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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN L. MONDAY, JR.,

Petitioner.

STATE'S ANSWER
TO ACLU'S AMICUS CURIAE BRIEF

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A. SUMMARY OF ISSUES ADDRESSED BY ACLU

The American Civil Liberties Union of Washington ("ACLU") has appeared as amicus curiae in this case, asking this Court to reverse defendant Kevin Monday's convictions for first-degree murder and first-degree assault. The ACLU asserts that the prosecutor made deliberate and repeated appeals to racial prejudice in Monday's trial and urges this Court to adopt a new rule of automatic reversal. Amicus Curiae Brief of ACLU (ACLU's Brief) at 1, 17-18.

The State agrees with the ACLU that appeals to racial prejudice have no place in a criminal trial. In this case, on two occasions, the prosecutor discussed the code against snitching in terms of race. There was overwhelming evidence that this code impacted the cooperation and testimony of certain State's witnesses, though the evidence of the code did not discuss it in terms of race. However, an examination of challenged comments in the context of the total argument establishes that the prosecutor was not making an appeal to racial prejudice, and neither the experienced defense attorney nor the trial judge perceived these comments as such appeals. Monday is not entitled to reversal of his convictions based upon these few comments.

In addition, the ACLU has not established that this Court should impose a rule of automatic reversal and abandon well-settled law

governing the review of claims of prosecutorial misconduct. Existing standards are sufficient to address and remedy claims that a prosecutor made an improper appeal to racial prejudice.

B. ARGUMENT

1. THE ACLU'S CHARACTERIZATION OF THE PROSECUTOR'S ARGUMENT IS INACCURATE.

The ACLU's claim that the prosecutor in this case "deliberately and repeatedly made appeals to racial prejudice" is inaccurate and ignores the full argument in the context of the facts and issues in this case.¹ ACLU's Brief at 1. As this Court has repeatedly instructed, the prosecutor's comments must be viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The ACLU does not engage in such an analysis, and a review of the remarks in the proper context reveals that the ACLU's

¹ It is not clear that the ACLU reviewed the full record in the case. Instead of citations to the record, the ACLU's Brief simply cites to the Appellant's Opening Brief. ACLU's Brief at 2-3. Some factual statements are inaccurate. For example, the ACLU claims that "Monday admitted to shooting Green accidentally." ACLU's Brief at 7. In fact, while Monday made a variety of contradictory statements about his involvement in the shooting, he did not claim that he shot Green accidentally. 19RP 191-92, 202-43; 20RP 20-36. Instead, when Monday ultimately admitted that he shot Green, he admitted he fired intentionally and did so in self-defense. 20RP 34.

characterization is not accurate.

The ACLU characterizes the prosecutor's argument as "repeated" appeals to racial prejudice. During the initial closing argument, the prosecutor made one reference to race during an argument that spans over 40 pages of transcript. As the prosecutor continued to discuss the code against snitching, he did not mention race again during his opening argument. Not surprisingly, the prosecutor devoted most of his argument to discussing the videotape of the shooting and Monday's statement to the police, in which he admitted to being the shooter. 21RP 40-64. In rebuttal argument, the prosecutor made one further reference to race when discussing the code, but then returned to a discussion of the testimony and evidence.² 21RP 109-33.

The ACLU claims that the prosecutor argued that "all African-Americans" followed "the code" that "black folk don't testify against black

² The ACLU also repeats Monday's claim that the prosecutor's occasional pronunciation of the word "police" during examination of Sykes was an appeal to racial prejudice. As the State has previously noted, the notion that the accent lent an air of racial bigotry is unsupported by the record; virtually all of the other civilian witnesses were African-American, and there is no indication that the prosecutor used any accent in questioning them. Monday's counsel made objections throughout the prosecutor's examination of Sykes, but he did not object to the pronunciation of police, indicating that he did not view it as offensive or improper.

folk."³ ACLU's Brief at 2. Any fair review of the full argument reveals that this characterization is untrue. Virtually all of the civilian witnesses in the case were African-American, and the prosecutor did not argue that a code against snitching had influenced the testimony of all these witnesses. In fact, he made the exact opposite argument with respect to Nakita Banks, who was present at the shooting. He told the jury, "You should believe everything that Nakita Banks told you because she has no dog in this fight. She didn't know anybody. In fact, I will tell you, she is the reason that the detectives started to unravel this case when they did." 21RP 36.

