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STATE OF WASHINGTON
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NO. 99793-4

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYLER BAGBY,

Petitioner.

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

SUPPLEMENTAL BRIEF OF THE PETITIONER

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United States Supreme Court

Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)..27

Lisenba v. California, 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166 (1941) 27

Peña-Rodriguez v. Colorado, __ U.S. __, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017)..10

Rose v. Mitchell, 443 U.S. 545, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) 10

Washington Supreme Court

Garfield Cty. Transp. Auth. v. State, 196 Wn.2d 378, 473 P.3d 1205 (2020) 11, 36

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State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) 11, 13

State v. Towessnute, 197 Wn.2d 574, 486 P.3d 111 (2021) 10

State v. Walker, 182 Wn.2d 463, 341 P.3d 976 (2015)..... 11

Washington Court of Appeals

State v. Ellis, 19 Wn. App. 2d 1006 (2021) 33

State v. Monday, 147 Wn. App. 1049 (2008)................ 32

State v. Zamora, 17 Wn. App. 2d 1073, *review granted*, 198 Wn.2d 1017 (2021) 34

Decisions of Other Courts

McFarland v. Smith, 611 F.2d 414 (2d Cir.1979) 26

Miller v. State of N.C., 583 F.2d 701 (4th Cir. 1978)...27

Weddington v. State, 545 A.2d 607 (Del. 1988) 27

Rules

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Other Authorities

Carodine, Montré D., *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521 (2009) 17

Carpenter, Andrew Elliot, *Chambers v. Mississippi: The Hearsay Rule and Racial Evaluations of Credibility*, 8 Wash. & Lee Race & Ethnic Anc. L.J. 15 (2002) 17

Devine, Patricia & Andrew Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 Personality & Soc. Psychol. Bull. 1139 (1995) 14

Duru, N. Jeremi, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315 (2004) 21, 24

Fred T. Korematsu Center for Law and Equality, *Race and Washington's Criminal Justice System, 2021 Report to the Washington Supreme Court* (2021) 12

Holland, Brooks, *Race and Ambivalent Criminal Procedure Remedies*, 47 Gonz. L. Rev. 341 (2012) 34

Hunt, Jennifer, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 Ann. Rev. L. & Soc. Sci. 269 (2015) 19

Johnson, Sheri Lynn, *The Color of Truth: Race and the Assessment of Credibility*, 1 Mich. J. Race & L. 261 (1996) 31

Jones, Melinda, *Preventing the Application of Stereotypic Biases in the Courtroom: The Role of Detailed Testimony*, 20 J. App. Soc. Psy. 1767 (1997) 21, 23

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Kevin Blackistone, *Black Men and Dogs: Don't Believe Vick*, National Public Radio (2007) 25

King County Prosecuting Attorney's Office, *Supplemental Brief of Respondent, State v. Monday*, 2009 WL 6082951 (Wash. 2009)....................33

Levinson, Justin D. & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307 (2010) 14

Linder, Ann, *The Black Man's Dog: The Social Context of Breed Specific Legislation*, 25 Animal L. 51 (2018) 25

Mitchell, Tara L., et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 Law & Hum. Behav. 621 (2005) 10, 18

powell, john a. & Stephen Menendian, *The Problem of Othering: Towards Inclusiveness and Belonging*, 1 Othering & Belonging 14 (2016) 16

powell, john a., *Us vs. Them: The Sinister Techniques of 'Othering' – and How to Avoid Them*, The Guardian (November 8, 2017)....................16

Rand, Joseph, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 Conn. L. Rev. 1 (2000) 22

Selmi, Michael, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 Ariz. St. L.J. 193 (2018) 20

Smiley, John and David Fakunle, *From 'Brute' To 'Thug:' the Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 (3-4) J. Hum. Behav. Soc. Environ. 350 (2016) 24

Sommers, Samuel & Phoebe Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997 (2003) 19

Stabile, Susan, *Othering and the Law*, 12 U. St. Thomas L.J. 381 (2016) 16, 18

Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* (2011) 11

Thompson, Mikah, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243 (2018) 18, 31

