No. 24-5166

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS JOSEPH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court plainly erred in declining to ask specific questions about unconscious racial bias during jury selection.

2. Whether testimony from a previously known witness who invoked his Fifth Amendment privilege at petitioner's trial constitutes "newly discovered evidence" warranting a new trial under Federal Rule of Criminal Procedure 33, when the witness later offers to testify.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not published in the Federal Reporter but is available at 2024 WL 1827291. The opinions and orders of the district court (Pet. App. 10a-18a, 19a-34a) are not published in the Federal Supplement but are available at 2022 WL 336975 and 2023 WL 4198731.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2024. The petition for a writ of certiorari was filed on July 25, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d); one count of 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; one count of 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; and two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2a. He was sentenced to 264 months of imprisonment, to be followed by five years of supervised release. Id. at 3a; Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-9a.

1. Petitioner "was a member of a violent street gang based in the Bronx called the Castle Hill Crew." Pet. App. 2a. For years, petitioner and other members of the Castle Hill Crew "engage[d] in acts of violence against rival gang[s]," including the Monroe Houses Crew. Ibid.

In November 2015, petitioner stabbed Angel Arroyo, a member of the Monroe Houses Crew, in retaliation for earlier gang violence. Pet. App. 4a. And in April 2017, petitioner shot at two Monroe Houses Crew members near Story Playground next to a public elementary school. Ibid. Petitioner missed his targets

and instead hit and injured a 12-year-old boy who was playing basketball. Ibid.; C.A. App. A111.

2. A grand jury in the Southern District of New York returned an indictment charging petitioner with one count of conspiring to commit racketeering activity, in violation of 18 U.S.C. 1962(d); one count of 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; one count of 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; and two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Superseding Indictment 1-8.

a. Before trial, petitioner requested that the district court instruct potential jurors on unconscious bias at several stages of the trial, including jury selection. C.A. App. A27-A31. Petitioner's proposed instruction defined such bias as "stereotypes, attitudes, or preferences that we express without conscious awareness, control, or intention" and that "can affect how we evaluate information and make decisions." Pet. App. 31a; C.A. App. A28. Petitioner did not, however, request that the district court ask any specific questions about unconscious bias during voir dire. Nor did he object to the list of questions that the district court proposed, which did not expressly mention unconscious bias. Pet. App. 32a.

The district court did not give petitioner's requested instruction on implicit bias during jury selection, but it instructed potential jurors that it was "important" to "have an unbiased jury." Voir Dire Tr. 1. After explaining the allegations in the indictment, the court asked the venire, "Is there anything about the nature of the charges that would interfere with your ability to be a fair and impartial juror in this case?" Id. at 7. The court also asked, "Would you for reasons that have nothing to do with the law or the evidence be reluctant or unwilling to return a verdict of not guilty?" Ibid. And the court also told the jurors to "ask yourself, is there something that was not covered in the questions that didn't come out about yourself that you would want to know if you were sitting where [the defense and prosecution attorneys] are." Id. at 15. Petitioner did not object to the district court's instructions to the venire or its questions to potential jurors. Pet. App. 8a.

b. During petitioner's trial, the government called Monroe Houses Crew member Angel Arroyo, who testified at length about the history of retaliatory violence between his gang and petitioner's. C.A. App. A219-A223, A250, A290-A308. Among other things, Arroyo testified that petitioner stabbed him in 2015 in retaliation for an earlier violent altercation between the two gangs. Pet. App. 4a; C.A. App. A297-A303.

Arroyo also specifically discussed the Story Playground shooting and the acts leading up to it. Arroyo testified that on

April 27, 2017, a fellow Monroe Houses Crew member named Nasir Vincent shot at petitioner "for invading [Monroe Houses Crew] territory." Pet. App. 4a; C.A. App. A309-A311, A317-A323. Arroyo testified that the next day, April 28, he saw Vincent and another member of the Monroe Houses Crew walk toward petitioner's apartment building to sell marijuana there. C.A. App. A140-A141, A324-A325. Arroyo said that a few minutes later, he heard several gunshots. Id. at A325. And Arroyo testified that he separately encountered Vincent and his confederate, each of whom told Arroyo that petitioner had just shot at them in the basketball courts next to the Story Playground. Id. at A187, A326-A329.

