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Questioning Prospective Jurors about Possible Racial or Ethnic Bias: *Lessons from Pena-Rodriguez v. Colorado*

BY ALYSON A. GRINE

Trial lawyers are familiar with the test set out in *Batson v. Kentucky* to prevent another party from seeking to exclude a prospective juror on the basis of race.¹ However, an attorney may be less clear about when he or she has a legal right or obligation to ask prospective



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jurors questions about race during *voir dire*. Do attorneys have a duty to explore racial bias in an effort to protect the Sixth Amendment guarantee of an impartial jury? Is asking about racial bias an effective tactic? Is it likely to expose biased views; or might it backfire, inflaming juror bias and increasing the odds that the verdict will be influenced by prejudice?

In a recent opinion, the United States Supreme Court discussed this issue, but the justices did not all see eye to eye. Part I of this article discusses the groundbreaking opinion from the United States Supreme Court, *Pena-Rodriguez v. Colorado*, decided March 6, 2017.² Part II addresses the role of *voir dire* in revealing bias and protecting defendants' constitutional rights, and includes opposing views from the majority and dis-

senting opinions in *Pena-Rodriguez*. Part III provides a review of case law to help attorneys identify the circumstances that give rise to a right, and possibly an obligation, to ask about racial bias during *voir dire*.

A Juror is Motivated by Ethnic Bias in Voting to Convict

In the recent case of *Pena-Rodriguez v. Colorado*, the United States Supreme Court

addressed a situation in which a juror reportedly stated during deliberations that he was relying on stereotypes about Latinos in voting to convict the defendant. The facts were as follows. Petitioner Pena-Rodriguez was found guilty of unlawful sexual contact and harassment. After the jury was discharged, petitioner's lawyer approached the jurors to see if they would be willing to discuss the case. Two jurors revealed that during deliber-

ations, another juror with the initials H.C. had made a number of disparaging statements about petitioner and his alibi witness. For example, according to the two jurors, H.C. said, “I think [petitioner] did it because he’s Mexican and Mexican men take whatever they want.”³ Defense counsel presented affidavits from the two jurors to the trial judge, and moved for a new trial. However, the judge denied the motion on the ground that “deliberations that occur among the jurors are protected from inquiry under [Colorado Rule of Evidence] 606(b).”⁴

Colorado’s Rule of Evidence 606(b), like its federal counterpart, is a “no-impeachment” rule. Every state has a version of the rule; for example, North Carolina Rule 606(b) provides:

Inquiry into validity of verdict or indictment. – Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.⁵

Generally speaking, the function of no-impeachment rules is to prevent attorneys from trying to overturn the jury’s verdict by offering testimony from jurors about what was said during deliberations. Such rules protect the finality of jury verdicts and insulate jurors from questions about who said what in the jury room.

In *Pena-Rodriguez*, however, the Court created an exception to the no-impeachment rule. The Court held that the Sixth Amendment right to a fair trial by an impartial jury requires that the trial judge be allowed to consider, post-verdict, a juror’s testimony that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his

or her vote to convict.⁶ If a trial court determines that a defendant was denied his Sixth Amendment right, the court may set aside the verdict and grant a motion for a new trial. The holding was required, in the majority’s view, because allowing a conviction based on racial bias to stand would violate the defendant’s constitutional rights and “risk systemic injury to the administration of justice.”⁷

The Role of *Voir Dire* in Revealing Racial Bias

While the principle holding of *Pena-Rodriguez* establishes an exception to the no-impeachment rule in situations where a juror makes a statement indicating that racial animus was a significant motivating factor in his or her finding of guilt, discussions of *voir dire* in both the majority opinion and the dissent remind practitioners that *voir dire* provides an important opportunity to explore whether potential jurors harbor racial biases.

