No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

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MAURICE BURKS

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

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PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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John M. Bailey
330 Franklin Rd.; Ste. 135A-427
Brentwood, TN 37027
(615) 319-1342

## QUESTIONS PRESENTED FOR REVIEW

This case is about the effects of racial bias - both deliberate and implicit - in the trial of a young, black man whose trial was infused with constitutionally impermissible racial targeting eading to a verdict unworthy of trust. This case exposes uncomfortable truths that reveal an unconstitutional trial. The questions presented are:

I. Whether it violates *Batson v. Kentucky*, 476 U.S. 79 (1986), for the government to begin its *voir dire* by targeting a young, black woman with a deliberately confusing question, not asked of any other juror, then using her lack of understanding the question as a pre-text for exercising a peremptory strike against her?

II. Whether it violates Due Process for the court to force five, young, black defendants to sit in a row behind their almost exclusively white attorneys, presenting the jury with an image that the defendants were joined together and that counsel did not want their clients sitting with them?

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Petitioner, Maurice Burks, respectfully prays that a writ of *certiorari* issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered on September 20, 2024.

OPINION BELOW

The Order of the United States Court of Appeals for the Sixth Circuit is unpublished, but reported at *United States v. Burks*, 2024 U.S. App. LEXIS 24052 (6th Cir.). That Order is

attached as Appendix "A".

## JURISDICTION

On September 20, 2024, the Sixth Circuit entered an Order affirming Petitioner's convictions and sentences. This Court has jurisdiction under 28 U.S.C. §1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime ... without due process of law ....

U.S. Const. Amend. XIV: No person shall be denied equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner, along with four (4) co-defendants, proceeded to trial on March 1, 2019, based upon allegations in a Third Superseding Indictment. Petitioner was charged with six (6) counts in the Third Superseding Indictment: a RICO conspiracy, a drug conspiracy, and four (4) counts related to the murder of Malcolm Wright on November 3, 2012.[1] Petitioner was convicted on all six (6) counts. The district court partially granted Petitioner's motion for new trial, granting him a new trial on the four (4) murder counts. The government appealed.

The United States Court of Appeals for the Sixth Circuit reversed the District Court's partial grant of Petitioner's motion for new trial. *United States v. Burks*, 974 F.3d 622 (6th Cir. 2020). The panel majority reached its opinion by utilizing a more stringent standard of review for when a district court grants a Rule 33 motion than when a district court denies a Rule 33

[1]The government waited eleven and a half years after the first of the criminal acts alleged in the conspiracy, almost nine (9) years after Petitioner's alleged first involvement, and over four and a half years after Malcolm Wright's killing, to indict Petitioner and his co-defendants for the crimes alleged.

motion, and substituting its own credibility determination regarding the government's three informant witnesses for that of the District Court, in violation of well settled circuit precedent. This Court denied Petitioner's request for *certiorari*. *Burks v. United States*, 141 S.Ct. 1722 (2021).

Petitioner then filed a second motion for new trial based on the government's *Brady* violation. The district court again partially granted Petitioner's motion, again granting him a new trial on the murder counts. The government again initially filed a notice of appeal. However, the government subsequently withdrew its appeal. Petitioner was sentenced to 420 months in prison on the RICO conspiracy and drug conspiracy convictions.

The Sixth Circuit affirmed Petitioner's convictions and sentences in an unpublished opinion. *United States v. Burks*, 2024 U.S. App. LEXIS 24052 (6th Cir.).

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal issues that Petitioner raises in this petition concern fundamental constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution. All of these issues were presented to the trial court and the United States Court of Appeals for the Sixth Circuit in motions and briefs challenging Petitioner's convictions and sentences in the underlying case. The United States Court of Appeals for the Sixth Circuit, by way of a written Order, rejected Petitioner's federal constitutional claims.