Petitioner subpoenaed Vincent as a defense witness. Pet. App. 15a; C.A. App. A311. The defense considered Vincent "an essential witness" whose "testimony would directly contradict" Arroyo's statements about the shootings on April 27 and 28. C.A. App. A312-A313. More specifically, Vincent would "testify on behalf of the defense that no such shooting took place on April 28, 2017." Id. at A38. At the time, Vincent had recently pleaded guilty to a federal charge for a separate act of gang-related violence and was awaiting sentencing. See Indictment at 14-16, United States v. Spencer, No. 20-cr-78 (S.D.N.Y. Jan. 28, 2020); 20-cr-78 Docket entry, Spencer, supra, (S.D.N.Y. July 7, 2021) (Minute Entry). Vincent's attorney informed the district court in this case that if Vincent were called to testify, he would assert his Fifth Amendment right against self-incrimination. Pet. App.

15a; C.A. App. A311. Vincent did not testify at petitioner's trial. Pet. App. 15a.

c. The district court's pre-deliberation charge to the jury included an instruction addressing unconscious bias. Specifically, the court instructed the jury to "resist jumping to any conclusions in favor or against a witness or party based upon unconscious or implicit bias." C.A. App. A899. The court explained that "unconscious or implicit biases are stereotypes, attitudes, or preferences that we have that can affect how we evaluate information and make decisions." Ibid.

The jury convicted petitioner on all counts. Pet. App. 2a.

3. Petitioner subsequently filed multiple posttrial motions.

a. First, petitioner moved for a partial judgment of acquittal and for a new trial. Pet. App. 19a. Petitioner argued, in part, that he was entitled to a new trial because the district court had not instructed prospective jurors during jury selection about implicit or unconscious racial bias. Id. at 31a; see C.A. App. A990-A991.

The district court denied petitioner's motion. Pet. App. 10a-34a. The court observed that it had "questioned potential jurors about the issue of prejudice," and that one potential juror had in fact "claimed an inability to be impartial due to prejudice" in response to those questions. Id. at 32a. The court also observed that its "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." Ibid. The court accordingly determined that a new trial was "not warranted based on the absence of any questions about implicit or unconscious bias during voir dire." Ibid.

b. Second, on the eve of his sentencing hearing, petitioner filed a second motion for new trial, which asserted "newly discovered evidence." Pet. App. 10a. Petitioner asserted that Vincent had provided the following witness statement: "[Petitioner] 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 [petitioner] shot at me on April 28, 2017." Pet. App. 13a (citation omitted). Petitioner later attached to his reply brief a declaration from Vincent containing the same assertions and adding that "I never met [petitioner] on April 27, 2017, in the vicinity of the James Monroe Houses in the Bronx. I never shot at [petitioner] that day, April 27, 2017." Ibid. (citation omitted). By the time petitioner filed his motion, Vincent had already been sentenced to time served in his own criminal case and had been released from imprisonment. See Judgment at 2, Spencer, supra, No. 20-cr-78 (S.D.N.Y. Nov. 22, 2021).

The district court proceeded to sentencing without ruling on petitioner's second motion for new trial. Pet. App. 10a-11a; C.A. App. A1059-A1060. At sentencing, petitioner admitted to the

shooting, although he argued that his motive was to impress a girlfriend, not to maintain or increase his position in the Castle Hill Crew. C.A. App. A1077; Pet. C.A. Br. 21. The district court sentenced petitioner to 264 months of imprisonment, to be followed by five years of supervised release. Pet. App. 10a; Judgment 3-4.

The district court ultimately denied petitioner's second motion for new trial. Pet. App. 10a-18a. The court explained that Federal Rule of Criminal Procedure 33 does not permit a new trial based on testimony that was known at trial but was unavailable based on the proffered witness's invocation of the Fifth Amendment. Id. at 16a (citing United States v. Forbes, 790 F.3d 403, 410-411 (2d Cir. 2015)). And because "Vincent's identity and alleged role were known six weeks prior to trial," the court determined that Vincent's statements were "at most newly available but not newly discovered" within the meaning of Rule 33. Pet. App. 17a.

4. The court of appeals affirmed the district court's denial of petitioner's motions for a new trial in an unpublished summary order. Pet. App. 1a-9a.

