IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review v. DAMON JAMES NAUDAIN, Defendant-Appellant, Respondent on Review.	Multnomah County Circuit Court Case No. 080432001 CA A160380 SC S067229

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER IN SUPPORT OF RESPONDENT ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from the Judgment of the Circuit Court for Multnomah County
Honorable Thomas Michael Ryan, Judge

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Before: Ortega, Presiding Judge, Egan, Chief Judge, and Powers, Judge
Author of Opinion: Ortega, Presiding Judge

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INTRODUCTION

Amicus Curiae, Oregon Justice Resource Center (OJRC), is a Portland-based non-profit organization founded in 2011. OJRC works to dismantle systemic discrimination in the administration of justice by promoting civil rights and by enhancing the quality of legal representation to traditionally underserved communities. OJRC serves this mission by focusing on the principle that our criminal-justice system should be founded on fairness, accountability, and evidence-based practices. OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and practice areas.

SUMMARY OF ARGUMENT

Racial disparities and biases persist despite research showing that overt prejudice has been repressed by changing social and legal norms. Research also shows, however, that all people hold *unconscious* racial biases. Those unconscious biases affect the way that people perceive, interpret, and remember events.

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Because unconscious bias has such a profound effect on the role of eyewitnesses and social pressures make it ineffective to elicit racial-bias evidence simply by asking witnesses about their racial bias, this court should adopt a rule that allows a witness to be impeached with evidence of both conscious and unconscious bias and that allows a defendant to prove unconscious bias by circumstantial evidence.

ARGUMENT

Changing legal and social norms have led to a reduction in overt expressions of racism. But racial disparities and biases persist. Social-science research shows that, although overt expressions of racism may have diminished, unconscious racial bias pervades society. And that bias affects how people perceive, interpret, and remember events around them. Thus, evidence of racial bias is exceedingly relevant and important to an eyewitness's credibility.

Nonetheless, the state suggests that the admission of racial-bias evidence should be limited to evidence that the witness has "identifiable and consciously held desire[s] for a particular result"—that is, that the witness has conscious or explicit bias. Pet BOM at 2. And it suggests that questioning a witness directly about his or her own racial bias is an effective and sufficient method for producing bias evidence. Pet BOM at 12–13, 15–16. But this court should

reject those arguments because they cannot be squared with the realities of human psychology.

In what follows, OJRC surveys research demonstrating that: (1) racial disparities persist despite a reduction in overt racial prejudice, due in large part to the prevalence of unconscious racial bias; (2) unconscious bias has a profound effect on the role of an eyewitness in that it affects the way events are perceived, interpreted, and remembered; (3) the effects of unconscious bias bear little relationship to whether a witness is consciously biased; and (4) such unconscious bias can be minimized only by intentional, concerted, and persistent efforts to expose oneself to positive interracial concepts. In light of this research, OJRC urges this court to adopt a legal standard (1) that allows a witness to be impeached with evidence of *both* conscious and unconscious bias (also known as explicit and implicit bias), and (2) that acknowledges that it is *not* effective to simply ask witnesses about their consciously-held racial prejudice.

I. Racial bias and disparities persist in the United States despite legal and social progress towards racial equality.

> *"We shall overcome because the arc of the moral universe is long, but it bends toward justice."—Reverend Martin Luther King, Jr. in 1968 paraphrasing abolitionist minister Theodore Parker in 1853.*

Despite efforts to remedy a history of racial bias and discrimination in the United States, significant racial disparities persist. Evidence strongly suggests that racial discrimination continues to be a primary factor in disparate outcomes, even as laws prohibit racial discrimination and as the majority of Americans consider racial prejudice to be morally wrong. Social psychologists began to study the nature of racial attitudes to understand this apparent contradiction. Results of that research indicate that the nature of racial bias has qualitatively changed. Conscious and overt racial prejudice may have declined, but unconscious or implicit racial bias persists. Implicit bias is more indirect and subtler than overt racism, but it shapes the attitudes of even well-educated and well-meaning people. And the consequences can be just as significant and pernicious as traditional, "old-fashioned" racism.

