thereby refined the *Khaalis* test of substantial prejudice,<sup>67</sup> establishing instead a standard of essential fairness to the defendant.

### B. *The Ramifications of Cordero*

In espousing the spirit of the recent Supreme Court decisions concerning voir dire, the *Cordero* court moved even closer toward establishing a new judicial framework within which to evaluate the propriety of the juror examination. In essence, the court provided criminal defendants with a jury that was not merely a representative sampling of the general population, but one that was carefully screened for inherent juror prejudices that could damage a defendant's chance for a fair hearing. Therefore, *Cordero* more closely parallels Justice Stevens' dissent in *Rosales-Lopez*<sup>68</sup> than the majority decisions of the Supreme Court in *Ham*, *Ristaino*, or *Rosales-Lopez*. The appellate court cautioned the trial judges to examine carefully and meticulously the prospective jury panel in criminal cases in order to avoid reversals of convictions that could occur due to infringement of a defendant's right to a fair and impartial jury.

In establishing a standard of essential fairness, the *Cordero* court considered not only the voir dire questions which were asked, but also the general charge to the jury panel that preceded them. At trial, the judge initially informed the prospective jurors about the nature of the offense in

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62. See *Cordero*, 456 A.2d at 841.

63. *Id.* at 844.

64. *Id.* at 844 n.14. Even when it is necessary for a trial judge to question a prospective jury panel regarding a particular matter, the trial judge generally retains the discretion to frame the questions in an appropriate fashion. Thus, it is the information elicited which is of importance and not the form of the question.

65. *Id.* at 844-45.

66. *Id.* at 845.

67. See *supra* notes 50-53 and accompanying text.

68. See *supra* notes 46-49 and accompanying text.

an oblique way.<sup>69</sup> This introduction to the case, coupled with the inadequacy of the voir dire questions, was insufficient to elicit adequate information about the actual prejudicial beliefs of the prospective jury so that the defense could exercise intelligent challenges.<sup>70</sup> Further, the veniremen had no way of knowing whether they would be biased in this case, thereby enabling them to disqualify themselves.<sup>71</sup> Thus the totality of the circumstances rendered the standard voir dire examination ineffective to ensure a fair jury trial. In conducting such an examination, the trial judge committed an abuse of discretion which constituted reversible error.<sup>72</sup>

In a terse dissent, Associate Judge Kern likened Cordero's objections to other "fabled defenses of gall."<sup>73</sup> Because Cordero himself had introduced information at trial regarding his political views and affiliations, Judge Kern found the appeal to be particularly ironic.<sup>74</sup> Furthermore, he noted that under the circumstances, Cordero did not suffer "substantial prejudice," the only judicial grounds in the District of Columbia for invalidating the trial judge's actions.<sup>75</sup>

69. See *Cordero*, 456 A.2d at 844-45.

70. See generally *Cordero*, 456 A.2d at 844-45.

71. A question frequently asked during voir dire is whether any potential juror feels that there is any reason why he or she would not be able to fairly and impartially decide the case at hand. A potential juror who answers in the affirmative essentially disqualifies himself from hearing that particular case. See generally Note, *Selection of Jurors by Voir Dire Examination and Challenge*, 58 YALE L.J. 638 (1949).

72. 456 A.2d at 845. The court determined that the trial judge committed an abuse of discretion because he did not tailor the voir dire examination to fit the circumstances of the particular case. *Id.* The reversal of a trial court under these circumstances is significant. The scope of voir dire has been traditionally within the discretion of the trial judge, although there have been reversals. See *supra* note 25. For a general discussion of trial court discretion and its shortcomings, see Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493 (1975).

73. 456 A.2d at 845-46 (Kern, J., dissenting). Judge Kern noted that the basis for Cordero's appeal was as outrageous as one posited by the proverbial "child who murdered his parents and then sought mercy on the ground he was an orphan." *Id.* at 846. Although providing a dramatic analogy, his dissent sidesteps the importance of a proper voir dire examination to the outcome of a criminal trial such as *Cordero*. Because Cordero's unorthodox political views were so interwoven with the facts of the case, it is difficult to understand Judge Kern's failure to recognize the importance of eliciting the jurors' political prejudices during the voir dire examination.

74. *Id.* For example, Cordero testified as to the nature of his combat duty in Vietnam, as well as to his post-war political activities with the Vietnam Veterans Against the War. *Id.* at 946-47.

75. *Id.* at 847. See generally *Khaalis v. United States*, 408 A.2d 313 (1980). Judge Kern intimated that the new standard announced in *Cordero* was a repetition of the standard announced by the United States Court of Appeals for the Seventh Circuit in the so-called "Yippie" trials. For a discussion of that standard, see *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972).

