No. 19-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner is an African-American man who was tried for sexually assaulting a white woman. During the prosecutor's opening statement, she gratuitously contrasted the alleged victim's "pasty white" skin with petitioner's "dark" skin. She described the incident as "a dark penis going into a white body." During the trial, she repeatedly called the jury's attention to petitioner's race and to the fact that he is "dark complected" below the waist. Although the prosecutor's comments had nothing to do with any issue at trial, defense counsel never objected to any of these errors. The Colorado Court of Appeals reversed for plain error, but the Colorado Supreme Court held that the errors were not plain because petitioner had not shown that they altered the jury's verdict.

The question presented is 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.

RELATED PROCEEDINGS

Colorado Supreme Court: *People v. Robinson*, No. 17SC823 (Dec. 9, 2019)

Colorado Court of Appeals, Division VI: *People v. Robinson*, No. 14CA1795 (Oct. 19, 2017)

El Paso County District Court: *People v. Robinson*, No. 13CR4158 (Aug. 1, 2014)

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PETITION FOR A WRIT OF CERTIORARI

Marcus Lee Robinson respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App. 1a) is published at 454 P.3d 229 (Colo. 2019). The opinion of the Colorado Court of Appeals (App. 16a) is unpublished and is available at 2017 WL 4684157 (Colo. Ct. App. 2017).

JURISDICTION

The judgment of the Colorado Supreme Court was entered on December 9, 2019. On February 14, 2020, Justice Sotomayor extended the time to file this certiorari petition to April 8, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in relevant part: "No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

In *Calhoun v. United States*, 133 S. Ct. 1136 (2013), the petitioner sought certiorari on a similar question to the one presented here: How should a court conduct plain error review where the prosecutor violates the Constitution by resorting to racial prejudice in order to secure a conviction? The Court denied certiorari in *Calhoun*, at least in part because

the petitioner had failed to raise the question in the Court of Appeals. *Id.* at 1137 (Sotomayor, J., respecting the denial of certiorari). Justice Sotomayor, joined by Justice Breyer, nevertheless explained that in "suggesting that race should play a role" in determining a defendant's guilt, "the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation." *Id.* She observed that the prosecutor's comment "was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason." *Id.* She declared that "[s]uch conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice." *Id.* at 1138. She concluded: "I hope never to see a case like this again." *Id.*

Our case is even worse than *Calhoun*. The prosecutor's invocation of racial prejudice was far more egregious. The prosecutor in *Calhoun* appealed to a stereotype of African-Americans as drug dealers. *Id.* at 1136. In our case—the trial of a black man for sexually assaulting a white woman—the prosecutor appealed to the stereotype of African-Americans as rapists of white women. The prosecutor invoked this pernicious stereotype multiple times in her opening statement and in direct examination of the state's only witness to the incident. And unlike the petitioner in *Calhoun*, we preserved the question of how courts should conduct plain error review by raising it in the appellate courts below.

1. Petitioner Marcus Robinson is an African-American man. He was charged with sexually assaulting two women, "A.M." and "E.G.," at a party hosted by A.M. and her roommate. App. 17a-18a. He knew both women because he was in an intimate relationship with A.M.'s roommate. *Id.* at 18a.

At the party, A.M. and E.G. drank enough alcohol that they both passed out on the same couch. *Id.* According to E.G., she woke up to find Robinson placing his exposed penis in her face. *Id.* She told Robinson to go away, and he did. *Id.* E.G. went back to sleep.

E.G. testified that when she woke up again, she saw Robinson rubbing A.M.'s thighs and breasts, while A.M. was still unconscious. *Id.* She again told him to go away and again went back to sleep. *Id.*

When E.G. woke up a third time, she said, she saw Robinson vaginally penetrating the still-unconscious A.M. *Id.* E.G. yelled at Robinson. *Id.* He left the apartment. *Id.* E.G. called 911. *Id.*

When Robinson was arrested, he admitted to the police that he had asked A.M. to have sex with him before she passed out, but he insisted that he had left her alone after she declined. *Id.* He expressed remorse for even having asked, because of his relationship with A.M.'s roommate. *Id.* He denied having had any sexual contact with either A.M. or E.G. *Id.*

The trial turned entirely on whether the jury believed E.G.'s version of what took place at the party. The nurse who examined A.M. found no injuries to her internal or external genitalia. *Id.* at 19a. A DNA expert found a trace amount of male DNA on A.M.'s external genitalia, but the sample was too small to

be matched to any individual. *Id.* E.G.'s testimony was the most important part of the trial.

