No. 19-1218

In the
Supreme Court of the United States

MARCUS LEE ROBINSON,
Petitioner,

v.

COLORADO,
Respondent.

On Petition for Writ of Certiorari to the Colorado Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner was charged with sexually assaulting an unconscious woman. Another woman witnessed the incident, which took place at night in a darkened room. To convict petitioner of a completed sexual assault, the prosecution had to prove penile penetration of the victim's vagina.

In her opening statement, the prosecutor drew the jury's attention to the contrasting skin tones of the victim, a white woman, and petitioner, an African-American man. She stated that jurors would hear that the perceiving witness saw "a dark penis going into a white body. That's how graphic she could see."

Although the prosecutor later questioned the witness about the parties' contrasting skin tones, the witness did not testify as the prosecutor had predicted.

Defense counsel did not object to the prosecutor's race-based statements or questions. The jury convicted petitioner of attempted sexual assault and other crimes. The Colorado Court of Appeals reversed those convictions, concluding that the prosecutor's conduct violated Colorado's plain-error standard. On review, the Colorado Supreme Court employed the same plain-error standard to reverse the court of appeals. The supreme court did not consider petitioner's new argument that the matter should be reviewed under a modified version of the plain-error test.

The question presented is whether this Court should review a case that raises no federal question and, in doing so, employ a novel standard of review that was never considered by Colorado's appellate courts.

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INTRODUCTION

Petitioner asks this Court to review a Colorado Supreme Court decision that does not address a federal question, and he asks this Court to employ a standard of review that Colorado's appellate courts did not consider. In the court of appeals, petitioner urged reversal under Colorado's plain-error standard, which is easier for defendants to satisfy than the federal standard. Consistent with petitioner's argument, the court of appeals employed the state standard. The Colorado Supreme Court likewise applied Colorado's plain-error test.

Having failed to prevail under Colorado's test, petitioner now asks this Court to review the Colorado Supreme Court's decision under a modified version of the federal plain-error test. In doing so, he asks the Court to do something that it lacks the authority to do — review a state law determination that is sufficient to support the judgment below — and another that it is loath to do — consider the merits of a new argument that was not addressed by the courts below.

Even if this Court were disposed to consider petitioner's request, this case is a poor vehicle to address the question presented. As the Colorado Supreme Court noted in its opinion, the prosecutor's race-based comments occurred in her opening statement while explaining to the jury what she expected the evidence would show. Her remarks were inartful and better left unsaid, but they were bereft of the sort of derogatory references to race that populate the cases cited by petitioner in support of his request

for certiorari review. And, as noted by the Colorado Supreme Court, the prosecutor's remarks were not simply gratuitous, but had potential relevance to the disputed evidentiary points of whether penile penetration occurred and how the perceiving witness was able to see such penetration in a darkened room. In these circumstances, further review by this Court is unwarranted.

STATEMENT OF THE CASE

1. Factual Background. While hosting a party at her apartment, A.M. became drunk and passed out on a couch. R. Tr. 107-108, 193 (May 13, 2014). E.G., who was a guest at the party, fell asleep at the other end of the couch. R. Tr. 107 (May 13, 2014). Petitioner, who was in a relationship with A.M.'s roommate, arrived as the party was winding down. Pet. App. 2a.

At petitioner's jury trial, E.G. testified that, after falling asleep, she was awakened three times by petitioner. The first time, petitioner was standing over her with his exposed penis in her face. Pet. App. 2a. E.G. told petitioner to leave her alone. R. Tr. 119 (May 13, 2014). He then walked away, and E.G. fell back to sleep. R. Tr. 119 (May 13, 2014). The second time, E.G. saw petitioner rubbing the breasts and thighs of the unconscious A.M. Pet. App. 2a. E.G. yelled at petitioner to get off of A.M. Pet. App. 2a. He again left the room, and she went back to sleep. Pet. App. 2a.

E.G. testified that she woke up a final time in response to what she described as a "sexual motion, like a grinding," and saw petitioner vaginally

penetrating the still-unconscious A.M. Pet. App. 2a. E.G. screamed at petitioner. Pet. App. 3a. He left the apartment, and E.G. called 911. Pet. App. 3a.