While the prosecutor's two references to race during closing argument were not necessary and not directly supported by the trial testimony, they were not an appeal to racial prejudice. The comments were made when discussing the code against snitching as it applied to the credibility of some of the State's witnesses. As noted in previous briefing, there was considerable and overwhelming testimony from numerous witnesses that there was a code against snitching. See Supplemental Brief of Respondent at 2. The first comment preceded the prosecutor's discussion of several State's witnesses whose trial testimony conflicted

³ The prosecutor actually argued that "the only thing that can explain to you the reasons why witness after witness is called to the stand and flat out denies what cannot be denied on that video is the code. And the code is black folk don't testify against black folk. You don't snitch to the police." 21RP 29.

with the events depicted on the videotape and/or previous statements made by the witness. During the prosecutor's discussion of these witnesses, he did not mention race, but focused his argument on the evidence and testimony. 21RP 32-35.

For example, the prosecutor noted that Felicia Barrett initially claimed that she was not present during the shooting. When she was confronted with the videotape, she admitted that she was within four feet of the shooter, though she claimed that she did not see his face. 21RP 34-35, 65. Similarly, the prosecutor pointed out that Annie Sykes denied seeing the shooting, though the videotape showed that she was standing next to the shooter as he fired the gun eleven times. 21RP 33. The prosecutor noted that Sykes denied knowing Monday, though his telephone number was stored in her cell phone. 21RP 37. When discussing Antonio Saunder's testimony, the prosecutor reminded the jury of Saunder's numerous contradictory statements and pointed out the inconsistencies between his trial testimony and the videotape. 21RP 32, 36. In the middle of this discussion, the prosecutor reminded the jury to disregard anything he said that was not supported by the evidence or testimony. 21RP 35.

In the cases cited by the ACLU, the government attempted to use the defendant's race, religion or national origin as evidence of guilt. For example, in United States v. Doe, 903 F.2d 16, 23 (DC Cir. 1990), several of the defendants were Jamaican, and the prosecutor presented expert witness testimony that Jamaicans had taken over the drug market and argued in closing that the "Jamaicans are coming in, they're taking over the retail sale of crack in Washington." Similarly, in United States v. Cabrera, 222 F.3d 590 (9th Cir. 2000), the defendants were Cuban, and the government's lead witness, a detective, made repeated references to investigating Cubans for drug offenses and suggested that Cubans were flight risks. In Bains v. Cambra, 204 F.3d 964 (9th Cir. 2000), the defendant, a Sikh, was charged with murder, and in closing argument, the prosecutor suggested that Sikhs were predisposed to violence when a family member had been dishonored.

In contrast with these cases, the prosecutor in this case did not argue or suggest that Monday was somehow more likely to have committed the crime because of his race. Accordingly, it is not surprising that neither the experienced defense attorney nor the trial judge perceived the prosecutor as making an appeal designed to convict the Monday on the basis of race. As the State has previously noted, defense counsel was not shy about interposing objections and, had he perceived that the prosecutor

was making "deliberate and repeated appeals to racial prejudice," he would have certainly objected. The Court of Appeals properly concluded that this argument was "not an appeal to racial bias traditionally held contemptuous by the courts." State v. Monday, 147 Wn. App. 1049, 2008 WL 5330824 at *9 (2008). This Court should affirm that decision.

2. THE COURT SHOULD NOT ADOPT A RULE OF AUTOMATIC REVERSAL.

Under well-settled law, in order to justify reversal of a conviction, a defendant must show a substantial likelihood that prosecutorial misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). If the defendant did not object to the improper comment, the error is considered waived "unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." McKenzie, 157 Wn.2d at 52 (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). In his briefing, Monday acknowledges that this is the proper standard to apply in examining the prosecutor's comments in this case. Brief of Appellant at 39-40; Petition for Review at 16; Petitioner's Supplemental Brief at 8. Applying these standards, the Court of Appeals held that "[g]iven the record before us,

this statement was not so flagrant or ill intentioned that any concern about the racial implications could not have been cured by objection and instruction." Monday, 2008 WL 5330824 at *8.

The ACLU asks this Court to abandon this settled law and automatically reverse Monday's conviction as systemic error. Because this is a new argument, made for the first time by amicus, this Court should decline to address it. See Madison v. State, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007) (holding that the court does not consider issues raised first and only by amicus).

