No.

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN SAWYERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal district court should give an implicit bias jury instruction upon request where other courts have recognized that implicit bias is a genuine concern calling for cautionary instructions?

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Petitioner Brian Sawyers respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on October 24, 2018. The decision is unpublished.

OPINION BELOW

On October 24, 2018, the Court of Appeals entered its decision affirming petitioner's drug trafficking convictions and resulting 180 months sentence. (Appendix A [memorandum decision].) On November 30, 2018, the petition for rehearing was denied. (Appendix B.)

JURISDICTION

On November 30, 2018, the Court of Appeals denied the petition for rehearing. (Appendix B.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on February 28, 2018. Supreme Court Rules 13(3). Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment (pertinent part)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ....

STATEMENT OF THE CASE

A. Over Eighty Percent of Defendants Charged with Selling Crack Cocaine Are African American

Petitioner was an African American man on trial for selling a small amount of crack cocaine to an informant at the hamburger stand he owned and operated in South Central Los Angeles. Over eighty-percent of defendants charged with crack cocaine offenses are black. United States Sentencing Commission, FIFTEEN YEARS OF GUIDELINES SENTENCING, An Assessment of How Well the Federal Criminal Justice System if Achieving the Goals of Sentencing Reform (November 2004) at xv. (Hereinafter "Fifteen Year Review.")

Empirical research has shown that in addition to explicit biases people have implicit biases; that is, "attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without even realizing it." Kang, et al., "Implicit Bias in the Courtroom," 59 UCLA L. Rev. 1124, 1126 (2012) (hereinafter "Kang") (law review article reports numerous studies showing that blacks are more likely to be prosecuted, to receive less favorable plea bargains, to be convicted by juries, and to be given higher sentences than whites).

In the past two decades, cognitive psychologists have conducted laboratory experiments and field studies which has turned up convincing evidence that "implicit biases exist, are pervasive, are large in magnitude, and have real-world effects." (*Ibid*.) "Since the mid-twentieth century, social scientists have uncovered empirical evidence of negative attitudes toward African Americans as well as stereotypes about their being violent and criminal." (*Id*. at 1136.) The "widely taken" Implicit Association Test (IAT) has shown a "high and nearly universal preference of whites over blacks." Hon. Theresa Doyle, "U.S. District Court Produces Video, Drafts Jury Instruction on Implicit Bias," Kings County Bar Association BAR BULLETIN (April 2017).

"[W]e recognize the proven impact of implicit biases on individuals' behavior and decision-making. Social scientists have examined extensively the theory of implicit bias in recent decades, especially as it relates to racial bias." *United States v. Ray*, 803 F.3 244, 259 (6th Cir. 2015) (citations omitted).

> The concept of "implicit bias" is defined, generally, as bias that is "not necessarily openly and explicitly expressed, but [is] harbored nonetheless." Implicit biases are 'often not conscious, intentional, or maliciously-based,' as opposed to explicit bias — generally defined as "bias that is openly expressed." (Citation omitted.) Further:
>
> > [W]hile explicit biases may be shunned and disapproved of in public, implicit biases only strengthen and "harden[]" over time, becoming part of one's core set of beliefs. Distinct from explicit biases, not all implicit biases take the shape of outward animosity or hatred toward a particular group. One can hold beliefs stemming from seemingly innocuous stereotypes, which then subsequently form cognitive schemas and implicit biases.
> >
> > Given its nature, the problem of implicit bias is extensive and pervasive, and its effect is substantial. Researchers argue that these implicit biases can predict behavior, impacting both mundane behavior, such as whether someone engages in simple acts of courtesy, and consequential behavior, such as how someone evaluates another person's work quality.

Ray, 803 F.3d at 259, n.8 (citing e.g. 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, 152 (2010) ("Implicit biases [unlike explicit biases] ... are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful. Unfortunately, they are also much more difficult to ascertain, measure, and study than explicit biases.").

