

No. 23-_____

IN THE

Supreme Court of the United States

ERIC SPENCER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ANIRUDH BANSAL

Counsel of Record

CAHILL GORDON & REINDEL LLP

32 Old Slip

New York, New York 10005

(212) 701-3000

abansal@cahill.com

Counsel for Petitioner

QUESTION PRESENTED

When reviewing a district court's ruling to admit hearsay into evidence, should the Court of Appeals apply an abuse of discretion standard or engage in *de novo* review?

PARTIES TO THE PROCEEDING

The Petitioner is Eric Spencer, who was the Defendant-Appellant below. The Appellee below was the United States of America.

LIST OF PROCEEDINGS

United States Court of Appeals for the Second Circuit

No. 22-1464

United States of America, *Appellee*, v. Eric Spencer, *Defendant-Appellant*.

Date of Summary Order: August 9, 2023.

Date of Mandate and Judgment: September 1, 2023

United States District Court for the Southern District of New York

No. 21 Cr. 193 (GHW)

United States of America v. Eric Spencer, *Defendant*

Date of Final Judgment: July 5, 2022

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
LIST OF PROCEEDINGS.....	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW.....	1
JURISDICTIONAL STATEMENT	2
RULES INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION.....	8
I. Courts of Appeal Disagree on the Correct Standard of Review Applicable to Hearsay Rulings.....	8
A. Intra- and Inter-Circuit Inconsistencies.....	9
B. Resolving the Foregoing Conflicts Warrants This Court’s Review.	12
II. The District Court’s Interpretation of the Hearsay Rules Should Have Been Reviewed De Novo, Which Would Have Resulted in a Different Outcome.....	13
CONCLUSION.....	16
CERTIFICATE OF SERVICE.....	17
APPENDIX	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Barnes v. City of Cincinnati</i> , 401 F.3d 729 (6th Cir. 2005)	9, 13
<i>Blunt v. Lower Merion Sch. Dist.</i> , 767 F.3d 247 (3d Cir. 2014).....	14
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	8
<i>U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC</i> , 138 S. Ct. 960 (2018)	13
<i>Evans v. Secretary, Dep't of Corr.</i> , 703 F.3d 1316 (11th Cir. 2013)	12
<i>FIH, LLC v. Barr</i> , No. 20-489, 2021 U.S. App. LEXIS 33752, 2021 WL 5286659 (2d Cir. Nov. 15, 2021).....	12
<i>Long v. Raymond Corp.</i> , 245 F. App'x 912 (11th Cir. 2007)	13
<i>Monasky v. Taglieri</i> , 140 S. Ct. 719 (2020)	13
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996)	12
<i>Peak v. Kubota Tractor Corp.</i> , 559 F. App'x 517 (6th Cir. 2014)	8
<i>SEC v. Am. Trailer Rentals Co.</i> , 379 U.S. 594 (1965)	12
<i>SEC v. Sargent</i> , 229 F.3d 68 (1st Cir. 2000).....	13
<i>United States v. Becerra-Sanchez</i> , 650 F. App'x 310 (9th Cir. 2016)	10

<i>United States v. Belloc-Hernandez,</i> 667 F. App'x 507 (5th Cir. 2016)	11
<i>United States v. Briscoe-Bey,</i> 126 F. App'x 551 (3d Cir. 2005).....	10
<i>United States v. Caver,</i> 470 F.3d 220 (6th Cir. 2006)	9, 13
<i>United States v. Donley,</i> 878 F.2d 735 (3d Cir. 1989).....	14
<i>United States v. Dwyer,</i> 493 F. App'x 313 (3d Cir. 2012).....	11
<i>United States v. Ferguson,</i> 676 F.3d 260 (2d Cir. 2011).....	12
<i>United States v. Graham,</i> 486 F. App'x 265 (3d Cir. 2012).....	11
<i>United States v. Gutierrez-Salinas,</i> 640 F. App'x 690 (9th Cir. 2016)	9, 13
<i>United States v. Hankton,</i> 51 F.4th 578 (5th Cir. 2022).....	11
<i>United States v. Jaffal,</i> 79 F.4th 582 (6th Cir. 2023).....	10
<i>United States v. Johnson,</i> 875 F.3d 1265 (9th Cir. 2017)	10
<i>United States v. Mitchell,</i> 145 F.3d 572 (3d Cir. 1998).....	10, 13, 14
<i>United States v. Mounts,</i> 584 F. App'x 482 (9th Cir. 2014)	9
<i>United States v. Spencer,</i> 21 Cr. 193 (S.D.N.Y. 2021) (GHW)	1
<i>United States v. Spencer,</i> No. 22-1464, 2023 WL 5091827 (2d Cir. Aug. 9, 2023)	1
<i>United States v. Stokes,</i> 392 F. App'x 362 (6th Cir. 2010)	9

