

No. 20-6871

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ANGNEM GREEN,  
*Petitioner,*

v.

STATE OF NEW YORK,  
*Respondent.*

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

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REPLY BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI

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Petitioner files this Reply Brief to address certain legal arguments made in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari to this Court.

Respondent provides no sound reason for this Court to leave in place the conviction of an African-American man, secured, in part, by racial inflammatory comments during closing arguments and mocking imitations of Petitioner's African-American voice. Simply put, the prosecutor's purpose was to appeal to the passions and prejudices of the all-white jury. This appeal to racial stereotypes or racial bias to achieve a conviction violated Petitioner's Constitutional right to a fair trial. This Petition presents a perfect vehicle to resolve an important issue of New York State and Federal Constitutional importance regarding the improper insertion of race into



a criminal trial. At the very least, Petitioner prays this Court grant the instant Petition for a Writ of Certiorari.

### **ARGUMENT**

There is no dispute that the racial inflammatory comments made during closing arguments and mocking imitations of Petitioner's African-American voice, was not one of the issues addressed by the New York State Appellate Division, Fourth Department (see *Brief in Opposition to Petition for Writ of Certiorari*, p. 1).

Respondent asserts (see *Brief in Opposition*, pp. 5-15) that the racially inflammatory closing summation of the prosecutor in the captioned case did not deprive Petitioner of his State and Federal Constitutional right to a fair trial. In support of that assertion, Respondent contends that the summation was not racially inflammatory because it did not appeal to the racial passions or prejudices of the jury and that even if it were otherwise improper, it did not rise to the level of denying Petitioner a right to a fair trial (see *Brief in Opposition*, p. 5). Moreover, Respondent maintains that Petitioner's trial counsel failed to preserve the issue of the prosecutor emulating Petitioner's African-American voice because defense counsel failed to timely object to the offending conduct (see *Brief in Opposition to Petition for Writ of Certiorari*, p. 5). However, Petitioner's trial counsel did in fact timely and immediately object to the prosecutor's overtly racist remarks, and the trial court sustained the objection (Appendix D, 63a). What transpired was as follows:

MR. MACBRIDE: She sits in this room here, and she's talking about the drug world in Geneva, a small town like Geneva, where word travels fast, and the drug dealer who sold her drugs is sitting right across from her. And not only that, it gets better. All the drug dealers' homeboys and homegirls are staring at her in the courtroom.

MR. BOGULSKI: Objection, your Honor.

THE COURT: Sustained.

MR. BOGULSKI: Racial inflammatory comments, and it's been going on -

THE COURT: Sustained.

(Appendix D, 63a).

Following the prosecutor's summation, defense counsel indicated that it was improper for the prosecutor to refer to those in the gallery as 'homeboys' and for the prosecutor to emulate an African-American sounding voice when talking about the phone calls (Appendix D, 64a).

**... as to preservation**

Respondent's contention that these issues are unpreserved for review is mistaken. The only authority Respondent cites in support of their preservation contention lends support to the instant Petition that there is no place in any trial for the injection of racially offensive arguments because resorting to those aspersions against racial groups creates the danger that jurors will approach the evidence from the point of view of biases triggered by racially influenced fears or prejudices (People v. Rivera, 136 A.D.2d 520, 521 [1988], aff'd, 73 N.Y.2d 941 [1989]). Here, unlike in Rivera, there was not overwhelming evidence of guilt and, as such, a

verdict of not guilty would have been reasonable. Here, the links between Petitioner and the underlying alleged transactions were an overheard phone call, and the testimony of a witness with questionable credibility. Although the court in Rivera did not conclude that it deprived the defendant of a fair trial, it noted its consternation that a racially offensive argument was employed in the prosecutor's closing summation (see Rivera, 136 A.D.2d, at 521).

Even if this Court found that defense counsel's objection failed to timely object to either improper comment by the prosecutor, their cumulative effect of a prosecutor's improper comments during summation overwhelmed Petitioner's right to a fair trial (see People v Calabria, 94 N.Y.2d 519, 523 [2000]). There was a substantial possibility that the prosecutor's improper comments contributed to the jury's verdict.

#### **...as to the merits**

On the merits, Respondent claims that, while there is universal rejection among state and federal courts of using racially inflammatory arguments, what constitutes an impermissible appeal to racial bias is unclear (see *Brief in Opposition*, p. 5-15). Rather than acknowledging the impact the use of the terms "homeboy" and "homegirl" might have had on the jury, Respondent decided to double-down that the remarks its colleague made during his summation were proper (*Brief in Opposition*, p. 5-15).

These remarks are more than mere conjecture and had an impact on the jury's consideration of the evidence (see Smith v. Farley, 59 F.3d 659, 664 [7<sup>th</sup> Cir.

1995]). The remarks of the prosecutor here fall closer to the kindling of racial or ethnic predilections affecting juror impartiality, rather than merely use of a rhetorical device. If Respondent truly believes that making racially tinged remarks is allowable as a rhetorical device, perhaps Respondent's office needs to reassess their professionalism training and policies of its colleagues.

As Respondent correctly notes, a court must reverse a conviction where a prosecutor's remarks were both inappropriate and harmful (see United States v. Young, 470 U.S. 1, 11 [1985]). The purpose of the prosecutor's comments in this prosecution were to "thug up" Petitioner and inflame the passions of the jury. As this was the purpose, both inappropriateness and harm requirements have been satisfied.

