IN THE
Supreme Court of the United States

HOMAIDAN AL-TURKI,
Petitioner,

v.

COLORADO,
Respondent.

On Petition for Writ of Certiorari
to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Pursuant to the Due Process Clause and the Sixth Amendment's guarantee of an impartial jury, a trial court must allow probing of a potential juror at *voir dire* for possible bias when there is a "significant likelihood" that racial or similarly invidious prejudice might infect the juror's deliberations. *Ristaino v. Ross*, 424 U.S. 589, 598 (1976); *accord Turner v. Murray*, 476 U.S. 28 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1973). In this case, petitioner, an Arab Muslim who faced an ethnically and religiously infused prosecution on charges punishable by life in prison, sought to probe the views of a juror who stated during *voir dire* that he was "more likely to believe" a Muslim would commit a crime and that, "notwithstanding the facts presented, . . . my bias may be altered based on the belief [that petitioner] would be obeying religion versus law." App. 14a.

The question presented is whether the courts below erred in refusing to allow petitioner to probe the juror for potential bias (or to dismiss the juror for cause) on the ground that the juror's comments "did not unequivocally express actual bias." App. 16a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Homaidan Al-Turki respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

OPINIONS BELOW

The Colorado Court of Appeals' opinion, App. 1a, is unreported, although the decision is noted at 2009 WL 147006. The order of the Colorado Supreme Court denying review of that decision, App. 30a, is unreported, although it can be found at 2009 WL 2916999.

JURISDICTION

The Colorado Supreme Court denied review in this case on September 14, 2009. App. 30a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that "the accused shall enjoy the right to a . . . trial [] by an impartial jury of the State and district wherein the crime shall have been committed."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This case presents an important issue involving the right of a criminal defendant to obtain the benefit of trial by an impartial jury.

1. Petitioner Homaidan Al-Turki is a Saudi Arabian citizen who moved to the United States in 1995. He settled near Denver, and, until the prosecution at issue here, was pursuing a Ph.D in linguistics at the University of Colorado. He lived with his wife and five children, two of whom are U.S. citizens. Petitioner also opened and operated a bookstore that sold Islamic texts and merchandise.

Unbeknownst to petitioner, the federal government began closely monitoring him in 2001 or 2002, based on his national origin and traditional Muslim beliefs. This surveillance lasted for years, but the federal government never charged him with any crime. As part of this surveillance, however, the federal government learned that petitioner had a live-in housekeeper from Indonesia, Z.A., and that her work visa was expired. On November 19, 2004, federal officials arrested and jailed Z.A. on immigration violations. These violations gave the federal government the power to deport her.

Over the course of five months, federal agents repeatedly interrogated Z.A., seeking to uncover evidence that petitioner was involved in some kind of wrongdoing. During over a dozen consecutive interviews (with FBI agents, counselors, and an Indonesian consular official who spoke with Z.A. in her native language), Z.A. denied being aware of any

malfeasance and told federal authorities that petitioner's family treated her well. Among other things, federal agents repeatedly asked Z.A. if petitioner had sexually assaulted her, and she repeatedly said no.

On April 7, 2005, however, Z.A. alleged for the first time that she had been sexually abused by petitioner for the previous four years. She also claimed that petitioner had refused to pay her for much of the work she performed. The next day, she signed an application for U.S. work authorization. The government granted the application shortly thereafter, allowing her to avoid deportation and stay and work in the United States.

2. The State of Colorado charged petitioner with twelve counts of aggravated sexual assault; kidnapping; conspiracy to commit first-degree kidnapping; criminal extortion; and false imprisonment. Petitioner maintained his complete innocence, and the case proceeded to trial.

A pool of 106 potential jurors was selected for the case. Even though the parties' positions made clear at the outset that ethnically and culturally sensitive issues would be threaded throughout the case, the trial judge tightly restricted *voir dire.* After distributing a basic jury questionnaire that informed the jurors that the defendant and the victim in the case were "Muslims from the Middle East and Indonesia," App. 20a, the judge described the charges to the venire members and told them that petitioner "says he did not commit these crimes." Tr. 2582. The judge then posed the generic question to all 106

venire members simultaneously whether they could be "fair and impartial" in the case. The trial court deemed all of the jurors who failed to say anything as qualified to serve. The parties were then given 45 minutes to question the jury pool and to exercise their peremptory challenges.

