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It Is Prejudice, Not Persuasion: Defense Attorneys Must Refrain from Racist Rhetoric at Trial

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It Is Prejudice, Not Persuasion: Defense Attorneys Must Refrain from Racist Rhetoric at Trial

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I. Introduction

177. In her article *Confronting Racist Prosecutorial Rhetoric at Trial*, Mary Nicol Bowman called for courts to reevaluate their analysis of prosecutorial appeals to race. In doing so, she agreed with Professor Anthony Alfeiri's assertion that racialized narratives in criminal trials apply a judicial gloss to stereotypical images, giving them an air of legitimacy that harms communities of color. Bowman joined Alfeiri's urge for a "new ethic of prosecution" that is "respectful of the dignity of racial identity and the integrity of racial community."[2] Racist rhetoric used by anyone in a criminal trial, however, is problematic because it undermines public faith in the adversarial process, distorts trial outcomes, and obfuscates the search for justice.[3]

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2 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 49 (2020) (citing Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227, 2235 (2001)).

3 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 49 (2020); Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 310 (2019).

178. This article agrees with Professor Anthony Alfeiri and Mary Nicol Bowman, but now calls upon defense attorneys to follow suit. Additionally, this article offers methods of enforcement for trial judges. Defense attorneys have long (and rightly) objected to and appealed prosecutors' uses of negative racial stereotypes to evoke prejudice against defendants,[4] but defense attorneys should hold themselves — and the courts should hold them — to the same legal and ethical standard they demand from prosecutors:

> Most of the reported cases containing some form of racial imagery involve prosecutors' summations. Defense summations may be even worse, but they are rarely the subject of an appeal because the Double Jeopardy Clause bars retrial after an acquittal.[5]

179. Part II of this article examines the horrific murder of Ahmaud Arbery in February 2020, the prosecution's evidence in the state and federal trials, and the racist rhetoric used by the defense attorneys in the state murder trial to try to exonerate their clients. Part III discusses what racist rhetoric is, and its prohibited use at trial to inflame the passions of the jury. Part IV proposes what defense attorneys should consider before invoking race-related arguments at trial, and what trial courts can do to ensure racist rhetoric is not used by any attorney in court. The proper analysis should not be who says it, but rather what is said. Arguments that use racist rhetoric — whether explicitly or implicitly — have no place coming from either side of the aisle in any court of law as they merely serve to further racial stereotypes and division.

II. Case Study: Murder of Ahmaud Arbery

180. On the afternoon of February 23rd, 2020, 25-year-old Ahmaud Arbery, an avid runner, went for a jog. As he jogged by the home of Travis and Gregory McMichael, they assumed he was a burglar, armed themselves with firearms, got in Travis McMichael's pickup truck, and chased him. The pursuit passed the home of William ("Roddie") Bryan, who got in his own truck and joined the chase. For the next five minutes, the three men chased Arbery through the neighborhood, trying to box him in with their trucks. Arbery ran away, changing direction multiple times in an attempt to escape. Arbery was unarmed, had his hands in plain view, and never said a word to his attackers or made any threatening sounds or gestures. Eventually the McMichael's were able to position their truck in front of Arbery as Bryan approached from behind. Travis McMichael got out and stood next to the open driver-side door holding a shotgun. Gregory McMichael sat in the bed of the pickup truck armed with a handgun. Arbery tried to run around the passenger side of the truck but was confronted by Travis McMichael,

4 Debra T. Landis, *Prosecutor's Appeal in Criminal Case to Racial, National, or Religious Prejudice as Ground for Mistrial, New Trial, Reversal, or Vacation of Sentence,* 70 A.L.R. 4TH 664 (1989).

5 Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1805, N. 28 (1993).

who pointed the shotgun at him. When Arbery tried to defend himself by grabbing for the gun, McMichael shot him three times, killing him.[6] The three men were not arrested until more than two months after the shooting when a video of the murder was leaked, went viral, and resulted in widespread media coverage and public outcry about race relations in America,[7] including how the police treated the suspects during the initial investigation,[8] as well as prosecutors' attempts to cover up the crime.[9] The public outcry surrounding Ahmaud Arbery's murder was rooted in what initially appeared — and was later proved — to be the racist motivations of the defendants. We know for a fact that this was about race:

> If it would have been a [W]hite man jogging through, they probably would have waved and offered a cup of lemonade. But because it was Mr. Arbery, he just had to be [engaged in] criminal activity. But, this is a historical depiction that our society is dealing with that needs to come down. We have portrayed [B]lack men as being criminal and a threat for so long, that we've embedded it into the fabric of our society. We have to go through and, thread by thread, take away these ridiculous preconceived notions that if a Black man is in a certain spot, or if he looks a certain way, he has to be doing something criminal.[10]

181. The United States Department of Justice tried and convicted all three defendants for federal hate crimes,[11] proving beyond a reasonable doubt the three men held racist beliefs that led them to make assumptions and decisions about Arbery that they would not have made if Arbery were White, and that they chased and killed him because of those racist beliefs. Travis McMichael's social media comments and text messages to friends, offered as exhibits at trial, showed that Travis harbored racial animus against Black people, whom he described as "sub-human savages" who "ruin everything;" the

6 Office of Public Affairs, *Federal Judge Sentences Three Men Convicted of Racially Motivated Hate Crimes in Connection with the Killing of Ahmaud Arbery in Georgia*, U.S. Department of Justice (August 8, 2022); Richard Fausset, et al., *Ahmaud Arbery Shooting: A Timeline of the Case*, N.Y. Times (August 8, 2022).