The court of appeals reviewed petitioner's challenge to the voir dire for plain error because petitioner "did not object to the district court's" questions or preliminary instructions. Pet. App. 8a. In doing so, the court emphasized that district courts have "broad discretion over how to screen jurors for bias." Ibid. And the court of appeals observed that the district court

had asked "generalized questions about impartiality," had "warn[ed] jurors of the general duty of impartiality," and had asked sufficiently detailed questions to elicit indicators of bias. Ibid. The court of appeals thus found that "[t]he district court did not commit error, much less plain error, by not including instructions or questions on implicit bias in its voir dire." Ibid.

The court of appeals also affirmed the denial of petitioner's motion for a new trial based on Vincent's newly available testimony. Pet. App. 8a-9a. The court observed, citing circuit precedent, that evidence is not "newly discovered" under Rule 33 "if the defendant knew of it prior to trial" and "there was a legal basis for the unavailability of the evidence at trial, such as the assertion of a valid [Fifth Amendment] privilege." Id. at 9a (citations omitted). And the court accordingly found that Vincent's testimony was not "'newly discovered'" because it "was known to [petitioner]" before trial and Vincent had "asserted his Fifth Amendment privilege as the basis for his unavailability." Ibid.

ARGUMENT

Petitioner contends (Pet. 12-19) that the district court erred in not instructing or questioning jurors about unconscious racial bias during jury selection. That contention lacks merit, and this case is in any event a poor vehicle for further review because it arose in a plain-error posture due to petitioner's

failure to object to the court's voir dire. Petitioner also contends (Pet. 20-24) that the court of appeals erred in finding that Vincent's proffered testimony was not "newly discovered evidence" warranting a new trial under Rule 33, but he fails to identify any circuit that would reach a contrary conclusion on these facts. The petition for a writ of certiorari should be denied.

1. Petitioner first contends (Pet. 12-19) that the district court erred by failing to question or instruct potential jurors about unconscious racial bias during jury selection. That contention does not warrant this Court's review.

a. "[T]he obligation to impanel an impartial jury lies in the first instance with the trial judge," who "must rely largely on his immediate perceptions" in conducting voir dire. Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981) (plurality opinion). For that reason, "[t]his Court has held many times that a district court enjoys broad discretion to manage jury selection, including what questions to ask prospective jurors." United States v. Tsarnaev, 595 U.S. 302, 316 (2022); see Mu'Min v. Virginia, 500 U.S. 415, 424 (1991) (observing that "the trial court retains great latitude in deciding what questions should be asked on voir dire"). And as a general matter, a district court does not abuse its broad discretion in declining to ask specific questions to a jury venire, even if the questioning could theoretically aid the defendant in exercising peremptory challenges. See Mu'Min,

500 U.S. at 424-425 (rejecting argument that voir-dire questions regarding pretrial publicity were constitutionally required merely because "such a revelation would be of some use in exercising peremptory challenges"); see also Tsarnaev, 595 U.S. at 314-317 (similar under federal supervisory authority).

Applying that principle, this Court held in Rosales-Lopez that a district court did not abuse its discretion in rejecting a defendant's request to ask potential jurors about possible racial or ethnic prejudice against the defendant because no "special circumstances" in the particular case mandated such an inquiry. See 451 U.S. at 192, 194 (plurality opinion); id. at 194-195 (Rehnquist, J., concurring in the result) (agreeing with "most of [the plurality's] reasoning" but with "somewhat more [deference] to the trial court's discretion"). Justice White's plurality opinion indicated that a constitutional obligation to ask jurors about such potential bias would arise only if racial issues are "inextricably bound up with the conduct of the trial," id. at 189 (quoting Ristaino v. Ross, 424 U.S. 589, 597 (1976)), and that such an inquiry could be deemed necessary by a supervising court "only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice" would influence the jury's evaluation of the evidence. Id. at 191-192; cf. Turner v. Murray, 476 U.S. 28, 36-37 (1986) (holding that "a capital defendant accused of an interracial crime is entitled to

have prospective jurors informed of the race of the victim and questioned on the issue of racial bias").