Judge Kern criticized *Cordero's* new test of "essential fairness."<sup>76</sup> In his view, the new test did not require the appellant to prove that he suffered substantial prejudice, but instead requires the government to demonstrate that the voir dire examination has adequately identified and eliminated any possible juror prejudices toward the defendant.<sup>77</sup> Notably absent in Judge Kern's dissent, however, is an analysis of the real meaning of the sixth amendment right to a fair and impartial jury. While he dissented because he found no basis for a shift from the "substantial prejudice" standard, Judge Kern failed to emphasize that the constitutional right to a fair and impartial jury is paramount in all evaluations of the propriety of the voir dire. The *Cordero* dissent, therefore, arguably reflects a mere surface consideration of the facts peculiar to *Cordero's* case.<sup>78</sup>

In *Cordero*, the District of Columbia Court of Appeals developed a more workable test for evaluating jury selection in criminal proceedings. The new test focuses on fairness to the accused, contrasting sharply with the previous standard of evaluating acceptable levels of unfairness or prejudice in jury selection. This shift in emphasis has broad implications. Trial courts no longer will have unfettered discretion in determining what should or should not be included in the voir dire examination. More significantly, the courts no longer will be free to conduct a summary voir dire in order to shorten the trial process.

The *Cordero* standard, however, may result in some adverse consequences. For example, the restrictions on trial court discretion may result in longer voir dire examinations, which ultimately may not enhance the quality of the jury selection process at all. Additionally, some may be critical of the more searching examination, fearing that judicial economy will fall by the wayside due to an extended voir dire process.<sup>79</sup> However, the underlying consideration of essential fairness addressed by the *Cordero* court will inevitably result in a fairer jury selection process that comports more fully with the mandates of the sixth amendment. Subjecting the trial

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76. *Cordero*, 456 A.2d at 847.

77. *Id.*

78. Judge Kern's cursory consideration may be explained by the minor nature of the alleged violations in *Cordero*.

79. The major objections voiced by practitioners to a more extensive voir dire is that it would further increase the amount of time and money spent on court proceedings, which many view as currently excessive. See Gaba, *supra* note 5, at 532. Additionally, there is no general sense among practitioners that the voir dire process actually produces its intended effect. "Perhaps there would be greater consensus that time should be spent on voir dire if there were some assurance as to the usefulness of the procedure." *Id.* It is conceivable that if voir dire examinations were tailored more specifically to the facts of particular cases, the result would be more satisfying.

judge's discretion in conducting the voir dire to a more stringent level of scrutiny will foster more thoughtful and effective examinations of prospective jurors.<sup>80</sup>

Rather than usurping the trial judge's function, the stricter test as set forth in *Cordero* can and should enhance his decisionmaking.<sup>81</sup> In order to comply with the *Cordero* test, the trial judge must examine prospective jurors more fully with regard to potential areas of prejudice. Recognizing that perfunctory examination of potential jurors is no longer permissible, the trial judge will focus more directly on identifying those persons whose background or interests would seriously impair a criminal defendant's right to a fair and impartial jury trial.

It is possible that *Cordero* could result in greater use of attorney-conducted voir dire examinations. Although in the past the trial judges have preferred to conduct the voir dire themselves in order to streamline the jury selection process, the fact remains that, under Rule 24, attorneys are allowed to question the veniremen.<sup>82</sup> Greater attorney involvement may prove beneficial to the court system because the attorney knows well the facts and issues of the immediate case. Counsel may particularize the voir dire inquiries accordingly. There is, however, a danger that some attorneys may utilize a longer voir dire in order to prolong trials. Nevertheless, it is unlikely that attorneys would prepare a lengthy voir dire examination except in cases in which potential juror prejudices could result in unfairness to the accused.

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80. See *supra* note 56 for an overview of the questions asked by the trial judge in *Cordero*. The questions were broadly based and, with the exception of the question designed to determine if any potential jurors had ever been convicted of disturbing the peace, could have been used in a civil trial as well. The absence of particular questions involving political prejudices was the determining factor in the reversal.

81. For a general discussion of benefits and drawbacks inherent in setting standards for trial judges in the voir dire process, see Note, *supra* note 72, at 1510-15 (setting forth explicit guidelines for the juror examination process). The Court may fear that an establishment of such guidelines would upset the delicate federal-state balance. Since different cases have divergent requirements, the Court may be reticent to specify rigid guidelines for the voir dire process. *Id.* at 1512. Additionally, the Court may be hesitant to prescribe certain questions designed to satisfy all psychological theories regarding bias. *Id.* at 1513. Finally, the Court has probably avoided the announcement of rigid specifications for conducting the voir dire due to increased court congestion and the obvious need to expedite trials. *Id.* On the other hand, factors which favor the establishment of universal voir dire standards include the fact that the voir dire is often perfunctory, thereby not serving its intended purpose. Because the examination is unregulated, the voir dire is sometimes misused by counsel. *Id.* at 1514. Minimum standards would seem to be appropriate in order to provide some type of uniformity in the jury selection process.

82. See *supra* note 4.

### III. CONCLUSION

In *Cordero v. United States*, the District of Columbia Court of Appeals established an essential fairness standard for evaluating jury selection in criminal proceedings. This stricter standard foreshadows a positive change in the jury selection process. Attorneys and judges alike will be more conscious during the voir dire to elicit prejudicial information from the veniremen. Inquiries into likely areas of prejudice will be tailored more carefully to the facts of the case. Although the trial judge's discretion may be subjected to greater scrutiny, *Cordero* will nonetheless serve to enhance the jury selection process by mandating a concerted effort on the part of trial judges to assure selection of fair and impartial jurors. A more effective voir dire in the impanelling of juries for criminal trials will safeguard the accused's sixth amendment right to an impartial jury.

*Beverly Petersen Jennison*