7 Maya Yang, *How the Murder of Ahmaud Arbery Further Exposes America's Broken and Racist Legal System*, The Guardian (November 24, 2021); Char Adams, *'They Almost Got Away With It:' How a Leaked Video Led to Convictions in the Ahmaud Arbery Case*, NBC News (November 24, 2021).

8 Fabiola Cineas, *Lawyers Left Racism Out of the Trial Over Ahmaud Arbery's Death. Here's Why*, Vox (November 24, 2021); see also Kate Brumback and Colleen Long, *Law Enforcement Ties, Long Delay Complicate Arbery Case*, Associated Press (May 17, 2020).

9 *Ex-Prosecutor Accused Of Interfering With Investigation Into Ahmaud Arbery's Killing*, NPR (September 2, 2021); see also Tori B. Powell, *Former Prosecutor Indicted Over Handling of Ahmaud Arbery's Case*, CBS News (September 2, 2021).

10 Kenichi Serino and Yasmeen Sami Alamiri, *Analysis: What the Arbery Verdict Reveals about Race and Justice in America*, PBS Newshour (November 24, 2021).

11 Liz Baker, *A Jury Finds Ahmaud Arbery's 3 Killers Guilty of Federal Hate Crimes*, NPR (February 22, 2022).

social media comments also revealed that Travis had for many years associated Black people with criminality and had expressed a desire to see Black people, particularly those he viewed as criminals, harmed or killed. Witnesses testified at trial about deeply racist comments Gregory McMichael had made to people he barely knew. One witness testified about a brief encounter she had with Gregory in a professional capacity, during which she commented that it was "too bad" that Julian Bond, a Black Georgia civil rights leader, had recently passed away; Gregory angrily responded that he wished Bond had "been put in the ground years ago" and that Bond and "those Blacks" were "nothing but trouble." According to the witness, Gregory then went on a five-minute rant about Black people. The jury also saw racist text messages from Roddie Bryan. When Bryan learned, just four days before the shooting, that his daughter was dating a Black man, Bryan referred to the boyfriend as a "ni----" and a "monkey." In other messages on social media, Bryan also referred to other Black people using racial slurs. When the police spoke to Bryan about Arbery's death, he admitted that he had never seen or heard anything about Arbery before; when he saw a Black man being chased, his "instinct" told him that the man must be a thief, or maybe had shot someone.[12]

182. However, to the shock of some,[13] no evidence of racist motive was introduced during the state trial in Glynn County, Georgia, which preceded the federal hate crimes case. None.[14] Although the failure to do so may seem confusing or counter-intuitive given the sweeping guilty verdicts in the federal hate crimes trial, the state's decision to avoid racism as the motive[15] for these murders was a strategic way to secure convictions given the make-up of the jury[16] and the strong video evidence.[17]

12 Office of Public Affairs, *Federal Judge Sentences Three Men Convicted of Racially Motivated Hate Crimes in Connection with the Killing of Ahmaud Arbery in Georgia*, U.S. Department of Justice (August 8, 2022).

13 Tariro Mzezewa, Giulia Heyward, and Richard Fausset, *Discussions of Race Are Notably Absent in Trial of Arbery Murder Suspects*, N.Y. Times (November 24, 2021); Fabiola Cineas, *Lawyers Left Racism Out of the Trial Over Ahmaud Arbery's Death. Here's Why*, Vox (November 24, 2021).

14 Anne Schindler, *Race Not a Factor Jurors Will Consider in the Case of Three Men Accused of Murdering Ahmaud Arbery*, FirstCoast News (November 19, 2021).

15 *State v. Folk*, 341 P.3d 586, 594 (Idaho Ct. App. 2014); see also *State v. Granger*, 103 So.3d 576, 589 (La. Ct. App. 5th Cir. 2012).

16 Joe Hernandez, *How the Jury in the Ahmaud Arbery Case Ended Up Nearly All White — And Why it Matters*, NPR (November 5, 2021).

17 **VIEWER WARNING:** Uncut Video, *Shooting of Ahmaud Arbery*, News4Jax (May 7, 2020).