Race was not an issue—until the prosecutor made it one.

2. During the prosecutor's opening statement, while discussing the charged offenses, she suddenly switched to a racial comparison between A.M. and Robinson:

> You're going to hear that [A.M.] is white. And she's actually pretty pasty. She's pasty white. And you obviously have seen Mr. Robinson is dark. He is an African American of dark complexion. [E.G.] looks over and she can see a dark penis going into a white body. That's how graphic she could see.

Id. at 16a. Defense counsel did not object. *Id.* at 17a. The trial court did not reprimand the prosecutor or instruct the jury to disregard her remarks. *Id.*

The race of the parties served no evidentiary purpose at trial. E.G. did not testify, for example, that she was able to identify Robinson by the color of his skin, or that the contrast between the parties' skin colors helped her to see the assault more clearly. *Id.* at 22a. E.G. did not mention Robinson's race at all—until the prosecutor brought the matter up yet again. During her direct examination of E.G., the prosecutor repeatedly urged E.G. to describe Robinson's skin color:

> Q: How was Mr. Robinson dressed at this point?
>
> A: Um, at this point by the third incident he was actually—he was naked from the waist

> down. That I do remember. I can't remember if he was wearing a shirt or not. But he was naked from the waist down because he had to run and get pants.
>
> Q: What race is Mr. Robinson?
>
> A: He's African American.
>
> Q: And how would you describe his complexion?
>
> A: It's dark.
>
> Q: Could you see his penis?
>
> A: Like if I had to draw a picture of it, no. But the fact that I saw him from the waist down and he was naked from the waist down and when he took off, I could see his butt clearly.
>
> Q: And is he dark complected at that location on his body as well?
>
> A: Yes.

Id. at 22a-23a. Again, defense counsel did not object, and the trial court did not tell the jury to disregard the prosecutor's questions about the color of Robinson's skin.

The prosecutor never made any effort to connect this colloquy about race, or her similar statements in opening argument, to any aspect of the government's case. In her closing argument, she did not assert, for instance, that the difference between Robinson's skin tone and that of A.M. had any bearing on whether E.G. had a clear view of the alleged assault, or on any other matter the jury would be considering. *Id.* at 23a.

It hardly needs saying that the prosecutor was invoking the oldest and most vicious racist stereotype in our history, that of the lustful African-American

man who rapes white women. *See* Randall Kennedy, *Race, Crime, and the Law* 90 (1997) (discussing "[t]he folklore that black men have a dangerous, virtually ungovernable lust for white women"). The color of Mr. Robinson's skin had nothing to do with whether he committed sexual assault. By emphasizing his race—especially in urging the jury to visualize the alleged incident as "a dark penis going into a white body"—the prosecutor was either deliberately appealing to racial prejudice or astonishingly oblivious to the meaning of her words.[1]

The jury acquitted Robinson of all the charges relating to E.G. App. 19a. The jury also acquitted Robinson of some of the counts relating to A.M. *Id.* But the jury convicted Robinson of unlawful sexual contact and attempted sexual assault relating to A.M. *Id.* The trial court sentenced Robinson to a prison term of four years to life. *Id.*

3. The Colorado Court of Appeals reversed. *Id.* at 16a-38a.

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[1] The prosecutor in this case has been reprimanded several times for exceeding the bounds of permissible advocacy, including by one judge who said she "has a goal of winning, of winning at any and all costs, throwing fair blows as well as foul blows." "Judge Lambastes Colorado Springs Prosecutor After Third Courtroom Error in 6 Months," *Colorado Springs Gazette*, Mar. 2, 2015, https://gazette.com/news/judge-lambastes-colorado-springs-prosecutor-after-third-courtroom-error-in/article_abfcc15e-aef3-50ac-9d30-d9a289d164b1.html; "El Paso County Prosecutor's Conduct Eyed in Alleged Jailhouse Murder Plot," *Colorado Springs Gazette*, May 28, 2017, https://gazette.com/crime/el-paso-county-prosecutor-s-conduct-eyed-in-alleged-jailhouse/article_0b5e3933-f0b2-5d34-89cf-fb0efe09057f.html.

