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STATE OF WASHINGTON

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NO. 82736-2

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THE SUPREME COURT OF THE STATE OF WASHINGTON
CLERK

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MONDAY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED.

1. The fairness of the criminal justice system depends on the even-handedness and integrity of the prosecution. In a case where African-American witnesses did not identify the defendant as the perpetrator of the crime, the prosecutor proclaimed "black folk" follow a "code" that they do not testify against "black folk," affected a derogatory accent when questioning an African-American witness, said he went to great lengths to prosecute only the guilty, and injected his years of professional experience as evidence against Kevin Monday. Did the prosecutor's race-based tactics, exacerbated by flagrant efforts to persuade the jury by improper means, undermine the fairness of the proceedings and the appearance of fairness necessary for due process of law?

2. The court sentenced Monday for "firearm" weapon enhancements even though the jury was only asked to find whether he possessed a "deadly weapon." Where the jury was not instructed on or asked to consider the essential elements of a firearm enhancement, did the court lack authority to impose the greater punishment of a firearm enhancement?

B. STATEMENT OF THE CASE.

Kevin Monday was accused of firing the gunshots that killed Francisco Green and injured his friends, Michael Gagney and Chris Green.¹ The prosecution charged Monday with one count of first degree premeditated murder and two counts of first degree intentional assault while armed with a handgun. CP 104-06. At his trial, the court instructed the jury on self-defense as well as lesser offenses of second degree murder, first and second degree manslaughter, and second and third degree assault. CP 189-95, 199-215.

The underlying incident occurred at 3 a.m. in downtown Seattle. Antonio Saunders confronted Francisco Green about an insulting remark and others joined the ensuing physical tussle. 5/15/07RP 153; 5/16/07RP 72; 5/17/07RP 38-39. Someone fired shots at Green and the car carrying Green's friends. A street performer's video camera filmed part of the unfolding argument and shooting. 5/15/07RP 23, 58-59. The videotape is blurry and depicts only a portion of the altercation, but shows a person rapidly

¹ Gagney and Chris Green were cousins and were not related to Francisco Green. 5/16/07RP 123, 137-38.

shooting a gun from some distance away, holding the gun sideways, and quickly leaving. 5/15/07RP 67; 5/22/09RP 97-98.

A passerby identified Saunders as the shooter, but Saunders and his girlfriend Annie Sykes told police that Monday fired the shots. 5/10/07RP 107-110; 5/17/09RP 45, 70. In Monday's home, the police found .40 caliber bullets, some from the same manufacturer as used in the shooting, a holster, and clothes similar to those worn by the shooter. 4/30/07RP115-16.

After Monday's arrest and following several hours of questioning through the middle of the night, Monday said he had not meant to shoot Francisco Green but fired his gun because he believed Green or his friends were reaching for a gun to shoot him. 5/7/07RP 45-47, 99, 121 (arrested at 9 p.m., police interview from 11:35 p.m. until 4:30 a.m., all admissions came after 2 a.m.); 5/29/07RP 33-35, 52 (Monday's police statement).

At Monday's trial, the prosecution called a number of witnesses who were acquaintances of Green or Saunders, none of whom were close friends with Monday. These witnesses had spotty memories of the incident, clouded by drug or alcohol use, and no one identified Monday as the shooter. See e.g., 5/14/07RP 86 (detective statement all witnesses uncooperative

throughout case); 146 (witness Jones “was really intoxicated”; thought shooter was “more light skinned and prettier” than Monday); 5/16/07RP 156-59 (Chris Green “ducking,” not looking, when heard shots); 5/17/07RP 28, 45 (Saunders “drunk,” told police Monday was shooter because “I thought Monday put the blame on me, so I decided to blame him,” and did not know who did shooting); 5/22/07RP 89 (witness Barrett used ecstasy, marijuana and alcohol); 5/24/07RP 34-5 (witness Banks had some drinks; unable to identify shooter in montage).

In his closing argument, the prosecutor explained the reason none of the State’s witnesses said they saw Monday commit the shooting was because “black folk don’t ID black folk” or testify against “black folk” in court. He labeled the dishonesty of “black folk” as a “code” or “rule” they followed without exception. As a basis for crediting his racist stereotype, the prosecutor told the jury of his vast experience prosecuting murder cases and his reliance upon long-standing tenets known by all “good prosecutors.”²

² Citations to the record and further explanation of the prosecutor’s misconduct are contained on pages 11-20, *supra*, and in Appellant’s Opening Brief, pp. 40-54.