This Court has never required a district court to instruct or question jurors about unconscious racial bias during jury selection. The district court in this case did not abuse its discretion by declining to do so. To the contrary, the court's voir dire was sufficient to uncover potential prejudice. The court asked "generalized questions about impartiality," to which one potential juror in fact responded by admitting an inability to be impartial. Pet. App. 8a, 32a. "[T]here is little reason to believe that a juror who did not answer" a "general question" about impartiality "would have answered affirmatively a question directed narrowly at racial prejudice," Rosales-Lopez, 451 U.S. at 193 n.8 (plurality opinion) -- particularly a question about unconscious racial prejudice, which by definition is prejudice of which the juror is not aware. The court also instructed the jury on unconscious bias in its closing charge.

As in Rosales-Lopez, no "special circumstances" in this case required more specific questioning on racial bias, let alone unconscious racial bias. Petitioner does not suggest that racial issues were "inextricably bound up with the conduct of the trial." Rosales-Lopez, 451 U.S. at 189 (citation omitted). Petitioner argues that circumstances in this case indicate a "reasonable possibility that implicit or unconscious bias may have influenced the jury," Pet. 18, but none of the circumstances that he

highlights suggests juror prejudice. Petitioner first states that he is "a young African-American man" and "upon information and belief, there were no African Americans on the jury." Ibid. But he does not suggest that the jury-selection process was racially biased, and this Court has never suggested that a special instruction on implicit racial bias is necessary every time a defendant's race is different from the jurors'. Cf. Rosales-Lopez, 451 U.S. at 190 (plurality opinion) ("There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups."). Petitioner also notes (Pet. 18) that a government witness identified a Castle Hill Crew member named "Marvin" in the courtroom, but he does not explain why that would trigger juror bias. Finally, petitioner observes (ibid.) that the jury sent the trial judge a note expressing that some jurors were concerned for their safety following the verdict. But he offers no reason to assume that the jurors' safety concerns stemmed from implicit racial bias, as opposed to the violent nature of the crimes charged and the Castle Hill Crew's history of retaliation.

b. Petitioner does not identify any court of appeals that would grant relief on his claim. He cites several decisions addressing the existence of implicit racial bias (Pet. 12-15), but none holds that a district court abuses its broad discretion when it declines to ask about such bias during voir dire.

Instead, the courts of appeals consistently find no abuse of discretion where district courts decline to inquire into implicit racial bias. See United States v. Caldwell, 81 F.4th 1160, 1176 (11th Cir. 2023), cert. denied, 144 S. Ct. 870 (2024) ("We have never held that a district court must conduct unconscious bias training or allow unconscious bias questioning during voir dire."); United States v. Young, 6 F.4th 804, 809 (8th Cir. 2021) (rejecting argument "that a district court must ask questions in a manner meant to elicit indications of implicit bias whenever the defendant requests it") (citation and internal quotation marks omitted); United States v. Mercado-Gracia, 989 F.3d 829, 841 (10th Cir. 2021) ("Mercado-Gracia cites no authority requiring a trial court to educate prospective jurors about implicit biases."), cert. denied, 142 S. Ct. 1574 (2022); see also United States v. Diaz, 854 Fed. Appx. 386, 389 (2d Cir. 2021) (unpublished) (rejecting the view that "the U.S. Constitution or the Supreme Court's supervisory mandate required the district court to also ask a specific question on implicit racial bias"), cert. denied, 142 S. Ct. 473 (2021). Further review of this claim is not warranted.

c. In any event, this case would be a poor vehicle for further review because it arises in a plain-error posture. The court of appeals reviewed petitioner's argument for plain error because petitioner did not object to the district court's voir

dire. Pet. App. 7a-8a; see Fed. R. Crim. P. 30(d). Petitioner does not challenge that standard.

To establish reversible plain error, a defendant must show (1) error, (2) that was "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings,"' and (4) that "'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (brackets and citations omitted). Accordingly, even if this Court were persuaded that the district court abused its discretion in supervising jury selection, petitioner would not be entitled to relief. At a minimum, any error below was not "clear or obvious." Ibid.

