NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

UNITED STATES OF AMERICA

Respondent,

v.

JAMES FELTON

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DEVIN MCLAUGHLIN
CJA Counsel for Petitioner
MATTHEW A. ZIDOVSKY
LANGROCK, SPERRY & WOOL, LLP
111 S. Pleasant Street
PO Drawer 351
Middlebury, VT 05753
(802) 388-6356
DMcLaughlin@langrock.com
MZidovsky@langrock.com

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Does our society's evolving understanding of the impact of implicit bias on jury behavior justify overturning the "substantial circumstances" test set out in *Rosales-Lopez v. United States*, 451 U.S. 182, 189, 192 (1981) (plurality opinion) and creating a per se rule that judges presiding over criminal cases involving alleged crimes of violence by Black men must, when asked, voir dire potential jurors about implicit bias and any unconscious preconceptions they hold about the propensity of Black men to commit violent acts?

2. Did the district court's refusal to voir dire the jury panel about implicit bias and any unconscious preconceptions they hold about the propensity of Black men to commit violent acts constitute a violation of the Petitioner's Sixth Amendment right to an impartial jury?

PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

Petitioner James Felton was the Appellant before the United States Court of Appeals for the Second Circuit.

Respondent United States of America was the Appellee before the Second Circuit.

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James Felton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

INTRODUCTION

The right to an impartial jury is among the most sacrosanct rights held by American citizens. This Court has implemented procedures designed to prevent racial prejudice from entering the jury room. These procedures have evolved over time—generally in step with changing norms and growth in the scientific understanding of how racial prejudice plays into the thought processes of various members of society. This case presents an opportunity for this Court to reconsider prior decisions that have almost certainly permitted persons harboring unconscious racial biases against certain minority groups to sit in judgment of members of those minority groups.

It is well-established that a person with a conscious bias against a certain minority group cannot sit in judgment of a member of that minority group. It is equally well-understood, including by former members of this Court, that both "conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) (citing *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1559-1560 (1988)); *see* Richardson, L. Song, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 Yale L.J. 862, 876 (2017) (noting that "[t]here is copious evidence that individuals of all races have implicit racial biases linking blacks with criminality" and cataloguing extensive academic research demonstrating the impact of implicit bias in the courtroom). Despite these circumstances, it is not yet established that a person with an unconscious bias against a certain minority group cannot sit in judgment of a member of that minority group.

There is no rational reason for the distinction; it is simply the way our criminal justice system functions at this time.

The Petitioner, who is a Black man charged with two extraordinarily violent murders and related crimes, asked the trial court to voir dire the jury pool to determine whether any of the members were predisposed to believe that Black people are more likely to commit violent crimes than white people. The Petitioner also asked the trial court to provide the jury pool a basic definition of "unconscious bias" before asking the potential jurors whether they could evaluate the trial evidence without basing their conclusions on "generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases." A28-29.[1] The trial court refused to ask these questions and instead formulated a generic admonition about basing conclusions on prejudices related to race, religion, sex, age, etc., which it followed with a single question as to whether the potential jurors could "put[] aside any feelings . . . based on these considerations." A58.

Voir dire is a defendant's only opportunity to glean information about potential jurors. This information forms the basis for striking potential jurors—either peremptorily or for cause. A district court's refusal to permit a defendant to gather sufficient relevant information about the jury pool increases the likelihood that the defendant will be judged by persons who, by virtue of their personal beliefs, should not be given that power.

It would be wrong to say that the district court and Second Circuit panel did not apply the law as they understood it to be. This Court's prior decisions make clear that, although a district court should ask questions related to racial prejudice and bias when requested by a defendant, it is

[1] Citations to A___ refer to pages of Appellant's Appendix filed in 2d Cir. Case 19-3552-CR, Doc. 43, filed 07/24/2020.

not constitutional error not to do so except under "special circumstances"[2] not present in this case. However, it would also be wrong to say that any rationale exists for this Court's current interpretation of the Sixth Amendment on this issue to continue. To be clear, Petitioner is not arguing that precedential cases governing voir dire were wrongly decided at the time (although an argument exists that they were). Instead, Petitioner is arguing that evolving norms and scientific understanding about human nature indicate that unconscious biases can infect a trial even in the absence of malice on the part of potential jurors that possess unconscious or implicit biases.

