No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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HECTOR RIVERA,

Petitioner,

v.

UNITED STATES,

Respondent.

---

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

The petitioner Hector Rivera asks leave to file the attached petition for a writ of certiorari, without prepayment of costs and to proceed *in forma pauperis*. Petitioner has been granted leave to so proceed in the Court of Appeals. No affidavit is attached, inasmuch as the Court of Appeals appointed counsel for petitioner under the Criminal Justice Act of 1964.

Respectfully submitted,

Robt A Culp

ROBERT A. CULP, ESQ.
Counsel of Record for Petitioner
HECTOR RIVERA
29 Garrison's Landing, P.O. Box 550
Garrison, New York 10524
(845) 424-4431

Dated: Garrison, New York
June 22, 2020

No. _____

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UNITED STATES,

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

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Robert A. Culp, Esq.
Attorney at Law
29 Garrison's Landing, P.O. Box 550
Garrison, New York 10524
(845) 424-4431

Counsel of Record and
Member of the Bar of this Court
for Petitioner Hector Rivera

## QUESTION PRESENTED

Whether a district court's discretion to limit the Sixth Amendment right to confront witnesses is as broad as the general discretion to limit evidence under Rule 403 of the Federal Rules of Evidence and includes forcing the defendant to put on alternative evidence as part of an affirmative case rather than confront the witness called by the government? The court below upheld a ban on acknowledged core Sixth Amendment cross-examination of a case investigator concerning evidence of another theory of the murder in question on the basis of the district court's discretion under Rule 403 and a determination that the defendant could seek to elicit relevant evidence affirmatively rather than by confronting the witness called by the government. While the court's decision consistent with other courts of appeal that regard Rule 403 balancing as determinative of confrontation issues, other courts of appeal emphatically reject this conclusion and hold that Sixth Amendment confrontation issues must be determined independently.

## STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

The names of all parties to this petition appear in the caption of the case on the cover page. The parties have no parent or subsidiary companies and do not issue stock. The proceedings directly related to this case are as follows:

- *United States v. Rivera,* No. 1:15-cr-00722-PAE-1, U.S. District Court for the Southern District of New York. Judgment entered May 7, 2018.
- *United States v. Rivera,* No. 18-1393-cr, U.S. Court of Appeals for the Second Circuit. Judgments entered October 17, 2019 and January 23, 2020.

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## OPINIONS BELOW

The October 17, 2019 summary order of the court of appeals affirming the judgment of the district court, may be found at *United States v. Rivera,* 791 Fed.Appx. 200 (2d Cir. 2019), and is reproduced at Appendix A. The January 23, 2020 order denying the petition for rehearing or rehearing *en banc* is reproduced at Appendix C. *United States v. Rivera,* 18-1393 (2d Cir. January 23, 2020). Excerpts of the November 13 and 16, 2017 trial proceedings containing bench rulings on the issue presented are reproduced at Appendix B. *United States v. Rivera,* 15-CR-722 (S.D.N.Y.; PAE).

## JURISDICTION

The judgment of the court of appeals was entered on October 17, 2019. App. A. The order denying the petition for rehearing or rehearing *en banc* was entered on January 23, 2020. App. C. This Court has jurisdiction under 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him….

2. Rule 403 of the Federal Rules of Evidence provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

## STATEMENT OF THE CASE

This Petition concerns the Second Circuit's conclusion that petitioner's Sixth Amendment right to confront the witnesses against him was not violated when the district court denied his counsel the opportunity to cross-examine a police detective about whether a reported death threat made by someone else to the murder victim hours before the murder was properly investigated. Exh A at 8-11. Although this line of questioning for a non-hearsay purpose was previously upheld by the court below as being at the core of the Sixth Amendment right to confront witnesses, *see Alvarez v. Ercole,* 763 F.3d 223 (2d Cir. 2014), the court upheld the district court's exclusion on discretionary grounds under Rule 403 of the Federal Rules of Evidence and endorsed the district court's conclusion that in lieu of confronting the government witness, defendant could put the evidence on through an affirmative case. This decision conflicts with the approaches of other circuits, including *Rhodes v. Dittman,* 903 F.3d 646, 659 (7th Cir. 2018) and *Blackston v. Rapelje,* 780 F.3d 340, 356 (6th Cir. 2015), and adds to the confusion in multiple appellate decisions whether the discretion of trial judges to exclude evidence under Rule 403 of the Federal Rules of Evidence (or state equivalents) alone satisfies the strictures of the Sixth Amendment right to confront witnesses.