Twelve people were selected to serve on the jury. As the court began to swear in the jury, one of the twelve, Juror C.M., interrupted the proceedings to ask a question:

> Before I take this oath, can I ask one question that I didn't address previously because I was under the impression that it really wouldn't matter. But with respect to the religious issue that has come to light in this, it appears what comes to light in what would be this trial, if I'm more likely to believe a person of faith would commit a crime if it conflicted – if the faith conflicted with the laws of our government. It being said that the Muslim religion will be at issue here, it is my understanding that the laws of God are higher than the laws of man. Would it be a bias that I have or would that be consistent with the Muslim religion?

App. 13a. The trial court responded by telling Juror C.M. in simple terms that he had a duty to base his decision on the evidence and applicable legal principles. Juror C.M. nonetheless persisted:

> What I say, *notwithstanding the facts presented,* if it came to a situation where it was a he said, she said issue, *my bias may be*

> *altered based on the belief he would be obeying religion versus law.*

App. 14a (emphasis added). After the trial court repeated its previous boilerplate admonition, Juror C.M. tried a third time to ascertain whether his predisposition was legally disqualifying:

> I guess at this time I may have some issue with that religion based on my belief that it is fundamentally my belief the laws of this country – and I'm concerned that I don't know – *I guess I'm presenting you what I may or may not have a bias going into this case*, and I'm – *I just don't know if that would be considered bias* or that would be considered factually consistent with religion that may be at hand here.

Tr. 2756, quoted in part at App. 14a (emphasis added).

At this point, petitioner requested leave to question Juror C.M. further about his views toward Islamic religion. The trial court denied that request. Petitioner then asked that the court excuse the juror for cause. The trial court denied that request too. Because petitioner had used all of his peremptory challenges, Juror C.M. then was seated, over defense objection, on the jury without any further questioning.

As indicated during pretrial proceedings, the prosecution sought to prove its allegations at trial by constant reference to Islamic culture and supposed Muslim practices. In opening statements, the

prosecution cast petitioner's requirement that Z.A. dress in traditional Muslim attire while in his house as indicative of his guilt. For example, the prosecution argued that the Muslim requirement that Z.A. cover her face made her "invisible" as a person, put her in "isolation," and, indeed, made her an "invisible prisoner." Tr. 2792. The prosecution explained to the jury "the People are asking you . . . to make her visible again." Tr. 2803.

The prosecution did not introduce any physical or forensic evidence to support its allegations. Nor did it offer any eye or ear witnesses testimony concerning its sexual assault allegations from anyone other than Z.A. Instead, it rested on Z.A.'s statements, and it introduced evidence concerning purported Muslim culture to explain why Z.A. never accused petitioner of any wrongdoing during the years the acts were supposedly committed. For instance, the prosecution brought a mannequin dressed in Muslim women's clothing into court to show the jury how petitioner required Z.A. to dress. It also questioned Z.A. extensively on the restrictive nature of such clothing. What is more, the prosecution called an expert witness in "Islamic and Muslim culture" and "women's issues." Explaining to the jury that her opinions derived in part from familiarity with the family of Osama bin Laden, the witness harshly critiqued Islam's general treatment of women. She claimed, for example, that "[i]n Islamic jurisprudence" in Saudi Arabia, women are "punished" for reporting sexual assault through "house arrest" or "honor killing." Tr. 3441-42. A rape, the witness added, could be "corrected" by having the victim marry the perpetrator. Tr. 3441.

The prosecution pushed these anti-Islamic themes still further in closing argument. It suggested that petitioner had been living in the United States long enough to "know[] the rules here," and that he had transgressed some norm that live-in housekeepers "aren't told what to wear." Tr. 2115. The prosecution further claimed that petitioner was "holding [Z.A.] captive," Tr. 2118, and required her to perform "extra assignments" such as entertaining during "Ramadan." Tr. 2121. The prosecution even referred to the September 11 terrorist attacks, arguing that Z.A. was so isolated that she did not even know about those events until considerably after they occurred. Tr. 4219-20.

The defense claimed in closing that Z.A. had lied to the federal agents, after months of prodding, to avoid deportation and objected that the "premise" of the whole prosecution was really "Islamophobia." Tr. 2137. "You're being asked," the defense suggested to the jury, "to select the deeply held beliefs of Mr. Al-Turki and his family and indeed those belonging to about a billion people on the planet, one of the world's great religions, and selectively take those instead of evidence instead of [proof] and say that they intended to use practices and to make this woman invisible, to subjugate her, to imprison her." Tr. 2137. The defense urged the jury not to give into "fear" concerning "cultural issues" and to acquit for the lack of "hard evidence" indicating that petitioner had committed any crimes. Tr. 2137-38.

