

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

CASE NO. 1:15-cr-00073-PAB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH BREWINGTON,

Defendant.

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**MR. BREWINGTON'S MOTION FOR A CASE-SPECIFIC  
JURY QUESTIONNAIRE, JURY INSTRUCTION, AND RELATED RELIEF**

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Kenneth Brewington, by and through undersigned counsel, hereby moves the Court for a case-specific jury questionnaire, jury instruction and related relief. Specifically, Mr. Brewington requests that the Court use the following procedures during voir dire: (1) a case-specific juror questionnaire that includes questions related to implicit bias; (2) an orientation video explaining implicit bias; (3) a preliminary instruction on implicit bias; and (4) supplemental attorney-conducted voir dire, including use of a 4:40 minute-long video clip from the television show *What Would You Do?* As set forth more fully below, the requested relief is necessary in order to minimize the impact of implicit bias and ensure that Mr. Brewington receives a fair trial.

I. **There Is A Significant Risk That Implicit Bias Will Have A Negative Impact On The Fairness Of Mr. Brewington's Trial**

"Implicit bias, or stereotyping, consists of the unconscious assumptions that humans make about individuals." *United States v. Mateo-Medina*, 845 F.3d 546, 553 (3d Cir. 2017). While implicit bias may play a particularly large role in situations requiring "rapid decision-making, such as police encounters," *id.*, it can also affect legal decision-making by jurors. Studies of mock jurors have, for example, shown that a defendant's skin color can "alter[] how jurors evaluated the evidence presented and also how they answered the crucial question 'How guilty is the defendant,'" with the darker-skinned defendant judged to be guiltier than the lighter-skinned defendant. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1144-45 (2012).

Individuals may "unconsciously act on such biases even though [they] may consciously abhor them." The Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, The Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 149 (2010). Many of the same mock jurors who found the darker-skinned defendant to be guiltier than the lighter-skinned defendant based on the same body of evidence, for instance, could not even *recall* the defendant's race. See Kang, 59 UCLA L. Rev. at 1145. There was, moreover, no correlation between the mock jurors' levels of explicit racial bias, and their weighing of the evidence or assessment of guilt. See *id.*; see also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and*

*Misremembering*, 57 Duke L.J. 345, 398-99 (2007) (finding that test subjects “misremembered certain legally relevant facts in a racially biased manner,” and in particular tended to make memory errors “in a manner harmful to African Americans”).

The risk that these implicit biases will have a negative impact on the fairness of this trial is heightened by two factors. First, Mr. Brewington is an African American man, and his race will be rendered more conspicuous by the fact that the witnesses against him, the prosecutors, the defense counsel, and the judge are not. Second, and somewhat counterintuitively, the risk that implicit bias will play a role in Mr. Brewington’s trial is actually *increased* by the fact that his case is not otherwise racially charged. Research suggests that, “[w]hen the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions,” whereas “when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their decision-making.” Kang, 59 UCLA L. Rev. at 1143. Unless measures are taken to combat implicit bias, then, there is a significant risk that the trial will be driven, at least in part, by these unconscious, and unfair, thought processes.

## **II. This Court Can And Should Take Steps To Limit Impact Of Implicit Bias**

Importantly, there are strategies for limiting the negative impact of implicit bias and promote impartial decision-making. Individuals with inflated senses of their own objectivity, for example, seem to be at particular risk for behaving in biased ways. See

Kang, 59 UCLA L. Rev. at 1172-73. Learning about the possible influence of nonconscious thought processes on decision-making, on the other hand, may actually lead people to be *more* objective. See *id.* at 1173. Similarly, research suggests that individuals who are consciously motivated to counteract their implicit biases make more objective decisions. See *id.* at 1174-75. In combination, these factors may explain why, for instance, trained police officers and judges seem to be able to engage in more objective decision-making than laypeople, even when they harbor the same kinds of implicit bias as the general population. See Bennett, 4 Harv. L. & Pol’y Rev. at 156-57.

