No. _____

9th Cir. No. 21-10212
D.C. No. 3:18-cr-08225-DGC-1

IN THE

Supreme Court of the United States

ROBERT JIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
From The United States Court of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The Court Violated Jim's Constitutional Rights To Due Process & A Fair Trial By Allowing Improper Evidence & Preventing Him From Presenting Evidence In His Defense?

II. Whether There Was Insufficient Evidence Presented At Trial To Convict Jim Beyond A Reasonable Doubt Of The Charges?

III. Whether It Was Plain Error When Jim's Counsel Failed To Make A Rule 29 Motion To The Court?

IV. Whether The District Court Erred In Sentencing Jim To Life Imprisonment On Counts 1 & 2?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Jim ("Jim"), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Ninth Circuit denying Jim's Petition for Panel Rehearing and Petition for Rehearing En Banc is annexed as Appendix A. A copy of the Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit affirming Jim's conviction and sentence is annexed as Appendix B. A copy of the Judgment of the United States District Court for the District of Arizona is annexed as Appendix C.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit decided this case was September 22, 2022. The Petition for Panel Rehearing and Petition for Rehearing En Banc was denied on October 27, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. §1153
2. 18 U.S.C. §2241(c)
3. 18 U.S.C. §2246
4. 18 U.S.C. §2247
5. 18 U.S.C. §2260A

6. 18 U.S.C. §3553(a)

7. U.S. Const. Amend. VI

8. U.S. Const. Amend. XIV

STATEMENT OF THE CASE

Jim was indicted on two counts of Aggravated Sexual Abuse of a Child in violation of 18 U.S.C. §§ 1153, 2241(c), 2246, and 2247, and two counts of Offense by a Registered Sex Offender in violation of 18 U.S.C. §§ 2241(c) & 2260A. (Redacted Second Superseding Indictment; 3-ER-431).[1] A three-day jury trial was conducted in Jim's case beginning on August 19, 2019.

Alta Jim ("Alta"), Petitioner's sister, testified that in 2017 she lived near Petitioner. Reporter's Transcript ("T.") 8/19/2019 @ p. 71-72; 2-ER-141-42. Alta's son, J., was 9 years old and was upset by an incident that she reported to police. *Id*. Shauna Yazzie, a police officer with the Navajo Nation Police Department, received a report of child sexual abuse on April 3, 2017 regarding Alta's children, J. and D. *Id*. @ 74-76; 2-ER-144-46. Yazzie interviewed J. *Id*. @ 79; 2-ER-149.

J. testified that he was 12 at the time of trial. *Id*. @ 81; 2-ER-151. J. referred to Jim as 'mean man'. *Id*. @ 84; 2-ER-154. J. said that when he was 8, Jim asked if he wanted candy and a cookie. J. said "yes". Jim then put his hands in J's pants and touched his penis. *Id*. @ 86; 2-ER-156. J. testified that Jim said 'if you tell anybody I'm going to kill your family'. J. kept moving around and Jim stopped. *Id*. @ 87; 2-ER-157.

[1] Citations are to the Excerpts of Record ("ER") filed in the Ninth Circuit Court of Appeals.

After some time, J. eventually told his mom what happened. *Id*. @ 88; 2-ER-158. J. testified about walking to Ralph's to play with his sister and brother. *Id*. @ 90; 2-ER-160. It was unusual for J. to walk there. *Id*. @ 91; 2-ER-161. His mom was watching him while he walked, but did not see him go into Jim's hogan. When J. went to Jim's hogan, Jim's wife was there the entire time.

When J. was interviewed by Ms. Blackwell, he never told her that Jim said he would kill J's family. *Id*. @ 92, 106; 2-ER-162, 176. J. told Ms. Blackwell that Jim said "do not tell anyone". He also told Ms. Blackwell that his mother told him to talk about Jim (his uncle) who was lying about being in Albuquerque. *Id*. @ 93; 2-ER-163. J.'s mother told him to say that on the way to meet with Ms. Blackwell. *Id*. @ 94; 2-ER-164. In the transcript with Ms. Blackwell, J. told Ms. Blackwell that he went home and told his mom right away. *Id*. @ 102; 2-ER-172.