A. Prosecution's Case in State Court

183. Georgia did not have a hate crimes statute in effect at the time Ahmaud Arbery was murdered.[18] His killers were charged in Georgia with Malice Murder, Felony Murder, Aggravated Assault, False Imprisonment, and Criminal Attempt to Commit a Felony.[19] Although none of these crimes required proof of motive in order to sustain a conviction,[20] prosecutors could have used the defendants' prior racist comments as evidence of why they assumed Arbery was a burglar, and their motive to chase, and ultimately kill, him on the day in question.[21] In fact, in a motion filed on October 2nd, 2020, prosecutors initially indicated they intended to offer race-related evidence to help the jury see that racism motivated the defendants' actions. Specifically, prosecutors sought to admit motive evidence that Travis and Gregory McMichael made racist Facebook posts; and that Travis McMichael and Roddie Bryan sent racist text messages.[22] Prosecutors also indicated they might use evidence of a photograph of Travis McMichael's vanity license plate that contained a Confederate flag emblem.[23] However, prosecutors entered no such evidence at trial. In fact, lead prosecutor Linda Dunikoski mentioned race for the first — and only — time during her closing argument when she said the defendants felt entitled to chase Arbery down "because he was a Black man running down the street."[24] When asked about her decision not to pursue race-based motive evidence after the guilty verdicts in an interview with *CNN*, Dunikoski explained:

> It was an agonizing decision . . . [We] wondered if [we] might kick [our]selves later . . . but it turned out to be a solid strategy. For one, Georgia didn't have a hate crime law at the time of Arbery's killing. [My] boss, Cobb County District Attorney Flynn Broady, also instructed [us] to avoid making it a Black v. White case and to focus on the murder. [I] worried, too, about unnecessarily alienating a juror or stirring any implicit biases. Hypothetically, if [we] had claimed the Confederate flag on Travis McMichael's truck showed he was racist and one of the jurors had, say, a nephew with a Confederate flag on his own truck, it might have ostracized that juror if she didn't be-

18 Ga. Code § 17-10-17 (2020); see also Angela Barajas, Dianne Gallagher, and Erica Henry, *Georgia Governor Signs Hate Crime Bill Spurred by Outrage Over Ahmaud Arbery's Killing*, CNN (June 26, 2020).

19 Ga. Code. §§ 16–5–1; 16–5–21; 16–5–41; and 16–4–1 (2014); *State of Georgia v. Travis McMichael, et al.*, GENERAL BILL OF INDICTMENT CR-2000443 (June 24, 2020).

20 Ga. Code. §§ 16–5–1; 16–5–21; 16–5–41; and 16–4–1 (2014).

21 Ga. Code. § 24–4–404(b) (2022).

22 *State of Georgia v. Travis McMichael, et al.*, FIRST AM. NOT. OF STATE'S INTENT TO INTRODUCE EVIDENCE OF OTHER ACTS CR2000433 (October 2, 2020); see also Bill Rankin, *State Wants Racist Posts in Evidence to Show Motive in Arbery Case*, THE ATLANTA JOURNAL-CONSTITUTION (October 4, 2020).

23 Janelle Griffith, *Ahmaud Arbery Murder Suspects Seek to Ban Confederate Flag License Plate from Evidence*, NBC NEWS (October 6, 2021).

24 Fabiola Cineas, *Lawyers Left Racism Out of the Trial Over Ahmaud Arbery's Death. Here's Why*, VOX (November 24, 2021).

> lieve her nephew was racist. Most importantly, [I] didn't need the racially charged texts and social posts. Georgia law does not require prosecutors to prove premeditation or motive in malice or felony murder cases. As [I] saw it, the video told the story. When we started brainstorming about it, we started actually going, 'Do we need to do this? Is it necessary? Is it going to move the needle toward a guilty verdict?' What we always said to each other was: 'Everybody could be green, and this is still a homicide. This is not self-defense.' So, why they did what they did became less important than rebutting their affirmative defenses.[25]

184. Given that Georgia did not have a hate crime at the time of Ahmaud Arbery's murder, this was a smart strategy that worked to secure convictions in state court, and the Department of Justice was then able to successfully prosecute the defendants for the racist aspects of this hate-crime in federal court. Prosecutor Dunikoski presenting a case theory based solely in evidence and that avoided race-based arguments heeded the call of many.[26] The defense, however, did not take that approach.

B. Defense's Case in State Court

185. The defense's legal justification for why the defendants chased Arbery was based on Georgia's citizen's arrest law that was in effect at the time of the murder:

> A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.[27]

186. Although this law was repealed after the defendants killed Arbery, the defense team used it to justify the defendants' behavior. Specifically, the Defense lawyers argued "the McMichaels pursued Arbery suspecting he was a burglar, after security cameras had previously recorded him entering a home under construction. Travis McMichael

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25 Eliott C. McLaughlin, *State Prosecutors Mostly Avoided Race in Trying Ahmaud Arbery's Killers. Feds Won't Have that Option*, CNN (February 16, 2022).

26 Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1805 (1993); see also Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 49 (2020); Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3096 (2018); Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 321 (2001); V.A. Richelle, *Racism As A Strategic Tool at Trial: Appealing Race-Based Prosecutorial Misconduct*, 67 TUL. L. REV. 2357, 2365 (1993); Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212 (1992).