## REASONS FOR GRANTING THE WRIT

In its opinion in Petitioner's case, the Sixth Circuit's decision: (1) fails to engage with the factual and legal arguments surrounding the government's targeting, then exercising a peremptory strike against a young, black female juror; (2) conflicts with this Court's decisions

interpreting *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny; (3) fails to engage with the factual and legal arguments surrounding the trial court's forcing Petitioner and his four black co-defendants to sit as a group behind their almost exclusively white attorneys, presenting a vivid picture to the jury that Petitioner and his co-defendants should be viewed as one entity and that counsel were afraid of their clients.

I. IT VIOLATED *BATSON V. KENTUCKY*, 476 U.S. 79 (1986), FOR THE GOVERNMENT TO BEGIN ITS *VOIR DIRE* BY TARGETING A YOUNG, BLACK WOMAN WITH A DELIBERATELY CONFUSING QUESTION, WHICH IT DID NOT ASK ANY OTHER JUROR, THEN USING HER LACK OF UNDERSTANDING OF THE QUESTION AS A JUSTIFICATION FOR USING A PEREMPTORY STRIKE AGAINST HER, WHEN THE TRIAL COURT, RECOGNIZING THAT THE QUESTION WAS INCOMPREHENSIBLE, IMMEDIATELY REPHRASED THE QUESTION IN AN UNDERSTANDABLE FORM AND THE JUROR PROVIDED A PERFECTLY SATISFACTORY ANSWER TO THE COURT'S QUESTION.

It is no secret that, "in the United States, prosecutors have manipulated peremptory challenges for a more invidious purpose: to exclude Black individuals from juries." Colleen P. Graffy, Harry M. Caldwell, and Gautam K. Sood, *First Twelve in the Box: Implicit Bias Driving the Peremptory Challenge to the Point of Extinction*, 102 Ore.L.Rev. 355, 357 (2024). Black persons have historically been, and continue to be, disproportionately excluded from juries.[2] Prosecutors have whitewashed juries through the exercise of peremptory challenges for as long as black persons have been eligible for jury service. Prosecutors' current use of peremptory challenges to exclude black persons from juries has its roots in the history of slavery and the wholesale exclusion of Black citizens from all aspects of civil society in many states following

[2]*See* Robin M. Maher, *What's Past is Prologue: The Importance of History in Flowers v. Mississippi*, Geo. Wash. L.Rev., On The Docket (Oct. Term 2018)(footnotes omitted)("Few methods employed for the purpose of excluding African Americans from jury service have been as enduring as the racially discriminatory use of peremptory challenges.").

Reconstruction.[3] And they are getting better at it. "In most cases... the discrimination becomes more subtle: prosecutors strategically pick a single Black juror ...." Kaitlyn Filip, *The Batson Challenge: Evidence, Court Opacity, and Discrimination Before the Supreme Court*, 42(2) LAW & INEQ. 31, 70 (2024). The government's actions in this case continues the racist tradition with modern sophistication.[4]

At Petitioner's trial, the government targeted juror number one,[5] a young, black woman, beginning its *voir dire* with individual questions to her. R. 1431 - SEALED; Page ID# 11226. Juror number one, like everyone else in the courtroom, had difficulty understanding the government's first questions during *voir dire*, which were directed only at juror number one. The government's questions were ill-conceived, ill-designed, and confusing. And only juror number one had to answer them.

When asked the first, and most understandable of the questions - "if the judge were to tell you that the United States has to prove this case beyond a reasonable doubt, but not beyond all possible or speculative doubt, do you have a problem with that? Can you follow the law?" - juror number one responded with a direct, straight forward answer - "I don't have a problem with

[3]Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 9 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pd.

[4]"(T)he use of race-and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005)(Breyer, J., concurring).

[5]The district court, over Petitioner's objection, R. 1123; Page ID# 8131, utilized an anonymous jury at the trial of the instant case, so Petitioner is unaware of this juror's - or any other jurors' - name.

it." R. 1431-SEALED; Page ID# 11226. Not content with that straight forward answer from a young, black woman, the government then proposed three more increasingly confused and confusing questions to juror number one. *Id*. When the juror expressed confusion, the district court quickly intervened to rephrase the government's intended question in an understandable form. Juror number one immediately answered that she would follow the law - without exception. R. 1431-SEALED; Page ID# 11228.[6] So did every other potential juror. Thus,

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[6]GOVERNMENT: Would you require the government to prove away all doubt, including those doubts that may be speculative or doubts that may just be possible?