Vogelman, Lawrence, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 Fordham Urb. L.J. 571 (1993) 21

Wang, Lu-in, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DePaul L. Rev. 1013 (2004) 23

Wash. St. Minority & Justice Comm'n, *Final Report* (1990) 12

Wash. St. S. Ct., Letter to Members of Judiciary & Legal Cmty. (June 4, 2020) 10

Yung Lee, Cynthia Kwei, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 Minn. L. Rev. 367 (1996) 25

A. INTRODUCTION

For Black men like Tyler Bagby, the likelihood of arrest, prosecution, conviction, and imprisonment is disproportionally high. Courts must remain vigilant to prevent unjust outcomes where race plays a factor in a conviction. Where this Court finds race played an improper role in a person's trial, it must act by reversing the conviction.

Mr. Bagby faced a courtroom where the judge, prosecutor, defense attorney, and the entire jury pool were white. When the government exploited this disparity by singling out Mr. Bagby by asking witnesses to identify Mr. Bagby by his "nationality" and asking questions that reinforced racist myths that Black men are violent and dangerous, it committed flagrant and ill-intentioned misconduct.

The government's misconduct requires reversal under current standards. But given the lower courts finding that the misconduct was not "flagrant and ill-intentioned" and to prevent continued government appeals to racial bias, this Court should hold that the introduction of racial bias is always "flagrant and ill-intentioned" and requires reversal without a demonstration of prejudice.

B. ISSUE

The Court of Appeals relied on the "flagrant and ill-intentioned" standard to affirm Mr. Bagby's conviction despite the prosecutor's appeal to racial stereotypes and bias. Should this Court conclude that all appeals to racial bias are "flagrant and ill-intentioned" as a matter of law?

C. STATEMENT OF THE CASE

Tyler Bagby is Black. From Stockton, California, he moved to Spokane with his mother and siblings to find a better life. 11/26-27 RP 220. After graduating from high school, Mr. Bagby went to Spokane Falls Community College. *Id.* at 222. He then transferred to Washington State University, majoring in communications. *Id.* at 219.

Mr. Bagby is six feet tall and weighs two hundred pounds. 11/27 RP 263. He enjoys exercising and working out. 11/26-27 RP 223. He worked while in school, with jobs at T-Mobile and local restaurants. *Id.* at 220.

On February 3, 2018, Mr. Bagby drove to Moscow, Idaho, to pick up Kailah Crisostomo, whom he was dating. 11/26-27 RP at 228. After they went to a concert, the two went back to Mr. Bagby's apartment,

where they met with several other people, including Shyla Roberson and Solomon Cooper. 11/26-27 RP 230, 283. The friends took some vodka shots and then left for a fraternity house party. *Id*.

They continued to drink at the fraternity party. Mr. Bagby thought he had between three to five beers, as did Ms. Crisostomo. *Id*. at 239. Ms. Roberson said she drank less. *Id*. at 42.

While at the party, the friends separated. 11/26-27 RP 27. At one point, Ms. Crisostomo left for the bathroom, leaving Mr. Bagby behind. *Id*. Mr. Bagby became concerned after she did not return and asked Ms. Roberson to check on her. *Id*. When Ms. Roberson did not come back, Mr. Bagby went to check on them in the co-ed bathroom. *Id*. at 241.

The two women were in a stall, with Ms. Crisostomo crying. 11/26-27 RP 28-9. Mr. Bagby tried

talking to Ms. Crisostomo while Ms. Roberson encouraged him to leave. *Id*. at 32, 241.

After a while, Austin Davis, who was also in the bathroom, told Mr. Bagby to go. *Id.* at 59.[1] Mr. Bagby thought Mr. Davis bumped him and felt threatened. *Id*. at 62. He punched Mr. Davis in the face, knocking him out. *Id*. at 62, 265. Mr. Bagby remembered hitting Mr. Davis once, but others said he punched him more than once. *Id*. at 246, 81. Mr. Cooper then came to the bathroom. *Id*. at 116. He picked up Mr. Bagby and took him outside. *Id*. at 117.