The Court of Appeals held that the prosecutor's remarks were "Flagrantly, Glaringly, and Tremendously Improper." *Id.* at 20a. The court explained 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." *Id.* at 20a-21a.

As the Court of Appeals observed,

> The prosecutor did not articulate to the jury any conceivably proper use of the race-based statements. … Instead, viewed objectively, the prosecutor's opening statement, by its words and in the context it was presented to the jury, 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.

Id. at 21a.

The Court of Appeals applied the plain error standard of review, 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." *Id.* at 25a (citation and internal quotation marks omitted).

The Court of Appeals determined that the misconduct was obvious. *Id.* The court noted that "such racially based statements are, and have been for years, totally off-limits in all courts in the United States." *Id.*

The Court of Appeals also determined that the error cast serious doubt on the reliability of Robinson's conviction, for four reasons.

First, the court took note of this Court's then-recent admonition, in another case arising from the Colorado courts, that "we must treat errors implicating racial discrimination 'with added precaution,'" because "'racial bias implicates *unique* historical, constitutional, and institutional concerns.'" *Id.* at 27a-28a (quoting *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868-69 (2017)).

Second, the court observed that "racial bias operates on multiple levels," both overt and subtle. *Id.* at 28a. Such bias "often surfaces indirectly or inadvertently and can be difficult to detect." *Id.* (citation and internal quotation marks omitted).

Third, the court took note of several studies showing that "principles of primacy may cause statements and arguments made early in a trial to have a disproportionately influential weight." *Id.*

Finally, the court explained that "in view of the unique concerns attendant to a prosecutor's appeal to racial prejudice," the prosecutor's error "fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct." *Id.* at 28a-29a (citation and internal quotation marks omitted).

The Court of Appeals acknowledged that "we cannot know with certainty what impact, if any, the prosecutor's conduct actually had on the jury." *Id.* at 29a. But the court determined that "the risk that

Robinson did not receive a fair trial by unbiased jurors simply is too great to ignore." *Id.* The court concluded: "It is the responsibility of courts 'to purge racial prejudice from the administration of justice.'" *Id.* (quoting *Pena-Rodriguez*, 137 S. Ct. at 867). "Only by reversing Robinson's convictions and giving him a new trial without racial taint can we discharge this responsibility." *Id.* at 29a.

Judge Furman wrote a concurring opinion in which he urged the Colorado Supreme Court to provide further guidance on this issue. *Id.* at 32a-38a.

4. The Colorado Supreme Court reversed. *Id.* at 1a-15a.

In the Colorado Supreme Court, Robinson, while defending the judgment of the Court of Appeals, also argued that for such blatant prosecutorial appeals to racial prejudice, appellate courts should not require the defendant to show that the prosecutor's comments altered the jury's verdict. He pointed out that "several jurisdictions have presumed prejudice or modified the prejudice showing when the prosecution improperly injects race into a trial, because the constitutional rights at stake demand greater oversight from appellate courts." Robinson Colo. S.C. Br. 31-32 (citing *Weddington v. State*, 545 A.2d 607, 614-15 (Del. 1988) ("In our opinion, the right to a fair trial that is free of improper racial implications is so basic to the federal Constitution that an infringement upon that right can never be treated as harmless error."); *State v. Monday*, 257 P.3d 551, 557-58 (Wash. 2011) (applying constitutional harmless error standard despite defense counsel's failure to object, because the prosecutor's use of racist rhetoric at trial

"fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial that its very existence demands that appellate courts set appropriate standards to deter such conduct."); *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005) (reversing despite strong evidence of guilt because "[a]ffirming this conviction would undermine our strong commitment to rooting out bias, no matter how subtle, indirect, or veiled."); *Miller v. North Carolina*, 583 F.2d 701, 708 (4th Cir. 1978) ("Where the jury is exposed to highly prejudicial argument by the prosecutor's calculated resort to racial prejudice on an issue as sensitive as consent to sexual intercourse in a prosecution for rape, we think that the prejudice engendered is so great that automatic reversal is required.")).

