No. 20-6871

IN THE
SUPREME COURT OF THE UNITED STATES

ANGNEM GREEN,
***Petitioner*,**

v.

STATE OF NEW YORK,

***Respondent*.**

ON PETITION FROM THE NEW YORK STATE
SUPREME COURT
APPELLATE DIVISION, FOURTH DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

James B. Ritts
District Attorney, Ontario County*
Ontario County Courthouse
Canandaigua, New York 14424
(585)396-4010
James.Ritts@ontariocountyny.gov

QUESTION PRESENTED

Whether the New York State Supreme Court, Appellate Division, Fourth Department erred in finding that the prosecutor's use of the word "homeboys," and his purported emulation of an African-American voice during summation did not violate Petitioner's Constitutional right to a fair trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ***Page***

Cases ***Page***

Statutes ***Page***

Secondary Sources

INTRODUCTION

At trial for drug sales charges, it is alleged that during summation the prosecutor attempted to emulate an African-American voice when recounting the content of phone calls between the Petitioner Angnem Green and a trial witness. There was no objection to this at the time. Later in his summation the prosecutor referred to members of the gallery as Petitioner's "homeboys." There was a timely objection. That objection was sustained. There was a request that word be stricken. That request was denied. During the course of this objection, defense counsel also mentioned the prosecutor's perceived attempt to emulate an African-American voice that defense counsel had failed to object to at the time. No motion for mistrial was made on either ground. Prior to deliberation the jury was given an instruction that they must decide this case only on the evidence in this

courtroom and that they must do so without prejudice and without sympathy (Trial Transcript ['TT'] 689). The Petitioner was found guilty.

The Petitioner appealed his convictions based upon multiple distinct issues. In his seventh issue on appeal was an assertion that he was denied his right to a fair trial by prosecutor's use of racially inflammatory language in closing. The Appellate Division, Fourth Department, wrote a decision in which it addressed some of the Petitioner's multiple complaints with specificity, deciding those not specifically addressed as follows, "[w]e have reviewed defendant's remaining contentions and conclude that none warrants further modification or reversal of the judgment" (*People v. Green*, 179 AD3d 1516, 1517, 118 NY.S3d 853, 855, leave to appeal denied, 35 NY3d 993, 149 NE3d 389 [2020], reconsideration denied, 35

NY3d 1045, 151 NE3d 522 [2020]). The race-based claim was one of those not specifically addressed.

STATEMENT OF THE CASE

On November 6, 2014, the Ontario County Grand Jury indicted the Petitioner on three charges of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE (Penal Law ['PL'] § 220.39[1]), and two charges of ENDANGERING THE WELFARE OF A CHILD (PL § 260.10[1]). The indictment alleged that the Petitioner Angnem Green knowingly and unlawfully sold cocaine on three occasions, and on one such occasion he did so in front of children.

A trial commenced on May 23, 2016. On May 24, 2016 both parties delivered closing arguments. In his summation, the prosecutor made the following statement:

> "[The petitioner is] pretty savvy. 'Why would I stick my own neck out on the line? Whoa, whoa, whoa, whoa, whoa. Let's switch it up. I'm going to send my boy to do the deal. He's going outside in the middle of the park. I'm not getting out there. I'm going to send my boy, Nicky Phelps, out to do that deal'" (TT 648).

The defense counsel made no objection to this portion of the prosecutor's summation.

The prosecutor then addressed the credibility of the confidential informant who testified as a State witness. He argued that the witness took a risk testifying, reminding the jury that Geneva was a small town where word travels fast, especially with the appellant's "homeboys" in the courtroom for her testimony (TT 663). Defense counsel objected, characterizing the use of the word "homeboys" as "racially inflammatory," and the trial court sustained the objection (*id.*). Defense counsel then asked the court to instruct the jury to disregard the prosecutor's comments regarding "homeboys" (*id.*). The court

indicated it would leave the record as is, but that the jury would be instructed to remove bias, sympathy, and prejudice from its deliberations (TT 676). Defense counsel did not ask for any further instructions or admonishments by the trial court.

Upon the close of summations, the jury was excused from the courtroom, at which time defense counsel then took further exception to the summation, arguing again, this time in the context of considering whether to make a motion for mistrial on these grounds, that it was inappropriate for the prosecutor to use the word "homeboys" while pointing to the gallery (TT 671). He went on to claim for the first time that the prosecutor had also inappropriately emulated an African-American voice when discussing the Petitioner's controlled phone calls (*id.*).