J. admitted that what he was telling the jury was different than what he told Ms. Blackwell. It was also different that J. testified at trial that Jim said Jim was going to kill J.'s family. J. said the reason for the discrepancies was that he keeps "forgetting things". *Id*. @ 103; 2-ER-173.

J. admitted he remembered things better in 2017. J. talked to his mom about what to say to the jury, and she told him what to say. *Id*. @ 104; 2-ER-174. Later, J. clarified that his mom told him to say what happened to him. J. said he was truthful with Ms. Blackwell. *Id*. @ 105; 2-ER-175. J. does not remember telling Ms. Blackwell that no one else was in the hogan. *Id*. @ 106-107; 2-ER-176-77. Ryan Butler, the FBI case agent, stated

that when J. was interviewed, he told Ms. Blackwell that no one else was in the hogan except for J., Jim, and a cat. *Id*. @ 108, 119; 2-ER-178, 189.

D. testified. T. 8/20/2019 @ p. 141; 2-ER-211. (She was a minor at the time of the incidents alleged in the indictment, but an adult at the time of the trial.) Ralph Jim had been D.'s guardian for many years. Jim is D's uncle. *Id*. @ 144; 2-ER-214. Ralph and Jim are brothers. D. discussed an incident from when she was 12. D. was home with her little brother and no other adults. *Id*. @ 145; 2-ER-215. Jim came to her house to watch a movie. When the movie was finished, D. turned off the television and went to her room to read a Harry Potter book. *Id*. @ 146; 2-ER-216.

D. testified that Jim came into her room. *Id*. @ 147; 2-ER-217. D. testified that Jim forcibly had intercourse with her. *Id*. @ 148-149; 2-ER-218-19. After Jim pulled up his pants, he told D. that if she told anyone, he would kill Uncle Ralph and her brother. D. testified that she immediately took a shower. *Id*. @ 150; 2-ER-220. When Uncle Ralph came home, she did not tell him because she was scared. *Id*. @ 151; 2-ER-221.

The first people D. told about the incident was her brother and mom. *Id*. @ 156; 2-ER-226. D. was interviewed regarding the incident in 2016 in Holbrook, AZ. *Id*. @ 157; 2-ER-227. When D. was interviewed, she did not tell the woman that Jim put his penis in her vagina. D. stated she was scared about what Jim stated to her. *Id*. @ 158; 2-ER-228. In 2017, D. was at an education meeting at her church. D. told the group that she was raped by Jim. Ralph was at the meeting also. A few months after the education meeting, Ralph took D. to the hospital. *Id*. @ 159; 2-ER-229. The government elicited testimony that Jim attempted to touch D.'s breasts on an ATV trip. Jim objected on relevance, but

the court allowed the testimony pursuant to Rules of Evidence 413 and 414. *Id*. @ 160-164; 1-ER-53-57.

D. confirmed that in the 2016 interview with Ms. Hunter, D. did not say that Jim raped her or put his penis in her. She said that Jim put his hand on the side of her vagina. *Id*. @ 170, 172; 2-ER-235, 237. D. also said that she told Ms. Hunter that Jim said that he was going to kill her family. *Id*. @ 170; 2-ER-235. The transcript of the interview did not reflect that language. In the transcript of the interview, D. stated that Jim said, "do not tell anyone". *Id*. @ 171-172; 2-ER-236-37. D. also stated in the interview that Jim never touched her any other time (no mention of the ATV incident).

D. stated she got her "story straight" when Ms. Blackwell asked if she was ready for the interview. *Id*. @ 173; 2-ER-238. D. explained she said that because her real story was coming out. *Id*. @ 175; 2-ER-240. D. agreed that her story changed several times. She stated her story changed because she was scared. *Id*. @ 174; 2-ER-239. The day before the incident with Jim, Ralph was in town getting birthday supplies for her brother S.'s birthday. *Id*. @ 193; 2-ER-258.

Ralph Jim ("Ralph") testified next. D. and S. (two of Alta's children) live with Ralph. Ralph is not a guardian to J. *Id*. @ 178; 2-ER-243. One day, Ralph saw J. walking past Jim's hogan. *Id*. @ 185; 2-ER-250. Jim told him that J. stopped by, and Jim gave him some candy or munchies. Much later, Ralph's sister told Ralph that something happened to J. that day. *Id*. @ 186; 2-ER-251.