27 Kate Brumback, *Explainer: What is the Defense strategy in Arbery Killing?*, AP NEWS (November 14, 2021).

shot Arbery while fearing for his life as they grappled over a shotgun."[28] However, in doing so, defense counsel used racially-charged language to "other" Ahmaud Arbery in an attempt to make his death seem less deserving of justice:

> 'Othering' refers to a process by which individuals and society view and label people who are different in a way that devalues them. Othering operates across multiple dimensions to reinforce a conception of a virtuous 'Self' and a lesser 'Other.' We determine that certain people are not us, and that determination functions to create . . . a devalued and dehumanized 'Other,' and a distancing of the other from ourselves. That obviously affects how we view such persons' needs and interests.[29]

187. Throughout trial, "[t]he defense team . . . invoked race through a series of dog whistles about Arbery's hygiene and appearance, though they never mentioned the color of Arbery's skin or that of his murderers."[30] Dog whistles in this context are "modern analogues of Black slavery tropes . . . and other racially coded language used to distinguish between races. . . . Racial coding and linguistic proxies for race, like 'inner-city,' 'welfare queens,' and 'thugs,' extend the racial narrative by alluding to race without specifically referencing it."[31]

188. In his opening statement, Travis McMichael's attorney described Arbery to the overwhelmingly white jury[32] as "an intruder" who had four times been recorded on video "plundering around" a neighboring house under construction.[33] Defense counsel "blended these racist tropes with arguments about the three [defendants] needing to patrol Satilla Shores to keep residents and property in the suburban neighborhood safe:"[34]

> [O]ne of the attorneys representing defendant Travis McMichael painted a picture of a neighborhood that was fearful of break-ins and thefts in his opening statements. He attempted to frame McMichael as someone who had a responsibility to protect the Satilla Shore neighborhood where he lived,

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28 Jeff Amy, *Georgia Gov. Kemp Signs Repeal of 1863 Citizen's Arrest Law*, AP NEWS (May 10, 2021).

29 Susan J. Stabile, *Othering and the Law*, 12 U. ST. THOMAS L.J. 381, 382 (2016).

30 Fabiola Cineas, *Lawyers Left Racism Out of the Trial Over Ahmaud Arbery's Death. Here's Why*, VOX (November 24, 2021).

31 Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3097–3099 (2018).

32 Joe Hernandez, *How the Jury in the Ahmaud Arbery Case Ended Up Nearly All White — And Why it Matters*, NPR (November 5, 2021).

33 Russ Bynum, *Attorneys Present Jurors with Dueling Portraits of Arbery*, AP NEWS (November 5, 2021).

34 Fabiola Cineas, *Lawyers Left Racism Out of the Trial Over Ahmaud Arbery's Death. Here's Why*, VOX (November 24, 2021).

> saying, 'This case is about duty and responsibility' in the first lines of his address to the jury.[35]

189. Satilla Shores is a predominately White residential neighborhood in Southeast Georgia,[36] and the attorney representing Greg McMichael used divisive racial imagery in her closing argument to suggest Arbery's hygiene and appearance alone meant he didn't belong in the neighborhood:

> Turning Ahmaud Arbery into a victim after the choices that he made does not reflect the reality of what brought Ahmaud Arbery to Satilla Shores in his khaki shorts with no socks to cover his long, dirty toenails. Legal experts and activists blasted this racist rhetoric after the trial. Civil Rights attorney Benjamin Crump claimed [the defense attorney's] description likened Arbery to a 'runaway slave' and ludicrously suggested that these men had the right to 'chase him and make him comply or kill him.'[37]

III. Racist Rhetoric

190. Racist rhetoric is designed, whether consciously or unconsciously, to trigger racial stereotypes in those who hear it.[38] Stereotypes are "well-learned sets of associations among groups and traits established in children's memories at an early age, before they have the cognitive skills to decide rationally upon the personal acceptability of the stereotypes."[39] Stereotyping puts others in particular categories that are then used to simplify the task of perceiving, processing, and retaining information about people in memory. Stereotyping involves making judgments about a person based on perceived characteristics of the particular group to which the person belongs rather than on an individual assessment of the person.[40] Some stereotypes are ostensibly positive, "such as the 'Asian as model minority' stereotype . . . or the stereotype of Black women as 'everyone's favorite aunt or grandmother' . . . " But more commonly, stereotypes are

35 Devon M. Sayers and Alta Spells, *Defense Attorneys Say Clients were Acting in Self-Defense when Arbery was Shot*, CNN (November 5, 2021).

36 Rich Mckay, *How Ahmaud Arbery's Death Changed a Coastal Georgia Community*, REUTERS (August 8, 2022).

37 Fabiola Cineas, *Lawyers Left Racism Out of the Trial Over Ahmaud Arbery's Death. Here's Why*, VOX (November 24, 2021).

38 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 48 (2020) (citing Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 665 (2017)).