“A probing voir dire examination is the best way to ensure that jurors do not harbor biases for or against the parties.” *Sampson v. United States*, 724 F.3d 150, 163-64 (1st Cir. 2013) (internal citation omitted). And increasingly, state and federal courts across the country have adopted voir dire procedures intended to counteract the negative impacts of implicit bias by educating jurors and increasing their motivation to evaluate the evidence objectively, free from implicit bias. See, e.g., *Unconscious Bias*, United States District Court for the Western District of Washington, <http://www.wawd.uscourts.gov/jury/unconscious-bias> (last visited Apr. 6, 2018) (video and jury instructions created by a committee of judges and attorneys to be presented to jurors “highlighting and combating the problems presented by unconscious bias”). Accordingly, Mr. Brewington requests that the Court exercise its broad discretion over matters related to jury selection and instruction in order to limit the impact of implicit bias on the trial by instituting the following procedures at trial:

**A. Case-Specific Juror Questionnaire**

Mr. Brewington requests that the Court order the use of a case-specific juror questionnaire. See Exhibit A (Proposed Juror Questionnaire). This is a complex white-collar case in which the defendant, Mr. Brewington, is black, and almost everybody else involved—including the alleged victims of the offense and his alleged co-conspirators—is not. And as previously discussed, the risk that implicit bias will have an impact on jurors' assessment of the evidence in this case is actually exacerbated by the fact that it is not otherwise racially charged.

Under these circumstances, a case-specific juror questionnaire is the appropriate tool to enable the selection of a fair and impartial jury. The case-specific juror questionnaire is particularly valuable in this case because it may be completed in private. Racial prejudice and implicit bias are sensitive subjects, and prospective jurors are likely to be more forthcoming on the page. The completed juror questionnaires will, moreover, enable counsel to use their limited time in court to address the subjects of racial prejudice and implicit bias more efficiently.

Accordingly, Mr. Brewington requests that this Court grant his request to use a case-specific juror questionnaire.

**B. Orientation Video Explaining Implicit Bias**

Mr. Brewington also requests that the Court play "Unconscious Bias," the attached video produced by the United States District Court for the Western District of Washington on the subject of unconscious or implicit bias, to all potential jurors during

orientation. See *Unconscious Bias*, United States District Court for the Western District of Washington (“Washington Video”) (Exhibit B).<sup>1,2</sup> The video, which is 10:53 minutes long, was “created by a committee of judges and attorneys” in the Western District of Washington, and is intended to “be presented to jurors with the intent of highlighting and combating problems presented by unconscious bias.” *Id.*

Relevant here, the Washington Video provides viewers with a brief but thorough education on the subject of implicit bias—and strategies for combating it. As previously discussed, research suggests that educating individuals about implicit bias can help reduce its impact, both by encouraging them to question their own objectivity, and by increasing their motivation to make fair decisions. See Kang, 59 UCLA L. Rev. at 1172-77. The Washington Video works on both of these fronts, simultaneously raising juror awareness of the potential pitfalls of unconscious bias, and encouraging jurors to combat any such bias within themselves by carefully reflecting on their decisions. The video is, moreover, measured in tone, rather than accusatory, and grounded in evidence-based, scientific terms—both factors that are likely to increase its efficacy in reducing implicit bias, and increasing juror fairness. See *id.* at 1183.

Accordingly, Mr. Brewington requests that this Court play the Washington Video to potential jurors during orientation.

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<sup>1</sup> The video is also available at the following link:

<http://www.wawd.uscourts.gov/jury/unconscious-bias> (last visited Apr. 6, 2018).

<sup>2</sup> Exhibit B is a single compact disk containing both of the recordings addressed in this motion. The disk is filed conventionally.

**C. Preliminary Instruction On Implicit Bias**

Mr. Brewington further requests that this Court issue the following preliminary instruction to the entire panel of potential jurors, prior to voir dire, which is based upon the model instruction used in the Western District of Washington:

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and selection process, you may be asked questions related to the issues of bias and unconscious bias.

