
SUPREME COURT OF THE STATE OF WASHINGTON

Kevin L. Monday, Jr.,

Petitioner,

v.

State of Washington,

Respondent.

**Amicus Curie Brief of the American Civil Liberties Union of
Washington**

Johanna Pirko
WSBA #41590
515 W Olympic Pl Apt 101
Seattle, WA 98119
(323) 369-6793

Sarah Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
ACLU of Washington Foundation
705 Second Avenue, Suite 300
Seattle, WA 98104
(206) 624-2184

Attorneys for Amicus Curiae

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INTEREST OF AMICUS

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonprofit, non-partisan organization with over 20,000 members dedicated to the preservation of civil liberties and civil rights, including the right of equal protection of the laws and right to a justice system free of discrimination or bias. The ACLU has submitted amicus briefs in numerous cases where these rights have been at stake including *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008) (whether trial court erred in denying *Batson* challenge to excusal of only African-American juror on panel) and *Turner v. Stime*, 153 Wn.App. 581, 222 P.3d 1243 (2009) (ordering new trial because jurors' racially-based comments about the plaintiffs' lawyer deprived the plaintiffs of a fair trial).

INTRODUCTION

This case involves a prosecutor who deliberately and repeatedly made appeals to racial prejudice during Kevin Monday's jury trial. Allowing Monday's conviction to stand under these circumstances not only deprives Monday of a constitutionally fair trial, but also undermines public confidence in the judicial system. Washington's courts have embraced a leadership role in eliminating actual and perceived racial bias in the courts. Consistent with this role, this Court should reverse the

decision of the Court of Appeals. It should also make clear that a prosecutor's repeated appeals to racial prejudice are such egregious misconduct and such an affront to the appearance of fairness that reversal is necessarily required, either because systemic or structural error is involved, or because harmlessness of the error cannot be found. Without an effective remedy for the kind of misconduct that occurred here, "we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means," subjecting "the freedom of each citizen ... to peril and chance." *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).

STATEMENT OF THE CASE

Kevin Monday was arrested for the fatal shooting of Francisco Green. Appellant's Opening Brief ["AOB"] at 5-7. After several hours of questioning, Monday admitted shooting Green accidentally. *Id.* at 7. Monday was charged with first degree murder, assault with a firearm, and unlawful possession of a firearm. *Id.* at 7.

In closing argument at trial, the prosecutor justified the state's failure to call any witness to identify Monday as the shooter by explaining to the jury that all African-Americans - including the state's own witnesses - followed "the code" that "black folk don't testify against black folk." *Id.* at 47-48. The prosecutor's representation that "the code"

governs the conduct of all African-American witnesses was not supported by the evidence at trial. *State v. Monday*, 2008 WL 5330824 at *8, review granted, 166 Wn.2d 1010, 210 P.3d 1018 (2009). There was testimony that people on the street are wary of speaking with police, but none to suggest African-Americans (any more than any other witness) felt this way. AOB at 48-49.

The prosecutor's use of racially-based stereotypes was not confined to closing argument. During his direct examination of State's witness Annie Sykes, the prosecutor repeatedly affected an accent when asking Sykes about her relationship with the "po-leese." The court reporter phonetically transcribed the prosecutor's affectation. AOB at 12.

The Court of Appeals agreed the prosecutor - rather than the evidence - "injected [the] characterization" that African-Americans follow a unique "code" that discourages compliance with the police. *State v. Monday, supra* at *8. The court also agreed the prosecutor's comments and affectation of an accent in questioning the witness were "improper" as the state may not "seek a conviction on racial bias." *Id.* at *9. The court explained:

This court finds great frustration that an otherwise solid performance by the prosecutor, which results in a conviction, is jeopardized by unnecessary and improper conduct. The prosecutor's actions . . . were clearly improper when he invoked

race in his closing argument and affected an accent when questioning Sykes.