<i>United States v. Watson,</i> 552 F. App'x 480 (6th Cir. 2014)	9
---	---

<i>Wagner v. Cty. of Maricopa,</i> 747 F.3d 1048 (9th Cir. 2013)	8
---	---

Statutes

18 U.S.C. § 1951.....	1
-----------------------	---

28 U.S.C. § 1254(1)	2
---------------------------	---

Other Authorities

Fed. R. Evid. 801.....	3
------------------------	---

Fed. R. Evid. 802.....	3, 14
------------------------	-------

Fed. R. Evid. 803.....	3, 14, 15
------------------------	-----------

19 Moore's Federal Practice - Civil § 206.04 (2023)	14
---	----

OPINIONS BELOW

On March 22, 2021, a Grand Jury in the Southern District of New York returned an indictment charging Petitioner Mr. Spencer with Hobbs Act Robbery and Conspiracy to Commit Hobbs Act Robbery, each in violation of 18 U.S.C. § 1951. *See United States v. Spencer*, 21 Cr. 193 (S.D.N.Y. 2021) (GHW). The case was tried before a jury beginning on March 22, 2022, and on March 28, 2022 the jury returned a verdict of guilty on both counts. On July 5, 2022, the District Court entered a Final Judgment, which is attached hereto as part of the Appendix. (App. at 62a–69a).

On June 7, 2022, Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed in a Summary Order filed on August 9, 2023. *United States v. Spencer*, No. 22-1464, 2023 WL 5091827 (2d Cir. Aug. 9, 2023). The Second Circuit issued its mandate and judgment on September 1, 2023. (App. at 53a–61a). The Second Circuit’s Opinion and mandate are attached hereto as part of the Appendix. (*Id.* at 1a–9a; 53a–61a).

JURISDICTIONAL STATEMENT

The Second Circuit issued its opinion on August 9, 2023. (*Id.* at 1a–9a). The mandate was issued on September 1, 2023. (*Id.* at 53a–61a). This Court has jurisdiction to review final decisions of the Circuit Courts of Appeal pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

Fed. R. Evid. 801. Definitions That Apply to This Article; Exclusions from Hearsay

...

- (c) Hearsay. “Hearsay” means a statement that:
 - (1) the declarant does not make while testifying at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Fed. R. Evid. 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Fed. R. Evid. 803. Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

STATEMENT OF THE CASE

The charges against Petitioner, set forth in a two-count indictment alleging conspiracy to commit Hobbs Act Robbery and Hobbs Act Robbery, stem from a February 2, 2021 theft of several handbags and other merchandise from a Chanel luxury-brand store on Spring Street in Manhattan. Petitioner was arrested in Florida on February 20, 2021 and has remained in custody since then.

United States District Judge Gregory H. Woods presided over the jury trial, which took place from March 22 to 28, 2021. During the trial, the District Court improperly admitted hearsay statements by two witnesses, both Chanel store security guards (“Guard-1” and “Guard-2”), which were recorded on police officer body camera video and a 911 call, respectively.

First, the District Court improperly admitted statements by Guard-1 to police officers, recorded on police officer body camera video, as excited utterances. Guard-1’s statements provided the highly prejudicial impression that Petitioner possessed a firearm, a disputed issue at trial. The statements were (1) that one of the suspects had a gun; (2) a description of the handle of the gun; and (3) that the suspect carrying it had a dark jacket. (App. at 29a:15–31a:13).

Guard-1’s hearsay statements did not qualify as excited utterances because they were made after Guard-1 had ample time to reflect on the events she was recounting. Guard-1’s hearsay statements were also not based on her personal knowledge and were self-contradictory, depriving them of the indicia of reliability required for admission.

