No. __-_____

IN THE
SUPREME COURT OF THE UNITED STATES

WALLY IRIZARRY-SISCO

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether Federal Rule of Evidence 803(2), the hearsay exception for "excited utterances," encompasses out of court statements that (a) go beyond the exciting event to describe historical facts, (b) are elicited not by the exciting event but by the questioning of another person, (c) in a child sex case.

2. Whether the use of acquitted conduct to enhance a sentence violates the Double Jeopardy Clause, the Due Process Clause, and/or the Sixth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wally Irizarry-Sisco respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the judgment entered against Irizarry, *United States v. Irizarry-Sisco*, No. 19-1763 (1st Cir. Nov. 22, 2023), is reported at 87 F.4th 38 and is included in the Appendix at App.01. The judgment of conviction entered by the district court, pursuant to a jury verdict, in *United States v. Irizarry-Sisco*, D.P.R. 15-cr-00391-PAD-1, is included in the Appendix at App.13.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1), because the Court of Appeals affirmed the judgment of the District Court on November 22, 2023.

APPOINTMENT OF COUNSEL

Undersigned counsel has been appointed by the Court of Appeals, pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, to represent Mr. Irizarry in this case.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U.S. Constitution, Amendment V

> No person shall be . . . be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law[.]

U.S. Constitution, Amendment VI

> 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.

Federal Rule of Evidence 803

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness....
>
> > (2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

STATEMENT OF THE CASE

On October 23, 2018, after a six-day trial, a jury in the District of Puerto Rico convicted Wally Irizarry-Sisco of one count of knowingly transporting a minor to engage in sexual activity, 18 U.S.C. § 2423(a), and acquitted him of a second count of the same, involving the same minor. The government alleged that Mr. Irizarry took the minor, Minor Y, to two separate motels in Puerto Rico, on two separate occasions, to engage in sexual activity. The travel was entirely within Puerto Rico, which the First Circuit has found sufficient to violate the federal statute. *See United States v. Cotto-Flores*, 970 F.3d 17, 27-28 (1st Cir. 2020), *cited in United States v. Irizarry-Sisco*, 87 F.4th 38, 43 n.4 (1st Cir. 2023).

During the trial, the district court permitted Minor Y's neighbor to testify to out-of-court statements Minor Y made in response to the neighbor's questioning, upon hearing Mr. Irizarry's truck approaching. *See Irizarry-Sisco*, 87 F.4th at 43. The court

admitted the statements as "excited utterances," under Fed. R. Evid. 803(2), even though: (a) the statements were elicited by the neighbor's questioning about what Mr. Irizarry "did to [her]," not by the exciting event (the truck); (b) the statements did not concern the exciting event but, rather, comprised an account of past facts that occurred approximately a week prior – the charged offense conduct; and (c) the statements occurred in a child sex case, which present "special evidentiary problems." *See id*. at 47-48.

During its deliberations, the jury submitted two notes with three questions before returning its verdict. *See United States v. Irizarry-Sisco*, D.P.R. 15-cr-00391-PAD-1, D.E. 226, 227. It convicted Mr. Irizarry on the first-in-time allegation (which involved less serious sexual conduct) and acquitted him of the second-in-time allegation. Nevertheless, at sentencing the district court found that Mr. Irizarry engaged in a "pattern" of conduct and applied a 5-point Guidelines enhancement. *See id*. at 44. That enhancement was necessarily based on the acquitted conduct, without which there was no "pattern." The court sentenced Mr. Irizarry-Sisco to 235 months (nearly 20 years) of incarceration. *See* App.14.

He appealed to the First Circuit, raising both of the issues presented here. On November 22, 2023 – more than two-and-one-half years after the oral argument – the First Circuit affirmed the judgment and sentence. App.1.

REASONS FOR GRANTING THE PETITION

I. The Excited Utterance Hearsay Exception Cannot Be Interpreted So Broadly As to Encompass Testimonial Statements By a Declarant, About the Charged Crime, Any Time the Declarant is Excited Thereafter.

The First Circuit affirmed the admission of hearsay statements that were: (a) made in response to direct questioning; (b) about the offense conduct, not about the exciting event; and (c) made by a child in a sexual assault case.

The district court permitted Minor Y's neighbor to testify, under Fed. R. Evid. 803(2), to statements Minor Y purportedly made to her neighbor after Minor Y heard Mr. Irizarry's truck approaching. This took place a week after the alleged sexual abuse incident (of which Mr. Irizarry was acquitted). The neighbor observed that Minor Y became startled at the sound of the truck and the neighbor asked Minor Y if Mr. Irizarry had done anything to her. "Minor Y initially denied that Irizarry had done anything to her," but the neighbor continued to question her, using highly leading questions, until Minor Y said Mr. Irizarry had done something. *See Irizarry-Sisco*, 87 F.4th at 43, 45-46.

