No.

In the Supreme Court of the United States

Akeen Ocean,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 'deliberate elicitation' for purposes of *Massiah v. United States*, 377 U.S. 201 (1964), occur only in cases where the government has expressly directed its informant to seek out and obtain incriminating statements from a post-indictment criminal defendant, or may courts find a *Massiah* violation in the absence of express direction in cases where the government has otherwise intentionally created a situation likely to, and which does, produce incriminating statements?

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TABLE OF AUTHORITIES

Petitioner Akeen Ocean respectfully requests issuance of a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, App:1-30,[1] is set forth at 904 F.3d 25 (1st Cir. 2018). Oral findings by the United States District Court for the District of Maine made on the record during trial are set forth at App:74-76.

JURISDICTION

The decision of the Court of Appeals for the First Circuit was issued on September 11, 2018. On November 29, 2018 Justice Stephen Breyer granted an extension of time within which to file a petition for a writ of certiorari up to and including February 8, 2019. See Docket 18A565. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

The District Court had original jurisdiction over Petitioner's case by virtue of its jurisdiction over offenses against the laws of the United States under 18 U.S.C. § 3231. The Court of Appeals had appellate jurisdiction over the District Court judgment pursuant to 28 U.S.C. § 1291.

[1] References to the Appendix are identified as App:Page(s).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution 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."

STATEMENT OF THE CASE

Petitioner's case highlights a split among the Circuit Courts of Appeal regarding the scope of the Sixth Amendment right to counsel as explicated in *Massiah v. United States*, 377 U.S. 201 (1964), and more particularly on the Circuits' differential interpretation of the government's affirmative obligation to respect an indicted defendant's right to counsel and not create circumstances in which a defendant is likely to make incriminating statements to a government agent outside the presence of counsel. The prosecution immunized Petitioner's friend and former girlfriend and used her as both a source of information about a charged drug distribution conspiracy and an important trial witness against Petitioner, but never directed her not to speak with Petitioner regarding his case or her role in it following his indictment. Meanwhile, the government pursued and obtained a pretrial detention order against Petitioner, thus ensuring he would spend more than year incarcerated and isolated while awaiting trial, where he would be likely to seek solace from an old friend who was familiar and appeared to sympathize with his plight. When the immunized friend/government witness predictably solicited contact with Petitioner and engaged in recorded conversations with him that contained incriminating statements about the charged offense and Petitioner's anticipated defense to it, the prosecution sought to admit those statements at trial as substantive evidence of guilt.

Because Petitioner was tried in the First Circuit, which requires a showing that an informant received government-issued 'marching orders' to gather information regarding a particular post-indictment defendant as a precondition to a *Massiah* violation, the District Court treated the recorded statements as the product of 'luck or happenstance' and the prosecution was permitted to introduce them at trial. The same outcome would apply if Petitioner were tried in the Second or Eighth Circuit. By contrast, had Petitioner been tried in the Sixth, Third, Ninth, or Eleventh Circuit, he would have been entitled to a multi-factorial analysis focused on whether his incriminating statements made to a prosecution-associated actor were the predictable product of circumstances the government created, and would likely have seen those statements excluded as having been elicited in violation of his right to counsel. These divergent standards mean that as a practical matter, Sixth Amendment rights vary geographically within the United States and provide less protection to defendants tried in 'express direction' jurisdictions. This Court's intercession is necessary to ensure that post-indictment criminal defendants enjoy the same level of protection of their constitutional right to counsel regardless of where they are tried.

A. The Charged Conspiracy to Traffic Cocaine Base from Connecticut for Distribution in Maine

Evidence at trial showed that a number of men from New Haven, Connecticut engaged in a conspiracy to traffic cocaine base (crack) from New Haven to Maine for distribution in Bangor and neighboring towns. Some of

the men were associated with an offshoot of the Bloods street gang, and authorities' attention had first focused on them as a part of an investigation by the Bureau of Alcohol, Tobacco, and Firearms. The conspirators transported the crack primarily by car, with Bangor-area addicts driving the principals to New Haven and back for resupplies in exchange for payment in cash and drugs.