The Court of Appeals agreed the prosecutor made flagrantly improper statements during trial but decided the misconduct was harmless. It also found the jury was only asked whether Monday possessed a deadly weapon, but the court had authority to impose firearm sentencing enhancements.

C. ARGUMENT.

1. BY ENCOURAGING IMPERMISSIBLE RACE-BASED DECISION-MAKING, THE PROSECUTOR VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE AND UNDERMINED MONDAY'S RIGHT TO FUNDAMENTALLY FAIR PROCEEDINGS

Trial proceedings must not only be fair, they must "appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). When the prosecution urges the jury to consider patently impermissible criteria such as racially defined stereotypes, the impropriety violates societal notions of fair play and undermines the integrity of the judiciary, the criminal justice system, and the individual accused of a crime. Rose v. Mitchell, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979) ("[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."). Here, the prosecution's use of invidious race-based

tactics, combined with a litany of other textbook examples of improper argument, undermined the fundamental fairness of the proceedings and require a new trial.

a. The integrity of the criminal justice system rests on the fairness of the process used to obtain a conviction. “The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach.” In the Matter of Hagler, 97 Wn.2d 818, 830, 650 P.2d 1103 (1982) (Utter, J. concurring) (quoting Kyle v. United States, 297 F.2d 507, 514 (2nd Cir. 1961)); see Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (prosecutorial misconduct violates the “fundamental fairness essential to the very concept of justice”) quoting Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941)). Due process is defined by “the traditional jurisprudential attitudes of our legal system” as well as “widely held notions of fair play.”³

³ M. Fisher, “Harmless Error, Prosecutorial Misconduct, and Due Process: There’s More to Due Process than the Bottom Line,” 88 Col. L.Rev. 1298, 1314 (1988) (further noting due process is based on “history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.” Haley v. Ohio, 332 U.S. 596, 607, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (Frankfurter, J., concurring)).

Prosecutors play a unique, central, and influential role in protecting the fundamental fairness of the criminal justice system. A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935); see State v. Hunson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (prosecutor's "trial behavior must be worthy of his office, for his misconduct may deprive the defendant of a fair trial."). A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." Id.

Because the public expects that the prosecutor acts impartially,

improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

When reviewing prosecutorial misconduct, the court first considers whether the prosecutor's actions were improper, and second, whether there is a substantial likelihood that the misconduct affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.2d 937 (2009). The failure to object to misconduct

does not waive the error on appeal if the remark amounts to a manifest constitutional error. State v. Dixon, 150 Wn.App. 46, 57, 207 P.3d 459 (2009). Where a prosecutor's remarks are so flagrant and ill-intentioned that they evince "an enduring and resulting prejudice," the court will grant relief without regard to whether there was a trial objection. Fisher, 165 Wn.2d at 747.

b. References to racial considerations in evaluating the prosecution's proof undermine the fairness and equality necessary to the criminal justice system. Appeals to racial bias violate the right to a fair trial. McClesky v. Kemp, 481 U.S. 279, 309 n.30, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) ("the Constitution prohibits racially biased prosecutorial arguments"). An argument couched in terms of racial prejudice does "more than just harm the individual defendant," it also "helps further embed the already too deep impression that there are two standards of justice in the United States" for white and black people. United States ex rel. Haynes v. McKendrick, 481 F.2d 152, 157 (2nd Cir. 1973). Encouraging the jury to consider racially discriminatory criteria in deciding criminal allegations is an odious and patently unacceptable means of obtaining a criminal conviction. United States v. Cruz, 981 F.2d 659, 663 (2nd Cir. 1992) ("[i]njection of a

defendant's ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial for reasons that need no elaboration here.”). To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. McFarland v. Smith, 611 F.2d 414, 417 (2nd Cir. 1979).

In McFarland, the prosecutor urged the jury to find a witness testified truthfully because both she and the defendant were black. The prosecutor argued that the fact that both the defendant and the prosecution's witness were black is “a fact like you consider any other fact.” 611 F.2d at 416.

The McFarland Court rejected the prosecution's excuse that this argument was innocuous, and not a racial slur, because

[e]ven a reference to race that is not derogatory may carry impermissible connotations, or may trigger prejudicial responses to the listeners that speaker might neither have predicted nor intended.