The Colorado Supreme Court did not accept this argument. Rather, the court held that although the prosecutor's race-based statements were improper, they did not amount to plain error, because they did not alter the jury's verdict.

In finding the prosecutor's statements improper, the Colorado Supreme Court observed that "the fact that racial considerations were introduced here, in the context of alleged sex crimes, made the risk of prejudice particularly acute, given the history of racial prejudice in this country." App. 10a. The court rejected the state's contention that the prosecutor's discussion of race merely explained how E.G. was able to observe the alleged sexual assault. *Id.* at 11a-12a. "Indeed," the court noted, "E.G. said nothing in her testimony about Robinson's race or the darkness of his skin until the prosecutor inquired directly about those attributes." *Id.* at 11a.

But the Colorado Supreme Court held that the error was not plain. The court reasoned that it "need not decide … whether the error at issue was obvious because even assuming, for the sake of argument, that it was, on the facts of this case we cannot say that the error so undermined the fundamental fairness of Robinson's trial so as to cast serious doubt on the reliability of his judgment of conviction." *Id.* at 14a.

The court provided two reasons for this conclusion.

First, while giving the standard jury instructions before the jury began deliberating, "the trial judge instructed the jurors that they were not to allow bias or prejudice of any kind to influence their decisions in this case, and absent evidence to the contrary, we presume that the jury followed this instruction." *Id.*

Second, the court noted that the jury acquitted Robinson of every charge requiring proof of penetration. "This indicates that the jury rejected the pertinent portions of E.G.'s testimony (and the prosecutor's assertions)," the court concluded, "and it tends to show that the jurors heeded the court's instruction not to allow bias or prejudice to influence their decisions." *Id.* The court added that "the fact that the jury acquitted Robinson of every charge to which the improper statements were directed tends to show that the jury could fairly and properly weigh and evaluate the evidence, notwithstanding the prosecutor's race-based comments." *Id.*

The court thus concluded that because Robinson could not show that the prosecutor's comments altered the jury's verdict, the error did not "cast seri-

ous doubt on the reliability of his judgment of conviction." *Id.* at 15a.

REASONS FOR GRANTING THE WRIT

"The Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987). As the Court has held "[t]ime and again," *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017), "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Id.* at 868 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). "Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)). A criminal trial in which the prosecutor repeatedly invokes an abhorrent racist stereotype in order to secure a conviction is obviously not consistent with due process or equal protection. As the Colorado courts recognized, a constitutional error plainly occurred at Marcus Robinson's trial. The only question is how that error should be reviewed on appeal in light of defense counsel's failure to object.

The standard of appellate review for the violation of a federal constitutional provision is itself 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).

Where the state courts have reviewed a federal constitutional claim for plain error, this Court may

do so as well. *Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Where a federal constitutional error has occurred at trial, therefore, whether the error is plain—that is, whether the conviction should be reversed despite defense counsel's failure to object—is a federal question.

It is also an important question. There was a time when courts allowed prosecutors to use racist rhetoric to secure convictions. This was especially true in cases of interracial sexual assault, in which prosecutors would appeal to the stereotype of the predatory black man defiling the pure white woman. *Calhoun*, 133 S. Ct. at 1137 (Sotomayor, J., respecting the denial of certiorari) (citing examples); *see, e.g.*, *McQuirter v. State*, 63 So. 2d 388, 390 (Ala. Ct. App. 1953) (finding sufficient evidence that "defendant intended to gratify his lustful desires" because "the prosecutrix was a white woman and defendant was a Negro man").