Once outside the fraternity, Mr. Bagby continued to be concerned about Ms. Crisostomo. He was also angry with Ms. Roberson for not letting him speak with her. 11/26-27 RP 135. He tried to contact Ms. Roberson

[1] Mr. Davis was also drinking and thought he had consumed about eight to ten beers. 11/26-27 RP 53.

through social media and then tried calling her. *Id*. He left her a message where he made threats, expressing his anger. *Id*. at 140. Mr. Bagby stated he had no recollection of making the phone call but believed he did after hearing the message at trial. *Id*. at 249.

Ms. Roberson and Ms. Crisostomo went to Ms. Roberson's apartment. Once there, Ms. Crisostomo passed out on the couch. 11/26-27 RP 141. Shortly afterward, Mr. Bagby arrived. *Id*. Ms. Roberson alleged he kicked in the door, although the jury would ultimately find him not guilty of this charge. *Id*. at 144. Once inside, Mr. Bagby tried to talk with Ms. Crisostomo, who left the living room to sleep in the bedroom. *Id*. The police arrived shortly afterward. *Id*.

The government charged Mr. Bagby with residential burglary, assault in the fourth degree, malicious mischief, and harassment. CP 11-13.

Other than two witnesses, Mr. Bagby was the only person of color at his trial. 11/16-26 RP 97. The entire jury pool, the judge, the lawyers, and all the remaining witnesses were white. *Id.*

Despite Mr. Bagby's identification not being at issue, the government asked almost every witness to describe Mr. Bagby by his "nationality" or race. The prosecutor asked three witnesses to comment on Mr. Bagby's "nationality." 11/26-27 RP 79, 80, 94. The prosecution often asked witnesses to differentiate Mr. Bagby from others based on his race. *See* 11/26-27 RP 33, 71, 72, 80, 80-81, 81, 86, 88, 95, 96, 97, 180.

No evidence suggested Mr. Bagby tried to get into the bathroom stall. Instead, he did nothing other than push on the door, which one of the women opened to talk to him. *Id.* at 59. Nevertheless, the prosecutor asked one of the women in the stall why she was scared

of Mr. Bagby. 11/26-27 RP 33. She replied, “Well he’s way bigger than me, and he goes to the gym and works out, like, if he -- I’ve known before that he has, like a temper and a rage, and he’s started to shake it, and I started getting scared like what if he gets in.” *Id.*

Mr. Bagby testified. At the start of his cross-examination of Mr. Bagby, the prosecutor asked him whether he loved his dog. 11/16-27 RP 261-62. When Mr. Bagby said he did, the prosecutor responded with the statement, “Unfortunately, some people [don’t]; but I’m glad to hear you’re not one of them.” *Id.* No evidence about a dog was ever introduced at Mr. Bagby’s trial.

The jury found Mr. Bagby not guilty of malicious mischief but guilty of residential burglary, fourth-degree assault, and harassment 11/26-27 RP 362.

The Court of Appeals found the government did not commit flagrant and ill-intentioned misconduct, relying on *State v. Monday*, 171 Wn.2d 667, 681, 257 P.3d 551 (2011). Slip. Op. 9-10. The Court determined the prosecution did not appeal to racial bias, although it did misuse the term "nationality." *Id*. The Court found the exchange about whether Mr. Bagby mistreats dogs an "awkward" attempt to complement and build rapport with Mr. Bagby. *Id*. The Court found the prosecution's reference to Mr. Bagby's race, misuse of the term "nationality," and questions about Mr. Bagby's dog were not attempts to play into racial stereotyping. *Id*.

D. ARGUMENT

"Discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Peña-Rodriguez v. Colorado*, __ U.S. __, 137

S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)). When the government employed racial stereotypes and unnecessarily highlighted race to secure its conviction against Mr. Bagby, it committed incurable misconduct. This Court should reverse Mr. Bagby's conviction to ensure fair trials for all.