39 Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1248 (2018) (quoting Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 741 (1995)).

40 Susan J. Stabile, *Othering and the Law*, 12 U. ST. THOMAS L.J. 381, 383 (2016).

negative, "such as the association of Latinos with illegal immigration or Black people with crime."[41] Examples of other negative stereotypes include:

> In a case involving recent Italian immigrants, both defense counsel and prosecutor argued about Al Capone and 'The Godfather.'[42]
>
> In a case involving Native-American defendants, the prosecutor argued that 'when you see an Indian that drinks liquor, you see a man that can't handle it' and that such drinking leads to violence.[43]
>
> In another case the prosecutor asked the defendant, 'Isn't it true in gypsy practice that it's okay to lie, cheat, and steal if you can get away with it?'[44]

191. Fundamentally, "negative stereotypes are used to rationalize prejudice and justify harsh treatment of others,"[45] which is why "[t]heories and arguments based upon racial, ethnic, and most other stereotypes are antithetical to and impermissible in a fair and impartial trial."[46] Racial bias, through the application of stereotypes, can have a very practical impact on the way in which jurors view and assess evidence at trial.[47] One way that race affects decision-making is through ingroup versus outgroup bias: "Ingroup bias 'occurs when people make more positive judgments about individuals who belong to the same social category simply because of shared group membership.'"[48] Conversely, outgroup bias involves negative judgments against individuals who are not part of the same

41 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 53-54 (2020) (quoting Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1252 (2018)).

42 Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1752 (1993) (citing *Commonwealth v. Graziano*, 331 N.E.2d 808, 812 (Mass. 1975)).

43 Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1752-1753 (1993) (citing *Soap v. Carter*, 632 F.2d 872, 878 (10th Cir. 1980) (Seymour, J., dissenting), cert. denied, 451 U.S. 939 (1981)).

44 Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1753 (1993) (citing *Stanton v. State*, 349 So. 2d 761, 764 n.1 (Fla. Dist. Ct. App. 1977)).

45 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 54 (2020) (citing Maureen Johnson, *Separate But (Un)equal: Why Institutionalized Anti-Racism is the Answer to the Never-Ending Cycle of Plessy v. Ferguson*, 52 U. RICH. L. REV. 327, 374–75 (2018)).

46 *State v. Monday*, 257 P.3d 551, 557 (Wash. 2011) (quoting *State v. Dhaliwal*, 79 P.3d 432 (Wash. 2003) (Chambers, J., concurring)); see also *People v. Lurry*, 395 N.E.2d 1234, 1238 (Ill. App. Ct. 1979); *Carter v. Rafferty*, 621 F. Supp. 533 (D.N.J. 1985), affirmed in part and dismissed in part, 826 F.2d 1299 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987).

47 Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1252 (2018).

48 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 50–51 (2020) (quoting Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 275 (2015)); see also Susan J. Stabile, *Othering and the Law*, 12 U. ST. THOMAS L.J. 381, 382 (2016).

group. "This dynamic is exemplified in the social science research showing that 'jurors tend to make more lenient judgments of same-race defendants and harsher judgments of other-race defendants.'"[49] Another way racial bias can affect juror decision-making is through emotions. "When a decision-maker feels fear, anger, or both, the need for retribution automatically becomes heightened."[50] Fear and anger are both intensified by racial stereotypes. Stereotypes also lessen empathy, particularly when connected to dehumanization.[51] Dehumanization occurs when people view other people "as less than human and thus not deserving of moral consideration."[52] Attorneys do not necessarily need to make explicit racial slurs for racial bias to potentially impact juror decision-making. In *Kelly v. Stone*, the United State Court of Appeals for the Ninth Circuit reversed a defendant's conviction for forcible rape and held the prosecutor's comments in closing argument that the "next victim might not be a little black girl from the other side of the tracks," and that "maybe next time he would use a knife," constituted highly inflammatory and wholly impressible appeals to racial prejudice.[53] In *Miller v. North Carolina*, the United States Court of Appeals for the Fourth Circuit reversed the defendants' convictions for the rape of a White woman because the prosecutor referred to the defendants as "these Black men" and ultimately argued that the defense of consent was untenable because no white woman would ever consent to having sexual relations with a Black man. The Fourth Circuit reasoned:

> [A]n appeal to racial prejudice impugns the concept of equal protection of the laws. One of the animating purposes of the equal protection clause of the fourteenth amendment, and a continuing principle of its jurisprudent, is the eradication of racial considerations from criminal proceedings.[54]

192. Any focus on race during trial plays upon stereotypes because, if not, "there would be little incentive . . . to invoke . . . racial images during the course of the trial:"[55]

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49 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 51 (2020) (citing Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 271, 274 (2015)).

50 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 59 (2020) (citing Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 854 (2019)).

51 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 59–60 (2020) (citing Justin D. Levinson, Robert J. Smith and Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 868–69 (2019)).