Courts have recognized *voir dire* as an important mechanism for protecting defendants’ trial rights. “[*Voir dire*] serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.”⁸ The attorneys’ opportunity to question prospective jurors has been cited in support of closing the door to the jury room and refusing to allow post-verdict challenges to deliberations. Prior to the holding in *Pena-Rodriguez*, the Supreme Court declined to make exceptions to Rule 606(b), indicating that *voir dire* and other safeguards were adequate to protect defendants’ trial rights. For example, in *Tanner v. US*, the Court refused to allow post-verdict inquiry where two jurors revealed after the trial that other jurors were intoxicated during the trial, identifying four existing safeguards that were in place to protect a defendant’s Sixth Amendment rights: 1) jurors can be examined during *voir dire*, 2) jurors can be observed during trial by court actors, 3) jurors can observe each other and report inappropriate behavior to the judge before they render a verdict, and 4) after the trial, counsel may offer evidence of misconduct by jurors, other than through testimony of jurors.⁹

For purposes of considering whether an exception to the no-impeachment rule was required, the Court distinguished *Pena-Rodriguez* on the grounds that Sixth Amendment interests are especially pro-

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nounced where racial bias is at play and *voir dire* and the other safeguards identified in *Tanner* might not suffice in such cases. According to the majority, exploring racial bias during *voir dire* may not prove effective in that broad questions regarding attitudes about race might not expose biases, while “more pointed questions could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.”¹⁰ Nevertheless, the Court recognized *voir dire* as an “important mechanism[] for discovering bias.”¹¹

In a dissenting opinion, Justice Alito, joined by Chief Justice Roberts and Justice Thomas, expressed a different view as to the effectiveness of *voir dire* in exposing biases. Justice Alito argued that the safeguards set out in *Tanner* are adequate to protect a defendant’s Sixth Amendment rights, including when a juror is motivated by racial bias. Specifically, *voir dire* serves as an effective mechanism for revealing racial prejudice.

The suggestion that *voir dire* is ineffective in unearthing bias runs counter to decisions of this Court holding that *voir dire* on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it....Thus, while *voir dire* is not a magic cure, there are good reasons to think that it is a valuable tool.¹²

In contrast to the majority’s concern that all approaches to race during jury selection are necessarily problematic, Justice Alito recognized social science research suggesting that, rather than reinforcing prejudice, making race salient may cause bias to recede.¹³ Justice Alito observed that not only do attorneys have tools such as questionnaires and individual questioning, but they can also avail themselves of practice

guides “replete with advice on conducting effective *voir dire* on the subject of race[.]” including a manual specific to North Carolina, *Raising Issues of Race in North Carolina Criminal Cases*.¹⁴

In sum, though there was some disagreement about the effectiveness and strategic desirability of addressing racial issues with potential jurors, both the majority and the dissent in *Pena-Rodriguez* recognize that racial bias is an appropriate area of inquiry during *voir dire* and an important safeguard of the right to a fair trial.¹⁵

When Can, Should, or Must Lawyers Discuss Racial Bias with Potential Jurors During *Voir Dire*?

As a general matter, criminal defendants have a constitutional right to *voir dire* jurors adequately. “[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.”¹⁶ Further, undue restriction of the right to *voir dire* is error.¹⁷ In certain circumstances, a defendant has a constitutional right to ask questions about race on *voir dire*. In *Pena-Rodriguez*, the Court stated: “In an effort to ensure that individuals who sit on juries are free of racial bias, [the US Supreme] Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*.”¹⁸