1. The persistent and systematic devaluing of Black lives predates and permeates the criminal legal system.

"The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all." *State v. Towessnute*, 197 Wn.2d 574, 575, 486 P.3d 111 (2021) (quoting Wash. St. S. Ct., Letter to Members of Judiciary & Legal Cmty. (June 4, 2020)). "As judges, we must recognize the role we have played in devaluing black lives."

Garfield Cty. Transp. Auth. v. State, 196 Wn.2d 378, 390, n.1, 473 P.3d 1205 (2020).

Washington's legal system is not immune from these biases. *State v. Walker*, 182 Wn.2d 463, 491, n.4, 341 P.3d 976 (2015) (Gordon McCloud, J. concurring) (citing *State v. Saintcalle*, 178 Wn.2d 34, n. 3-6, 309 P.3d 326 (2013)). This Court recognizes that "bias pervades the entire legal system in general and hence [minorities] do not trust the court system to resolve their disputes or administer justice evenhandedly." *Id.*, at 488 (quoting Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 6 (2011)[2]

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[2] https://digitalcommons.law.seattleu.edu/korematsu_center/118/

(alteration in original (quoting Wash. St. Minority & Justice Comm'n, *Final Report,* xxi (1990)).[3]

There is a reason for this distrust. Persons of color and Indigenous people are more likely to be stopped, searched, arrested, prosecuted, convicted, and imprisoned than white people. Fred T. Korematsu Center for Law and Equality, *Race and Washington's Criminal Justice System, 2021 Report to the Washington Supreme Court*, 2-3 (2021).[4] "Race and racial bias matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system." *Id*. at 7.

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[3] http://www.courts.wa.gov/committee/pdf/TaskForce.pdf)

[4] https://digitalcommons.law.seattleu.edu/korematsu_center/116/

2. When the government relies on prejudice and racial bias, it commits flagrant and ill-intentioned misconduct.

"[R]acial bias is a common and pervasive evil that causes systemic harm to the administration of justice." *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019); *see also Monday*, 171 Wn.2d at 678; *State v. Jefferson*, 192 Wn.2d 225, 240, 429 P.3d 467 (2018) (plurality opinion); *Saintcalle*, 178 Wn.2d at 49. Racial bias constitutes misconduct, which has no place in the criminal legal system. "Theories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial." *Monday*, 171 Wn.2d at 667.

Negative attitudes towards Black people and the stereotype they are violent and criminal are prevalent. Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1128 (2012); (*referencing* Patricia

Devine & Andrew Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 Personality & Soc. Psychol. Bull. 1139 (1995)). Stereotypes are activated "easily, automatically, and often unconsciously." Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 327 (2010). And because attitudes about stereotypes are implicit, they function automatically, including ways a person would not endorse if they were consciously aware of the bias. Kang, 59 UCLA L. Rev. at 1129.

3. The government committed flagrant and ill-intentioned misconduct when it "othered" Mr. Bagby to separate him from the jury.

When Mr. Bagby entered the courtroom, it was clear he was different. Mr. Bagby was the only person other than two witnesses who were not white. 11/16-26

RP 97. When the government used racial stereotypes to reinforce its theory that Mr. Bagby was a dangerous man, it committed reversible error.

From the start of the trial, Mr. Bagby did not deny he was the person involved in this incident, only that he had committed no crime. 11/26/18 RP 22. Identity was never an issue. *Id*. Nonetheless, the prosecutor required witnesses to identify Mr. Bagby, not by a distinctive trait, but by his "nationality." 11/26-27 RP 79, 80, 94. Where it did not use the term "nationality," the government asked witnesses to differentiate Mr. Bagby from the others at his trial based on his race. *See* 11/26-27 RP 33, 71, 72, 80, 80-81, 81, 86, 88, 95, 96, 97, 180.

