No. 24-

IN THE

Supreme Court of the United States

NICHOLAS JOSEPH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether this Court should grant Certiorari to address whether a trial judge, when requested by defense counsel, must *voir dire* on implicit or unconscious bias such that its refusal to so do is an abuse of discretion which violates an accused's Sixth Amendment right to an impartial jury.

2) Whether this Court should grant Certiorari to address a conflict between the Circuits as to whether newly available evidence, which previously had been unavailable due to the invocation of a valid privilege, may be sufficient to establish "newly discovered evidence" under Rule 33 of the Federal Rules of Criminal Procedure.

LIST OF PARTIES TO THE PROCEEDING

The Petitioner is Nicholas Joseph, Defendant and Defendant-Appellant in the courts below. The Respondent is the United States, Plaintiff and Plaintiff-Appellee in the courts below.

LIST OF RELATED CASES

- *United States v. Joseph*, No. 20-cr-603, U. S. District Court for the Southern District of New York. Judgment entered July 1, 2022.
- *United States v. Joseph*, No. 22-1552, U. S. Court of Appeals for the Second Circuit. Judgment entered April 26, 2024.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom, 2018 Mich. St. L. Rev. 1243 (2019) 14

Eberhardt, Jennifer et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. No. 6, 876 (2004) 12, 13

Kang, Jerry, et al., *Are Ideal Litigators White? Measuring the Myth of Color Case Blindness*, 7 J. EMPIRICAL LEG. STUD. 886 (2010) 15

Levinson, Justin D. & Young, Danielle, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112W. Va. L. Rev. 307 (2010) 14

Roberts, Anna, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (Feb. 2012)..... 13

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 (2001) 13, 15

Thompson, Mikah K, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243 (2019)..... 14

PETITION FOR A WRIT OF CERTIORARI

Nicholas Joseph respectfully petitions for a writ of certiorari to review the April 26, 2024 judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit, dated April 26, 2024, is attached as Appendix A. (App. 1a-9a).[1] It is unreported and appears on Westlaw as *United States v. Joseph,* No. 22-1552, 2024 WL 1827291 (2d Cir. 2024).

The Opinion and Order of the United States District Court for the Southern District of New York (Castel, J.), dated June 27, 2023, denying Mr. Joseph's motion for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, is attached as Appendix B (App.10a-18a). It is unreported and appears on Westlaw as *United States v. Joseph*, 20-cr-603 (PKC), 2023 WL 4198731 (S.D.N.Y. June 27, 2023).

The Opinion and Order of the United States District Court for the Southern District of New York (Castel, J.), dated February 4, 2022, denying Mr. Joseph's motion pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, is attached as Appendix C (App.19a-34a). It is unreported and appears on Westlaw as *United States v. Joseph*, 20-cr-603 (PKC), 2022 WL 336975 (S.D.N.Y. Feb. 4, 2022).

[1] Numbers preceded by "App." refer to pages in the appendix to this petition.

JURISDICTION

The Second Circuit issued its Opinion on April 26, 2024 (App.1a-9a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition was filed within ninety days of that date.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the U.S. Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 33 of the Federal Rules of Criminal Procedure provides:

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

INTRODUCTION

Defendant-Appellant, Nicholas Joseph, petitions for a writ of certiorari. As is argued more fully below, the Second Circuit's decision rejects the notion that the Sixth Amendment's right to an impartial jury requires a trial judge, when requested, to *voir dire* a prospective jurors on the concepts of unconcious and implicit bias. Along with instructing and questioning potential jurors on express bias, it is equally, if not more crucial, for a trial judge to instruct on the concepts of unconscious and implicit bias so that prospective jurors – before their selection— understand these concepts, conduct self-examination, and consider whether such views may influence their own impartiality when it comes to fact-finding and reaching a verdict. This issue has far-reaching consequences for every accused who proceeds to trial throughout the nation.

Additionally, Mr. Joseph respectfully urges this Court address a split in the Circuits regarding the definition of "newly discovered evidence" as set forth in Rule 33 of the Federal Rules of Criminal Procedure. Specifically, as the First Circuit has held, newly available evidence, that was previously unavailable during an accused's case due to an invocation of privilege, may be considered "newly discovered evidence" for purposes of deciding whether an accused is entitled to a new trial. *United States v. Montilla-Rivera*, 115 F.3d 1060 (1st Cir. 1997); *United States v. Del-Valle*, 566 F.3d 31 (1st Cir. 2009**)**. However, in Mr. Joseph's case, the Second Circuit rejected this view. Instead, relying on its prior decisions in *United States v. Owens*, 500 F.3d 83 (2d Cir. 2007); and in *United States v. Forbes*, 790 F.3d 403 (2d Cir. 2015), the Second Circuit held that newly available evidence, *per se*, was not newly discovered evidence,

notwithstanding the fact that the newly discovered evidence in Mr. Joseph's case came from a co-defendant who previously had invoked the privilege against self-incrimination. Accordingly, this Court should grant Certiorari to clarify the definition of "newly discovered evidence" to allow for uniformity among the Circuits and equal justice to an accused regardless of the court in which they are tried.

For these reasons, and for those explained below, this Court should grant Mr. Joseph's petition for certiorari.

STATEMENT OF THE CASE

A. The Indictment

Pursuant to superseding indictment S2 20 Cr. 603 (PKC), Mr. Joseph was charged with five counts – racketeering conspiracy in violation of 18 U.S.C. §1962(d) (Count 1); attempted murder and assault with a dangerous weapon in aid of racketeering in violation of 18 U.S.C. §1959) (Count 2); using, carrying and discharging a firearm 18 U.S.C. §924(c) (Count 3); and two counts of felon in possession of a firearm in violation of 18 U.S.C. §922(g) (Counts 4 and 5). The charges stemmed from Mr. Joseph's alleged membership in the Castle Hill Crew, a criminal enterprise based in the Soundview neighborhood of the Bronx; his shooting of a rival gang member on April 28, 2017; and the actual or constructive possession of two firearms. At the time of his arrest, Mr. Joseph was only 22 years old.

B. Defense Counsel's Proposed *Voir Dire* and Requests to Charge

Prior to trial, defense counsel proposed the following language be included in the preliminary instructions given before jury selection:

> We all have or have had feelings, assumptions, perceptions, fears, and stereotypes also known as biases about people and places that have affected our memories, our thoughts, what we see or hear and/or the decisions we make or have made. Some biases we are aware or conscious of and others we might not be fully aware of, which is why they are called "implicit biases" or "unconscious biases." Unconscious/implicit biases are stereotypes, attitudes, or preferences that we express without conscious awareness, control, or intention. Like conscious bias, unconscious/implicit bias, too, can affect how we evaluate information and make decisions.
>
> It is important that if you are selected as a juror, you must discharge your duties without discrimination, meaning that bias or stereotypes regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity or gender of the defendant, any of the witnesses or the lawyers will play absolutely no role in the exercise of your judgment throughout the trial.

However, at the *voir dire*, the district court did not include any language about implicit or unconscious bias, including that proposed by defense counsel. Additionally, the district court's instructions did not mention bias or any other form of potential prejudice except to instruct that, " It's important that they get their day in court and that they have an unbiased jury …"

Notably, Mr. Joseph is African American and all of the members of the gang with which he was associated weere either African American or Latino. However, upon information and belief, there were no African Americans on the jury.

C. The Trial

1. The Government's Case

At trial, the government sought to prove that, from at least in or about 2014 and including in or about December 2020, Mr. Joseph had been a member of a criminal enterprise, the Castle Hill Crew ("CHC"), which had committed an an array of violent offenses, including attempted murders and assaults, as well as narcotics trafficking and bank fraud. The government maintained that the CHC was at war with rival gangs, including a gang from the neighboring James Monroe Houses, the Monroe Crew ("MC"). The government further maintained that on April 28, 2017, while attempting to shoot at rival MC members in retaliation for a shooting that had occurred one day earlier, Mr. Joseph had shot a 12-year-old bystander.

To prove its case, the government primarily relied on the testimony of two cooperating gang members, Angel Arroyo, a former MC member and Christopher Cruz, a former CHC member, along with photographic and video evidence, to establish that Mr. Joseph was a member of the CHC. During his testimony, Arroyo identified a man seated in the back row of the courtroom galley as a Marvin, a CHC member. Arroyo had testified earlier about Marvin and the government had presented a considerable amount of photographic evidence in which Arroyo repeatedly identified Mr. Joseph together with Marvin. In all, Marvin's name came up in Arroyo's testimony approximately 42 times.

2. The Defense Case

Shortly before jury selection, the defense indicated it intended to call former MC gang member, Nasir Vincent, as a witness. A subpoena was issued for Vincent's testimony and served on his attorney. Vincent's counsel appeared before the district court, conformed that she spoke with him, and advised that, if her client was called, he would invoke his Fifth Amendment right. Moreover, he would not speak with defense counsel or an investigator.

3. The District Court's Instruction on Bias

In its charge, the district court instructed the jury that, "Your verdict must be based solely upon the evidence developed at trial or the lack of evidence. The parties in this case are entitled to a trial free from prejudice about a party's race, religion, national origin, sex or age**.** Our judicial system cannot work unless you reach your verdict through a fair and impartial consideration of the evidence." Without defining or explaining either term, the district court further instructed:

> You must resist jumping to any conclusions in favor or against a witness or party based upon unconscious or implicit bias. Unconscious or implicit biases are stereotypes, attitudes, or preferences that we have that can affect how we evaluate information and make decisions**.** Your verdict must be based on the evidence or lack of evidence and the Court's instructions on the law.