A. Legal and social progress towards racial equality has been steady but uneven.

While the Declaration of Independence professed the self-evident truth that "all men are created equal" in 1776, the United States Constitution did not guarantee this basic human right until Congress enacted amendments abolishing slavery[1] and establishing equal protection under the law after the Civil War.

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[1] Of course, the Thirteenth Amendment to the United States Constitution provides for one exception to the abolition of slavery and involuntary servitude: "as punishment for a crime."

See US Const, Amend XIII, XIV, and XV (ratified in 1865, 1868, and 1870, respectively). Still, Congress and the courts did not earnestly enforce the legal promise of racial equality for nearly 100 years. *See, e.g.*, *Brown v. Board of Education*, 347 US 483, 74 S Ct 686, 98 L Ed 873 (1954) (holding that "separate but equal" segregated public schools violated the Equal Protection Clause); Civil Rights Act of 1964, Pub L 88-352, 78 Stat 241 (codified as amended at 42 USC § 1981 *et seq*) (prohibiting discrimination or segregation in places of public accommodation based on "race, color, religion, or national origin"); Voting Rights Act of 1965, Pub L 89-110, 79 Stat 437 (codified as amended at 52 USC § 10101 *et seq*) (prohibiting racial discrimination in voting). The legal gains of the civil rights era were quickly followed by a political backlash against robust remedies for racial discrimination in the United States that continues to the present day. *See generally* Anthony Cook, *The Ghosts of 1964: Race, Reagan, and the Neo-Conservative Backlash to the Civil Rights Movement*, 6 Ala CR & CL L Rev 81, 81–119 (2015); *Shelby County v. Holder*, 570 US 529, 133 S Ct 2612, 186 L Ed 2d 651 (2013) (striking down provisions of the Voting Rights Act of 1965).

As the law came to properly recognize racial discrimination as legally wrong, Americans also generally came to profess that it is morally wrong. John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 Advances Experimental

Soc Psychol 1, 2 (2004) ("From 1960 to the present, public opinion polls have revealed that whites increasingly support integration in public schools, public transportation, jobs and housing" while "whites' support for interracial marriage has also grown correspondingly."); *see* Nilanjana Dasgupta, *Color Lines in the Mind: Implicit Prejudice, Discrimination, and the Potential for Change*, in *Twenty-First Century Color Lines: Multiracial Change in Contemporary America* 97, 98 (Andrew Grant-Thomas & Gary Orfield eds., 2009) (citing studies showing that "racist attitudes have declined steadily over the past few decades") (citations omitted). That is not to ignore the fact that overt racism continues to be a potent force in American social life. *See, e.g.*, Michael Tesler, *The Return of Old-Fashioned Racism to White Americans' Partisan Preferences in the Early Obama Era*, 75 J Pol 110, 111 (2013) (describing empirical evidence that "indicate[s] that Barack Obama's association with the Democratic Party has * * * made [old-fashioned racism] a significant factor in white Americans' partisan preferences after decades of quiescence"); Nicholas A. Valentino *et al*, *The Changing Norms of Racial Political Rhetoric and the End of Racial Priming*, 80 J Pol 757, 758 (2018) (discussing evidence from nationally representative surveys demonstrating that, "[w]hereas explicit racial rhetoric once seemed aversive to large swaths of American society, such messages are no longer as widely rejected"); Act of

Sept. 14, 2017, Pub L 115-58, 131 Stat 1149 (joint resolution of Congress acknowledging the "growing prevalence" of "hate groups that espouse racism, extremism, xenophobia, anti-Semitism, and White supremacy"). But obvious, explicit, or open expressions of racial prejudice have become less socially acceptable.

B. Despite progress towards racial equality, significant racial disparity persists.

Amidst the complicated and often contradictory threads in legal and social progress toward racial equality, significant racial disparity persists in nearly all aspects of American society, and evidence suggests that discrimination is a primary factor. For example, the median income of Black families is less than two-thirds that of White families and growing; the racial gap in basic measures of health and wellbeing has been maintained or widened substantially over the past 50 years; and steady trends toward residential integration observed from 1950 to 1970 have either slowed or stagnated. Dovidio & Gaertner, *Aversive Racism* at 2–3 (collecting data).