The process the government engaged in is called "othering." Othering is "based on the conscious or unconscious assumption that a certain identified group

poses a threat to the favoured group." john a. powell, *Us vs. Them: The Sinister Techniques of 'Othering' – and How to Avoid Them*, The Guardian (November 8, 2017).[5] Othering is a "set of dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities." john a. powell & Stephen Menendian, *The Problem of Othering: Towards Inclusiveness and Belonging*, 1 Othering & Belonging 14, 18 (2016);[6] Susan Stabile, *Othering and the Law*, 12 U. St. Thomas L.J. 381, 382 (2016).

A prosecutor can "other" a defendant by "draw[ing] a line around the defendant, locating both

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[5] https://www.theguardian.com/inequality/2017/nov/08/us-vs-them-the-sinister-techniques-of-othering-and-how-to-avoid-them

[6] https://www.otheringandbelonging.org/wp-content/uploads/2016/07/OtheringAndBelonging_Issue1.pdf

herself and her audience on the same opposite of that line--thereby defining the attorney as a trustworthy member of the jurors' community." Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 532 (2009) (internal quotations omitted). This technique allows lawyers "to connect with the jurors based on race, subtly reinforcing the idea that the minority witness is part of the 'other,' and so should not be trusted." Andrew Elliot Carpenter, *Chambers v. Mississippi: The Hearsay Rule and Racial Evaluations of Credibility*, 8 Wash. & Lee Race & Ethnic Anc. L.J. 15, 22 (2002).

This differentiating Mr. Bagby from everyone else in the courtroom was critical because of how bias influences jury verdicts. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic*

Review of Defendant Treatment, 29 Law & Hum. Behav. 621, 627-28 (2005). Most people carry some level of bias against persons of color that manifests itself in the application of racial stereotypes. Mikah Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1244 (2018).

Asking witnesses to identify Mr. Bagby by his "nationality" was an attempt to distinguish him from his all-white jury. The use of the term "nationality" reminded the jurors Mr. Bagby was not from their community. Stabile, 12 U. St. Thomas L. J. at 397. Mr. Bagby's arguments and assertions of innocence were not of the same value as those made by the government. *State v. Reed*, 102 Wn.2d 140, 143, 684 P.2d 699 (1984) ("Are you going to let a bunch of city lawyers come down here and make your decision? A

bunch of city doctors who drive down here in their Mercedes Benz?"). These subtle questions suggested to the jury Mr. Bagby did not belong and did not need their protection.

Distinguishing Mr. Bagby by race or "nationality" is especially dangerous because white juror bias against Black defendants impacts their decisions on guilt. Samuel Sommers & Phoebe Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997, 1006 (2003). This is because "the race and ethnicity of defendants, victims, and jurors can impact the outcomes of criminal trials." Jennifer Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 Ann. Rev. L. & Soc. Sci. 269, 270, 273 (2015).

It was impossible to miss that Mr. Bagby was Black when he went to trial, when everyone in the

courtroom was white, including the entire jury pool, the judge, and the lawyers. 11/16-26 RP 97. By distinguishing Mr. Bagby by race, the government carefully separated Mr. Bagby from the jury. By repeatedly using the word "nationality," the government further separated Mr. Bagby from the jury. By then playing on stereotypes to reinforce the theory Mr. Bagby was dangerous, the government ensured his convictions for the charged offenses.

4. **The government committed flagrant and ill-intentioned misconduct when it played on racial stereotyping to prove its case.**

It is a common misperception among jurors and the public that Black men are more likely to commit crimes than other groups of people. Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 Ariz. St. L.J. 193, 199 (2018). Playing on this stereotype is especially dangerous because

stereotypes significantly influence individuals who are not motivated to seek individuating information about members of stereotyped groups. Melinda Jones, *Preventing the Application of Stereotypic Biases in the Courtroom: The Role of Detailed Testimony*, 20 J. App. Soc. Psy. 1767, 1768 (1997).

These stereotypes are powerful because they are deeply rooted in American history when they were used to justify slavery. N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1320 (2004). "The unfortunate truth is that historically in our society, black men have been portrayed as a people to be feared; savages, unable to be tamed." Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 Fordham Urb. L.J. 571, 573 n.5 (1993).