But times have changed. Courts should not be allowing prosecutors to make such arguments any longer. This case raises a question that goes to the heart of what it means for a trial to be fair: Where a prosecutor repeatedly makes blatant appeals to racial prejudice to secure a conviction, does plain error review require the defendant to show that the prosecutor's invocation of racism altered the jury's verdict?

I. Where a prosecutor appeals to racial prejudice to secure a conviction, the error is plain, without regard to whether the defendant can show that it influenced the verdict.

The decision below is incorrect. Where the prosecutor violates the Constitution by appealing to vile racial stereotypes to secure a conviction, the error is plain. The defendant need not show that the prosecutor's racism caused the jury's verdict to change.

An error is plain where: (1) it was not "intentionally relinquished or abandoned"; (2) it was "clear or obvious"; (3) it "affected the defendant's substantial rights"; and (4) it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018) (citations and internal quotation marks omitted). There is no dispute about the first, second, or fourth of these criteria. First, Marcus Robinson did not intentionally abandon his right to a trial free from flagrant racism. Second, the prosecutor's repeated discussions of the blackness of Robinson's genitalia and the whiteness of A.M.'s skin were clear and obvious errors. And fourth, there can be little doubt that the prosecutor's appeal to racial prejudice seriously affected the fairness, integrity, and public reputation of judicial proceedings. The trial can hardly be called fair. It must have damaged the public reputation of the criminal justice system among those who heard of it, especially the African-American residents of Colorado Springs and the surrounding county, who can now scarcely have much confidence that they will receive fair trials. As the Court has emphasized, racial prejudice "poisons pub-

lic confidence in the evenhanded administration of justice." *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015).

Only the third criterion is at issue—whether, to show that the error affected Robinson's "substantial rights," he must demonstrate that it changed the jury's verdict. In the "ordinary case," a defendant must make this showing to establish plain error. *See, e.g.*, *United States v. Marcus*, 560 U.S. 258, 262 (2010). But the Court has always been careful to note that some errors may affect substantial rights even where the defendant cannot show that they influenced the jury's verdict. *Id.* at 263 (citing cases); *United States v. Olano*, 507 U.S. 725, 735 (1993) ("There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome.").

A prosecutor's flagrant appeal to racial stereotypes is such an error—one that is plain even where the defendant cannot show that it affected the verdict. It is "[a] constitutional rule that racial bias in the jury system must be addressed," not merely to distinguish the guilty from the innocent, but also because it "is necessary to prevent a systemic loss of confidence in jury verdicts." *Pena-Rodriguez*, 137 S. Ct. at 869. Racial prejudice at trial "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose*, 443 U.S. at 555-56. If the reason for ridding trials of racism were merely to ensure accurate verdicts, we would permit prosecutors to don Ku Klux Klan costumes or Nazi uniforms—so long as the defendants are guilty.

At the very least, the burden should be placed on the government to prove that a prosecutor's appeal to racist stereotypes did *not* affect the jury's verdict. *See Olano*, 507 U.S. at 735 (noting that on plain er-

ror review, there are some "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice").

Unlike with a typical error, the effect of which can be assessed by weighing the strength of the evidence left over once the error has been corrected, the impact of a prosecutor's appeal to racial stereotypes is extraordinarily difficult to gauge. When "a defendant's race [is made] directly pertinent …, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record." *Buck*, 137 S. Ct. at 777.

This is because racism often exerts its influence below the level of the jurors' awareness. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1129 (2012) (observing that the impact of racial attitudes and stereotypes "on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes"). No juror will consciously think: "I would have acquitted, but for that racist stereotype on which the prosecutor relied." Rather, the prosecutor's reliance on a racist stereotype primes the jurors to think of the defendant as less than fully human. Jurors may implicitly give more credence to the prosecutor's white witnesses and less to the defendant's own account. As a result, they may subconsciously resolve close calls against the defendant rather than against the government. The impact of implicit bias is difficult, if not impossible, to measure.

