Appeals to Racial Prejudice by Prosecutors

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Once upon a time in U.S. criminal trials, prosecutors tried often to inflame a jury's racial fears and stereotypes with predictions of bloodshed, terror, and violence unless the jury convicted the accused black man. Common arguments included: "Unless you hang this Negro, white people won't be safe (*Moulton v. State*);" "How would you like to have your daughter on a train with nine Negroes in a car (*Weems v. State*);" "I am well enough acquainted with this class of niggers to know that they have got it in for the [white] race in their heart (*Taylor v. State*)" "It will not be safe if you permit a Negro to come in and slaughter a white man (*People v. Jeans*);" "You should consider the fact that Mary Sue Rowe is a young white woman and that this defendant is a black man for the purpose of determining his intent at the time he entered Mrs. Rowe's home (*Holland v. State*);" "The defendant is a big, black gorilla with arms as long as your legs (*Harris v. State*);" "The jury should deal harshly with such cattle (*Davis v. State*)."

Such appeals to racial prejudice by prosecutors occur much less frequently today, and when they do, a conviction usually is reversed. But not always. Indeed, the U.S. Supreme Court this week refused to review a criminal drug conviction in which the federal prosecutor ridiculed the defendant's innocent explanation that he did not know that other persons in a hotel room were involved in a drug deal with the following sarcastic question:

"You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you -- a light bulb doesn't go off in your head a say, This is a drug deal?"

Because the defense lawyer, inexplicably, did not object to the prosecutor's racially-charged insinuation, the Fifth Circuit Court of Appeals did not disturb the conviction, nor did the court publish its decision in the main digest of federal cases. And because of the defense lawyer's failure, the Supreme Court did not grant review. Nevertheless, Justice Sotomayor, joined by Justice Breyer, took the opportunity to write separately to make it absolutely clear that the Court's denial of review did not indicate tolerance for the federal prosecutor's pernicious remark. "By suggesting that race should play a role in establishing a defendant's criminal intent," Justice Sotomayor wrote, "the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our nation." The prosecutor by arousing the jury's deep-seated prejudice sought to manipulate the jury to decide against the black defendant not because he was guilty but because of he was black. The prosecutor thereby incited the jury, as Justice Sotomayor noted, to substitute racial stereotype for evidence, and racial prejudice for reason.

The federal prosecutor's foul-mouthed blow was bad enough. But equally bad was the arrogant and even shocking response from the United States Attorney's Office which handled the appeal. The government's brief characterized the prosecutor's question as "impolitic," and stated that the defendant was not prejudiced by the prosecutor's remark, "even assuming the question crossed the line," as if there was any doubt that the question "crossed the line." Also disturbing was the failure of the U.S. Solicitor General to file a response to the defendant's request for review and address the prosecutor's misconduct. The Solicitor General did so only after the Supreme Court ordered it to respond.

Given the manner in which the U.S. Attorney's Office and the Solicitor General marginalized the prosecutor's venal conduct, it is unlikely that the Justice Department's disciplinary body, the Office of Professional Responsibility, will take any action, even though the prosecutor in making the racially-charged comment violated rules of professional ethics. Failure to impose discipline is unfortunate, but to those persons who keep track of the infrequent incidence of prosecutors being disciplined, not all that surprising.