*Cf.* Preliminary Instruction To Be Given To The Entire Panel Before Jury Selection, Western District of Washington, <http://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf>.

In addition to setting the stage for voir dire, the proposed preliminary instruction “alert[s] the jury to the concept of unconscious bias” and instructs them “in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making.” *Id.* In these ways, the proposed preliminary instruction helps to ensure that jurors are educated about implicit bias. As previously discussed, education helps to ensure that potential jurors are both “skeptical about their own objectivity” and “motivated to check against implicit bias,” and thus more likely to make objective decisions. 59 UCLA L. Rev. at 1181.

Accordingly, Mr. Brewington requests that this Court read the proposed preliminary instruction to the entire panel prior to voir dire.

**D. Supplemental Attorney-Conducted Voir Dire, Including Use Of *What Would You Do?* Video Clip**

Mr. Brewington further requests that the Court provide undersigned counsel with the opportunity for 30 minutes of attorney-conducted voir dire, including questions related to the attached clip from *What Would You Do?* (Exhibit B), a television show produced by ABC that uses hidden cameras to capture bystander reactions to staged situations.<sup>3</sup>

The requested relief is appropriate for several reasons. To begin with, counsel “are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome.” Bennett, 4 Harv. L. & Pol’y Rev. at 160. There is, furthermore, research suggesting “that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges.” *Id.* Thus, attorney-led voir dire in this arena is more likely to achieve the goal of identifying biased jurors, including those who “may not appreciate it and, in any event, may be reluctant to admit [their] lack of objectivity.” *Sampson*, 724 F.3d at 164.

To this end, the *What Would You Do?* clip provides an accessible and direct example of implicit bias. The clip, which is less than five minutes long,

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<sup>3</sup> The clip can also be found here: <https://www.youtube.com/watch?v=ge7i60GuNRg>.

opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock!

Kang, 59 UCLA L. Rev. at 1182 n.250. The clip provides such an effective introduction to the concept of implicit bias that the Honorable Mark W. Bennett, U.S. District Judge for the Northern District of Iowa, regularly shows it to jurors as part of jury selection. See *id.* at 1181-82 & 1182 n.250.

Accordingly, Mr. Brewington requests that this Court provide undersigned counsel with the opportunity to conduct 30 minutes of attorney-led voir dire, including questions related to the “What Would You Do?” clip..

**III. Conclusion**

For the foregoing reasons, Mr. Brewington respectfully requests that this motion be granted, and that this Court order the requested relief.

Respectfully submitted,

VIRGINIA L. GRADY  
Federal Public Defender

s/Robert W. Pepin

ROBERT W. PEPIN  
Assistant Federal Public Defender  
633 17<sup>th</sup> Street, Suite 1000  
Denver, CO 80202  
Telephone: (303) 294-7002  
FAX: (303) 294-1192  
robert.pepin@fd.org  
Attorney for Defendant

And

s/Mary Butterton

MARY BUTTERTON  
Assistant Federal Public Defender  
633 17<sup>th</sup> Street, Suite 1000  
Denver, CO 80202  
Telephone: (303) 294-7002  
FAX: (303) 294-1192  
mary.butterton@fd.org  
Attorney for Defendant

## CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I electronically filed the foregoing **Mr. Brewington's Motion for a Case-Specific Jury Questionnaire, Jury Instruction, and Related Relief** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Jennifer G. Ballantyne, Assistant United States Attorney  
USDOJ-DC-Criminal Div-Fraud  
E-mail: [jennifer.ballentyne@usdoj.gov](mailto:jennifer.ballentyne@usdoj.gov)

Anna G. Kaminska, Assistant United States Attorney  
U.S. Department of Justice-DC-1400 NY Ave.  
E-mail: [anna.Kaminska@usdoj.gov](mailto:anna.Kaminska@usdoj.gov)

Henry Parker Van Dyck, Assistant United States Attorney  
U.S. Department of Justice-DC-1400 NY Ave.  
E-mail: [henry.van.dyck@usdoj.gov](mailto:henry.van.dyck@usdoj.gov)