The myth of the "Bestial Black Man" is "deeply embedded in American culture," reinforcing the misperception "that black men are animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape." Duri, 25 Cardozo L. Review at 1320. Using part of this stereotype reinforces other common myths about Black men, including that they are less intelligent, making it less likely they can recall and describe events accurately; that they are not trustworthy and honest, which would have obvious implications when Mr. Bagby testified; and that Black men are violent, reinforcing the jurors' propensity to find Mr. Bagby guilty. Joseph Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 Conn. L. Rev. 1, 3 (2000).

These dangers are compounded in deliberations, as persons who are under stress or pressed for time are

more likely to rely on stereotypes in their decision-making process. Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DePaul L. Rev. 1013, 1071-72 (2004). This is especially true where jurors are asked to judge guilt and the defendant is accused of a crime "stereotypically associated" with their racial group. Jones, 20 J. App Soc. Psy. at 1768.

The government used these stereotypes to prove its case. In its case, the government asked one of the witnesses to describe Mr. Bagby's reputation for violence. 11/26-27 RP 33. She spoke of his "temper" and "rage," even though there was no evidence he acted out in this way towards her during these incidents. *Id.*

Then when the government began to cross-examine Mr. Bagby, it focused on whether he was cruel to his dog. 11/27 RP 262. After Mr. Bagby questioned

the absurdity of this accusation, the prosecutor stated he was glad Mr. Bagby was not one of those people who mistreated their animals. *Id*.

This Court should see these questions as thinly veiled plays on stereotypes common to Black men. These myths have been used to devalue Black lives throughout American history. John Smiley and David Fakunle, *From 'Brute' To 'Thug:' the Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 (3-4) J. Hum. Behav. Soc. Environ. 350, 356 (2016). They persist today and continue to reinforce the view Black men are more likely to commit crimes than other people, as suggested by the government when it asked a witness to describe Mr. Bagby's "temper" and "rage." Duru, 25 Cardozo L. Rev. at 1342 (citing Cynthia Kwei Yung Lee, *Race and Self-*

Defense: Toward a Normative Conception of Reasonableness, 81 Minn. L. Rev. 367, 406 (1996)).

Further, the suggestion that Black men mistreat dogs is a myth used to perpetuate the stereotype that Black men are dangerous. Kevin Blackistone, *Black Men and Dogs: Don't Believe Vick*, National Public Radio (2007);[7] Ann Linder, *The Black Man's Dog: The Social Context of Breed Specific Legislation*, 25 Animal L. 51, 57 (2018).[8] Like the use of the term "nationality" and the questions about Mr. Bagby's reputation for dangerousness, this misconduct reinforced the stereotype that Mr. Bagby, because he was Black, was more likely to have committed the crimes charged.

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[7]https://www.npr.org/templates/story/story.php?storyId=14698643

[8]https://web.archive.org/web/20071211120818/http://www.cnn.com/2007/US/law/12/10/vick.sentenced/index.html

"Even a reference [to race] that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." *McFarland v. Smith*, 611 F.2d 414, 417 (2d Cir.1979). Focusing on race and stereotype operated to differentiate Mr. Bagby from all of the other witnesses at his trial. "Like wolves in sheep's clothing, a careful word here and there can trigger racial bias." *Monday*, 171 Wn.2d at 678. This subtle but insidious word choice played on the natural biases of the jury, which was likely to show bias against Mr. Bagby because of his race. *See* Kang, 59 UCLA L. Rev. at 1143.

This Court should not assume that the prosecution's intentional word choices were in error. Instead, they were an attempt to distinguish Mr. Bagby based on his race. *Monday*, 171 Wn.2d at 678.

This Court should see these questions for what they are: misconduct that improperly highlighted Mr. Bagby's race to ensure race played a predominant role in the jurors' consideration of his guilt. It was improper under any circumstance.

