

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal Case No. 19-20767

Hon. Linda V. Parker

v.

STEVE ALAN HAGAR,

Defendant.

---

**REPLY IN SUPPORT OF MR. HAGAR'S REQUEST TO SHOW  
THE W.D. WASH. VIDEO ABOUT UNCONSCIOUS BIAS**

The government accuses Steve Hagar, a 26-year-old Black man, of possessing a firearm after having been convicted of a felony. This case arose when three Detroit Police Officers saw Mr. Hagar and two other Black men walking on Seven Mile Road. They were not doing anything suspicious, and the police had received no reports of criminal activity. These officers pulled up next to the three men and jumped out. Mr. Hagar ran. The officers who gave chase ultimately tackled and shackled him with a taser drawn. The question for the jury is whether Mr. Hagar possessed the gun one of the officers found in an alley after the chase. To say that this case has nothing to do with race is to ignore reality.

Although Black citizens do not make up the majority of the Eastern District of Michigan, 84% of all felon-in-possession cases in this district involve Black defendants.

(Ex. A, U.S.S.C. Interactive Sourcebook FY 2017.) Mr. Hagar will soon appear for a trial, where it is expected that a group of mostly white jurors from Detroit's surrounding suburbs will decide his fate. The history of racial tension and segregation in the metro Detroit area is well-documented. To this day, there is a wall on Eight Mile that was built to separate the Black citizens of Detroit from the suburbs where real estate developers wanted white people to live.

Race permeates every facet of our society, including the administration of justice. Though courthouses around the country have made efforts to ensure that their courtrooms are race-neutral environments, no courthouse can immunize itself from individually held biases or prejudices.

The U.S. District Court for the Western District of Washington took an innovative first step to remedy the issues of implicit bias and commissioned a video in coordination with the U.S. Attorney's Office, the Federal Public Defender, and civil litigators, that all judges now show to every potential jury before jury selection in each and every case. *See* United States District Court for the Western District of Washington, *Unconscious Bias Juror Video*, available at <https://www.wawd.uscourts.gov/jury/unconscious-bias> ("The video and jury instructions on this page were created by a committee of judges and attorneys and will be presented to jurors in every case with the intent of highlighting and combating the problems presented by unconscious bias.").

Mr. Hagar requests that this Courts show his potential jurors the Western District of Washington’s video.<sup>1</sup> The goal here is not to change any opinions. Instead, it is to ensure that Mr. Hagar has a jury that can be fair and impartial. *See generally* Judge 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, 171 (2010) and Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn. L. Rev. 827, 859-60, n. 254 (2012).

## DISCUSSION

It is an “unmistakable principle . . . that discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’” *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). The Supreme Court has identified the jury as a criminal defendant’s primary protection against racial prejudice. *Id.* (“The jury is to be a criminal defendant’s fundamental protection of life and liberty against race or color prejudice[.]”) (internal quotation marks and quotation omitted). For this reason, “[i]n an effort to ensure that individuals who sit on juries are free of racial bias, the [Supreme] Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*.” *Id.* (citing *Ham v. South Carolina*, 409 U.S. 524 (1973); *Rosales-*

---

<sup>1</sup> Undersigned counsel has obtained permission from William McCool for this Court and any judge or staff member of the U.S. District Court for the Eastern District of Michigan to use this video. (Ex. B, McCool E-mail)

*Lopez v. United States*, 451 U.S. 182, 189-90 (1981) (plurality opinion); *Turner v. Murray*, 476 U.S. 28 (1986).

This jurisprudence supports the notion that the justice system must identify methods to ferret out racial prejudice among jurors. If this task is left unchecked, there exists a great risk of “systemic injury to the administration of justice.” *Id.* Indeed, “[p]ermitting racial prejudice in the jury system damages ‘both the fact and the perception’ of the jury’s role as ‘a vital check against the wrongful exercise of power by the State.” *Id.* (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

**A. The Prevalence and Veiled Nature of Implicit Bias Poses a Threat to Mr. Hagar’s Right to an Impartial Jury and a Fair Trial.**

Jury impartiality is the core requirement of the right to a trial by jury. The accused has a right to be tried by a group of indifferent jurors who lack any biases or prejudices that would impact their ability to make a fair decision based solely upon the evidence. *See Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (an impartial jury is one that has not formed an opinion prior to hearing the evidence and one that does not base its decision upon pre-formed conclusions and biases); *see also* U.S. Const. amend. VI (the accused shall enjoy the right to a speedy and public trial, by an impartial jury).

