STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2008AP000810 - CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

LANDRAY M. HARRIS,
Defendant-Respondent.

ON PETITION FOR REVIEW OF
A COURT OF APPEALS' DECISION VACATING
A SENTENCE ENTERED IN MILWAUKEE COUNTY
CIRCUIT COURT,
THE HONORABLE JOSEPH WALL PRESIDING

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE'S AMICUS BRIEF

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INTRODUCTION

This case involves the intersection between race, gender and the criminal justice system. It is the position of the National Association for the Advancement of Colored People (NAACP) that this Court cannot analyze these components in isolation. If they are considered during sentencing, implicitly or explicitly, a defendant should be resentenced.

Race or gender cannot be considered at sentencing. ***Rose v. Mitchell***, 443 U.S. 545,555 (1979); ***Graham v. Collins***, 506 U.S. 461,484 (1993) (Thomas,J., concurring); ***J.E.B. v. Alabama***, 511 U.S. 127,135-36 (1994); ***Frontiero v. Richardson***, 411 U.S. 677,684 (1973); ***State v. Shillcutt***, 119 Wis. 2d 788,829, 350 N.W.2d 686 (1984) (Abrahamson,J., dissenting); ***State v. Jagodinsky***, 209 Wis.2d 577,579, 563 N.W.2d 188 (1997). If the sentencing judge considers race and/or gender it is a due process violation and the remedy is resentencing. ***Id***.

The State argues that the sentencing judge did not make overtly racial comments. (Petitioner's Brief 15). Further, the State contends that since there are many legitimate sentencing factors that "could be construed as

being related to race or racial stereotypes," the statements in this case were a proper exercise of discretion. (Petitioner's Brief 15). Harris argues that the court's statements "conveyed sexism and racism." (Respondent's Brief 10).

The Court of Appeals did not call the statements racist or sexist, but instead held that the "appearance of justice is important, and that even where it could not be determined that the trial court actually improperly relied on race as a sentencing factor, resentencing was required to satisfy 'the appearance of justice.'" (Slip. Op. ¶18).

The NAACP argues that the statements strongly implied that race and gender *were* impermissibly considered at sentencing. Everyone in the judicial system—especially judges—should be conscious of stereotypes and beliefs that guide the decision-making processes. Reviewing courts should have the authority to assess how comments made could be perceived and order resentencing if warranted.

ARGUMENT

I. THIS COURT SHOULD CAREFULLY EXAMINE REMARKS THAT COULD BE PERCIEVED AS RACIALLY BIASED.

Developments in social sciences have led to widely accepted theories of unconscious racism. These theories assert that people who are not racists often unintentionally discriminate. Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Preemptory Challenge*, 85 B.U. L.Rev. 155,160 (2005) (Page). Everyone learns stereotypes from culture and environment. *Id.* These stereotypes set up how we understand the world—sometimes leading to conscious or unconscious discrimination. *Id.* at 181. As researchers note:

> A more modern racist will "sympathize with the victims of past injustice; support public policies that, in principle, promote racial equality and ameliorate the consequences of racism; . . . regard themselves as non prejudiced and discriminatory; but almost unavoidably, possess negative feelings and beliefs about blacks . . . [that] are typically excluded from awareness."

Id. at 182-83 (internal citations omitted).

A. UNCONSCIOUS RACISM IN SENTENCING IS A CHALLENGE OUR STATE COURTS MUST ACKNOWLEDGE.

1. Unconscious Racism is too often not acknowledged for three reasons.

1. *Ignorance*

Ignorance is the first obstacle to taking account of unconscious racism. To most judges, in fact to most of society, "racial discrimination," "racism," "racial bias," and "racial prejudice" are the property of the hate-filled, stereotype-sprouting, put-them-in-their-place white supremacist—what social scientists call the "dominative racist." *See* Jones, *Prejudice and Racism* 121-24 (1972) (Jones); Kovel, *White Racism* 54-55 (1970) (Kovel); Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964,* 37 Rutgers L. Rev. 673,687-90 (1985) (Pettigrew). As a society, we have made important progress in rejecting gross stereotypes and blatant discrimination. This has not rid us of racism. The Supreme Court has acknowledged:

> We . . . cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

Rose v. Mitchell, 443 U.S. at 558-559.