Renee Ornelas ("Dr. Ornelas"), a child abuse pediatrician with Tsehootsooi Medical Center, performed a child sexual abuse examination on D. *Id*. @ 198; 2-ER-263.

D. was 16 at the time. Dr. Ornelas met with Ralph first before meeting with D. *Id*. @ 199; 2-ER-264. D. reported the incident and Dr. Ornelas conducted a physical exam. *Id*. @ 202-207; 2-ER-267-72. The examination was a normal examination, and there were no physical signs of a sexual assault. *Id*. @ 208-210; 2-ER-273, 275. (Dr. Ornelas clarified that many forms of sexual assault will result in a normal examination. *Id*. @ 212; 2-ER-277). D. told Dr. Ornelas she was asleep when the assault happened and did not say that she was reading a Harry Potter book. *Id*. @ 211; 2-ER-276.

Tudy Jim ("Tudy") testified to evidence pursuant to Rules of Evidence 413 and 414. The judge read the following admonition, "You are about to hear evidence that Jim was convicted of a similar offense of child molestation. You may use this evidence to decide whether Jim committed the acts charged in the indictment in this case. You may not convict Jim simply because he was convicted of other unlawful acts. You may give the evidence such weight as you think it should receive or no weight." *Id*. @ 215; 2-ER-280.

Tudy is the daughter of Jim. *Id*. @ 216; 2-ER-281. Jim is the father of Tudy's eldest son. She was 13 when she had her child. *Id*. @ 217; 2-ER-282. The acts were not consensual, and Jim forced himself on her. The assaults occurred more than once. *Id*. @ 218-220; 2-ER-283-85. Jim told Tudy to lie about how she got pregnant. *Id*. @ 220; 2-ER-285. Jim told Tudy that he would hurt or kill her mother and that he would do the same assault to her younger sister if Tudy would not allow the assault to proceed. *Id*. @ 221; 2-ER-286.

Todd Temple ("Temple"), retired special agent of the FBI, investigated the crimes on Tudy. *Id*. @ 225-227; 1-ER-58-60. The court ruled that Temple could testify to the prior conviction, not to modus operendi, etc. *Id*. @ 228-233; 1-ER-61-66.

Gregory Tsosie ("Tsosie"), police officer with the Navajo Nation, testified regarding Jim's requirement to register as a sex offender with the Navajo Nation SORNA office. *Id*. @ 237-257; 3-ER-295-315. Tsosie stated that from his experience with Jim that Jim was trying to comply with the registration statutes. *Id*. @ 258; 3-ER-316.

Wendy Dutton ("Dutton"), a forensic interviewer with the child protection team at Phoenix Children's Hospital, did not know the facts of this case, but she testified in general about the sexual abuse of children. *Id*. @ 259, 267-279; 3-ER-317, 325-37. Dutton testified that there can be delayed and piecemeal disclosures in Navajo children. *Id*. @ 280-282; 3-ER-338-40.

Dutton acknowledged that false reporting does occur. *Id*. @ 291-292; 3-ER-349-50. Dutton further stated that investigators can be wrong in their investigation. *Id*. @ 292; 3-ER-350. There are two types of false allegation cases. There are ones that are intentional or malicious, meaning the allegations were made for an ulterior motive or goal. The commonalities for cases of false allegations are generally involving younger children whose parents are involved in a high conflict divorce or custody dispute. Most often, the allegations arise from one of the adults, and the child might be coached or encouraged to make the false report against the other parent or the other parent's new partner in an effort to gain advantage in the custody dispute.

There are some children, older children, who initiate the false reports themselves. Sometimes teenage girls will make false allegations to change a living situation. *Id*. @ 293; 3-ER-351. Teen girls will also make up allegations to try to get a mother's abuser out of the house, to cover up consensual sex, or if the child has a severe mental illness. *Id*. @ 294; 3-ER-352.

Dutton clarified that she had no idea whether the allegations in this particular case were true or false or even what the allegations were in this case. She was just providing a summary of her experience and an understanding of research she has studied. *Id*. @ 298-299; 3-ER-356-57.

The parties stipulated that Jim has some quantum of Indian blood and is a member of the Navajo Nation. *Id*. @ 300-301; 3-ER-358-59. The government rested. *Id*. @ 302; 3-ER-360.