2. Petitioner also contends (Pet. 20-24) that the court of appeals erred in determining that Nasir Vincent's proffered testimony did not constitute "newly discovered evidence" under Rule 33. Pet. App. 8a-9a. This Court has previously denied several petitions presenting similar issues. See Griffin v. United States, 568 U.S. 1193 (2013) (No. 12-485); Jasin v. United States, 537 U.S. 947 (2002) (No. 01-10649); Cunningham v. United States, 526 U.S. 1003 (1999) (No. 98-724). The Court should follow the same course here.

a. Federal Rule of Criminal Procedure 33 authorizes a district court to grant a new trial "if the interest of justice so

requires." The rule requires that a motion for a new trial "grounded on newly discovered evidence" be filed within three years "after the verdict or finding of guilty." Fed. R. Crim. P. 33(b). When considering motions for new trials based on newly discovered evidence, courts generally require the defendant to show that the evidence: (i) is newly discovered and was unknown at the time of trial; (ii) could not have been uncovered earlier through the exercise of due diligence by the defendant; (iii) is not merely cumulative or impeaching; (iv) is material to the issues involved; and (v) will probably produce an acquittal. See Pet. App. 8a-9a; see also 3 Charles Alan Wright & Sarah N. Welling, Federal Practice and Procedure § 584 (5th ed. 2022).

In this case, the court of appeals correctly determined that petitioner had not presented "newly discovered evidence," Fed. R. Crim. P. 33(b). Petitioner knew about Vincent before trial and sought to call him as a witness to offer the same exculpatory evidence that he now claims is "newly discovered." See Pet. App. 14a-15a, 17a. Indeed, petitioner's counsel acknowledged to the district court that when the defense subpoenaed Vincent, it "had a good-faith reason to believe that he would say the things that he [later] said in his affidavit." C.A. App. A1068. As the court of appeals explained, "'[e]vidence is not new if the defendant knew of it prior to trial'"; as a result, "Vincent's testimony is not 'newly discovered' * * * and cannot be considered under Rule 33." Pet. App. 9a (citation omitted).

That court of appeals' determination was sound. "One does not 'discover' evidence after trial that one was aware of prior to trial," and "[t]o hold otherwise stretches the meaning of the word 'discover' beyond its common understanding." United States v. Owen, 500 F.3d 83, 89-90 (2d Cir. 2007), cert. denied, 552 U.S. 1237 (2008); see, e.g., 3 The Oxford English Dictionary 432 (1st ed. 1933) (defining "[d]iscover" as "[t]o obtain sight or knowledge of (something previously unknown) for the first time; to come to the knowledge of; to find out"). Vincent's testimony was not newly discovered evidence, but instead evidence that was newly available once Vincent was sentenced and no longer intended to invoke his Fifth Amendment privilege. The "unambiguous language of Rule 33," however, "says nothing about newly available evidence." United States v. Jasin, 280 F.3d 355, 368 (3d Cir.), cert. denied, 537 U.S. 947 (2002).

The court of appeals' interpretation of Rule 33 comports with the interpretation of the overwhelming majority of circuits that have considered the issue. Other circuits have almost uniformly recognized that "testimony known to the defendant at the time of trial is not 'newly discovered evidence'" under Rule 33, "even if it was unavailable at trial by reason of the witness's Fifth Amendment privilege against self-incrimination." Jasin, 280 F.3d at 364; see Owen, 500 F.3d at 88 (citing additional cases from the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits); see also United States v. Lofton, 333 F.3d 874, 875-876 (8th Cir.

2003); United States v. Dale, 991 F.2d 819, 839 & n.42 (D.C. Cir.) (per curiam), cert. denied, 510 U.S. 906, and 510 U.S. 1030 (1993); United States v. Griffin, 489 Fed. Appx. 679, 681-682 (4th Cir. 2012) (per curiam) (unpublished), cert. denied 568 U.S. 1193 (2013).

That rule makes good sense. Once a potential witness has been convicted and sentenced, the witness has "nothing to lose" by offering testimony that exonerates another defendant, United States v. Freeman, 77 F.3d 812, 817 (5th Cir. 1996), and he often has something to gain. For example, codefendants in that position have obvious incentives to offer exculpatory testimony about their confederates, and therefore, such testimony is "untrustworthy and should not be encouraged." United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir.), cert. denied, 506 U.S. 890 (1992). But even where the potential witness is not a codefendant but rather a member of a rival gang, as Vincent was here, he may face pressure to offer exculpatory testimony to stave off retaliation by the defendant's confederates. And the rule accordingly does not differentiate between different types of witnesses.

b. Petitioner asserts (Pet. 20-24) that this Court should grant review to resolve disagreement between the First Circuit and the eleven circuits that have adopted the interpretation of Rule 33 applied by the court of appeals below. But petitioner's claim here would not have prevailed in any circuit.