PROSPECTIVE JUROR: Could you repeat the question?

GOVERNMENT: Yes, ma'am. So if the judge were to instruct you that the United States has to prove the case beyond a reasonable doubt -- that is, it's our burden to do that -- but that a reasonable doubt is not a speculative doubt, it's not a doubt -- it is not a mere possible doubt, would you still require the government to prove away even any speculative doubts that you may have?

PROSPECTIVE JUROR: Yes.

GOVERNMENT: You would? Even if the judge told you that we didn't have to prove away speculative doubts?

PROSPECTIVE JUROR: Yes.

GOVERNMENT: Thank you.

THE COURT: All right. Ladies and gentlemen, and especially to Juror Number 1, at the end of this case, I will give you the instructions that you must follow, and you will have to follow those instructions whether you agree with them or you don't agree with them. You don't have the option of not following the instructions that I give you. Further, you'll get a copy of the instructions that you can refer to, for those of you who are selected to deliberate and render a verdict in this case. So what I want to ask you all again -- and I think we've covered this already -- if I give you instructions -- I will give you instructions. Will you follow those instructions as I give them to you, disregarding any opinions, beliefs, or feelings you may have about them, and nevertheless follow the instructions that I give you? Is there anyone who cannot do that or who will not do that? And specifically, Juror Number 1, now that I've clarified, if you're selected to be on this jury, and I charge you the law to follow, will you follow the law as I give it to you?

PROSPECTIVE JUROR: Yes.

THE COURT: Without exception?

PROSPECTIVE JUROR: Yes.

every other white juror who the government did not strike gave the same answer to the trial court's clarifying question as did juror number one.[7]

Petitioner objected to the excusal of juror number one based upon *Batson*. Transcript, March 4, 2019 - SEALED, p. 94. The trial court required the government to provide a race neutral basis for its strike of juror number one. The government responded that her answer to the government's incomprehensible question was its basis for striking her. That explanation was contrary to the record and inadequate to justify the excusal of juror number one. *Id*., pp. 95-96. The trial court allowed the government to use a peremptory challenge against juror number one and removed her from the jury in Petitioner's trial. *Id*., p. 96.

In addressing the government's "use of a peremptory strike against Juror Number One, an African American woman," the Sixth Circuit noted the government argued "that it struck Juror Number One because she did not initially respond that she could apply the reasonable doubt, rather than a higher, standard of proof," but that "Burks disputed the factual basis of the challenge, contending that Juror Number One did not initially understand the question." The court held the district court's determination that the government "provided a legitimate, nondiscriminatory reason for its strike" was "not clearly erroneous" and "no *Batson* violation occurred." *United States v. Burks*, 2024 U.S. App. LEXIS 24052, *17-19 (6th Cir.). The Sixth Circuit's opinion failed to engage in any meaningful examination of the record in this case and the government's motives in targeting juror number one and questioning her differently than it

[7]Juror number one answered only a few, nondescript questions during *voir dire*. Juror number one indicated that she could follow the beyond a reasonable doubt standard in criminal cases and that she knew one other person on the venire panel. Those answers did not differentiate juror number one from other, white jurors who the government did not strike.

did every other juror. In so doing, the court failed to follow this Court's directives in *Batson* and its progeny and failed to recognize the constitutional importance of the issue before it.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Foster v. Chatman*, 578 U.S. 488, 501 (2016), *quoting Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 266 (1977)). In assessing Petitioner's *Batson* claim, that inquiry had to take into account the government's disparate questioning of juror number one relative to white jurors. The Sixth Circuit did not make any such inquiry. If it had, the evidence clearly establishes that, pursuant to this Court's precedent, the government violated *Batson* at Petitioner's trial.