The Connecticut men cultivated local addicts and used them as distribution channels through a simple commission system: for each four or five grams of crack for which the addict could return full payment to the distributor (frequently by redistributing the crack to other addicts), he or she would receive a gram for personal consumption. Other addicts would assist the distributors by driving them around the area or acting as couriers, dropping off drugs to end users and picking up and returning payment. Not all was harmonious in these relationships, however. Once the distributors made direct connections with end users they often cut out these middleman-addicts and made the sales themselves, thus saving themselves the cost of the gram they would previously have provided as a commission.

The government presented its case primarily through Rodrigo Ramirez, one of the Connecticut men, who testified pursuant to guilty plea and cooperation agreements in connection with racketeering, murder, and drug charges he faced in the District of Connecticut, and seven of the local addicts. Of these addict-witnesses all but one testified pursuant to their own

guilty plea and cooperation agreements made to resolve charges associated with the alleged conspiracy. Only Christie Thetonia, a former girlfriend of Petitioner's who remained close to him, received immunity in exchange for her testimony and avoided any conviction for her role in the trafficking and distribution operation.

Ramirez explained how the conspirators insinuated themselves into the homes and lives of local addicts, used them to access the local customer base via the commission sales system, and eventually appropriated each addict's contacts for themselves, after which the locals took on support roles providing housing to the main actors, ferrying drugs up from Connecticut and sale proceeds back, and acting as couriers for drugs and money in connection with local operation. Addict-witnesses, including Thetonia, supported this overview testimony with details of their particular interactions with and observations of the lead Connecticut conspirators and their local minions, providing evidence on the conspiracy's reach, the specific roles played by each participant, and the amount of drugs each of them consumed and distributed.

B. The Limited Direct Evidence of Petitioner's Participation in the Conspiracy and the Role of His Post-Charge Jailhouse Statements to Thetonia in the Government's Case

Even in the context of the government's narrative—which was focused primarily on his co-defendant Jermaine Mitchell, who was one of the lead conspirators—Petitioner was a marginal figure in the world of Bangor-area crack distribution during the period of the Connecticut-to-Maine trafficking

scheme.[2] Testimony from Ramirez and a few of the local addicts established that Petitioner purchased a significant amount of crack from the conspirators and redistributed it to his own customers. However, it also showed that, unlike the other local addicts, Petitioner successfully fended off the conspirators' attempts to appropriate his customer contacts and refused to assume the support roles in the conspiracy taken on by the other locals once they lost their ability to operate independently.

In order to shore up its relatively weak case against Petitioner, the government introduced and played for the jury recordings of his jailhouse conversations, conducted both over the phone and in person, with Thetonia, the former girlfriend of his whom the government had immunized and used to build its conspiracy case. In the jail recordings, Petitioner told Thetonia "everybody you hung with or hook me up with slay me" and expressed particular concern that three of the local addict-witnesses would testify that they "got that crack from me." App:97-98. He expressed concern that these addict-witnesses, as well as Ramirez, would inflate the amount of crack he had purchased or distributed, and that he was being falsely associated with the New Haven conspirators because both he and they were African-American. App:79-80, 85, 98. Petitioner also told Thetonia he believed he had hurt himself with statements he made to investigating police officers that "I was a middleman. I might have got some money out, I might have got a

[2] Mitchell and Petitioner were the only two people implicated in the charged conspiracy not to plead guilty or otherwise cooperate with the prosecution.

couple dollars out of it, I might have got some crack." App:86. Finally, he told Thetonia she could help protect him without hurting herself: "they can't take that [immunity agreement] back, they already give it to you. You did, you got your immunity when you testified at the grand jury. All you gotta do is say man, I'm not coming, or I'll be there but then don't come" or, alternatively, "just say he [Petitioner] didn't have nothing to do with it. That's all you gotta say." Appx:90, 101. Aside from discussing his case with Thetonia, Petitioner also confided to her about anxiety attacks he was having while in jail awaiting trail and his worries about how his aging parents and children would fare with him in prison. Appx:77, 87, 94-95, 106-10.