Criminal defendants have a constitutional right to an impartial jury. District courts should take reasonable steps to protect and enforce this constitutional right, including specifically asking questions during voir dire intended to flesh out and confront implicit bias and any unconscious preconceptions that potential jurors hold about the propensity of Black men to commit violent acts. The failure to do so when asked by a defendant constitutes a violation of the Sixth Amendment. This Court should take this opportunity to hold as such and should remand this case to the district court for a new trial with a constitutionally adequate jury.

OPINIONS BELOW

The Second Circuit's unpublished opinion is available at *United States v. Diaz*, 854 Fed.Appx. 386 (2d Cir. May 5, 2021) and is reproduced as Appendix A. There is no district court memorandum opinion, but relevant hearing and trial transcripts are included in Appellant's Appendix filed in 2d Cir. Case 19-3352-CR, Doc. 43.

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[2] As a practical matter, the special circumstance that triggers a constitutional right to voir dire potential jurors about racial bias is when issues of race are inextricably intertwined in the charged crime, including most specifically in cases involving interracial violence. *See, e.g., Rosales-Lopez*, 451 U.S. at 192.

JURISDICTION

The Second Circuit issued its unpublished opinion May 5, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. This petition is timely pursuant to this Court's March 19, 2020 Order extending the deadline to file petitions for writ of certiorari to 150 days from the date of the lower court judgment.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "[i]n all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."

STATEMENT OF THE CASE

Petitioner James Felton is a Black man. He was charged with two extraordinarily violent murders and other related crimes. Mr. Felton raised defenses to each charged crime and elected to proceed to trial to have the charges and his defenses thereto weighed by a jury of his peers. In doing so, he believed that the members of the jury that would decide his fate would do so based on the evidence presented in support of the charges and defenses and not on any preconceptions about him related to the color of his skin.

Mr. Felton's attorneys recognized that the pervasive stereotype of Black men as violent, hostile and aggressive would be an omnipresent backdrop for the trial—even for jurors who did not consciously hold these biases and even though neither victim was white. Mr. Felton's attorneys requested the district court to voir dire the jury pool about implicit racial bias as well as conscious bias. The attorneys proposed several voir dire questions to the district court. These questions were designed to prod the potential jurors into recognizing and examining their own race-based

preconceptions, including explicit and implicit biases. Mr. Felton's attorneys understood that this goal could not be accomplished by asking the potential jurors a single, frontal question about whether any of them harbored racial prejudice against Black men. Admitting racial prejudice is no longer socially acceptable, especially among New Yorkers living in the Southern District, and the potential jurors, like the vast majority of well-intentioned people, were likely to be unaware of how their evaluation of the evidence at trial might be affected by their own unconscious preconceptions. Mr. Felton's attorneys proposed the following voir dire questions to the district court:

> Do you believe that blacks are more likely to commit violent crimes than whites?
>
> Is there anything about the defendant's race which would make it difficult for you to be fair and impartial?
>
> Unconscious biases are stereotypes, attitudes or preferences that people may consciously reject but may be expressed without conscious awareness, control or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions. Would you be able to evaluate the evidence in this case without basing your conclusions on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes or biases?

A29.

The district court agreed to address the issue of race directly but refused to pose questions intended to reveal (or at least confront) implicit biases held by the potential jurors, stating:

> THE COURT: Well, I mean, I can tell you that I'm not inclined to ask a number of these questions. I certainly will ask about the defendant's race. But to pose a question as to whether jurors believe that blacks are more likely to commit violent crimes than whites, I'm not going to ask that kind of question. And questions that I do ask are directed at trying to ascertain biases in jurors without a sociological discussion of unconscious biases or stereotypes.