4. The Jury Note, Verdict and Sentence

On September 22, 2021, the jury found Mr. Joseph guilty of all five charges. Along with the note announcing they had reached a verdict, the jury had sent another note labled "question". It stated: "*Some of us are concerned for our safety after the verdict is announced. Are there any protocols that would ensure our safety? Or can*

that be addressed?" After reading the note to the parties, the trial judge indicated, "I don't plan to orally say anything but I've called down to see if we could get some extra CSOs who would be able to escort our jurors out."

On June 20, 2022, the district court sentenced Mr. Joseph to an aggregate term of imprisonment of 264 months.

D. <u>The Initial Rule 29 and 33 Motions</u>

Following the verdict, Mr. Joseph moved for a partial judgment of acquittal and a new trial, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. One of the grounds for his Rule 33 motion was that the district court had failed to instuct the prospective jurors on implicit bias during *voir dire*, as requested by defense counsel. By Opinion and Order dated February 4, 2022, the district court rejected Mr. Joseph's claims and denied the motion. (Appendix C).

E. <u>The Second Rule 33 Motion</u>

On June 29, 2022, the day before sentencing, Mr. Joseph filed a second motion for a new trial pursuant to Rule 33 based on newly discovered evidence, relying on a sworn Declaration from Nasir Vincent and reported statements made by Latief Jenkins.

By Order and Opinion dated June 27, 2023 (Appendix B), the district court denied the motion, "principally because each of the two witnesses who are the basis for the claim of newly discovered evidence were known to the defense prior to trial." (App.11a). Relying on *United States v. Owen*, 500 F.3d 83 (2d Cir. 2007) and *United States v. Forbes*, 790 F.3d 403 (2d Cir. 2015), the district court concluded that

Vincent's proffered affidavit was "at most newly available but not newly discovered." The district court noted that the trial record did not demonstrate that the defense subpoenaed Jenkins, or sought to do so. Because Jenkins' identity (and Vincent's) were disclosed in the government's in limine motion filed six weeks before trial (App. 13a), the district court concluded that Jenkins's statement was "simply not newly discovered evidence and there is no added wrinkle arising from an earlier claim of privilege." (App.17a).

F. The Direct Appeal and the Second Circuit's Decision

Mr. Joseph directly appealed his judgment and sentence to the Second Circuit. In his brief, Mr. Joseph claimed, *inter alia*, that: (1) the district court's refusal to *voir dire* on implicit or unconscious bias as requested by defense counsel, and its later denial of his Rule 33 motion on this ground, were abuses of discretion that resulted in a violation of his Sixth Amendment right to an impartial jury; and (2) the district court abused its discretion when it failed to consider the newly available affidavit of Nasir Vincent in deciding Mr. Joseph's second Rule 33 motion based on newly discovered evidence.

By Summary Order decided April 26, 2024 (Appendix A), the Second Circuit rejected Mr. Joseph's claims and affirmed his convictions and sentences.

In discussing Mr. Joseph's claim that the district court had violated his right to an impartial jury by failing to *voir dire* on unconscious or implicit bias, as requested, the Circuit, relying on its decision in *United States v. Nieves*, 58 F.4th 623,

632 (2d Cir. 2023), concluded otherwise. Reviewing this issue for plain error, the Panel found that:

> District courts retain broad discretion over how to screen jurors for bias. They can ask subtler or generalized questions about impartiality, or they can warn jurors of the general duty of impartiality, provided the juror has sufficient context about the case. *See Nieves*, 58 F.4th at 639. And even if the court doesn't ask any of these bias-related questions, the district court could ask "sufficiently detailed question[s] to allow [a] defendant[] to indirectly ferret out more subtle biases through peremptory challenges based on circumstantial indicators of bias." *Id.* (internal quotation marks omitted). The district court did all of the above. The district court did not commit error, much less plain error, by not including instructions or questions on implicit bias in its voir dire.

(App.8a).

In denying Mr. Joseph's claim that the district court had abused its discretion when it failed to consider Mr. Vincent's affidavit as newly discovered evidence, the Second Circuit concluded that, "Vincent's testimony is not 'newly discovered' under our precedent in *Forbes* and cannot be considered under Rule 33, as the testimony was known to Joseph and Vincent asserted his Fifth Amendment privilege as the basis for his unavailability." (App.9a).

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD GRANT CERTIORARI ON THE ISSUE OF WHETHER AND WHEN A DISTRICT COURT'S REFUSAL TO *VOIR DIRE* POTENTIAL JURORS, WHEN REQUESTED BY THE DEFENSE, CONSTITUTES AN ABUSE OF DISCRETION AND VIOLATES AN ACCUSED'S SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY.

While district courts retain broad discretion over how to screen jurors for bias, a trial court's refusal to *voir dire* on implicit or unconscious bias, when requested to by defense counsel, may constitute an abuse of discretion, leading to the violation of an accused's Sixth Amendment right to an impartial jury. Without such instructions, prospective jurors may remain blind to the fact that these types of biases exist, or that they hold them. And charging them at the end of the case cannot cure this defect as it fails to subject them to dismissal as it would have had they recognized and disclosed such bias at *voir dire*. Instead, jurors with an unconscious or implicit bias are left to decide the fate of the accused. Accordingly, this Court should grant Certiorari to address whether and when a trial judge abuses their discretaion when they refuse to *voir dire* on implicit or unconscious bias when requested to do so by defense counsel.

Scholars have concluded that while most white Americans, regardless of class or education, consciously embrace the principle of racial equality and no longer express the type of open anti-Black bias that was once prevalent, they still maintain an unconscious, associational link between Black males and crime. 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 to 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.

The subliminal process of unconscious stereotyping is called "implicit bias." "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 (3d 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*, 505 U.S. 42 (1992) 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." In *Texas Dept. of*

Hous. and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 521 (2015), this Court recognized that "unconscious prejudices" play a role in in housing discrimination.

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. 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. "[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*, 112W. 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. Simply asking a single question to the entire venire, 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, *Shirley v. Yates*, 807 F.3d 1090, fn. 26 (9th Cir. 2016); *United States v. Ray,* 803 F.3d 244, 260 (6th Cir. 2015); *State v. Williams*, 929 N.W.2d 621, 639-640 (Iowa 2019).

Significantly, 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 Case Blindness*, 7 J. EMPIRICAL LEG. STUD. 886, 900–01 (2010); Sommers & Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, supra at 212-213.

That said, the Sixth Amendment guarantees a criminal defendant's right to an "impartial jury." *United States v. Parse*, 789 F.3d 83, 110-111 (2d Cir. 2015). Consequently, this Court, in its supervisory capacity, has directed trial courts to v*oir dire* on racial bias <u>when requested to do so by the defense</u>, even when the inquiry is not constitutionally required. *Rosales-Lopez v. United States,* 451 U.S. 182, 191-92 (1981); *Ristaino v. Ross,* 424 U.S. 589, 597 n.9 (1976).

Citing and quoting *Rosales-Lopez*, the Second Circuit has acknowledged that "the *voir dire* process 'plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.' … That is because an inadequate voir dire compromises the trial court's 'responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence.'" *United States v. Nieves,* 58 F.4th 623, 631 (2d Cir. 2023). "District [court] judges have long been accorded ample discretion in determining how best to conduct *voir dire* pursuant to Rule 24 of the Federal Rules of Criminal Procedure." *Id*. (internal quotations and citations omitted). However, as this Court has recognized, such discretion is not unlimited. *Aldridge v. United States*, 283 U.S. 306 (1981). The district court's "exercise of this discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." *Id*. at 310.

Even in that forgiving, deferential light, "the defense deserves 'a full and fair opportunity to expose bias or prejudice on the part of veniremen.' " *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989), quoting *United States v. Barnes*, 604 F.2d 121, 139 (2d Cir. 1979). Where the court finds that such bias or prejudice exists, a juror is subject to dismissal for cause. *United States v. Torres*, 128 F.3d 38, 43, 46-47 (2d Cir. 1997) (noting that dismissal is mandatory in some circumstances and discretionary in others). *Id.*

As a basic principle, "[t]here must be sufficient information elicited on *voir dire* to permit a defendant to intelligently exercise both for-cause and peremptory

challenges." *Colombo*, 869 F.2d at 151, quoting *Barnes*, 604 F.2d at 142. In other words, there must be sufficient factfinding at *voir dire* to allow for facts probative of any of these forms of bias to reveal themselves. Otherwise, "[f]undamental unfairness arises if voir dire is not 'adequate ... to identify unqualified jurors.' " *United States v. Whitten*, 610 F.3d 168, 185 (2d Cir. 2010) (second alteration in original), quoting *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). As this Court emphasized decades ago, in *Aldridge*: "We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." 283 U.S. at 314.

In Mr. Joseph's case, defense counsel requested, in writing, that the district court instruct the prospective jurors on implicit or unconscious bias during *voir dire*. Indeed, he went so far as to provide suggested language. Notwithstanding defense counsel's request, the district court declined to do so, and in fact, said very little about bias at all. Instead, the trial judge waited until almost the end of the trial to first raise the issue of possible implicit or unconsious bias.

Moreover, in later denying Mr. Joseph's initial Rule 33 motion, the district court abused its discretion when it erroneously concluded that the requested relief "was not warranted based on the absence of any question about implicit or unconscious bias during voir dire." (App. 32a). However, the district court's decision to wait until the trial was practically over before first raising the issue of implicit or

unconscious bias with the jury was simply too little too late. By then, no avenue existed either to determine if the selected jurors were implicitly biased and if so, no means was available to remedy this fatal infirmity.

