No. _____

In the Supreme Court of the United States

JAMES HENRY JOHNSON,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

ELISA A. LONG
Interim Federal Public Defender

RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender
Counsel of Record

FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF PENNSYLVANIA
1001 Liberty Avenue
Suite 1500
Pittsburgh, PA 15222
(412) 644-6565
renee_pietropaolo@fd.org

QUESTIONS PRESENTED

Whether a criminal defendant is denied his Due Process and Sixth Amendment right to an impartial jury when the trial court determines that a potential juror who expresses an awareness that race can unconsciously affect perception and decision-making demonstrates partiality and must be excused for cause.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are those named in the caption to this petition.

RELATED PROCEEDINGS

- *United States* v. *Johnson*, Crim. No. 2:17-cr-243, United States District Court for the Western District of Pennsylvania. Judgment entered Sept. 23, 2022.
- *United States v. Johnson,* No. 22-2845, United States Court of Appeals for the Third Circuit. Judgment entered Feb. 14, 2024.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND CONSTITUTIONAL PROVISIONS:

OTHER:

No. _____

In the Supreme Court of the United States

JAMES JOHNSON,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

James Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit appears at Appendix A to the petition (App., *infra*, 1a-16a) and is unreported at *United States v. Johnson*, 2024 WL 617719 (3d Cir. 2024). The order denying the petition for rehearing with suggestion for rehearing en banc appears at Appendix B to the petition (App., *infra*. 17a).

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2024. The petition for rehearing with suggestion for rehearing en banc was denied April 11,

2024. (App., *infra*, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment 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 defence.

U.S. Const. Amend. VI.

The Due Process Clause of the Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. 5.

STATEMENT OF THE CASE

The trial court denied James Johnson his right to an impartial jury by a tainted *voir dire* that excluded qualified jurors who understood implicit bias and that race may play a role in the criminal justice system, but refused to strike jurors espousing the racially biased view that African American males are more likely to engage in violence or be involved with drugs or guns. Mr. Johnson's case undermines principles this Court has repeatedly and forcefully protected: the right to an impartial jury, and the recognition that overt racial bias in the criminal justice system undermines the rule of law and must be eliminated. Under this Court's authority, the wrongful exclusion of qualified jurors requires reversal. Although a showing of harm is unnecessary, the wrongful exclusion of qualified jurors who expressed color consciousness is particularly problematic here as the evidence was not overwhelming, and these jurors may have been open to the defense theory that Mr. Johnson was misidentified by an officer whose credibility was severely undermined and who conducted an incomplete investigation because he relied on propensity (racially-charged rap music evidence) to fill in the blanks.

1. James Johnson was convicted following a jury trial of distributing a controlled substance on December 30, 2016, possessing with intent to deliver substances recovered during a January 2, 2017 search of an unsecured house (21 U.S.C. §§ 841(a)(1), (b)(1)(C)), possessing a firearm also recovered during that search (18 U.S.C. § 922(g)(1)), and possessing that firearm in furtherance of drug trafficking (18 U.S.C. § 924(c)(1)(A)(i)). C.A. App.68-72. The district court sentenced

him to 92 months' incarceration for the gun and drug counts and to a consecutive 60 months incarceration for the § 924(c) count. C.A. App.1.

2. During *voir dire* in what was a racially charged prosecution, the district court used juror questionnaires to probe for racial bias. C.A. App. 10-11. Prospective Juror No. 2 indicated that the race of the accused and his counsel (Black) would impact her consideration. C.A. App. 280-82. She clarified that belief was connected to her understanding of implicit bias, which she defined as "[b]iases that are not necessarily thought of. They're just something . . . you do it without really knowing that's why you're doing it." C.A. App. 286-87.[1] Prospective Juror No. 2 expressed an intent to "sit with" evidence to ensure her decision-making was not impacted by inherent bias because the defendant is African American. C.A. App. 284-87. When asked to explain how the defendant and his counsel's race would impact her consideration and scrutiny of the evidence, she clarified that she'd slow her decision-making to ensure it was not impacted by inherent biases. C.A. App. 284-87, 290, 294. Her stated goal was to ensure "there were no biases making [her] think differently about the case than [she] would if" the defendant were white. C.A. App. 294-95. If the evidence established guilt beyond a reasonable doubt, she would have no difficult returning a guilty verdict. C.A. App. 288-89.

[1] "Implicit bias involves…subconscious feelings, perceptions, attitudes, and stereotypes that have developed as a result of prior influences and imprints. [I]mplicit bias does not require animus…[but] can be just as problematic…." U.S. Department of Justice, *Understanding Bias: A Resource Guide*, https://www.justice.gov/file/1437326/download.