Medical personnel came to the apartment and attended to A.M., who they found unconscious and with her leggings and underwear around her ankles. Pet. App. 3a. A.M. was revived and examined at a hospital. R. Tr. 14-18 (May 14, 2014). A.M. had no memory of what had occurred at the apartment, and the nurse who examined her could not determine whether A.M. had been subjected to a sexual assault that included vaginal penetration. R. Tr. 16-21.

Petitioner was arrested, and he admitted to police that he had asked A.M. to have sex with him. Pet. App. 3a. But he denied having any sexual contact with A.M., who had repeatedly turned down his solicitations. Pet. App. 3a. Petitioner also denied any sexual contact with E.G. Pet. App. 3a.

Petitioner was tried on various charges, including the alleged sexual assault of A.M. Near the end of jury selection, defense counsel asked the prospective jurors if they were made uncomfortable by the disparate races of petitioner, an African-American man, and A.M., a white woman. R. Tr. 58 (May 13, 2014). No one expressed any concerns. R. Tr. 58 (May 13, 2014). Several panel members stated that they would not let matters of race influence their verdict and would alert the trial judge if others did. R. Tr. 58-59 (May 13, 2014).

In her opening statement, the prosecutor discussed the distinct skin tones of A.M. and petitioner. She

predicted the jurors would hear that the perceiving witness, E.G., saw "a dark penis going into a white body. That's how graphic she could see." R. Tr. 92 (May 13, 2014). But E.G.'s testimony did not unfold as the prosecutor predicted. Although she testified that she could see that penile penetration occurred, and although the prosecutor questioned her about the difference in the parties' skin color, E.G. did not testify that the contrasting skin tones of A.M. and petitioner enabled her to see a completed sexual assault. R. Tr. 126-127 (May 13, 2014).

Throughout the trial, the trial judge reminded the jurors that they were to evaluate the evidence independent of their personal prejudices and the attorneys' statements. Immediately before opening statements, the judge instructed the jurors that opening statements are not evidence but are intended as an aid in understanding what the evidence will be. R. Tr. 82 (May 13, 2014). Immediately before closing arguments, the judge instructed the jurors that they were not to allow bias or prejudice to influence their decisions in the case. R. Tr. 112-113 (May 14, 2014).

The jury acquitted petitioner of all the charges in which E.G. was the named victim. As to the charges for which the named victim was A.M., the jury acquitted petitioner of every count that required proof of sexual penetration. Pet. App. 5a. But it convicted petitioner of two counts of attempted sexual assault and two counts of unlawful sexual contact. Pet. App. 5a.

2. Proceedings in the Colorado Court of Appeals. Petitioner directly appealed his convictions.

Pet. App. 16a-38a. He argued that the prosecutor's description in opening statement of "a dark penis going into a white body" constituted misconduct that violated Colorado's test for plain error. Robinson C.A. Br. 5-6 (citing *People v. Bowers*, 801 P.2d 511 (Colo. 1990); *Hagos v. People*, 288 P.3d 116 (Colo. 2012); and *Harris v. People*, 888 P.2d 259 (Colo. 1995)). In a published opinion (found at 459 P.3d 605 (Colo.App. 2017)), the court of appeals agreed with petitioner's argument and reversed his convictions. Pet. App. 26a.

The court of appeals applied Colorado's plain-error test, under which "[r]eversal is required if the misconduct was obvious and 'so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction.'" Pet. App. 25a (quoting *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987)). The court concluded that the prosecutor's race-based remarks in her opening statement constituted misconduct because she did not articulate any conceivably proper basis for the remarks. Pet. App. 21a. The court also concluded that the error was obvious, because such race-based statements are "totally off-limits" in all courts "[e]xcept under extremely rare circumstances." Pet. App. 25a. Finally, the court concluded that, although several circumstances may have mitigated the impact of the prosecutor's statements, and although it was impossible to tell if the prosecutor's remarks had any impact on the jury, they cast serious doubt on the reliability of petitioner's convictions because "the risk that Robinson did not receive a fair trial by unbiased jurors is simply too great to ignore." Pet. App. 26a-29a.