Additionally, circumstances here indicate that there is a reasonable possibility that implicit or unconscious bias may have influenced the jury. *Rosales -Lopez*, 451 U.S. at 191; First, Mr. Joseph was a young African-American man, charged with multiple violent offenses, including racketeering, attempted murder, assault, the possession and discharge of firearms, and gang membership. Second, upon information and belief, there were no African Americans on the jury. Third, the prosecutor's questioning of former rival gang member, Arroyo, led to Arroyo's identification of the presence of "Marvin" in the courtroom. To make matters worse, Marvin was a Castle Hill Crew member who appeared in numerous photographs with Appellant. Indeed, Marvin's name came up 42 times in Arroyo's testimony. Fourth, -- and most concerning – just prior to announcing their verdict, the jurors sent a final note to the court expressing fear for their safety following the announcement of their verdict, and inquiring about means for their protection. Consequently, had the trial judge asked the *voir dire* questions proposed by defense counsel, it would have significantly reduced the likelihood of a jury prejudice due to unconscious or implicit racial bias.

Thus, the Second Circuit erroneously determined that the district court did not abuse its discretion when it failed to give the requested *voir dire* instruction on unconscious and implicit bias. Likewise, the district court's denial of Mr. Joseph's's

initial Rule 33 motion, in which he raised this argument, also amounted to an abuse of discretion. *Rosales-Lopez*, 451 U.S. at 191; *Nieves,* 58 F.4th at 633. Accordingly, this Court should grant Certiorari to determine whether and when a trial judge's refusal to *voir dire* on implicit or unconscious bias, when requested by defense counsel, amounts to an abuse of discretion which violates an accused's Sixth Amendment right to an impartial jury.

2. THE SECOND CIRCUIT ERRED WHEN IT DENIED MR. JOSEPH'S RULE 33 MOTION FOR A NEW TRIAL WITHOUT CONSIDERING THE DECLARATION OF NASIR VINCENT BASED ON PRIOR CIRCUIT CASE LAW HOLDING THAT NEWLY AVAILABLE EVIDENCE DOES NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE. AS A SPLIT IN THE CIRCUITS EXISTS ON THIS ISSUE, THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE DEFINITION OF "NEWLY DISCOVERED EVIDENCE" UNDER RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, IN ORDER TO ALLOW FOR UNIFORMITY AMONG THE CIRCUITS AND EQUAL JUSTICE TO AN ACCUSED IRRESPECTIVE OF THE COURT IN WHICH THEY WERE TRIED.

The Second Circuit's conclusion that the district court did not abuse its discretion by refusing to consider the Affidavit of Nasir Vincent when it decided and denied Mr. Joseph's Rule 33 motion for a new trial conflicts with rulings in the First Circuit that have considered newly available evidence to be newly discovered evidence where the evidence previously was unavailable due to the invocation of a valid privilege. Accordingly, granting certiorari is necessary to secure and maintain uniformity on this issue throughout the nation's circuit courts.

In its June 27, 2023 Opinion and Order (Appendix B), the district court denied Mr. Joseph's second Rule 33 motion based on newly discovered evidence in the form of a sworn Declaration from former rival gang member, Nasir Vincent. In pertinent part, Vincent's Declaration stated:

> I never met NICHOLAS JOSEPH, on April 27, 2017, in the vicinity of James Monroe Houses in the Bronx. I never shot at NICHOLAS JOSEPH, that day, April 27, 2017, in the vinity of the James Monroe Houses.
>
> Furthermore, I never saw NICHOLAS JOSEPH, on April 18, 2017, in the vicinity of Story Avenue Playground in the Brons. NICHOLAS

> JOSEPH NEVER SHOT AT ME ON April 28, 2017, in the vicinity of the Story Avenue Playground in the Bronx. I never told ANGEL ARROYO that NICHOLAS JOSEPH shot at me on April 28, 2017.

Vincent's Declaration, if considered, would have refuted the government's evidence, introduced through the testimony of its main cooperating witness, Arroyo, that the motive for the shooting on April 28, 2017 was gang-related, to wit: to retaliate for an alleged attempt, by a member of the Monroe Houses Crew, to shoot Mr. Joseph one day earlier, on April 27, 2017.

In denying the motion, and relying on prior Second Circuit case law in *United States v. Forbes*, 790 F.3d 403 (2d Cir. 2015) and *United States v. Owen*, 500 F.3d 83 (2d Cir. 2007), the district court refused to even consider Vincent's newly available Declaration, finding that it did not constitute "newly discovered evidence" pursuant to Rule 33. Adhering to *Forbes* and *Owens*, the district court rejected Vincent's Declaration outright because the defense was aware of Vincent's existance during trial, and there was a legal basis for Vincent's unavailability at trial, based on his invoking the Fifth amendment privilege against self-incrimination. In doing so, the district court never considered the Declaration's actual substance or whether it had the discretion to do so.

Notably, had Mr. Joseph been tried in the First Circuit, the result might have been different because Vincent's Declaration automatically would not have been considered insufficient under Rule 33. See *United States v. Montilla-Rivera*, 115 F.3d 1060 (1st Cir. 1997); *United States v. Del-Valle*, 566 F.3d 31 (1st Cir. 2009**)**. In *Montilla-Rivera*, the defendant, Montilla, initially sought to have his two co-

defendants, Zorilla and Calderón, testify as defense witnesses. 115 F.3d at 1063. However, two days before Montilla filed an application for their production in court, both had entered guilty pleas. *Id*. Zorilla and Calderón informed the court that they would not testify, on advice of and through their counsel. On July 1, 1995, Montilla was convicted. Calderón and Zorrilla were not sentenced until September 26, 1995. *Id*. On July 17, 1996, Montilla filed a motion for a new trial pursuant to Fed.R.Crim.P. 33. In support of his motion, Montilla included affividavits from Zorrilla and Calderón, essentially exculpating him. *Id*.

The First Circuit addressed the issue of whether exculpatory affidavits from codefendants who did not testify at trial because they exercised their Fifth Amendment privileges may ever qualify as "newly discovered" evidence within the meaning of Rule 33, ultimately answering this legal question in the affirmative. *Id*. at 1065-66. In doing so, the First Circuit recognized that, "[m]ost other circuits have expressed hostility to this notion, usually on the ground that the defendant was aware of the potential testimony at trial, even if that testimony was unavailable due to assertions of privilege. " *Id*. (collecting cases).

However, while acknowledging this split, the First Circuit identified its own interpretation of Rule 33, which holds that the "newly discovered" language of Rule 33 encompasses evidence that was unavailable." See *Vega Pelegrina v. United States,* 601 F.2d 18, 21 (1st Cir.1979). In doing so, the First Circuit identified a four-part test different from that utilized by other circuits, outlined in *United States v. Wright,* 625 F.2d 1017 (1st Cir.1980), saying that the first question is whether the evidence "was

unknown *or unavailable* to the defendant at time of trial." *Id.* at 1019 (emphasis added) (collecting cases).

The "[i]n the interests of justice" standard of Fed.R.Crim.P. 33 further supports this interpretation. The *Montilla* Court aptly recognized that "there seems little distinction between evidence which a defendant could not present because he did not know of it and evidence which he could not present because the witness was unavailable despite exercising due diligence." *Id*. at 1066. As noted in *Montilla*, newly available evidence from a co-defendant, who was "unavailable" because he chose to exercise his privilege, should be cautiously considered, where "there is a facial showing of compliance with the other prongs sufficient to warrant further inquiry." *Montilla*, 115 F.3d at 1066.

In Mr. Joseph's case, as was true with the Morales Affidavit in *Montilla*, the Vincent Declaration is, on its face, material, and the testimony, if believed, could lead to a different outcome as the only evidence linking Mr. Joseph to the events of April 27, 2017 came from Angel Arroyo, whose testimony was suspect for many reasons. As observed in *Montilla*, Vincent's testimony, while it may not be true, "is not inherently implausible." *Id*. Moreover, defense counsel exercised due diligence and subpoenaed Mr. Vincent as a trial witnes. However, in response, Mr. Vincent's attorney informed the trial court that, if called to testify, her client would take the Fifth, and that he was refusing to speak with defense counsel or an investigator.

In sum, in order to secure and maintain uniformity on this issue throughout the nation's courts, we respectfully request that this Court grant Certiorari to clarify

whether and when newly available evidence may constitute "newly discovered evidence" for purposes of Rule 33 of the Federal Rules of Criminal Procedure.

CONCLUSION

For the reasons above, Mr. Joseph respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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July 25, 2024

APPENDIX

TABLE OF CONTENTS

Page

22-1552
United States v. Joseph

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of April, two thousand twenty-four.

PRESENT:

DENNIS JACOBS,
MICHAEL H. PARK,
ALISON J. NATHAN,
Circuit Judges.

United States of America,

***Appellee*,**

v. **22-1552**

Nicholas Joseph,

Defendant-Appellant.

FOR APPELLEE: ANDREW K. CHAN (Emily A. Johnson and Danielle R. Sasson, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

FOR APPELLANT: RANDA D. MAHER, Great Neck, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Castel, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Appellant Nicholas Joseph was a member of a violent street gang based in the Bronx called the Castle Hill Crew ("CHC"). The CHC engages in acts of violence against rival gang members, including members of a gang called the Monroe Houses Crew ("MHC"). Joseph was tried and convicted on five counts for his involvement in gang violence, including a shooting that occurred on April 28, 2017 (the "April Shooting"), and gun possession: Count One for participating in a racketeering conspiracy in violation of 18 U.S.C. § 1962(d); Count Two for assault with a dangerous weapon and attempted murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(3), (a)(5), (a)(6), and 2; Count Three for using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i), (ii), (iii), and 2; Count Four for being a felon in possession of a firearm and ammunition on or about July 10, 2020 in violation of 18 U.S.C. §§ 922(g)(1); and Count Five for being a felon in possession in or around November and December 2020 in violation of 18 U.S.C. §§ 922(g)(1).