Kyle Conrad Hankey, Assistant United States Attorney  
E-mail: [kyle.hankey@usdoj.gov](mailto:kyle.hankey@usdoj.gov)

and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participant in the manner (mail, hand-delivery, etc.) indicated by the non-participant's name:

Kenneth Brewington (via Mail)

s/Robert W. Pepin  
ROBERT W. PEPIN  
Assistant Federal Public Defender  
633 17<sup>th</sup> Street, Suite 1000  
Denver, CO 80202  
Telephone: (303) 294-7002  
FAX: (303) 294-1192  
robert.pepin@fd.org  
Attorney for Defendant

# Exhibit A

**JUROR QUESTIONNAIRE**

*Use back if additional room is needed to answer.*

The information you provide in this questionnaire will be confidential and will only be used for this trial.

<p><b>1. Did you attend business school, study finance, securities, asset management, investment strategy, or other associated disciplines?</b></p> <p style="text-align: center;"><input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>Details, please:</p>	<p><b>2. Have you studied for and/or obtained licensing or certifications associated with finance, securities trading, asset management, or related fields?</b></p> <p style="text-align: center;"><input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>Details, please:</p>	<p><b>3. Have you worked in finance, securities trading, asset management, investment strategy, or related fields?</b></p> <p style="text-align: center;"><input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>Details, please:</p>
<p><b>4. Have you experienced disputes between you and people with whom you were doing business?</b></p> <p style="text-align: center;"><input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>Details, please:</p>	<p><b>5. Have you ever made an investment that went bad?</b>   <input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>Details, please:</p>	<p><b>6. Have you or someone close to you ever been the victim of fraud?</b>   <input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>What kind of fraud?</p> <p>Who was the victim?</p> <p>What was the value and type of loss?</p>
<p><b>7. What was the race or ethnicity of the person or persons who committed fraud against you or someone close to you?</b></p>	<p><b>8. Have you or someone close to you ever been the victim of a crime other than fraud?</b></p> <p style="text-align: center;"><input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>Details, please.</p>	<p><b>9. Do criminals have too many rights?</b></p> <p style="text-align: center;"><input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>Please tell us why you feel that way.</p>
<p><b>10. Do you agree or disagree that racial prejudice still exists in America?</b></p> <div style="text-align: center; margin-top: 10px;"> </div>		<p><b>11. Do people accused of crimes have too many rights?</b></p> <p style="text-align: center;"><input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>Please tell us why you feel that way.</p>
<p><b>12. Do you agree or disagree that a person can be unintentionally biased against African Americans?</b></p> <div style="text-align: center; margin-top: 10px;"> </div>		<p><b>13. Do you believe African-Americans commit more crimes than whites?</b></p> <p style="text-align: center;"><input type="checkbox"/> Yes   <input type="checkbox"/> No</p>
<p><b>14. How do you feel when you hear negative remarks about African Americans?</b></p>	<p><b>15. What would you do if you were selected as a juror and during deliberations another juror made comments about African Americans and/or race?</b></p>	<p><b>16. Is there any reason why you would be unwilling/unable to serve as a juror in a case where an African American is charged with a crime?</b></p> <p style="text-align: center;"><input type="checkbox"/> Yes   <input type="checkbox"/> No</p> <p>Please explain:</p>

The answers contained in this questionnaire are true and correct to the best of my ability.

\_\_\_\_\_  
Juror's Name (printed)

\_\_\_\_\_  
Juror's Signature

\_\_\_\_\_  
Date

IN THE UNITED STATES DISTRICT COURT  
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**EXHIBIT B**  
CONVENTIONALLY SUBMITTED DISK CONTAINING TWO VIDEOS

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1. *Unconscious Bias*, United States District Court for the Western District of Washington; <http://www.wawd.uscourts.gov/jury/unconscious-bias> (last visited Apr. 6, 2018)
2. *What Would You Do?*; <https://www.youtube.com/watch?v=ge7i60GuNRg>