Id. at *10. Despite this, the court held reversal was not required because the “strong evidence against Monday” overcame any prejudice from the prosecutor’s comments. *Id.*

ARGUMENT

I. A Prosecutor’s Resort to Racial Stereotypes to Secure a Verdict is Egregious Misconduct.

A. Courts Have Uniformly Condemned as Antithetical to the Constitution a Prosecutor’s Appeal to Racial Bias.

Fundamental to constitutional due process is the requirement that a finding of guilt rest on the evidence presented at trial rather than on a defendant’s status. *Taylor v. Kentucky*, 436 U.S. 478, 486-88, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). Given this, it is no surprise courts have uniformly condemned as antithetical to the Constitution a prosecutor’s appeals to racial bias as a distraction from the merits of the evidence. *See, e.g., United States v. Cruz*, 981 F.2d 659, 663-64 (2nd Cir. 1992) (“Injection of a defendant’s ethnicity into a trial as evidence of criminal behavior is self-evidently improper”). Washington’s courts have also condemned the injection of racial or ethnic stereotypes into criminal cases. *See, e.g., State v. Barber*, 118 Wn.2d 335, 346-47, 823 P.2d 1068, 1075 (1992) (“distinctions between citizens solely because of their ancestry are

odious to a free people whose institutions are founded upon the doctrine of equality”).

More specifically, Washington courts have repeatedly chastised prosecutors for references to racially biased stereotypes in closing argument. In *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) this Court reversed the defendant’s conviction based on the prosecutor’s derogatory remarks about the defendant’s membership in the American Indian Movement, a group the prosecutor characterized in closing argument as “militant . . . butchers, that killed indiscriminately.” *State v. Belgarde*. The Court noted the comments were a “deliberate appeal to the jury’s passion and prejudice and encouraged it to render a verdict based on [the defendant’s racial and ethnic] associations rather than properly admitted evidence.” *Id.* at 507-08. Moreover, the court condemned the prosecutor’s “testimony,” through which the prosecutor attempted to compensate for deficiencies in the state’s case by introducing highly inflammatory, and irrelevant, “facts.” *See id.* at 509 (noting the prosecutor’s “‘testimony’ supported the witnesses’ explanation for their delay in reporting the defendant’s alleged confessions and thereby supported their credibility by introduction of facts outside the record”).

In *State v. Torres, supra*, 16 Wn. App. at 257 the court reversed the defendants’ convictions because of the prosecutor’s repeated improper

and irrelevant references to the defendants' race. The court found the prosecutor's racial references had no purpose other than to raise the improper inference that the defendants - because of their race - would be more likely to commit the charged crimes. *Id.* at 255. The court cautioned courts must be vigilant to enforce the constitutional guarantee of a fair trial, which protects not only the guilty but also the innocent. *Id.* at 263. The court explained:

If prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means. *Courts must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance.*

Id. (emphasis supplied); *see also State v. Avendano-Lopez*, 79 Wn.App. 706, 718, 904 P.2d 324 (1995) (“[A]ppeals to nationality or other prejudices are *highly improper in a court of justice*”) [emphasis added].

In *State v. Perez-Mejia*, 134 Wn.App.907, 909-10, 918, 134 P.3d 838 (2006) the court reversed the defendant's conviction because the prosecutor's repeated references to nationalism and the defendant's ethnicity were “unquestionably improper” and “compromised the fairness of the trial.” *State v. Perez-Mejia* at 909-910.. Such misconduct is of “constitutional magnitude” and, although subject to harmless error analysis warrants reversal even if the evidence was sufficient to support the jury's verdict. *State v. Perez-Mejia*, 134 Wash.App. at 909 n. 1; *see*

also State v. Suarez-Bravo, 72 Wn. App. 359, 361, 368, 864 P.2d 426 (1994) (even though the evidence sufficiently supported conviction, reversal was required because it was substantially likely the jury's verdict was compromised by the prosecutor's comments on the defendant's ethnicity and citizenship status).