Implicit bias threatens Mr. Hagar’s right to an impartial jury and a fair trial. Implicit bias is inimical to impartiality, as it entails “relatively unconscious and relatively

automatic features of prejudiced judgment and social behavior.”<sup>2</sup> Judge Donald has acknowledged the problem of implicit biases and the disproportionate manner in which these biases negatively impact African American citizens. *See United States v. Robinson*, 872 F.3d 760, 785 (6th Cir. 2017) (Donald, J. concurring in part) (discussing the manner in which implicit bias operates and inures to the detriment of African Americans).

Research has established that the majority of tested Americans harbor negative implicit attitudes and stereotypes towards African Americans and dark-skinned peoples.<sup>3</sup> For instance, there is a consistent implicit association of “black with negative qualities such as bad and unpleasant, [or] with negative stereotypes like aggressive and lazy.”<sup>4</sup> Moreover, and especially pertinent here, studies have established that people tend “to interpret actions by a black person as more violent or threatening than the same actions performed by a white person.”<sup>5</sup>

---

2 *See* Michael Brownstein, *Implicit Bias*, The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), available at <https://plato.stanford.edu/entries/implicit-bias/>.

3 *See* Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1244 (2018) (“Social science research has made clear that a majority of Americans carry some level of subconscious or implicit bias against racial minorities and that this bias manifests itself in the application of racial stereotypes.”).

4 *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U.L. Rev. 795, 802 (2012).

5 *See* Sagar & Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. Personality & Soc. Psychol. 590, 597 (1980); *see also* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC Irvine L. Rev. 843, 844 (2015) (finding that implicit biases are discriminatory biases based on either implicit attitudes—feelings that one has about a particular group or implicit stereotypes that one associates with a particular group. African Americans, for example are stereotypically linked to crime and violence; their behavior is more likely to be viewed as violent, hostile

Without some form of intervention to force potential jurors to acknowledge and reflect on their biases, there is a risk the jury will allow biases to distort their interpretation and perception of the evidence presented against Mr. Hagar. Whether jurors intend to behave in a biased way is immaterial; the end result for Mr. Hagar is the same. What makes implicit biases especially pernicious in the context of jury trials is that they are often unconscious. *See Pena-Rodriguez*, 137 S. Ct. at 869 (“Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations.”). A potential juror may truly believe that they possess no biases against people of color but still harbor unconscious biases. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (“Bias is easy to attribute to others and difficult to discern in oneself.”). Implicit biases are not conscious, intentional, maliciously based, or openly expressed. *See Ray*, 803 F.3d at 260–61 (Donald, J.) (citing Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 Harv. J. L. & Pol’y Rev. at 152 ); Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit bias and the Law*, 58 UCLA L. Rev. 465, 465 (2010)). As Massachusetts State Judge Kenneth Desmond said, “in the most basic sense, implicit bias is thoughts about other people you didn’t know you had. Consequently, it is difficult for individuals who do not fall victim to the impact of

---

and aggressive than is the behavior of whites; and they are more readily associated with weapons than are whites); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DePaul J. for Soc. Just. 139, 154 (2010) (“[I]mplicit bias against socially underprivileged groups and out groups is prevalent in our culture. As a result, there is a chance that implicit bias is present anytime a member of such a group is the defendant in a criminal trial.”).

certain biases to identify the ways they are manifested.”<sup>6</sup>

Implicit biases pose an especially pestilent problem for an accused who is also a member of a group that society historically and presently stereotypes. As an African-American man, Mr. Hagar is subject to a litany of prejudices and stereotypes that are grounded in centuries of explicitly racist policies and practices. As time went on, policies aimed at excluding African Americans became less explicit; facially race-neutral policies accomplished the same goal. *See generally* Ta-Nehisi Coates, *The Case for Reparations*, *The Atlantic* (June 2014), available at <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (last visited Feb. 21, 2020); Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, *The Atlantic* (Oct. 2015), available at <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> (last visited Feb. 21, 2020). In other words, as expressing biased views or harboring conscious biases became less acceptable, it became harder to identify and ferret out unconscious biases.