The jury acquitted petitioner of the kidnapping charges. It also acquitted him of the aggravated sexual assault charges. But it convicted him of

twelve counts of the lesser included offense of unlawful sexual contact. It also convicted him of false imprisonment, conspiracy to commit false imprisonment, and criminal extortion. The trial court sentenced him to the maximum term of twenty-eight years to life in prison.

3. Petitioner appealed, arguing among other things that the trial court's limitations on *voir dire* – especially its refusal to allow questioning of C.M. – "denied Mr. Al-Turki his rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution." Deft's C.A. Br. 20 (opening paragraph of argument). After developing that claim in his brief, petitioner further contended that the trial court "violat[ed] Mr. Al-Turki's rights to due process and a fair trial by an impartial jury. *See Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (due process requires that defendant be permitted to question prospective jurors about potential race bias in cases where facts raise racial issues)." Deft's C.A. Br. 40.

The Colorado Court of Appeals rejected this argument and affirmed. It did not dispute that ethnically and religiously charged contentions were at the core of petitioner's case. But the court of appeals reasoned that petitioner was not entitled to question Juror C.M. about those issues because "Juror C.M.'s comments did not unequivocally express actual bias against defendant or his religion." App. 16a. The court of appeals supported that holding by citing to *Carrillo v. People*, 974 P.2d 478 (Colo. 1999), in which the Colorado Supreme Court held that a trial court need not allow further

questioning of a juror unless the juror "articulate[s] a clear expression of bias." *Id.* at 488.

4. Petitioner sought discretionary review in the Colorado Supreme Court. In the first paragraph of his argument, he contended: "The trial court's refusal to permit further questioning or, alternatively, excuse the juror for cause violated Mr. Al-Turki's constitutional rights to due process and to a fair and impartial jury. U.S. Const. amends. V, VI, XIV." Deft's Pet'n for Cert. 6. The State opposed review, asserting that "it is clear that by stating that Juror C.M. 'did not unequivocally express actual bias,' the court of appeals meant exactly what [the Colorado Supreme] Court meant in stating in *Carrillo* that the challenged juror did not 'articulate a clear expression of bias requiring his dismissal.'" State's Opp. to Cert. 9.

The Colorado Supreme Court denied review, with one justice stating that he would have granted review to address two of petitioner's claims, including his claim regarding *voir dire.* App. 30a-31a.

5. This petition follows.

REASONS FOR GRANTING THE WRIT

This Court repeatedly has made clear that a trial court must allow a defendant in a criminal case to probe prospective jurors for bias whenever there is a "significant likelihood" that racial or similarly invidious prejudice might infect the juror's deliberations. Here, at the outset of an ethnically and religiously infused prosecution, petitioner sought to question a potential juror who interrupted the taking of his oath to say he was biased against Muslims. The trial court, however, rejected this request for questioning, and the Colorado Court of Appeals affirmed, holding that the juror's comments "did not unequivocally express actual bias." App. 16a. This decision, which follows others in Colorado, so clearly and consequentially departs from the Constitution's "significant likelihood" standard as to require this Court's intervention.

1. Although the Constitution generally leaves *voir dire* to the sound discretion of trial judges, "[t]here are . . . constitutional requirements with respect to questioning prospective jurors about racial or ethnic bias." *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981). Specifically, "[p]reservation of the opportunity to prove actual bias is a guarantee of the defendant's [Sixth Amendment] right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-72 (1950); *accord Ristaino v. Ross*, 424 U.S. 589, 597 (1976). The Due Process Clause's guarantee of "essential fairness" likewise requires courts to provide defendants with an adequate opportunity to ferret out invidious bias during *voir dire*. *Ham v. South Carolina*, 409 U.S. 524, 527 (1973); *see also*

Aldridge v. United States, 283 U.S. 308, 314-15 (1931) (equating "religious prejudices" with racial and ethnic bias in this respect). Without an adequate opportunity to probe for bias, a defendant cannot effectively use his peremptory challenges, and trial courts cannot intelligently rule on motions to strike jurors for cause.

In a series of cases, this Court has established a clear standard for resolving disputes in this respect. This first such case is *Ham.* There, the State of South Carolina charged a black man "known locally" for his work in civil rights activities with a drug crime. 409 U.S. at 525. The accused's "basic defense at the trial was that law enforcement officers were 'out to get him' because of his civil rights activities, and that he had been framed on the drug charge." *Id.* The trial court, however, refused to allow the defendant to ask the prospective jurors whether they might be biased or prejudiced against African Americans. The state supreme court upheld this decision.