A burgeoning literature documents the rise of the "aversive" racist, a person whose ambivalent racial attitudes

leads him or her to deny his or her prejudice and express it indirectly, covertly[1] and often unconsciously[2]. Jones, at 121-24; Pettigrew; McConahay & Hough, *Symbolic Racism,* 32(2), J. Soc. Issues 23-24 (1976)(using term 'symbolic

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[1] Strong public norms against racial prejudice compete with private norms that endorse it. *See* Schuman, Steeh & Bobo, *Racial Attitudes In America: Trends and Interpretations*, 211-212, 202 (1985) (hereinafter Schuman). Discrimination is most prevalent in private and public settings where it may be practiced without disclosure of prejudiced attitudes. Allport, *The Nature of Prejudice*, 56-57 (1954); *Schuman* at 65 (discussing race-of-interviewer effects on reported racial attitudes); Crosby, Bromley & Saxe, *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 Psychol. Bull. 549, 554, 559 (1980) (hereinafter Crosby) (reviewing helping-behavior studies and studies examining effect on subjects' reported racial attitudes when telling subjects that truthfulness of their statements is being monitored by sensitive lie detector); Gaertner & Dovidio, *The Aversive Form of Racism*, in *Prejudice, Discrimination, and Racism*, 80-84 (J. Dovidio & S. Gaertner eds. 1986)(reviewing experiments on positive and negative rating scale studies and reaction time/rating scale studies) (Gaertner); Sigall & Page, *A Little Fading, A Little Faking,* 18 J. Personality & Soc. Psychol. 247 (1971).

[2] Crosby at 555- 56 (reviewing nonverbal behavior studies); Gaertner (reviewing a variety of studies and concluding that aversive racists rationalize negative responses to minorities in ambiguous situations and thus maintain perception of themselves as egalitarian, unprejudiced, and nondiscriminating); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev. 317, 329-32, 343 (1987) (reviewing the literature) (Lawrence); McConahay at 44.

racism') (McConahay). [3] That literature, which spans Freudians, cognitive psychologists and sociologists,[4] also documents how pervasively and subtly race influences the thinking of us all.

Certainly public awareness of the concept and dynamics of unconscious racism is low. But public ignorance is not a sufficient barrier to incorporating new insights about race into judicial thinking. The courts have been educated,

[3] Many whites agree with the goal of racial equality in principle, but obstruct specific reforms aimed at implementing that principle. Katz, *Stigma: A Social Psychological Analysis* 14-16(1981)(reviewing a variety of studies); Schuman at 211-12; Pettigrew at 689-91 (also reviewing a variety of studies).

[4] Terminology and explanations of the origin of unconscious racism differ among various disciplines, but all document the existence and prevalence of the same phenomenon. For an excellent, brief description of the different causal theories of psychoanalytic theory and cognitive psychology, see Lawrence at 330-31; for a comprehensive treatment of various motivational and cognitive approaches to the newer forms of racism, as well as a briefer treatment of institutional and socio-cultural perspectives, see Gaertner. Also see Page at 180-235. (discussing the development of the research on stereotype formation, development and maintenance and on how unconscious stereotyping influences inference, judgment and behavior).

and subsequently educators, before.[5] At least two former members of the U.S. Supreme Court were aware of unconscious racism: Justice Marshall's concurrence in ***Batson v. Kentucky***, 476 U.S. 79, 106(1986)(Marshall, J., concurring) and Justice Brennan's dissent in ***Turner v. Murray***, 476 U.S. 28, 42 (Brennan, J. dissenting). Even the majority opinion comes close to recognition of unconscious racism when it alludes to "less consciously held racial attitudes." ***Id***. at 35 (majority opinion). Thus, ignorance alone does not explain the blindspot.[6]

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[5] ***Brown v. Board of Education***, 347 U.S. 483 (1954) is an example of the Court leading and educating the public. ***Gideon v. Wainwright***, 372 U.S. 335 (1963), has served the same function regarding the right to counsel. Justice Antonin Scalia acknowledged the existence of unconscious racism in a memorandum that he wrote to Justice Thurgood Marshall regarding the decision in ***McCleskey v Kemp***, 481 U.S. 279 (1987), "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof."

[6] Forty-five state supreme courts, or other courts, have established some type of organization to promote racial and/or gender fairness in the courts. The Wisconsin Supreme Court Gender Neutrality Implementation Committee is an example. See National Consortium on Racial and Ethnic Fairness in the Courts 1-4, http://www.consortiumonline.net/links.html.