The defense called Eleanor Guerro ("Guerro"), the fiancé of Jim. Jim and Guerro have been together for 10 years, and they live in Round Rock, Arizona. *Id*. @ 305; 3-ER-363. Eleanor and Jim lived in a small hogan which was a one-room house with no partitions. *Id*. @ 306; 3-ER-364.

Guerro never saw J. in the hogan and never saw Jim harm J. in any way. *Id*. @ 307; 3-ER-365. The last time Guerro viewed J. was when J. was little, and J. was walking to Ralph's home. Jim did not take the children on ATV rides. *Id*. @ 310; 3-ER-368. Guerro said that she never left Jim to speak to Verona. *Id*. Verona was called on rebuttal to state that Guerro came to speak to Verona at Ralph's house. *Id*. @ 313-314; 3-ER-371-72. The defense rested after Guerro's testimony.

On August 21, 2019, the jury found Jim guilty of all counts in the indictment. T. 8/21/19 @ p. 2-6; 1-ER-44-48.

Sentencing occurred on July 21, 2021. T. 7/21/21 @ p. 2; 1-ER-8. The court asked if defense counsel had an opportunity to review the presentence report with Jim. Counsel stated, "We did briefly. We, unfortunately, didn't have a very long discussion. I know Ms. Aguilar before I came on—because I came on really late in this—did go over that with Mr. Jim." The court asked if there was a reason that a more detailed discussion did not happen. Counsel stated that Jim did not want to talk to him, and they disagreed. Counsel stated that Jim wanted him to file various motions which "would potentially violate my ethics rules, that had no legal basis. I explained that to him and he asked me to leave."

The court then asked defense counsel if he believed Jim had sufficient opportunity to understand what is in the presentence report in light of the "brief discussions and Ms. Aguilar's previous meetings". Counsel stated "yes". *Id.* @ 3; 1-ER-9. Counsel stated there was no objection to the presentence report.

The court stated the presentence report calculation under the federal sentencing guidelines resulted in a total offense level of 43 with a criminal history category of V. This resulted in a guidelines range for Counts 1 and 2 of life in prison and Counts 3 and 4 of ten years in custody. *Id.* @ 4; 1-ER-10.

Jim addressed the court and stated that he was innocent. He described an incident where "they" took a picture of naked children and gave him the film to be

developed. He had proof that he did not take the pictures and was at work when the pictures were taken. *Id.* @ 5-7, 20; 1-ER-11-13, 26.

Jim further stated that he was being falsely accused because his brother would not give back the temporary grazing permit. Jim wanted to build a home on his homesite, and then he was falsely accused of the crimes. Jim wanted to move, but his brother asked him to stay in order to help with raising the children. *Id.* @ 8; 1-ER-14. There was an accusation from his brother that Jim was chasing his cattle. *Id.* @ 9; 1-ER-15. Jim stated that he lost his homesite and most of his property. *Id.* @ 15-17; 1-ER-21-23.

Jim stated he requested that his attorney file an interlocutory appeal, and he was only visited three times by his attorney (five minutes each time). *Id.* @ 18-19; 1-ER-24-25. Jim stated he asked his attorney to ask particular questions, and he wanted the witnesses to be subject to lie detector tests. *Id.* @ 19; 1-ER-25. Jim stated he wrote many letters to the court and the prosecutors begging for assistance. *Id.* @ 20-22; 1-ER-26-28.

The government argued for life imprisonment stating there is no other sentence that will adequately protect individuals. *Id.* @ 25; 1-ER-31. Prior to sentencing, the court recited Jim's prior convictions. The court sentenced Jim to life on Counts 1 and 2 and ten years on Counts 3 and 4. *Id.* @ 29-31; 1-ER-35-37. The court asked Jim if he understood the sentences, and Jim stated that he understood about 45% of the information presented by the court. The court responded, "I believe based on your observations of me while I spoke that you understood more than 45 percent". *Id.* @ 34-35; 1-ER-40-41.

Jim timely filed a notice of appeal on July 31, 2021. (Notice of Appeal, 3-ER-433). On September 22, 2022, the Ninth Circuit affirmed Jim's conviction and sentence. On October 27, 2022, the Ninth Circuit denied Jim's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Court Violated Jim's Constitutional Rights To Due Process & A Fair Trial.

