

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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ALBERT DIAZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

When the United States Attorney's Office designates a person as a "Target," the person is one "as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who in the judgment of the prosecutor is a putative defendant" as defined in the U.S. Department of Justice, Justice Manual, § 9-11.151. The Petitioner, Diaz, was designated a "Target" by the Assistant United States Attorney in a report that also authorized a putative co-defendant to interview and record Diaz on behalf of the Government to elicit incriminating admissions from him. The question presented in this petition is:

Whether the Fifth Circuit Court of Appeals correctly held that the Sixth Amendment right to counsel does not attach once the United States has focused its case on indicting the person and away from its investigation, but before those planned formal charges have issued, in contradiction with this Court's holding and three other circuit courts of appeals that have held that the Sixth Amendment right to counsel can attach prior to the issuance of formal charges.

## **PARTIES TO THE PROCEEDING**

Albert Diaz, petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the plaintiff-appellee below.

## **RELATED CASES**

- *The United States of America v. Albert Diaz, M.D.*, No. 2:17-CR-31-KS-JCG, U.S. District Court for the Southern District of Mississippi, Eastern Division. Judgment entered on June 12, 2018.
- *The United States of America v. Albert Diaz, M.D.*, No. 18-60455, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on September 13, 2019.

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**PETITION FOR WRIT OF CERTIORARI**

Albert Diaz respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

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**OPINION BELOW**

The opinion of the Court of Appeals is unreported. The opinion of the Court of Appeals regarding Petitioner's appeal is available at:

*United States v. Diaz*, 18-60455, 2019 WL 4410261 (5th Cir. Sept. 13, 2019).

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**JURISDICTION**

The Fifth Circuit entered judgment on September 13, 2019. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1254(1).

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**CONSTITUTIONAL PROVISION INVOLVED**

The Sixth Amendment of the United States Constitution provides, in pertinent part, that:

"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 . . . and to have the assistance of counsel for his defence.”

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## INTRODUCTION

This Court has explained that there is no formalistic manner in which a court determines the attachment of the Sixth Amendment right to counsel. “The rule is not ‘mere formalism,’ but a recognition of the point at which ‘the Government has committed itself to prosecute,’ ‘the adverse positions of Government and defendant have solidified,’ and the accused, ‘finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.’” *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008). Federal Circuit Courts of Appeals, reading the same cases authored by this Honorable Court, have reached different conclusions regarding the same issue; when the Sixth Amendment right to counsel attaches.

The First, Third, and Seventh Circuits Courts of Appeals have held that the Sixth Amendment right to counsel can attach prior to the issuance of formal charges. *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) [capital murder investigation turned to accusation]; *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) [person magisteriated after arrest but before formal charges enjoys the

Sixth Amendment right to counsel despite no involvement by a prosecutor]; *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) [the Sixth Amendment right to counsel can attach when the Government has crossed the line from fact finder to adversary in narrow circumstances before formal charges are brought]; *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892–93 (3d Cir. 1999) [*en banc*, Matteo did not have his Sixth Amendment right to counsel attach, but court noted that the right to counsel may attach at stages earlier than a formal charge when “the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused’s fate and reduce the trial itself to a mere formality.”]; *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992) [Sixth Amendment right to counsel attached at pre-indictment line-up].

**The Courts of Appeals are divided as to whether the Sixth Amendment right to counsel can attach before the initiation of formal judicial proceedings.**

This Court’s review is needed to resolve a significant conflict among the Courts of Appeals as to whether the Sixth Amendment right to counsel can attach prior to the initiation of “formal judicial proceedings.” And whether it can attach “from the moment he ‘finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.’” *Rothgery v. Gillespie*

*County, Tex.*, 554 U.S. 191, 198, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) [quoting *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) [plurality opinion]]. Here, Diaz had been audited and subpoenaed; nine months thereafter he was designated a “Target,” and a Government informant was then conscripted to meet with him and elicit incriminating statements from him. ROA4918.

The Fourth, Fifth, Eighth, Ninth, Tenth, and DC Circuits Courts of Appeals apply a bright line rule that the Sixth Amendment right to counsel attaches only after the initiation of formal charges. *See United States v. Ayala*, 601 F.3d 256, 272 (4th Cir. 2010) [applying rigid rule in which Sixth Amendment right to counsel did not attach at grand jury proceedings, but only when an indictment was issued]; *United States v. Heinz*, 983 F.2d 609, 612 (5th Cir. 1993) [Sixth Amendment right to counsel did not attach during grand jury proceedings, but rather when an indictment is issued]; *United States v. Morriss*, 531 F.3d 591, 593–94 (8th Cir. 2008) [Sixth Amendment right to counsel did not attach until “initial appearance before judicial officer where he learned the charge against him, and his liberty is subject to restriction”]; *United States v. Hayes*, 231 F.3d 663, 673 (9th Cir. 2000) [*en banc*, Sixth Amendment right to counsel did not attach because “the Government remained an investigator rather than a prosecutor” when he was designated a Target but was not yet formally charged]; *United States v. Calhoun*, 796 F.3d 1251, 1254–55 (10th Cir. 2015) [holding that the Sixth Amendment right to counsel does not attach to grand

jury proceedings, or prior to the resulting indictment]; *United States v. Sutton*, 801 F.2d 1346, 1365–66 (D.C. Cir. 1986) [indicating that Sixth Amendment right to counsel did not attach during the investigation when Government was ***unaware*** that the defendant was represented by counsel during the “investigatory” stage, emphasis supplied].