A208.

Instead of addressing the issue in a way that would have challenged the potential jurors to consider their preconceptions about race and violent crime, the district court simply explained that "consider[ing] personal feelings about a defendant's race, religion, national origin, sex or age" is "improper," and then asked the members of the jury pool if they could "put[] aside" any feelings they have about Mr. Felton "based on these considerations." A58. Not surprisingly, none of the potential jurors admitted that they could not put aside any discriminatory feelings they harbored against Mr. Felton. *Id.* There was no other voir dire on the issue of racial bias.

Ultimately, a jury was chosen that included at least two members that might have been struck for cause had the district court asked the voir dire questions proffered by Mr. Felton's attorneys.[3] That jury then convicted Mr. Felton.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT'S REFUSAL TO VOIR DIRE ON IMPLICIT BIAS VIOLATED MR. FELTON'S RIGHT TO AN IMPARTIAL JURY

The Sixth Amendment guarantees a criminal defendant's right to an "impartial jury." Racial bias, which is "odious in all aspects," is "especially pernicious in the administration of [criminal] justice." *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 868 (2017). "The jury is to be a criminal defendant's fundamental protection of life and liberty against race or color prejudice." *Id.*

[3] Two of the twelve selected jurors identified then-President Donald Trump as the person that they "admire most." *See* A161-62, 190-91, 198. On August 15, 2017, in keeping with other comments made during and prior to his presidency, Donald Trump publicly referred to attendees at a white nationalist rally in Charlottesville, Virginia as "very fine people." *See* Glenn Kessler, The 'very fine people' at Charlottesville: Who were they?, The Washington Post, May 8, 2020, https://www.washingtonpost.com/politics/2020/05/08/very-fine-people-charlottesville-who-were-they-2/ (last visited Sept. 7, 2021).

(internal quotation marks and citation omitted). Racial bias is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.*

"Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice." *Rosales-Lopez*, 451 U.S. at 188. Under *Rosales-Lopez*, 451 U.S. at 189, and *Ristaino v. Ross*, 424 U.S. 589, 597 (1976), a defendant does not have a constitutional right to voir dire the jury pool about racial bias except under "special circumstances" – that is where race is inextricably intertwined with the issues involved such that "a significant likelihood [exists] that racial prejudice might infect [the] trial." This interpretation of a criminal defendant's rights eroded the prior standard, which "entitl[ed] a minority defendant to some inquiry of prospective jurors on voir dire about possible racial or ethnic prejudice unrelated to the specific facts of the case." *Rosales-Lopez*, 451 U.S. at 201 (Stevens, J., dissenting) (collecting cases). Justice Stevens raised concerns about the application of the rule announced in *Rosales-Lopez* at the time, recognizing that it would be improper for a member of the Nazi party to sit in judgment of a Jewish defendant – even if no "special circumstances" existed that would bring the defendant's religion or ethnicity into the case. *Id.* at 197. Despite Justice Stevens' concerns, the plurality formulated a rule that conditioned the existence of a constitutional right on the specific facts of the case. This was perhaps consistent with the societal norms and scientific understanding of jury behavior at the time; the *Rosales-Lopez* rule is clearly attempting to articulate a right to root out explicit bias – i.e. – the type of bias that requires a potential juror to confront and admit his or her own wholesale and identifiable hostility to a given minority group. This however is not the type of bias at issue in this case.

A. Implicit or Unconscious Bias Inevitably Infects a Jury Unless Effectively Mitigated by a Searching Voir Dire Which Addresses the Issue Directly

Implicit biases are subliminal discriminatory racial biases or stereotypes that a person associates with a particular group. These racial biases inevitably distort the manner in which jurors interpret otherwise neutral facts, and often unfairly determine the verdict.