The modern covert nature of racial biases arguably poses a greater threat because jurors may be unaware of their implicit bias. In light of the very real nature of implicit bias, and the fact that Mr. Hagar is accused of acting criminally, it only makes sense to acknowledge how race, gender, and age may impact a juror’s views and take steps to mitigate the harm.

---

<sup>6</sup> *See* Hon. Kenneth V. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, Boston B.J., Summer 2016, at 3.

**B. The Video Is Balanced, Uncontroverted, Not Inflammatory, and Supplements Instructions About Conscious Bias**

Showing prospective jurors a brief, scientifically uncontroverted video is appropriate, sound, and within the Court's wide discretion to ensure a fair and impartial jury. *See Skilling v. United States*, 561 U.S. 358, 386 (2010) ("Jury selection . . . is particularly within the province of the trial judge." (cleaned up)). The proposed video is a neutral, education presentation. The video features three people: U.S. District Judge John C. Coughenour, civil rights attorney Jeffrey Robinson, and then-U.S. Attorney for the Western District of Washington, Annette Hayes.

The beginning of the video discusses the difference between intentional discrimination and unconscious bias, to ensure that potential jurors understand that explicit biases are not the subject of this video. Narrators differentiate between conscious bias and unconscious bias: "[O]ur conscious biases can also lead to intentional and harmful discrimination." (Unconscious Bias Video at 1:42–1:48.) "For example, consciously deciding that a person is not entitled to equal rights based on their race, sex, age, nationality, or religion is a clear example of intentional, deliberate and harmful discrimination." (Video at 1:48–2:05.) But after the nine seconds of images, the speaker clearly states: "Today, though, I want to talk to you about unconscious bias. Unconscious bias is different and it's something we all have, simply because we're human." (Video at 2:05–2:16.) The video goes on to discuss how unconscious bias can impact the way we perceive different people and situations without being fully aware



that we are bringing biases to our judgment. The images the video employs to “choreograph” unconscious bias are a photograph of the judge who is the first speaker in the video (Video at 3:32); a man riding a motorcycle (Video at 3:59); a list of primary colors (Video at 4:40); resumes labeled John and Jane Doe (Video at 6:35); and a horse (Video at 7:39). Race is mentioned three times in the eleven minutes.

Simply, the video explains how unconscious bias can negatively impact the way that jurors look at witnesses for either side, the defendant, the attorneys, and the Judge presiding over the case, in addition to all of the events described in the testimony provided at trial. The video correctly instructs all such jurors to consider the assumptions they bring to the table, and be aware of them.

### **C. Other Jurisdictions Routinely Show the Unconscious Bias Video**

The government contends “the video has not gained much traction outside the Western District of Washington.” (R. 22, Gov’t Resp. Re: Unconscious Bias, PgID 54.) That is incorrect.

Since releasing this innovative video, numerous district courts around the country have decided to show the video. *See, e.g.*, U.S. District Court for the Northern District of California, *Unconscious Bias Video for Potential Jurors*, <https://www.cand.uscourts.gov/attorneys/unconscious-bias-video-for-potential-jurors/> (last visited Feb. 19, 2020); Ex. C, *United States v. Sampson*, 1:18-cr-02029, Order Following Pretrial Conference (E.D. Wash. Mar. 15 2019) (Bastian, J.); Ex. D, *United States v. Reed*, 17-CR-253, Order Re Intent to Play Unconscious Bias Video (D. Minn. Jan. 30, 2019) (Brasel,