Joseph filed a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 and a motion for a new trial under Rule 33. He argued that the district court should enter a judgment of acquittal for Counts Two and Three because the government failed to prove that the April Shooting was gang-related. He then argued, among other things, that he deserved a new trial because the district court failed to voir dire on implicit or unconscious racial bias in violation of his Sixth Amendment right to an impartial jury. The district court denied these motions,

finding "overwhelming evidence" in support of Counts Two and Three, and concluding that the court's voir dire questioning was proper. A1033. The day before sentencing, Joseph filed a second Rule 33 motion, claiming among other things that he was entitled to a new trial because Nasir Vincent, an MHC member targeted by Joseph at the April Shooting, was now willing to testify that Joseph did not shoot at him at the April Shooting. Vincent did not testify at trial because his counsel informed the district court that he planned to assert his Fifth Amendment privilege. The district court denied the motion because Vincent's identity and alleged role were known to the defense prior to trial; "the evidence [was] at most newly available but not newly discovered." A1151. Joseph was sentenced to 264 months of imprisonment.

Joseph now appeals, arguing that (1) the evidence was insufficient for conviction on Counts Two, Three, and Five; (2) the district court abused its discretion in the voir dire process by failing to include his proposed instructions on unconscious or implicit bias; and (3) the district court abused its discretion by failing to consider Vincent's newly available affidavit. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Sufficiency of Evidence

A. Standard of Review

We "review[] de novo a challenge to the sufficiency of evidence supporting a criminal conviction, and must affirm if the evidence, when viewed in its totality and in the light most favorable to the government, would permit any rational jury to find the essential elements of the crime beyond a reasonable doubt." *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004) (citation omitted). "A defendant challenging the sufficiency of the evidence bears a heavy

burden." *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). "We must credit every inference that the jury might have drawn in favor of the government because the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court." *United States v. Atilla*, 966 F.3d 118, 128 (2d Cir. 2020) (citations and quotation marks omitted). "The jury may reach its verdict based upon inferences drawn from circumstantial evidence." *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011) (internal quotation marks omitted).

"In order to avoid usurping the role of the jury, courts must defer to the jury's assessment of witness credibility . . . when reviewing the sufficiency of the evidence." *United States v. Triumph Cap. Grp., Inc.*, 544 F.3d 149, 158-59 (2d Cir. 2008). "[A] conviction may be sustained on the basis of the testimony of a single accomplice, so long as that testimony is not incredible on its face and is capable of establishing guilty beyond a reasonable doubt." *United States v. Duron*, No. 22-1559-cr, 2023 WL 8253056, at *2 (2d Cir. Nov. 29, 2023) (quoting *United States v. Diaz*, 176 F.3d 52, 92 (2d Cir. 1999)).

B. Counts Two and Three

At trial, the government introduced the testimony of several witnesses. Angel Arroyo, a former MHC member and one of the government's cooperating witnesses, testified that in November 2015, he was stabbed multiple times by Joseph and another CHC member in retaliation for an earlier violent altercation between CHC and MHC members; that on April 27, 2017, Vincent shot at Joseph for invading MHC territory; and that the next day, Joseph shot at MHC members, including Vincent, in the Story Playground next to a public elementary school in retaliation for the shooting that occurred the day before. Joseph missed his target and instead shot and injured a 12-year-old boy.

The government introduced ShotSpotter (a gunshot detection software), surveillance video, and DNA evidence. ShotSpotter evidence showed three gunshots near Joseph's building around the time of the April Shooting, but no gunshots in the vicinity of the shooting that occurred the day before. Surveillance video showed Joseph, right before the April Shooting, running out of his building with gun in hand towards the Story Playground. The government's second cooperating witness and member of the CHC, Christopher Cruz, testified that after the April Shooting, CHC members bragged about how Joseph had "put in work" for the CHC, and that Joseph gained status and "became somebody." The government also provided evidence from social media, rap videos, and the contents of Joseph's cellphone in which he bragged about "spinning" or "beefing" with rival members.

Joseph argues that the evidence did not sufficiently establish that his purpose in discharging his gun at the April Shooting was to maintain or increase his position in the CHC as required for conviction on Counts Two and Three.[1] "We consistently have construed the 'maintaining or increasing position' language in § 1959 . . . liberally. This element is satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *United States v. White*, 7 F.4th 90, 101 (2d Cir. 2021) (quotation marks omitted). The government is not required to prove that Joseph's "sole or principal motive was maintaining

[1] "Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or *maintaining or increasing position* in an enterprise engaged in racketeering activity" commits a crime of violence, shall be punished. 18 U.S.C. § 1959(a) (emphasis added).

or increasing his position, so long as it prove[s] that enhancement of status was among his purposes." *United States v. Farmer*, 583 F.3d 131, 143-44 (2d Cir. 2009) (cleaned up).

There was ample evidence, in the form of cooperator testimony and social media, rap videos, and content in Joseph's cellphone, of the long-standing acts of violence and retribution between the CHC and the MHC, from which the jury could find that one of Joseph's purposes in committing the shooting was to increase or maintain his status in the CHC. Cruz's testimony showed Joseph's status in the CHC did in fact increase as a result of the shooting. The jury acted well within its discretion to assess the credibility of witnesses, including Arroyo and Cruz, to make permissible inferences, and to weigh the evidence in reaching its conclusion. We affirm the district court's judgment convicting Joseph of committing violent crimes in aid of racketeering under Count Two and discharging a gun in furtherance of the violent crimes under Count Three.

C. Count Five

On December 10, 2020, police recovered a loaded silver pistol with a white handle at a construction site in the vicinity of where Joseph was arrested and the path by which another CHC member, Malik James, was chased. DNA evidence indicated James likely contributed to the mixture of DNA found on the gun, but Joseph likely did not. Only hours before the arrest, Joseph sent text messages claiming he had a gun. Moreover, multiple videos found on Joseph's phone from November to December 2020 showed Joseph and James brandishing the same white and silver gun.

Joseph claims that the evidence was insufficient to prove Joseph possessed the gun. We disagree. The evidence was sufficient for the jury to conclude that Joseph possessed the gun in

and around November and December 2020, and at the very least constructively possessed[2] it on December 10, 2020. Given that Joseph and James were together at the time of Joseph's arrest, the jury made reasonable inferences based on evidence of James's DNA on the gun that James abandoned the gun at the construction site during the police chase and that Joseph at least shared possession of the gun. We affirm the district court's judgment convicting Joseph of being a felon in possession of a firearm under Count Five.

II. Voir Dire Instructions

Joseph argues that the district court abused its discretion by not including instructions or questions on implicit bias in its voir dire. A district court has broad discretion in conducting voir dire, which we review for abuse of discretion. *See United States v. Nieves*, 58 F.4th 623, 632 (2d Cir. 2023). The "deferential standard applies to both the general manner in which [voir dire] has been conducted, and the specific questions a district court elects to ask, or not to ask." *Id*. "[W]e have never reversed a conviction for the failure to ask a particular question of prospective jurors." *Id*. at 626 (quoting *United States v. Bright*, No. 20-3792, 2022 WL 53621, at *1 (2d Cir. Jan. 6, 2022)). If a plaintiff fails to object to voir dire in the district court, we review for plain error instead of abuse of discretion. *United States v. Colabella*, 448 F.2d 1299, 1302-03 (2d Cir. 1971).

There is "no *per se* constitutional rule . . . requiring inquiry as to racial prejudice." *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981). "Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case

[2] "Constructive possession exists when a person has the power and intention to exercise dominion and control over an object, and may be shown by direct or circumstantial evidence." *United States v. Facen*, 812 F.3d 280, 286–87 (2d Cir. 2016) (quotation marks omitted).

does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion." *Id.*; *see also United States v. Diaz*, 854 F. App'x 386, 388 (2d Cir. 2021) (quoting *Rosales-Lopez*).

We review for plain error because Joseph did not object to the district court's voir dire. District courts retain broad discretion over how to screen jurors for bias. They can ask subtler or generalized questions about impartiality, or they can warn jurors of the general duty of impartiality, provided the juror has sufficient context about the case. *See Nieves*, 58 F.4th at 639. And even if the court doesn't ask any of these bias-related questions, the district court could ask "sufficiently detailed question[s] to allow [a] defendant[] to indirectly ferret out more subtle biases through *peremptory* challenges based on circumstantial indicators of bias." *Id*. (internal quotation marks omitted). The district court did all of the above. The district court did not commit error, much less plain error, by not including instructions or questions on implicit bias in its voir dire.

III. Newly Discovered Evidence

Finally, Joseph argues that the district court erred by denying his Rule 33 motion for a new trial based on newly discovered evidence in the form of Vincent's testimony. Rule 33(a) provides that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A motion for a new trial may be brought on newly discovered evidence. *See* Fed. R. Crim. P. 33(b)(1). "We review the denial of a Rule 33 motion for a new trial for abuse of discretion." *United States v. James*, 712 F.3d 79, 107 (2d Cir. 2013). "To merit relief based on a claim of newly discovered evidence, the burden is on the defendant to satisfy five elements: (1) that the evidence is newly discovered after trial; (2) that facts are alleged from which the court can infer due diligence on the part of the movant to obtain the evidence; (3) that the evidence is

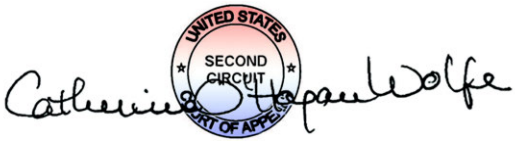
material; (4) that the evidence is not merely cumulative or impeaching; and (5) that the evidence would likely result in an acquittal." *Id*. (quotation marks omitted).

"Evidence is not new if the defendant knew of it prior to trial, and is not considered newly discovered if, with the exercise of reasonable diligence, it could have been discovered before or during the trial." *United States v. Parse*, 789 F.3d 83, 109 (2d Cir. 2015). Moreover, "evidence is excluded from the meaning of 'newly discovered' under Rule 33 where . . . there was a *legal* basis for the unavailability of the evidence at trial, such as the assertion of a valid [Fifth Amendment] privilege." *United States v. Forbes*, 790 F.3d 403, 408 (2d Cir. 2015).