2. Fear

Surmounting ignorance may feel dangerous. Some may ask what is the limiting principle if we begin to recognize unconscious bias. That question seems to suggest a fear of too much justice. Students of unconscious racism, however, would predict irrational fear, or at least fear disproportionate to the threat.[7]

Fear may be what caused the trial court to hold that the statements from sentencing a proper exercise of discretion and "an adequate consideration to all aspects of the defendant's character as part of the overall factors it must consider at the time of sentencing." (Pet.-Ap. 122). This court should not hide behind the intent of ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.3d 512 (1971), and ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, to allow improper sentencing considerations.

3. *Denial*

[7] A variety of measures and samples have found that the objective threat posed by racial change is a poor predictor of white racial attitudes and behavior. Subjective threat, the dangers perceived from alteration in the racial status quo, is what motivates white opposition to racial change. Pettigrew, at 691 (reviewing literature).

There is also the psychological risk whether we want to acknowledge that racism infects us all. Denial is also a property of unconscious racism.[8] Even if one makes the distinction between conscious, unconscionable racism, and unconscious racism, it is hardly ego-enhancing to think of oneself as the passive recipient of a culturally pervasive illness.

Denial can justify one's opposition to racial change, both to oneself and to the world, by citing nonracial reasons. In the context of criminal procedure decisions, finding a nonracial reason is particularly easy to do: one cites the guilt of the suspect or defendant. This is why despite the fact that the trial court may not have said anything overtly racial, it is still necessary for this Court to curtail these types of statements.

B. AN EXAMINATION OF COMMENT'S CONTEXT IS A WAY FOR APPELLATE COURTS TO EXAMINE WHETHER UNCONSCIOUS RACISM WAS PRESENT IN A PROCEEDING.

[8] Kovel at 54-55, 60-61 (1970); Crosby (reviewing the literature); Gaertner at 84-86 (reviewing results of number of experiments); McConahay at 43-44; Pettigrew at 690.

Given the current research about the ways racial discrimination manifests itself, perceptions of a judge's words are paramount—perception, in this case, is reality. A deeper inquiry is necessary to prevent this unconscious racism from infecting the courts.

The U.S. Supreme Court stressed that public perceptions of judicial actions is important to maintaining public confidence in the system. *See* ***Commonwealth Coatings Corp. v. Cont'l Cas. Co.***, 393 U.S. 145,150 (1968); ***Peters v. Kiff***, 407 U.S. 493,502 (1972); ***In re Murchison***, 349 U.S. 133,136 (1955); ***Caperton v. A.T. Massey Coal Co., Inc.*** 556 U. S. ____ (2009). Wisconsin courts concur: "Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational decision-making as well as to ensure public confidence in the decision-making process." ***Marris v. City of Cedarburg***, 176 Wis.2d 14,25-26, 498 N.W.2d 842 (1993).

Given this goal, the fact that the comments at issue in this case were made in Milwaukee County is troublesome. Milwaukee is the second most segregated city, has the third largest growth in incarceration rates, and the highest rate of incarceration for African Americans in the country. Pager,

The Mark of a Criminal Record, The Am. J. of Soc., Vol. 108, No. 5, 937-75, 965 (Mar. 2003) (Pager).

A reviewing court must consider how comments could be perceived. A judge must know her audience to ensure the comments made reflect and are understood by those involved to be proper considerations.

II. THE COURT'S USE OF THE PHRASE "BABY MAMA" EXPRESSED RACIAL AND GENDER BIAS.

The Court of Appeals opinions discussed the origin of the phrase "baby mama." The dissent argued that because the phrase was the title of a popular movie, the phrase has moved into the mainstream and is not connected to any particular race. However, that is not true. "Baby Mama" carries negative connotations related to both race and gender.

Linguist John McWhorter argues that, though there are indicators that "baby mama" is moving into the mainstream, it has solid grammatical roots in Black English. That history has not been shed simply by its use in a popular movie. "A Language Is Not Just a Basket of Words: What's up with 'baby Mama'?, *The New Republic*, Mar. 4, 2009, available at

http://www.tnr.com/blog/john-mcwhorter/language-not-just-basket-words-whats-baby-mama. "Baby mama," is frequently used in pop culture, specifically in hip hop lyrics, to portray a negative image of African American women and men.[9]

Given its history and current usage, "baby mama" conjures up a particular image–rooted in gender and racial inequality. If a court is going to follow the instructions of ***Gallion*** and use phrases and colloquialisms that are free from legal jargon, the court must ensure that it knows the definitions and context of those phrases.

a. THE SENTENCING COURT'S STATEMENTS ALSO GAVE THE IMPRESSION THAT THE SENTENCE WAS BASED ON HARRIS' GENDER.