C. The District Court's Ruling on Petitioner's *Massiah* Objection to Introduction of the Recorded Jailhouse Conversations

Petitioner's former girlfriend Thetonia participated in a proffer session with the government and was given immunity in exchange for grand jury and future trial testimony that would incriminate Petitioner in late summer 2014. App:113-14. Petitioner was indicted in February 2015 and spent the sixteen months between then and his June 2016 trial in jail on the government's motion. It was during Thetonia's phone calls with and visits to Petitioner in jail that the uncounseled, incriminating statements used against him at trial were recorded, and Petitioner's objection to introduction of these statements pursuant to *Massiah* was based on the argument "that allowing the government agent to—to interact with [a post-indictment defendant who had asserted his right to counsel] when he's supposed to be in

a safe haven…in custody in a jail, and it's not just one interaction, but several over this period of time from April to May" 2016 violated his rights protected by the Sixth Amendment. App:31. Defense counsel sought a *voir dire* of Thetonia to probe "whether or not [the] implicit setup of [Petitioner] being in jail and her approaching the jail with whatever deal [with the government] she's worked through, whether or not those dealings gave her so much of an impulse to go" speak with Petitioner about his case while he was incarcerated and awaiting trial. App:41.

In her *voir dire* testimony, Thetonia explained that prosecutors "had me come in" during the summer of 2014 to "discuss whatever my involvement was" with the alleged conspiracy, after which the government "offered me immunity" and she began to cooperate with the prosecution. App:61.[3] Sometime after she had been granted immunity and started working with the prosecution, Thetonia saw Petitioner at the jail where he was in pretrial detention while she was incarcerated on a charge unrelated to his case. App:62. She gave Petitioner her phone number, and "eventually he began calling me." App:62-63. Thetonia acknowledged she initiated contact with Petitioner: "I did, actually, because he was there [in jail]. He couldn't have contacted me unless I went to him for him to contact me." App:64. While she knew any conversations she had with Petitioner would be recorded, and thus available to authorities, Thetonia said she saw no problem with

[3] Thetonia's proffer agreement and immunity agreement are attached at App:113-16.

communicating with Petitioner because they "have a past" and she "care[d] about him." App:63. Asked to explain her in-person visit to Petitioner that produced a recording introduced as evidence of guilt at his trial, Thetonia said she had a phone conversation with Petitioner "in which he asked if I was going to come see him and I wanted to go see him." App:73.

Thetonia denied that the government asked her to call or visit Petitioner in jail for purposes of obtaining incriminating information from him. App:73. When defense counsel asked whether she was aware that her obligations to the government meant she would have to furnish it with any information gleaned from her conversations with Petitioner, Thetonia demurred and said only that she "was never told not to have any communication with him." App:62.

The District Court rejected Petitioner's *Massiah* objection based on "a bright-line rule that is applicable in the First Circuit" providing that "an informant becomes a government agent…for purposes of *Massiah* only when the informant has been instructed by the police to get information about the particular defendant" and the lack of "any evidence whatsoever that there was such an instruction" in Petitioner's case. App:75. Applying the standard

> that government agents may not deliberately and designedly set out to elicit information from a defendant represented by counsel, again, I see no indication at all that [Thetonia] was acting on behalf of the government, that the government instructed her to go see Mr. Ocean. She said that Mr. Ocean is a friend of hers, and he likes her, and she likes him, and they wanted to talk, and she gave him her number, he called it, he asked her to come visit. There's no indication of any

> conversation with the police from which I could even begin to infer that she was acting as a government agent.

App:75-76.