Vincent's testimony is not "newly discovered" under our precedent in *Forbes* and cannot be considered under Rule 33, as the testimony was known to Joseph and Vincent asserted his Fifth Amendment privilege as the basis for his unavailability. The district court thus acted well within its discretion to deny Joseph's motion for a new trial.

We have considered all of Joseph's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

20-cr-603 (PKC)

-against-

OPINION
AND ORDER

NICHOLAS JOSEPH,

Defendant.
----------x

CASTEL, U.S.D.J.

Following his conviction at trial on all five counts, defendant Nicholas Joseph moved for a partial judgment of acquittal and a new trial pursuant to Rules 29 and 33, Fed. R. Crim. P. The Court denied the motions in an Opinion and Order of February 4, 2022 (the "February 4 Opinion"). (ECF 100.) At 7 p.m. on the literal eve of sentencing, defense counsel filed a second motion for a new trial, five pages in length, this time on the grounds of newly discovered evidence. (ECF 117.) Because the sentencing had been repeatedly adjourned at the request of the defense (ECF 98, 102, 105, 111) and after hearing the views of counsel (6/30/22 Tr. 11-12), the Court declined to further adjourn the sentencing.[1]

At sentencing, the Court adopted the advisory guidelines range of 360 months to life without objection from the defendant. (Id. at 7-9.) The government urged a sentence of "at least" 300 months imprisonment (id. at 41) and the Office of Probation recommended a sentence of 480 months. The Court sentenced defendant to principally 264 months imprisonment, 96 months below the bottom of the advisory guidelines range. (ECF 122.)

[1] Defense counsel wrote the day before the sentencing that he had "discussed the motion in detail with the Government this morning. I expect the government to respond either tonight or tomorrow morning. I will not request an adjournment of tomorrow's sentencing hearing if the Court denies the motion." (ECF 117.)

Defendant appealed. The Court took no action on the motion for a new trial during the pendency of the appeal. See Rule 33(b)(1), Fed. R. Crim P. ("If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.").[2] On June 20, 2023, the undersigned was first informed by appellate counsel that the appeal had been stayed by the United States Court of Appeals for the Second Circuit pending a ruling on Joseph's second motion for a new trial. (ECF 136.)

For reasons that will be explained, the Court will deny the motion principally because each of the two witnesses who are the basis for the claim of newly discovered evidence were known to the defense prior to trial. For the purpose of this motion, the Court accepts the defense version of the witnesses' testimony and thus no evidentiary hearing is necessary.

The Court reviewed at length the trial evidence and need not do so again. The reader is referred to the Court's February 4 Opinion.

Overview of the Charges

Defendant was charged in a second superseding indictment with five counts: Count 1, participating in a racketeering conspiracy in violation of 18 U.S.C. § 1962(d); Count 2, attempted murder and assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. § 1959; Count 3, using and carrying a firearm, which was discharged, in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c); and Counts 4 and 5, possession of firearms and ammunition while a convicted felon, in violation of 18 U.S.C. §§ 922(g). (ECF 33.)

At trial, the government's theory of the case, well-supported by evidence, was that defendant was a member of the Castle Hill Crew, a criminal enterprise based in the

[2] The Court acknowledges that it had the authority to deny the motion or issue an indicative ruling that it would grant the motion if the matter were remanded to the district court. United States v. Jiau, 545 Fed. App'x 34, 36 (2d Cir. 2013).

Soundview neighborhood of the Bronx, and that on April 28, 2017, he discharged a firearm at the neighborhood's Story Playground, causing a 12-year-old boy, an innocent bystander, to be shot in the hip. The government argued to the jury that the April 28 shooting was an act of retaliation for an unsuccessful attempt by a member of a rival gang, the Monroe Houses Crew, to attack defendant the day before. The government offered evidence of defendant's conviction of a felony, defendant's knowledge of his conviction and his knowing possession of two firearms. The jury returned guilty verdicts on all five counts.

At sentencing, defendant admitted to the shooting but said his motive was "to look good for the female," denying that it had been for the purpose of maintaining or increasing his position within the gang. (6/30/22 Tr. at 29.)

Standards for a Rule 33 Motion Based Upon Newly Discovered Evidence

"Relief under Rule 33 based on newly discovered evidence may be granted only upon a showing that '(1) the evidence [was] newly discovered after trial; (2) facts are alleged from which the court can infer due diligence on the part of the movant to obtain the evidence; (3) the evidence is material; (4) the evidence is not merely cumulative or impeaching; and (5) the evidence would likely result in an acquittal.'" United States v. Forbes, 790 F.3d 403, 406-07 (2d Cir. 2015) (quoting United States v. Owen, 500 F.3d 83, 88 (2d Cir. 2007)).

The "Newly Discovered" Evidence

In the motion for a new trial, defendant asserts that the two witnesses, Nasir Vincent and Latief Jenkins, would contradict the government's evidence, specifically the testimony of cooperator Angel Arroyo, that the April 28, 2017 shooting was in retaliation for an attack on defendant the day before by a member of the Monroe Houses Crew. Arroyo had testified that he observed rival gang members Nasir Vincent and Latief Jenkins and the defendant

and that he heard but did not see a single gunshot and observed defendant running in the opposite direction of Vincent and Jenkins.

The government asserts that the testimony of the two witnesses fails the standard for a motion for a new trial because both were known to the defense prior to trial, and were disclosed in a motion in limine six weeks prior to trial and in 3500 material produced three weeks prior to trial. Indeed, in the case of Vincent, the defense subpoenaed the witness for trial, asserted to the Court that he had testimony that would exonerate defendant, but the witness, through his attorney, stated that he would assert his privilege against self-incrimination.

According to the defendant, Nasir Vincent has stated since the trial that "I never met Nicholas Joseph, on April 28, 2017, in the vicinity of the Story Avenue Playground in the Bronx. Nicholas Joseph never shot at me on April 28, 2017, in the vicinity of the Story Avenue Playground in the Bronx. I never told Angel Arroyo that Nicholas Joseph shot at me on April 28, 2017." (ECF 117 at 4.) A subsequently filed declaration by Vincent repeats the foregoing statements and adds that "I never met NICHOLAS JOSEPH on April 27, 2017, in the vicinity of the James Monroe Houses in the Bronx. I never shot at NICHOLAS JOSPEH, that day, April 27, 2017, in the vicinity of the James Madison Houses." (ECF 132-1.)

Latief Jenkins, according to the defense, has stated that "I don't recall seeing Nicholas Joseph in the vicinity of the James Monroe Houses in the Bronx on April 27, 2022. I don't recall seeing Nicholas Joseph in the vicinity of the Story Avenue Playground in the Bronx on April 28, 2017." (ECF 117 at 5.) No declaration by Jenkins has been submitted.[3]

[3] A fair reading of the defendant's reply submission is that defendant has abandoned any argument based on Jenkins from whom they were unable to secure a declaration. The Court nevertheless considers the claim with regard to Jenkins.

It is incontrovertible that the identities and roles of Nasir Vincent and Latif Jenkins were disclosed by the government in their motion in limine filed with the Court on July 23, 2021, six weeks prior to trial:

> CW-1 will testify about how members of the Monroe Houses Crew saw the defendant in the vicinity of the Monroe Houses and then decided to shoot at the defendant. CW-1 provided a gun to Monroe Houses Crew member Nasir Vincent, and CW-1 then heard the shots seconds later. After Vincent fired at the defendant, CW-1 and another member of the Monroe Houses Crew chased after the defendant, attempting to shoot him. The next day, CW-1 was present in the vicinity of the Monroe Houses when he saw Vincent and another member of the Monroe Houses Crew named Latief Jenkins walking toward the Story Playground. CW-1 then heard gunshots coming from the direction of the Story Playground, and saw Vincent and Jenkins run back from the direction of the playground just seconds after the shots were fired. Jenkins immediately told CW-1 and others that the defendant had fired shots at them in the playground, and also provided a description of what the defendant had been wearing when he fired the shots.

(ECF 30 at 9-10; emphasis added.) CW-1, Angel Arroyo, testified at trial substantially consistent with the foregoing. (9/15/21 Tr. 335-37, 346-55.)[4] The identities and roles of both Vincent and Jenkins also appeared in the 3500 material produced on or about August 25, 2021, three weeks before trial. (ECF 118 at 2.)

The significance of Vincent was not lost on defense counsel who disclosed shortly before jury selection his intention to call Vincent as a witness. (9/13/21 Tr. at 64-65.) The government raised with the Court certain logistical issues that may arise by reason of the pandemic from Vincent's production, and defense counsel was asked by the Court to respond: "Your Honor, I have not yet asked the Court to intervene in this matter. The government knows

[4] The government's later reply brief on its in limine motions, filed before trial, disclosed that "[t]he Government expects that CW-1's testimony will include recounting statements made to him by . . . Nasir Vincent and Latief Jenkins, in the moments after the Playground Shooting, during which they identified the defendant as the shooter and provided a description of what the defendant had been wearing." (ECF 54 at 5.)

the name of the witness, the government has an offer of proof as to what the witness is going to testify to. I've spoken to that witness's attorney." (9/13/21 Tr. at 64.) "I'm trying to make arrangements to have Mr. Vincent brought to court on Wednesday to see whether or not he would invoke or testify." (Id. at 65.) "I also have a subpoena just in case the Court needs to sign it." (Id.)

