Filed
D.C. Superior Court
12/22/2022 18:02PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES

V.

HARRY TUCKER

Case Number 2022 CF2 1977

Judge Neal Kravitz

MOTION FOR JURY INSTRUCTION TO IDENTIFY AND CORRECT JURORS' IMPLICIT BIAS

Mr. Tucker, through undersigned counsel, pursuant to the Fifth and Sixth Amendments to the United States Constitution, respectfully moves this Honorable Court to provide to the jury the proposed jury instruction (see *Exhibit A*) to identify and correct jurors' implicit bias that would otherwise interfere with their ability to decide this case fairly and impartially. The Department of Justice ("DOJ") itself has recognized the impact of implicit bias on the criminal justice system, requiring its employees (including Assistant United States Attorneys) to undergo training consistent with the proposal made in this Motion.

SUMMARY OF THE ARGUMENT

The Department of Justice itself has recognized the impact of implicit bias on the criminal justice system and the social science underpinning implicit bias. *See* Department of Justice, *Memorandum for all Department Law Enforcement Agents and Prosecutors* (June 27, 2016) (see *Exhibit B*). The DOJ has observed that "implicit bias is part of human nature" and "presents unique challenges to effective law enforcement, because it can alter where [individuals] look for evidence and how they analyze it without their awareness of ability to compensate." *Id.* at 1. As the DOJ has also recognized, "The good news is that research suggests that vast majority of people can

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when they creep into their reasoning or situational awareness." *Id.* Accordingly, the DOJ has started a "comprehensive effort to train the Department personnel who have the most direct involvement in our criminal justice system," including AUSAs and federal law enforcement agents. *Id.* at 2. The purpose of these trainings is to help individuals "understand how unconscious and unintentional biases" affect their thinking, reinforce individuals' "ability to look past extraneous information," and "reaffirm [the DOJ's] commitment to a criminal justice system that is fair impartial, and procedurally just." *Id.* at 1-2. *See also* Department of Justice, *FAQs on Implicit Bias* (attached as Exhibit C) ("[S]ocial psychologists have found that with information and motivation, people can implement 'controlled' (unbiased) behavioral responses that override automatic associations and biases.").

The DOJ's acknowledgment and roll-out of implicit-bias training is rooted in well-established empirical research. This research shows the following: (1) implicit racial bias against African Americans is ubiquitous in the United States; (2) implicit racial bias affects decision-making and behavior and substantially increases the likelihood that people will draw adverse inferences against African American defendants; (3) individuals whose perspectives are tainted by implicit racial bias are generally incapable of identifying that bias on their own because it is an unconscious form of bias; (4) and implicit racial bias may be identified and corrected through certain mental exercises, such as imagining the defendant as belonging to a different race (i.e., through a "race-switching" or "cloaking" exercise).

The voir dire process is incapable of screening for individuals harboring implicit racial biases because, as mentioned above, implicit racial bias is unconscious and is unlikely to manifest in response to questions asked through voir dire. Moreover, given the ubiquity of implicit racial bias, it would be logistically impossible to select a jury comprised of individuals without such bias.

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Thus, it is virtually inevitable that the majority, if not all, of the members of Mr. Tucker's jury will harbor implicit racial bias against African Americans.

Absent any remedial action, the participation of jurors harboring implicit racial bias against African Americans would prevent Mr. Tucker from receiving a fair trial by an impartial jury in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

The proposed instruction (attached as *Exhibit A*) would help jurors identify and correct their own implicit racial biases without any cost to the Court or prejudice to the government. As such, Mr. Tucker requests that this Court issue the proposed instruction to the jury prior to opening statements and (using a briefer script) prior to the beginning of deliberations.