Id. at 417. Asking the jury to draw an adverse inference based on race must be justified by a compelling state interest. Id.

In another case, a prosecutor discussed “colored people” as people with different mannerisms, appearances, and weaknesses from “ordinary people.” Haynes, 481 F.2d at 155. The Haynes

Court found the prosecutor's numerous references to black people as if they were a separate group with different defining characteristics was simply unacceptable. Even though defense counsel had not objected, the court questioned whether this failure was based on an unconscious acquiescence to the same prejudice. Id. at 156.

The prosecutor in Haynes encouraged the jury to consider "dismal stereotypes" about African-American witnesses, but he did not actually encourage the jury to find that black witnesses were less reliable than whites. Id. at 162 (Hays, J., dissenting). The dissenting judge agreed it would have been unconstitutionally prejudicial if the prosecutor had argued black witnesses were less reliable than white witnesses, which is the very kind of argument made by the prosecutor in Monday's case.

As explained in Haynes, a racially prejudicial argument "negates the defendant's right to be tried on the evidence in the case and not on extraneous issues." Id. at 157. Even though racial prejudice has been long-condemned, race or ethnicity remain fodder for influencing juries. Cluett v. Rosenthal, 58 N.W. 1009, 1011 (Mich. 1894) (plaintiff's attorney mentioned several times "these men are from Jerusalem," without legitimate purpose);

Simmons v. State, 71 So. 979 (Ala. App. 1916) (“You must deal with a negro in the light of the fact that he is a negro, and applying your experience and common sense,” was calculated to prejudice the defendant before the jury).

Encouraging the jury to consider ethnic-based patterns of behavior is contrary to the “formal equality under the law” that is a bedrock legal principle. United States v. Vue, 13 F.3d 1206, 1213 (8th Cir. 1994). For example, it is “highly improper” for the prosecutor to elicit evidence that Hmong individuals are often involved in opium smuggling when the defendants are of Hmong ethnic descent. Id. This “injection of ethnicity into the trial clearly invited the jury to put the Vues’ racial and cultural background into the balance in determining their guilt.” Id.

Race-based arguments are not tolerated as a means of encouraging a conviction. State v. Perez-Mejia, 134 Wn.App. 907, 918, 143 P.3d 838 (2006) (State’s argument about “machismo” was “clearly designed to call attention to” defendant’s ethnicity and thus an “unquestionably improper” appeal to ethnic prejudice). Racism’s pernicious influence arises in the internal workings of a juror’s thoughts and in secret deliberations, so it cannot be used to impugn the integrity of the verdict. A prosecutor’s direct reliance on

race-conscious arguments infects the trial, violates the fairness of the proceedings, and denies the equal protection of the laws.

c. The prosecution injected invidious racial characterizations into the case against Monday. Prosecutor James Konat explicitly posited that African-Americans are unreliable witnesses, encouraged the jury to use racial considerations in evaluating the case against Monday, and used derogatory, belittling language toward African-American witnesses.

The prosecution's case rested upon testimony from numerous African-American lay witnesses, and Monday is African-American. See Exs. 23-30 & Ex. 192 (photographs of witnesses and Monday). These witnesses did not identify Monday as the shooter.

According to the prosecutor, the reason his witnesses did not identify Monday as the shooter was because "black folk don't testify against black folk." 5/30/07RP 29, 109-110. He called this purported truism a "code," and he explicitly defined the "code" as meaning "black folk don't ID black folk." Id. The prosecutor repeatedly alluded to this exclusively race-based proclivity of black people by referring to the "code" as the reason his case against

Monday was not stronger throughout his argument. See e.g., 5/30/07RP 29, 32, 37 (“it’s all about the code”), 64, 109, 115, 116.

The prosecutor also asserted that none of the witnesses were exceptions to this “code that black folk don’t ID black folk in court.” 5/30/07RP 109-10.⁴ He said, “let me make it very clear to you if I didn’t, I don’t accept [sic]⁵ from the code that black folk don’t ID black folk.” Id. at 109. He claimed this is “code” is a “rule” applicable to all of the prosecution’s African-American witnesses. Id. at 109-10.