J.); Ex. E, *United States v. Lawrence*, 18-CR-527 (E.D.N.Y. Nov. 6, 2019) (Bloom, M.J.); Ex. F, *United States v. Lawrence*, 18-CR-527 (E.D.N.Y. Nov. 12, 2019) (Weinstein, J.). Undersigned counsel is also aware that the U.S. District Court for the District of Oregon is in the process of creating its own video to show jurors about unconscious bias.<sup>7</sup>

This case bears no similarity to *Thomas v. Cannon*, 15-5346, 2017 WL 11423601 (W.D. Wash. June 20, 2017), a civil case. That case was the only known exception to the policy in the Western District of Washington that the video “will be presented to jurors in every case.”<sup>8</sup> *Id.* at \*2; Western District of Washington, *Unconscious Bias Juror Video*, <https://www.wawd.uscourts.gov/jury/unconscious-bias>. While noting that the video *should* be played in most cases, the judge chose not to show the video because of the nature of the lawsuit. The Thomas family, the plaintiffs, claimed that the white police officer-defendants killed their unarmed Black male son because of his race. *Thomas*, 2017 WL 11423601 at \*2. The central claim in the case was race-based. Not so here.

This is a criminal trial. The government in a criminal case does not represent the police officers it calls as witnesses. “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to

---

<sup>7</sup> Undersigned counsel has received information from federal defenders in the District of Montana, District of Idaho, and District of Minnesota that judges in those districts routinely show the video to potential jurors.

<sup>8</sup> There are plenty of 18 U.S.C. § 922(g) trials in the Western District of Washington.

govern impartially is as compelling as its obligation to govern at all.” *Berger v. United States*, 295 U.S. 78, 88 (1935). The government is tasked with prosecuting Mr. Hagar, not defending their witnesses.

#### **D. The Government’s Opposition to Training Jurors in Unconscious Bias and Skepticism of the Research Are Contrary to the Policy of the Department of Justice**

The government further suggests that the validity of studies of unconscious bias have been debunked. (R. 22, Gov’t Resp. Re: Unconscious Bias, PgID 54–55.) But this research has been adopted as valid by the United States Department of Justice. Information about research into implicit bias is available to the public on the DOJ’s website as of February 20, 2020.

- U.S. Dep’t of Justice, *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, Press Release Number 16-747 (June 27, 2016), <https://www.justice.gov/opa/pr/departments-justice-announces-new-department-wide-implicit-bias-training-personnel> (directing that 28,000 DOJ employees will be trained because “the research is clear that most people experience some degree of unconscious bias, and that the effects of that bias can be counted by acknowledging its existence and utilizing response strategies.”).
- United States Department of Justice, *Memorandum for All Department Law Enforcement Agents and Prosecutors* (June 27, 2016), <https://www.justice.gov/opa/file/871116/download> (“Over the past several decades, social science research has revealed that we all experience some degree of ‘implicit bias,’ the unconscious and often subtle associations we make between groups of people and stereotypes about those groups.”).
- United States Department of Justice, *FAQs on Implicit Bias* (June 27, 2016), <https://www.justice.gov/opa/file/871121/download> (“As the research shows, bias starts with our automatic tendency to categorize individuals: we employ mental shortcuts to make sense of the world and this process

can involve categorizing people we do not know according to group membership.”).

Unconscious bias is real. The research behind it is decades-old, rigorously controlled, scientific research that is universally accepted across the scientific community and the federal courts, which is why it has been adopted by the United States Department of Justice. *See, e.g., Texas Dept. of Hous. and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2512 (2015) (recognizing “unconscious prejudices” in disparate treatment in housing discrimination); American Bar Association, *Implicit Bias Initiative*, <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/> (last visited Feb. 20, 2020). Implicit bias has been the subject of training at federal courthouses, federal defender offices, prosecution offices (including the Department of Justice, as shown), and corporate workplaces. It is taught at universities and law schools across the country.

