SPEAR, J., dissenting. I concur in parts II and III of the majority opinion, and the conclusion in part I that the prosecutor's references to the race of the perpetrators did not violate the defendant's right to a fair trial. I respectfully disagree, however, with the majority's conclusion that we should not exercise our supervisory power to vacate the judgment of conviction.

In *State* v. *Garrett*, 42 Conn. App. 507, 681 A.2d 362, cert. denied, 239 Conn. 928, 929, 683 A.2d 398 (1996), we addressed an unpreserved claim of prosecutorial misconduct that was based on the prosecutor's use of the words ''black'' or ''blackness'' six times during closing argument in reference to a black defendant. We concluded that *Golding* review was not warranted because the comments were restricted to a very brief segment of the closing argument. Even so, we cautioned that ''[a]lthough we conclude that the racial comments were not so egregious as to deprive the defendant of a fair trial, this case presents a *serious* question as to whether we should invoke our supervisory power to vacate the judgment of conviction and order a new trial to deter similar conduct. . . . Our decision not to do so in this instance should not be misconstrued as a tacit approval of the prosecutor's conduct. We do not

condone such behavior.'' (Citation omitted; emphasis added.) Id., 517 n.9.

Our Supreme Court has remarked that ''[w]e are mindful of the sage admonition that appellate rebuke without reversal ignores the reality of the adversary system of justice. The deprecatory words we use in our opinions . . . are purely ceremonial. [Prosecutors], employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice [of verbal criticism without judicial action] . . . breeds a deplorably cynical attitude towards the judiciary.'' (Internal quotation marks omitted.) *State* v. *Ubaldi*, 190 Conn. 559, 571, 462 A.2d 1001, cert. denied, 464 U.S. 916, 104 S. Ct. 280, 78 L. Ed. 2d 259 (1983), quoting *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), cert. denied, 329 U.S. 742, 67 S. Ct. 49, 91 L. Ed. 640 (1946). Here, the prosecutor made sixteen gratuitous references to race less than two years after our caution in *Garrett*.[1] This is a classic example of the ineffectiveness of a ''verbal spanking'' without a reversal.

Turning to the factors in *State* v. *Pouncey*, 241 Conn. 802, 699 A.2d 901 (1997), the extent of prejudice to the defendant and the availability of other sanctions for the prosecutor's misconduct weigh in favor of the defendant. With respect to prejudice, some courts have held that appeals to racial prejudice by prosecutors should automatically result in a reversal. See *Miller* v. *North Carolina*, 583 F.2d 701, 708 (4th Cir. 1978); *Weddington* v. *State*, 545 A.2d 607, 614–15 (Del. 1988). It is impossible to ascertain the effect of the improper racial appeal, and reversal is required because such conduct taints the entire trial proceeding. See *Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1594–95 (1988). With respect to other sanctions that are available, our Supreme Court has stated: ''According to some authorities, the evil of overzealous prosecutors is more appropriately combatted through contempt sanctions, disciplinary boards or other means. . . . This court, however, has long been of the view that it is ultimately responsible for the enforcement of court rules and prosecutorial misconduct cases.'' (Citation omitted.) *State* v. *Ubaldi*, supra, 190 Conn. 571. In short, it is the court's job to rein in such prosecutors.

There is no question that at a new trial, the victims would have to relive the incident with the attendant emotional trauma. That factor weighs against vacating the judgment of conviction. The '' 'practical problems of memory loss and unavailability of witnesses after much time has elapsed' ''; *State* v. *Pouncey*, supra, 241 Conn. 813; on this record, would not appear to be a significant problem. There is nothing in the record to indicate that the victims and the state's witness, Tyrone Broaden, would not be available for a new trial. More-

over, the witnesses may refresh their recollection from the transcript of the first trial, and the testimony of a witness who cannot be produced can be introduced. *State* v. *Ubaldi*, supra, 190 Conn. 572.