II. Research shows that the nature of racial bias has changed; although there may be a reduction in overt prejudice, unconscious bias is pervasive.

Early mainstream social psychology (circa the 1930s) saw racism as "an ideology, doctrine, or set of beliefs" that was largely a problem of "disordered personality." Tamas Pataki, *Introduction*, in *Racism in Mind* 1, 10 (Michael

Levine & Tamas Pataki eds., 2004) (recounting an early definition for racism). This "old-fashioned" racism was generally obvious and easy to recognize in overt manifestations of racial antipathy, such as public lynching and Jim Crow laws. Dovidio & Gaertner, *Aversive Racism*, at 3. Unsurprisingly, psychological research on racial bias and discrimination in this era generally focused on observable behavior and self-reports. Pataki, *Introduction*, in *Racism in Mind* at 21.

Beginning in the late 1970s, psychology researchers changed their approach and began to view racial bias and discrimination as forms of biased intergroup judgment resulting from mundane and completely normal cognitive mental processes. John F. Dovidio & Samuel L. Gaertner, *When Good People Do Bad Things: The Nature of Contemporary Racism*, in *Covert Racism: Theories, Institutions and Experiences* 111, 113 (Rodney D. Coates ed., 2011) (stating that the "negative feelings and beliefs that underlie aversive racism are rooted in normal, often adaptive, psychological processes"). This change in emphasis came about, in part, because researchers increasingly found that participants may not be willing to report their attitudes honestly—particularly when those attitudes violate social norms—or may not be accurate in doing so, which compelled them to develop alternative methods to observe and measure unconscious attitudes and association. Dasgupta, *Color Lines in the Mind* at 98

(explaining the adaptation of cognitive science tools that do not rely on a person's willingness and ability to accurately report their thoughts and actions).

The results of this research demonstrate that contemporary forms of racism are "qualitatively different from the old-fashioned, blatant kind," Dovidio & Gaertner, *When Good People Do Bad Things* at 112–13 (defining aversive racism in contrast to overt racism), and suggests that a basic way in which people try to understand their world—categorization—can, of its own accord, lead to stereotyping and discrimination. *See* William A. Cunningham *et al*, *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 Personality & Soc Psychol Bull 1332, 1332–45 (2004) (explaining how use of stereotypes is a normal part of human thought).

Researchers thus distinguished between conscious and unconscious mental processes—also known as explicit-implicit, aware-unaware, direct-indirect, and controlled-automatic processes. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-esteem, and Stereotypes*, 102 Psychol Rev 4, 4 n 1 (1995) (listing word-pair possibilities and settling on implicit-explicit due to its connotations in memory research). Under this approach, a person's motivation, intent, and conscious awareness are not required preconditions for developing and employing stereotypes that result in discrimination. *See* Dasgupta, *Color Lines in the Mind* at 98 (explaining that

unconscious or explicit attitudes and beliefs may be expressed without full awareness or the ability to control or change them at will, depending on the strength of the mental association).

As discussed below, this research has compellingly demonstrated the existence of unconscious race-based stereotyping. Dovidio & Gaertner, *When Good People Do Bad Things* at 113 ("A critical aspect of the aversive racism framework is the conflict between the denial of personal prejudice and the underlying *unconscious* negative feelings and beliefs.") (emphasis in original). Many people may simultaneously hold conscious, or explicit, egalitarian attitudes and unconscious, or implicit, negative attitudes. *See* Cunningham *et al*, 30 Personality & Soc Psychol Bull at 1342 (noticing a "growing consensus" that implicit and explicit attitudes towards minorities can be "dramatically opposed to each other in valence").

III. All people have unconscious biases that affect the way that they perceive, interpret, and remember events.

As overt racism has become less acceptable in American society, asking a witness directly about his or her racial biases has become less effective. Not only may social pressures prevent a witness from disclosing consciously held prejudices, but the witness may not be consciously aware of his or her racial biases. And these unconscious or implicit biases may have an important effect

on the way the witness perceive, interpret, and remember events based on the race of the persons involved.