Recently, in *Turner v. Stime*, the court reversed a civil judgment and remanded for a new trial because it was "reasonably likely" that jurors' "racially-based comments" during deliberations compromised the plaintiff's right to a fair trial. *Turner v. Stime, supra*, 153 Wn.App. at 593-94. During deliberations, several jurors made racial comments about the plaintiffs' lawyer, Mr. Kamitomo, who was of Japanese ancestry. *Id.* No comparable comments were made about the defendant's Caucasian lawyer. *Id.* at 592. Because it was reasonably likely the jurors' bias affected the "objective deliberation" of the case, the defendant was denied a constitutionally fair trial and reversal was required. *Id.* at 593.

Courts outside Washington have uniformly acknowledged that a prosecutor's unwarranted injection of race into a criminal trial compromises the defendant's constitutional right to a fair trial. For example, in *State v. Rogan*, 91 Haw. 405, 984 P.2d 1231 (Haw. 1999) the Hawaii Supreme Court reversed the defendant's conviction and barred retrial because the prosecutor's argument to the jury that "every mother's

nightmare” was to find “some black, military guy on top of your daughter” so fundamentally compromised the defendant’s right to a fair trial. The

Rogan court reasoned:

Arguments by the prosecution contrived to stimulate racial prejudice represent a brazen attempt to subvert a criminal defendant’s [constitutional] right to trial by an impartial jury. . . . Such arguments foster jury bias through racial stereotypes and group predilections, thereby promoting an atmosphere that is inimical to the consideration of the evidence at trial.

Id.

Clearly-established federal law similarly provides that prosecutor appeals to racial and ethnic prejudice violate a criminal defendant’s constitutional right to a fair trial and warrant reversal unless the misconduct is harmless beyond a reasonable doubt. *Bains v. Cambra*, 204 F.3d 964, 974, 971 & n. 3 (9th Cir. 2000). Indeed, some federal courts have suggested a prosecutor’s unwarranted infusion of race into the trial is so egregious that it should be subject to automatic reversal as structural error. *See, e.g., United States v. McKendrick*, 481 F.2d 152, 161 (2d Cir. 1973) (“Racially prejudicial remarks are . . . so likely to prevent the jury from deciding a case in an impartial manner and so difficult, if not impossible, to correct once introduced, that a good argument for applying a more absolute standard may be made”).

In *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990) the D.C. Circuit reversed the defendant's conviction because the prosecutor repeatedly suggested the defendants - because of their Jamaican heritage - were more likely to commit crimes. Given the ominous "portent for harm" from the prosecutor's comments, the court could not conclude the prosecutor's improper argument was harmless beyond a reasonable doubt. *Id.*, see also *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000) (reversing conviction because racial and ethnic stereotypes supported the defendant's conviction); *United States v. Vue*, 13 F.3d 1206 (8th Cir. 1993) (though evidence was sufficient to sustain convictions, reversal was required because suggestion that persons of the defendants' ethnic background were more likely to commit crimes was not harmless beyond a reasonable doubt); *Bains v. Cambra*, 204 F.3d at 975 (rejecting impermissible syllogism that the defendant, "like all other Sikh persons, solely on account of his being a Sikh rather than any other kind of person, was compelled to kill").

Accordingly, under well-established state and federal law, it is clear that prosecutorial appeals to racial prejudice deny the defendant the "fair trial" guaranteed by the Constitution.

B. Prosecutors' Special Duties as a Public Officer Also Clearly Prohibit Appeals to Racial Prejudice.

The American Bar Association emphasizes that, “in presenting a criminal case to the jury, it is incumbent upon a public prosecutor, as a quasi-judicial officer, to seek a verdict free of prejudice and based upon reason.” *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). “The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.” The American Bar Association Criminal Justice Section Standards, Prosecution Function, Standard 3-1.2, subd. (b).

Because of this:

Remarks calculated to evoke bias or prejudice should never be made in a court by anyone, *especially the prosecutor*. Where the jury’s predisposition against some particular segment of society is exploited to stigmatize the accused or the accused’s witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment.

(emphasis added.) The American Bar Association Criminal Justice Section Standards, Prosecution Function, Standard 3-5.8, Commentary. Moreover,

prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor’s arguments, not only because of the prestige associated with the prosecutor’s office, but also because of the fact-finding facilities presumably available to the office.