The prosecutor’s improper, racially derogatory treatment of African-Americans extended to his direct examination of one of the principal, African-American, witnesses in the case. Annie Sykes was at the scene and saw her boyfriend, Antonio Saunders, instigate the fight with Francisco Green that directly preceded the shooting. 5/21/07RP 148-49; Ex. 26 (Sykes photograph).

When questioning Sykes, the prosecutor inexplicably affected an accent when asking about her relationship with “po-leese.” His tone was so remarkable that the court reporter

⁴ The prosecutor is quoted as saying several times that Chris Green and Gagney were not “acceptions” to this rule or code. 5/30/07RP 110. From the context, it appears the prosecutor meant “exceptions” to the code or rule.

transcribed the remarks phonetically to show the prosecutor's emphasis. Since the court reporter did not phonetically alter other witnesses' words, and only on certain occasions described the prosecutor as saying "po-leese," the record indicates the prosecutor intentionally adopted this affectation.

The prosecutor asked Sykes whether, "there is a code on the streets that you don't talk to the po-leese?" 5/22/07RP 19. Five questions later, he said again, "Let me ask you this about your conversations with the po-leese." Id. Two pages of transcripts later, the prosecutor asked Sykes whether her boyfriend's involvement in the fight was, "one of the reasons that you stayed away and tried to avoid the po-leese, right?" 5/22/07RP 22. Following another two questions, the prosecutor asked about whether "there is a code on the streets that you don't call the po-leese." Id. at 23.

After a lengthy period of questioning Sykes without affecting an accent, the prosecutor returned to the "po-leese." 5/22/07RP 51-53. He asked Sykes four additional times whether she did not want anyone to know she was cooperating "with the po-leese."

⁵ Apparently meaning he did not give "exceptions" to any African American witnesses from this race-based code.

Sykes herself repeatedly spoke of “police” not “po-leese,” with only a single exception, when she is once quoted as adopting the same affectation as the prosecutor. 5/22/07RP 19. Almost immediately thereafter, when the prosecutor asked a question consisting solely of the word, “Really,” the court directed the prosecutor to ask questions without using “the tone of voice that he’s giving us,” which the court perceived as an effort to indicate to the jury that the witness should not be believed. 5/22/07RP 20.⁶ The topic of the prosecutor’s questions when pressuring Sykes about the “po-leese” was whether she would ever cooperate with the police. Sykes explained that “some people talk to the police, some don’t” and neither she nor anyone else said that “black folk” followed a particular code. 5/22/07RP 19.

The Court of Appeals termed the prosecutor’s remarks “clearly improper” and unnecessary, although harmless. Slip op. at 19. But the prosecutor’s dismissive tone and derogatory language served as an imprimatur of racial bigotry toward an African-American witness and displayed an effort to license the jurors to

⁶ The day before, when the prosecutor was aggressively questioning Sykes, the court instructed him, “let the street language remain in the street. You don’t have to buy into it.” 5/21/07RP 182.

treat witnesses differently based on their race. This approach to garnering a conviction is not only unnecessary, it is so odious to the system of fairness and the appearance of fairness on which the criminal justice system rests it violated due process.

d. The prosecution made numerous additional flagrant and ill-intentioned arguments to the jury. The prosecutor's argument about the "code" keeping "black folk" from testifying honestly against another of their race occurred in the context of the prosecutor's pervasive efforts to influence the jury by virtue of his personal experience, professional prestige, and prior vetting of the truthfulness of the allegations.

Signaling that his efforts to prosecute Monday drew from vast experience, the prosecutor began his closing argument by telling the jury he had been a prosecutor for "17 years and 11 months," and in the past 15 years he had prosecuted "many murder cases." 5/30/07RP 26-27 (Appendix A).⁷ He offered this personal history not simply as biographical insight, but to explain that in his many years as a prosecutor he relied upon several "tenets" that "all good prosecutors, I think, believe" and these

“tenets have proven true time and time again over the years” and specifically in this case. Id. at 27. By making it known to the jury that the prosecutor’s remarks flowed not only from his personal opinion but also from the experience and prestige of all good prosecutors, he injected an irrelevant basis to enhance the universally accepted nature of his arguments, including the claim that “black folk” operate by a unique and distrustful code.