Here, for example, the jury acquitted Marcus Robinson of some of the charges but convicted him of others. The Colorado Supreme Court thought this

meant the jury had not been influenced by the prosecutor's "dark penis" and "white body" comments. App. 14a. But it would be just as reasonable to infer that without these comments the jury would have acquitted Robinson of *all* the charges. As Judge Furman noted below, the "illogical verdict in this case" may have been "a compromise verdict … poisoned by racial prejudice." *Id.* at 34a-35a. It is impossible to know which of these two inferences is correct.

Similarly, the Colorado Supreme Court thought that the prosecutor's appeals to a racist stereotype were neutralized by the trial court's boilerplate instruction that jurors "were not to allow bias or prejudice of any kind to influence their decisions." *Id.* at 14a. But such an instruction, provided at the end of a trial, cannot neutralize the ways in which the jurors were subconsciously primed to perceive the evidence through the lens of the stereotype. Jurors may *believe* that racial prejudice plays no role in their decision, but they may be wrong, because they are unaware of the stereotype's influence.

It will thus often be difficult for the defendant to show that the prosecutor's reliance on racism influenced the verdict, and it will often be equally difficult for the government to show the opposite. One party or the other will be left with a heavy burden. That burden should be placed on the government, the party that committed the error and that can prevent similar errors from taking place in the future by training its prosecutors to refrain from the kind of blatant racial stereotyping that took place in this case.

II. The decision below is contrary to decisions of many lower courts that have found plain error in similar circumstances, even where the defendant cannot show that the prosecutor's appeal to racial prejudice altered the verdict.

Several lower courts have held that where the prosecutor appeals to racial prejudice to secure a conviction, the error is plain even where the defendant cannot show that it altered the jury's verdict. Some courts apply a rule of automatic reversal in this situation. Others place the burden of showing harmlessness on the government. Either of these approaches is more sensible than the approach adopted by the Colorado Supreme Court, in light of the importance of ensuring that racism plays no role at trial.

A. Some courts reverse automatically where the prosecutor appeals to racial prejudice, and where defense counsel fails to object at trial. These courts have recognized that "[w]hen an improper appeal to racial prejudice infects a proceeding, … a substantial right of the defendant is violated, prejudice is presumed, and reversal is required." *State v. Thompson*, 233 So. 3d 529, 563 (La. 2017). They have acknowledged that "the right to a fair trial that is free of improper racial implications is so basic to the federal Constitution that an infringement upon that right can never be treated as harmless error." *Weddington v. State*, 545 A.2d 607, 614-15 (Del. 1988).

In *Miller v. North Carolina*, 583 F.2d 701 (4th Cir. 1978), for example, African-American defendants were tried for raping a white woman. Their defense

was that the woman had consented to intercourse. *Id.* at 704. At closing argument, the prosecutor repeatedly referred to the defendants as "these black men," and argued to the jury that the woman did not consent because "the average white woman abhors anything of this type in nature that had to do with a black man." *Id.* Defense counsel did not object. *Id.* The Fourth Circuit held that "the prosecutor's remarks so infected the proceeding as to deny appellants due process of law." *Id.* at 707.

The Fourth Circuit then turned to the appropriate standard of review. The court held that the error was one that "infects the entire proceeding making it impossible to evaluate the effect of the error on the jury. As a consequence, with such errors reversal is automatic." *Id.* at 708. The Fourth Circuit concluded that despite defense counsel's failure to object, "[w]here the jury is exposed to highly prejudicial argument by the prosecutor's calculated resort to racial prejudice on an issue as sensitive as consent to sexual intercourse in a prosecution for rape, we think that the prejudice engendered is so great that automatic reversal is required." *Id.*

The same automatic reversal standard was adopted in *Reynolds v. State*, 580 So. 2d 254, 255-56 (Fla. Ct. App. 1991), another case involving an African-American defendant charged with sexually assaulting a white woman. During the trial, the prosecutor repeatedly referred to the parties' races. Defense counsel failed to object. *Id.* at 256. The court concluded that despite the lack of an objection, "the prosecutor's racial comments, which focused on the crucial issue of consent and improperly injected the issue of race into the prosecution, were so egregious

and pervasive that Reynolds was deprived of his right to a fair trial." *Id.* The court held that such comments "constitute fundamental error requiring automatic reversal." *Id. See also Perez v. State*, 689 So. 2d 306, 307-08 (Fla. Ct. App. 1997).