More specifically, approximately *six minutes* after the offense, and after Guard-1 left the scene and discussed the offense with others, Guard-1 stated to officers, “[t]hey had a gun” three times. (*Id.* at 29a:15–30a:5). However, when asked by police officers for a description of the gun, Guard-1 immediately backtracked stating, “I didn’t see it.” (*Id.* at 30a:3). Guard-1 then contradicted herself again, stating, “a little bit of the handle was brown . . . no black. He had it in his pants.” (*Id.* at 30a:4). Guard-1 confirmed at trial that she was unsure of ever having seen a gun during the offense. (ECF No. 105 at 85:8–9, 13–15; 93:10–12; 100:7–13). Clearly these unreliable, contradictory statements, made after reflection and consultation with others, did not qualify as excited utterances.

Second, the District Court improperly admitted hearsay statements by a second witness (“Guard-2”) to a 911 operator, also to the effect that Petitioner possessed a firearm, as excited utterances and present sense impressions. (App. at 19a:23–29a:14; 51a:1–52a:15). Guard-2’s statements included: (i) “[Y]es, one of the men [was] armed” (*id.* at 20a:18–21); (ii) “[O]ne male had a gun, but it was four suspects” (*id.* at 20a:24–25); and (iii) “handgun,” when asked by the operator what kind of gun he had seen. (*Id.* at 20a:24–21a:1).

The 911 call recording and Guard-2’s trial testimony make clear that his statements to the 911 operator were based on conjecture and information relayed from others, and therefore should not have been admitted. At the start of the 911 call, Guard-2 can be heard discussing the incident with others, including Guard-1, who told Guard-2 multiple times, “he had a gun.” (*Id.* at 20a:10–21). Moreover,

Guard-2's statement, "yes, one of the men [was] armed" was made only after the 911 operator asked, "someone in the back[ground] saying that they saw a gun?" (*Id.* at 20a:12–21). Guard-2 testified at trial that he told the 911 operator that he saw a gun only "[b]ecause my officer [Guard-1] said she had seen it," not because Guard-2 had observed the gun himself. (ECF No. 105 at 15:4–18). Guard-2's testimony also makes clear that he simply *assumed* the suspect had a gun based on his past experience and the suspect's body language. For example, he testified that "in past experience, I've also had stuff happen to me in my line of work . . . I would know that if someone reaches for something, and they pull it out, they're going to use it. I always kept that assumption." (ECF No. 103 at 48: 11–24). Guard-2 also testified that he speculated the suspect had a gun because although he "could only see on an angle," he saw that the suspect "reached inside of his waistband and actually tucked his hand in. So it's like, okay, he has something, and he will basically probably pull it out and use it." (*Id.* at 47:11–16).

The erroneous admission of these out-of-court statements was highly prejudicial to Petitioner because it allowed the jury repeatedly to hear inadmissible evidence to the effect that Petitioner possessed a weapon during the charged robbery, a crime in which force is an element the Government was required to prove.

The trial culminated in Petitioner's conviction on one count of conspiracy to commit Hobbs Act Robbery and one count of Hobbs Act Robbery. On June 30, 2022, the District Court sentenced Petitioner to 87 months' imprisonment, followed by

three years of supervised release. The District Court also imposed restitution in the amount of \$204,500. (App. at 62a–69a).

Petitioner filed a timely notice of appeal to the Second Circuit on July 7, 2022, challenging the admissibility of the hearsay statements recorded on the body camera footage and 911 call. The Second Circuit reviewed the admissibility of the statements under an abuse of discretion standard.¹ The Second Circuit then held that the District Court did not abuse its discretion in admitting the disputed statements, and affirmed the judgment of the District Court. (*Id.* at 1a–9a).