The US Supreme Court has found the refusal to permit inquiry into racial attitudes a reversible error in a few different contexts.¹⁹ In *Ham v. South Carolina*, the Court held that a black defendant, who was a civil rights activist and whose defense was that he was selectively prosecuted for marijuana possession because of his civil rights activity, was entitled to *voir dire* jurors about racial bias.²⁰ In *Ristaino v. Ross*, the Court held that the Due Process Clause does not create a general right in non-capital cases to *voir dire* jurors about racial prejudice, but such questions are constitutionally protected when cases involve “special factors,” such as those presented in *Ham*.²¹ In a plurality opinion in *Rosales-Lopez v. United States*, some members of the Court suggested that trial courts must allow *voir dire* questions concerning possible racial prejudice against a defendant when the defendant is charged with a violent crime and the defendant and victim are of different racial or ethnic groups.²² Additionally,

in a plurality opinion in *Turner v. Murray*, the Court found that defendants in capital cases involving interracial crime have a constitutional right to *voir dire* jurors about racial biases.²³ Broadly speaking, courts have stated that a trial judge must allow a defendant’s request to examine jurors regarding bias “when there is a showing of a ‘likelihood’ that racial or ethnic prejudice may affect the jurors.”²⁴

The North Carolina Supreme Court has recognized that *voir dire* questions aimed at ensuring that “racially biased jurors [will] not be seated on the jury” are proper.²⁵ As early as 1870, the North Carolina Supreme Court found error where the court refused to allow a preliminary question regarding racial bias: “Suppose the question had been allowed, and the juror had answered, that the state of his feelings towards [African American people] was such that he could not show equal and impartial justice between the State and the prisoner, especially in charges of this character: it is at once seen that he would have been grossly unfit to sit in the jury box.”²⁶ However, the North Carolina Supreme Court held in another case that whether to allow questions about racial and ethnic attitudes and biases is within the discretion of the trial judge.²⁷ In *State v. Robinson*, the North Carolina Supreme Court held that where the trial judge allowed the defendant to question prospective jurors about whether racial prejudice would affect their ability to be fair and impartial and to ask questions of prospective white jurors about their associations with black people, the trial judge did not abuse his discretion in sustaining prosecutor’s objection to other questions, such as “Do you belong to any social club or political organization or church in which there are no black members?” and “Do you feel like the presence of blacks in your neighborhood has lowered the value of your property...?”²⁸

Typically, in cases in which the courts have found that inquiry into racial bias was mandated, the issue was whether the trial judge erred in allowing or disallowing such questions. Does it follow that trial attorneys who are conducting *voir dire* have an affirmative duty to inquire into racial bias in order to protect their client’s right to an impartial jury? Is failure to do so constitutionally deficient? Courts have been reluctant to find that failure to inquire into racial

bias constitutes ineffectiveness of counsel. Such a determination would require a showing that a different result would have occurred at trial had counsel inquired into bias, a high hurdle.²⁹ Additionally, courts have been deferential to trial attorneys in light of the strategy judgments they must make in the heat of trial.³⁰ In particular, courts have been reluctant to find that counsel was deficient where the evidence did not explicitly pertain to racial issues.³¹ However, ineffectiveness claims based on the failure to guard against a violation of a client’s Sixth Amendment right when counsel fails to inquire into racial bias may be an emerging area of law.³² In *Pena-Rodriguez*, the court’s description of jury selection suggests that defense counsel failed to thoroughly explore issues of racial bias during *voir dire*. Instead, the defense attorney relied on general questions about potential jurors’ ability to be fair. Justice Alito’s dissent suggests that attorneys should probe more deeply to guard against the influence of bias, and identifies resources that may enable attorneys to do so capably.³³

Conclusion

Precedent from the US Supreme Court supports that there is a constitutional right to inquire into racial bias during *voir dire* where the defendant has been charged with an interracial crime of violence or is raising a claim that he or she was subjected to selective enforcement or selective prosecution on account of his or her race or ethnicity. The right may also exist where racial issues are “inextricably bound up with the conduct of the trial[.]”³⁴ as where the theory of defense involves consideration of racial issues such as cross-racial misidentification, use of racial epithets, or racial biases of a witness. States may choose to offer greater protections than those recognized by the US Supreme Court.