3. Proceedings in the Colorado Supreme Court. The Colorado Supreme Court granted certiorari and, in a unanimous decision, reversed the court of appeals. Pet. App. 1a-15a. Although it agreed with the court of appeals that the prosecutor's statements were improper, the supreme court held that reversal was not required under Colorado's test for plain error.

In discussing whether the error was obvious, the supreme court noted that the prosecutor's race-based comments occurred in the context of suggesting to the jury how she expected E.G. to testify. Pet. App. 13a. The supreme court recognized that this expected testimony was at least possibly relevant to whether penile penetration occurred and how E.G. could have seen such penetration in a darkened room. Pet. App. 13a. The court stated that, in these circumstances, "we can discern a reasonable argument that the impropriety of the prosecutor's comments may not have been so obvious as to require the trial court to intervene sua sponte." Pet. App. 13a. And it noted that such an argument had particular force here, "where the comments were made in opening statement and defense counsel did not object, notwithstanding the fact that during voir dire, she had made clear that she was sensitive to the issues of race presented in this case." Pet. App. 13a-14a.

Ultimately the supreme court concluded that it need not decide whether the error was obvious because the other elements required to show plain error under Colorado law were not satisfied. Pet. App. 14a. The court reached this conclusion for two reasons.

First, the trial judge had instructed the jury that it was not to let bias or prejudice influence its decisions, and there was no evidence in the record to suggest that the jury failed to follow this instruction. Pet. App. 14a. Second, the jury acquitted petitioner of every charge to which the improper statements were directed (namely, every charge requiring proof of penetration), which tended to show that the jurors fairly and properly weighed the evidence despite the prosecutor's statements. Pet. App. 14a. For these reasons, the supreme court concluded that the prosecutor's error did not so undermine the fundamental fairness of petitioner's trial so as to cast serious doubt on the reliability of his judgment of conviction, and thus the test for plain error was not met. Pet. App. 14a.

The Colorado Supreme Court did not acknowledge petitioner's argument, which he failed to make in the court of appeals, that the prosecutor's remarks should be examined under a novel standard that would presume prejudice or otherwise relax the application of the plain-error standard when examining race-based comments. Pet. S.C. Br. 30-32.

REASONS FOR DENYING THE PETITION

Petitioner frames the question presented as "whether, to establish that a prosecutor's blatant appeals to racial prejudice constitute plain error, the defendant must show that they altered the jury's verdict." Pet. (i). Petitioner argues that the answer to this question should be "no," but he forfeited the right to make this argument when he failed to raise it in the Colorado Court of Appeals, leaving that court, and later the Colorado Supreme Court, to evaluate the prosecutor's remarks under Colorado's standard test for plain error. Like the federal plain-error test, the Colorado test places the burden of establishing such error on the defendant.

The Colorado Supreme Court's application of its state's plain-error test does not present a federal question for this Court's resolution and petitioner does not assert that Colorado lacks a legitimate interest in enforcing its procedural rule. Instead, he asks the Court to apply a new standard that was not properly raised and was never considered by the Colorado Courts.

I. This Court lacks jurisdiction over this case, because the Colorado Supreme Court did not consider the alleged federal question presented in the petition.

This Court's has authority to correct state judgments that incorrectly adjudicate federal rights. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). But state courts are the ultimate expositors of state law, and this Court is bound by their constructions except in

extreme circumstances. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

Petitioner asserts that this Court has jurisdiction over the Colorado Supreme Court's decision under 28 U.S.C. § 1257(a) as a right claimed under the Constitution of the United States. Pet. 1. But the Colorado Supreme Court did not base its decision upon any federal claim asserted by petitioner. The Colorado Supreme Court affirmed petitioner's convictions because it concluded that the prosecutor's remarks during the trial did not violate the state's test for plain error. *See* Colorado Crim. P. 52(b). As applied by Colorado courts, plain error review involves a three-part inquiry: (1) whether there was an error; (2) whether the error was "plain," meaning that it was clear or obvious; and (3) whether the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *See*, *e.g.*, *Hoggard v. People*, 465 P.3d 34, 43 (Colo. 2020).[1]