REASONS FOR GRANTING THE PETITION

I. Courts of Appeal Disagree on the Correct Standard of Review Applicable to Hearsay Rulings.

This Court has not yet addressed the standard of appellate review that should be applied to a trial court’s rulings on hearsay, and as several United States Courts of Appeal have recognized, the proper standard of review for the admission of hearsay evidence is unclear. *See, e.g., Peak v. Kubota Tractor Corp.*, 559 F. App’x 517, 521 (6th Cir. 2014) (“[T]he standard of review for admission of hearsay evidence is somewhat unclear.”); *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013) (“[I]t is not entirely clear whether construction of a hearsay rule is a matter of

¹ Although Petitioner did not raise the issue of the standard of review with regard to rulings on hearsay in his appeal to the Second Circuit, the Supreme Court has observed that “the Court’s practice of declining to address issues left unresolved in earlier proceedings is not an inflexible rule. Departure from the rule is appropriate in ‘exceptional’ circumstances.” *Boumediene v. Bush*, 553 U.S. 723, 772 (2008). Exceptional circumstances are present here because the introduction of inadmissible evidence that influenced the jury’s determination of guilt was upheld by the Second Circuit.

discretion or a legal issue subject to *de novo* review.”). As detailed below, there is intra- and inter-circuit inconsistency regarding the standard of appellate review that should apply to a district court’s determination on the admissibility of evidence under the hearsay rules and exceptions.

A. Intra- and Inter-Circuit Inconsistencies.

The Sixth and Ninth Circuits have been particularly inconsistent with respect to the standard of review applicable to hearsay rulings. For example, several panels in the Sixth and Ninth Circuits have determined that a district court’s decision to admit hearsay evidence is reviewed *de novo*. *See, e.g., Barnes v. City of Cincinnati*, 401 F.3d 729, 742 (6th Cir. 2005) (“This Court reviews a district court’s ruling to admit evidence over a hearsay objection *de novo*.); *United States v. Caver*, 470 F.3d 220, 239 (6th Cir. 2006) (“This court reviews the district court’s decision to admit hearsay evidence *de novo*.); *United States v. Watson*, 552 F. App’x 480, 486 (6th Cir. 2014) (“We review a district court’s decision to admit evidence over a hearsay objection *de novo*.); *United States v. Gutierrez-Salinas*, 640 F. App’x 690, 692 (9th Cir. 2016) (“[This court] reviews the admission of evidence under an exception to the hearsay rule . . . *de novo*.”).

In contrast, other panels in the Sixth and Ninth Circuits have reviewed rulings regarding the admissibility of purportedly hearsay evidence for abuse of discretion. *See, e.g., United States v. Stokes*, 392 F. App’x 362, 365 (6th Cir. 2010) (“This court reviews a district court’s hearsay determinations for abuse of discretion.”); *United States v. Mounts*, 584 F. App’x 482, 484 (9th Cir. 2014) (“We review the trial court’s

decision to admit evidence under a hearsay exception for an abuse of discretion.”); *United States v. Becerra-Sanchez*, 650 F. App’x 310, 311 (9th Cir. 2016) (reviewing for abuse of discretion the district court’s decision to admit hearsay statements under then-existing state of mind exception).

And in some cases, the Sixth and Ninth Circuits have applied a third standard of review, a two-step process in which they review the district court’s interpretation of a hearsay rule *de novo*, and the admission of evidence under a hearsay exception for abuse of discretion. *See, e.g., United States v. Jaffal*, 79 F.4th 582, 598 (6th Cir. 2023) (“Although we review a district court’s evidentiary rulings under the abuse-of-discretion standard, the issue of ‘whether a statement is hearsay is a legal question that we review *de novo*.’”); *United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017) (“We review the interpretation of the rule against hearsay *de novo*, and the admission of evidence under a hearsay exception for abuse of discretion.”).

Panels in the Third Circuit have fluctuated between applying a purely *de novo* standard of review, or using a two-step test. *Compare United States v. Mitchell*, 145 F.3d 572, 576–77, 580 (3d Cir. 1998) (exercising plenary or *de novo* review over the district court’s admission of hearsay evidence, concluding that the district court erred in introducing the evidence as either a present sense impression or excited utterance, and vacating the conviction and remanding for a new trial); *United States v. Briscoe-Bey*, 126 F. App’x 551, 552 (3d Cir. 2005) (exercising plenary review in considering whether the district court erred in admitting hearsay evidence in light of appellant’s contention that some of the evidence to which he objected could not be admitted on

any basis) *with United States v. Graham*, 486 F. App'x 265, 269 (3d Cir. 2012) ("We review a district court's admission of alleged hearsay statements for abuse of discretion, but our review is plenary as to the district court's interpretation of the Federal Rules of Evidence."); *United States v. Dwyer*, 493 F. App'x 313, 316 (3d Cir. 2012) ("We exercise plenary review over the question whether a statement is hearsay, and review for abuse of discretion a district court's application of hearsay exceptions.").