In an opinion by then-Justice Rehnquist, this Court unanimously reversed. This Court reasoned that "under the facts shown by this record," the Constitution required the trial court to allow the defendant "to have the jurors interrogated on the issue of racial bias." *Id.* at 527. As this Court later explained at greater length, the *Ham* decision "reflected an assessment of whether under all of the circumstances presented there was a constitutionally *significant likelihood* that, absent questioning about racial prejudice, the jurors would be not as 'indifferent as [they stand] unsworne.'" *Ristaino*, 424

U.S. at 596 (emphasis added) (quoting Coke on Littleton 155b (19th ed. 1832)). When "[r]acial issues . . . [a]re inextricably bound up with the conduct of the trial," it is likely to "intensify any prejudice that individual members of the jury might harbor" and it becomes necessary to allow questioning of potential jurors "to meet the constitutional requirement that an impartial jury be impaneled." *Id.* at 597.

Not all, or even many, disputes over the scope of *voir dire* in racially or ethnically charged cases end up triggering a constitutional dispute. This Court, as a matter of its supervisory authority over federal courts, requires federal district courts to allow probing for bias whenever there is a "reasonable possibility" that invidious prejudice might influence the jury. *Rosales-Lopez*, 451 U.S. at 182. Many state court systems, following guidelines established by the American Bar Association, similarly allow such probing as a matter of state law or allow challenges for cause whenever there is a "reasonable doubt that the juror can be fair and impartial." ABA Principles for Jury Trials, Principle 11.C.3 (adopted 2005).

But in cases following *Ham*, this Court has steadfastly insisted on the "significant likelihood" of bias test as a constitutional floor, demanding that trial courts allow questioning of potential jurors whenever it is satisfied. *See Ristaino*, 424 U.S. at 598 (rejecting constitutional claim of inadequate *voir dire* because "[t]he circumstances thus did not suggest a *significant likelihood* that racial prejudice might infect Ross' trial") (emphasis added); *Rosales-Lopez*, 451 U.S. at 190 ("[W]hen there are more

substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case" than the races of the defendant and the victim, "the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount[s] to an unconstitutional abuse of discretion.") (emphasis added); *Turner v. Murray*, 476 U.S. 28, 33 (1986) (plurality opinion) ("The broad inquiry in each case must be . . . whether under all of the circumstances presented there was a constitutionally *significant likelihood* that, absent questioning about racial prejudice, the jurors would not be indifferent as [they stand] unsworne.") (emphasis added and internal quotation omitted).

2. The Colorado Court of Appeals in this case improperly ignored the constitutional "significant likelihood" test. Just like the defendant in *Ham*, petitioner stood trial as a member of a persecuted minority, who was locally known for his ethno-political views (in petitioner's case, by way of his bookstore). *See supra* at 2, 5-7 (detailing the facts of the prosecution). Just like the defendant in *Ham*, petitioner defended himself on the ground that the State was prosecuting him on the basis of his ethno-political beliefs and activities. Petitioner argued at trial that the prosecution was propounding ethnic prejudices ("Islamophobia") in place of actual evidence of guilt. *See supra* at 7. Just like in *Ham*, therefore, "[r]acial issues . . . were inextricably bound up with the conduct of the trial." *Ristaino*, 424 U.S. at 597.

Indeed, there is more cause for concern here than in *Ham*, for the prosecution itself injected ethnicity

into the case by arguing that petitioner's Islamic practices subjugated the alleged victim and explained why she had failed to accuse him of any wrongdoing until arrested and faced with deportation. The prosecution even called an expert witness in Muslim culture and Islam's general treatment of women. Worse yet, one juror here, Juror C.M., actually acknowledged his bias right before being sworn in. The potential juror suggested that based on his assumptions about Muslims, he would be "more likely to believe a person of [Islamic] faith would commit a crime if conflicted – if the faith conflicted with the laws of our government." App. 13a. The potential juror also told the trial court that "notwithstanding the facts presented . . . my bias may be altered based on the belief [that petitioner] would be obeying religion versus law." App. 14a. Yet even then, the trial court refused to allow petitioner to question the juror for potential bias (and also refused to strike the juror for cause).

Petitioner clearly and unambiguously argued on appeal, citing *Ham*, that the trial court's refusal to allow such questioning "denied Mr. Al-Turki his rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution." Deft's C.A. Br. 20; *see also* Deft's C.A. Br. 40 ("The trial court's" restrictions on *voir dire* "violat[ed] Mr. Al-Turki's rights to due process and a fair trial by an impartial jury."). But the Colorado Court of Appeals rejected this argument, on the ground that the juror's comments "did not *unequivocally express actual bias* against the defendant or his religion." App. 16a (emphasis added).