Racial discrimination in the administration of justice "strikes at the core concerns of the Fourteenth Amendment and at the fundamental values of our society and our legal system." *Rose v. Mitchell*, 443 U.S. 545, 564 (1979). This is nowhere truer than in jury selection.[8] The ability to serve on a jury is one of "the most substantial opportunit[ies] that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019), *citing Powers v. Ohio*, 499 U.S. 400, 407 (1991). The harm from discrimination affecting the composition of the jury "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose*, 443 U.S. at 556; *Buck v. Davis*, 580 U.S. 100, 124

[8]This Court "regularly affirms the importance of eliminating racial bias in jury adjudication, underscoring that '[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process.'" Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 Columbia L.Rev. 1, 19-20 (2024).

(2017)("[Such discrimination] injures not just the defendant, but 'the law as an institution . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'").[9] Such doubt, in turn, undermines "public confidence" in the criminal justice system and fosters community suspicion that a verdict may not have been "given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413; *see also Foster v. Chatman*, 578 U.S. 488, 523 (2016).[10]

It is also demeaning to the juror. "Unfair exclusion from juries harms prospective jurors by denying them access to democratic participation and subjecting them to humiliating and harassing courtroom discussion, including disparate *voir dire* questioning and stereotyping." Ellen Boland Monroe, *Washington's General Rule 37 and Montana's Call for Jury Selection Reform, 84 Mont.L.Rev. 247, 250 (2023).* Here, the government not only insulted juror number one by questioning her differently than it did any white juror, but by using her confusion regarding the government's deliberately confusing questions, it effectively stated that she was not smart enough to serve on Petitioner's jury. This was reprehensible.

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[9]Jury service provides citizens with an opportunity to participate in the legal system and enhances their regard and understanding of the legal system, the judiciary, and the jury system. *See* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 285–86 (Robert E. Litan ed., 1993). Unlawful exclusion of citizens from jury duty, therefore, forsakes significant opportunities to strengthen and deepen our democracy.

[10]The jury's indispensable role as "a criminal defendant's fundamental protection of life and liberty against race or color prejudice," *Pena-Rodriquez v. Colorado*, 580 U.S. 206, 223 (2017), *quoting McCleskey v. Kemp*, 481 U.S. 279, 310 (1987)) (internal quotation marks omitted), means that racial discrimination in jury selection threatens the gravest of harms to criminal defendants. "Striking black prospective jurors on the basis of race 'poisons public confidence' in the judicial process,' because it suggests the justice system is complicit in racial discrimination." *Mitchell v. Genovese*, 974 F.3d 638, 652 (6th Cir. 2020)(citations omitted).

In short, "[a]ctive discrimination by a prosecutor" during jury selection "invites cynicism respecting the jury's neutrality and its obligations to adhere to the law," and it "cannot be tolerated." *Powers*, 499 U.S. at 411–12. In *Flowers*, this Court reiterated the principle that, "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers*, 139 S.Ct. at 2244.

Thus, it is imperative that courts remain diligent in ferreting out racial discrimination in jury selection procedures. Failure to do so risks inflicting grave harm on not only the defendant and the citizens that are unlawfully excluded from jury duty, but also on the community at large by undermining the public's confidence in the criminal justice system and, therefore, weakening the foundations of our multiracial democracy. The Sixth Circuit's opinion in Petitioner's case does not meet this standard.

The Equal Protection Clause prevents purposeful discrimination against a protected class and thus it can limit an attorney's ability to exercise peremptory strikes. This Court has recognized limitations on peremptory strikes to ensure that strikes are not used for a discriminatory purpose against a protected class. *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the Court set forth a three-prong test to determine whether a prosecutor improperly excused a prospective juror based on the juror's race. First, the party challenging the strike must establish a prima facie case of purposeful racial discrimination; second, the prosecutor "must provide race-neutral reasons for its peremptory strikes;" and, third, the court must determine "whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers*, 588 U.S. at 298. Petitioner's case hinges on the final one. The government did not ask the convoluted question it posed to juror one to any white jurors, and that

is because the government wanted to create a reason to cite in response to a *Batson* challenge. That is unconstitutional.