The Fifth Circuit has also shown inconsistency in its approach. Unlike the Third Circuit, which alternates between a two-step review and a purely *de novo* review, panels in the Fifth Circuit have alternated between applying a two-step test, and reviewing for abuse of discretion only. For example, in *United States v. Hankton*, 51 F.4th 578, 600–01 (5th Cir. 2022), the court stated that it "review[s] *de novo* 'the district court's legal conclusion about whether a statement is hearsay. A district court's decision to admit or exclude evidence is reviewed for abuse of discretion Any error in admitting evidence is subject to harmless error review.'" In contrast, in *United States v. Belloc-Hernandez*, 667 F. App'x 507, 508 (5th Cir. 2016), the panel reviewed the district court's decision to admit hearsay evidence for abuse of discretion, with no mention of an initial *de novo* review regarding the legal conclusion about whether a statement is hearsay.

The Court of Appeals below has also exhibited inconsistency in determining the proper standard of review for evidentiary rulings concerning hearsay. For example, in *United States v. Choudhry*, the Second Circuit reviewed the district

court’s hearsay rulings for abuse of discretion. 649 F. App’x 60, 62 (2d Cir. 2016). However, the Second Circuit has also stated that certain hearsay determinations are reviewed *de novo*. For example, in *United States v. Ferguson*, 676 F.3d 260, 285 (2d Cir. 2011), the Second Circuit reviewed *de novo* whether a particular statement constituted double-hearsay. The Second Circuit has also applied the two-step test used intermittently by other Courts of Appeal. *See, e.g., FIH, LLC v. Barr*, No. 20-489, 2021 U.S. App. LEXIS 33752, at *11, 2021 WL 5286659, at *4 (2d Cir. Nov. 15, 2021) (“Whether certain evidence is hearsay is generally a question of law that is reviewed *de novo*. But ‘a district court’s hearsay rulings based upon factual findings or the exercise of its discretion warrant additional deference.’”).

B. Resolving the Foregoing Conflicts Warrants This Court’s Review.

As this Court has previously noted, consistency in appellate review is vital in safeguarding against arbitrary decision making, ensuring that the “same question” is not decided “one way between one set of litigants and the opposite way between another.” *SEC v. Am. Trailer Rentals Co.*, 379 U.S. 594, 620 (1965). Furthermore, standards of review “can often be outcome-determinative.” *Evans v. Secretary, Dep’t of Corr.*, 703 F.3d 1316, 1336 (11th Cir. 2013) (en banc) (Jordan, J., concurring) (“Standards of review are critical to the business of judging, and can often be outcome determinative.”). Accordingly, this Court has previously intervened to establish uniform standards of review among federal courts. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 695 (1996) (granting certiorari to “resolve the conflict among the Circuits over the applicable standard of appellate review” governing

determinations of reasonable suspicion and probable cause); *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020) (“Certiorari was further warranted to resolve a division in Courts of Appeals over the appropriate standard of appellate review” of district court’s determination of child’s habitual residence under Hague Convention); *U.S. Bank Nat’l Ass’n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018) (granting certiorari to clarify correct standard of review for a bankruptcy court’s determination of non-statutory insider status).

II. The District Court’s Interpretation of the Hearsay Rules Should Have Been Reviewed *De Novo*, Which Would Have Resulted in a Different Outcome.

We respectfully urge this Court to grant *certiorari* review and to adopt the approach of certain panels of the Third, Sixth, and Ninth Circuits, and require Courts of Appeal to review trial courts’ interpretations of hearsay rules, and their decisions to admit hearsay evidence over a defendant’s objection, *de novo*. *See Barnes*, 401 F.3d at 742; *Caver*, 470 F.3d at 239; *Gutierrez-Salinas*, 640 F. App’x at 692; *Mitchell*, 145 F.3d at 576.