Even if this characterization of the juror's comments as less than an "unequivocal" expression of bias were accurate (itself a highly contestable point[1]), the Colorado Court of Appeals decided this case on the basis of the wrong standard. A defendant need not show that a potential juror is "unequivocally" ethnically or religiously biased against him in order to be permitted to probe that juror's views. Rather, the Constitution requires a trial court to allow such probing whenever there is a "significant likelihood" of prejudice. *E.g., Ristaino*, 424 U.S. at 598. The facts surrounding this prosecution and petitioner's defense alone met that standard, and Juror C.M.'s comments erased any doubt that at least questioning of that juror was necessary.

3. The stark incompatibility between the Colorado Court of Appeals' decision and this Court's precedent may suggest that summary reversal is more appropriate than a full review on the merits. *See, e.g., Maryland v. Dyson,* 527 U.S. 465, 466-67 (1999) (summarily reversing state intermediate court decision in criminal case that used wrong test to resolve federal constitutional claim). But for three

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[1] The definition of bias is a "predisposition" to believe that members of an ethnic group are more likely to engage in certain *behavior. 1 The New Shorter Oxford English Dictionary 223* (1993). That is exactly how Juror C.M. described his views; he said he would be "more likely to believe a person of [Islamic] faith would commit a crime if conflicted – if the faith conflicted with the laws of our government." App. 13a. The only thing about which Juror C.M. was less than clear, since he was not a lawyer, was whether he believed his predisposition against Muslims rendered him legally unable to be a fair and impartial juror in the case.

reasons, it is critical that this Court take some kind of action here.

First, the integrity of the federal Constitution and this Court's decisions is at stake. Abiding by the etiquette of federalism, petitioner challenged the trial court's refusal to allow questioning of the potentially biased juror primarily on state-law grounds. But there can be no doubt that petitioner also fairly raised a federal constitutional objection to the trial court's actions in the Colorado Court of Appeals and the Colorado Supreme Court. *See supra* 8-9. Now that the Colorado courts have declined to afford relief on state-law grounds and have refused to follow the federal Constitution's minimum requirements in this area, it is incumbent on this Court to ensure that *some* court apply the proper federal standard to petitioner's obviously meritorious claim. *See Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam) (summarily reversing when defendant fairly raised federal claim but lower courts ignored it).

Second, the decision below shows that Colorado courts are apparently unwilling to follow the federal "significant likelihood" standard. In rejecting petitioner's claim, the Colorado Court of Appeals cited *Carrillo v. People*, 974 P.2d 478 (Colo. 1999), in which the Colorado Supreme Court held that a trial court need not allow further questioning of a juror unless the juror "articulate[s] a clear expression of bias." *Id.* at 488. Other Colorado appellate decisions are in accord. *See, e.g., People v. Wilson* 114 P.3d 19, 25 (Colo. App. 2004) (requiring "unequivocal[]" showing of bias). Thus, as the State put it in this case: "[I]t is clear that by stating that Juror C.M. 'did

not unequivocally express actual bias,' the court of appeals meant exactly what [the Colorado Supreme] Court meant in stating in *Carrillo* that the challenged juror did not 'articulate a clear expression of bias requiring his dismissal.'" State's Opp. to Cert. in Colo. S. Ct. 9 (quoting *Carrillo*). The court of appeals apparently perceived the law in Colorado as so settled that it was unnecessary to publish this opinion. It is time for this Court to step in.

Third, Colorado's substitution of an "unequivocal express[ion of] actual bias" standard for the Constitution's "significant likelihood" causes real harms. Most immediately, it harms defendants. In the context of death-qualifying jurors, this Court has observed: "What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985). This is particularly so in the context of ethnic prejudice. As "empirical findings" have demonstrated, "the average potential juror will be extremely reluctant to disclose his biases" at all, much less in unambiguous terms. *Fisher v. State*, 481 So.2d 203, 220 (Miss. 1985). Indeed, "[s]ome prospective jurors who hold biases are likely to state that they can be impartial solely because that answer is consistent with socially learned values that people should be impartial." Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 Chi.-Kent L. Rev. 1143, 1150 (2003). The Constitution's "significant likelihood" standard deals in probabilities instead of certainties in order to account for such realities.

The State's impossibly high hurdle for probing potential jurors for invidious bias also impairs the public's perception of the criminal justice system. This Court has explained:

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. *No surer way could be devised to bring the processes of justice into disrepute.*

Rosales-Lopez, 451 U.S. at 191 (plurality opinion) (quoting *Aldridge*, 283 U.S. at 314-15) (emphasis added). This Court should reaffirm that our Constitution does not tolerate ethnic or religious prejudices of any kind to infect our jury boxes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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