No. 09-700

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State's brief in opposition leaves little doubt that the trial court violated petitioner's federal constitutional right to probe potential jurors for possible ethnic bias. The State thus attempts to fend off this Court's intervention by arguing that petitioner did not adequately raise this federal claim in the Colorado courts. That argument is unfounded. This Court should grant certiorari and reverse.

A. The Decision Below Is Incorrect.

In its cursory defense of the decision below, the State argues that the trial court satisfied the rule of *Ham v. South Carolina*, 409 U.S. 524 (1973), and its progeny because it "*did* allow probing of jurors' biases," instead of "refusing to do *any* probing of racial or ethnic biases of jurors." BIO 13. This argument, however, misconceives this Court's precedent.

The rule that *Ham* established is that a defendant is entitled to probe for bias insofar as, "*under all of the circumstances presented*[,] there [i]s a constitutionally significant likelihood" that racial or ethnic would bias infect the jury box. *Ristaino v. Ross*, 424 U.S. 589, 596 (1976); *accord accord Turner v. Murray*, 476 U.S. 28, 33 (1986) (plurality opinion); *Rosalez-Lopez v. United States*, 451 U.S. 182, 189 (1981). This totality-of-the-circumstances test obviously includes any previous questions the trial court has asked and answers potential jurors have given. Accordingly, if, after a standard questionnaire or initial inquiries, there remains a "significant likelihood" that a potential juror is biased, *Ham*

entitles the defendant to demand additional questioning. *See* Pet. 11-13. Any other rule would turn *Ham* on its head; it would mean that a trial court could discharge its duty to protect the accused's right to an impartial jury by asking a few questions that revealed an actual probability of bias, and then doing nothing about it.

The only real issue on the merits, therefore, is whether the Colorado courts applied the correct legal standard in shutting off petitioner's ability to question Juror C.M. concerning his apparent predisposition against Muslims. This Court's precedent makes clear that the courts should have asked whether there was a "significant likelihood" that Juror C.M. was biased. *Ristaino*, 424 U.S. at 596; *accord Turner*, 476 U.S. at 33 (plurality opinion); *Rosalez-Lopez,* 451 U.S. at 189. The decision below, however, held that the trial court properly denied petitioner's "request for extended *voir dire*" because "Juror C.M.'s comments did not *unequivocally express* actual bias." Pet. App. 16a (emphasis added). The State does not even try to argue that this "no unequivocal expression" reasoning is consistent with federal law. Nor could it. The decision cannot stand.

B. The Question Presented Is Properly Before This Court.

Faced with a decision below that squarely conflicts with this Court's precedent, the State resorts to arguing that the question presented is not properly before this Court. Not so.

1. The State argues primarily that petitioner did not adequately raise his *Ham* claim in the Colorado appellate courts. BIO 11-13. But this Court's cases make clear that the State is mistaken.

A party adequately raises a federal claim in state court if he articulates the claim and cites "the federal source of law on which [he] relies *or* a case deciding such a claim based on federal grounds." *Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)) (emphasis added); *accord Lilly v. Virginia*, 527 U.S. 116, 123 (1999). Petitioner articulated his federal claim in the Colorado Court of Appeals and provided *both* of these kinds of citations to support it. He began the argument section of his brief this way:

> The trial court's refusal to excuse jurors for cause *and its strict time limitations on jury selection* 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* and article II, sections 16 and 25, of the Colorado Constitution.

Deft's C.A. Br. 20 (emphasis added).[1] Later on, he specifically cited *Ham* and provided a parenthetical explaining that the case held that "due process requires that defendant be permitted to question prospective jurors about potential race bias in cases where facts raise racial issues." *Id.* at 40. And at oral argument, he reiterated that "the Due Process

[1] The pertinent portions of petitioner's brief in the Colorado Court of Appeals are reproduced in the Appendix to this brief.

Clause in a clear line of cases" from "the United States Supreme Court" required extra questioning of Juror C.M. Tr. of Oral Arg. 6. Likewise, in his petition for review to the Colorado Supreme Court, petitioner argued that "[t]he trial court's refusal to permit further questioning or, alternatively, to excuse [Juror C.M.] 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.