Likewise, in *State v. Kirk*, 339 P.3d 1213, 1214 (Idaho Ct. App. 2014), another case involving an African-American defendant accused of sexual offenses against a white victim, "the prosecutor improperly injected race into his case by singing the first few lines of the song 'Dixie' during closing argument." Defense counsel failed to object. *Id.* at 1215. The court held that in reviewing the error, it would not "focus on the strength of the State's evidence," because "provocation of racial animus against a criminal defendant carries some of the characteristics of structural error in that racial bias implicates the defendant's right to a trial before an impartial jury." *Id.* at 1218. The court thus reversed the conviction, even though "nothing in the record suggests that the jurors harbored any racial prejudice or that they were actually influenced by the prosecutor's recitation of 'Dixie.'" *Id.*

B. Other lower courts have held that where the prosecutor appeals to racial prejudice to secure a conviction, and where defense counsel fails to object, the burden of proving harmlessness beyond a reasonable doubt should be placed on the government. For instance, in *State v. Monday*, 257 P.3d 551 (Wash. 2011), an African-American defendant was tried for murder. At trial, the prosecutor repeatedly suggested that African-Americans adhered to an "antisnitch code" preventing them from testifying

against each other. *Id.* at 557. Defense counsel did not object. *Id.* The Washington Supreme Court held that this was constitutional error. *Id.* "It is deeply troubling that an experienced prosecutor … would resort to such tactics," the court observed. *Id.* "The notion that the State's representative in a criminal trial, the prosecutor, should seek to achieve a conviction by resorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained." *Id.*

The Washington Supreme Court then turned to the appropriate standard of review. A prosecutor's appeal to racial prejudice "is so repugnant to the concept of an impartial trial that its very existence demands that appellate courts set appropriate standards to deter such conduct," the court reasoned. *Id.* at 558. "Such a test exists: constitutional harmless error." *Id.* The court accordingly held that despite the absence of an objection, "when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. We also hold that in such cases, the burden is on the State." *Id.*

Similarly, in *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990), two Jamaican defendants and one African-American defendant were tried on drug charges. Throughout the trial, the prosecutor repeatedly stated that Jamaicans were involved in drug trafficking. *Id.* at 18. In his summation, the prosecutor argued to the jury that "what is happen-

ing in Washington, D.C., is that Jamaicans are coming in, they're taking over the retail sale of crack in Washington, D.C. It's a lucrative trade. The money, the crack, the cocaine that is coming into the city being taken over by people just like this—just like this." *Id.* at 24. Defense counsel did not object. *Id.* at 26. The D.C. Circuit found that this was constitutional error, because "the Constitution prohibits racially-biased prosecutorial arguments. Racial fairness of the trial is an indispensable ingredient of due process." *Id.* at 25 (footnotes, citations, and internal quotation marks omitted).

The D.C. Circuit then turned to the appropriate standard of review. The court determined that plain error was the appropriate standard, in light of defense counsel's failure to object. *Id.* at 26. In assessing prejudice, however, the D.C. Circuit borrowed the harmless error standard from *Chapman v. California*, under which the government must establish harmlessness beyond a reasonable doubt. *Id.* at 27-28. The court concluded: "We are satisfied that the Government cannot survive that exacting test." *Id.* at 28.

* * *

In our case, the prosecutor's repeated discussions of black genitalia and white bodies—in the trial of an African-American man accused of sexually assaulting a white woman—evoked the abhorrent stereotype that once routinely plagued trials like this one. It would not be surprising to read such comments in a trial transcript from the era of the Scottsboro Boys. It is appalling to read them in a trial transcript from

2014. If this was not plain error, it is hard to imagine what would be.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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