As several Courts of Appeal have recognized, a district court’s interpretation of the Federal Rules of Evidence is subject to *de novo* review. *See, e.g., SEC v. Sargent*, 229 F.3d 68, 79 (1st Cir. 2000) (“The interpretation of the Federal Rules of Evidence is a question of law which we review *de novo*.”); *Long v. Raymond Corp.*, 245 F. App’x 912, 913 (11th Cir. 2007) (“A district court’s interpretation of federal procedural rules, such as the Federal Rules of Evidence, is subject to *de novo* review.”). That some Circuits treat the *interpretation* of the hearsay rules

differently than the *application* of those rules for purposes of appellate review is, respectfully, a false dichotomy. The application of hearsay rules is clearly an interpretation of the Federal Rules of Evidence, and should likewise be subject to *de novo* review.

More specifically, hearsay is not admissible unless, as is relevant here, one of the enumerated exceptions in Rule 803 applies. Fed. R. Evid. 802. In order to make an evidentiary ruling on a particular statement, the district court must first determine whether a statement is hearsay, and then whether that statement is subject to one of the enumerated exceptions under Rule 803. This analysis necessarily requires the district court to interpret the Federal Rules of Evidence, which is a question of law subject to *de novo* review. *See, e.g., United States v. Donley*, 878 F.2d 735, 737 (3d Cir. 1989) (stating that “whether the [challenged] statements . . . qualify as an exception to the rule barring hearsay evidence” is subject to plenary² review); *Mitchell*, 145 F.3d at 576 (exercising *de novo*, or plenary review over district court’s holding that hearsay evidence was admissible under the present sense impression, excited utterance, or catch all exceptions because its review involved “considering whether the district court correctly interpreted the Federal Rules of Evidence and relevant case law”).

² The Third Circuit “discern[s] no difference between the plenary and *de novo* standards of review.” *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 n.30 (3d Cir. 2014). *See also* 19 Moore’s Federal Practice - Civil § 206.04 (2023) (“The *de novo* standard has also been termed ‘plenary’[.]”).

Accordingly, the Court of Appeals below should have reviewed the District Court's conclusion that the hearsay statements at issue fell under one of the Rule 803 exceptions *de novo*, rather than under an abuse of discretion standard.

The District Court's rulings regarding the body camera footage and 911 call were erroneous and affected the Petitioner's substantial rights. The statements at issue lacked intrinsic reliability and were not based on personal knowledge, and failed to meet Rule 803's requirements for admission under the present sense impression and excited utterance exceptions. Moreover, the rulings affected the substantial rights of the Petitioner because the admission of highly prejudicial hearsay evidence tending to show the Petitioner possessed a gun went to an essential element of the offenses charged — the threatened or actual use of force — and improperly affected the jury's verdict. If the Court of Appeals below had reviewed the District Court's interpretation of the hearsay exceptions *de novo*, the hearsay evidence would have been excluded and Petitioner's conviction would have been reversed.

CONCLUSION

Based on the arguments presented above, Mr. Spencer respectfully requests that the Court grant his Petition for *Certiorari*.

/s/ Anirudh Bansal

Anirudh Bansal
CAHILL GORDON & REINDEL LLP
32 Old Slip
New York, New York 10005
(212) 701-3000
abansal@cahill.com

Counsel of Record

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

ERIC SPENCER
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Second Circuit.
Second Circuit Case No. 22-1464

CERTIFICATE OF SERVICE

I, Anirudh Bansal, certify that today, November 7, 2023, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of *Certiorari* and the Motion to Proceed *In Forma Pauperis* was served on the Solicitor General of the United States by Federal Express, addressed to:

Elizabeth Prelogar,
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.,
Washington, DC 20530-0001

Dated: November 7, 2023

/s/ Anirudh Bansal
Anirudh Bansal
Counsel of Record

CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(a))

This brief was prepared using Microsoft Word. According to the word count done using that program, this motion contains 3,514 words total.

This brief was written using the Century Schoolbook font, a proportionally-spaced typeface with serifs, in 12-point font size. This brief complies with the type-volume limitation, typeface requirements, and type style requirements of Fed. R. App. P. 32(a). In addition, I have scanned the brief for viruses and believe it to be virus-free.

Dated: November 7, 2023

/s/ Anirudh Bansal
Anirudh Bansal
Counsel of Record