Even if the issue is properly raised, this Court does not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful. State v. Kier, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008); In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The ACLU has not met this burden.

There is a strong presumption that constitutional errors that may have occurred are subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The United States Supreme Court has held that an extremely narrow category of errors, affecting "a very limited class of cases," is not subject to harmless error analysis. Johnson v. United States, 520 U.S. 461, 468,

117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)). These "structural" errors are almost always reversible error because they "contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Neder, 527 U.S. at 8 (citations omitted). Such errors "infect the entire trial process," so as to "necessarily render a trial fundamentally unfair." Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).⁴

This Court has never treated improper statements or arguments by a prosecutor as structural error. Instead, the court has long recognized that most improper arguments are errors in the trial process, and that they can be corrected by an appropriate objection and curative instruction. State v. Kingsbury, 147 Wash. 426, 433, 266 P. 174 (1928). Had defense counsel objected in this case and the trial court instructed the jury to disregard the prosecutor's comment, the jury is presumed to follow the court's

⁴ Errors that fit within this limited category include trials wherein there was a complete denial of counsel, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); a biased trial judge, Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927); racial discrimination in selection of a grand jury, Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986); improper denial of self-representation, McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); denial of public trial, Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); and the use of a defective reasonable-doubt jury instruction, Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Each of these errors is "unquantifiable and indeterminate" such that an appellate court could never discern whether the error did not prejudice the defendant. Sullivan, 508 U.S. at 282.

instructions. Even when there is no objection, under current Washington law, the court may reverse the conviction if the argument was so flagrant and ill-intentioned that it resulted in an enduring prejudice that could not be obviated by a curative instruction. State v. Gregory, 158 Wn.2d 759, 842, 147 P.3d 1201 (2006).

The ACLU argues that a new rule of automatic reversal for improper appeals to racial prejudice is necessary because "deterrence has not worked" and that "even the most objective jury cannot be trusted to filter insidious racial prejudice from a balanced consideration of the evidence." ACLU's Brief at 17-18. However, the authority cited by the ACLU does not support its broad claims.

As proof that a rule of automatic reversal is required, the ACLU cites two previous decisions involving claims of prosecutorial misconduct. ACLU's Brief at 16-17. However, neither case involved a claim that the prosecutor made improper appeals to racial prejudice.⁵ In fact, such claims appear to be relatively rare in Washington State; in his supplemental brief, Monday primarily relies upon several out-of-state opinions involving improper appeals to racial prejudice. See Petitioner's

⁵ In State v. Charlton, 90 Wn.2d 657, 663, 585 P.2d 142 (1978), the prosecutor commented upon the defendant's spouse's failure to testify. In State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995), the prosecutor improperly asked the defendant whether another witness was lying.

Supplemental Brief at 8-11. In the few Washington cases involving claims that the prosecutor improperly invoked race or national origin, the appellate courts, applying existing law, have reversed the convictions.⁶

The only authority cited by the ACLU for the notion that harmless error should not apply is United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2nd Cir. 1973). In that case, the prosecutor repeatedly referred to African-Americans as "colored people" and commented that defense counsel was "well versed" with the "colored race." Id. at 154-55. While the court noted that "a good argument" could be made for applying a more absolute standard of reversal, the Second Circuit proceeded to consider whether the error was harmless and concluded that it was not. Id. at 161. In the nearly forty years since McKendrick, no appellate court has held that a rule of automatic reversal is required. Accordingly, the ACLU has not made a compelling case for this Court to overturn established caselaw for evaluating claims of prosecutorial misconduct.

⁶ In State v. Perez-Mejia, 134 Wn. App. 907, 143 P.3d 838 (2006), the court reversed a murder conviction based upon the prosecutor's inflammatory argument. In State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976), the court reversed rape and burglary convictions as the result of multiple instances of prosecutorial misconduct.

C. CONCLUSION

For all the reasons set forth in this and previous briefing, the State requests the Court to affirm Monday's convictions.

DATED this 30th day of April, 2010.

Respectfully submitted,

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to:

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Sarah Dunne and Nancy Talner, attorneys for ACLU of Washington Foundation, 705 Second Avenue, Suite 300, Seattle, WA 98104

containing a copy of the STATE'S ANSWER TO ACLUE'S AMICUS CURIAE BRIEF, in STATE V. KEVIN MONDAY, Cause No. 82736-2, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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