52 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 60 (2020) (citing Mark Godsey, *Blind Injustice: A Former Prosecutor Exposes The Psychology And Politics Of Wrongful Convictions* 18, 39 (2017)); see also Susan J. Stabile, *Othering and the Law*, 12 U. ST. THOMAS L.J. 381, 382 (2016).

53 *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975).

54 *Miller v. North Carolina*, 583 F.2d 701 (4th Cir. 1978).

55 Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1805 (1993).

> As American society has matured, blatant forms of racism have increasingly been replaced by newer, more elusive, but equally injurious forms of derision . . . modern prejudice is subtle, [and] modern forms of racial discrimination are typically indirect and ostensibly non-racial.[56]

193. For example, in *Smith v. Farley*, the defendant appealed his conviction alleging, among other things, that he was denied a fair trial based on the prosecutor's racially prejudicial comments in closing argument that described a Black female witness' allegedly dishonest performance on the stand as "shucking and jiving" and the Black defendant's conduct during the murder "super-fly" (an alleged reference to a 1970's film that perpetuates negative-stereotypes about Black males). The United States Court of Appeals for the Seventh Circuit noted:

> There is no place in a criminal prosecution for gratuitous references to race, especially when a defendant's life hangs in the balance, . . . [e]lementary concepts of equal protection and due process alike forbid a prosecutor to seek to procure a verdict on the basis of racial animosity.[57]

194. For all these reasons, racist rhetoric, in any form, does not belong in a court of law because it only serves to perpetuate existing negative stereotypes, further sew racial division, and result in potentially unfair outcomes based on emotions, not facts. Further, a defense attorney using racist rhetoric with the hope of getting an acquittal, as opposed to a prosecutor doing the same with the hope of securing a conviction, does not make such an argument any less improper. Racist rhetoric has no place coming from either side of the aisle in our courts of law. So, what can be done?

IV. Proposed Solutions

A. If Defense Counsel Would Object To, or Appeal, The Argument, They Should Not Make It

195. Of course, defense attorneys should vigorously defend their clients, but defense attorneys should approach their case theory and analysis through this ethical lens: If I heard a prosecutor make the same, or a similar, race-related argument, would I object? Would I move for a mistrial? Would I appeal a conviction on constitutional grounds alleging that my client's fundamental rights to due process, equal protection, and a fair trial were violated?[58] If the answer to any of those questions is yes, defense counsel

56 Andrea D. Lyon, *Setting the record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic of Gender Prosecution during Trial*, 6 MICH. J. RACE & L. 319, 336 (2001); see also *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1588, 1591 (1988).

57 *Smith v. Farley*, 59 F.3d 659, 663–68 (7th Cir. 1995).

58 *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1588, 1595, N. 1 (1988).

should not make the argument because defense counsel has a duty to keep racist rhetoric out of juror's decision-making as much as prosecutors do:

> The standard most often quoted was formulated in *Berger v. United States* in which the Supreme Court defined the role of the prosecutor: 'He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'[59]

196. In defending Ahmaud Arbery's killers, the attorneys used racist rhetoric rooted in negative stereotypes and "othering" with the hope that it would dehumanize Arbery in the eyes of the nearly all-White jury. If that were not the intended purpose, there would have been no reason to reference Arbery's "khaki shorts and no socks to cover his long, dirty toenails."[60] Further, there was no evidence Arbery broke any laws when he entered the house that was under construction shortly before his death; rather, video surveillance suggests he may have entered the property to get a drink of water before continuing on his jog.[61] Nevertheless, defense counsel argued the defendants had a duty to patrol Satilla Shores to keep it safe,[62] and called Arbery "an intruder,"[63] even though the McMichael's only ever saw Arbery jogging on a public street. Defense counsel used the fact that Arbery entered the house under construction to justify the defendants' conduct in subsequently chasing him. However, it was undisputed at trial as that the defendants never saw Arbery walk on the construction site that day. The defendants did not learn that fact until after Arbery was dead, which means, as Prosecutor Dunikoski correctly pointed out at trial, the defendants had no knowledge that Arbery had committed a crime when they started chasing him, but rather just assumed a Black man running down the street was a criminal.[64] Defense counsel also used the phrase "plundering" to describe Arbery's conduct in the neighborhood.[65] Plunder (noun) is defined

59 *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1588, 1595, N. 2 (1988) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1934).

60 Fabiola Cineas, *Lawyers Left Racism Out of the Trial Over Ahmaud Arbery's Death. Here's Why*, VOX (November 24, 2021).

61 Richard Fausset and Rick Rojas, *Where Ahmaud Arbery Ran, Neighbors Cast Wary Eyes*, N.Y. TIMES (May 22, 2020).

62 Fabiola Cineas, *Lawyers Left Racism Out of the Trial Over Ahmaud Arbery's Death. Here's Why*, VOX (November 24, 2021); see also Jason Hanna, Devon M. Sayers & Alta Spells, *Homeowner Who Called 911 About People At Site In Months Before Arbery's Killing Testified He Did Not Ask The McMichaels To Help Secure His Property*, CNN (November 12, 2021).