The prosecutor responded that his summation was fair comment where the defense summation

called the witness credibility into question, and, where the gallery could be heard during the trial (TT 673). Despite contemplating it, defense counsel did not formally move for a mistrial on these grounds (*id.*).

During the course of giving jury instructions, the court made the following statement regarding prejudice and bias:

> "Remember, when this trial began, that each of you promised, when you were being selected, you each solely promised that you would honestly deliberate and express your views to each other. You promised on your oaths that you would decide this case only on the evidence in this courtroom and the laws as I have explained them to you, and that you would do so without prejudice and without sympathy" (TT 698).

Following the instructions, the jury began deliberations. The jury eventually submitted a note to the court indicating that they had reached a verdict on the first three counts, and were still deliberating on count four. (TT 746). The People asked the court to

dismiss the fourth count of the indictment, and the defense counsel did not object (*id.*). The jury returned a verdict of guilty on three counts of Criminal Sale of a Controlled Substance in the Third Degree. (TT 750-51).

The jury was dismissed, and defense counsel renewed his motion for a trial order of dismissal, asserting only that the Petitioner's identity had not been established (TT 765). The People opposed, and the court denied the motion (TT 765-66).

On February 7, 2016, the Petitioner appealed to the Fourth Department of the Appellate Division, New York State Supreme Court. The Petitioner submitted his appeal, the People responded, and the Appellate Division issued a decision modifying the sentence in the interest of justice, but affirming the judgment of conviction in all respects (*People v. Green*, *supra*).

REASON TO DENY THE PETITION

The Petitioner contends that he was denied his constitutionally guaranteed right to fair trial due to a racially inflammatory summation by the prosecutor. Your Respondent herein maintains that the summation was not racially inflammatory inasmuch as it did not appeal to the jury's racial passion or prejudice, and to the extent that it was otherwise improper, it did not rise to the level of denying the Petitioner a fair trial requiring reversal. One of the two allegations of racially inflammatory conduct in summation is also unpreserved for review.

… as to preservation

While it is seemingly unresolved to some extent federally, to preserve a claim of improper prosecutorial conduct in New York, a trial Defendant must timely object to the allegedly improper conduct

(*see People v. Rivera*, 73 N.Y.2d 941, 942, 537 N.E.2d 618, 618 [1989]); *see also* CPL § 470.05(2).

Defense counsel did not object to the prosecutor's alleged emulation of an African-American voice, and this issue was thus unpreserved for review at the State level.

… as to the merits

In the context of racial comments, although both state and federal courts universally reject racially inflammatory presentations, precisely what constitutes an impermissible appeal to racial bias in summation is somewhat nebulous.

Generally, if the circumstances of a particular case indicate a significant likelihood that racial bias may have influenced a jury, the Constitution requires questioning as to such bias (*see Ristaino v. Ross,* 424 U.S. 589, 596, 96 S.Ct. 1017, 1021, 47 L.Ed.2d 258 [1976]). What does that mean? Perhaps the most

succinct explanation was provided by Judge Frank's dissent in *United States v. Antonelli Fireworks Co*., where he wrote that a prosecutor "should not be permitted to summon that thirteenth juror, prejudice" (155 F.2d 631, 659 [2d Cir. 1946]).

Generally, to warrant a reversal of a conviction on grounds of a prosecutor's improper comment in closing argument, a court must find that the prosecutor's remarks were both inappropriate and harmful (*United States v. Young,* 470 U.S. 1, 11, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 [1985]). In New York, prosecutorial misconduct only warrants reversal when it substantially prejudices the defendant's trial (*People v. Galloway*, 54 NY2d 396, 401 [1981]). If an error does occur, even if that error is serious, it may be remedied by either an instruction at the time of the error, or in the trial court's final instructions to the jury (s*ee People v. Diotte*, 63 AD3d 1281 [3d Dept.

2009]; *People v. Guica*, 58 AD3d 750 [2d Dept. 2008]; *People v. Alexander*, 50 AD3d 816 [2d Dept. 2008]).