B. The District Court Rejected the Defense Instruction on Implicit Bias

To educate jurors about implicit bias, the Honorable Mark Bennett, District of Iowa, now gives the following instruction in every trial (Kang at 1182-1183), which Petitioner requested be given in his case:

> Everyone, including the court, has feelings, assumptions, perceptions and fears about and exposure to stereotypes. We call these "implicit biases." We call them "implicit biases" because we are often not aware of them and they are not malicious. No one is a bad person for having "implicit biases"; they are a function of how our brains work. These hidden thoughts and feelings can impact, however, what we see and hear,how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, or stereotypes,and to consider whether your reactions to what you see and hear are based on any "implicit biases." Do not decide the case based on "implicit biases." The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence and requires you to put aside any assumptions, stereotypes or biases that you may have.

(CR 97, 1 ER 260.)

The government objected that: "To the extent that defendant is concerned about biases, the voir dire process will address this issue. There is no need to provide the jurors with an instruction that they may be biased and be unaware of that bias." (1 ER 262.)

Petitioner responded that:

> Voir dire can only expose the explicit biases of potential jurors. Legal, neuro- and social science research definitively demonstrate that jurors hold biases even if they are unaware of them and that the implicit nature of those biases leads to the seating of biased jurors. "[T]he general research consensus is that

> jurors of one race tend to show bias against defendants who belong to another race."

(1 ER 263, citing Kang at 1142.)

Petitioner also argued, inter alia, that juror bias violated his right to an impartial jury and pointed out that the State of California (see infra) has adopted an instruction that acknowledges the reality of implicit bias. (1 ER 263.) Pennsylvania also has a standard jury instruction on implicit bias. PA-JICIV No. 1.140 (2014). (1 ER 261.)

The district court ruled: "Then with regard to disputed instructions, I will not give the defendant's three instructions that were objected to by the Government. The objections are noted." (3 ER 757.)

C. Voir Dire Touched Only on Explicit Biases and Did Not Warn Potential Jurors about Implicit Bias

The court did ask jurors if they had any problems sitting on the case (2 ER 347) and several jurors spoke up and expressed biases for and/or against law enforcement vis-a-vis drug cases. Several mentioned drug problems in their own family. (2 ER 349-350, 354, 360, 361.) The court also commented:

> Anyone else feel in a similar fashion as these two jurors that have spoken? We all live in a community; so we all see it. Any of you feel the same sort of attitude to a bias for or against the police or for or against drugs?
>
> I'm asking these questions basically to try to find a fair and impartial juror to hear this case. There are **implicit biases** such as the two that have already mentioned it. That's natural, and we want to hear those responses.

> As far as being a fair and impartial juror, is there any of you that would feel right now that you cannot be a fair and impartial juror? Is there any of that cannot be a fair and impartial juror at this time?

(2 ER 349-350, emphasis added.)

The court did not explain that an implicit bias was one that the juror may not even be aware of. In fact, the way the court phrased the term, it was referring to bias concerning drugs.

The court also asked: "Do any of you have such a strong feeling that any particular race is more likely to sell crack cocaine than other – people of other races? (2 ER 367.) Not surprisingly, no one responded that he or she would view the case through a racial lens.

At no time, either during preinstruction (2 ER 398-405) or final instructions (4 ER 804-815) did the court advise the jurors to be on guard against implicit biases such as racial stereotypes insofar as it may affect their decisionmaking.

D. The Ninth Circuit Affirmed in a Brief Memorandum Decision

This Court rejected the implicit bias argument stating only:

> The district court did not abuse its discretion in declining to instruct the jury specifically on implicit bias. Sawyers cites no authority requiring such an instruction, nor does he cite any evidence of jury bias in this case.

Memorandum at 2.

REASONS FOR GRANTING THE WRIT

IMPLICIT BIAS IS A GENUINE PHENOMENON RECOGNIZED BY VARIOUS COURTS THAT WARRANTS A CAUTIONARY JURY INSTRUCTION

A. After Petitioner's Trial, the Western District of Washington Began Showing Potential Jurors a Video about Implicit Bias

In March 2017, after Petitioner's trial concluded in August 2016, the Western District of Washington began showing an eleven minute video to prospective jurors alerting them to hidden biases they might bring into the courtroom. See Gayla, "A Federal Court Asks Jurors to Confront Their Hidden Biases" (6/21/17) (available at www.marshallproject.org). The video cost $15,000 to make and features the Honorable John Coughenour, the United States Attorney Annette Hayes, and the deputy legal director of the ACLU, Jeffrey Robinson. (*Id.*) The video is available on the court's website at: www.wawd.uscourts.gov/jury/unconscious-bias.