A. Everyone holds unconscious racial biases.

"[E]veryone has unconscious bias" based on such things as race, gender, and age. OregonCourts, *Oregon Implicit Bias Training* at 0:58, YouTube (May 11, 2020), https://www.youtube.com/watch?v=BA-z4mS_Evg (accessed July 15, 2020). And "because this type of bias happens at an unconscious level, it can impact our thinking and decision making without us knowing." *Id*. at 1:06.

Unconscious bias stems from the natural operation of the human brain, which must streamline the vast amount of incoming data from the surrounding world to avoid being overwhelmed. Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W Va L Rev 305, 317 (2012). To do so, the mind unconsciously categorizes the objects, events, and people we encounter to allow "us to organize [sensory] information into discrete and recognizable categories and to determine quickly what to think and feel about those categories." *Id*; *see also* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan L Rev 1161, 1188–89 (1995) ("To function at all, we must design strategies for

simplifying the perceptual environment and acting on less-than-perfect information.”).

For example, upon seeing a person wearing a black robe at the front of a courtroom, a person’s brain may automatically, instantaneously, and subconsciously categorize them as a judge and retrieve the feelings and ideas the person holds about judges in general. *See* Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S Cal L Rev 1103, 1137 (2004) (explaining, as an example, how subconscious “role schemas” help people know what to expect from medical doctors); *Oregon Implicit Bias Training* at 1:40 (explaining that human brains “make quick, unconscious, and automatic associations in response to the world around us”). The content of the person’s “judge stereotype” supplies the assumptions and expectations the person holds for the judge sitting in the courtroom. *See* Chen & Hanson, 77 S Cal L Rev at 1137. In the same way, people automatically and unconsciously categorize and stereotype others on the basis of their race, gender, age, perceived wealth, etc. Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 BU L Rev 155, 187–88 (2005).

The content of stereotypes is learned from an early age, “not only from direct contact with the members of the categorized group, but also from parents,

peer groups, and the popular media." *Id.* at 203; *accord* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 UC Davis L Rev 745, 766 (2018) ("Learned racial preferences start as early as three months and appear to vary with exposure to members of different racial groups.") (footnote omitted); Daniel Masakayan, *The Unconscious Discrimination Paradox: How Expanding Title VII to Incorporate Implicit Bias Cannot Solve the Issues Posed by Unconscious Discrimination*, 25 Geo Mason L Rev 246, 249 (2017) ("An individual develops implicit bias throughout his lifetime through social influences, culture, and his interpersonal relationships or interactions with other social groups.") (footnote omitted); Wilkins, 115 W Va L Rev at 324–25 (explaining that racial stereotypes are shaped largely by "vicarious experiences," such as, "statements from friends and family, news reports, depictions in television shows and movies," because such experiences "dominate in terms of sheer quantity and frequency").

The content of our stereotypes is not necessarily negative. After all, a person may assume all judges are intelligent and fair-minded. Nonetheless, negative stereotypes are pervasive, especially stereotypes concerning those that we consider to be different than us. Jerry Kang, *Trojan Horses of Race*, 118 Harv L Rev 1489, 1512 (2005) (describing the overwhelming "tendency to

automatically associate positive characteristics with * * * ingroups * * * [and] negative characteristics with outgroups"); Wilkins, 115 W Va L Rev at 319 (similar).

B. Unconscious bias affects a person's perception, interpretation, and memory.

Unconscious bias does not just affect how people feel on a subconscious level; research shows that it influences how people perceive, interpret, and remember events. Kang, 118 Harv L Rev at 1503–04.

1. How unconscious bias affects perception

A large amount of research demonstrates that unconscious bias directly affects what a person sees and hears in the world. Just a small amount of that research is discussed below, but even that is sufficient to demonstrate that unconscious bias makes people more likely to perceive danger when shown a Black man's face than a White man's face—even when circumstances are identical.