63 Russ Bynum, *Attorneys Present Jurors with Dueling Portraits of Arbery*, AP NEWS (November 5, 2021).

64 Fabiola Cineas, *The Significance of the Guilty Verdicts in Ahmaud Arbery's Murder*, VOX (November 24, 2024).

65 Russ Bynum, *Attorneys Present Jurors with Dueling Portraits of Arbery*, AP NEWS (November 5, 2021); see also Eliott C. McLaughlin, Devon M. Sayers and Alta Spells, *Ahmaud Arbery Killing Trial: Attorneys Deliver Closing Arguments in Case of Jogger's Shooting*, CNN (November 22, 2021).

as "valuables taken or stolen by force," and synonyms for the word plunder include "loot, raid, pillage, ransack, and raid,"[66] but there was no evidence Arbery ever stole anything:

> 'Ahmaud did not take anything from the construction site,' the family's lawyers said[ ]. 'He did not cause any damage to the property. He remained for a brief period of time and was not instructed by anyone to leave but rather left on his own accord to continue his jog. Ahmaud's actions at this empty home under construction were in no way a felony under Georgia law.'[67]

197. As such, this language constituted racist rhetoric that dehumanized Arbery based on negative stereotypes about Black men.[68] In other words, the argument was designed to suggest it was acceptable for the defendants to assume that a young Black man out for a jog was a felon, and they were therefore entitled to chase him down and detain him for questioning; and when he didn't comply, they were justified in killing him.

198. Given that a prosecutor using such racist rhetoric would be improper, objectionable, and likely reversible error, defense attorneys should not do the same. And they do not need to. Defense counsel for Travis and Greg McMichael and Roddie Bryan did not need to implore racist rhetoric in order to defend their clients. They could have pursued the same defense theory without making those particular arguments rooted in racial stereotypes. Specifically, that their clients lawfully attempted a citizen's arrest under existing Georgia law that ultimately resulted in Travis McMichael believing he needed to act in self-defense when Arbery reached for his gun. Counsel could have argued there had been break-ins and thefts in the Satilla Shores neighborhood in the weeks preceding this tragic event, including the theft of Travis McMichael's gun, and that both of the McMichaels had previously seen video surveillance of someone resembling Arbery inside a house under construction on their street. As a result, when Greg McMichael saw Arbery "hauling ass" down the street on the day in question, McMichael believed Arbery may've been the burglar. Although McMichael's conclusion was a race-based assumption, defense counsel could've gained credibility with the jury by acknowledging his client's assumption was wrong, but arguing it nevertheless was his belief based on the information he was aware of at the time. In other words, they didn't need to approach the theory that McMichael's assumption was right by labeling Arbery "an intruder."

199. Travis McMichael and Roddie Bryan's lawyers could have also acknowledged that those two men made the same wrongful assumption, which eventually led to their involvement in this tragic event. But that wrongful assumption does not change the fact

66 *Plunder*, MERRIAM-WEBSTER.

67 Janelle Griffith, *Owner of Empty House Amaud Arbery Allegedly Entered Before Shooting Might Not Move In Because of Threats*, NBC NEWS (May 12, 2020).

68 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 50-64 (2020).

that Travis McMichael ultimately believed he needed to act in self-defense when Arbery reached for his shotgun.[69] In other words, the defense attorneys could have asserted the same defense in vigorous representation of their clients without using racist rhetoric to imply to the mostly White jury that the White defendants' were justified in chasing an unarmed Black man who made the fateful decision to go for a jog that day through their neighborhood.

B. Courts Should Require a Motion in Limine by Any Party Seeking to Reference Race, Whether Implicitly or Explicitly

200. In her article, *Confronting Racist Prosecutorial Rhetoric at Trial*, Mary Nicol Bowman proposes that courts require prosecutors file a motion in limine to address proposed references to race during trial:

> [W]hile courts could in some instances evaluate these line-drawing issues during the flow of trial, the better practice is to require prosecutors to bring a motion in limine in advance to justify their plan[] . . . to reference race either explicitly or implicitly. This approach would help both parties articulate their arguments, which can help prosecutors focus on drawing appropriate lines and can make it easier for defense counsel to respond. It would also help trial courts by providing briefing on the issue and giving judges more time to decide the issue than the court would have in ruling on an objection during trial. Trial courts could then provide clearer directions about what is relevant and appropriate and help ensure that evidence or argument related to race is only used for a proper and limited purpose. This approach would also provide a clearer record for appellate review.[70]

201. This article agrees, but courts should take Bowman's idea one step further and require any party seeking to reference race, either explicitly or implicitly, during trial to make a motion in limine detailing what the reference will be and the proposed, proper evidentiary purpose of the reference. The court can then hear any potential objection and issue a pretrial ruling to avoid the jury hearing any prejudicial or improper arguments. With respect to Bowman's reference to appellate review, although prosecutors cannot appeal an acquittal, the point remains that only relevant evidence offered for a proper purpose should be admitted at trial.[71] It is common sense that rules of evidence apply to the parties on both sides of the aisle. As such, defense attorneys, like prosecutors, should not be permitted to make prejudicial, racially charged arguments that are

69 *Man Accused in Ahmaud Arbery's Killing Changed his Story, also Checked Body for Gun after Shooting, Officers Testify*, CBS NEWS (November 10, 2021).