Even a reference that may not appear derogatory, may still carry impermissible connotations, or may trigger prejudiced responses in the listener, that the speaker might neither have predicted nor intended. Although, as the Respondent notes, the trial court instructed the jury that their decision must be reached based on the evidence alone, without prejudice, and without sympathy, this instruction did nothing to mitigate the effect of the prosecutor's racial and inflammatory comments (Appendix D, 64-65a; Trial Tr. 698). In fact, the bell of racism had already been rung.

The prosecutor intended to fan the flames of fear and prejudice knowing that the Petitioner's race differed from every member of the all-white jury. The trial court did not curatively instruct the jury to disregard the prosecutor's comments

(Appendix D, 68a-69a). Rather the trial court decided to “leave the [R]ecord as is” (Appendix D, 68a-69a). As a result, the jury was likely to take Petitioner’s race into account when rendering their verdict since the weight of the evidence in this case was not overwhelming. By deciding to “leave the [R]ecord as is”, the trial court condoned the prosecutor’s conduct rather than condemned it (see People v. Lovello, 1 N.Y. 2d 436, 438-439 [1956]).

There can be no dispute that the function of a prosecutor extends beyond that of an advocate (see People v. Libbett, 101 A.D.2d 705, 706 [4<sup>th</sup> Dep’t. 1984]). A prosecutor’s summation is not:

an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his command. ... Above all [a prosecutor] should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant

(People v. Ashwal, 39 N.Y.2d 105, 109-110 [1976]) (emphasis added).

Respondent also claims that in today’s age there is nothing in the word “homeboy” that can fan the flames of racial hatred (see *Brief in Opposition to Petition for Writ of Certiorari*, p. 14). However, Respondent callously disregards the purpose and context the prosecutor used the term. To the casual observer, the colloquial term “homeboy” might be adopted by several racial and ethnic groups, but when one racial or ethnic group with a history of discrimination towards another uses it in the presence of a marginalized group it takes a wholly different meaning and effect on the listener.

Unlike in Calhoun v. United States, 568 U.S. 1206 [2013]), where Calhoun

sought a Writ of Certiorari on a similar issue to the one presented here; and that Calhoun's counsel failed to object to the improper conduct at trial, Petitioner's counsel here objected both at the time of the offending comments and again following the prosecutor's summation. As such, plain-error review would not be necessary for Petitioner to "demonstrate that [the error] 'affected the outcome'" (Puckett v. United States, 556 U.S. 129, 135 [2009]).

As to Respondent's contention that the prosecution had to prove culpable mental state in order to meet their burden, Petitioner does not dispute that the mens rea is generally a required element the prosecution must prove (see *Brief in Opposition*, p. 13). However, to assert a blanket claim that because defense counsel in subjecting the prosecution's argument to meaningful adversarial challenge, attacked the credibility of its witnesses that now the prosecution can make racially inflammatory comments frustrates the principle of the right to a fair trial, the progress this country has made since the abolishment of slavery and Jim Crow policies, and the integrity of a conviction secured by the prosecution.

The prosecutor with a universe of words at his disposal, chose to use racially charged words that intended to fan the flames of racial hatred. Respondent through their arguments imply they have the superpower ability to delve into the mindset of every person of a historically marginalized community that has ever been referred to by a racially derogatory term, and tell them that they should not take any offense to what it said to them. Here, the white prosecutor did more than merely refer to Petitioner and Petitioner's family in the gallery, he pointed at them, singling them

out from the rest of the white courtroom (Appendix D, 63-65a). Respondent evinces the continuing challenges that persons of historically marginalized communities have when being prosecuted by white prosecutors and tried by a white jury.

It simply belies credibility that the trial court's instructions to the jury would have ameliorated the racial bell that the prosecutor rung in this case. Without holding a hearing or questioning prosecutor to determine the real purpose of why the prosecutor made the racially charged statements or emulated Petitioner's voice in his summation, Respondent's contentions are nothing more than self-serving assertions.

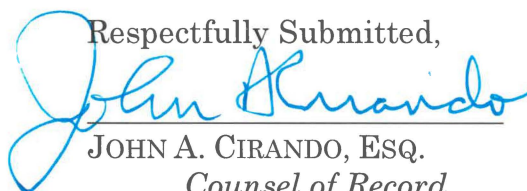
As such, but for the aforementioned errors that occurred in the trial court, especially considering the lack of overwhelming evidence, the outcome of the instant case would have been different. Therefore, Petitioner was denied his Due Process right to a fair trial under the Fourteenth Amendment. The fundamental principle that every person accused of a crime to have a fair and impartial trial was violated.

## CONCLUSION

This Court should grant the Petition for Writ of Certiorari in this matter to determine whether Petitioner's State and Federal Constitutional right to a fair trial was violated, where not a single judge commented or admonished the prosecutor's conduct. If the Court does not address the merits of this case, it certainly will not be the last time a prosecutor employs racially inflammatory remarks during a criminal trial nor emulates the voice of a criminal defendant to appeal to the passions and prejudices of the jury.

For the reasons set forth in this Reply Brief, and those in the Petition for Writ of Certiorari, this Court should grant Certiorari in this case.

Respectfully Submitted,



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