5. The flagrant and ill-intentioned appeal to racial bias requires the reversal of Mr. Bagby's convictions.

Questions designed to inject race as an issue before the jury pose a serious threat to a fair trial. *Miller v. State of N.C.*, 583 F.2d 701, 706 (4th Cir. 1978). They violate the "fundamental fairness which is essential to the very concept of justice." *Weddington v. State*, 545 A.2d 607, 613 (Del. 1988) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)); *Lisenba v. California*, 314 U. S. 219, 236, 62 S. Ct. 280, 86 L. Ed. 166 (1941)).

The Court of Appeals affirmed Mr. Bagby's conviction, relying on *Monday's* analysis of "flagrant and ill-intentioned" misconduct. Slip. Op. at 9-10. To remedy this error, this Court should hold that any appeal to racial bias is "flagrant and ill-intentioned" as a matter of law and violates the right to an impartial jury. *See Monday*, 171 Wn.2d at 681.

The prosecutor's error by repeatedly using the word "nationality" and referring to Mr. Bagby by his race was incurable. Emphasizing Mr. Bagby's race highlighted the myth of his dangerousness, especially given his size. 11/27/18 RP 63. This emphasis diminished the possibility the jury could determine whether he acted in self-defense when he punched Mr. Davis. The prosecutor's acts and word choice othered Mr. Bagby from the all-white jury and played on the

myth that Black men are dangerous, improperly affecting the trial's outcome.

Likewise, the prosecutor's language affected the jury's verdict on the burglary charge. *Monday*, 171 Wn.2d at 681. Without the highlight on race, the jury may have found Mr. Bagby lacked the intent to commit a burglary. Importantly, the jury found Mr. Bagby did not commit malicious mischief for damaging the apartment's front door. The jury could have found Mr. Bagby had no intent to commit a crime once he entered the apartment.

Because the prosecution committed flagrant and ill-intentioned misconduct, reversal of Mr. Bagby's convictions is required. *Id*. at 678. This Court should hold it cannot find beyond a reasonable doubt the government's use of race to other Mr. Bagby from the all-white jury did not materially affect the verdict. This

Court should also hold that the use of stereotypes, including that Black men are prone to violence, compromised the jury's verdict, requiring reversal.

6. The injection of racial bias is so repugnant that it should never be permitted in a criminal trial.

This Court should adopt the standard proposed by Justice Madsen in *Monday* and hold the use of race to secure a conviction is always unacceptable. In *Monday*, Justice Madsen argued "the injection of insidious discrimination . . . is so repugnant to the core principles of integrity and justice upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint." *Monday*, 171 Wn.2d at 558-59 (Madsen, J., concurring). Rather than engage in an unconvincing attempt to show the error was not harmless, this Court should hold the injection of racial discrimination "cannot be

countenanced at all, not even to the extent of contemplating to any degree that error might be harmless." *Id.* at 682.

Washington is no longer in an era where it is permissible to blatantly argue Black people are inherently less trustworthy because of their race or should not be believed because Black people are inclined to lie for each other. Thompson, 2018 Mich. St. L. Rev. at 1260 (citing Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 Mich. J. Race & L. 261, 274 (1996)). Instead, the use of race has become more subtle so that "well-intentioned jurors may be completely unaware that stereotypes and bias are at play as they judge the truthfulness of trial witnesses." *Id.*

This Court has spent decades attempting to eliminate the use of misconduct based on racial bias

from the courtroom. But because the use of racial discrimination is so insidious, the current standard, which requires a harmlessness analysis, is inadequate. In *State v. Belgarde*, this Court examined bias when the prosecutor likened American Indian Movement members to Libya's "Kadafi" and the Irish Republican Army's political wing "Sean Finn." 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Finding the misconduct was flagrant and ill-intentioned, this Court reversed. *Id.*

Prosecutors were still using racial stereotypes to convict persons of color more than twenty years later. This Court had to reverse a murder conviction in *Monday* because the prosecutor employed coded language and stereotyping. 171 Wn.2d at 681. Like here, the Court of Appeals affirmed in *Monday*, relying on the flagrant and ill-intentioned misconduct standard. *State v. Monday*, 147 Wn. App. 1049 (2008)

(*See* GR 14.1). In this Court, the appellate prosecutor relied on the same standard used here to argue against reversing Mr. Monday's conviction. King County Prosecuting Attorney's Office, *Supplemental Brief of Respondent, State v. Monday*, 2009 WL 6082951, 7 (Wash. 2009). Applying the *Belgarde* standard, this Court strained to fit the prosecutor's clear misconduct into the flagrant and ill-intentioned standard. *Monday*, 171 Wn.2d at 681.