The Ninth Circuit found the District Court did not abuse its discretion by admitting evidence of Jim's prior sexual abuse of other family members. However, this was an extremely emotional case involving the alleged sexual abuse of two other family members (Jim's niece and nephew). The jury would have been easily swayed by the improper and prejudicial viewing of evidence that showed Jim as if he was already guilty.

A now-retired FBI Special Agent testified that Jim was previously convicted of sexually assaulting his daughter. This testimony was pursuant to Rules 413 (prior sexual assaults) and 414 (prior child molestations) of the Federal Rules of Evidence. Jim timely objected to the testimony but the court allowed it. 1-ER-58-66. Similarly, the court admitted evidence that Jim tried to touch D.'s breasts while on an ATV-riding trip. Jim again unsuccessfully objected. 1-ER-53-57. As such, the issue is preserved for this Court's review. *See, e.g., United States v. Gadson*, 763 F.3d 1189, 1199 (9th Cir. 2014) (preserved challenges to district court evidentiary rulings are reviewable for abuse of discretion).

While Rules 413 and 414 allow prior evidence of sexual assault, the evidence remains subject to the restrictions of Federal Rule of Evidence 403. *See United States v. Thornhill*, 940 F.3d 1114, 1118 (9th Cir. 2019). Rule 403 states that otherwise relevant and proper evidence is not admissible if its probative value is "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 403 requires district courts to balance the probative value of evidence against the potentially prejudicial impact on the jury's perception of the case. *See United States v. Ramirez-Robles*, 386 F.3d 1234, 1246 (9th Cir. 2004). In the Rule 403 context, unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. U.S.*, 519 U.S. 172, 180 (1997).

To determine whether prior sexual assault evidence is admissible under Rule 403, the trial court should weigh several factors. These include, but are not limited to: (1) the similarity of the prior acts to the acts charged; (2) the closeness in time of the prior acts to the acts charged; (3) the frequency of the prior acts; (4) the presence or lack of intervening circumstances; and (5) the necessity of the evidence beyond the testimony already offered at trial. *See Thornhill*, 940 F.3d at 1118; *U.S. v. LeMay*, 260 F.3d 1018, 1027-28 (9th Cir. 2001).

Here, the prior crime admitted into evidence was a single conviction that Jim had for prior acts involving his daughter, as well as attempting to touch D.'s breasts during an ATV trip at some undefined time. The isolated nature of the incidents weighs in

favor of excluding the evidence. *Cf. Thornhill*, 940 F.3d at 1120 (defendant had pleaded guilty to molesting daughter on several occasions within four-year span); *LeMay*, 260 F.3d at 1029 (evidence of a third incident where defendant had abused young relatives suggested that prior abuse "was not an isolated occurrence").

There was no necessity for the Government to call Jim's daughter to establish that the prior sexual assault was "very similar" to the charged crime. The FBI Special Agent could have simply testified that Jim was convicted of sexually abusing his daughter in the past. That is the similarity at hand. The salacious details of the assault were not necessary. In terms of necessity, his daughter's testimony was only "helpful" to the Government in a way that increased the risk of undue prejudice. Also, there is no indication by D. that the alleged ATV incident involved sexual intercourse.

The admission of this evidence was especially prejudicial to the separate charges involving J., the nephew. The district court did not spend any time analyzing or considering the evidence in light of the charges involving J. Jim was charged with touching J.'s penis with his hand. J. testified at trial that when he was 8 years old, he was walking past Jim's home when Jim asked if he wanted candy and a cookie. J. said "yes" and while inside Jim's home, Jim put his hands into J's pants and touched his penis. J. testified that he kept moving around and then Jim stopped. 2-ER-156-157. Fed. R. Evid. 414(a) states that in criminal child molestation cases, "the court may admit evidence that the defendant committed any other child molestation" but the evidence may only be considered on "any matter to which it is relevant." There is "a high risk of undue prejudice whenever ... joinder of counts allows evidence of other crimes to be

introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." *Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998) (*citing United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir.1986)).