3. The district court struck this juror for cause. C.A. App. 447. The court endorsed Prospective Juror No. 2's intent to test herself to ensure implicit bias is not "involved in [her] decision-making…." C.A. App. 447, 147. But it struck Juror No. 2 because it inferred from her correct understanding of implicit bias that she would "imput[e] those biases to others" and "in effect be imposing an additional burden" on the government:

> I believe . . . it is likely that she would be unable to detach the view that she believes that there are additional biases that are not internal to her, that she has to be cognizant and aware of and cautious of as they might affect, but the imputation of those biases to others. . . . And . . . if she did that . . . she would in effect be imposing an additional burden in this case that the law does not apply. . . .

C.A. App. 447-48.

4. Mr. Johnson appealed, and the Court of Appeals affirmed. Not only did the Court of Appeals find no error in the trial court's inference drawing, it went further, baldly equating a prospective juror's intent to exercise caution to ensure her decision-making is *not* impacted by unconscious racial bias with bias: "Juror No. 2 would be 'extra cautio[us]' about inherent biases based on race, which would affect her impartiality in assessing witness testimony and attorney arguments." App. *infra*, 14a.

REASONS FOR GRANTING THE PETITION

A. The Third Circuit's Decision Conflicts with Supreme Court Precedent on important questions of federal law.

"The jury is a central foundation of our justice system and our democracy. . . . [T]he jury is a necessary check on governmental power . . . [and] a tangible

implementation of the principle that the law comes from the people." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 209 (2017). The Sixth Amendment guarantees a criminal defendant the right to a trial "by an impartial jury." U.S. Const. Amend. VI. An "impartial jury" is one that is "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217 (1982), and that disregards any personal prejudices or biases. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 411 (1991) (referencing a defendant's "right to be tried by a jury free from ethnic [or] racial … prejudice"). Courts have the power to exclude only those potential jurors who lack impartiality, that is, those whose "views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." *Wainwright v. Witt*, 469 U.S. 412, 420-24 (1985). Legally cognizable basis of partiality are narrow and must be proved by the party seeking the juror's exclusion. *Id.*, 469 U.S. at 423; *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (providing, "challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality.").

These principles are controlling yet the Court below held that a trial court may strike for cause a prospective juror who expressed an accurate awareness of implicit racial bias. App. 14a. The trial court inferred from Juror No. 2's correct understanding that "*everyone"* has implicit biases and that these biases may impact unconsciously "how we assess or remember what we see and hear, and how we make[]decisions," *see* C.A. App. 1836, that she would "imput[e] those biases to others" and "in effect be imposing an

additional burden" on the government. C.A. App. 447-48. Finding no error in the trial court's inference drawing, the Court of Appeals went further, baldly equating a prospective juror's intent to exercise caution to ensure her decision-making is not impacted by unconscious racial bias with bias: "Juror No. 2 would be 'extra cautio[us]' about inherent biases based on race, which would affect her impartiality in assessing witness testimony and attorney arguments." App. 14a.

An understanding that everyone—including jurors and witnesses—has unconscious biases that impact our evaluation and recall of evidence and decision-making does not impose a higher burden on the government; it demonstrates qualification to perform the duties of a juror. For that reason, the for-cause exclusion of such jurors actually lowers the government's burden by removing jurors who would meaningfully test themselves and witnesses for bias—a fundamental jury responsibility. And an intent to consciously guard against allowing race to influence decision-making cannot be equated with partiality or bias.

The wrongful exclusion of qualified jurors violates Due Process and Sixth Amendment limits on the power of courts to exclude jurors for cause, distorts the composition of the jury, *Gray v. Mississippi*, 481 U.S. 648, 665 (1987), undermines public confidence in the jury system by creating "the appearance of the prosecution, with the assistance of the court, attempting to 'stack the deck' against the defendant," *United States v. Salamone*, 800 F.2d 1216, 1227 n.15 (3d Cir. 1986) (*quoting Gray*,

481 U.S. at 658-59), and implicates the constitutional rights of prospective jurors to serve. This Court should grant *certiorari*.

1. The jury's core function is to assess witness credibility, including any witness bias.

It is a fundamental premise of criminal trials that the jury's core function is to assess witness credibility, in an impartial manner. *See United States v. Scheffer*, 523 U.S. 303, 312-13 (1998). Indeed, assessing credibility is exclusively the jury's province. *See* C.A. App. 782, 1840-41. In assessing witness credibility, jurors are instructed to consider whether a witness has any "bias," *see* C.A. App. 1841, as bias is "always relevant" to credibility, *see Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

2. An understanding of implicit bias helps jurors perform this core function.

Implicit bias refers to the "set of attitudes or stereotypes that affect our cognition, affect and behavior in [an] unconscious and automatic manner." Hu, X., & Hancock, A. M. (2024). *State of the science: Introduction to implicit bias review 2018-2020*. The Kirwan Institute for the Study of Race and Ethnicity, https://kirwaninstitute.osu.edu/research/state-science-introduction-implicit-bias-review-2018-2020; *see* Bernice B. Donald and Sarah E. Redfield, *Framing the Discussion,* in Enhancing Justice: Reducing Bias 5, 14 (Sarah E. Redfield, ed., 2017) (Preface by Judge Theodore McKee). These "learned associations absorbed from all around us, outside our direct awareness or control, []affect our understanding, actions, and decisions." Donald & Redfield, *Arcing Toward Justice: Can*

Understanding Implicit Bias Help Change the Path of Criminal Justice?, 34 Crim. Just. 18, 20 (2019).

