

In the  
**Supreme Court of the United States**

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Nicholas Joseph,

Petitioner,

v.

United States,

Respondent.

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

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**REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION**

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## REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

### I. The Government Incorrectly Asserts that Petitioner's Contention -- that the District Court Abused its Discretion and Denied Mr. Joseph's Sixth Amendment Right to an Impartial Jury by Refusing to Question or Instruct the Jury on Unconscious or Implicit Bias -- is Without Merit

Defendant-Appellant, Nicholas Joseph, has petitioned this Court for a writ of certiorari on two grounds. First, Petitioner urges this Court to consider whether, in order to protect the Sixth Amendment right of an accused to an impartial jury, a trial court must, or at least when requested as in Mr. Joseph's case, *voir dire* prospective jurors on the concepts of unconscious and implicit bias, as well as instruct the jury on these concepts prior to deliberations. Questioning and instructing potential jurors and jurors on express bias, while important, does not protect against the same danger as do questions or instructions about implicit or unconscious bias. Therefore, an express bias instruction, alone, is insufficient to ensure that prospective jurors understand the concepts of implicit or unconscious bias, conduct self-examination, and consider whether such views may influence their own impartiality when it comes to fact-finding and reaching a verdict. Nor does an express bias charge given prior to deliberations adequately instruct a juror not to be swayed by an unconscious or implicit bias they may hold when reaching a verdict. This issue has far-reaching consequences for every accused who proceeds to trial throughout the nation.

Petitioner does not dispute that district courts retain broad discretion over how to screen jurors for bias. *United States v. Tsarnaev*, 595 U.S. 302, 316 (2022). However, we continue to maintain that: (1) a trial court's refusal to *voir dire* on

implicit or unconscious bias, when requested to by defense counsel, constitutes an abuse of discretion, which may lead to the violation of an accused's Sixth Amendment right to an impartial jury; and (2) in Petitioner's case, the trial court's refusal to *voir dire* or instruct the jury on implicit or unconscious bias lead to such a violation.

In its brief in opposition (the "Govt. Brief"), the government primarily argues that the district court was not required, even under *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), to *voir dire* or instruct on implicit or unconscious bias. In doing so, the government maintains that "no 'special circumstances' in this case required more specific questioning on racial bias, let alone unconscious racial bias." (Govt. Brief at 12). As support, the government downplays the significance of Petitioner's evidence to the contrary (Petition at 18), which demonstrates that the specter of racial bias, indeed, was present in Mr. Joseph's case. (Govt. Brief at 13).

The government's brief fails to address the notion that, absent instructions on unconscious or implicit bias, prospective jurors may remain blind to the fact that these types of biases exist, or that they hold them. Accordingly, the absence of such questioning may result in selecting jurors with an unconscious or implicit bias to decide the fate of the accused. Moreover, the government fails to comment on any of the scholarly work, cited and discussed in Petitioner's brief, indicating 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). Or that, 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.

Additionally, the government ignores the fact that, prior to the *voir dire*, defense counsel requested, in writing, that the district court instruct the prospective jurors on implicit or unconscious bias during *voir dire* – including providing suggested language. Not only did the district judge decline to include the instruction requested by the defense, but it said very little about bias at all. (Petition at 6). Thus, while the defense did not object after the district court concluded its *voir dire*, the issue was squarely before the district court. Even if this Court was to agree with the government that this argument should be reviewed for plain error, the facts set forth in the Petition establish that such error was “clear or obvious” notwithstanding the government’s claim to the contrary. (Govt. Brief at 15).

Further, the court’s brief jury instruction about possible implicit or unconscious bias in its final charge (Petition at 8), did nothing to remedy this violation – which affected Mr. Joseph’s Sixth Amendment right to an impartial jury. By then, the damage already was done as there was no mechanism by which to identify or excuse a juror with unconscious or implicit bias prior to their participating in deliberations.

Finally, contrary to the government’s claim (Govt. Brief at 14), Mr. Joseph’s case is an appropriate vehicle for review of this issue because the evidence supports finding the potential for racial bias, including that Mr. Joseph’s offenses arose within the context of his gang-membership, an all too common scenario for young African-American defendants. Thus, a ruling by this Court on the issue of whether an implicit or unconscious bias charge is required when requested by the defense would impact myriad similarly-situated defendants. Moreover, the government’s list of circuit court cases finding that a district court’s refusal to charge or inquire into implicit racial bias was not an abuse of discretion, (Govt. Brief at 14) is even more reason for this Court to provide clarity on this significant issue.

Accordingly, this Court should grant certiorari and provide guidance to the Circuit Courts of Appeals on this issue which impacts the right of an accused to an impartial jury and a fair trial.