In United States v. Montilla-Rivera, 115 F.3d 1060 (1997), the First Circuit concluded that the post-trial exculpatory testimony of the defendant's two co-defendants might warrant a new trial. Id. at 1065-1066. Montilla-Rivera made clear that such proffers of "new" evidence must be viewed "with great skepticism," id. at 1066, and stated that it "share[d] the general skepticism concerning those statements" expressed by other courts, id. at 1067. Like other circuits, the First Circuit recognized that "[a] convicted, sentenced codefendant has little to lose (and perhaps something to gain) by such testimony." Id. at 1066. In its view, however, "the better rule is not to categorically exclude the testimony of a codefendant who asserted his Fifth Amendment privilege at trial under the first prong [of the new-trial test] but to consider it, albeit with great skepticism, in the context of all prongs." Ibid. (emphases added).

Applying that stringent standard, the First Circuit concluded that in light of the "unusual combination of circumstances" present in that case -- including "the weakness of the government's case" -- the co-defendants' statements warranted a hearing at which the district court could decide whether to grant a new trial. Montilla-Rivera, 115 F.3d at 1067. But it cautioned that its decision "by no means confer[red] any automatic right * * * to a new trial or even to a hearing." Ibid. And on remand, the district court denied the defendant's motion for a new trial, and

the First Circuit affirmed. See United States v. Montilla-Rivera, 171 F.3d 37, 39, 42 (1999).

The First Circuit has subsequently emphasized that the decision in Montilla-Rivera turned on the unusual circumstances in that case. United States v. Del-Valle, 566 F.3d 31, 39 (1st Cir. 2009) (citing Montilla-Rivera, 115 F.3d at 1066). This case "does not present the same sort of 'unusual circumstances' that animated [the] decision in Montilla-Rivera," id., and thus petitioner would not have prevailed even if his case had arisen in the First Circuit. Unlike in Montilla-Rivera, in which the evidence against the defendant came from a single informant, see 115 F.3d at 1067, the overwhelming evidence against petitioner came from multiple independent sources.

That evidence included "[s]urveillance video" showing petitioner, "right before" the shooting, "running out of his building with gun in hand towards the Story Playground." Pet. App. 5a. The government also introduced evidence showing "three gunshots near [petitioner's] building around the time" of the shooting. Ibid. And a cooperating witness testified that after the shooting, Castle Hill Crew "members bragged about how [petitioner] had 'put in work' for" their gang, and petitioner "gained status and 'became somebody.'" Ibid. Given that evidence, petitioner could not satisfy the exacting standard set forth in Montilla-Rivera.

c. Even if petitioner could satisfy the first element of the Rule 33 standard, further review of this case would be unwarranted because, largely for the reasons that petitioner could not prevail under the approach in Montilla-Rivera, he cannot satisfy the Rule 33 standard's other elements. In particular, petitioner has no realistic possibility of demonstrating that Vincent's testimony would likely result in an acquittal on retrial in light of the other evidence against petitioner, including the surveillance footage of petitioner running toward the scene of the shooting armed with a gun.

Petitioner argues (Pet. 21) that Vincent's testimony would preclude the government from proving that the Story Playground shooting was "gang-related" -- that is, that petitioner committed the shooting at least in part to maintain or increase his position in the Castle Hill Crew, as required for conviction on two of the counts charged. See Pet. App. 5a. He asserts that Vincent's declaration "refuted" Arroyo's testimony that Vincent had shot at petitioner on April 27 at the Monroe Houses, and thus undermines the government's theory that the Story Playground shooting was an act of gang-related retaliation. Pet. 21. But "ample evidence" aside from Arroyo's testimony established that petitioner committed the shooting to increase or maintain his status in the Castle Hill Crew, including testimony that petitioner's status in the gang "did in fact increase as a result of the shooting." Pet. App. 6a.

In light of the overwhelming evidence against petitioner, Vincent's testimony would not lead a reasonable jury to acquit. Thus, even a favorable resolution of the second question presented would lack any practical value for petitioner because the district court on remand would deny his Rule 33 motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2024