In cases dealing with alleged appeals to racial prejudice, the federal test applicable where the evidence of guilt is not otherwise overwhelming, is the "probability of prejudice" test (*U. S. ex rel. Haynes v. McKendrick*, 481 F.2d 152, 159 [2d Cir. 1973]). To determine whether the comments of any prosecutor have deprived any defendant of a fair trial by creating the probability of prejudice requires an implicitly fact-sensitive inquiry. To understand how to apply that test to the instant case, we must first look at what statements in summation have been previously found to violate the rule.

In *Haynes v. McKendrick*, *supra*, the prosecutor referred to African-Americans as, "these people," referred to some members of the minority community as the "young bucks in that

neighborhood," and complained of the weakness and inability of "them" to do or know things that are "commonplace for the *ordinary person* (emphasis supplied) to know" (481 F.2d 152, 160 [2d Cir. 1973]). That court pointed out that the closing remarks of the prosecutor "served to dichotomize the people in the courtroom, to divide them into black and white" (*id*.).

In *People v. Hearns*, 18 A.D.2d 922, 923, 238 N.Y.S.2d 173, 174-75 (2d Dept. 1963), the New York Appellate Division reversed a conviction because the prosecutor had urged the jury to credit the testimony of Black police officers partly on the basis of their membership in the same racial group as the defendant. That argument, the court concluded, is predicated on a false and illogical premise and therefore constitutes an appeal to racial prejudice (*id*.). This same racism was spurned at the Federal level as well, where, in *McFarland v. Smith,* 611 F2d

414 (2d Cir 1979), the court found due process denied where the prosecutor had urged that a Black police officer's testimony be considered more credible by virtue of the fact that she was testifying against a Black defendant.

In *Bennet v. Stirling*, the Fourth Circuit found that a prosecutor's reference to a Black defendant accused of sex crimes as "King-Kong" in summation was egregious enough to deprive the defendant of a fair trial where it conjured the "long and ugly history of depicting African-Americans as monkeys and apes, and the pejorative and inflammatory nature of such references" (170 F. Supp. 3d 851, 864 (D.S.C.), aff'd, 842 F.3d 319 [4th Cir. 2016]).

In *Commonwealth v. Graziano,* 368 Mass. 325, 331 N.E.2d 808, 812–13 (1975), the Supreme Judicial Court of Massachusetts overturned the conviction of two Italian defendants in part because the prosecutor

evoked their national origins and improperly appealed to ethnic stereotypes by alluding to Mario Puzo's *The Godfather* in summation, and also repeatedly referencing Al Capone. In that case, the negative allusions were unmistakable, and, in addition, the prosecutor made other more direct references to defendants' ethnicity when he remarked that defense witnesses "[a]ll come from Italy" and "they" speak better English than he does (*id*.).

In *Hampton v. State*, the Supreme Court of Mississippi found statements of the prosecutor to be unconstitutional misconduct where he stated that, "mulattoes should be kicked out by the white race and spurned by the negroes"; that "they were negroes, and that as long as one drop of the accursed blood was in their veins they have to bear it"; that "these negroes (referring to the defendant and his brother) thought they were better than other negroes, but in fact they

were worse than negroes," "they were negritoes (pointing at the defendant), a race hated by the white race and despised by the negroes, accursed by every white man who loves his race, and despised by every negro who respects his race" (*Hampton v. State*, 88 Miss. 257, 40 So. 545, 546 [1906]).

Equally elucidative in this fact-based inquiry are those decisions which have evaluated comments in summation and found they did *not* prejudice the defendant.

In *United States v. Weiss*, the Second Circuit found that the prosecutor's summation did not result in a "probability of prejudice," even at the subliminal level, where allusions to *The Merchant of Venice* were so oblique that that the connection to the play was unclear, and even if they could have triggered some connection with that play, they could not have triggered a prejudiced response unless the listener

made a further connection with the play's anti-Semitic overtones (930 F.2d 185, 196 [2d Cir. 1991]).

In *Smith v. Farley*, the Seventh Circuit held that a prosecutor's reference in summation to a Black defendant as acting "super-fly," and stating that a reluctant prosecutorial witness was "shucking and jiving" on the stand did not rise to the level of prejudice so as to deprive the defendant of due process (59 F.3d 659, 664 [7th Cir. 1995]). That court noted that the phrase "shucking and jiving" was not even clearly racial in character, having been absorbed into Standard English such that it now applies to all racial and ethnic groups (*id.*). As to the use of the word "super-fly," the court agreed it was clearly racial in nature, but held that given its accepted definition of, among other things, "superior; wonderful," it is merely conjecture that the use of the term "super-fly" had any impact on the jury's consideration of the case (*id.*).