#### **E. The Unconscious Bias Video is Not Duplicative or Confusing**

The government’s chief complaints about the video is that instruction about unconscious bias is unnecessary, confusing, and duplicative of other mechanisms in place to ensure juror impartiality, such as voir dire, the “Call to Serve” video, and jury instructions. To some extent, the parties agree. Mr. Hagar and his counsel intend to question potential jurors during voir dire to identify implicit biases. They also plan to request a jury instruction about implicit bias, such as the one drafted by judges and lawyers in the Western District of Washington. *See* W.D. Wash. Unconscious Bias Jury

Instruction, <https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf> (last visited Feb. 21, 2020). The video offers an additional layer of protection from a neutral source.

The “Call to Serve” video does not address unconscious bias. The “Call to Serve” video created by the Federal Judicial Center offers a historical overview of the right to a jury in the United States, emphasizes the importance of jury service, outlines selection and procedures, and admonishes jurors not to conduct independent research, to discuss the case with anyone—including posts on social media. But the “Call to Serve” video contains no discussion of unconscious bias.

The Sixth Circuit Pattern Jury Instructions do not address unconscious bias either. Instead, they correctly inform jurors not to let bias, sympathy, or prejudice influence their decisions. But without information about unconscious bias, jurors may fail to identify how these unconscious biases may affect their view of the evidence. Again, the problem with unconscious biases is that everyone has them and may not know it. The unconscious bias video forces jurors to consider whether they harbor these biases when they may not otherwise do so.

Most troubling, the government argues that educating jurors about unconscious bias could “caus[e] [jurors] to discard their common sense and everyday experience when evaluating the evidence.” (R. 22, Gov’t Resp. Re: Unconscious Bias, PgID 52.) Surely the government isn’t suggesting that stereotypes about race, age, or gender are the same as “common sense” or “every day experience.” If so, then that highlights the

need to educate everyone about the mental shortcuts people use to form opinions without evidence. And the jurors are not supposed to be deciding cases based on their “common sense” or personal experiences; they are supposed to base their decisions on the evidence presented at trial. Highlighting the need to identify, challenge, and discard unconscious biases when looking at evidence is simply asking jurors to do what they are supposed to do: forming evidence-based decisions.

Finally, the government takes issue with the discussion at the end of the video when Annette Hayes, the then-U.S. Attorney for the Western District of Washington, “encourages jurors to, during deliberations, confront each other with the possibility of implicit bias.” (R. 22, Gov’t Resp. Re: Unconscious Bias, PgID 52–53.) The government fears that doing so will create discord during jury deliberations and distract jurors from the evidence. Yet Ms. Hayes actually emphasizes the need for jurors to focus on the evidence and whether they would come to the same conclusion if the defendant or witness were of a different gender, race, or age. (Video at 8:15-38.) This practice isn’t antithetical to the deliberative process; it is an important step to ensure that the evidence—not unconscious biases—is the basis for a verdict.

## CONCLUSION

Even the most well-intentioned jurors could be negatively affected by implicit bias to such an extent that it could compromise Mr. Hagar's right to a fair trial. The video is an innovative tool to guard against such concerns, as it serves as a reminder to jurors that they must not allow themselves to be swayed by implicit bias. A district-wide policy is not necessary for this Court to adopt a prophylactic measure to protect Mr. Hagar's right to trial by a fair and impartial jury.

Date: February 21, 2020

Respectfully Submitted,

**FEDERAL COMMUNITY DEFENDER**

s/ Colleen P. Fitzharris  
Attorney for Steve Hagar  
613 Abbott Street, Suite 500  
Detroit, Michigan 48226  
313-967-5866  
E-mail: [colleen\\_fitzharris@fd.org](mailto:colleen_fitzharris@fd.org)  
WSBA # 48021

**CERTIFICATE OF SERVICE**

Counsel certifies that on the above date, the foregoing paper was filed with the clerk of the Court using the ECF system, which will send notification to opposing counsel.

Respectfully Submitted,

**FEDERAL COMMUNITY DEFENDER**

s/Colleen P. Fitzharris  
Attorney for Steve Hagar  
613 Abbott St., Suite 500  
Detroit, MI 48226  
Phone: 313-967-5542

Dated: February 21, 2020