To date, courts have been reluctant to find that failure to explore issues of racial bias during *voir dire* constitutes ineffectiveness of counsel. However, this may be an emerging area of law. Support exists for the proposition that inquiry into bias during *voir dire* is a best practice. For example, Justice Alito noted in *Pena-Rodriguez* that *voir dire* on race is “typically advisable in any case if a defendant requests it,”³⁵ and the US Supreme Court observed in *Ristaino* that “the wiser course generally is to pro-

pound appropriate questions designed to identify racial prejudice if requested by the defendant.”³⁶

Juror bias may be present even in a case in which it is not readily apparent that race is at issue, and it may be both appropriate and advisable for attorneys to inquire into such issues during *voir dire*. In fact, experts have suggested that “juror racial bias is most likely to occur in run-of-the-mill trials without blatantly racial issues,” as jurors are less likely to guard against the influence of prejudice in such cases.³⁷ As Justice Alito observed in *Pena-Rodriguez*, by raising race during *voir dire*, attorneys bring concerns about bias to the jurors’ awareness, which may cause them to correct for implicit racial biases.³⁸ Fortunately, a number of resources are available to assist attorneys in addressing the sensitive topic of racial bias during jury selection.³⁹ *Pena-Rodriguez* and scholarship cited therein indicate that in order to insulate jury deliberations from racial bias, it is advisable for attorneys to become proficient in exploring racial attitudes during *voir dire*.⁴⁰ ■

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Endnotes

1. *Batson v. Kentucky*, 476 US 79, 89 (1986).
2. *Pena-Rodriguez v. Colorado*, 580 US ___, 2017 WL 855760 (2017).
3. *Id.*, slip op. at 4.
4. *Id.*
5. NC Gen. Stat. § 8C-1, Rule 606(b).
6. *Pena-Rodriguez*, slip. op. at 2.
7. *Id.*, slip op. at 15-16.
8. *Mu'Min v. Virginia*, 500 US 415, 431, (1991). *See also State v. Conner*, 335 NC 618, 629 (1994) (stating that the purpose of *voir dire* examination “is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial.” (internal quotation marks omitted)).
9. *Tanner v. US*, 483 US 107 (1987). *See also Warger v. Shauers*, 574 US ___, 135 S. Ct. 521 (2014) (finding that even where jurors lie during *voir dire*, the right to

an impartial jury can still be protected via *Tanner* safeguards 3) and 4)).

10. *Pena-Rodriguez*, slip op. at 16 (internal citations and quotation marks omitted).
11. *Id.*, slip op. at 16.
12. *Id.*, Alito, J., dissenting, slip op. at 13-14.
13. *Id.*, Alito, J., dissenting, slip op. at 13 n.9 (citing authorities).
14. *Id.*, Alito, J., dissenting, slip op. at 12 (In footnote 8, Justice Alito identifies *Raising Issues of Race in North Carolina Criminal Cases* as an example of a manual that provides *voir dire* strategies and sample questions; he cites the manual and quotes from it as follows: A. Grine & E. Coward, *Raising Issues of Race in North Carolina Criminal Cases*, p. 8-14 (2014) (suggesting that attorneys “share a brief example about a judgment shaped by a racial stereotype” to make it easier for jurors to share their own biased views), unc.live/2nLgqNI (as last visited Mar. 3, 2017); *id.*, at 8-15 to 8-17 (suggesting additional strategies and providing sample questions)).

Additional resources include: Jeff Robinson, *Jury Selection and Race: Discovering the Good, the Bad, and the Ugly* (unpublished materials from a joint presentation on race and jury selection) (on file with author), bit.ly/2oJOMkR; Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC IRVINE L. REV. 843, 847 (2015) (In this article, Law Professor Cynthia Lee argues “that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection.”), bit.ly/2oE3YTq; Jeff Adachi, Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans (sample motion), bit.ly/2nc5E6z.