D. The Court of Appeals' Decision

The Court of Appeals affirmed Petitioner's conviction and rejected his *Massiah* claim on the grounds that the record contained "no evidence of an effort by the Government to get incriminating statements from Ocean." Appx:18. It rejected Petitioner's contention that circumstances created by the government's immunization of Thetonia, failure to instruct her not to contact the indicted defendants prior to trial, and isolation of Petitioner in pretrial detention where he was likely to reach out for support and reassurance from a person who appeared sympathetic to his plight were relevant for Sixth Amendment purposes:

> the Government did not instruct Christie to visit Ocean or to report back what she learned from him. Christie had no contact with the Government between her testimony at the grand jury in September of 2014 and June of 2016, when she was served with a trial subpoena. Christie visited Ocean of her own volition because he was a friend. She did not advise the Government that she had visited him. Although Christie testified under a grant of immunity, there was no evidence of any agreement by her to elicit information from Ocean or to work as a Government informant…Beyond his claim that Christie acted as a government agent, Ocean contends that the Government made him more susceptible to self-incrimination by detaining him pretrial, thus creating this situation and its consequences. Under this theory, however, any pretrial detainee who has made an incriminating statement that comes to the attention of authorities would be able to establish a Sixth Amendment violation.

Appx:16-17. The Court of Appeals reiterated that, in the First Circuit, *Massiah* violations will be found only where an informant has "marching orders" from the government to obtain incriminating information from a represented defendant, regardless of whether the government has otherwise created circumstances likely to produce such statements. Appx:18 (quoting *United States v. Wallace*, 71 Fed. Appx. 868, 871 (1st Cir. 2003)).

REASONS THE PETITION SHOULD BE GRANTED

The basic premise of the rule erected by *Massiah v. United States* is simple: a criminal defendant is "denied the basic protections of [the Sixth Amendment right to counsel] when there [i]s used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. 201, 206 (1964). This Court's subsequent decisions have largely addressed the varied factual scenarios in which Sixth Amendment violations can occur—whether a indicted defendant is incarcerated, whether his or her interlocutor is openly identified with the government, whether informant or defendant was the person who initiated a particular discussion—but have declined to directly address the governmental intent or lack thereof needed to make a showing of deliberate elicitation for *Massiah* purposes. This vacuum has left the Courts of Appeal to develop widely divergent standards on this core principle, such that the Sixth Amendment right to counsel provides different levels of protection in different federal districts. Petitioner's case gives the Court an appropriate opportunity to provide a uniform definition of deliberate elicitation for use in all federal courts.

A. *Massiah* and Its Progeny Focus on the Government's Intentional Creation of Situations Likely to Produce Incriminating Statements, Not on the Presence or Absence of Express Direction to an Informant to Elicit Such Evidence

Massiah itself featured a post-indictment defendant who remained at liberty before trial and whose co-conspirator in the charged offense chose to cooperate with police and, pursuant to that agreement, agreed to secretly transmit to authorities conversations with the defendant in which the defendant made self-incriminating statements. *Id*. at 202-03. The Court subsequently applied its exclusionary rule to jailhouse statements elicited by a fellow-prisoner informant placed in a pretrial defendant's cell with directions to listen and report back but not to inquire or initiate conversation about the charged crimes, see *United States v. Henry*, 447 U.S. 264, 265-67 (1980); to recorded conversations between an informant and a pretrial defendant who is at liberty and who initiates the conversation with the informant, even where police have directed the informant not to question the defendant, see *Maine v. Moulton*, 474 U.S. 159, 162-66 (1985); and to statements made by a defendant who had just been indicted and had not yet retained or been appointed counsel about the crime of indictment to the police officers who came to his home to arrest him. See *Fellers v. United States*, 540 U.S. 519, 521-23 (2004). The Court has also held, however, that incriminating statements made by an indicted defendant to a jailhouse informant need not be excluded where the informant was told only to listen to the defendant and

in fact did nothing to stimulate the self-incrimination. See *Kuhlmann v. Wilson*, 477 U.S. 436, 438-40 (1986).