Id.

II. Courts Should “Jealously Guard” a Defendant’s Fair Trial Rights and Deter Appeals to Racial Prejudice by Requiring Reversal as a Systemic Remedy.

A. Courts Recognize that Appeals to Racial Bias in the Courtroom Undermine the Public’s Confidence in the Justice System.

“The criminal justice system works most fairly when its agencies (police, prosecutors, courts) serve as checks and balances on each other.”

Robert D. Crutchfield, et al., *Racial and Ethnic Disparities in the Prosecution of Felony Cases in King County*, at 57 (Nov. 1995).

Accordingly, courts should “jealously guard” against the “established violation of a criminal defendant’s federal due process and equal protection rights,” which occurs when a prosecutor needlessly injects racial bias into a trial. *See State v. Dhaliwal*, 150 Wn.2d 559, 582-83, 79 P.3d 432 (2003) (Alexander, J., concurring). A prosecutor’s injection of racial bias into a trial injures not only the defendant, but society as a whole. As one court explained:

[T]he introduction of racial prejudice into a trial helps further embed the already too deep impression in public consciousness that there are two standards of justice in the United States, one for whites and the other for blacks. Such an appearance of duality in our racially troubled times is, quite simply, intolerable from the standpoint of our future society.

United States v. McKendrick, *supra*, 481 F.2d at 157-159. *See also, Miller v. Johnson*, 515 U.S. 900, 912, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995)

(racial classifications “threaten to carry us further from the goal of a political system in which race no longer matters - a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire”).

The harm to society from actual and *perceived* racial bias in the criminal justice system is well documented. A 1999 study by the National Center for the State Courts came to the conclusion that racial and ethnic minorities strongly question the state judicial system’s commitment to them. National Center for State Courts, *How the Public Views the State Courts - A 1999 National Survey*, May 14, 1999.¹ The study found that over 70% of African-American respondents believe they, as a group, receive worse treatment from the courts, as compared to only 40% of white and Hispanic respondents. *Id.* at 8. While 83% of respondents thought the courts treat “people like them” either better or the same as others, two thirds of African-American respondents thought “people like them” were treated worse than others. *Id.* African-Americans and Hispanics were “significantly less likely” than white respondents to agree judges were generally fair in their decision-making. *Id.* African-American respondents were also significantly less likely to agree with the premise that “courts protect defendants’ constitutional rights.” *Id.* at 32.

¹ Available at:
https://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.

Judges should be at the forefront of eradicating actual and perceived bias in the courtroom. As the Conference of State Court Administrators has explained, both “demand a swift and unequivocal response” from courts as “even the perception of unfairness impacts the public’s trust and confidence in the courts and justice system.” Conference of State Court Administrators, *White Paper on State Courts’ Responsibility to Address Issues of Racial and Ethnic Fairness* (Dec. 2001)². The Conference of Chief Justices has issued a resolution on the “important responsibility” of courts “*to take the lead role* in eliminating racial and ethnic bias in the courts and throughout the entire justice system.” Conference of Chief Justices, *Policy Statements and Resolutions, Resolution No. 28*, (Aug. 1, 2002).³ Among other things, the Resolution provides:

The public looks to the courts above other governmental institutions for fairness and neutrality and must have confidence in the courts and the judicial process. . . . [The CCJ] [u]rges state judiciaries to work actively to address bias, both actual and perceived, within the court system, and to take a leadership role in addressing bias in the justice system.

Id.

² Available at: <http://cosca.ncsc.dni.us/WhitePapers/raciaethnicwhiteaprr.pdf>, at 2. The Conference of State Court Administrators (COSCA) was organized in 1953 and is composed of the principal court administrative officer from each state court.

³ Available at: <http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol28RacialEthnicFairness.html>.