For example, in a series of seven related studies, researchers asked whether Black men were perceived as more physically formidable than White men. John Paul Wilson *et al*, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J Personality & Soc Psychol 59 (2017). The study looked at perceptions of size, strength, and the capacity to do harm. Researchers found that non-Black observers perceived Black men as

being taller, heavier, more muscular, and stronger than White men, even though the actual height, weight, and strength of the White and Black men were the same. *Id.* at 64–65. Moreover, when participants were asked to imagine getting in a fight with the men, participants showed a "robust race-based bias," judging Black men as being "more capable of harm" than White men. *Id.* at 65–66. Researchers concluded that "this race-based bias in perceived formidability results from perceivers' *beliefs* about race (*i.e.*, stereotypes), rather than an accurate inference of physical size based on facial cues."[2] *Id.* at 66 (emphasis in original).

Other studies show that observers are more likely to perceive a weapon in the presence of a Black person than in the presence of a White person. In one such study, participants were shown a photograph of a White or Black persons' face for 200 milliseconds followed by a photograph of a weapon or a tool. B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled*

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[2] During one portion of the study, researchers sought to determine the effect that overt racial prejudice had on participants. Wilson, 113 J Personality & Soc Psychol at 66. They found that overt prejudice "modestly correlated" with the perception that Black men were more capable of harm but not with the perception that Black men were more muscular. *Id.* at 66–67. They concluded, "[r]ace-based differences in perceptions of physical size are therefore not easily explained by general anti-Black prejudice but, instead, likely result from specific stereotypes associating Blacks with size and threat." *Id.* at 67.

Processes in Misperceiving a Weapon, 81 J Personality & Soc Psychol 181, 183–84 (2001). The participants were asked to identify the objects as quickly and accurately as possible. *Id.* at 184. Results showed that participants who saw photos of Black faces immediately before photos of guns, were significantly faster at identifying the guns than when they saw photos of White faces before photos of guns.[3] *Id.* at 185. In a follow-up experiment, which placed participants under greater time pressure, participants who saw Black faces before photos of tools were more likely to misidentify tools as guns compared to participants who saw White faces before photos of tools. *Id.* at 188. The researchers concluded, "Results of this research strongly support the hypothesis that the race of faces paired with objects does influence the perceptual identification of weapons." *Id.* at 190; *see also* Jennifer L. Eberhardt *et al*, *Seeing Black: Race, Crime, and Visual Processing*, 87 J Personality & Soc Psychol 876 (2004) (documenting similar results in a modified version of the experiment).

The well-known "shooter bias" experiments provides more evidence of the way that unconscious bias affects perception. In those experiments,

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[3] "Correlational analyses showed that racial bias in performance on the perceptual identification task was not directly related to explicit racial attitudes." Payne, 81 J Personality & Soc Psychol at 187.

participants "play a video game that instructs them to shoot perpetrators (who are holding guns) as fast as they can but not to shoot innocent bystanders (who are unarmed but holding a non-gun object, such as a cell phone)." Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L J 345, 356–57 (2007) (summarizing a group of studies published in separate papers) (footnote omitted). The experiment revealed "a propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders." *Id.* Furthermore, in a similar study, when the participants' brains were monitored for electrical activity, "participants' brain activity showed more threat-related brain activity for Black actors than White actors (even for Blacks without guns), and more control response activity for White actors compared to Black actors." *Id.* at 358 (footnote omitted).

In short, research demonstrates that implicit biases make observers more likely to see threats—either physical formidableness or the presence of weapons—when shown a Black person than when shown a White person.

Perhaps more importantly, observers are more likely to *incorrectly* perceive a threat in the presence of a Black person.[4]

2. How unconscious bias affects interpretation

Not only does unconscious racial bias affect what an observer sees, it affects how ambiguous actions are interpreted. Again, a small portion of the research is summarized below, but it is sufficient to demonstrate that the conduct or facial expressions of Black people are more likely to be interpreted as hostile than equivalent conduct or expressions of White people.