A number of guiding principles have emerged from these decisions. That the government may not have intended the informant to elicit incriminating statements, and may in fact have expressly directed the informant not to initiate conversation about the charged crime, is not dispositive; courts must instead determine whether the government "intentionally creat[ed] a situation likely to induce [an indicted defendant] to make incriminating statements without the presence of counsel." *Henry*, 447 U.S. at 271, 274. Nor is it important to the Sixth Amendment analysis whether informant or "defendant requested the meeting and initiated and led the conversation in which incriminating statements were made," since "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." *Moulton*, 474 U.S. at 175-76. Moreover, the *Massiah* rule does not apply solely to statements made to undisclosed informants, and applies even where uniformed police officers "inform [a defendant] that their purpose in coming was to discuss his involvement in the" charged offense. *Fellers*, 540 U.S. at 524. Underlying these broadly protective principles is the government's "affirmative obligation not to act in

a manner that circumvents the protections accorded the accused by" the Sixth Amendment right to counsel. *Moulton*, 474 U.S. at 176.

This Court has also made clear, however, that the widely varied scenarios in which *Massiah* violations may be found, and the fact the government's intent to elicit incriminating statements (or lack thereof) is not dispositive to the inquiry, does not mean the Sixth Amendment is "violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Kuhlmann*, 477 U.S. at 459. Instead, "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Id*. Such a 'design' does not, however, exist only where the government has purposefully schemed to obtain statements from a defendant in the absence of counsel. Rather, it may be found where the government purposely creates a set of circumstances—whether by exploitation of previously existing relationships between actors, isolation of a defendant in jail and insertion of an informant for the purpose of providing an apparently 'sympathetic ear,' or some other means—that is likely to result in the elicitation of incriminating, uncounseled statements. See *Moulton*, 474 U.S. at 177 & n.3; *Henry*, 447 U.S. at 270-74.

As the foregoing demonstrates, the principles that have emerged from this Court's post-*Massiah* decisional law can be difficult to reconcile, since these cases appear to require governmental 'design' before a violation may be

found but also to reject the simplistic notion that respect for defendants' Sixth Amendment rights requires the government to do nothing more than refrain from purposefully scheming to subvert the right to counsel. As discussed below, the Courts of Appeal have divided on these principles, with one group refusing to find *Massiah* violations in the absence of express direction by law enforcement that an informant seek out information from an indicted defendant and the other maintaining that the totality of the circumstances—including, most importantly, what the government knew or should have known to be the likely outcome of its actions—must be assessed in determining whether state actors have deliberately elicited incriminating statements from an indicted defendant in violation of the Sixth Amendment.

B. The Circuit Courts of Appeal Have Divided Over Whether Express Direction from the Government that an Informant Seek Out and Elicit Incriminating Statements from a Defendant is a Precondition to a *Massiah* Violation

The scope of the protections afforded by the Sixth Amendment right to counsel as explicated in *Massiah* varies widely among the Circuits, notwithstanding that all Courts of Appeal maintain, as they must, that their interpretive approach follows directly from this Court's precedents. In the First Circuit, where Petitioner was tried, a "successful *Massiah* objection requires a defendant to show, at a bare minimum, that the person with whom he conversed had previously been enlisted for that purpose by the authorities," notwithstanding the fact that "[w]hich party initiated the meeting at which the government obtained the statements is not decisive or

even important to the *Massiah* analysis." App:15 (quoting *United States v. Wallace*, 71 Fed. Appx. 868, 870 (1st Cir. 2003)). 'Enlistment,' in turn, means an informant "must have been instructed to both focus on, and actively to elicit information from, the defendant." *Wallace*, 71 Fed. Appx. at 871 (citing *United States v. LaBare*, 191 F.3d 60, 65 (1st Cir. 1999)). If "there is no evidence of an effort by the Government to get incriminating statements from [a defendant, he] has failed to make out a violation of his Sixth Amendment rights." App:18 (citing *Henry*, 447 U.S. at 273). Thus, even where the government has intentionally created a set of circumstances likely to produce uncounseled self-incrimination, it may introduce such statements at trial as substantive elements of guilt whenever that likely outcome is realized so long as it has not directly instructed its informant to go out and collect them.