The government's behavior here is particularly compelling in its clear intent to keep juror number one from sitting on Petitioner's case. First, the government targeted juror number one by asking her individual questions at the very beginning of its *voir dire*. Second, the government asked juror number one virtually incomprehensible questions designed to confuse her - questions that it did not ask any other juror. Third, because the government did not ask the incomprehensible questions that it asked of juror number one to any of the similarly situated white jurors on Petitioner's jury panel, its explanation for striking juror number one unconvincing at best.[11] This "kind of disparate questioning, which might fairly be called trickery" is an indication of discriminatory intent. *Miller-El v. Dretke*, 545 U.S. 231, 261 (2005). The "trickery" in *Miller El* is the same as the government misconduct that took place here.

The government's failure to ask any other juror anything remotely similar to the confusing question it posed solely to juror one is telling. Pretext can be inferred when a prosecutor treats similarly situated jurors of different races differently. As this Court has explained:

> (D)isparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race. *See Miller-El I*, 537 U. S., at 331-332, 344-345. In other words, by asking a lot of questions of the black prospective jurors or conducting additional inquiry into their backgrounds,

[11] "(W)here a 'prosecutor offer[s] several pretextual explanations for these strikes, . . . this undercuts his credibility.'" *Walker v. Davis*, 822 Fed. Appx. 549, 556 (9th Cir. 2020), *quoting, Kesser v. Cambra*, 465 F.3d 351, 369 (9th Cir. 2006).

> a prosecutor can try to find some pretextual reason - any reason - that the prosecutor can later articulate to justify what is in reality a racially motivated strike. And by not doing the same for white prospective jurors, by not asking white prospective jurors those same questions, the prosecutor can try to distort the record so as to thereby avoid being accused of treating black and white jurors differently. Disparity in questioning and investigation can produce a record that says little about white prospective jurors and is therefore resistant to characteristic-by-characteristic comparisons of struck black prospective jurors and seated white jurors. Prosecutors can decline to seek what they do not want to find about white prospective jurors.

*Flowers v. Mississippi*, 139 S. Ct. at 2247-2248.

The government's reliance on juror one's answer to the confusing question posed by the government is a ruse. To the extent the government tried to imply juror number one indicated she would not follow the law or the court's instructions, that claim is contrary to the record. Juror number one never indicated she would have any trouble following the law or holding the prosecution to it burden of proof, and the government's insinuation otherwise is not well taken. *See State v. Tesfasilasye*, 200 Wn.2d 345, 359-61, 518 P.3d 193 (2022)(rejecting strikes based on descriptions of jurors' beliefs about law when jurors not given accurate information about law or questioned about ability to follow court's instructions). One has to look at the entire record. *See Miller-El*, 545 U.S. at 252 ("The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking (the juror at question) in an implausible light."). *See also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).[12]

Juror number one gave a direct, unambiguous, and unimpeachable response after the

[12]To find a constitutional violation, the Court need only find that race was a substantial motivating factor but not necessarily that the racial motivation was "determinative." *See Snyder*, 552 U.S. at 485, *citing Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

district court asked a coherent question regarding the same subject as the government's confused question. And, just as in *Snyder*, after juror one gave her unambiguous response to the court's question, "the prosecution did not choose to question (her) more deeply about this matter." *Id.*, 552 U.S. at 481. Significantly, the government never sought to clarify this distinction through further questioning, and such failure raises doubt as to the plausibility of the concern. *See Miller-El v. Dretke*, 545 U.S. 231, 246 (2005), *citing Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination."). *People v. Wright*, 2024 IL App (1st) 161404-B, P25, 2024 Ill. App. LEXIS 1274, *18. In *Snyder*, the prosecutor relying on the initial answer was pretextual; similarly, the government relying on juror one's answer when it came in response to a deliberately confusing question and was cleared up when the judge asked the question directly reflects pretext.