Most white Americans consciously embrace the principle of racial equality and no longer express the type of open anti-Black bias that was once prevalent. Nonetheless, most Americans, regardless of class or education, still maintain an unconscious, associational link between Black males and crime. *See* Eberhardt, Jennifer et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. No. 6, 876-893 (2004); Sommers, Samuel R. & Ellsworth, Phoebe C., *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Policy & Law 201, 212 (2001). Many Americans continue to subliminally link Black males with violent, hostile, and aggressive behavior, and more readily associate Black men with weapons, even while consciously rejecting these stereotypes and any notion that they possess them. Roberts, Anna, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn. L. Rev. 827, 831 (Feb. 2012). "Not only is the association between Blacks and crime strong (i.e., consistent and frequent), it also appears to be automatic (i.e., not subject to intentional control)." *Seeing Black: Race, Crime, and Visual Processing*, *supra* at 876.

Implicit bias has been recognized as an ugly, but undeniable feature of almost all sectors of American society, including the federal legal system.

> Implicit bias, or stereotyping, consists of the unconscious assumptions that humans make about individuals, particularly in situations that require rapid decision-making, such as police encounters. "Extensive research has shown that in such situations the vast majority of Americans of all races implicitly associate black

> Americans with adjectives such as 'dangerous,' 'aggressive,' 'violent,' and 'criminal.'"

United States v. Mateo-Medina, 845 F.3d 546, 553 (3rd Cir. 2017).

The phenomenon of "implicit bias" has not gone unrecognized by this Court. Retired-Justice Sandra Day O'Connor, in her dissent in *Georgia v. McCollum*, *supra*, wrote, "It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." 505 U.S. at 68. In *Texas Dept. of Hous. and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2512 (2015), this Court recognized that "unconscious prejudices" play a role in in housing discrimination. *See also United States v. Ray*, 803 F.3d 244, 259-260 (6th Cir. 2015) ("[W]e recognize the proven impact of implicit biases on individuals' behavior and decision-making.").

The implicit bias associating Black men with crime and violence affects the unconscious assessments made by individuals who harbor no explicit bias and sincerely believe themselves to be bias-free. It is so pervasive that even many Black Americans themselves unconsciously hold the stereotype. Rev. Jesse Jackson once famously admitted, "There is nothing more painful to me . . . than to walk down the street and hear footsteps and start thinking about robbery then look around and see somebody white and feel relieved." Johnson, Mary A , Crime: New Frontier: Jesse Jackson Calls It Top Civil-Rights Issue, Chi. Sun-Times, November 29, 1993. Harboring implicit biases does not mean that the person is morally corrupt. "To put it simply, good people often discriminate, and they often discriminate without being aware of it." *State v. Saintcalle*, 309 P.3d 326, 336 (Wash. 2013) (citing Page, Antony Batson, *Blind-Spot: Unconscious Stereotyping and The Peremptory Challenge*, 85 B.U. L. Rev. 155 (2005)).

The result of these unconscious associations is to stack the courtroom deck against the Black male defendant, especially when he is charged with a crime involving violence or a gun. Jurors are unconsciously inclined to view the white defendant as innocent and the Black defendant as guilty even when presented with identical evidence. "[J]urors [are] significantly more likely to conclude that the evidence was probative of guilt when the case involved a dark-skinned perpetrator versus a light-skinned perpetrator." Levinson, Justin D. & Young, Danielle, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 337 (2010). The unconscious stereotype of Black men as violent unwittingly bolsters the prosecution's case when the allegations are consistent with the stereotype. Thompson, Mikah K., *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1262 (2019).