One “tenet,” which the prosecutor also called an “old adage,” was that it was very difficult to have a compelling closing argument when the case was “really, really, really strong.” 5/30/07RP 27, 30. This “tenet” told the jury to disregard any lack of persuasiveness in the prosecutor’s closing argument, as it was a well-known and “proven” “tenet” among “good prosecutors” that the sheer strength of the case against Monday made it unlikely his closing argument would be compelling.

The second proven “tenet” among good prosecutors was something he also labeled “the theme” of his argument: that a criminal defendant is “inherently unreliable.” 5/30/07RP 27, 43, 45, 59. He described the criminal defendant’s inherent unreliability

⁷ Because first two pages of the prosecutor’s closing argument set the groundwork for the improper themes challenged herein, they are attached as

as not simply an individual's motive to lie after being accused of a crime, but rather an immutable trait of character. 5/30/07RP 45.

The prosecutor assured the jury that this prosecution rested upon his personal knowledge and experience. In fact, the prosecutor made this argument explicitly in his opening statement, telling the jury he goes to great lengths not to falsely accuse anyone. He said,

You're going to learn that we take absolutely every single measure we can think of to make sure that no man is falsely accused, and no man is falsely convicted of something he didn't do.

5/10/07RP(opening) 13. The court correctly sustained the defense objection, because it is flagrantly improper to tell the jury that the prosecution is convinced that the accused person is guilty. See Washington v. Hofbauer, 228 F.3d 689, 701-02 (6th Cir. 2000) ("always improper" to suggest defendant's guilt predetermined prior to trial); United States v. Splain, 545 F.3d 1131, 1134-35 (8th Cir. 1976) ("serious transgression" to suggest government would not prosecute unless "we are convinced he has committed a crime"). This initial comment became a "skunk in the jury box" after the

Appendix A herein for reference.

array of prosecutorial improprieties encouraged the jury to rely on the prosecutor's experience and the truth-seeking role.⁸

The prosecutor's claim of proven evidence showing the inherent unreliability of all criminal defendants blatantly undermined the presumption of innocence that attaches to all people accused of crimes. Moreover, the argument conveyed to the jury the extrajudicial notion that prosecutors find people accused of crimes essentially untrustworthy people. United States v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1996) (calling defendants "bad people" simply does not further the aims of justice or aid in the search for truth, and is likely to inflame bias in the jury"). The inevitable inference for the jury was that "black folk," such as the "black folk" who testified at trial and admitted to a variety of drug use or other criminal activity, were simply unreliable by virtue of their race.

In the case at bar, the prosecution's numerous African-American witnesses claimed their memories of the incident were clouded by intoxication or distraction and did not identify Monday as the perpetrator. But this very gap in the prosecution's evidence -- the failure of the witnesses to testify as to Monday's culpability --

⁸ Dunn v. United States, 307 F.2d 883, 887 (5th Cir. 1962) ("If you throw a skunk in the jury box, you cannot instruct the jury not to smell it.").

does not authorize improper tactics to obtain a conviction. And there was no evidentiary basis for broadly claiming a genetic predisposition for dishonesty in the courtroom possessed by the belittled "black folk."

The prosecutor made additional patently improper arguments asking the jury to rely on the prosecutor's prestige and assurances of the strength of the case. He repeatedly insinuated to the jury that he was personally trying to discern the truthfulness of the witnesses' testimony and reminded the jury that he possessed knowledge they did not have.⁹ He aligned himself personally with the sympathy and prestige publicly-accorded to Norm Maleng, the long-time elected prosecutor of King County who had unexpectedly died only four days earlier and who had hired and promoted this very trial prosecutor.¹⁰

e. The prosecution's violations of basic notions of fair play requires a new trial. Monday only objected to some of the instances of the prosecutor's misconduct. However, the

⁹ See e.g., 5/21/07RP 50-51 (when questioning Saunders, "my job is to point out to the jury which part of what you are saying is true and which part isn't."); 5/21/07RP 183 (question to Sykes, "I am going to try to determine what was the truth and what wasn't the truth about what you told the detectives on May 9."); 5/21/07RP 166 (question posed to Sykes, "I know what [sweating me] it means, but if some of these folks don't.").

prosecutor's self-proclaimed "theme" of the case relied on improper arguments and this Court must assess their harmfulness cumulatively. State v. Jerrels, 83 Wn.App. 503, 508, 925 P.2d 209 (1996). Here, the prosecutor used long-disfavored, textbook examples of improper argument that were not spontaneous but were planned comments of such a fundamentally odious nature that the errors could not have been cured by individual limiting instructions given the thematic, repeated nature of the misconduct.