Most importantly, race is different. "Race occupies a special place in the modern law of constitutional criminal procedure . . . ." *Smith* v. *Farley*, 59 F.3d 659, 688 (7th Cir. 1995) (rejecting claim that prosecutor made improper appeal to racial prejudice), cert. denied sub nom. *Smith* v. *Parke*, 516 U.S. 1123, 116 S. Ct. 935, 133 L. Ed. 2d 861 (1996). Our Supreme Court has acknowledged that race is different in the context of alleged juror misconduct. *State* v. *Brown*, 235 Conn. 502, 528–29, 668 A.2d 1288 (1995), requires that a trial court conduct a preliminary inquiry whenever juror misconduct is alleged. The scope and form of the inquiry is to be determined by the court in its discretion. "[A]n allegation of racial bias on the part of a juror differs so fundamentally from other types of juror misconduct that *Brown* is of limited guidance and does not go far enough. Because such allegations are a matter of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole . . . we deem it appropriate in all future cases in which a defendant alleges that a juror has made racial epithets, such as in the present case, that the trial court should conduct a more extensive inquiry than that prescribed in *Brown*." (Citation omitted; internal quotation marks omitted.) *State* v. *Santiago*, 245 Conn. 301, 340, 715 A.2d 1 (1998).

Because racial issues require careful scrutiny, the remarks here should be examined closely. I cannot conceive of any valid reason for those racial references. What could be the purpose of the numerous gratuitous references to the defendant's race other than to appeal to the possible racial prejudice of the jurors?[2] Imagine a situation in which the two robbery victims were black and the two perpetrators were white, and the case was tried before an all black jury.[3] What would an observer conclude if the prosecutor made sixteen references to the fact that the perpetrators were white males? Put more simply, if the perpetrators in this case had been white, I cannot imagine that the prosecutor would refer to their race sixteen times in his closing argument to the jury.

Even though there does not appear to be any widespread problem of improper racial references during closing arguments by prosecutors in the state of Connecticut, I believe that we should back up the cautionary words that we used in *Garrett* with action in this case. I would vacate the judgment of conviction and order a new trial to send a message that this kind of conduct will not be tolerated in the future.

Accordingly, I respectfully dissent.

[1] Following are the relevant excerpts from the prosecutor's opening argu-

ment: ''[T]hey were chased by two gentlemen, *two black males*. And they gave a description of those *black males. Black male* one about five feet, eleven inches, 200 pounds . . . . The *larger black male* . . . came up to the window and tapped a knife on the window. . . . When the *larger black male* realized . . . that Mr. Corneau wasn't going to give up the car, he walked around to the other side . . . . Fortunately, the *larger black male* didn't do anything at that point in time. Remember . . . there is *another black male*, a *smaller black male* . . . . When the *larger black male* goes to the car, he's sort of standing behind him a little bit. When the *larger black male* goes to the other side, he's still standing behind him a little bit . . . . At that point in time, the *larger black male* indicates to Mr. Innaimo that he wants his wallet. . . . During that entire time, the *larger black male* is standing within three feet of Mr. Innaimo with the knife at the side of his face. . . . Mr. Innaimo gives up his wallet . . . to the *larger black male* . . . . [T]he *larger black male* threatened the use of force in order to get the person to give up the truck. . . . You have two suspects. You have *one larger black male*, five feet, eleven inches, 205, and you have a *smaller black male*, five feet, nine inches, approximately 155.'' (Emphasis added.)

[2] In his article, ''The Demeanor Gap: Race, Lie Detection, and the Jury,'' Joseph W. Rand writes: ''Thus, if a white juror has developed a schema that African-American men act a certain way, she will more easily process information that is consistent with that stereotype, and disregard information that is inconsistent. The bias may not be motivated by evil intent, but rather by an adaptive cognitive process.'' J. Rand, ''The Demeanor Gap: Race, Lie Detection, and the Jury,'' 33 Conn. L. Rev. 1, 41 (2000).

[3] There is no dispute that the jury in this case was all white.