A subpoena was ultimately issued and served for the testimony of Vincent. (9/15/21 Tr. at 338.) His attorney appeared before the Court to advise that if called her client would assert his Fifth Amendment rights and that she had confirmed this after lengthy conversations with her client. (Id.) Defense counsel described Vincent as an "essential witness" and asked that he publicly invoke his rights. (Id.) The Court asked if counsel had support for the request and he had none beyond the Sixth Amendment, presumably the confrontation clause. (Id. at 338-39.) The Court concluded that the probative value, if any, of having the witness appear before the jury and invoke the Fifth Amendment to all questions other than his name was slight and was substantially outweighed by the danger of unfair prejudice. (Id. at 340-41.) The Court further concluded that, based upon the representations of Vincent's counsel, there was no need for the witness to appear out of the presence of the jury.[5] (Id.) Vincent's counsel appeared before the Court and confirmed that she had spoken at length to Vincent and he would neither testify nor speak with defense counsel. (Id. at 338, 341.) Defense counsel made no further application to the Court.

As far as the record or involvement of the Court is concerned, there was no similar effort made by the defense to secure the testimony of Jenkins. This is understandable

[5] Issues of pandemic precautions made the unnecessary production of an incarcerated witness ill-advised. Of course, had it been constitutionally required—and it was not—the Court would have ordered it.

because his information about the key events of April 27 and 28 consists of the absence of a recollection. ("I don't recall. . . .")

In United States v Owen, 500 F.3d 83, 92 (2d Cir. 2007), the Circuit reversed the district court's grant of a motion for a new trial based on newly discovered evidence consisting of the testimony of a co-defendant who had previously invoked his Fifth Amendment right not to testify at a joint trial with Owen. In the words of the Owen panel:

> We have never before held that a new trial may be granted pursuant to Rule 33 on the basis of evidence that was known by the defendant prior to trial, but became newly available after trial, and we decline to do so here. As Judge Friendly observed, albeit in *dicta,* courts "must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavail[a]ble only because a co-defendant, since convicted, had availed himself of his privilege not to testify." United States v. Jacobs, 475 F.2d 270, 286 n.33 (2d Cir. 1973). Following this counsel, we now join the majority of circuits to have addressed the issue and hold that Rule 33 does not authorize district courts to grant new trials on the basis of such evidence since it is not newly discovered, but merely newly available.

Id. at 89.

The Court applied Owen to a claim of newly discovered evidence based upon a co-conspirator's initial invocation of the Fifth Amendment followed by a post-trial decision to waive Fifth Amendment protections and offer of testimony to exonerate the defendant, holding that the evidence was newly available but not newly discovered. United States v. Forbes, 790 F.3d 403, 410-11 (2d Cir. 2015). In Forbes, the Court held that "evidence is excluded from the meaning of 'newly discovered' under Rule 33 where (1) the defendant was aware of the evidence before or during trial, *and* (2) there was a *legal* basis for the unavailability of the evidence at trial, such as the assertion of a valid privilege. This second requirement reflects the delicate balance between protecting the finality of judgments and the 'interest of justice' that Rule 33

seeks to protect, and it is consistent with our decision in Owen." Id. at 408 (emphasis in original).

The circumstance of Vincent falls squarely within Forbes. Vincent's identity and alleged role were known six weeks prior to trial, he was considered by the defense to be an essential witness, a proffer of his testimony was made to the government, but his testimony was unavailable because of the invocation of the Fifth Amendment privilege. Vincent's lawyer appeared in Court in the presence of the government and defense counsel. No claim has ever been made that his invocation of the privilege was without a legal basis. While Vincent was neither a co-defendant nor a co-conspirator of the witness but instead a member of a rival gang, the holding of Forbes controls; the evidence is at most newly available but not newly discovered.

The circumstance of Jenkins is slightly different. His identity and alleged role were disclosed by the government six weeks before trial. There is nothing in the record showing that he was subpoenaed by defense counsel or sought to be subpoenaed by defense counsel or told the defense that, if subpoenaed, he would not testify invoking a privilege. Jenkins's present statement is simply not newly discovered evidence and there is no added wrinkle arising from an earlier claim of privilege. As a separate ground for disqualification of Jenkins's testimony as a basis for a new trial under Rule 33, the admission of Jenkins's "I don't recall" testimony "would [not] probably lead to an acquittal." United States v Siddiqi, 959 F.2d 1167, 1173 (2d Cir. 1992).

CONCLUSION

Defendant's motion for a new trial on the basis of newly discovered evidence is DENIED. (ECF 117.)

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
June 27, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

20-cr-603 (PKC)

-against-

OPINION
AND ORDER

NICHOLAS JOSEPH,

Defendant.
----------x

CASTEL, U.S.D.J.

Defendant Nicholas Joseph moves for a partial judgment of acquittal and a new trial pursuant to Rules 29 and 33, Fed. R. Crim. P. For the reasons that will be explained, the motion is denied.

A five-count S2 indictment charged Joseph with participating in a racketeering conspiracy in violation of 18 U.S.C. § 1962(d); attempted murder and assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. § 1959; using and carrying a firearm, which was discharged, in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c); and two counts of being a felon in possession of firearms and ammunition, in violation of 18 U.S.C. §§ 922(g). (Docket # 33.)

Joseph's trial commenced on September 13, 2021. At trial, the government endeavored to prove that Joseph was a member of the Castle Hill Crew, a criminal enterprise based in the Soundview neighborhood of the Bronx, and that on April 28, 2017, Joseph discharged a firearm at the neighborhood's Story Playground, causing a 12-year-old boy to be shot in the hip. The government argued to the jury that the April 28 shooting was an act of retaliation for an unsuccessful attempt to attack Joseph that occurred on the day prior.

On September 22, 2021, the jury returned a verdict of guilty on all five counts. (Docket # 69.) Joseph now moves under Rule 29 for a judgment of acquittal as to Count Two and Count Three. In the alternative, he moves for a new trial pursuant to Rule 33.

I. Joseph's Rule 29 Motion for Judgment of Acquittal Will Be Denied.

Rule 29 provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." In reviewing a Rule 29 motion, the court "must view the evidence in a light that is most favorable to the government, and with all reasonable inferences resolved in favor of the government." United States v. Anderson, 747 F.3d 51, 60 (2d Cir. 2014) (internal quotation marks omitted). "The jury may reach its verdict based upon inferences drawn from circumstantial evidence, and the evidence must be viewed in conjunction, not in isolation." United States v. Pugh, 945 F.3d 9, 19 (2d Cir. 2019) (quotation marks omitted). A court must "defer[ ] to the jury's evaluation of the credibility of witnesses, its choices between permissible inferences, and its assessment of the weight of the evidence." United States v. Jones, 482 F.3d 60, 68 (2d Cir. 2006); United States v. Florez, 447 F.3d 145, 156 (2d Cir. 2006) ("We will not attempt to second-guess a jury's credibility determination on a sufficiency challenge."). The motion must be denied if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Aguilar, 585 F.3d 652, 656 (2d Cir. 2009) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see also United States v. Cuti, 720 F.3d 453, 461 (2d Cir. 2013) (a verdict should be disturbed only where "the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.").

Count Two of the S2 Indictment charged Joseph with a violent crime in aid of racketeering, 18 U.S.C. § 1959(a). "To convict the defendant of a violent crime in aid of racketeering, the government was obliged to prove five elements: '(1) that the Organization was a RICO enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant in question had a position in the enterprise, (4) that the defendant committed the alleged crime of violence, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise.'" United States v. White, 7 F.4th 90, 101 (2d Cir. 2021) (quoting United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992)). The fifth element is satisfied "if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership. The government need not prove that maintaining or increasing the defendant's position in the RICO enterprise was his sole or principal motive." Id. (quotation marks and citations omitted); see also United States v. Farmer, 583 F.3d 131, 143-44 (2d Cir. 2009) ("The government was not required to prove that Farmer's sole or principal motive was maintaining or increasing his position, so long as it proved that enhancement of status was among his purposes.") (quotation marks and citation omitted).

At trial, the government adduced evidence about the existence of a criminal organization referred to as the "Castle Hill Crew." Witness testimony and trial exhibits described the Castle Hill Crew as a gang based in and around the Castle Hill Houses in the Soundview neighborhood of the Bronx, whose criminal purpose included drug sales and bank-fraud schemes. (See, e.g., Tr. 307-08, 375-76, 546, 548, 559, 589-91, 599-600, 656, 548-49, 656.) The government introduced into evidence multiple photographs and videos that showed Joseph alongside members of the Castle Hill Crew, as well as social media posts touting his

membership in the Castle Hill Crew and photos of Joseph's crew-related tattoos. (See, e.g., GX 308A, 308B, 309A, 309B, 309F, 310-13, 315, 315A, 317F, 503-3, 503-26, 730C, 503-4, 503-39, 705.)

Witness testimony described a violent rivalry between the Castle Hill Crew and the "Monroe Crew," which was based out of the nearby James Monroe Houses. (See, e.g., Trial Tr. 245-46, 554-55.) Angel Arroyo, a cooperating witness formerly affiliated with the Monroe Crew, testified that members of the Castle Hill Crew and the Monroe Crew were expected to commit acts of violence when they encountered one another – an expectation colloquially known as "putting in work, "spinning," and "earning your stripes." (Tr. 247-48.) Arroyo testified that examples of "putting in work" including "[s]tabbings, shootings, smashing." (Tr. 247.) Christopher Cruz of the Castle Hill Crew testified that putting in work "could mean anywhere from selling drugs to hurting somebody. . . . The more work you put in the higher up you are. . . . Meaning like, statuswise, you could just control what you need to control." (Tr. 553.) Cruz testified that if a rival gang committed violence against the Castle Hill Crew, "Whatever they did, you want to do ten times worse," and that if a member of the Monroe Crew attacked someone from Castle Hill Crew, the expectation was to "[g]o back and shoot." (Tr. 554.)