The totality of the evidence surrounding the strike of juror number one establishes that she was struck in violation of *Batson*. Despite the evidence of racial *animus*, the Sixth Circuit refused to address the factual predicates for the government's strike of juror number one, ignored this Court's settled precedent, and denied relief. This Court should grant *certiorari* to correct the legal error that occurred below and offer lower courts more guidance on what is required when undertaking *Batson* review.

II. IT VIOLATED DUE PROCESS FOR THE TRIAL COURT TO FORCE PETITIONER, AN AFRICAN AMERICAN, AND HIS FOUR CO-DEFENDANTS, WHO ARE ALL AFRICAN AMERICANS, TO SIT TOGETHER BEHIND THEIR ALMOST EXCLUSIVELY WHITE ATTORNEYS, CREATING THE VISUAL PRESENTATION FOR THE JURORS THAT THE CO-DEFENDANTS WERE ALL BOUND TOGETHER AND THEIR ATTORNEYS DID NOT WANT TO SIT WITH THEM.

It is no secret that the criminal justice system operates more harshly against people of color, particularly indigent people of color, than their affluent white counterparts.[13] It is also well recognized that implicit bias has a devastating effect on indigent people of color's ability to obtain equal justice.[14] In this case, the trial court accentuated these factors by creating a seating arrangement for Petitioner's trial which highlighted Petitioner's color and separated him and his black co-defendants from their white attorneys. This extraordinary and prejudicial decision by the trial court violated Petitioner's rights to due process and a fair trial.

Before Petitioner's trial, the district court *sua sponte* created an alternative seating arrangement for defendants and counsel from that utilized in other cases. The trial court ordered a row of black defendants to sit behind their almost entirely white attorneys.[15] This created the

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[13]"In our courts, African-Americans are more harshly treated, more severely punished and more likely to be presumed guilty," said Chief Justice Cheri Beasley (North Carolina Supreme Court). "These protests are a resounding, national chorus of voices whose lived experiences reinforce the notion that black people are ostracized, cast out, and dehumanized," she said. "As chief justice, it is my responsibility to take ownership of the way our courts administer justice, and acknowledge that we must do better, we must be better." Jess Bravin, *Breaking With Tradition, Some Judges Speak Out on Racial Injustice*, Wall Street Journal, June 13, 2020.

[14]*See* Jeffrey J. Rachlinksi, *et al.*, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1225 (2009)(reporting results of study of implicit bias in judges which included findings that "implicit biases are widespread among judges").

[15]Petitioner filed a Motion to Allow Defendant to Sit at Counsel Table. R. 1176; Page ID# 8349. Before jury selection began, the trial court announced from the bench it was denying Petitioner's motion. R. 2289; Page ID# 30698. Petitioner then filed a Notice of Continuing Objection to Court's Ruling on Motion to Allow Defendant to Sit at Counsel Table, R. 1200; Page ID# 8628, in which Petitioner requested a continuing objection to the Court's ruling prohibiting him from sitting at counsel table. Petitioner also filed a Motion to Allow Photographs of Courtroom Setup, R. 1209; Page ID# 8679, which the court granted, so there are now pictures which demonstrate how the defendants, including Petitioner, sitting behind their counsel looked to the jury.

visual illusion, for jurors, that counsel did not want their clients seated at counsel table with them and feared their clients.[16] This was untrue and prejudicial.[17] It created an impermissible, and untrue, impression that Petitioner posed some danger in the courtroom. Further, it is simply human nature for humans sitting next to one another to interact. This happened during the trial. The seating arrangement created the visual illusion that the co-defendants were one cohesive entity. The seating arrangement added an unfair measure of guilt by association. The seating arrangement effectively made the defendants a government exhibit by visually creating an appearance they were a group, which was particularly prejudicial in a RICO conspiracy case. The trial court's seating arrangement actively created implicit bias against Petitioner.