The Court of Appeals decided this case on narrow grounds choosing not to address considerations of gender.

[9] Songs using "baby mama" in a negative context include "Baby Mama" by Three 6 Mafia, (complaining about paying child support); "Baby Mama" by Fantasia Barrino, (calling for solidarity between single, unwed mothers not receiving any support from the father of their child); "Gold Digger" by Kanye West, (discussing women who purposefully have children to get money from wealthy men). The complete lyrics can be found at www.lyrics.com.

(Slip. Op. note 4). The issues of gender and race are closely intertwined in this case and cannot be separated.

The trial court's statements did not stop at "baby mama," "you guys," and "these women." The court's written decision denying Harris' motion for resentencing included:

> The comments concerning the defendant's unemployment status and the willingness of his child's mother to go out and work and go to school while the defendant sat home were meant to express incredulity over a 21 year old able-bodied male *allowing* the child's mother to go out and work instead of going out and finding a job on behalf of his family and furthering his financial prospects.

(Pet.-Ap. 122) (emphasis added). This statement implies that since Harris is not fulfilling a traditional gender role, he should be punished more harshly.[10]

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[10] Researchers have investigated attitudes toward traditional parents (stay-at-home mothers and employed fathers) and nontraditional parents (stay-at-home fathers and employed mothers). Using a between-subjects design, Study 1 found nontraditional parents were liked significantly less than traditional parents. Participants also believed that stay-at-home fathers were not regarded highly by others. Study 2 replicated these results using a within-subjects design, suggesting that participants felt little compunction about expressing negative attitudes toward nontraditional parents. Study 3 found that employed mothers were less disliked when described as working out of financial necessity rather than for personal fulfillment. Both male and female participants reported negative evaluations of employed mothers and stay-at-home fathers.

Researchers have found that even when African American fathers are not able to financially contribute to their children, most often because of poverty, they can contribute to their children's well-being in other ways. Maldonado, *Deadbeat or Deadbroke: Redefining Childs Support for Poor Fathers*, 39 U.C. Davis L. Rev. 991,993-94 (2006). Parental involvement, especially by nonresidential father who traditionally lose contact, benefits children by reducing their academic, social and emotional problems. *Id.* at 997. Though a father may not be able to find employment, he is still providing a valuable service to his family by caring for his child.

Households decide the roles members play based on many factors. Without knowing these factors in each family, a court should not base its sentencing decision on Harris fulfilling a nontraditional role –staying home to provide childcare while the female goes to work and school. Considering the widespread criticism that African American fathers do not provide adequate emotional and financial

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Brescoll &Uhlmann, *Attitudes Toward Traditonal and Nontraditional Parents*, Psychol. of Women Q., 29 (2005), 436-445.

support for their children, the fact that Harris was taking an active role in his daughter's upbringing should not be held against him. [11] *Id.* at 993-94

A study in Milwaukee showed that white job seekers *with* criminal backgrounds were more likely to get call back interviews than black job seekers *without* any criminal history. (Pager at 958-59). [12]

Considering the obstacles an African American male job-seeker faces in Milwaukee, it is reasonable for a family to decide that certain members of the household will be charged with childcare and others will work outside of the home.

When deciding this case, this Court cannot and should not analyze the gender and racial nature of the statements

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[11] These criticisms have not just come in academic literature. President Obama gave a speech on the importance of African American men to be involved in their children's lives (the text of the speech is available at http://www.cnn.com/2008/POLITICS/06/27/obama.fathers.ay/).

[12] In this study, researchers paired equally qualified white and black job seekers—some with criminal convictions, some without. (Pager at 946-51). The participants applied for the same jobs, using the the same resumes and qualifications. The only difference between the different job seekers was their race and whether or not they had a criminal conviction. The carefully controlled study found that, even with the same credentials, white job seekers without a criminal background were more than twice as likely to get callback interviews when compared with black job seekers with no criminal history. (Pager at 958-59).

separately. Instead this Court should acknowledge the intersectionality of race and gender.

CONCLUSION

The NAACP respectfully requests that this Court affirm the decision to grant resentencing.

Dated this 11th day of September, 2009.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is _____words.

_____

Kathryn A. Holtz

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____

Kathryn A. Holtz