To be sure, most of petitioner's argument in the Colorado courts dealt with state law and state cases. But that is as it should be in our federal system; where reasonably possible, parties should ask for relief, first and foremost, under state law and precedent. In *Lilly*, for instance, the defendant "focused" in state court "on state hearsay law" in challenging the admission of a co-defendant's statements. 527 U.S. at 123. But this Court held that he properly preserved a federal Confrontation Clause claim for review because he "expressly argued in his opening brief to [the state] court that the admission of the statements violated his Sixth Amendment right to confrontation" and cited one of this Court's confrontation decisions in his reply brief. *Id.*[2]; *see also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (finding a federal claim properly preserved under similar circumstances). Petitioner's brief to

[2] The defendant in *Lilly* cited two of this Court's decisions to the Virginia Supreme Court: *Lee v. Illinois*, 476 U.S. 530 (1986), and *Williamson v. United States*, 512 U.S. 594 (1995). *See Lilly*, 527 U.S. at 123. But only *Lee* involves the Confrontation Clause. *Williamson* involves the Federal Rules of Evidence, which are inapplicable in state court.

the Colorado Court of Appeals did the same thing, with the insignificant difference that he cited this Court's precedent in his opening brief. And in the Colorado Supreme Court, petitioner reprised the federal aspect of his claim by expressly "cit[ing]" the Sixth and Fourteenth Amendments to "the Constitution," *Howell*, 543 U.S. at 443, in support of his claim that "[t]he trial court's refusal to permit further questioning" of Juror C.M. "violated Mr. Al-Turki's constitutional rights to due process and to a fair and impartial jury." Deft's Pet'n for Cert. 6.

The State protests that petitioner's reference in the Colorado Court of Appeals to *Ham* was inadequate because it appeared in the midst of an argument that the trial court unreasonably limited *voir dire* "in general," BIO 12, and "'[t]he discussion of a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim,'" *id.* (quoting *Adams*, 520 U.S. at 88). But petitioner's attack on the trial court's general limitation on *voir dire* was hardly "unrelated," *id.*, to the trial court's failure to question Juror C.M. about his apparent bias. To the contrary, the two errors were one and the same. The very reason the trial court declined to probe Juror C.M. was because it had ordered *ex ante* that *voir dire* would last only forty-five minutes. *See* Pet. 4-5. In other words, the trial court's refusal to budge from its general limitation on *voir dire*, even after Juror C.M. expressed his predisposition against Muslims and petitioner specifically requested additional questioning, is exactly what caused the violation of petitioner's federal constitutional rights.

The relevant section of petitioner's brief, in fact, explicitly drew this connection. It first explained that "[o]ne juror (C.M. (#71)) made repeated attempts to disclose his anti-Muslim bias against Mr. Al-Turki. The juror said Mr. Al-Turki's religion made him more likely to have broken the law. This juror expressed reluctance to take the juror oath and did so only after being forced to by the trial court." Deft's C.A. Br. 38. After discussing other jurors' circumstances, petitioner then argued that "[t]he trial court rigidly adhered to an arbitrary forty-five minute time limitation that was unreasonable given . . . the obvious issues that merited exploration, including: . . . potential prejudices against Muslims, Middle Easterners, or immigrants." *Id.* at 39. On the very next page, petitioner made his position plain: "The trial court's unreasonable time limitation precluded counsel from questioning many prospective jurors about entire topics altogether, violating Mr. Al-Turki's rights to due process and a fair trial by an impartial jury." *Id.* at 40. He then cited *Ham,* as noted above, for the proposition that "due process requires that defendant be permitted to question prospective jurors about potential race bias in cases where facts raise racial issues." *Id.* There can be no doubt that this discussion and citation fairly advised the Colorado Court of Appeals of the *Ham*-based claim petitioner makes here.

2. To the extent that the State separately suggests that the question presented is not properly before this Court because the Colorado Court of Appeals did not "decide[]" the question presented or "cite a single case dealing with that issue . . . in the opinion," BIO 12, the State is equally mistaken. It is

well established that a federal claim is properly before this Court whenever "it was either addressed by, *or properly presented to*, the state court that rendered the decision" at issue. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (emphasis added). Thus, so long as the party invoking this Court's jurisdiction gave the state court "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 394 U.S. 493, 501 (1981), it is immaterial whether the state court "direct[ly]" rejected federal claim. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). When, as here, "the necessary effect of the judgment has been to deny the claim, that is enough." *Id.*; *see generally* Eugene Gressman et al., Supreme Court Practice § 3.18, at 187 (9th ed. 2007).

CONCLUSION

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

Respectfully submitted,

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March 17, 2010

APPENDIX A

COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
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Appeal from the District Court in and for the Eighteenth Judicial District, Arapahoe County, Colorado
Honorable Mark J. Hannen, Case No. 05CR432

Appellees-Plaintiffs:
PEOPLE OF THE STATE OF COLORADO

COURT USE ONLY

Appellant-Defendant:
HOMAIDAN AL-TURKI

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Opening Brief

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Argument

I. Because the trial court erroneously denied challenges for cause and unreasonably restricted jury *voire dire*, a new trial is required.