Given the reality of implicit bias, judges and many researchers across the country have come to recognize that jury selection as practiced today is inadequate to mitigate anti-Black racial prejudice. As recently stated by this Court in *Pena-Rodriguez*, "[g]eneric questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations." 137 S.Ct. at 869. As such, simply asking a single question to the entire jury pool, such as, "Does any prospective juror have any feelings, positive or negative about the defendant based on his race?," will not bring to the surface biases about which the jurors themselves may not be conscious. A typical juror assumes that he or she knows himself or herself and, unless expressly prompted to do so, is unlikely to engage in the sort of introspection necessary to confront implicit biases of which he or she is unconscious. "A juror is not likely to admit being a prejudiced person . . . and indeed might not recognize the extent to which unconscious racial stereotypes might affect his or her

evaluation of a defendant of a different race . . . ." *State v. Tucker*, 629 A.2d 1067, 1077-78 (Conn. 1993); *see also* Bennett, Judge Mark W., *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, 169 (2010); Arterton, Judge Janet Bond, *Unconscious Bias and the Impartial Jury*, 40 Conn. L. Rev. 1023 (2008); *Shirley v. Yates*, 807 F.3d 1090, 1110 n.26 (9th Cir. 2016); *Ray*, 803 F.3d at 260; *State v. Williams*, 929 N.W.2d 621, 639-40 (Iowa 2019).

Here, the district court's single question regarding bias, as well intended as it may have been, was not likely to elicit a juror's meaningful answer about conscious, much less implicit, racist attitudes. The district court's question on bias was all but destined to elicit the answer the jurors expected that the judge wanted to hear – that each could be fair – rather than any disclosure that would be meaningful to the parties or the court in exercising peremptory challenges and those for cause. The question did nothing to direct the jurors' attention to the issue of implicit bias, and it would have been shocking if any member of the jury pool openly identified himself or herself as prejudiced. *See Saintcalle*, 178 Wash.2d at 46 ("It is now socially unacceptable to be overtly racist."). As retired District Judge Mark W. Bennett (N.D. Iowa) observed, ". . . I cannot help but notice that jurors are all too likely to give me the answers that they think I want, and they almost uniformly answer that they can 'be fair.'" *Unraveling the Gordian Knot*, *supra* at 160.

The district court's one question on bias was so broadly formulated that even a person harboring explicit bias against Black men could answer it honestly and still sit on the jury. The court first instructed the jurors that, "it would be improper for any of you to consider any personal feelings you may have about a defendant's race, religion, national origin, sex, or age," and then,

instead of asking the potential jurors if anyone harbored a bias, asked whether anyone had "any difficulty putting aside any feelings, positive or negative, about the defendant, Mr. Felton, based on these considerations?" A58. While courts may have deemed the question sufficient in times when jurors openly admitted biases and the concept of "implicit bias" was barely known, it is now evident that the question is more likely to disguise racial bias than to disclose it.

B. Inquiring on Voir Dire about Implicit Racial Bias Reduces the Likelihood of a Prejudiced Jury

The voir dire questions proposed by Mr. Felton, if asked, would have significantly reduced the likelihood of a jury prejudiced by unconscious racial bias. Studies of racial bias in the criminal justice system, from arrest to sentencing, uniformly show that implicit bias can effectively be reduced by bringing the issue directly to the attention of the bias holder, regardless of whether that person is a police officer, judge, or juror. In perhaps the most important study, research shows that jurors in the most racially charged cases, where the problem of implicit bias is expressly vetted on voir dire, are less influenced by racial bias than are jurors in cases where race is a less obvious factor and the issue is ignored on voir dire. Speaking to jurors about implicit bias reduces bias, while sweeping the issue under the rug does not. Kang, Jerry, *et al.*, *Are Ideal Litigators White? Measuring the Myth of Color Blindness*, 7 J. Empirical Leg. Stud. 886, 900–01 (2010); *White Juror Bias*, *supra* at 212-213.