In a seminal study from 1976, a researcher created two videos involving one student pushing another. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J Personality & Soc Psychol 590 (1976). The videos were identical, except for the race of the pusher. *Id.* at 594. These videos were shown to White participants. *Id.* at 592. When the pusher was Black and the victim White, 75 percent of participants classified the pusher as "violent," and only 6 percent classified the pusher as "playing around." *Id.* at 595. When

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[4] Similarly, a 2007 study using fMRI scans to measure activity in the part of the brain that recognizes threats showed that White participants' brains showed greater activity when participants were shown Black male faces than when shown White male faces. Jaclyn Ronquillo *et al*, *The Effects of Skin Tone on Race-Related Amygdala Activity: An fMRI Investigation*, 2 Soc Cognitive Affective Neuroscience 41 (2007).

roles were reversed, only 17 percent of participants classified the White pusher as "violent," and 42 percent classified the pusher as "playing around." *Id.*

That study was later replicated with sixth-grade boys, who were shown hand-drawn videos of one character bumping into another in a hallway. Kang, 118 Harv L Rev at 1515 n 117 (citing H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J Personality & Soc Psychol 590, 593–95 (1980)). The race of the "bumper" was indicated by shading in the drawings, which were otherwise identical. *Id.* Results showed that "[t]he darker the skin, the more that the ambiguous narrative * * * was interpreted as aggressive and hostile." *Id.*

In a similar vein, a 2003 study showed that people with high levels of implicit bias more readily interpreted ambiguous Black facial expressions as hostile. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 No. 6 Psych Sci 640 (2003). In that study, participants watched four computer-animated movie clips in which the expressions on a face—sometimes White and sometimes Black—slowly morphed from hostile to happy. *Id.* at 640. Participants were asked to identify the point at which the facial expression was no longer hostile. *Id.* Participants were then tested for explicit and implicit racial attitudes. *Id.*

Results confirmed that participants with higher implicit bias perceived hostility to remain on Black faces longer than White faces. *Id.* at 642. When the videos were reversed, those with high implicit bias more quickly identified the Black faces as showing hostility than the White face.[5] *Id.*

3. How unconscious bias affects memory

Given that unconscious bias affects the way humans perceive and interpret the world, it is no surprise that research shows that it leads to inaccurate memories as well. Research into human memory processes reveal people misremember facts in normal and predictable ways. *See* Levinson, 57 Duke L J at 348 (2007) (discussing the topic in detail). Generally, memory errors fall into two groups, "those based on recall (forgetting) and those based on recollections (false memories)," and both groups "emerge in situations in which stereotypes are involved." *Id.* at 376 (footnote omitted). Levinson summarizes the issue succinctly:

> "[S]tereotypes facilitate the way the brain stores and processes information. Thus, when people attempt to recall information that is somewhat hazy in their memories, they generally rely on

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[5] Research has also shown that unconscious bias can affect how ambiguous evidence in a criminal trial is interpreted. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W Va L Rev 307, 331–34 (2010) (demonstrating that when shown the same evidence, mock jurors found ambiguous evidence to be more probative when the defendant had dark skin). Conscious bias did *not* play a significant role in the results. *Id*. at 338.

> familiarity and expectations to help fill in the content of those memories. * * * As a result, people often recall stereotype-consistent information more easily than stereotype-inconsistent information. The link between stereotypes and memory is even stronger when looking at memory distortions such as false memories. * * * When people recall certain information that is part of a web of existing schemas and stereotypes, they may erroneously (and unknowingly) create additional memories of things that never happened that are consistent with those stereotypes."

Id. at 376–78 (footnotes omitted).

One study of 153 undergraduate students showed that there was a stronger tendency to remember when a Black character in a story acted aggressively than when a White character did so. *Id.* at 390–91. Students were asked to read a story about a fistfight. *Id.* at 391. The variable was the name of the aggressive actor in the story: people read about either William (presumably White), Kawika (presumably Hawaiian), or Tyronne (presumably Black). *Id.* at 350. After a short distraction, the students were asked 16 yes-or-no questions to test their memories of the story. *Id.* at 393. Results showed that participants misremembered certain relevant facts in a racially-biased manner. *Id.* at 398. "[P]articipants were more likely to remember Tyronne's aggressive behavior than William's aggressive behavior, even when the facts were quite simple and only fifteen minutes or so had elapsed since they read the facts." *Id.* at 399. When the story portrayed Tyronne as committing a specific aggressive act, 80.2

percent of participants correctly remembered that fact. *Id.* When it was William, only 67.8 percent remembered. *Id.* Similarly, only 43 percent correctly recalled that William punched someone from behind, while 59 percent correctly recalled that fact when it was done by Tyronne. *Id.* at 400.