The evidence about sexual abuse of Jim's daughter was not relevant to the allegation involving J. Regarding the *LeMay* factors, the sexual abuse of the daughter was completely different from the allegations involving J. The daughter testified that Jim forcibly had sexual intercourse with her and impregnated her at age 12. Those acts were not at all like the allegations involving J., which was touching his penis. Simply characterizing both acts as the 'rape of a relative' is too tenuous. 2-ER-101. The acts are clearly different, with one involving the penetration of a pre-teen girl and the other involving the touching of a prepubescent boy.

Also, the acts were committed approximately 27-28 years apart. Jim was convicted of sexually abusing his daughter in 1998 and was charged with sexually abusing J. in approximately 2015 or 2016.

All prior acts of sexual abuse alleged by the Government (even those that were ruled inadmissible by the Court) were involving teen or pre-teen girls. Other than the charge involving J., there not a single allegation involving Jim inappropriately touching or sexually abusing boys of any age. The incident involving J. is a completely isolated incident and dissimilar to any conduct that Jim previously displayed.

Apparently it never occurred to the district court or the Government to consider how dissimilar the acts involving Jim's daughter were to the allegation involving J. The trial court never considered the prejudice that would occur to Jim by allowing the

testimony of his daughter to be admitted as evidence on the charge involving J. The Court did not limit the evidence of the prior sexual abuse of the daughter to only the charge involving D.

In sum, the Government's primary purpose for the introduction of the prior conviction was to appeal to the emotions of the jury. Other than propensity, the evidence had no relevancy to the issues that the jury needed in reaching their verdicts since his daughter had already testified. If there was any relevancy, it was outweighed by the highly prejudicial nature of the evidence. It was cumulative to introduce this evidence from two separate witnesses.

In *U.S. v. Bercier,* 2007 U.S. App. Lexis 25490 (8th Cir.) at 13-14 (citing *United States v. Iron Shell*, 633 F. 2d 77, 84 (8th Cir. 1980), cert. denied, 450 U.S. 1001, 101 S. Ct. 1709 (1981), the Court found that there was no foundation establishing the doctor told victim that the details of what happened and identity of assailant were essential to her diagnosis of treatment. Although the evidence was cumulative, the court found it not to be harmless because the purpose was to bolster victim's testimony, and "in a case that turned entirely on the credibility of [victim], this tipped the scales unfairly. *Id*. at 18. Like *Bercier*, the evidence from the Agent was used to bolster Tudy's testimony, and was highly prejudicial.

The presumption of innocence, although not specifically articulated in the Constitution, is a basic component of a fair trial. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Duckett v. Godinez*, 67 F.3d 734, 747 (9th Cir. 1995). Long ago this Court stated:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Coffin v. U.S., 156 U.S. 432, 453 (1895). Here, Jim was robbed of his presumption of innocence when the district court allowed evidence of the prior conviction and thus failed to guard against dilution of the principle that guilt is to be established by truly probative and not unfairly prejudicial evidence. Petitioner's conviction completely hinged on the jury's decision regarding the credibility of the accusers. As a result, it cannot be said that the error was harmless beyond a reasonable doubt. Jim's constitutional right to a presumption of innocence was undermined and the delicate balance of evidence in this trial was upset. This Court should grant certiorari and remand Jim's case because he did not receive a fair trial as guaranteed by the Fourteenth Amendment.

II. <u>There Was Insufficient Evidence To Convict Jim Of The Charges.</u>

The Ninth Circuit found that sufficient evidence supported Jim's convictions. But the only direct evidence of Jim's guilt was the testimony of the children, D. and J. That testimony was contradictory and confused. This was especially true regarding J.'s testimony.

For example, when J. was interviewed by Ms. Blackwell, he never told her that Jim said he would kill J's family. 2-ER-162, 176. He only told Ms. Blackwell that Jim said not to tell anyone. J. fully admitted that what he was telling the jury was different than what he told Ms. Blackwell. J. asserted the reason for the discrepancies was that he

keeps forgetting things. 2-ER-173. J. admitted he remembered things better in 2017. J. did not recall telling Ms. Blackwell that no one else was in Jim's hogan. 2-ER-176-77. The assigned FBI Special Agent, however, stated that J. told Ms. Blackwell no one else was in the hogan except for J., Jim, and a cat. 2-ER-178.

At one point J. said that Jim's fiancée, Guerro, was present in the hogan. Guerro testified, however, that not only had she not seen J. since he was little, but their hogan consisted of one room with no partitions.