A decade after *Monday*, Washington's appellate courts are still faced with instances of prosecutors improperly injecting race into criminal trials. In *State v. Ellis*, the prosecutor invoked the O.J. Simpson trial in a case where a Black defendant was on trial for killing his white spouse. 19 Wn. App. 2d 1006 (2021) (*See* GR 14.1). The Court of Appeals reversed. *Id*. In *State v. Zamora*, the prosecutor discussed border

security in a case involving a defendant with a Spanish surname. *State v. Zamora*, 17 Wn. App. 2d 1073, *review granted*, 198 Wn.2d 1017 (2021) (*See* GR 14.1). The Court of Appeals affirmed this argument as not flagrant and ill-intentioned, although this Court granted Mr. Zamora's petition for review, which is still pending. *Id.*

The only way to get the government to stop using racial bias is to hold that the use of racial bias is always flagrant and ill-intentioned. When racial bias is used to secure a conviction, prejudice should be presumed. Rather than rely on the flagrant and ill-intentioned standard, this Court should hold that the use of racial bias to obtain a conviction must be treated as a structural error that can never be cured. Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 Gonz. L. Rev. 341, 364 (2012) (discussing

Justice Madsen's proposed standard). Adopting this standard is critical to our criminal legal system's legitimacy, moral integrity, and human dignity. *Id.*

Adopting a standard that prohibits the appeal to racial bias to secure a conviction regardless of whether it affected the trial's outcome is consistent with this Court's case analysis and its rule-making process. *See Jefferson*, 192 Wn.2d at 229; GR 37. In *Jefferson*, this Court held that if an objective observer could view race or ethnicity as a factor in the use of the peremptory strike during jury selection, the strike must be denied, and the challenge to that strike must be accepted. 192 Wn.2d at 230. This Court should adopt a similar standard for misconduct.

Prosecutors should never rely on racial bias and stereotypes in a criminal case. "This system, and the individuals affected by it, deserves clarity in the law's

commitment to remedying racial injustice as a structural error that 'cannot be minimized or easily rationalized as harmless.'" *Monday*, 171 Wn.2d at 680 (Madsen, J., concurring.) Adopting the standard proposed in the *Monday* concurrence affirms this Court's commitment to recognizing the role courts have played in devaluing Black lives and works to restore dignity and integrity to the criminal legal system. *See Garfield*, 196 Wn.2d at 390, n.1.

Racial discrimination "cannot be countenanced at all, not even to the extent of contemplating to any degree that error might be harmless." *Monday*, 171 Wn.2d at 682 (Madsen, J. concurring). Subjecting racial bias to a harmlessness standard fails to account for the impact misconduct has on the criminal legal system. It does nothing to eliminate future misconduct and perpetuates the disproportionate conviction and

incarceration of Black defendants. This Court should adopt the standard enunciated by Justice Madsen in *Monday* to require reversal in all cases where the government uses race to secure a conviction.

E. CONCLUSION

The Court of Appeals was wrong when it concluded the government did not commit flagrant and ill-intentioned misconduct when it appealed to racial bias and prejudice. This Court should find the government committed flagrant and ill-intentioned misconduct when it employed othering and racial stereotyping to ensure Mr. Bagby's conviction. This Court should also hold that the improper injection of race into a criminal trial is always flagrant and ill-intentioned and that reversal is required as a matter of law.

This brief is 4,948 words long and complies with RAP 18.17.

DATED this 26th day of January 2022.

Respectfully submitted,

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Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 99793-4
	)	
TYLER BAGBY,	)	
	)	
PETITIONER.	)	

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