The Second Circuit similarly limits the *Massiah* inquiry to whether the government has 'directly enlisted' an informant to seek out and obtain information from an indicted defendant. See *United State v. Birbal*, 113 F.3d 342, 345-46 (2nd Cir. 1997) (finding no Sixth Amendment violation where informant with preexisting agreement to provide government with information "had not been enlisted to seek out and collect information from Birbal" and "agreement with the government did not require him to elicit information from Birbal"). In the Second Circuit, the government's affirmative obligation to respect the accused's right to counsel is really "an affirmative obligation *not to solicit* incriminating statements from the

defendant in the absence of counsel," not to refrain from creating situations likely to have the same result. *United States v. Rosa*, 11 F.3d 315, 329 (2nd Cir. 1993) (emphasis added). In the Eighth Circuit, "[a]n informant becomes a government agent for purposes of the Sixth Amendment's protection against deliberate government elicitation only when the informant has been instructed by the government to get information about the particular defendant." *Stewart v. Wagner*, 836 F.3d 978, 986 (8th Cir. 2016) (quotation and alterations omitted). And in the Seventh Circuit, the key to the *Massiah* inquiry is whether "the government directed the interrogator toward the defendant in order to obtain incriminating information." *United States v. D.F.*, 63 F.3d 671, 682 n.16 (7th Cir. 1995); but see *United States v. O'Dell*, 1995 U.S. App. LEXIS 37376 at *8-9 (7th Cir. 1995) ("The fact that the government was not closely managing [informant's] actions in prison does not insulate the government from responsibility for [informant's] actions").

In contrast to those Circuits that require evidence the government expressly directed an informant to obtain incriminating evidence from an indicted defendant before they will find a Sixth Amendment violation, a number of other Courts of Appeal have acknowledged that such a limitation conflicts with the multi-factorial analysis into the government's intentional creation of a situation likely to produce incriminating statements underlying this Court's *Massiah* decisions. Thus, in the Sixth Circuit "[a] court must...analyze the facts and circumstances of a particular case to determine

whether there exists an express or implied agreement between the State and the informant at the time the elicitation took place," since "[t]o hold otherwise would allow the State to accomplish with a 'wink and a nod' what it cannot do overtly. This, the Sixth Amendment does not permit." *Ayers v. Hudson*, 623 F.3d 301, 311-12 (6th Cir. 2010). The *Ayers* court observed that "[r]egardless of whether specific instructions were given by the detectives," when the government has a preexisting relationship with its informant that has already produced evidence in the case against a defendant, it "must have known that [the informant] was likely to obtain additional incriminating statements from" the defendant when they interacted again. *Id.* at 316 (quoting *Moulton*, 474 U.S. at 176 n.2) (alterations omitted).

The Ninth Circuit has also parted ways with the 'express direction' courts, observing that this Court's precedents "make[] clear that it is not the government's intent or overt acts that are important; rather, it is the likely...result of the government's acts" that is relevant to the *Massiah* analysis. *Randolph v. California*, 380 F.3d 1133, 1144 (9th Cir. 2004) (quoting *Henry*, 447 U.S. at 271). Thus, the Sixth Amendment may be violated even "if there is no express agreement between the informant and the government that the informant will be compensated for his services," since "it is the relationship between the informant and the State, not the compensation the informant receives, that is the central and determinative issue." *Id.*; see also *id.* at 1146 (finding *Massiah* violation where police "took the risk that

[informant] might deliberately elicit information from" defendant after government had used informant as source of information in defendant's case). In the Third Circuit, a *Massiah* violation can occur where an informant has previously provided the government with information in exchange for charge or sentencing concessions and the record "contains evidence suggesting [the informant] may have had a tacit agreement with the government" regarding the defendant whose statements he or she elicited. See *United States v. Brink*, 39 F.3d 419, 423-24 (3rd Cir. 1994); see also *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 893 (3rd Cir. 1999) (*Massiah* inquiry triggered where there is "some evidence that an agreement, express or implied, between the individual and a government official existed at the time the elicitation [took] place"). And in the Eleventh Circuit, "[t]here is, by necessity, no bright-rule for determining whether an individual is a government agent for purposes of the sixth amendment right to counsel. The answer depends on the facts and circumstances of each case." *Depree v. Thomas*, 946 F.2d 784, 793-94 (11th Cir. 1991).