70 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 107–108, N. 439 (2020).

71 FED. R. EVID. 401; see also FED. R. EVID. 403.

designed to inflame the passions of the jury in an effort to have them make an emotional decision as opposed to a factual one. Requiring any party seeking to reference race, either implicitly or explicitly, during trial to file a motion in limine detailing the purpose of such evidence will help ensure the parties properly use the evidence, and articulate their arguments in support of, and opposition to, such evidence.

C. Jury Instructions

202. If there is an appropriate purpose for race-related evidence to be used during trial, judges should instruct the jury on the limited purpose of such evidence:

> Cautionary or limiting instructions are those given to the jury during the trial that are designed to assist the jury in its consideration of certain types of evidence. Some evidence — be it witness testimony or an exhibit — may be admitted for one purpose and not for any other. When the trial judge admits such evidence, he or she should give an instruction telling the jury precisely the purposes for which the evidence can and cannot be used.[72]

203. Courts should also include in their instructions to the jury before opening statements and after closing arguments not only that limiting instructions given during the trial should be adhered to, but also urge them not to rely on stereotypes or biases in their decision-making. Research indicates it is "more effective to give jury instructions generally, and debiasing instructions in particular, before the jury hears evidence"[73] because those instructions "provide a framework for evaluating the evidence and help . . . [jurors] focus on and remember relevant evidence rather than improper considerations such as race." In addition, pre-evidence instructions "prime jurors to organize the evidence according to legal principles rather than personal biases."[74]

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72 Robert E. Larson, *Navigating the Federal Trial, What are Cautionary or Limiting Jury Instructions?* (2023).

73 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 97 (2020) (citing Leonard B. Sand and Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 439–40 (1985)).

74 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 97 (2020) (citing Elizabeth Ingriselli, *Note, Mitigating Jurors Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1715 (2015)).

D. When Racist Rhetoric Is Used, Trial Courts Should Act Sua Sponte, Admonish Any Party That Appeals to Racial Bias, Give Specific Curative Instructions, and Consider Granting Mistrials

204. Historically, trial courts have very rarely sua sponte reprimanded prosecutors for racist rhetoric.[75] But given the concerns discussed above, courts should be willing to step in when any attorney in their courtroom uses racist rhetoric, especially knowing attorneys may make a strategic decision not to object in front of the jury out of concern they could be viewed as playing "the race card."[76] In *State v. Jones*, the North Carolina Supreme Court acknowledged this concept and accordingly concluded:

> [It is] incumbent on the trial court to monitor vigilantly the course of such arguments [and] to intervene as warranted[] . . . to stop improper argument and to instruct the jury not to consider it when, among other things, the prosecutor become[s] abusive.[77]

205. "Regardless of whether . . . counsel objects or the trial court intervenes sua sponte, trial courts should actively confront racist language head-on rather than reinforcing colorblind narratives. Attempts at being colorblind can exacerbate the power of implicit racial biases because ignoring race can cause automatic engagement of stereotype-congruent responses."[78] Therefore, jurors are less likely to be influenced by racist rhetoric when courts flag the racial dimension, rather than simply sustaining an objection or using a more generic label like "inflammatory." This labeling is particularly important for subtle expressions of prejudice that might trigger reactions based on bias or stereotype. Further, although Bowman suggests the court label the prosecutor's rhetoric as "being an inappropriate invocation of bias or stereotypes" because the prosecutor "feel[ing] some shame" is a "healthy tonic in appropriate doses because it reminds the recipient of the society norms that should guide and circumscribe her thoughts and actions," the same concept should apply equally to defense attorneys who improperly use racial stereotypes to evoke juror bias. After the court labels the improper remark as having potential to trigger bias, the court should give a specific curative instruction that enables the jury to recognize the situation, not rely on bias, and avoid similar rhetoric in

75 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 110 (2020) (citing Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 337 (2006)).

76 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 79, N. 261–263 (2020).

77 *State v. Jones*, 558 S.E.2d 97, 103–105 (N.C. 2002).

78 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 111 (2020); Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3100 (2018); see also Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1252 (2002).

the future.[79]

V. Conclusion

206. If we want to remove racist rhetoric from the courtroom, it must be excised from both sides of the aisle, and there are numerous steps trial courts can take to help make sure that happens. Implementing this fundamentally fair, constitutionally proper, and humanly decent standard of practice will not hinder defense counsel from vigorously defending their clients, but rather will ensure racist rhetoric can never be used to improperly influence a jury.

79 Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 111-113 (2020).