15. *Pena-Rodriguez*, Alito, J., dissenting, slip op. at 13-14.
16. *Morgan v. Illinois*, 504 US 719, 729-30 (1992) (holding that capital defendant constitutionally entitled to ask specific “life qualifying” questions to the jury); *see also Rosales-Lopez v. United States*, 451 US 182, 188 (1981) (plurality opinion) (“Without an adequate *voir dire* the trial judge’s responsibility to remove prospective jurors who will not be able impartially to follow the court’s instructions and evaluate the evidence cannot be fulfilled.”). *But cf. Mu'Min v. Virginia*, 500 US 415, 425 (1991) (emphasizing extent of trial judge’s discretion in controlling *voir dire* and holding that *voir dire* questions about the content of pretrial publicity to which jurors might have been exposed are not constitutionally required). North Carolina statutes likewise give the parties the right to “personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge.” G.S. 15A-1214(c); *see also* G.S. 15A-1212(9) (recognizing right to challenge for cause an individual juror who is unable to render a fair and impartial verdict). For a further discussion of *voir dire*, *see* 2 Julie Ramseur Lewis & John Rubin, North Carolina Defender Manual § 25.3 (*Voir Dire*) (2d ed. 2012).
17. *See State v. Conner*, 335 NC 618, 629 (1994) (holding that pretrial order limiting right to *voir dire* to questions not asked by court was error).
18. *Pena-Rodriguez*, slip op. at 14 (citing *Ham v. South Carolina*, 409 US 524 (1973); *Rosales-Lopez v. US*, 451 US 182 (1981); *Turner v. Murray*, 476 US 28 (1986)).

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19. These cases are discussed at greater length in Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC Irvine L. Rev. 843, 852-59 (2015), bit.ly/2p2cfcg.
20. 409 US 524 (1973).
21. 424 US 589 (1976).
22. 451 US 182 (1981). *See also Aldridge v. United States*, 283 US 308 (1931) (reversing black defendant’s conviction for murder of a white policeman where trial court refused to ask prospective jurors whether they held racial prejudices).
23. 476 US 28 (1986).
24. *Turner*, 476 US at 40 (Brennan, J., concurring in part and dissenting in part) (stating that the court had declared this principle in *Rosales-Lopez*, 451 US at 190).
25. *State v. Williams*, 339 NC 1, 18 (1994) (holding there was no error in a capital case involving a black defendant and a white victim, when, during jury selection,

CONTINUED ON PAGE 27

viewed the “chicken scratch” penmanship of his doctor will appreciate the difficulty of predicting the different ways that a drug name might be interpreted. This, however, is precisely what pharmaceutical trademark attorneys must do.

In addition to assessing “traditional” trademark similarity, a pharmaceutical trademark attorney must consider potential handwriting similarity. For example, not many people would consider the trademarks AVANDIA and COUMADIN to be similar to one another, but take a look at the following prescription for AVANDIA (a medication for diabetes) and see if you can understand why the pharmacist incorrectly gave the patient COUMADIN (a blood thinner).



The challenges to a pharmaceutical trademark do not end with handwriting. The trademark attorney must also consider phonetic similarity (for telephone orders), and must be aware of medical abbreviations that should not appear in a trademark. For example, when a doctor intends for the patient to take a medication twice a day, the doctor will write the abbreviation “BID” on the prescription, as a short-hand way of telling the pharmacist how the medication should be taken. Therefore, the name of a drug should not end in “BID” in order to avoid potential misunderstanding. By the

time a trademark attorney has considered all of these issues, many candidates are eliminated. In a typical name creation exercise, a drug company might go through 350 – 500 candidates in order to arrive at five to ten potentially acceptable trademarks for a new medicine.

In addition to the Patent & Trademark Office, any pharmaceutical trademark must be reviewed and approved by the FDA prior to being used in the US. Regulatory authorities in other territories, including the EU and Canada, also conduct reviews of any proposed pharmaceutical trademark, and typically reject 30–50% of the candidates they review. The next time you wonder where the name of that new medication came from, be sure to thank the trademark attorney.