The First Circuit's decision deals a blow to the evidentiary rules concerning hearsay and defendants' rights under the Confrontation Clause. It permits the introduction of hearsay statements about the charged offense, by a declarant who is "re-excited," at any time, by any kind of stimuli. *See id.* (quoting *United States v. Napier*, 518 F.2d 316, 317 (9th Cir. 1975), in which a crime victim was "re-excited" by the sight of a photograph of her alleged attacker in the newspaper, eight weeks after the attack). It cannot be correct that any time a declarant is excited by a triggering

event, her/his core testimonial statements *about the crime* can be admitted through a third party – whether an aunt, a cop, or anyone else. *See Ohio v. Clark*, 576 U.S. 237, 243-48, 135 S. Ct. 2173, 2179 (2015) (suggesting hearsay rules inform Confrontation Clause determination)); *id.* at 252 (Scalia, J., concur.) (discussing core testimonial statements). The statements here did not concern the exciting event itself, as the Rule 803(2) exception traditionally operated, and as the First Circuit all but acknowledged. *See Irizarry-Sisco*, 87 F.4th at 48 ("'Relating to' an event under Rule 803(2) . . . . encompasses those situations in which the 'subject matter of the statement is such as would likely be evoked by the event'" (citations omitted)).

The First Circuit's decision on this point was driven by emotion and sympathy for Minor Y, not the application of law. *See, e.g., id.* at 46 ("[t]he prospect of a third consecutive weekend of sexual abuse, when the second [*of which Irizarry was acquitted*] had been a dramatic escalation from the first, was undoubtedly frightening for Minor Y.").

II. The Use of Acquitted Conduct to Enhance Mr. Irizarry's Sentence Is Unfair and Unconstitutional.

The district court applied a 5-level enhancement for a "pattern of activity involving prohibited sexual conduct," based on the conduct of which Mr. Irizarry was acquitted (and without which there was no "pattern of activity"). *See Irizarry-Sisco*, 87 F.4th at 50-51. The First Circuit noted that the Sentencing Commission is considering an amendment to preclude the use of acquitted conduct, *see id.* at 51 n.7, but that, "as the law now plainly stands, acquitted conduct, if proved by a preponderance of the evidence, . . . may form the basis for a sentencing enhancement."

Id. at 51. Therefore, it found no clear error in the district court having credited the child victim's "version of events," by a preponderance of the evidence, that the jury necessarily rejected. *Id*.

The use of acquitted conduct to enhance Mr. Irizarry's sentence violated the Double Jeopardy Clause, the Sixth Amendment, and the Due Process Clause. *See Jones v. United States*, 574 U.S. 948, 949, 135 S. Ct. 8 (2014) (Scalia, Ginsburg, and Thomas, JJ.) (dissenting from the denial of. *certiorari*) ("Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, . . . and must be found by a jury, not a judge" (internal quotation marks and citation omitted)); *see also United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part); *United States v. Sabillon-Umana*, 772 F. 3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.); *United States v. Watts*, 519 U. S. 148, 170, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (Kennedy, J., dissenting).

III. The Court Should Hold this Petition Until the U.S. Sentencing Commission Addresses the Acquitted Conduct Issue and Then Grant, Vacate and Remand this Case for Further Proceedings.

A pronouncement by the Sentencing Commission on the use of acquitted conduct at sentencing is expected imminently. *See Irizarry-Sisco*, 87 F.4th at 51 n.7 (quoting statement of the Chair of the U.S. Sentencing Commission that, "'We intend to resolve questions involving acquitted conduct [in 2024]'"); *McClinton v. United States*, 143 S. Ct. 2400, 2401 (2023) (statement of Sotomayor, J. respecting the denial of *certiorari*) ("[t]he Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-

conduct sentencing in the coming year. If the Commission does not act expeditiously . . . however, this Court may need to take up the constitutional issues presented"); *id.* at 2403 (statement of Kavanaugh, with Gorsuch, and Barrett, JJ., respecting the denial of *certiorari*) ("[t]he use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions. But the Sentencing Commission is currently considering the issue. It is appropriate for this Court to wait for the Sentencing Commission's determination").

Accordingly, Mr. Irizarry asks that the Court hold this petition until either the Sentencing Commission amends the Sentencing Guidelines or this Court grants *certiorari* to resolve the acquitted conduct issue, and then grant, vacate, and remand this case for resentencing.

CONCLUSION

For the foregoing reasons, Petitioner Wally Irizarry-Sisco respectfully requests that this Court grant his petition for a writ of *certiorari*, vacate the decision of the Court of Appeals, and remand to the district court for further proceedings.

Respectfully submitted,

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