**Other Circuit Courts of Appeals have held that the Sixth Amendment right to counsel can attach before formal charges issue, as in *Rothgery*, and citing *Gouveia*.**

However, this Court and the First, Third, and Seventh Circuits Courts of Appeals do not follow such a formalistic approach, and attach the Sixth Amendment right to counsel before the filing of formal charges, where the Government’s role has shifted from investigatory to accusatory, and where the prosecutor has clearly become the defendant’s adversary. *Escobedo v. Illinois*, 378 U.S. 478, 492, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) [Sixth Amendment right to counsel attached after defendant requested counsel during a custodial arrest]; *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) [before formal charge but after magistration Sixth Amendment right to counsel applies]; *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) [stating that the right to counsel might attach in limited circumstances before any formal charges are made citing *United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984)]; *Matteo v. Superintendent, SCI Albion*, 171 F.3d

877, 892–93 (3d Cir. 1999) [*en banc*, Sixth Amendment right to counsel attaches only at or after the initiation of judicial proceedings and may attach at earlier stages when “the accused is confronted just as at trial by the procedural system or by his expert adversary, or by both in a situation where the results of the confrontation might well settle the accused’s fate and reduce the trial itself to a mere formality,” [quoting *United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984)]; *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992) [Sixth Amendment right to counsel applied at pre-indictment line-up because the Government had crossed the divide from fact finder to adversary].

The First Circuit discusses that the right to counsel attaches before any formal charges are made, or before an indictment or arraignment. *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995). The Third and Seventh Circuits have extended the Sixth Amendment right to counsel to the initiation of “adversarial confrontations.” See *United States v. Giamo*, 665 Fed. Appx. 154, 156–57 (3d Cir. 2016) [holding that the right to counsel attaches during the negotiation of a guilty plea on an unindicted offense]; *United States v. Jansen*, 884 F.3d 649, 656–59 n.4 (7th Cir. 2018) [right to counsel attaches during the negotiation of a guilty plea on an unindicted offense].

**Once Diaz was designated a “Target,” the role of the prosecutor crossed the line from fact finder to advocate.**

Here, the Fifth Circuit held that the Sixth Amendment right to counsel had not attached until “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *United States v. Diaz*, App. 14, 18-60455, 2019 WL 4410261 (5th Cir. Sept. 13, 2019) [quoting *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 198 (2008)].<sup>1</sup>

After an interview with the Government, in which Diaz was labeled as a “Target,” his attorney instructed the Government to not contact Diaz. ROA4915. At that point, the prosecutor knew Diaz was represented by counsel and had clearly become Diaz’s adversary; labeling him as a “Target” and sending a putative co-defendant to interview him to obtain his admissions. The prosecutor acted in this respect as an adversary and employed a cooperating co-actor to record incriminating information that it had been unable to obtain from Diaz prior. After this attorney communication, the Government continued its efforts to speak with Diaz through its agent, Schaar, and documented same through this putative co-defendant’s surreptitious recordings. *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988) [indicating that “artfully contrived lawyer’s devices” can “shift the relationship between prosecutor and informant” so that the “informant becomes the

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<sup>1</sup> *Rothgery* relied upon *Kirby v. Illinois*, 406 U.S. 682 (1972), which was a plurality opinion issued by this Court.

prosecutor's alter ego and engaged in communication proscribed by" the no contact rule]. This continued on for several months without Diaz's counsel's knowledge, in violation of the attorney-client relationship. Had the district court determined that the Sixth Amendment right to counsel had attached the moment the Government became his adversary, the surreptitious recordings of Diaz would have been suppressed.

**The Circuit Courts of Appeals could use guidance to create a uniform rule regarding when, prior to the issuance of formal charges, the Sixth Amendment right to counsel attaches.**

On one hand, several circuits interpret this Court's plurality opinion in *Kirby* to mean that the Sixth Amendment right to counsel does not attach until some formal proceeding has commenced in court. On the other hand, some Circuits interpret this Court's opinion in *United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984) to mean that the Sixth Amendment right attaches when the line between fact finder and adversary is crossed. The Circuit Courts of Appeals are reading the same cases from this Court, but are applying this Court's analysis in a manner that has resulted in inconsistency as to when the Sixth Amendment right to counsel attaches. Guidance from this Court to resolve the question presented will not just determine the outcome of this case, it will also provide the uniformity in the law needed in this important matter, when the Sixth Amendment

right to counsel attaches prior to the issuance of formal charges.