The crimes charged in Count Two and Count Three relate to the discharge of a firearm that resulted in a bullet striking a twelve-year-old boy at the Story Playground in the Soundview neighborhood of the Bronx. Count Two charged Joseph with violent crime in aid of racketeering for the purpose of maintaining and increasing his position in the Castle Hill Crew. (S2 Indictment ¶ 10.) Count Three charged Joseph with carrying, possessing, brandishing and discharging a firearm in connection with the violent crime charged in Count Two. (S2 Indictment ¶ 11.)

At trial, Arroyo testified about an incident of April 27, 2017 in which a member of the Monroe Crew attempted to shoot Joseph and another member of the Castle Hill Crew using a .32 revolver.[1] (Tr. 335-37, 346-50.) Arroyo testified that on that date, he was selling drugs outside of the Monroe Houses when he handed a gun to a fellow Monroe Crew member named "Willy." (Tr. 335-37, 343.) Arroyo then observed a conversation between Willy, Joseph and others from the two rival crews. (Tr. 346-48.) Following the interaction, a person named "Nasir" expressed anger toward Willy because Willy failed to shoot the Castle Hill Crew members. (Tr. 347.) Nasir then took the gun and went toward the area where Joseph and another Castle Hill Crew member were believed to be, after which Arroyo heard a gunshot. (Tr. 348.) Arroyo did not observe the gun being discharged, but he then saw Joseph and another Castle Hill Crew member run in one direction and Nasir run in the other. (Tr. 348-49.)

Arroyo testified that the next day, on April 28, 2017, Arroyo was again outside the Monroe Houses when he observed fellow Monroe Crew members Nasir and "Latief" walking toward the nearby Story Playground. (Tr. 350-51.) Nasir and Latief told Arroyo that they were going to sell drugs to a buyer in a private apartment complex where Joseph happened to live. (Tr. 153, 167, 217, 351.) A few minutes later, Arroyo heard three or four gunshots from the direction of the apartment complex. (Tr. 351-52.) Latief and Nasir ran toward Arroyo and told him that Joseph had shot at them in the Story Playground basketball courts. (Tr. 352-55.)

ShotSpotter, which is a system of sensors used to geolocate gunfire, detected three shots fired at or near 820 Thierot Avenue, the address of the apartment building where Joseph resided, on April 28, 2017 between 5:09:31 p.m. and 5:09:40 p.m. (GX 1000; Tr. 167.) Surveillance video from the lobby of 820 Thierot Avenue showed an individual who appeared to

[1] Though the Court will refer to the defendant by his given name, witnesses throughout the trial referred to Joseph by the nickname "Gotti."

be Joseph lingering in and around the lobby with two other individuals at approximately 5:07 p.m. (GX 301.) A video taken from the building exterior appeared to show Joseph walking toward the Story Playground, then returning at a sprint, at which point he retrieved from an accomplice an object that appeared to be a gun. (GX 302.) The video showed Joseph running from the front door of 820 Thierot toward Story Playground at 5:09:21 p.m., with the apparent gun in hand, and disappearing from view at 5:09:26. (GX 302.) During this timeframe, a 12-year-old boy in the Story Playground was shot in the hip. (Tr. 143; GX 602.) The surveillance video showed Joseph's associates returning to the lobby, but not Joseph. (GX 301.)

Cruz testified that members of the Castle Hill Crew later discussed that Joseph had "put in work" for Castle Hill at a park in 2017. (Tr. 611-12.) Cruz testified that Joseph then "became somebody" and "had more status than most of the people that was in the gang." (Tr. 612.) The government adduced evidence of the search history from Joseph's cellphone from December 2020, including searches for news stories about the Story Playground shooting and the victim's name. (Tr. 845-51; GX 507, 508.)

Joseph urges that his motion for a judgment of acquittal should be granted because no eye witness testified that they observed him discharge the firearm at the playground shooting of April 28, 2017. However, there was direct and circumstantial evidence that Joseph was the playground shooter, including the lobby surveillance video taken from Joseph's apartment building at 820 Thierot Avenue. Further, Arroyo testified that his fellow Monroe Crew members Nasir and Latief ran from the Story Playground and told him that Joseph had shot at them. (Tr. 353-54.) Those statements were admitted as excited utterances and present-sense impression exceptions to the hearsay rule. Fed. R. Evid. 803(1), (2). ShotSpotter evidence also indicated that three shots were fired from the area near 820 Thierot Avenue and the Story

Playground at a point in time that coincided with the lobby surveillance footage. (Tr. 194-95; GX 1000.) A rational trier of fact weighing this evidence could conclude that the surveillance video depicted Joseph leaving for Story Playground while carrying a firearm and credit the ShotSpotter evidence that three shots were fired at or around the same time, and conclude that Joseph was the person who discharged the firearm at the Story Playground. See Cuti, 720 F.3d at 461. A rational trier of fact also could credit Arroyo's testimony about the statements of Nasir and Latief. See id. That no eye witness testified that he or she observed Joseph discharge the firearm does not warrant Rule 29 relief.

Joseph's remaining arguments go toward whether there was sufficient evidence that the shooting was carried out in aid of the Castle Hill Crew racketeering conspiracy. As noted, one element under 18 U.S.C. § 1959(a) is proof that the defendant committed a crime of violence and "that his general purpose in so doing was to maintain or increase his position in the enterprise." White, 7 F.4th at 101; see also Farmer, 583 F.3d at 143-44.

Joseph urges that the government did not sufficiently prove that he was involved in an altercation on April 27, thereby defeating any evidence that the April 28 playground shooting was motivated by retaliation. Joseph notes that the parties stipulated that the ShotSpotter array at the Monroe Houses did not pick up any shot fired on April 27, 2017. (DX Z.) He also notes that no witness other than Arroyo testified about observing an April 27 shooting at the Monroe Houses. Thus, Joseph urges, a rational trier of fact could not conclude that the shooting of April 28 was carried out in retaliation for the incident of April 27.

At trial, the government called as a witness Walter Collier III, who was qualified as an expert in the forensic analysis of ShotSpotter data. (Tr. 190.) Collier testified that ShotSpotter detects approximately 90% of outdoor gunfire. (Tr. 205.) He testified that "many"

factors can prevent gunfire detection, including when a weapon is fired downward. (Tr. 189.) A rational trier of fact could weigh the absence of ShotSpotter data alongside the testimony of Arroyo, and credit Arroyo's testimony that he observed Nasir pursue Joseph with a gun and then heard the gun's discharge. See Jones, 482 F.3d at 68 (a court must "defer[ ] to the jury's evaluation of the credibility of witnesses, its choices between permissible inferences, and its assessment of the weight of the evidence.").

In addition to Arroyo's testimony about the events of April 27, the jury also was entitled to weigh and credit evidence of the ongoing acts of violence and retribution between members of the Monroe Crew and Castle Hill Crew, as described in the testimony of Arroyo and Cruz and shown in trial exhibits. (Tr. 316-37; 554-55; GX 311.) A rational trier of fact could conclude that Joseph discharged the firearm at the Story Playground in order to increase or maintain his status in the Castle Hill Crew, even if it was not in direct retribution for an incident on April 27.

Lastly, Joseph urges that Rule 29 relief is warranted because the mother of the 12-year-old victim testified at trial that she had heard that the April 28 shooting was motivated by a personal dispute over a girlfriend. (Tr. 147.) At trial, defense counsel asked, "And do you recall whether or not you said at one of those meetings -- at both of those meetings -- that the reason for the shooting was about a girlfriend?" (Tr. 147.) The government objected to the question on hearsay grounds. (Tr. 147.) Before the Court ruled on the objection, the witness stated, "I said it was a rumor, because neighborhood talk, so that's what I heard." (Tr. 147.) The government re-stated its objection, and the Court stated, "Yes. I understand. It's not admitted for the truth of its contents, but the fact that it was said." (Tr. 147.) When defense counsel later referred to this testimony in closing summations, the Court again instructed the jury that the statement was not

to be considered for the truth of its contents. (Tr. 891-92.)[2] Defense counsel confirmed that he was referencing the testimony "for a limited purpose" and not for its truth. (Tr. 892.) In view of the overwhelming evidence that "putting in work" was a means of advancing within the Castle Hill Crew, the statement in the course of interviews that the shooting was motivated by a personal dispute involving a girlfriend does not warrant a judgment of acquittal under Rule 29.

Joseph's motion for a judgment of acquittal as to Counts Two and Three under Rule 29 will therefore be denied.

II. Defendant's Rule 33 Motion for a New Trial Will Be Denied.

A. Legal Standard.

In the alternative, Joseph moves for a new trial under Rule 33(a), which provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." "'Although a trial court has broader discretion to grant a new trial pursuant to Rule 33 than to grant a motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, where the truth of the prosecution's evidence must be assumed, that discretion should be exercised sparingly' and only in the most extraordinary circumstances." United States v. Landesman, 17 F.4th 298, 330 (2d Cir. 2021) (quoting United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992)). "'In evaluating a Rule 33 motion, the court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation, keeping in mind that the ultimate test for such a motion is 'whether letting a guilty verdict stand would be a manifest injustice.'" Id. (quoting United States v. Alston, 899 F.3d 135, 146 (2d Cir. 2018)). While a court may weigh evidence and witness credibility, it must not usurp the jury's role. Id.

[2] No objection was made by the defense at the time of the witness's testimony or in summation to the Court's limiting instruction. No claim is made in the post-verdict motion as to the limitation on the jury's consideration of the witness's affirmative response.

Rule 33 relief may be appropriate where the evidence weighs so heavily against the verdict "'that it would be manifest injustice to let the verdict stand.'" Id. (quoting United States v. Archer, 977 F.3d 181, 188 (2d Cir. 2020)).

