No. 19-1218

In the Supreme Court of the United States

MARCUS LEE ROBINSON,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONER

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This Court has repeatedly said that some errors at trial may constitute plain error even if it cannot be shown that they affected the outcome. *See, e.g.*, *United States v. Marcus*, 560 U.S. 258, 263 (2010); *United States v. Olano*, 507 U.S. 725, 735 (1993). The question in this case is whether a prosecutor's appeal to racial prejudice to secure a conviction is one such error. Several lower courts have held that it is. Pet. 18-22. Below, the Colorado Supreme Court disagreed. Pet. App. 1a-16a.

Colorado's Brief in Opposition does not discuss any of the foregoing. Instead, Colorado tries to erect three procedural obstacles to plenary review—jurisdiction, forfeiture, and vehicle. But Colorado is badly mistaken in all three respects.

I. Colorado errs in suggesting that the Court lacks jurisdiction.

First, Colorado asserts (BIO 8-11) that the Court lacks jurisdiction, on the theory that the decision below involves no federal question. This assertion is incorrect. The issues below were whether the prosecutor's appeal to racial prejudice violated the Fourteenth Amendment and, if so, whether the violation constituted plain error. The Court of Appeals answered yes to both. On the first issue, the Court of Appeals held that "a prosecutor's appeal to racial stereotypes or racial bias to achieve a conviction is especially deplorable and gravely violates a defendant's right to due process of law." Pet. App. 20a-21a. On the second issue, the Court of Appeals held that the error was plain, even though "we cannot know with certainty what impact, if any, the prosecutor's

conduct actually had on the jury," because "[i]t is the responsibility of courts 'to purge racial prejudice from the administration of justice.'" *Id.* at 29a (quoting *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017)). The Colorado Supreme Court agreed that the prosecutor's appeal to racial prejudice was constitutional error but held that the error was *not* plain because it could not be shown to have influenced the jury's verdict. Pet. App. 14a-15a.

This is a federal question. "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean." *Chapman v. California*, 386 U.S. 18, 21 (1967). For this reason, this Court has not hesitated to review federal constitutional claims for plain error in cases arising from state courts. *See, e.g.*, *Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The Court has exercised plain error review in such cases because "the Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness." *Webb v. Webb*, 451 U.S. 493, 502 (1981) (Powell, J., concurring).

Colorado makes much (BIO 9-10) of the states' authority to establish their own procedural rules governing appellate review, but this is beside the point. States are obviously entitled to establish their own rules regarding how *state courts* will address plain errors, but such rules do not deprive *this Court* of its jurisdiction to review federal constitutional claims for plain error, regardless of how these claims were addressed in the state courts. In our case, the prose-

cutor's "dark penis" and "white body" remarks were egregious violations of the federal constitution. This Court has the jurisdiction to make its own judgment about whether they constituted plain error.

II. Colorado errs in suggesting that petitioner's claim has been forfeited.

Colorado is simply mistaken in asserting (BIO 11-12) that we failed to raise this issue below. In the Court of Appeals, we argued that the prosecutor's appeals to racial prejudice were so flagrant that they constituted plain error, and the Court of Appeals agreed. We made the same argument in the Colorado Supreme Court. Indeed, in the course of defending the Court of Appeals' judgment, we specifically urged that where a prosecutor injects racial prejudice into a criminal trial, the error is plain regardless of whether it alters the jury's verdict. Robinson Colo. S.C. Br. 31-32.

Colorado errs in claiming (BIO 12) that the Colorado Supreme Court determined that our argument had been forfeited. The court said nothing of the kind. Rather, the court disagreed with us on the merits, by concluding that although the prosecutor's comments regarding the color of the parties' skin were error, "we cannot say that those comments so undermined the fundamental fairness of Robinson's trial as to cast serious doubt on the reliability of his judgment of conviction." Pet. App. 15a.

III. Colorado errs in suggesting that this case is a poor vehicle.

Colorado argues (BIO 13-16) that this case is a poor vehicle, on the theory that no error actually oc-

curred. The fact that Colorado even makes this argument demonstrates how difficult it will be to eradicate racial prejudice from the criminal justice system.