[1] Under both the Colorado and the federal tests for plain error, the defendant bears the burden of showing that any error that occurred was plain. *See People v. Vigil*, 127 P.3d 916, 929, 930 (Colo. 2006); *United States v. Olano*, 507 U.S. 725, 734 (1993). But Colorado's test is less stringent than the federal test, which requires a showing of 1) error (2) that is clear or obvious and (3) affects the defendant's substantial rights, meaning that it must have affected the outcome of the district court proceedings. *Olano*, *id.* at 732-736. If the first three elements of the federal test are met, the reviewing court may exercise its discretion to correct the error, but only if (4) the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 736. Colorado has not adopted the fourth element of the federal plain-error test, relieving the defendant of the burden of showing an element that this Court views as essential to establish plain error.

Because his case was resolved under state law, petitioner cannot now ask this Court to consider his constitutional claim. It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that the judgment as rendered could not have been given without deciding it. *Lynch v. New York ex. Rel. Pierson*, 293 U.S. 52, 54 (1934). Here, the Colorado Supreme Court did not address any constitutional issues in its opinion. It did not do so because it was able to resolve the case by applying the state's criminal procedural rule governing plain error.

State procedural rules that provide the basis for an appellate decision will be honored if they serve a legitimate state interest. *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). And the plain-error rule serves a legitimate state interest: It creates an incentive to timely raise claims and objections at the trial court level. It thus enhances the trial court's ability to avoid errors or correct them efficiently. And it prevents litigants from "sandbagging," *i.e.*, remaining silent about an objection and raising it in a belated manner only if the case does not conclude in their favor. *Puckett v. United States*, 556 U.S. 129, 134 (2009).

Petitioner does not question the legitimacy of Colorado's plain error rule, but he argues that a modified form of the rule should be applied in a case like this, where a prosecutor's race-based comments are

challenged on appeal in the absence of an objection at trial. This is an argument that he failed to properly raise in the state courts.

II. Petitioner has forfeited the right to argue that this Court should review the prosecutor's remarks under a modified version of the plain-error test that would relieve him of the burden of showing prejudice to his substantial rights, given his failure to raise that argument in a proper manner in the Colorado courts.

This Court is "a court of review, not first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005). It consistently refuses to address new arguments that were not raised in the lower courts. *See*, *e.g.*, *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) (declining to address in the first instance claims that were not addressed below). The Colorado Supreme Court employs the same approach. *See American Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 326 (Colo. 2009)(declining to consider an argument that was not presented to the Colorado Court of Appeals).

Petitioner argues that, given the nature of the error at issue, the burden should be on the government to prove that the prosecutor's remarks did not affect the outcome of his trial. Alternatively, he argues that the nature of the error should result in the automatic reversal of his convictions. Pet. 15-22.

But in the state court of appeals, petitioner limited his argument to an assertion that the prosecutor's

statements constituted plain error. Robinson C.A. Br. 5-6. He did not argue that he was entitled to automatic reversal, nor did he argue that the government should have the burden of proving that the prosecutor's statements did not affect the jury's verdict.

In the state supreme court, petitioner argued for the first time that the court should consider adopting a different test for evaluating statements that invoke race. Robinson, Colo. S.C. Br., 31-32. The state supreme court did not acknowledge that argument, undoubtedly because petitioner had failed to present it to the state court of appeals.

Petitioner's method of litigating this case is akin to that of the petitioner in *Calhoun v. United States*, 133 S. Ct. 1136 (2013), who argued in a petition for a writ of certiorari that a prosecutor's racially-charged question should lead to automatic reversal of his convictions, even though there was no objection to the question during trial. This Court denied certiorari at least in part because the petitioner was relying on a new argument. *Id*. at 1137 (Sotomayer, J. respecting the denial of certiorari).

Petitioner argues that his case is not like *Calhoun* because he asked the Colorado Supreme Court to apply a modified version of the state plain-error test. Pet. 2. But he overlooks the reality that the Colorado Supreme Court, like this Court, is a court of review rather than first view. Petitioner failed to preserve his arguments in the state supreme court because he did not present them in the state court of appeals. That failure of presentation dooms his present effort. His arguments are not properly preserved for certiorari review.