Another respected study found that university students and police officers, in a shooting range type experiment, all shared a "shooter bias" against Black people, in that, under ambiguous circumstances, they were more likely and faster to shoot a black target, armed or unarmed, than a white target. But when the officers were made aware of their bias – in other words, when their implicit bias was brought to their attention, they significantly reduced "shootings" of unarmed

black targets. The officers' awareness of their unconscious bias enabled them to positively modify their subliminal responses. *Unraveling the Gordian Knot*, *supra* at 155-156. Similarly, a third study found that judges, on a personal level, harbor the same implicit biases as laymen, but because of their conscious commitment to codes of judiciary conduct and the desire to achieve fairness, they compensate for these biases through cognitive correction in the performance of their judicial duties. Rachlinsky, Jeffrey J. *et al.*, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1203-04 (2009); *Unraveling the Gordian Knot*, *supra* at 157. All of these studies demonstrated that the problem of implicit racial basis is serious but can be mitigated when it is addressed frankly and openly.

Allowing the jurors to recognize, and hence overcome, their implicit racial bias is exactly what Mr. Felton's counsel sought to accomplish by requesting that the trial court ask the panel three simple, non-threatening questions:

> Do you believe that blacks are more likely to commit violent crimes than whites?
>
> Is there anything about the defendant's race which would make it difficult for your to be fair and impartial?
>
> Unconscious biases are stereotypes, attitudes or preferences that people may consciously reject but may be expressed without conscious awareness, control or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions. Would you be able to evaluate the evidence in this case without basing your conclusions on personal likes or dislikes, generalizations, gut feelings, prejudices sympathies, stereotypes or biases?

A29.

There was nothing unusual or revolutionary about these questions. They were designed to elicit implicit bias, and are precisely the types of questions that retired Judge Bennett asked when

he sat in the district court, *see Unraveling the Gordian Knot*, *supra* at 169, and that trial courts in Pennsylvania and Washington typically ask jurors in civil cases:

> 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.

Pa. SSJI (Civ), § 1.140 Bias, Pennsylvania Suggested Standard Civil Jury Instructions (2014).

* * * *

> [T]here is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.

WPI 1.01 Advance Oral Instruction – Beginning of Proceedings, 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. (6th ed. 2017).

There may, of course, be other methods for addressing the problem of implicit bias. The United States District Court for the Western District of Washington shows a short video, featuring a federal judge, explaining how jurors, in fulfilling their constitutional function, must consciously compensate for their own implicit biases. *See* Unconscious Bias Juror Video, United States District Court for the Western District of Washington, http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited Sept. 7, 2021). Regardless of which is method is chosen, all of these methods for addressing implicit bias have one common element – they all bring the issue directly to the jury pool's attention.

C. The Court Should Reconsider Prior Decisions Holding that an Inquiry About Race Is Constitutionally Required Only Where the Allegations Are Inherently Racially Charged

The district court gave no reason for refusing to inquire about implicit bias or for only asking a single perfunctory question about race, but it undoubtedly relied on a series of cases from this Court holding that the Constitution does not require trial courts to inquire about racial biases except under those relatively few circumstances where there are "substantial indications" that bias is likely to prejudice the jury. *See Rosales-Lopez*, *supra*; *Ristaino v. Ross*, *supra*.[4]

As discussed briefly above, *Rosales-Lopez*, 451 U.S. at 190, and *Ristaino* hold that "substantial indications" of potential racial bias exist only in limited cases involving interracial violence or where racial overtones are all but certain to overwhelm the jury. Contemporary knowledge and social science, as well as more recent judicial opinions, all suggest that the underlying assumptions in the *Rosales-Lopez* line of cases are unfounded. In *Rosales-Lopez*, for instance, the Court found that there were no "substantial indications" where a Mexican-American was charged with alien smuggling. Alien-smuggling, the Court found, is "race-neutral" and the allegations did not suggest interracial violence. In *Ristaino*, the Court found that there were no "substantial indications" where a Black man was charged with assaulting a white college security officer, since the alleged crimes did not contain express racial confrontations or overtones. In several cases, this Court, working with the assumption that jurors, if asked directly, would easily admit racist views, further held that, even where "substantial indications" exist, a trial court may