Studies show that implicit biases are pervasive in this country, with a majority of individuals unknowingly harboring racial biases. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 153 (2010). As social scientists have observed, "we are not, on average or generally, cognitively colorblind." Jerry Kang & Kristin Lane*, Seeing through Colorblindness: Implicit Bias and the La*w, 58 UCLA L. Rev. 465, 473 (2010). Studies indicate that implicit biases, no less than explicit biases, predict individual behavior and lead to discrimination.

Implicit bias, like explicit bias, is prone to manifest in the jury room. In one study, social scientists examined whether altering the skin tone of a perpetrator in a security camera photo affected the way participants judged various pieces of trial evidence. Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence,* 112 W. Va. L. Rev. 307, 331 (2010). Using photos of a perpetrator with progressively darker skin color, the study found that mock jurors' evaluation of trial evidence was influenced by racial bias. This racial bias predicted guilty and not guilty verdicts, with mock jurors more likely to find darker-skinned perpetrators guilty than lighter-skinned counterparts. *Id.* at 337-39.

Another study evaluated whether implicit racial bias affects a juror's evaluation of ambiguous evidence. Justin Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty / Not Guilty Implicit Association Test,* 8 Ohio State J. Crim. L. 187, 190 (2010). The study suggested that mock jurors exhibited strong associations between black individuals and a guilty verdict (as compared with white individuals), and this implicit racial bias predicted how a juror evaluated ambiguous evidence. *Id.* at 204. That is, mock jurors appear to show an implicit racial bias that results in black men being afforded a weaker presumption of innocence. *Id.*

Implicit bias also has been found to cause jurors to misremember case facts in racially biased ways. Bennett, at 157 (citing Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-Making and Misremembering,* 57 Duke L.J. 345, 398-401 (2007)). One study found that mock jurors more easily recalled aggressive facts when the actor-defendant was black as opposed to white, and mock jurors rated the personality of different-race defendants as more violent as compared to same-race defendants. *See* Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L. J. 345, 350 (2007); Samuel Sommers & Phoebe Ellsworth, *Race in the Courtroom: Perceptions of Guilt & Dispositional Attributions,* 26(11) Personality & Soc. Psychol. Bull. 1367, 1370-71, 1374-76 (2000).

The documented effects of implicit bias in mock juries are likely to be magnified in an actual jury setting, where pressures run high and the consequences

are real. Time-pressured or stressful conditions, situations involving complex problems, and situations involving ambiguity have been suggested as especially conducive to activating implicit bias. *See, e.g.*, Marianne Bertrand et al., *Implicit Discrimination,* 95(2) The Am. Econ. Rev. 94, 95-97 (2005); Barbara Reskin, *Unconsciousness Raising,* Q1 Regional Rev. 33, 34, 36 (2005); Dolly Chugh, *Societal & Managerial Implications of Implicit Social Cognition: Why Milliseconds Matter,* 17(2) Soc. Just. Res. 203, 212, 216, 217 (2004). The context of jury deliberations—which can and often does meet each of these criteria—provides a fertile ground for the influence of jurors' implicit biases.

3. The trial court's determination that a juror who will scrutinize witness testimony for implicit bias will hold the government to a higher burden is antithetical to the fundamental, exclusive, role of jurors to assess witness credibility, including for bias.

Jurors bear exclusive responsibility for evaluating witnesses and evidence to decide facts. C.A. App. 1833-36, 1840-41. *See United States v. Scheffer*, 523 U.S. 303, 311 (1998); *Delaware v. Van Arsdall*, 475 U.S. 673, 678-80 (1986). A witness' bias or prejudice is "always relevant" to an evaluation of his testimony. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Thus, consciousness of the influence of bias aids jurors' exercise of their core responsibilities to decide the facts and assess witness credibility; it cannot be equated with increasing the government's burden.

4. Excluding jurors, not shown to be partial, based on how they would scrutinize matters exclusively their province, witness credibility,

violates due process and Sixth Amendment limits on the power of courts to exclude jurors for cause, skews the composition of the jury and violates Mr. Johnson's right to an impartial factfinder.