In *United States v. Hernandez*, the prosecutor stated during summation that "each of you by the verdict that is represented by the evidence will send a clear message to Cuban drug dealers" (865 F.2d at 927). This was the prosecutor's only reference to Cubans, and curative instructions were given by the trial judge. The Seventh Circuit concluded that "within the context of the entire trial, the remark was not so inflammatory as to prejudice the defendant" (*id.* at 928).

In *United States v. Lively*, the Delaware District Court found a defendant's claim of racial prejudice without merit where the prosecutor used the word "dude" (817 F. Supp. 453 [D. Del.], aff'd, 14 F.3d 50 [3d Cir. 1993]). The defendant claimed that the use of the term "dude" was introduced to appeal to the jury's prejudice (*id.*). The court held that the defendant failed to prove that this remark was overtly

racist, and found the defendant's claim frivolous (*id*.). "To reach a conclusion that the remarks were intended subliminally to appeal to racial prejudices, the Court must accept that the prosecutor's reference to 'dudes' meant only black men and that the jury would understand "dudes" to only refer to black men. The Court refuses to engage in such speculation because the word 'dude' is used in any number of contexts and certainly is not limited to men or women of a particular race. The Court rejects as frivolous, therefore, a conclusion that 'dudes' equals black men" (*id.*, 463).

Aggregating these cases into an analytical framework and applying them to the instant case, it becomes clear that the remarks in this case fall squarely in line with those where no deprivation of the right to a fair trial was found. This was not the undeniable kindling of racial or ethnic predilections

affecting juror impartiality discussed in *United States v. Doe*, 903 F.2d 16, 28 (D.C. Cir. 1990).

The Petitioner contends that two of the remarks made by the prosecutor during his summation were improper. The Petitioner ignores, however, that the comments of the prosecutor were largely a response to the comments of defense counsel in summation.

It is the right of counsel during summation to "comment upon every pertinent matter of fact bearing upon the questions the jury have to decide" (*Williams v. Brooklyn El. R.R.*, 126 NY 96, 102 [1981]). In criminal cases, this right applies to the defendant and prosecutor alike (*Herring v. New York*, 422 U.S. 853 [1975]; *People v. Mull*, 167 N.Y. 247 [1901]). However, since a jury must decide the issues solely on the evidence presented, prosecutors must confine their comments to the "four corners of the evidence," and

avoid irrelevant comments that have no bearing on the issues before the jury (*Williams*, *supra* at 103; *see People v. Carborano*, 301 NY 39, 42 [1950]). Remarks by the prosecutor may also be proper if they are a suitable response to the defense summation (s*ee People v. Lazzaro*, 62 AD3d 1035 [3d Dept. 2009]; *People v. Simpson*, 50 AD3d 452 [1st Dept. 2008]; *People v. Ortiz*, 39 AD3d 423 [1st Dept. 2007]). In the instant matter, therefore, "the prosecutors' comments must be evaluated in light of the defense argument that preceded it" (*Darden v. Wainwright*, 477 U.S. 168, 179, 106 S. Ct. 2464, 2470, 91 L. Ed. 2d 144 [1986]).

In the instant matter, the Petitioner claims that the prosecutor imitated "Petitioner's African-American voice" (*Petition* at p. 4). It is agreed that the prosecutor spoke in the first-person as the Petitioner (TT 647-678). However, the prosecutor also spoke in

the first-person as a witness (TT 646-647), and as defense counsel (TT 647). Tellingly, he also retold his own questioning in the first-person, adding some colloquial flourish, when he emulated himself questioning Detective Vine as to why Vine used Robinson instead of just buying the cocaine from the Petitioner himself, he said "Bro, why didn't you just do the deals yourself?" (TT 656). Of course, in his actual direct he never prefaced his question with "Bro" (TT 414-415). That he would use such a term in summation while imitating himself, however, tells of the manner in which he is prone to speaking.

Thus, it is not that this Petitioner was singled out by imitation, but simply that speaking in the first-person was a common rhetorical device for this prosecutor. Importantly, nothing in what the prosecutor said made any direct reference to race or ethnicity.