ARGUMENT

I. THE FIFTH AND SIXTH AMENDMENTS GUARANTEE MR. TUCKER A JURY THAT IS FREE OF ACTUAL AND PERCEIVED RACIAL BIAS

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* " U.S. CONST. AMEND. VI (emphasis added). Similarly, the Fifth Amendment Due Process Clause, which also reverse-incorporates the Fourteenth Amendment's Equal Protection Clause, ensures every criminal defendant a fair trial and impartial jury while also prohibiting all forms of state-sanctioned discrimination based on race.[1] *Peters v. Kiff*, 407 U.S. 493, 501 (1972) ("[T]he Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law."). Indeed, "[t]he right to trial by an impartial judge or jury is fundamental and deeply

[1] "[T]he Constitution and federal and state laws unequivocally establish that state-sanctioned discrimination is unlawful and must be eradicated." *Kittle v. United States*, 65 A.3d 1144, 1153 (D.C. 2013) (citing U.S. Const. amend. XIV, § 1 (the Equal Protection Clause); Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (prohibiting discrimination in application of voter registration requirements, public accommodations and employment, and eliminating racial segregation in public schools); and D.C. Human Rights Act, D.C. Code § 2-1402.01 et seq. (2001) "Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life..... ").

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embedded in American jurisprudence." *Young v. United States*, 694 A.2d 891, 894 (D.C. 1997) (citation omitted); *see also United States v. Boney*, 977 F.2d 624, 633 (D.C. Cir. 1992) ("The Supreme Court has stressed repeatedly that the touchstone of the guarantee of an impartial jury is a protection against juror bias."); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("No right ranks higher than the right of the accused to a fair trial."); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.").

The courts have identified racial bias in particular as a uniquely vehement threat to defendants' Fifth and Sixth Amendment right to an impartial jury. *See Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013) ("The insidiousness of racial or ethnic bias is therefore distinguishable from other forms of juror misconduct or incompetence," citing other states, including South Carolina, Connecticut, Delaware, Massachusetts, Montana, and North Dakota, which have recognized the distinction between racial or ethnic bias and other forms of juror misconduct); *see also Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) (recognizing criminal defendant's fundamental right to "protection of life and liberty against race or color prejudice."); *Ross v. Massachusetts*, 414 U.S. 1080, 1081 (1973) ("The importance of the right at issue here—the opportunity to ascertain the **racial bias** of the veniremen—can hardly be gainsaid. The right to trial by an 'impartial jury' is a cornerstone of our system of justice.").

Moreover, the proscription of racial bias applies not only to *actual* bias, but also to *the likelihood* or *appearance* of bias. *Peters*, 407 U.S. at 502 ("[T]his Court has held that due process

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is denied by circumstances that create the likelihood or the appearance of bias."); *see also In re Murchison*, 349 U.S. 133, 136 (1955) ("Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). As such, the Constitution endows Mr. Tucker with the right to a jury that is free of actual racial bias as well as the likelihood or appearance of racial bias.

II. EMPIRICAL DATA CONFIRM THAT IMPLICIT RACIAL BIAS IS UBIQUITOUS AND IS LIKELY TO INTERFERE WITH JURORS' ABILITY TO MAKE FAIR AND IMPARTIAL DECISIONS INVOLVING AFRICAN AMERICAN DEFENDANTS

Recent developments[2] in cognitive psychology and neuroscience have established that implicit—or unconscious—racial bias is ubiquitous in the United States and compromises individuals' capacity to make fair and unbiased decisions when the subject of the decision is African American. *See* PAMELA M. CASEY ET AL., HELPING COURTS ADDRESS IMPLICIT BIAS A-6 (Nat'l Ctr. for State Courts 2012), http://www.ncsc.org/ibreport (last visited May 13, 2014) ("[M]ost Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks . . . ."); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("[Americans] inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race

[2] *See* Robert J. Stephens & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 795 (2012) ("A scientific revolution . . . has generated new interest with regard to how upstanding people—including judges, jurors, lawyers, and police—may discriminate without intending to do so. This implicit bias revolution has created new opportunities to empirically investigate how actors within the legal system can perpetuate discrimination in ways that have been—until now—almost impossible to detect."); *see also* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. Person. & Soc. Psych. 1464, 1478 (1998) ("Findings of three experiments consistently confirmed the usefulness of the IAT (implicit association test) for assessing differences in evaluative associations between pairs of semantic or social categories. The findings also suggested that the IAT may resist self-presentational forces that can mask personally or socially undesirable evaluative associations, such as the ethnic and racial attitudes investigated in Experiments 2 and 3.").

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