B. Jury Notes.

Joseph urges that he is entitled to a new trial because the Court's handling of juror notes did not comply with the four-part procedure described in United States v. Collins, 665 F.3d 454, 459-60 (2d Cir. 2012). A criminal defendant's right to be present at trial is based on the Fifth Amendment's due process clause and the Sixth Amendment's confrontation clause, and Rule 43(a)(2) provides that a defendant has the right to be present at "every stage of trial." Collins, 665 F.3d at 459. This right applies to a court's review and response to juror notes. Id. The Second Circuit has articulated the "proper practice" for handling jury notes: "'(1) the jury inquiry should be in writing; (2) the note should be marked as the court's exhibit and read into the record with counsel and defendant present; (3) counsel should have an opportunity to suggest a response, and the judge should inform counsel of the response to be given; and (4) on the recall of the jury, the trial judge should read the note into the record, allowing an opportunity to the jury to correct the inquiry or to elaborate upon it.'" Id. at 460 (quoting United States v. Mejia, 356 F.3d 470, 475 (2d Cir. 2004)). This process "reduces the risk that the trial court will respond in a way that prejudices one side" and avoids ex parte communications between the judge and any juror that "may unintentionally 'drift' into a supplemental instruction" outside the presence of the defendant. Id.[3] In Collins, the trial judge held an ex parte interview with a juror without first sharing the contents of the juror's note or seeking counsel's input. Id. at 458-59.

[3] There is a distinction between the holding of Collins and other cases involving a defendant's right to be present during the handling of jury notes and the Circuit's helpful guidance, originating in its decision in United States v. Ronder, 639 F.2d 931, 933 (2d Cir. 1981). Judicial practice has evolved since 1981, such that in responding to a

In one juror note, which was marked as Court Exhibit 7, a juror requested permission to retrieve a work-related item from a colleague during a lunch break, stating in part, "I request permission to either step out to pick up this item or to have my teammate step in to the courthouse to hand it over to me." Joseph observes that the Court did not raise the contents of the note with counsel or allow them the opportunity to comment on a proposed response. However, on the record and in the presence of counsel and the defendant, the Court stated, "I know Juror 3 has a request about picking up a package on Saturday -- on Monday during the lunch break. We'll make that happen. You can step out and pick up the package. You'll work with [the deputy clerk] and the CSOs. You can step out and you can bring it back into the courthouse. If there's a problem, I'll be around." (Tr. 620.) The jury then left the courtroom, at which point the Court heard from counsel on an evidentiary dispute. (Tr. 622-25.) Counsel had the opportunity to propose an immediate correction or clarification of the Court's response if they thought one was warranted. Joseph's Rule 33 motion does not now claim prejudice or unfairness in the Court's response or its failure to follow the four-step Collins process, nor does it explain why the Court's response would entitle him to a new trial under Rule 33(a).

Another note, which was marked as Court Exhibit 12, was sent by the jury at the conclusion of deliberations but before the verdict was taken, and was contained in an envelope marked "question." The Court discussed the note on the record at a sidebar with counsel:

> But I did open the one that [reads] "question". And it's dated 12:35 today and it says:

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jury note a formal "recall of the jury" into the courtroom is neither sought by either side nor required under the circumstances. For example, there are occasions after reading and marking a jury note where the Court will confer with counsel in the presence of the defendant and arrive at a response that is typed, marked as a Court exhibit and delivered to the jury room. Similarly, a jury request for a read-back is often dealt with in consultation with both sides by the preparation of an edited transcript (redacted to eliminate sidebars and other extraneous matter) that is then delivered to the jury room. Respectfully, the Court does not consider these practices to run afoul of any holding from the Circuit.

> "Some of us are concerned for our safety after the verdict is announced. Are there any protocols that would ensure our safety or can that be addressed?"
>
> Just want you to know that that note came in and that what I'm doing is I don't plan to orally say anything but I've called down to see if we could get some extra CSOs who would be able to escort our jurors out. Everybody's entitled to know. So, you know what I know.
>
> Thank you.

(Tr. 988.) While the note was shown to counsel for each side and marked as Court Exhibit 12, Joseph points out that it was not read aloud in open court. The assertion is true so far as it goes. But the sidebar was in the courtroom and the Court never barred defendant from attendance at sidebars or requesting such attendance. He also claims that the issue was not "directly addressed by the trial court." (Def. Mem. at 11.) The Court addressed the note by advising counsel that it did not plan to say anything to the jury but would arrange additional security upon the return of the verdict. Joseph does not identify any prejudice related to the Court's handling of Court Exhibit 12. Counsel had the opportunity to object to the Court's proposed handling of the note and did not do so. Joseph does not explain why the response to this note entitles him to a new trial under Rule 33(a).

Lastly, Joseph observes that the jury did not explicitly state in a note that it had reached a verdict. (Def. Mem. at 11.) Instead, the jury submitted an envelope labeled "verdict," which contained a completed verdict form. (See Tr. 988.) Joseph does not cite to any authority or offer a rationale as to why a jury note is required to announce that a verdict has been reached, nor does he explained how he was prejudiced by the absence of such a note.

Joseph's motion for a new trial based on the Court's responses to the jury notes will be denied.

C. Questioning about Unconscious or Implicit Bias During Voir Dire.

Joseph urges that a new trial is warranted because during voir dire, the Court did not question or instruct jurors about their unconscious or implicit racial bias, in violation of Joseph's right to a fair trial under the Sixth Amendment. Joseph notes that the risks of implicit bias were heightened in his case because he is an African American and the purported members of the Castle Hill Crew were all either African American or Latino. Joseph also notes that there were no African Americans on the jury.

The Fifth and Sixth Amendments guarantee a criminal defendant the right to be tried before an impartial jury, which includes a jury free of bias. See, e.g., United States v. Parse, 789 F.3d 83, 111 (2d Cir. 2015). There is no per se constitutional rule that requires an inquiry about racial prejudice during voir dire, although a court must inquire if there are "substantial indications" of likely racial or ethnic prejudice affecting jurors in a particular case. United States v. Diaz, 854 Fed. App'x 386, 388 (2d Cir 2021) (summary order) (citing Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981)).

Prior to trial, Joseph proposed a preliminary instruction that would have defined an unconscious or implicit bias as "stereotypes, attitudes, or preferences that we express without conscious awareness, control, or intention. Like conscious bias, unconscious/implicit bias, too, can affect how we evaluate information and make decisions." (Docket # 48.) The Court's closing charge included an instruction about unconscious or implicit bias: "You must resist jumping to any conclusions in favor or against a witness or party based upon unconscious or implicit bias. Unconscious or implicit biases are stereotypes, attitudes, or preferences that we have that can affect how we evaluate information and make decisions. Your verdict must be based on the evidence or lack of evidence and the Court's instructions on the law." (Tr. 925.)

The jury was required to follow all of the Court's instructions and Joseph does not explain how he was prejudiced by its inclusion in the final instructions rather than the preliminary instructions.

Joseph also complains that questions to jurors in voir dire did not raise the issue of implicit bias. Prior to voir dire, the Court distributed copies of its proposed questions to jurors and Joseph made no objection.[4] (Court Exhibits 1, 2; 9/8/21 Tr. at 3; 9/10/21 Tr. at 14.)

While its questions to jurors did not expressly refer to implicit or unconscious bias, the Court questioned potential jurors about the issue of prejudice, and asked whether there was any reason a potential juror "would be unable to sit as a fair and impartial juror in this case and render a true and just verdict without fear, favor, sympathy, or prejudice in accordance with the law . . . ." (Court Exhibit 2 ¶ 31.) One potential juror claimed an inability to be impartial due to prejudice. (Voir Dire Tr. 150.)

Rule 33(a) relief is not warranted based on the absence of any question about implicit or unconscious bias during voir dire. The Court questioned potential jurors about the issue of prejudice. Moreover, the Court's closing charge cautioned jurors about the potential risk of unconscious or implicit biases in deliberations and instructed them that their verdict must be based on the evidence and the Court's instructions. (Tr. 925.)

Joseph's motion for a new trial directed toward the questioning of jurors about unconscious bias will be denied.

D. Witness Identification of "Marvin" in the Courtroom Gallery.

Lastly, Joseph notes that during trial, the government elicited testimony from Arroyo that a purported member of the Castle Hill Crew was seated in the gallery of the

[4] Both the government and defense counsel proposed revisions to the list of places and persons expected to be at issue in the trial but they raised no objection to the questions to jurors. (9/8/21 Tr. at 51-52; Tr. 69-70.)

courtroom. (Tr. 250.) The government asked Arroyo if he recognized anyone in the courtroom, and Arroyo pointed out a member of the public in the gallery who he identified as "Marvin from Castle Hill." (Tr. 250.) Arroyo also identified Joseph. (Tr. 251.) Joseph urges that the identification of Marvin was "gratuitous and unnecessary" and "highly prejudicial." (Def. Mem. 12.) Marvin's image appeared in several government exhibits, and Arroyo later testified that Marvin and Joseph had once chased him down and stabbed him. (Tr. 324-27.) Joseph asserts that Arroyo's identification of Marvin caused the jurors to fear for their safety after the verdict, and that Marvin was present merely as a good-faith attempt to show support for his friend Joseph. (Def. Mem. 12-13.) Joseph urges that Arroyo's identification of Marvin underscores the need to include a question to jurors about implicit bias.

Joseph has not demonstrated unfair prejudice based on Arroyo's identification of Marvin, nor has he plausibly explained how the identification placed racial bias at issue. Arroyo identified Marvin in response to questions that appeared to have been intended to elicit Arroyo's identification of Joseph. Several images depicting Marvin with Joseph were received into evidence and Arroyo also testified about Marvin's participation in a violent attack against him. Joseph has not persuasively explained how Arroyo's identification of Marvin affected his right to a fair trial or otherwise touched on the issue of implicit or unconscious bias.

Joseph's motion for a new trial directed toward Arroyo's identification of Marvin will be denied.

CONCLUSION.

For the reasons explained, Joseph's motion for relief under Rules 29 and 33 is DENIED. (Docket # 90.)

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
February 4, 2022