### A. District Court Proceedings

1. Petitioner was charged in 2015 and tried in 2017 with arranging a *2004* murder in New York's diamond district. On May 20, 2004, Eduard Nektalov, a businessman in the diamond district in New York City was fatally shot as he left

his store by a gunman who fled without apprehension. NYPD Detective, Joseph Della Rocca testified about the investigation and described how Carlos Fortier was identified as the shooter through forensic connections to the gun from another case, but that Fortier died in prison before he could face trial. Exh.A. 2-4,8.

At trial, the government relied heavily on the testimony of cooperating witnesses facing heavy sentences for criminal activity and seeking leniency. Roni Amrussi, facing a 35 year mandatory minimum, testified that petitioner was a "muscle man" who assisted him with various activities in the district. Amrussi testified that in 2001 he was severely beaten by Nektalov over a dispute and notified Rivera. He claimed Rivera, after three years, urged revenge but Amrussi demurred. Despite being the one with the revenge motive in light of the prior beating, Amrussi claimed he had no role in the murder. Stranger still, Amrussi claimed he paid Rivera $150,000 after the murder he insisted he did not seek. Exh.A 2-3.

The government also called Lixander Morales, facing mandatory life, who testified that Rivera hired him to arrange the killing, and that he in turn hired Fortier to carry it out. Morales said defendant gave him a gun and had him prepare Fortier. Morales said Rivera paid him $20,000 the day after the murder and that he was told by Fortier he was paid $10,000. SO2-3.

The government sought to corroborate the testimony with evidence of phone calls purportedly between Rivera and a pay phone where Fortier was staying in the Bronx. The government also called Ivan Martinez who gave dubious testimony that

he happened to witness murder arrangements in midtown and a later payment in the Bronx to Morales by Rivera, even though he never reported this evidence to NYPD until many months into his cooperation in 2005 and the FBI was never informed until 2009.

2. The issue presented here concerned the district court's refusal to allow counsel to question NYPD Detective Della Rocca about efforts to investigate a threat made to the murder victim by someone unrelated to petitioner just hours before the murder growing out of a shooting of Nektalov's cousin. *See* PO2-3, Defendant's Opening Brief ("OB") 8-9 (with appendix and record citations).

As the court below framed the factual underpinnings of the issue:

> [T]he police arrested one Simon Samandarov for the shooting of Nektalov's cousin, Alik Pinkhasov, several months before Nektalov was killed. According to an internal police report produced to the defendant before trial under 18 U.S.C. § 3500, mere hours before he was shot dead, Nektalov received a phone call in which "a male named either Sasha or Sam[] stat[ed] in substance that [Nektalov] should have his cousin Alik drop [certain] charges or the same thing [would] happen to [Nektalov] that happened to [his] cousin." [Exh.A 8]

Although the district court allowed questioning "about the earlier arrest of Samandarov in connection with the Pinkhasov shooting," it refused any cross-examination related to the threat to Nektalov under Rule 403 of the Federal Rules of Evidence. As the court below described it, the district court:

> expressed concern that, even with a limiting instruction, "[t]he dramatic quality of the hearsay claim that [Nektalov] . . . received an arguable death threat several hours before his death" would make it difficult for the jury not to consider the threat made in the

> phone call, as noted in the police report, for the truth of the matter asserted. App'x 75. Citing these and other considerations, the District Court excluded the proffered statement under Federal Rule of Evidence 403. It made clear at the same time that its ruling was "without prejudice," and that defense counsel could "try to figure out a different way to work around this [evidentiary problem]." App'x 76, 78. It also observed that Rivera was "at liberty to explore the police investigation into the Pinkhasov shooting." App'x 78. [Exh A 8-9]