In the trial of an African-American man for sexually assaulting a white woman, the prosecutor repeatedly contrasted Robinson's "dark complexion" and "dark penis" with the alleged victim's "pasty white" skin and "white body." The prosecutor's remarks had no connection to any issue at trial. Both appellate courts below held that this was error. "[V]iewed objectively," the Court of Appeals concluded, this "was an appeal to racial prejudice. Indeed, the prosecutor's words invoked some of the most damaging historical racial stereotypes—stereotypes that have infected judicial proceedings in this country for generations." Pet. App. 21a.

Yet Colorado insists that the prosecutor did nothing wrong. In Colorado's view, her comments were merely "ill-conceived" (BIO 13) and "injudicious" (BIO 15)—but not erroneous. If this argument sounds familiar, it is because Colorado is employing the same never-concede-an-inch litigation strategy the United States used in *Calhoun v. United States*, 133 S. Ct. 1136, 1138 (2013) (statement of Sotomayor, J.) (criticizing the government for defending similar prosecutorial appeals to racial prejudice as merely "impolitic" but not wrong). Our adversarial system has many virtues, but one of its vices is that it encourages government lawyers to secure and preserve convictions at the expense of other important public values, including the elimination of racism from criminal trials. Appeals to racial prejudice continue to mar the criminal justice system in

part because prosecutors have little incentive to change their behavior unless a court forces them to.

In any event, Colorado's contention that no error occurred collapses upon the slightest inspection. Colorado first argues (BIO 13) that the prosecutor's "dark penis" and "white body" remarks were not really so bad because they were "unaccompanied by any editorial comment." But jurors are not simpletons. They do not need the prosecutor to tell them explicitly why she is invoking a vile racial stereotype. Indeed, had the prosecutor added "editorial comment"—such as "I'm dwelling on the parties' skin colors because African-American men are known to rape white women"—it would only have weakened her message, because it would have highlighted the absurdity of the stereotype. As an appeal to racial prejudice, the prosecutor's words were more effective because they drew upon a familiar stereotype without discussing it explicitly.

Colorado next contends (BIO 14-15) that the prosecutor's remarks about the parties' skin colors *did* relate to the evidence at trial, on the theory that the difference in skin color afforded the witness a better view of the alleged assault. But this erroneous claim was thoroughly debunked by both appellate courts below. As both courts correctly observed, the witness never testified to any such thing, and the prosecutor never even attempted to connect her remarks to any of the evidence presented at trial. Pet. App. 11a, 22a-23a. As this case comes to the Court, it involves a prosecutor who was found by the state courts below to have deliberately appealed to racial prejudice to secure a conviction by summoning a racial stereo-

type with no conceivable relevance to any issue the jury could properly consider.

Even now, Colorado continues to defend the prosecutor's misconduct (BIO 14-15 n.2) by proposing to lodge with the Court a police report that played no role at trial and for that reason was not part of the record. But even if this police report is what gave the prosecutor the idea to emphasize Marcus Robinson's "dark penis" and the alleged victim's "white body" in her remarks to the jury, that does not excuse her misconduct, because the prosecutor's remarks had no connection to any evidence that was presented at trial. As the court below found, "[t]he prosecutor did not articulate to the jury any conceivably proper use of the race-based statements. Thus, irrespective of whether a different record might justify such statements, this record does not permit such a conclusion." Pet. App. 21a.

There is no doubt that a serious constitutional error occurred at trial. The only question is whether the error was plain, despite the unknowability of whether it influenced the jury's verdict. This case is an ideal vehicle for addressing this question.

A generation or two ago, one might have expected that by now there would be no need to consider the issue of how a court should remedy a government official's deliberate exploitation of racial prejudice during a criminal trial. One might have hoped that by now the topic would be of interest only to historians. As this case suggests, however, some old habits die hard. Our criminal justice system has not yet fully shaken off the effects of centuries of American history. It is hard to imagine much progress being made without this Court's involvement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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