The trial court's refusal to excuse jurors for cause and its strict time limitations on jury selection 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 and article II, sections 16 and 25, of the Colorado Constitution. *See People v. Rhodus*, 870 P.2d 470, 73 (Colo. 1994) ("Due process requires a fair trial in a fair tribunal"). The trial court's erroneous denials of challenges for cause due to bias also infringed C.R.S. § 16-10-103(1)(j) and Crim. P. 24(b)(1)(X).

The potential for juror bias was glaringly obvious from the circumstances of this highly publicized case. The prosecution and defense jointly proposed a *voir* [21] *dire* process that would have afforded them an adequate opportunity to question jurors about their personal attitudes.[106]

The trial court rejected the joint stipulation and instead conducted a general *voir dire* of all 106 people simultaneously, asking generally whether the venire

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[106] Supp. Record 0043-0046.

members could be "fair and impartial."[107] The overwhelming majority of the venire members said nothing in response to these kinds of general questions posed to the entire panel.[108] The parties were then given forty-five minutes apiece to question the entire panel of 106 people. Despite statements in jury questionnaires and in general *voir dire* that suggested potential bias, individual questioning was so limited as to be perfunctory or nonexistent. *Cf. Morgan v. Illinois*, 504 U.S. 719, 734-35 (1992) (holding that "general fairness and 'follow the law' questions" are insufficient to ferret out jurors who would automatically impose the death penalty for conviction of a capital offense.). No *in camera* questioning at all was conducted in this sexual assault case.

The trial court cited generic silence in response to its *voir dire* of the entire panel as justification for refusing to excuse for cause a juror who in open [22] court expressed bias against Mr. Al-Turki because he is a Muslim. Since all preemptory challenges had been exhausted, this juror actually served on the jury. Citing silence, the court refused to excuse two female prospective jurors who themselves had been sexually assaulted, causing the defense to exercise two peremptory challenges. The court's rulings resulted in a biased jury and a fundamentally unfair trial.

A. The trial court erroneously denied three defense challenges for cause.

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[107] R2634:1-9(Apx.33).

[108] R2629:9(Apx.28)—R2634:21(Apx.33).

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B. The trial court's rigid adherence to an unreasonable time limit denied Mr. Al-Turki the ability to intelligently exercise his challenges for cause and peremptory challenges.

Standard of Review. A trial court's limit limitations on *voir dire* are reviewed for an abuse of discretion. *People v. Rudnick*, 878 P.2d 16, 21 (Colo. App. 1993).

Discussion. *Voir dire* plays a "critical function" in assuring an impartial jury. *Morgan*, 504 U.S. at 72. "Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Id.* at 729-30.

This was a highly publicized case that not only involved numerous charges of sexual assault but also raised issues concerning the Muslim religion and Middle Eastern culture. It was precisely the type of case that demanded careful [36] jury selection procedures. However, the hurried process by which Mr. Al-Turki's jury was selected was fatally flawed, from start to finish.

Disregarding a stipulation of the parties concerning the *voir dire* procedures,[141] the trial court required the attorneys to question a panel of 106 potential jurors with only forty-five minutes per side.[142] Thus, ***Mr. Al-Turki's attorney had, on average, only twenty-five seconds in which to question each potential juror*** (or approximately eight or nine lines of record transcript). In a trial of such serious charges – first degree kidnapping (requiring a life sentence upon conviction) – such a restriction is unreasonable as a matter of law.

At least a dozen prospective jurors indicated on their questionnaires that they were unable to openly discuss their experience of having been or knowing a sexual assault victim.[143] Nonetheless, the court did not conduct any *in camera* questioning of any potential jurors.

[37] Defense counsel repeatedly complained about the lack of time under the trial court's procedures and asked for more time to conduct additional *voir dire*.[144] When asked to pass the panel for cause, defense counsel declined to do so, asserting that there had not been adequate opportunity to question prospective jurors who had self-identified as sexual assault

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[141] Supp. Record 0043-0046.
[142] R2635:11-12.
[143] D.J. (#10), R533s; D.T. (#18), R5348; G.W. (#31), R5370; S.S. (#43), R5392; T.C. (#46), R5398; J.M. (#51), R5616; T.S. (#65), R5644); C.M. (#71), R5656; D.C. (374), R5662; C.T. (#79), R5672; C.G. (#87), R5688; B.C. (#99), R5712.
[144] R2720:2-10; R2725:24-R2726:9.

victims.[145] Defense counsel again requested additional time to question the jurors.[146] The trial court refused, ruling that it had "ample information concerning the prospective jurors based on their answers to the questionnaires" and the court's own questioning of the jurors regarding their ability to be fair and impartial.[147]

The trial court also denied several defense challenges for cause and denied defense counsel additional time to further develop those challenges. (*See* Arg. I.A., *supra*.)