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[4] This Court, in its supervisory capacity, has directed trial courts to voir dire on racial bias when requested to do so by the defense, even when the inquiry is not Constitutionally required. *See Rosales-Lopez*, 451 U.S. at 191-92; *Ristaino*, 424 U.S. at 597 n.9. The purpose of the inquiry is to dispel any notion of injustice, but a district court's refusal to do so is not reversable error unless the inquiry was Constitutionally required.

discharge its obligation to cure racial bias by asking a single direct question: whether any of the potential jurors harbors any prejudice that would affect his or ability to judge the case? *See Ham v. South Carolina*, 409 U.S. 524, 527 (1973).

Given what we now understand about implicit bias, *Rosales-Lopez*, *Ristaino* and *Ham* now appear as puzzling, almost incomprehensible, decisions. Each are extreme examples of the law failing to keep up with science. When *Rosales-Lopez* was decided in 1981, and *Ristaino* in 1976, science had barely touched the surface of how implicit bias or unconscious stereotyping affects decision-making in the criminal justice system. These decisions evince a complete unawareness of implicit bias and the prejudicial effect of the widely held stereotype of the Black male as violent, aggressive, and inclined to criminal activity.

Indeed, recent scholarly research shows the impact of implicit biases held by jurors in cases with different fact patterns. For example, in *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 Behav. Sci. & L. 599 (2009), the authors conducted an experiment intended to test the assumption underlying the *Rosales-Lopez* "substantial circumstances" test, which (generally speaking) is "that juror bias against racial outgroups would be greater when the case is somehow racially charged or inflamed, as opposed to those instances when race does not explicitly figure in the crime." Kang, Jerry *et al.*, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1143 (2012). Counterintuitively, the studies showed that:

> When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, **when the case is not racially charged**, even though there is a Black defendant and a White victim, **jurors are not especially vigilant about the possibility of racial bias influencing**

> **their decision making**. These findings are more consistent with an implicit bias than a concealed explicit bias explanation.

Id. (citing *White Juror Bias*, *supra* at 255) (emphasis added).

Not surprisingly, adherence to *Rosales-Lopez* and *Ristaino* has produced results which, by contemporary standards, appear highly flawed. The Fourth Circuit, for instance, concluded that there is no Constitutional guarantee of voir dire on racial bias in a capital murder case where both the defendant and the victims were Black and the jury pool was predominantly white. *Goins v. Angelone*, 226 F.3d 312 (4th Cir. 2000), *abrogated on other grounds by Bell v. Jarvis*, 236 F.3d 149, 160 (4th Cir. 2000). In *United States v. Borders*, 270 F.3d 1180, 1182-84 (8th Cir 2001), the Eighth Circuit concluded no voir dire on racial bias was Constitutionally required where a Black defendant, charged with a narcotics conspiracy which the trial court described as non-violent, was tried before a largely white venire, despite the oft- recognized association of narcotics with firearms and violence and Black men with all three types of crime. *Rosales-Lopez* and *Ristaino* both reflect a bygone view of race and bias that courts and scholars have come to understand as, at best, wishful thinking – that jurors are ordinarily bias-free, prejudiced only when the facts involve a perceived threat to their own racial or ethnic group, and that they are fully aware of, and will freely admit to, their biases if asked directly on voir dire. Given the current, more scientific, awareness of the subtle ways in which racism transcends rational thought, permeates unconscious action, and subverts rational decision making, it is clear that virtually every case in which a Black man is accused of a crime involving drugs, guns and/or violence is inherently affected by racial stereotypes such that there is no rational basis for the "substantial indications" distinction articulated by *Rosales-Lopez* and *Ristaino*.