Although acknowledging that Petitioner argued that the courtroom setup in his case

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[16]This was particularly harmful in the instant case in which the jurors sent "several" notes to the court early in the trial expressing their fears regarding serving in this case. *United States v. Darden*, 2019 U.S.Dist.LEXIS 142181, *28 (M.D.Tenn. 2019). When combined with the fact that the government presented improper, unsubstantiated, and prejudicial evidence regarding witnesses' alleged fears of the defendants, the seating arrangement utilized at Petitioner's trial only added to the prejudice.

[17]This was far from the only way in which the trial court's seating arrangement prejudiced Petitioner. First, it restricted the communication between Petitioner and counsel. Second, when Petitioner needed to alert counsel to something a witness has said, it could not be done as quickly as if Petitioner was seated at counsel table. Third, when Petitioner did alert counsel to something a witness had said, the jury noticed it - which would not be true if Petitioner was seated at counsel table - and, thus, emphasized that testimony, and also served as "testimony" from Petitioner. Fourth, when Petitioner did communicate with his attorneys while seated behind counsel table, it created a noise disturbance which prevented counsel from hearing the testimony. This prevented counsel from providing effective assistance of counsel during cross examination of that witness. These restrictions, during a complex and lengthy trial, deprived Petitioner of his rights to due process, a fair trial, confrontation, cross-examination, the right to present a defense, the right to effective assistance of counsel, the right to be free from self-incrimination; and was just one of many ways in which Petitioner was prejudiced by the denial of his severance motion.

"risked aggravating jurors' potential implicit bias against African Americans," the Sixth Circuit never addressed that issue in its unpublished opinion, ruling only that, "(a) district court's decisions regarding courtroom seating are typically considered a type of courtroom management" and the "Defendants were located close enough to counsel to confer." *United States v. Burks*, 2024 U.S. App. LEXIS 24052, *15-16 (6th Cir.).[18]

To be sure, courtroom setup, like many other administrative matters, typically fall within the trial court's discretion. However, when the court exercises its discretion in a way that violates a defendant's right to due process and a fair trial, that discretion must give way to the defendant's constitutional rights. The courtroom setup in the instant case falls within that exception to the trial court's discretion.

Implicit bias may be defined as the "operation of attitudes and stereotypes in ways that can cause bias in judgment or action without one being aware of this operation." Dave McGowan, *Juror Number Six: Implicit Bias and the Future of Jury Trials*, 61 San Diego L.Rev. 497, 517 (2024), *quoting* Professor Anthony Greenwald. Petitioner is not naive. Implicit bias recognition is hard work and it requires confronting and addressing issues of race in a way the judiciary has been reluctant to do. But this case quite frankly screams for this Court's attention.

Seating Petitioner and his co-defendants as they were was akin to shackling them in front of the juror. The row of young, black men seated together created the visual imagery of black chain gangs in a southern prison - exactly what the government wanted. This was not just

[18]Undersigned counsel was Petitioner's trial counsel. Respectfully, the Sixth Circuit is simply incorrect in its assertion that there was no unconstitutional impediment to attorney-client communication due to the courtroom setup. Counsel can avow that there was.

prejudicial, but unconstitutional. "The law has long forbidden routine use of visible shackles during the guilt phase" of a criminal trial. *Deck v. Missouri*, 544 U.S. 622, 626 (2005).[19] What the trial court did in Petitioner's case was to effectively put invisible shackles on Petitioner and his four co-defendants. The image presented to the jury was just that stark.

This Court need not take counsel's word for what the courtroom setup looked like. As noted above, at Petitioner's request, the court took pictures of the defendants and counsel as they appeared to the jury. Those pictures are contained in DN 1255 – SEALED and attached as Appendix B.