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### **STATEMENT OF THE CASE**

Albert Diaz was convicted of ten counts of healthcare fraud, one count of distributing controlled substances by prescribing pain and scar cream to persons he had not yet examined, and five counts of obstruction of justice for submitting undated medical charts to a healthcare audit to imply he had seen these patients before he prescribed them the creams; when he had seen them afterward. He was sentenced to forty-two months in federal prison because the court substantially varied downward in his favor for the extraordinary reason that Diaz had not profited in any way from the fraud. Diaz appealed his convictions to the Fifth Circuit Court of Appeals, which affirmed his convictions.

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### **ARGUMENT**

Diaz, who was then a physician, was approached by a pharmaceutical representative he had known for fourteen years, who told him that a number of Veterans Administration patients were being refused their previously prescribed and necessary pain and scar cream. This pharmaceutical representative, Scharr, told Diaz that these patients were being asked to take addictive prescription pain pills instead of being given the

cream. ROA1840: 14-22. For this reason, Diaz agreed to provide the prescriptions without first examining the patients, but he insisted on examining them later. ROA2384: 9-20 & ROA1840: 23-25. He sought no billing information from them and submitted no claims to any health insurance program for their care, even after the healthcare benefit audit began and he examined them to confirm the prescriptions. ROA2384: 11-20; 2409: 3-16; 2409: 17-25; 2410; 2422: 6. He performed the examinations after he prescribed the pain and scar cream, out of concern that the state medical board might discipline him for prescribing medicine without examining the patients first.

In December 2015, TRICARE, a health insurance company, informed Diaz that he was the subject of a TRICARE/DOD audit. ROA4907. On January 21, 2016, Diaz met with Mississippi Medical Licensure Investigative Division officers who came to question him on behalf of the FBI. ROA175. During the course of this meeting, Diaz asserted his right to remain silent on the advice of counsel. ROA175. Upon acknowledging Diaz's invocation of his rights, the agents discontinued their questioning and served Diaz with a subpoena on behalf of the FBI that commanded him to appear in the United States' Attorney's Office, Jackson, Mississippi. ROA4914. Thereafter, Diaz hired counsel to represent him in the matter. That lawyer responded to the grand jury subpoena by producing documents and a letter. ROA4915. He also advised the Government not to contact his client outside his presence. *Id.*

On September 13, 2016, the IRS Criminal Investigation Division and AUSA Dustin David solicited subsequently indicted co-defendant Schaar's cooperation as an informant to record conversations with Diaz, a designated "Target" of its criminal investigation as reflected in that report. ROA4918. The Government had every intention of indicting Diaz, yet continued to strategically extract incriminating statements from him through Schaar, circumventing his counsel to communicate with him directly. ROA150. The Government's intrusion was purposeful, it was recorded by Schaar, repeated, and guided toward specific aspects of the Government's charges. Schaar directly inquired into defense strategy, but Diaz revealed none. Schaar was also able to provide incriminating information and get Diaz to agree with it; he told Diaz that the compounding pharmacist, Randy Thomley, had provided him a list of Veterans Administration patients to whom Diaz provided the prescriptions. Schaar advised Diaz that the pharmacy was charging the patients for the pain and scar cream, something Diaz did not know. He discussed with Diaz the fact that the Government was paying for those charges. He discussed the fact that his work compensation benefited from the prescriptions. And he obtained the admission from Diaz that he prescribed the medicine before he examined and saw the patients. The information and recordings were both used at trial to convict Diaz, providing in many respects the evidence that Diaz knew persons were financially benefiting from the prescribed medications, that the Government was paying for the medications, and that Diaz had misled auditors about when he examined the patients.

The Government's invasion into Diaz's relationship and communication with his attorney violated his Sixth Amendment right to counsel, which had attached as soon as the Government labeled Diaz as a "Target." This purposeful interference with Diaz's attorney-client relationship and invasion of the defense camp for strategic and other purposes violated his constitutional rights to due process and counsel. The Government knew Diaz had defense counsel and that he had previously, when they interviewed him during the audit, invoked his right to remain silent and to rely on counsel. The Government dealt with his lawyer and was advised not to communicate with Diaz without counsel present. Some nine months after he was originally contacted, Diaz was designated as a "Target," someone who the Government had decided to indict. It was then that the Government sent a putative co-defendant to record Diaz, circumventing his lawyer. This case presents clear circumstances under which this Court can decide whether the Sixth Amendment right to counsel applies before formal charges have issued in federal court and at a time when the prosecutor has crossed the line from fact finder to adversary.

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## **CONCLUSION**

The Supreme Court should, therefore, grant this petition for certiorari in order to clarify when the Sixth Amendment right to counsel should attach, providing guidance to the Circuit Courts of Appeals that have resolved the issue differently by relying on this Court's

opinions, to establish uniformity in the law concerning this issue, and to correct the Fifth Circuit's erroneous holding in this cause.

Respectfully submitted,

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