As these decisions illustrate, the scope of the Sixth Amendment protections enjoyed by criminal defendants, and the affirmative efforts government actors must make to respect the right to counsel, vary significantly depending on the Circuit in which a defendant is tried. In one set of Circuits, the government discharges its obligation so long as it does not expressly direct its informant to seek out and elicit incriminating statements

from a defendant, regardless of any preexisting relationship between and among defendant, informant, and the government. In the other set, courts will examine the totality of the circumstances in a particular case to determine whether the government created a situation it knew or should have known was likely to result in a defendant making incriminating statements in the absence of counsel, even where it did not direct the informant to seek out the defendant or elicit the statements at issue.

C. The Fact Petitioner's *Massiah* Claim Would Have Fared Differently Had He Been Tried in a Different Circuit Demonstrates the Need for This Court's Review and Enunciation of a Uniform Deliberate Elicitation Standard

The outcome of Petitioner's *Massiah* objection, and potentially his trial, would likely have been different if he had been tried in a 'totality of the circumstances' jurisdiction rather than in an 'express direction' jurisdiction, as he was. The facts and circumstances of his case show that Thetonia—Petitioner's friend and former girlfriend—had been enlisted by the government for the purpose of providing it with information and testimony to help convict Mr. Ocean when she was immunized and agreed to work with the government in exchange for protection from prosecution. Thetonia was intimately familiar with Petitioner, had been involved in the same course of alleged criminal conduct for which he stood indicted and was incarcerated awaiting trial, and therefore occupied a position of trust in his mind that was particularly susceptible to exploitation given his isolation in pretrial detention on the government's motion. Such factors have been important to

this Court's finding of Sixth Amendment violations in cases like *Massiah*, *Henry*, and *Moulton*, and would have been relevant to that assessment here had Petitioner's trial been held in a 'totality of the circumstances' jurisdiction. But because he was tried in an 'express direction' jurisdiction, the only relevant question was whether the government had told Thetonia to visit Petitioner at the jail and elicit the recorded statements used against him at trial. Contrast App:75 (rejecting Petitioner's *Massiah* objection based on "a bright-line rule that is applicable in the First Circuit" that "an informant becomes a government agent…for purposes of *Massiah* only when the informant has been instructed by the police to get information about the particular defendant") and *Depree*, 946 F.2d at 793-94 ("[t]here is, by necessity, no bright-rule for determining whether an individual is a government agent for purposes of the sixth amendment right to counsel"). This narrow construction of the *Massiah* rule is inconsistent with this Court's decisions and lessens the protections afforded by the right to counsel.

While the core question in the *Massiah* inquiry is whether a government agent deliberately elicited incriminating statements from an indicted defendant, this Court has made plain that deliberate elicitation is not the equivalent of custodial interrogation. *Fellers*, 540 U.S. at 524; see also *Randolph*, 380 F.3d at 1144 ("Notably, 'stimulation' of conversation [necessary to finding of deliberate elicitation] falls far short of 'interrogation'"). Instead, it has looked to multiple, case-specific factors to

determine whether the government has intentionally created a situation likely to induce a defendant to make incriminating statements in the absence of counsel, such as: an informant's relationship with the government, including any instructions he or she has received from it; a defendant's awareness and perception of the informant's status; and the fact a defendant "was in custody and under indictment at the time he was engaged in conversation by" the informant. *Henry*, 447 U.S. at 270. With regard to this last consideration, the Court has emphasized that "the mere fact of custody imposes pressures on the accused" that create "powerful psychological inducements to reach for aid" from a sympathetic listener, and courts presented with *Massiah* claims based on jailhouse statements must bear this fact in mind when evaluating whether governmental conduct infringed a defendant's right to counsel. *Id*. at 273-74.