Recognizing and addressing racial bias in the criminal justice system is particularly important because of racism's insidious nature. Without the court intervening, the jury may be incapable of realizing that irrelevant and prejudicial considerations have tainted its judgment. *See United States v. McKendrick, supra*, 481 F.2d at 159. As one court aptly explained, because "bias often surfaces indirectly or inadvertently and can be difficult to detect," affirming a conviction when the prosecutor has improperly injected race into a trial would "undermine [courts'] strong commitment to rooting out bias, no matter how subtle, indirect or veiled." *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005). These principles help demonstrate the need for a strong rule granting reversal of convictions – either treating the error as structural as in *McKendrick, supra*, reversing despite strong prosecution evidence based on the Court's supervisory powers as in *Cabrera*, or applying a particularly rigorous harmless error test - to deter prosecutor misconduct of the type that occurred here.

B. A Strong, Effective Remedy for Prosecution Appeals to Racial Prejudice is Needed to Counteract Racial Disparities in the Criminal Justice System.

In *Farrakhan v. Gregoire*, 590 F.3d 989, 1004 n. 20, 1012 (9th Cir. 2009) the Ninth Circuit Court of Appeals recently upheld a trial court finding of "compelling evidence" that "Washington's criminal justice system is infected with racial bias." This bias results in disproportionate

representation of minorities in prison. The court's order in *Farrakhan* has been stayed pending further proceedings. However, as the statistics below demonstrate, numerous studies thoroughly substantiate the *Farrakhan* court's conclusion that minorities are disproportionately represented in the criminal justice system. This disproportionate representation makes it particularly imperative that courts continue to embrace their "lead role" in eradicating actual and perceived racial bias in the courts. *See* Conference of Chief Justices, *Policy Statements and Resolutions, Resolution No. 28*, (Aug. 1, 2002).

As of 2008, African-American men between the ages of 20 and 34 were incarcerated at a rate of 1 to 9, the highest rate among any group of Americans. *One in 100: Behind Bars in America 2008*. The Pew Center for the States, February 2008, p. 5. As of 2006, African-American women were almost four times as likely as white women to be incarcerated. *Bureau of Justice Statistics Bulletin: Prison and Jail Inmates at Midyear 2006*, U.S. Department of Justice, Office of Justice Programs, June 2007. In general, African-Americans are incarcerated at a rate of 5.6 times their white counterparts. *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*. The Sentencing Project, 2007, p. 3. Similarly, Latinos are incarcerated at a rate almost twice that of their white counterparts. *Uneven Justice*, p. 3. In summary, sixty percent of the prison population is

comprised of people of color. Ashley Nellis, *Reducing Jail Populations by Addressing Racial Disparity in the Criminal Justice System*, The Sentencing Project, 2009, p. 1.

These dramatic statistics make it particularly important for courts to serve as a systemic “check” on prosecutorial appeals to racial prejudice, which compromise the fairness of a trial and the integrity of the judicial system. *See* Robert D. Crutchfield, et al., *Racial and Ethnic Disparities in the Prosecution of Felony Cases in King County*, at 57 (Nov. 1995).

C. Reversal of Monday’s Conviction is an Essential Remedy for the Misconduct Here.

More than thirty years ago, this Court reversed a defendant’s conviction based on prosecutor misconduct in closing argument and sought to deter such misconduct in other cases. *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). In concluding reversal was required, this Court admonished:

In spite of our frequent warnings that prejudicial prosecutorial tactics will not be permitted, we find that some prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions. In most of these situations, competent evidence fully sustains a conviction. Thus, we are hard pressed to imagine what, if anything, such prosecutors hope to gain by introduction of unfair and improper tactics.

Id.

In 1995, the Court of Appeals also noted that prosecutors are emboldened to engage in conduct the courts have clearly condemned, rather than deterred, because the courts so commonly refuse reversal on harmless error grounds. *State v. Neidigh*, 78 Wn.App. 71, 895 P.2d 423 (1995) (“The court at oral argument asked why prosecutors continue to pose “liar” questions notwithstanding the cases cited above. Mr. Chambers, on behalf of the State, responded, ‘it’s always been found to be harmless error’ when no objection is raised”) For whatever reason, more than thirty years after *Charlton* and 15 years after *Neidigh*, prosecutors continue undeterred to introduce irrelevant and prejudicial material into a case otherwise supported by apparently strong evidence. The Court of Appeals expressed its frustration *in this case* with the prosecutor’s jeopardizing a fair trial by unnecessary and improper invocations of race. *State v. Monday, supra*, at *10.