III. This case is a poor vehicle for resolving the question presented.

The cases cited in the petition for a writ of certiorari — and the precedents cited in those cases — demonstrate that this country has a wretched history of prosecutors making appeals to racial prejudice to juries. And regrettably those appeals are an ongoing problem, as demonstrated by recent case law that petitioner cites.

Respondent does not condone prosecutor appeals to racial animus. But, for several reasons, this case is a poor vehicle for addressing the issue of how to handle such misconduct.

First, this case presents a poor vehicle for resolving the question presented because of the tenor of the prosecutor's remarks. The comments, which were admittedly ill-conceived and inappropriate, highlighted a race-related fact but were unaccompanied by any editorial comment. In this regard, they are different from the comments in most of the cases cited by petitioner, in which prosecutors invoke racial slurs and stereotypes to establish guilt. *See*, *e.g.*, *Calhoun v. United States*, 133 S. Ct. 1136 (2013)(prosecutor asked the defendant on cross-examination why a gathering of African-Americans and Hispanics in a hotel room with a bag full money did not lead him to believe he was witnessing a drug deal); *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990)(prosecutor made generalizations in closing argument about Jamaicans taking over the drug trade); *Miller v. North Carolina*, 583 F.2d 701 (4th

Cir. 1978)(prosecutor's racially inflammatory closing in a rape trial included argument that "the average white woman" would never consent to having sexual relations with a black man); *Reynolds v. State*, 580 So.2d 254 (Fla.App. Dist. 1991) (prosecutor in a sexual battery case repeatedly emphasized that (among other things) white women such as the victim were not safe from defendant, a black man, and that the victim would not have consented to the encounter); *State v. Monday*, 257 P.3d 551 (Wash. 2011) (prosecutor discounted the testimony of African-American witnesses on the basis of their race alone and repeatedly mocked their pronunciation of the word "police" during trial).

Second, this case is a poor vehicle for resolving the question presented because of the circumstances in which the prosecutor's remarks occurred. As the Colorado Supreme Court recognized, the comments at issue occurred in the prosecutor's opening statement, "in the context of suggesting to the jury what E.G. was apparently expected to say in her testimony." Pet. App. 13a. This distinguishes them from the comments in most of the cases petitioner relies on. And, as noted by the Colorado Supreme Court, "[t]his testimony was at least possibly relevant to two evidentiary points, namely, (1) whether Robinson's alleged assault on A.M. included penetration and (2) how E.G. was able to see such penetration in a darkened room." Pet. App. 13(a).[2]

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[2] Relying on newspaper articles that are not part of the appellate record, and indeed do not even pertain to this case, petitioner suggests that the prosecutor's conduct was motivated by a desire to win a conviction at all costs. Pet. 6. To counter that suggestion, respondent directs the Court's attention to a police report (which

It does not necessarily follow from A.M.'s failure to testify as promised that the prosecutor was either "deliberately appealing to racial prejudice or astonishingly oblivious to the meaning of her words." Pet. 6. "Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given." *Frazier v. Cupp*, 394 U.S. 731, 736 (1969).

The prosecutor's comments were injudicious. But, as the Colorado Supreme Court recognized, those comments were an attempt to inform the jury how a witness was expected to testify. They had at least some relevance to an essential element of an alleged sexual assault — *i.e.*, whether sexual penetration had occurred. For this reason, the circumstances of this case present a poor vehicle for addressing the

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is also not part of the appellate record, but was released to petitioner's trial attorney in discovery) that records an interview between a police officer and the perceiving witness, E.G. In response to a question about how she was able see sexual penetration that had occurred in a darkened room, E.G. stated that "[A.M.] is white, and Marcus is black, so she was able to see everything." The report suggests that the prosecutor had benign motives for her remarks — namely, that she expected E.G. to testify about the parties' contrasting skin tones. It also explains why petitioner's trial attorney allowed the prosecutor's remarks to pass without objection.

Respondent will file a motion under Rule 32.3 of the Rules of this Court to lodge the police report with the Clerk as non-record material.

appropriate test for reviewing "blatant appeals to racial prejudice." Pet. (i).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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