Viewed in this light, the *Rosales-Lopez/Ristaino* standard has proven woefully inadequate to protect the rights of Black men to a bias free-jury. As discussed briefly above, this failure was all but predicted by Justice Stevens in his critique of the "special circumstances" doctrine. *See Rosales-Lopez*, 451 U.S. at 196 (Stevens, J., dissenting) ("Even when there are no 'special circumstances' connected with an alleged criminal transaction indicating an unusual risk of racial or other group bias, a member of the Nazi Party should not be allowed to sit in judgment on a Jewish defendant.").

Given contemporary insights into the nature of racism, a possibility exists that the Justices who affirmed the voir dire practices in *Rosales-Lopez* and *Ristaino* would instead now join Justice Stevens' opinion and find that the Constitution requires voir dire on racial bias whenever a Black man is charged with a violent crime. It also seems unlikely that those Justices would be satisfied with the type of perfunctory, ill-formed question that the district court asked here, and would likely require a more searching voir dire on racial bias including questions on implicit bias, whenever a Black man is charged with a violent crime.

To the extent that *Rosales-Lopez* and *Ristaino* dispense with the Constitutional right in cases involving intra-racial violence, or permit the district court to discharge its duty to inquire by asking a single, frontal question on bias, the Court should find that these cases no longer reflect contemporary law, knowledge, or morality. When new scientific knowledge, or shifts in the national consensus, erode the intellectual or philosophical underpinnings upon which prior decisions relied, this Court has an obligation to reevaluate those decisions in the interest of justice. *See McGirt v. Oklahoma*, 140 S.Ct. 2542, 2480 (2020) ("the magnitude of a legal wrong is no reason to perpetuate it"); *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S.Ct. 2298, 2309 (2021)

(holding that "correct judgments have no need for [stare decisis] to prop them up"); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (explaining that one relevant consideration in departing from prior precedent "is whether the decision is unsound in principle" (internal quotation marks and citation omitted)).

II. INCHOATE DISAGREEMENT BETWEEN CIRCUITS

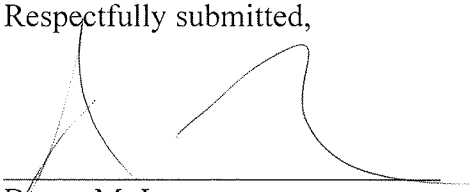
Until this case, no Circuit Court has directly addressed the question about whether a district court is required to voir dire on implicit bias where a Black man is charged with a violent crime. The Second Circuit has now ruled in the negative. This ruling contradicts a recent Seventh Circuit opinion in which the Circuit Court, in response to the defendant's arguments "regarding the emerging science on implicit bias," ruled that "voir dire was the appropriate vehicle to address implicit bias." *United States v. Adkinson*, 916 F.3d 605, 609 (7th Cir. 2019). There is no indication in the published opinion that *Adkinson* involved interracial violence or other racially charged issues. *Id.* at 608-09. However, the defendant was Black and the charged crime involved weapons—considerations that play into implicit biases held by potential jurors. *Id.* As such, an inference exists that Seventh Circuit might require voir dire on the topic of implicit bias, when requested by a defendant, in the absence of the special circumstances set out in *Rosales-Lopez* and *Ristiano*. While the Second Circuit opinion in this case and *Adkinson* may not constitute a classic circuit split, they do indicate disagreement between the circuits with respect to a defendant's right to address implicit bias during jury selection. Mr. Felton respectfully suggests that it would be advisable for the Court to take this opportunity to forestall additional disagreement between the circuit courts on this topic. *See* Sup. Ct. R. 10(a).

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Felton's petition for writ of certiorari and remand for a new trial with a constitutionally adequate jury.

Dated: September 21, 2021.

Respectfully submitted,



DEVIN MCLAUGHLIN
CJA Counsel of Record
MATTHEW A. ZIDOVSKY
LANGROCK, SPERRY & WOOL, LLP
111 S. Pleasant Street
PO Drawer 351
Middlebury, VT 05753
(802) 388-6356
DMcLaughlin@langrock.com
MZidovsky@langrock.com

1288550.1