Furthermore, the harmless error analysis must consider whether the jury would have reached this same verdict absent the prosecutor's litany of improper arguments. There must be a compelling state interest when the prosecution urges race-based decision-making by jurors. McFarland, 611 F.2d at 417. The constitutional harmless error test places the burden on the prosecution to prove the error did not affect the verdict beyond a reasonable doubt, while the nonconstitutional test requires flagrant misconduct that is substantially likely to have affected the verdict. Fisher, 165 Wn.2d at 747.

¹⁰ The prosecutor explained Maleng hired him "17 years ago" and this would be "the last murder case" that "I will try under his name." 5/22/07RP 27.

The jury convicted Monday of premeditated first degree murder, even though it had before it numerous lesser offenses to consider such as intentional second degree murder or first degree manslaughter, as well as self-defense. He was also convicted of first degree assault even though the instructions included lesser offenses of second and third degree assault.

Yet at best the evidence showed the initial fight arose spontaneously between other people, the action escalated quickly, and Monday fired any shots from some distance away while holding a gun sideways and shooting rapidly. The "premeditation" required for first degree murder requires "the deliberate formation of and reflection upon the intent to take a human life," after some period of thought. State v. Hoffman, 116 Wn.2d 51, 82, 804 P.2d 577 (1991). Here, the prosecutor's theory was that Monday joined in the fight between Saunders and Francisco Green simply to help Saunders, without having personal animosity toward Green. The notion that he premeditatedly sought to kill is particularly far-fetched, and the jury's verdict of this most serious offense likely reflects the tampering affects of the misconduct.

The police agreed the videotape was blurry, significant action takes place outside of the camera's lens as people come

and go from the picture, and the nature of the argument leading to the shooting simply cannot be discerned. 5/3/07RP 24-25, 110. No witnesses affirmatively identified Monday or explained what occurred with reason, logic, and consistency.

The Court of Appeals brushed aside the prosecutor's tactics, claiming that his efforts to taint "black folk" would have backfired because the "black" witnesses were prosecution witnesses. Slip op. at 19-20. But the prosecutor obtained a conviction by simultaneously disparaging African-American witnesses while urging the jury to accept the parts of their testimony that helped the State's case, and then explaining the jury could trust the prosecutor because of his years of experience and his efforts to "make sure no man is falsely convicted of something he didn't do."

5/10/07RP(opening) 13. The State's unfair and flagrantly improper efforts to secure a verdict on the greatest possible charges by means that have been long-discredited affected the verdict and require reversal and remand for a new trial. Perez-Mejia, 134 Wn.App. at 918.

2. THE PROSECUTION ONLY ASKED THE JURY TO FIND MONDAY WAS ARMED WITH A DEADLY WEAPON AND THEREFORE, THE COURT LACKED AUTHORITY TO IMPOSE A FIREARM ENHANCEMENT

A sentence that is not authorized by law is invalid on its face.

In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008). Here, the special verdict form asked only whether Monday was armed with “**a deadly weapon**” and the jury answered “yes.”

The prosecution is neither required nor presumed to be seeking the most onerous punishment and the reference to a handgun during a trial does not provide the court with authority to impose the more onerous firearm sentencing enhancement absent a jury verdict reflecting such authority. State v. Recuenco, 163 Wn.2d 428, 436, 180 P.3d 1276 (2008).

In Recuenco, the information charged the defendant with committing a crime while armed “with a deadly weapon, to-wit: a handgun.” 163 Wn.2d at 431. Like the case at bar, the jury was not instructed on the definition of a “firearm” under RCW 9.41.010, which is an essential element of a firearm enhancement. 163 Wn.2d at 431; RCW 9.94A.533(3). And identically to the case at bar, the special verdict form merely asked whether the defendant

was “armed with a deadly weapon at the time of the commission of the crime.” 163 Wn.2d at 431; CP 225.

In Recuenco, this Court found that a firearm sentencing enhancement has not been properly charged and proven when the charging document, instructions, and verdict form do not unambiguously demonstrate a properly noticed conviction for a firearm enhancement. 163 Wn.2d at 431, 442. Monday’s verdict form and jury instructions were predicated on the same deadly weapon language and do not authorize the court to impose a sentencing enhancement not dictated by the jury’s verdict.