**II. The Government Incorrectly Asserts that Review by this Court of the Question of Whether the Definition of “Newly Discovered Evidence” Under Rule 33 of the Federal Rules Of Criminal Procedure Should Include “Newly Available Evidence” is Unwarranted.**

As a second ground for seeking the granting of his petition for a writ of certiorari, Mr. Joseph respectfully urges this Court to clarify whether, as set forth in Rule 33 of the Federal Rules of Criminal Procedure, “newly discovered evidence” includes evidence that previously was “unavailable” during an accused’s case due to an invocation of privilege. In doing so, this Court would address a split between the First Circuit and the majority of other circuits regarding this definition. The requested clarification would guarantee equal justice to an accused, regardless of the Circuit in which they are tried. The government contends, *inter alia*, that review of this issue is not warranted by this Court because Mr. Joseph cannot satisfy the Rule 33 standard (Govt. Brief at 21). In particular, the government seems to assert that even if the Declaration of Nasir Vincent (the “Vincent Declaration”) was considered newly discovered (which it disputes), the Vincent Declaration was cumulative and not material. However, as detailed both in the Petition and below, the evidence belies these assertions.

In Mr. Joseph’s case, the Vincent Declaration, on its face, is both material and non-cumulative. (Petition at 20-21). In his Declaration, Mr. Vincent, a rival gang member of the Monroe Houses Crew (“MHC”), unequivocally denied seeing Mr. Joseph, a Castle Hill Crew (“CHC”) member, on April 27, 2017 near the James Monroe Houses in the Bronx (Vincent’s territory). More significantly, Mr. Vincent

further denied shooting Mr. Joseph that day. Notably, it was Vincent's alleged shooting of Mr. Joseph that allegedly lead Mr. Joseph to commit a retaliatory shooting the next day on April 28, 2017 in the vicinity of the Story Avenue Playground. According to the government's narrative, Mr. Joseph's shooting was in retaliation for Mr. Vincent's alleged shooting of Mr. Joseph one day earlier. Thus, according to the government, the shooting was gang-related. However, if believed, Mr. Vincent's testimony could have lead to finding that Mr. Joseph was not guilty of a gang-related shooting on April 28, 2017. (Petition at 20-21). As noted in the Petition, other than the trial testimony of Angel Arroyo, another rival gang member turned cooperator, whose testimony was suspect for previously detailed reasons, there was no evidence to establish that Mr. Joseph was involved in the James Monroe Houses shooting on April 27, 2017.

The government's discussion of footage on a surveillance video from April 28, 2017 – the next day – at the Story Avenue Playground – does not render Mr. Vincent's sworn statements cumulative. Indeed, the footage shows only that Mr. Joseph was present on April 28, 2017 at the Story Avenue Playground. However, the video does not show Mr. Joseph was present on April 27, 2017 at the James Monroe Houses (Govt. Br. at 20). Thus, it does not negate Mr. Vincent's sworn declaration that he did not shoot at Mr. Joseph that day, making his testimony about this material fact non-cumulative.

Moreover, as noted in the Petition, the testimony of Christopher Cruz, another cooperating witness, that Mr. Joseph allegedly had bragged about the shooting to

elevate his position in the gang was inherently incredible. Nine years older than Mr. Joseph, Cruz had been affiliated with the elder group of CHC members. In contrast, Mr. Joseph was affiliated with the younger group, whom Cruz called the “670 Corporation.” While Cruz claimed to know the younger members of CHC, he failed to identify Mr. Joseph in court either as a CHC gang member or otherwise. (A.515-516, 530).<sup>1</sup> Additionally, Cruz did not know Mr. Joseph’s age, if he was from Castle Hill, or where he lived. (A.587-89).

Cruz claimed that in 2017, a few members of the CHC had told him that Petitioner-Appellant “had put in work for Castle Hill.” However, when asked by the prosecutor where the “work” had occurred, Cruz stated, “All they said was that [Mr. Joseph] just went to a park.” (A.585-86).

Finally, as previously noted in the Petition, had Mr. Joseph been tried in the First Circuit, the result might have been different because the Vincent Declaration automatically would not have been considered insufficient under Rule 33. See *United States v. Montilla-Rivera*, 115 F.3d 1060 (1<sup>st</sup> Cir. 1997); *United States v. Del-Valle*, 566 F.3d 31 (1<sup>st</sup> Cir. 2009).

Accordingly we respectfully request that, to secure and maintain uniformity on this issue throughout the nation’s courts, 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.

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<sup>1</sup> Numbers preceded by “A” refer to pages of Petitioner-Appellant’s separately bound Appendix filed in the U.S. Court of Appeals for the Second Circuit, together with his principal brief. (Case No. 22-1552-cr, ECF Docs. 62, 63).

## CONCLUSION

For the reasons above, along with those set forth in his Petition for a Writ of Certiorari dated July 25, 2024, Mr. Joseph respectfully requests that this Court grant the petition.

Respectfully submitted,

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