## B. Decision of the Court of Appeals

Although the court of appeals acknowledged that the Confrontation Clause "guarantees a criminal defendant the right to cross examine government witnesses at trial," Exh.A 9 (citing *United States v. Figueroa*, 548 F.3d 222, 227 (2d Cir. 2008)), it stressed that the "right does not, however, 'guarantee unfettered cross-examination.'" *Id.* (quoting *Alvarez v. Ercole,* 763 F.3d 223, 230 (2d Cir. 2014)). The court concluded that "the District Court did not abuse its discretion by precluding Rivera from cross-examing Detective Della Rocca about the threatening phone call." Exh.A 9.

The court reasoned that the probative value outweighed the potential for prejudice. The court deemed the "probative value" of the investigation into the call to be "limited" given that the call would not have been admitted for the truth. Against this the court of appeals agreed with the district court

> that the phone call created "a considerable risk . . . [that] [t]he jury would or might well consider the statement for the truth of the embedded matter asserted"—*i.e.*, that Nektalov actually received a phone call, just hours before he was murdered, in which the speaker made a veiled threat to shoot him. App'x 75. [Exh.A 9]

The court also underscored, as did the district court, that counsel could have "tested the adequacy of the police investigation into Nektalov's death through other witnesses or other evidence. Exh.A 9 The court characterized this as a "strategic" decision that defense counsel chose not to pursue this avenue. Exh.A 10-11. The court distinguished *Alvarez v. Ercole,* 763 F.3d 223 (2d Cir. 2014), a habeas appeal upholding the petitioner's Sixth Amendment rights in a similar situation because:

> Here, by contrast, the District Court did not "entirely preclude[] [Rivera] from fleshing out his main defense theory." *Id.* at 232. Instead, its evidentiary ruling narrowly precluded Rivera from eliciting a single hearsay statement. [Exh.A 10]

## REASONS FOR GRANTING THE PETITION

### The Decision Below Conflicts With Other Courts of Appeal that Reject Rule 403 Balancing as Determinative of Confrontation Rights Under the Sixth Amendment.

The Court should review this case because the approach of the court below is in conflict with that of other circuits and demonstrates confusion at the very least whether a district court's discretion under the Confrontation Clause is no different than that under Rule 403 of the Federal Rules of Evidence. Conflict and confusion are also seen on the question whether the Confrontation Clause entitles a defendant to *confront* the prosecution witness rather than be palmed off to a suggestion to introduce evidence another way, as happened here.

### A. The Sixth Amendment Confrontation Right and Rule 403 Balancing

1. The courts below subjected the Confrontation Clause issues in this case to Rule 403 balancing of "probative value" against "unfair prejudice." But the question presented is whether that is appropriate with respect to core Sixth Amendment confrontation.

There is no doubt that the issue in this case – challenging the scope of the investigation with the government's investigator on the stand -- was at the "core" of the Sixth Amendment right to confrontation. In its prior decision in *Alvarez v. Ercole,* 763 F.3d 223 (2d Cir. 2014), the court below held that such confrontation was a clearly established right under the Sixth Amendment as to which a criminal defendant must have "a meaningful opportunity to cross-examine witnesses against him." *Id.* at 229-30 (quoting *Brinson v. Walker,* 547 F.3d 387, 392 (2d Cir.2008));

*see also Pennsylvania v. Ritchie,* 480 U.S. 39, 51 (1987) (plurality opinion) ("[T]he right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable.") In *Alvarez,* the right was deemed controlling notwithstanding that the cross examination on the other theory would not have been for the truth of the matter asserted.[1]

The decision below, however, treats the issue as one for exercise of ordinary discretion under Rule 403 of the Federal Rules of Evidence. To be sure, this Court has held that Sixth Amendment issues are subject to discretion on the part of the trial court. In *Delaware v. Van Arsdall,* 475 U.S. 673, 678-79 (1986) the Court held:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

(quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam). But the Court has never held that this discretion is coterminous with ordinary

[1] In *Alvarez,* the court upheld a grant of a habeas petition in a murder case. At his state trial, petitioner had sought to cross-examine a detective about possible alternative theories of the killing as reflected in police memos. The court rejected as unreasonable the state's explanation that the questioning was properly precluded because it would elicit hearsay. The Court emphasized that "counsel specifically argued that the purpose of the line of questioning regarding the [relevant memo] was not to show that an alternate perpetrator had in fact committed the crime, but was pursued to demonstrate that there was an alternate suspect that the police had disregarded in their investigation." *Id.* at 231. While recognizing the latitude of trial judges to prevent unfair prejudice or confusion, the Court found "risk that the jury would have interpreted this line of questioning to suggest" the truth of the alternate theory to be outweighed by the importance of defendant "fleshing out his main defense theory: that the police investigation into the murder was flawed and had improperly disregarded a promising alternate suspect." *Id.* at 232.

Rule 403 balancing of "probative value" against "unfair prejudice." *See Old Chief v. United States,* 519 U.S. 172, 184 (1997).

The court below explicitly endorsed the district court's "exclu[sion of] the proffered statement under Federal Rule of Evidence 403." Ex.A 8 (citing district court ruling). Conducting classic Rule 403 balancing, the court diminished the "probative value" of the evidence as "limited" to "showing the law enforcement failed to conduct an adequate investigation" as if that theory is somehow of lesser value. Exh.A 9. Against this, the court balanced the "danger of jury confustion" should the jury disregard an instruction that the evidence of another threat was not for the truth of the matter asserted. *Id.* This was the very argument rejected by *Alvarez.* The court there found the "risk that the jury would have interpreted this line of questioning to suggest" the truth of the alternate theory to be outweighed by the importance of defendant "fleshing out his main defense theory." 763 F.3d at 232. That the same point was treated differently in two cases shows that the court below is applying case by case discretion rather than implementing Sixth Amendment principles.

2. Other courts of appeal do not take the approach of the court below and distinguish discretion under the Confrontation Clause from Rule 403 balancing.

In *Rhodes v. Dittman,* 903 F.3d 646, 659 (7th Cir. 2018) the Seventh Circuit rejected a contention that the Sixth Amendment confrontation right could be analyzed through "only Rule 403 balancing." On habeas review, the court held that defense counsel was wrongly precluded from confronting a witness on details of the

prosecution theory that her beating motivated the killing in question. The court emphatically rejected the argument that "ordinary Rule 403 discretionary rule" applied:

> That analysis was contrary to clearly established Supreme Court precedent holding that the Confrontation Clause is not satisfied merely because the evidence offered by the accused might be excluded properly under Rule 403 or its equivalent.

*Id.* at 659.

The court continued:

> In applying ordinary Rule 403 balancing, without giving any special consideration to the defendant's constitutional right to confront witnesses against him, the state supreme court's decision was contrary to controlling United States Supreme Court precedent.

*Id.*

In *Blackston v. Rapelje,* 780 F.3d 340, 356 (6th Cir. 2015) the Sixth Circuit upheld a grant of habeas relief to a defendant who had been denied the right to impeach the prior testimony of an unavailable witness with evidence of recantation. The court rejected the Rule 403 discretionary arguments including that the recantation evidence was cumulative, prejudicial and fraudulent in light of the witness' otherwise consistent testimony. *Id.* at 354. Importantly, although the court rejected the Rule 403 arguments in their own right, it also highlighted that Rule 403 analysis cannot "trump" the Confrontation Clause:

> The Confrontation Clause "is a procedural rather than a substantive guarantee," *Crawford [v. United States],* 541 U.S. [36, 61 (2004)], one that applies regardless of whether the judge is swayed personally by the material's substantive persuasiveness. Nor are mere reliability concerns under Rule 403 the sort of "paramount" state interests that would allow the exclusion of evidence, let alone

> trump a defendant's confrontation rights. *Davis [v. Alaska],* 415 U.S. 308[,] 319–20 [(1974)] .