Instead, what the prosecutor was attempting to do was respond to the arguments of counsel. The defense, in summation, spent a great deal of time focusing the jury's attention on the fact that the police never observed the defendant to sell drugs, and that there was no credible evidence that the defendant set up the drug deals with the person who was witnessed selling the drugs—Nicky Phillips (TT 621-624).

Based upon the defense summation, it was incumbent upon the prosecutor to point out how the facts of the case make out accessorial liability. Among those facts were the conversations between the Petitioner and State witness April Robinson. Both Detective Vine and April Robinson testified to the contents of the calls (TT 362, 381, 482-483). The witnesses described calls with the Petitioner wherein the Petitioner negotiated the sale of cocaine, then a second call wherein the Petitioner told Robinson that

the plan had changed, and he was sending Nicky Phillips to do the deal (TT 362). Commenting on the phone calls with the defendant was fair in a case where the defense articulated in summation by defense counsel was that Nicky Phillips, and not the Petitioner, was the drug dealer.

Additionally, the prosecutor in this case, as with virtually every criminal case in our nation, had to contend with a culpable mental state. It should be considered within the broad bounds of permissible rhetoric to speak in the voice of the defendant in summation where doing so can connect the evidence in the case to the required culpable mental state that the prosecutor bears the burden of proving.

The second race-based accusation is when the prosecutor uses the word "homeboys" during his summation. Here again, the prosecutor was responding to the summation of defense counsel, who

spent a great deal of time devoted to attacking the credibility of State witness April Robinson (TT 624-643).

The prosecutor then rightfully addressed the credibility of April Robinson. He argued that the witness took a risk testifying, reminding the jury that Geneva was a small town where word travels fast, especially with the Petitioner's "homeboys" in the courtroom for her testimony (TT 663).

Defense counsel objected, characterizing the use of the word "homeboys" as "racially inflammatory," and the trial court sustained the objection (TT 663). Defense counsel then asked the court to instruct the jury to disregard the prosecutor's comments regarding "homeboys" (*id.*). The court indicated it would leave the record as is, but that the jury would be instructed to remove bias, sympathy, and prejudice from its deliberations (TT 676). Defense

counsel did not ask for any further instructions or admonishments by the trial court.

The prosecutor's comment was fair comment where the defense summation called the witness credibility into question, and, where the gallery could be heard during the trial (TT 673). In addition to being otherwise fair comment on the record, the word "homeboys" is not, as suggested, inherently racist. To the contrary, like "shucking and jiving," or "super-fly," in *Smith v. Farley*, *supra*, the word "homeboy" is no longer clearly racial in character, having long been absorbed into our ordinary American language such that it now applies to all races and ethnic groups, and is used commonly amongst them all.

In today's age there is simply nothing in that word that can fan the flames of racial hatred. The word "homeboy" is now commonly defined as "someone from one's neighborhood, hometown or

region" (*homeboy*, Merriam-Webster Collegiate Dictionary [11th ed. 2014]), and that is precisely how it was used here.

During the course of giving jury instructions, the court made the following statement regarding prejudice and bias:

"Remember, when this trial began, that each of you promised, when you were being selected, you each solely promised that you would honestly deliberate and express your views to each other. You promised on your oaths that you would decide this case only on the evidence in this courtroom and the laws as I have explained them to you, and that you would do so without prejudice and without sympathy" (TT 698).

The likelihood of any prejudice is dissipated by appropriate jury instructions that sympathy may not play a role in jury deliberations (*see People v. Williamson*, 267 AD2d 487, 490 [3rd Dept., 1999]; *People v. Caminero*, 193 AD2d 547 [1st Dept., 1993]). In this case, the trial judge expressly advised the jury that, "nor may your verdicts be influenced in any way by any bias, prejudice [or] sympathy." (TT 689).

It is beyond contention that "appeals to racial passion can distort the search for truth and drastically affect a juror's impartiality" (*Doe*, *supra,* 25). The instant matter, however, did not involve any appeal to racial passion, and nothing in the prosecutor's two brief remarks can be fairly said to have drastically affected any juror's impartiality. Especially in light of the ameliorative instructions given by the trial court.

CONCLUSION

For the foregoing reasons, the People respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

James B. Ritts
District Attorney, Ontario County
By: V. Christopher Eaggleston
Assistant District Attorney