Several recent Court of Appeals decisions have upheld this very principle following Recuenco. In State v. Brainard, 148 Wn.App. 93, 104, 180 P.3d 460 (2009), the court reversed a firearm enhancement when the jury was not instructed on the legal definition of a firearm as required for the enhancement. Because the jury’s verdict rested on a deadly weapon enhancement, the court lacked authority to impose a firearm enhancement. Id.; see also State v. Williams, 147 Wn.App. 479, 481, 195 P.3d 578 (2009) (“Here, as in Recuenco, the jury found that the defendant was armed with a deadly weapon, rather than a firearm. Accordingly, we again conclude that the sentencing judge was without authority to

impose firearm enhancements.”); In re Pers. Restraint of Scott, 149 Wn.App. 213, 220, 202 P.3d 985 (2009) (firearm enhancement facially invalid when jury was instructed on deadly weapon enhancements and returned verdicts finding the defendant armed with a deadly weapon); In re Pers. Restraint of Delgado, 149 Wn.App. 223, 227, 204 P.3d 939 (2009) (same).

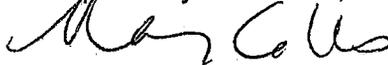
RCW 9.94A.533(3) permits a firearm enhancement only if the offender “was armed with a firearm as defined in RCW 9.41.010.” A jury must find this essential element. The jury was not asked to make this finding in the case at bar and therefore, the firearm sentencing enhancements must be reduced to reflect the facts found by the jury.

D. CONCLUSION.

Kevin Monday respectfully requests this Court order a new trial, and alternatively, strike the firearm weapon enhancements improperly imposed based on deadly weapon findings.

DATED this 30th day of September 2009.

Respectfully submitted,



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APPENDIX A

1 (Whereupon the following proceedings commenced
2 at 1:30 p.m. in the presence of the jury.)

3 THE COURT: Please be seated. Mr. Minor?

4 MR. MINOR: The Defense rests, your Honor.

5 THE COURT: All right. The State has rested
6 and the Defense has rested. As I indicated to you the
7 defendant has no obligation to present any testimony. The
8 jury instructions will now follow. I will read you these
9 jury instructions. I will tell you in advance they are
10 rather lengthy. Part of what we were doing for half a day
11 was compiling this. You will each receive a set of these
12 back in the jury room. You will one set of the verdict
13 forms. We do not send back multiple sets of the verdict
14 forms because we frankly do not want to get multiple
15 verdicts back from you. The presiding juror is the one
16 who handles the verdict forms, fills them out, and returns
17 them, and there is only one set of forms.

18 (Whereupon Jury Instructions were read to the
19 Jury. The Jury Instructions were not reported or
20 transcribed.)

21 CLOSING ARGUMENTS ON BEHALF OF THE STATE

22 BY MR. KONAT:

23 Thank you, your Honor. Mr. Minor, as always,
24 detectives, ladies and gentlemen of the jury:

25 Seventeen years and eleven months ago yesterday

David Pierce, Wa. Lic 2218
P.O.Box 14277

1 I signed on, I signed on to serve at the pleasure of
2 Norman K. Maling. I never imagined in a million years I
3 would get to try as many murder cases as I have in the
4 last 15 years, and I never imagined I would ever get to
5 try one, a doozy, like this one. Seventeen years and
6 about ten months ago I started going to training sessions
7 in the King County prosecutor's office on Saturday
8 mornings that we just dreaded when we could be playing
9 golf or water skiing or doing whatever else you might
10 expect to be doing. And two things stood out at me very
11 shortly into my career as a prosecutor, two tenets that
12 all good prosecutors, I think, believe. One is that when
13 you have got a really, really, really strong case, it's
14 hard to come up with something really, really, really
15 compelling to say. And the other is that the word of a
16 criminal defendant is inherently unreliable. Both of
17 those tenets have proven true time and time again over the
18 years, and they have done it specifically in this case
19 over the last five weeks -- four weeks.

20 I never imagined when I signed on to serve at
21 the pleasure of Norm Maling, this won't be the last murder
22 case I will try, but it is the last one I will try under
23 his name. I imagined I would call eight witnesses who
24 simply will not or cannot bring themselves to admit what
25 cannot be denied.

David Pierce, Wa. Lic 2218
P.O.Box 14277