As summarized, Juror No. 2 expressed an awareness of implicit bias, an intent to slow her decision-making, and empathy. *See* C.A. App. 284-96. Each of these recognized bias-neutralizing strategies[2] was endorsed by the district court. *See* C.A. App.147 (district court explaining implicit bias "relates to what we all come to the table with about how we see the world and [highlighting] the responsibility of jurors to . . . slow . . . their decisionmaking to make sure . . . they're making . . . decisions based only on the evidence and on the law and not[] their predispositions. . . "), App. 1836 (instructing "*everyone"* has "feelings, assumptions, perceptions we may not even be aware of . . . [that] can impact on how we assess or remember what we see and hear, and how we make important decisions . . . [and encouraging jurors to] resist jumping to conclusions that may be unintentionally based on" such feelings). Nevertheless, the court struck Juror No. 2 for cause.

Courts have the power to exclude only those potential jurors lack who impartiality, that is, those whose "views would prevent or substantially impair the

[2] Research suggests debiasing strategies, including raising awareness, slowing decision-making, and fostering perspective-taking and empathy. *Arcing Toward Justice*, 56; David Hoffman & Helen Winter, *Follow the Science: Proven Strategies for Reducing Unconscious Bias*, Harv.N.L.Rev. 1, 11-12, 20, 56 (Fall, 2022), https://www.hnlr.org/wp-content/uploads/sites/22/Follow-the-Science_Hoffman-and-Winter.pdf. *See* Jerry Kang*, Implicit Bias in the Courtroom*, 59 UCLA L.Rev. 1124, 1177 (2012) ("One way to counter [implicit biases] is to engage in effortful, deliberative processing.").

performance of their duties in accordance with their instructions or their oaths." *Wainwright*, 469 U.S. at 420-24. Consciousness of the influence of bias is not itself bias and does not establish a lack of partiality necessary to justify juror exclusion.

Moreover, the wrongful disqualification of jurors who, properly, may examine witness credibility for the improper influence of racial bias distorts the composition of the jury in favor of the government and harms the integrity of the judicial system. *See Gray v. Mississippi*, 481 U.S. 648, 659, 664 (1987) (erroneous exclusion of qualified juror in violation of Sixth and Fourteenth Amendments impacts the composition of the jury panel and "stack[s] the deck against" the defendant). "[T]here is the appearance of the prosecution, with the assistance of the court, attempting to 'stack the deck' against the defendant." *Salamone,* 800 F.2d at 1227 n.15 (quoting *Gray*, 481 U.S. at 658-59); *id.*, 1232 (Stapleton, concurring). *See also Mason v. United States*, 170 A.3d 188 (D.C. App. 2017) (wrongful for cause exclusion of juror who expressed a belief that the criminal justice system reflects systemic bias against Blacks has "a tendency to 'unacceptably skew the jury'").

That the trial court inconsistently treated other questions of juror bias casts doubt on its role as neutral arbiter. Paradoxically, and without any handwringing, the trial court refused to strike two jurors who admitted ***conscious*** racial bias, answering yes to the question: "Do you believe that African American men are more likely than other people to engage in violence or criminal conduct, or to be involved in any way with guns or drugs?" C.A. App. 688-98, 545-52. *See Buck v. Davis*, 580 U.S.100, 121 (2017) (condemning characterization of Black men as "violence prone"

as "particularly noxious strain of racial prejudice"). The trial court also refused to remove a retired probation officer who expressed unwavering pro-law-enforcement-bias. *See* C.A. App. 475-79, 480-81, 486-88, 490-97 (juror opining 99% of police are "always truthful" and admitting he identifies with police and would "lean[] toward" the government in evaluating evidence). It did not view this juror's acknowledged pro-law-enforcement "leaning" as "affecting [his] impartiality," reducing the government's burden, or otherwise impacting the presumption of innocence.

B. The question presented is important and warrants review.

Ignoring issues of racial bias in the jury system "damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 223 (2017). It is ultimately the duty of the courts "to confront racial animus in the justice system," *id.*, 222, not to exacerbate racial disparities by excluding from the jury room those who express an awareness race can unconsciously affect perception and decision-making and an intent to consciously guard against its improper influence.

The pervasiveness of actual and implicit bias means that there can be no doubt that challenges to juror qualifications on this basis and, relatedly, on the basis of expressions of awareness of racial disparities in the criminal justice system, *see* C.A. App. 437-46, will continue to recur. Without this Court's review, lower courts' misapplication of this Court's precedent will continue to impact criminal defendants across the country. This case presents an optimal vehicle in which to address these important questions of federal criminal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Renee Domenique Pietropaolo
Renee Domenique Pietropaolo
Assistant Federal Public Defender
Counsel of Record

Elisa A. Long
Interim Federal Public Defender

Federal Public Defender for the
Western District of Pennsylvania
1001 Liberty Avenue, Suite 1500
Pittsburgh, PA 15222
(412) 644-6565
renee_pietropaolo@fd.org

July 31, 2024