The pictures in Appendix B vividly display what the jury viewed - the defendants banished to sit behind their attorneys, backs against the wall, unable to communicate with their attorneys without drawing undue attention to themselves.[20] The black defendants are bound together behind their white attorneys, like a chain gang in a southern prison, or a black person riding a bus in Alabama in the 1950s. "Physical or tangible images, like verbal or written imagery, have something to say about the quality of justice being dispensed in courthouses and throughout the country's legal venues." Regina Austin, *A Confederate Flag in the Jury Room*

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[19]*Deck* summarized the near-universal consensus of lower courts and commentators that a criminal defendant has a right to remain free of physical restraints that are visible to the jury. "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. It suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'" *Deck*, 544 U.S. at 630, *quoting Holbrook v. Flynn*, 475 U.S. 560, 569 (1986))(citation omitted). Here, the trial court separated Petitioner and his co-defendants not only from the community, but also their attorneys. It created an impermissible, and untrue, impression that Petitioner posed some danger in the courtroom.

[20]The photos also demonstrate that the district court's alleged concern about there not being space for the defendants at counsel table was, at best, extremely overstated.

*Leads to a New Trial: "Talking Images" and the Visual Turn in Law*, PennCareyLaw, University of Pennsylvania, Jan. 21, 2022.[21]

To say there is no prejudice, implicit and overt, is to turn a blind eye to the obvious. To be sure, there is a tradition deeply imbedded in our nation's fabric for doing just that. This Court should not. Courts should create an atmosphere that protects a defendant from unfair prejudice.[22] The district court here created an unnecessary and unusual procedure to do just the opposite.[23] This Court should grant *certiorari* to address the unconstitutional and prejudicial courtroom setup at Petitioner's trial.

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[21]"In the United States, there are waves of recognition of racial inequities inevitably followed by long stretches of apathy in which the majority of Americans minimize the existence of racism, particularly directed against Black individuals." Jacqueline Yi, Helen A. Neville, Nathan R. Todd, and Yara Mekawi, *Ignoring Race and Denying Racism: A Meta-Analysis of the Associations Between Colorblind Racial Ideology, Anti-Blackness, and Other Variables Antithetical to Racial Justice*, American Psychological Association, Journal of Counseling Psychology 1 (2022).

[22]Some judges have recognized the need to create an atmosphere that protects a defendant from unfair prejudice. *See Commonwealth v. Shipp*, 2020 Va. Cir. LEXIS 486 (Fairfax County Dec. 20, 2020)(Circuit court judge found that, because defendant's constitutional right to a fair jury trial stood paramount over the countervailing interest of paying homage to the tradition of adorning courtrooms with portraits that honored past jurists, who were "overwhelmingly" white, the jury trial of a black defendant, and any other defendant, was to proceed in a courtroom devoid of portraits to further justice.)

[23]It blinks reality to suggest that jurors - conditioned to seeing defendants sitting with their counsel in every courtroom visual they have encountered - did not imagine the worst when confronted with a row of black men sitting behind their all-but-exclusively white attorneys.

## CONCLUSION

This Court should grant *certiorari* in the instant case because the Court of Appeals' holding in Petitioner's case is in direct conflict with the above listed decisions by this Court, as well as the holding in numerous other cases. *See Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 130 (1959)("We granted the petition for *certiorari* because (the lower court) decision seemed to be out of line with the authorities"). The Court of Appeals has "decided a federal question of substance ... in a way probably not in accord with applicable decisions of this (C)ourt." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). This Court should grant *certiorari* to decided these substantial legal issues. The writ of *certiorari* should, therefore, be granted.

Respectfully submitted,

*/s/ John M. Bailey*
John M. Bailey
330 Franklin Rd.; Ste. 135A-427
Brentwood, TN 37027
(615) 319-1342

Attorney for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2024, I electronically filed the foregoing Petition for Writ of *Certiorari* with the clerk of this court. I also certify that a copy of the foregoing Petition for Writ of *Certiorari* was served upon counsel for Respondent, Ben Schrader, Assistant United States Attorney, 110 Ninth Ave., South, Suite A-961, Nashville, TN 37203-3870, at his email address and United States Mail, this 19th day of December, 2024.

*/s/ John M. Bailey*
John M. Bailey