Similar patterns emerged in a series of four studies that asked participants to remember which movie roles actors were applying for. Heather M. Kleider *et al*, *Looking Like a Criminal: Stereotypical Black Facial Features Promote Face Source Memory Error*, 40 Memory & Cognition 1200 (2012). Researchers showed participants three slides. *Id*. at 1205. Each slide contained four pictures of Black men (previously determined to fall on various points on a continuum of stereotypically Black facial features) and a role they had applied for—either a drug dealer, artist, or teacher. *Id.* at 1204. After a short distraction, the participants were asked to recall which role each man had applied for. *Id*. First, results showed that participants were more likely to correctly recall actors with stereotypically Black features who applied for the drug dealer role, than any other combination. *Id.* Second, results showed that when faces were miscategorized, stereotypically Black faces were more likely to be incorrectly grouped into the drug-dealer category. *Id.* at 1206. Researchers concluded that stereotypical Black facial features were "linked to criminality and serve[d] as memory cues and/or arguably facilitate[d] encoding

of stereotypical faces into the drug dealer category." *Id.* "Furthermore, this facial-feature cue also led people to miscategorize stereotypical faces into the drug dealer category more than into the other categories, suggesting that the association between face type and criminality was used as a default when memory failed." *Id.*

In another study, 57 police officers were subliminally shown a word associated with crime or shown no word at all. Eberhardt *et al*, 87 J Personality & Soc Psychol at 886. Afterward, they were shown a lineup, and a perpetrator was identified. *Id.* Then, they were asked later to recall which person from the lineup was the perpetrator. *Id.* Results showed that they were more likely to falsely identify a picture with a more stereotypically Black features when primed with a crime-related word. *Id.*

> "When these officers were asked, 'Which face did you see?,' priming them with crime led them to envision a Black face that was even more strongly representative of the Black racial category than the Black face to which they were actually exposed."

Id. at 888. That lead the researchers to conclude:

> "Blacks who appear most stereotypically Black may be most vulnerable to false identifications in real criminal lineups. This type of false identification may be likely even when the actual perpetrator is present in the lineup and even when the eyewitness was visually drawn to the perpetrator's face at the time of the crime."

Id.

C. There is very little correlation between the effect of unconscious bias and the presence of consciously held racial prejudice.

The research described above is only a small sample from the psychological field that examines unconscious bias, but it strongly demonstrates that unconscious bias is extremely relevant in a trial setting because it influences the way that a witness perceives, interprets, and remembers events. Importantly, the effects of unconscious bias exist regardless of whether a person is *consciously prejudiced* against another race. Therefore, if a witness is cross-examined on the nature and extent of their racial prejudice, their answers will not illuminate their unconscious bias in a meaningful way.

Generally, the presence of conscious bias *does* result in perceptions, interpretations, or memories that are averse to Black people because greater prejudice leads to greater unconscious bias. *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L Rev 1241, 1249 (2002) ("Stereotypes are more easily activated in people who display more conscious prejudice.") (footnote omitted); Kang, 118 Harv L Rev at 1514 ("Those of us with the greatest explicit bias * * * against a racial minority tend also to have the greatest implicit bias against them * * *.").

But the inverse is not true—the *lack* of conscious prejudice does *not* mean that a person has less unconscious bias. "[P]eople's conscious (or

explicit) attitudes and their unconscious (or implicit) attitudes (or associations, or beliefs) are often different, or to use the psychological term, dissociated." Page, 85 BU L Rev at 190. In other words, a person can have strong unconscious bias even if they profess a conscious desire for equality and abhor discrimination:

> "[T]he evidence is overwhelming that 'implicit bias measures are dissociated from explicit bias measures.' In other words, a person may sincerely deny having any conscious racial biases—may, in fact, be deeply committed to principles of equality and racial justice—but nonetheless harbor implicit, automatic biases against African Americans."