B. Other Courts Approve an Implicit Bias Instruction

California has approved an implicit bias instruction as follows:

> Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. **We may not be fully aware of some of our other biases.**
>
> Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.
>
> As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision.

> You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias*]].
>
> Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

California Civil Jury Instruction ("CACI") 113 (emphasis added)

In *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) (GAB at 43) the appellate court found the trial court had indeed abused its discretion "because it erroneously believed" it could not give the instruction which was "a correct statement of anti discrimination principles." *Id.* at 817. The appellate court held that the error was not prejudicial in that case, but encouraged the trial courts to give the implicit bias instruction.

> While there is general agreement that the courts should address the problem of implicit bias in the courtroom, courts have broad discretion about how to do so. One of the ways courts have addressed implicit bias is by giving jury instructions similar to the one proposed by Plain in this case. *We strongly encourage district courts to be proactive about addressing implicit bias ...*

State v. Plain, 898 N.W.2d at 817 (emphasis added).

C. After Petitioner's Trial, this Court Observed That Voir Dire May Be Insufficient in Exposing Racial Prejudice

On March 6, 2017, this Court held that when a juror states during deliberations that he was biased against the defendant because he was Hispanic, such evidence of racial

bias can be used to impeach the verdict. The high court stressed that "the jury is a central foundation of our justice system and our democracy." *Colorado v. Pena-Rodriguez*, ___U.S. ___, 137 S.Ct. 855, 860, 197 L.Ed.2d 107 (2017).

> Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense. A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. This principle, itself centuries old, is often referred to as the no-impeachment rule. The instant case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.

Pena-Rodriguez, 137 S.Ct. at 861.

The Court pointed out that the Fourteenth Amendment was designed to "eliminate racial discrimination emanating from official sources in the States." *Id.* at 867.

> It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.

Ibid.

This Court emphasized that its past "decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns." *Pena-Rodriguez*, 137 S.Ct. at 868.

> An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Ibid.

This Court also recognized that while voir dire may uncover some biases of potential jurors, it may not be sufficient for discovering racial bias. *Pena-Rodriguez*, 137 S.Ct. at 868.

> For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias in voir dire. (citation.) Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. **Yet more pointed questions could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.**

Id. at 869, citing *Rosales-Lopez*, at 195, 101 S.Ct. 1629 and *Ristano v. Ross*, 424 U.S. 589 (1976) (emphasis added).

"The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Pena-Rodriguez*, 137 S.Ct. at 869.

> A constitutional rule that racial bias in the justice system must be addressed – including, in some instances, after the verdict has been entered – is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

Ibid.

D. The Failure to Give Petitioner's Requested Instruction on Implicit Bias Violated His Sixth Amendment Rights

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate [the] right to a fair trial." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998). A biased adjudicator is one of the few "structural defects which defies analysis by harmless error standards," because the "entire conduct of the trial from beginning to end is obviously affected." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

To be sure, there is no case which presently holds that the failure to give the requested instruction on implicit bias is error, much less reversible error. However, voir dire may not only be insufficient to root out jurors who are racially prejudiced, but such pointed questions may make matters worse. *Pena-Rodriguez*, 137 S.Ct. at 869. As discussed above, it can no longer be denied that people have hidden biases and that blacks are viewed much more negatively than whites in the criminal justice system. Further, as noted above, other courts approve of advising jurors to confront implicit bias.

Give that Petitioner was a black man on trial for selling crack cocaine who requested an implicit bias instruction, this case presents the perfect opportunity to decide whether district courts should be required to give such an instruction upon request.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: February 27, 2019 Respectfully submitted,

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Counsel of Record