D. testified that when she was 12 years old, Jim came to her house to watch a movie. When the movie was finished, D. went to her room to read a Harry Potter book. 2-ER-215-216. D. testified Jim then came into her room and forcibly had intercourse with her. 2-ER-217-19. Jim told D. that if she told anyone, he would kill Uncle Ralph and her brother. 2-ER-221.

When D. was interviewed in 2016, she did not tell the woman that Jim put his penis in her vagina. D. asserted that she was scared about what Jim stated to her. 2-ER-228. In 2017 was the first time D. stated she was raped by Jim. The Government also elicited testimony that Jim attempted to touch D.'s breasts on an ATV trip.

At trial, D. confirmed that in the 2016 interview with Ms. Hunter that she did not say that Jim raped her or put his penis in her. Rather, D. said that Jim put his hand on the side of her vagina. 2-ER-235, 237. In the transcript of the interview, D. stated only that Jim said not to tell anyone (not that he would kill them). 2-ER-236-37. D. also stated in the interview that Jim never touched her any other time (no mention of any ATV incident).

D. explained her real story was coming out. 2-ER-240. D. agreed that her story changed several times, asserting that this was because she was scared. 2-ER-239.

The only other evidence pointed out by the Government was "T.J.'s testimony about how she was raped by Petitioner at a similar age" and "Agent Temple's testimony about Petitioner's 1999 conviction" (which was for the sexual abuse of T.J.). The fact that the Government pointed to T.J.'s testimony and Jim's 1999 conviction as compelling evidence of Jim's guilt in this case only highlights the overwhelming prejudice of the trial court's admission of that evidence. This is further proof such evidence should have been excluded as argued in Section I, above. After a de novo review of the evidence in this case, even viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This is especially true when the improperly admitted evidence of T.J.'s testimony and Jim's 1999 conviction are removed from consideration.

The Government then inserted Wendy Dutton's testimony as an attempt to overcome the issues with the children's changing stories. While inconsistencies are generally for a jury to resolve, here there were so many inconsistencies that the Government's case failed the test of "bare rationality." *Cf. Coleman v. Johnson*, 566 U.S. 650, 656 (2012). As such, this Court should grant review and remand Jim's case for a new trial.

III. It Was Plain Error For Jim's Counsel Not To Make A Rule 29 Motion To The Court.

The Ninth Circuit took "no position" on Jim's argument that his defense counsel was ineffective for failing to file a motion for judgment of acquittal because the Panel was declining to address the issue on direct appeal. However, the issue with trial counsel's failure to make a Rule 29 Motion constituted plain error and is appropriate for direct appeal. Generally, ineffective assistance of counsel claims arising from convictions in federal district courts are brought in a habeas action. *See* 28 U.S.C. § 2255; *Massaro v. U.S.*, 538 U.S. 500, 509 (2003). Still, the failure to make a Rule 29 motion remains reviewable on direct appeal under the *Strickland* standard. *See, e.g., United States v. Quintero-Barraza*, 78 F.3d 1344, 1351 (9th Cir. 1995); *United States v. Feldman*, 853 F.2d 648, 665 (9th Cir. 1988); *Strickland v. Washington,* 466 U.S. 668, 688 (1984). "[W]here the record adequately sets forth the facts giving rise to a claim of ineffective assistance of counsel, as it does in the instant matter, the Court will consider the defendant's argument on direct appeal. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1347 (9th Cir. 1995).

The standard for evaluating a Rule 29 motion is the same as the de novo *Jackson* due process standard used in evaluating whether the evidence is sufficient to sustain the verdict: whether viewing all the evidence in the light most favorable to the government, any rational jury could find the defendant guilty beyond a reasonable doubt. *See Charley*, 1 F.4th at 643; *United States v. Roston*, 986 F.2d 1287, 1289 (9th Cir. 1993). If no Rule 29 motion was made, however, review is for "plain error" to prevent a "miscarriage of justice. *See Id.*; *United States v. Stauffer*, 922 F.2d 508, 511 (9th Cir. 1990).

Defense attorneys should make a Rule 29 motion for judgment of acquittal at a jury trial in every case. There are examples of cases where a district judge has said he or she would have granted a judgment of acquittal if only the defense attorney had moved for one. *See, e.g., United States v. McCormick*, 72 F.3d 1404, 1411 (9th Cir. 1995) (Court gives "some deference" to the trial judge's comments at sentencing that he would have granted a post-trial Rule 29 motion if one had been made).