Considered in light of the factors this Court has identified as relevant, Thetonia's conversations with Petitioner meet the 'deliberate elicitation' standard. By the terms of her engagement with the government Thetonia was bound to truthfully respond to whatever questions the government posed to her at trial, including by providing information obtained from the Petitioner during their jailhouse conversations if asked. See App:115-16 (granting immunity "in order that Ms. Thetonia can truthfully answer any questions put to her before the grand jury [or] in court proceedings" and specifying that "[n]othing in this letter will prevent the United States from

instituting prosecution of Christie Thetonia for perjury or making a false statement" in such a context). At the time of her conversations with Petitioner Thetonia knew, at a minimum, of these obligations to the government and their relationship to her escape from prosecution as well as the fact Petitioner was one of only two indicted defendants who had declined to plead guilty and cooperate with the prosecution. Notwithstanding the District Court's conclusion to the contrary, see App:74-76, the fact Thetonia was never told to seek out Petitioner and obtain incriminating statements from him is not dispositive, given that *Massiah* does not turn on who initiated a particular communication. *Moulton*, 474 U.S. at 174.

With regard to Petitioner's general knowledge of Thetonia's status as a government informant, which was important to the Court of Appeals' analysis, see App:17-18, there is no question Petitioner's awareness she had already been granted immunity puts his case outside the paradigmatic *Massiah* scenario involving a wholly undisclosed government agent engaged in surreptitious interrogation. Still, the recorded conversations show Petitioner's ignorance of the nature of Thetonia's relationship to the government and belief her grand jury testimony alone, and not her ongoing obligation to incriminate him at trial (including by disclosure of their jail conversations) was sufficient to guarantee her immunity. See App:90, 101 ("they can't take that [immunity agreement] back, they already give it to you…You did, you got your immunity when you testified at the grand

jury…all you gotta do is say man, I'm not coming, or I'll be there but then don't come…The only one that can get me out of that shit is you, that you already got immunity, so you good"). Despite Petitioner's obvious misunderstanding of the terms of her immunity and corresponding mistaken belief she was someone to whom he could reach out for support from his place of incarceration, Thetonia responded to his statements by repeatedly telling him he was "[r]ight" that her immunity was complete and could not be withdrawn or compromised by a government determination she had testified falsely or incompletely. App: 90, 101. Moreover, these misleading affirmations occurred after Thetonia had initiated contact with Petitioner while he was incarcerated, providing her phone number and encouraging him to reach out to her for aid and support from his place of confinement. *Henry*, 447 U.S. at 273-74.

There is no question an incarcerated defendant's misunderstanding of a co-participant-turned-informant's relationship with the government, and the informant's encouragement of that misunderstanding in the context of conversations that produce incriminating statements, would be relevant to whether the government had created a situation likely to produce incriminating statements in a 'totality of the circumstances' jurisdiction. It was entirely predictable that in the course of his extended pretrial detention on the government's motion, Petitioner would reach for aid and comfort from a person he knew and believed saw the case from his perspective. And, as

demonstrated by the recorded jailhouse conversations themselves, Thetonia's sympathetic exchanges with Petitioner and expressions of agreement he was being unfairly prosecuted and lied about by others who were cooperating with the government created in him the mistaken belief she was someone in whom he could confide and from whom he could seek assistance. See App:79-85. The government's affirmative obligation to respect Petitioner's right to counsel in this context meant, at the very least, that a witness who was cooperating in his prosecution could not simply engage in conversations where she ratified Petitioner's misunderstanding of her relationship with the government and elicited incriminating statements from him without correcting his mistakes.

In an 'express direction' jurisdiction like the First Circuit, however, the only fact that mattered was that Thetonia had no 'marching orders' from the government to seek out Petitioner at the jail, engage him in conversation that elicited incriminating statements, and report back to police or prosecutors. See App:17-18. Such a rule "allow[s] the State to accomplish with a 'wink and a nod' what it cannot do overtly," *Ayers*, 623 F.3d at 311-12, by creating a situation likely to result in a defendant's self-incrimination, sitting back and watching the predictable outcome manifest, and then using the fruits at trial. This outcome unacceptably narrows the right to counsel in 'express direction' jurisdictions and is inconsistent with the governmental obligations established by this Court's *Massiah* decisions. Review by this Court is

necessary to ensure that the right to counsel is uniform, and protective, across all federal districts.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the GRANT his Petition, issue the Writ, and order briefing on the merits.

Respectfully Submitted,

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