Consumer Entertainment Product Trademarks – Christopher S. Thomas, Parker Poe, Raleigh

Developing a strong brand can be very expensive. A trademark, more than anything else, represents the goodwill—both as that term is used colloquially and as an accounting term of art—of the mark owner. It follows that trademarks for consumer entertainment products, especially those that are sold under well-known brands, are extremely valuable to their own-



Thomas

ers. Because of that, and because customers and fans of such products often feel a strong affinity with those brands, the owners of such marks must protect them.

Brand owners must protect their marks from those who seek to unlawfully divert customers by falsely representing that products or services emanate from, or have been approved by, the brand owner. Protecting trademark rights from this sort of infringement is often called “policing.” But brand owners also need to protect their marks and goodwill from misguided policing efforts (sometimes the result of over-zealous trademark enforcement) that can do more damage than good to the brand in the eyes of the public. This is especially true now that the recipient of an inelegant demand letter may publish it to the world using social media. Savvy brand owners and their trademark lawyers understand this.

Trademark practice involves assisting clients with the creation, clearance, adoption, and registration of brands. That part of the practice can be immensely rewarding and fun, especially seeing a new mark in use on a successful product. After a mark is registered, much of the work is in protecting the mark. It is in formulating a measured enforcement strategy—one that is consistent with the values of the brand owner and what the brand symbolizes—where a trademark lawyer can provide the most value to his or her client and their brands. ■

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Questioning Prospective Jurors (cont.)

- the prosecutor asked whether the jurors could “put the issue of race completely out of [their minds].”
26. *State v. McAfee*, 64 NC 339, 340 (1870).
 27. *See State v. Robinson*, 330 NC 1, 12–13 (1991).
 28. *State v. Robinson*, 330 NC 1, 12–13 (1991).
 29. *Catlin v. Henry*, 76 Fed. Appx. 818 (9th Cir. 2003) (unpublished) (holding that defense counsel did not render ineffective assistance of counsel in failing to *voir dire* potential jurors about racial bias where there was no showing of actual bias by jury and no showing that different result would have occurred if counsel would have questioned jury about bias).
 30. *United States ex rel. Preston v. Ellsworth*, 408 F.

- Supp. 568 (D. Del. 1975) (holding that defense counsel’s refusal, despite a request by the black defendant, to ask *voir dire* questions of the jury panel concerning racial prejudice was not ineffective where counsel justified his refusal on the partial ground that prejudice was not involved in the case because two of the state’s three key witnesses were black). *See also State v. Sanders*, 750 N.E.2d 90 (Ohio 2001) (holding defense attorneys’ failure to inquire into racial and religious attitudes at *voir dire* was not ineffective assistance of counsel, although defendant was an African American Muslim charged with murdering a white person, as trial lawyers were in the best position to determine whether such *voir dire* was needed).
31. *See, e.g., State v. Hale*, 892 N.E.2d 864 (Ohio 2008) (holding defense counsel did not perform deficiently in failing to *voir dire* prospective jurors on racial prejudice where case did not involve an interracial murder and evidence did not raise any racial issues).

32. *Cf. Padilla v. Kentucky*, 559 US 356 (2010) (recognizing for the first time that the Sixth Amendment guarantee of effective assistance of counsel requires attorneys to inform clients whether a plea carries a risk of deportation in light of the seriousness of potential consequences).
33. *Pena-Rodriguez*, Alito, J., dissenting, slip op. at 11-14.
34. *Ristaino*, 424 US at 597.
35. *Pena-Rodriguez*, Alito, J., dissenting, slip op. at 13-14.
36. *Ristaino*, 424 US at 597 n.9.
37. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 601 (2006).
38. *Pena-Rodriguez*, Alito, J., dissenting, slip op. at 13 n.9.
39. *See supra note xiv*.
40. *Id.*