*Id.* at 357.

Additional decisions of the courts of appeal reveal confusion at best whether Rule 403 analysis can substitute for that under the Confrontation Clause. Some courts see no distinction. *See, e.g., United States v. Massimino*, 641 Fed.Appx. 153, 165 (3d Cir. 2016)("Under both Rule 403 and the Sixth Amendment, the district court may preclude cross-examination where the evidence is of marginal relevance or will result in unfair prejudice or confusion of the issues."); *United States v. Brown*, 500 F.3d 48, 57 n.5 (1st Cir. 2007)(upholding denial of Sixth Amendment claim "premised on … Rule 403"). Other courts appear to see a distinction. *See, e.g., United States v. Walker,* 930 F.2d 789, 792 (10th Cir.1991) ("[A] proper Rule 403 ruling will [not] subsume the constitutional issue, but [Rule 403] does identify the types of competing interests a court may consider …."); *Childers v. Floyd*, 736 F.3d 1331, 1335-36 (11th Cir. 2013)(dissent criticizing court: "Our per curiam opinion seems to suggest that Rule 403 and the Sixth Amendment right of confrontation go hand in hand with one another—if there is no Rule 403 violation, then it follows that there is no Sixth Amendment constitutional violation either. I cannot subscribe to that view.")

Clearly, the courts of appeal have conflicting and confusing approaches to whether Rule 403 balancing is a proper surrogate to determine Sixth Amendment confrontation rights. This case provides a proper vehicle for addressing and clarifying this issue.

## B . The Significance of Alternative Means of Proof

This case also exemplifies a conflict in the significance of whether a Sixth Amendment claim can be denied because alternatives to confrontation were available to the defendant. The court below reasoned, as did the district court, that counsel could have "tested the adequacy of the police investigation into Nektalov's death through other witnesses or other evidence. Exh.A 9. The court characterized this as a "strategic" decision that defense counsel chose not to pursue this avenue. Exh A. 10-11.

But the right in question is the right to *confront* the government witnesses and not to simply have to choose another method of proof. Again, other circuit courts recognize this where core Sixth Amendment rights are at issue. As the Seventh Circuit put it in *Rhodes v. Dittmann,*

> The focus of the analysis for "whether the confrontation right has been violated must be on the particular witness," not on whether the defendant could admit similar evidence through other means. *Van Arsdall*, 475 U.S. at 680

903 F.3d at 662. Or, as this Court put it in *Van Arsdall,* the Confrontation Clause "guarantees an *opportunity* for effective cross-examination.'" 475 U.S. at 679. *See United States v. Beltran-Garcia*, 338 Fed.Appx. 765, 774 (10th Cir. 2009). It does not simply guarantee the opportunity for cross-examination or a reasonable alternative at the discretion of the trial court.

In this case, petitioner was not given an opportunity to confront the witness the government chose to put on the stand. Although the court characterized the exclusion as a "single hearsay statement," Exh A. 10, it was the compelling

existence of a possible death threat to a murder victim just hours before his murder. To not allow inquiry into whether this alleged threat was properly investigated, is to deny cross-examination on the very subject matter of the entire case below. The court below also emphasized that the defense counsel declined to seek to put on affirmative proof on the question. Exh.A. 10-11. But counsel explained, "[w]e don't want the jury to compare the government's case and the defense case. We want them to just focus on the government's case…" Exh.B. Tr.837. Petitioner's Sixth Amendment demand was to *confront* Della Rocca, not put its own case on. That after all was the very issue here – defendant's Sixth Amendment right to *confront* witnesses. *Alvarez,* at 229-30.

For these additional reasons, respectfully, the court below relied on the additionally mistaken view that the Sixth Amendment need only require an alternative means to confrontation. This Court should review the implications of that position.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: June 22, 2020

Respectfully submitted,

Robt A Culp

Robert A. Culp, Esq.
Attorney at Law
29 Garrison's Landing, P.O. Box 550
Garrison, New York 10524
(845) 424-4431

Counsel of Record and
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