Even if counsel could not think of an argument, a general motion could be made. Even if counsel did not move for acquittal before the verdict, counsel could still file a short, written motion. This "general" motion for acquittal could be enough to preserve the sufficiency of the evidence claim for appeal. *United States v. Viayra*, 365 F.3d 790, 793 (9th Cir. 2004) (agreeing with "[s]everal of our sister circuits [that] have held that Rule 29 motions for acquittal do not need to state the grounds upon which they are based because 'the very nature of such motions is to question the sufficiency of the evidence to support a conviction").

A Rule 29 motion made at the close of the government's case is typically waived and reviewed only for plain error unless renewed after the close of all the evidence. *United States v. Alvarado*, 982 F.2d 659, 662 (1st Cir. 1992); *United States v. Mora*, 876 F.2d 76, 77 (9th Cir. 1989). The appellate court will review whether the total evidence presented in both the government's case and the defense case are sufficient to uphold the conviction. *United States v. Byfield*, 928 F.2d 1163, 1166 (D.C. Cir. 1991); *United States v. Bowie*, 892 F.2d 1494, 1497 (10th Cir. 1990).

The testimony by the Government's witnesses was convoluted and contradictory, and there was no reason for his counsel not to make a Rule 29 motion. The failure to make the motion both fell below the standard of reasonableness and caused Jim prejudice by leading to a lesser standard of review on appeal. Therefore, this Court should grant review and remand Jim's case for a new trial because of ineffective assistance of counsel.

IV. The District Court Erred When It Sentenced Jim To Life Imprisonment On Counts 1 & 2

The Ninth Circuit found that Jim's life sentence was reasonable. The Court reviews the substantive reasonableness of a sentence under a deferential abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 41 (2007). In *Gall*, this Court addressed the issue as to whether a sentence which constitutes a substantial variance from the Guidelines must be justified by extraordinary circumstances. This Court rejected a requirement for finding extraordinary circumstances in the case of departure from the Guidelines.

Although the Sentencing Guidelines are now advisory under *United States v. Booker*, a sentencing court shall consult them in helping to determine an appropriate sentence. 543 U.S. 220 (2005); *United States v. Cantrell*, 433 F.3d 1269, 1278-79 (9th Cir. 2006). The district court must calculate the Guidelines range accurately, and must comply with Fed. R. Crim. P. 32. *See United States v. Mix*, 457 F.3d 906, 911 (9th Cir. 2006). The scheme of downward and upward departures is essentially replaced by the requirement that judges impose a "reasonable sentence." *United States v. Zolp*, 479 F.3d

715 (9th Cir. 2007). Appellate review is to determine whether the sentence is reasonable, and a procedurally erroneous or substantively unreasonable sentence will be set aside. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008).

A sentence of life imprisonment for Counts 1 & 2 was not mandatory under the statutes. Had the district court made an individualized assessment based upon the facts of Jim's case and exercised its discretion, it would have been arrived at a total sentence that was reasonable. Jim is 60 years old and a life sentence was not reasonable.

The district court did not consider all the 18 U.S.C. § 3553(a) factors. The district court only considered Jim's prior crimes. 1-ER-29. There is no indication the court considered any of Jim's personal history, other characteristics, or any other mitigating circumstances. Jim submitted 12 letters to the court for its consideration. 1-ER-27. The district court gave no indication during its consideration of the §3553(a) factors that it reviewed or considered any of the information in Jim's letters. But the district court did consider the victim impact statements. 1-ER-29.

The Guidelines did not render a reasonable sentence. Since the district court failed to use its discretion to impose a reasonable sentence, Jim's sentence violates 18 U.S.C. § 3553(a). This Court should grant review to vacate Jim's sentence and remand for resentencing.

CONCLUSION

This case involves questions of exceptional importance involving the violation of Mr. Jim's constitutional rights. Such violations deprived Mr. Jim of a fair trial and

resulted in an unreasonable sentence. Therefore, Mr. Jim respectfully requests this Court grant certiorari.

RESPECTFULLY SUBMITTED this 19th day of January 2023.

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