Wilkins, 115 W Va L Rev at 320; *accord* Kang, 118 Harv L Rev at 1514 ("[E]ven if our sincere self-reports of bias score zero, we would still engage in disparate treatment of individuals on the basis of race * * *.").

D. Negative unconscious biases are minimized by exposure to circumstances that contradict those biases.

As stated above, all people have unconscious biases, but they need not be negative ones. However, turning negative unconscious biases to positive ones is hard. That is because unconscious bias is largely formed "through repeated exposure to [negative] associations" in popular culture—thus, unconscious bias is "not only generated but also maintained by culture." C. FitzGerald *et al*, *Interventions Designed to Reduce Implicit Prejudices and Implicit Stereotypes in Real World Contexts: A Systematic Review*, 7 No. 1 BMC Psychol 29 (2019),

https://doi.org/10.1186/s40359-019-0299-7 (accessed July 15, 2020). Because sources of negative racial stereotypes pervade popular culture, combating negative biases takes frequent and purposeful action:

> "Any counter-actions, even if effective immediately, would then themselves be rapidly countered since participants remain part of their culture from which they receive constant inputs. To tackle this, interventions may need to be repeated frequently or somehow be constructed so that they create durable changes in the habits of participants. More in-depth interventions where participants follow a whole course or interact frequently with the outgroup have been successful."

Id.

Even short-term reductions in unconscious bias have been shown to require repeated exposure to circumstances that contradict the content of the racial stereotypes. For example, in an evaluation of 17 interventions aimed at reducing unconscious racial bias, researchers found that successful interventions required "exposure to counterstereotypical exemplars," such that Black people were portrayed in a very positive light and White people were portrayed negatively. C. Lia, *et al*, *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J Exp Psychol Gen 1765, *16–20, *45 (2014), https://bit.ly/2DCFS4p (accessed July 15, 2020). Further, successful interventions required participants to make conscious and intentional goals to overcome racial biases and repeated conditioning, such that Black

people were repeatedly paired with positive ideas or concepts. *Id.* at *25–30, *45.

In short, negative unconscious bias requires purposeful and repeated exposure to circumstances that combat the content of negative stereotypes. They do not and cannot disappear on their own. As relevant to this case, the fact that Beachell was involved in a long-term intimate relationship with a person that professed overt prejudice against Black people makes it much less likely that she undertook the frequent and purposeful actions necessary to overcome negative racial biases. Further, it makes it more likely that she was exposed to and internalized negative stereotypes about Black people.

IV. This court should adopt a rule that allows for the exploration of explicit and implicit bias without relying solely on a witness's self-report of racial bias.

If the aim of a trial is to put before the jury the facts necessary to decide whether a defendant is guilty, then evidence of racial bias—both conscious and unconscious—should be readily admissible. The presence of *unconscious* bias has been shown to have a profound effect on a person's perception, interpretation, and memory of events—the very things that an eyewitness supplies to a jury. Given its relevance and the unlikelihood that a witness will admit to conscious racial bias, this court should adopt a rule that allows for the

admission of circumstantial evidence tending to show that a witness holds unconscious bias.

CONCLUSION

Amicus Curiae respectfully asks this court to affirm the decision of the Court of Appeals, reverse the judgment of the trial court, and remand to allow respondent to elicit evidence of Beachell's conscious and unconscious racial bias.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that, on July 15, 2020, I electronically filed the foregoing Brief of *Amicus Curiae*, Oregon Justice Resource Center, with the Appellate Court Administrator, Appellate Records Section, and electronically served upon David O. Ferry, attorney for Respondent on Review, and Susan G. Howe, attorney for Petitioner on Review, by using the appellate electronic filing system.

CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(1)(b) and (2) the word count of this brief, as described in ORAP 5.05(1)(a), is 7,222 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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