Because deterrence has not worked and consistent with the resolution of state courts to “take a leadership role” in “actively addressing” the bias that “infects” Washington’s criminal justice system, this Court should reverse Monday’s conviction either as systemic error or because the prosecutor’s improper resort to racial stereotypes cannot be considered “harmless beyond a reasonable doubt.” *State v. Perez-Mejia, supra*, 134 Wn.App. at 920 & n. 11. It is questionable whether a

prosecutor's deliberate and repeated injection of racial prejudice into a trial can ever be "harmless error." *See, e.g., United States v. McKendrick*, 481 F.2d at 161. The misconduct is more "flagrant and ill-intentioned" when it occurs after repeated appellate court opinions (cited above) informing prosecutors that it is misconduct. *State v. Fleming*, 83 Wn.App. 209, 214, 921 P.2d 1076 (1996).

Adoption of a stringent rule of reversal here is particularly warranted as even the most objective jury cannot be trusted to filter insidious racial prejudice from a balanced consideration of the evidence. For this reason, this misconduct is comparable to those errors found to so affect the framework of the trial that they call for automatic reversal. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (judge's bias compels reversal of conviction despite strength of evidence against defendant).

Even if this Court rejects an automatic reversal rule, it is still clear that the Court should apply a particularly rigorous harmless error test given the facts here. In this case, the prosecutor's appeals to racial prejudice were peppered throughout the trial, demonstrating that the misconduct was calculated to sway the jury with prejudice, rather than with evidence. This is not a case where the prosecutor made an isolated fleeting reference that, in the context of the whole trial, might go

unnoticed by the jury. Rather, the prosecutor's improper injection of race into the trial was pervasive, compromising both key witness examination and closing argument. Because of this, the misconduct is so "flagrant and ill-intentioned" that no objection or request for a curative instruction could have obviated its prejudicial effect. *See State v. Belgarde*, 110 Wn.2d at 507-508. Whether or not defense counsel objected at trial does not change the analysis. Indeed, this is irrelevant because no curative instruction could have remedied the discriminatory bias.

The state's flagrant injection of irrelevant racial considerations into a criminal trial necessarily casts doubt on the fairness of the trial.

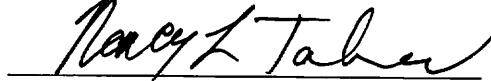
Prosecutor appeals to racial prejudice against African-Americans have been occurring for over 100 years. Bennett L. Gershman, *Prosecutorial Misconduct* § 11:6 (2nd ed. 2009) (describing examples from cases dating back to the early 1900's, including some that sound remarkably similar to the prosecutor's comments about "black folk" following a code in this case: "You know the Negro race – how they stick up to each other when accused of crime,") Accordingly, it is time that the courts hold attorneys responsible and effectively deter the injection of racial bias into a criminal proceeding. *See Conference of Chief Justices, Policy Statements and Resolutions, Resolution No. 28*, (Aug. 1, 2002).

CONCLUSION

Affording Monday a new trial will allow this Court to protect the integrity of the judicial system by embracing a “lead role” in eliminating appeals to racial prejudice from Washington’s criminal justice system. Reversal will also promote attorney accountability and deter similar misconduct in the future. Accordingly, this Court should reverse the decision of the Court of Appeals and remand for a new and constitutionally fair trial.

RESPECTFULLY SUBMITTED this 9 day of April, 2010.

ACLU OF WASHINGTON FOUNDATION

A handwritten signature in black ink, appearing to read "Nancy L. Talner", is written over a horizontal line.

Sarah A. Dunne, WSBA #34896

Nancy L. Talner, WSBA #11196

Johanna R. Pirko, WSBA #41590

Attorneys for Amicus Curiae American Civil
Liberties Union of Washington