Among the twelve jurors who convicted Mr. Al-Turki in this case, eight of them – a full two-thirds of the jury – either did not speak at all during* voir dire *(five), spoke only concerning hardship issues (two), or spoke only to express* [38] ***bias just before being sworn, when the trial court allowed no further questioning by counsel (one).[148]

The twelve jurors who convicted Mr. Al-Turki included the following:

- One juror (C.M. (#71) made repeated attempts to disclose his anti-Muslim bias against Mr. Al-Turki. The juror said Mr. Al-Turki's religion made him more likely to have broken the law.

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145 R2731:20-R2732:22.
146 R2732:23.
147 R2732:24-R2733:11.
148 R4455:6-R4456:5.

This juror expressed reluctance to take the juror oath and did so only after being forced to by the trial court.[149]

- Four jurors had a relative, friend or acquaintance who had been sexually assaulted.[150] Of these, one expressly indicated he could not discuss this matter in open court.[151]
- Three jurors recalled pretrial publicity about the case.[152] Of these, one lived only blocks from the Al-Turki home.[153]
- One juror said that upon learning that the defendant and various witnesses were Muslims from the Middle East and Indonesia, her reaction was "frightened."[154]

In Colorado, a trial judge is authorized to "limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive, or otherwise improper examination" [39] during *voir dire*. Crim.P. 24(a)(3). That is not what the trial court did here. The trial court rigidly adhered to an arbitrary forty-five minute time limitation that was unreasonable given the enormous size of the panel (106 prospective jurors), the seriousness of this case, and the obvious issues that merited exploration, including: exposure to pretrial publicity; attitudes about and victimization by sexual assault; potential prejudices against Muslims, Middle

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149 R2751:23-R2760:13 (Apx. 35-44).

150 L.P. (#52), R5618; E.H. (#57), R5628; D.P. (#66), R5646; C.M. (#71), R5656.

151 C.M. (#71), R5656.

152 J.T. (#45), R5396; L.P. (#52), R5618; D.I. (#56), R5625.

153 L.P. (#52), R5618.

154 J.C. (#4), R5320.

Easterners, or immigrants; and application of the law regarding the defendant not testifying.[155]

Colorado law provides that a trial court may reasonably limit the time available for *voir dire* "[s]o long as the *voir dire* examination is conducted in a manner that will facilitate an intelligent exercise of challenges for cause and peremptory challenges." *Rudnick*, 878 P.2d at 21. The *voir dire* procedures here [40] were unreasonable because they did not allow for an intelligent exercise of challenges for cause and peremptory challenges.

The trial court's unreasonable time limitation precluded counsel from questioning many prospective jurors about entire topics altogether, violating Mr. Al-Turki's rights to due process and a fair trial by an

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[155] One example of how the unreasonable time limitation impacted Mr. Al-Turki's ability to select a fair and impartial jury occurred with respect to prospective juror M.R. (#22). M.R. was a pizza delivery man who stated on his questionnaire, in response to being informed that the defendant, the complaining witness, and other witnesses are Muslims from the Middle East and Indonesia: "I don't like those people, they tip bad and their house always smells." R5354. Defense counsel challenged M.R. for cause based on his questionnaire, but due to the time pressures of the court's *voir dire* procedures, mistakenly stated that the reason for the challenge was that M.R. was a sexual assault victim, rather than this juror harbored a strong ethnic bias. R2721:4-7. In its haste to select the jury, the trial court apparently failed to review the relevant page of the questionnaire, instead summarily denying the challenge for cause. R2721:8. Had the trial court addressed the ethnic bias that was patently obvious on M.R.'s questionnaire, it surely would have excused him for cause. Instead, Mr. Al-Turki had to waste a peremptory challenge on M.R. to ensure that he would not serve. R2744:5-9.

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 racial bias in cases where facts raise race issues); *Maes v. District Court*, 180 Colo. 169, 175-76, 503 P.2d 621, 624-25 (1972) ("That *voir dire* inquiry is permissible into matters of racial prejudice in the interest of obtaining a fair and impartial jury is undisputed . . . .").

The few Colorado cases upholding time limitations on *voir dire* are easily distinguished.

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