No. 22A_____

In the Supreme Court of the United States

PHILIP ESFORMES,
APPLICANT

v.

UNITED STATES OF AMERICA

APPLICATION TO STAY THE ELEVENTH CIRCUIT'S MANDATE PENDING A PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CLARENCE THOMAS
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT

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LIST OF RELATED PROCEEDINGS

The proceedings below were:

1. *United States v. Philip Esformes*, Nos. 19-13838, 19-14874 (11th Cir.).

2. *United States v. Philip Esformes*, No. 18-15170 (11th Cir.).

3. *United States v. Philip Esformes*, No. 16-16485 (11th Cir.).

4. *United States v. Philip Esformes*, No. 16-cr-20549 (S.D. Fla.).

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Pursuant to 28 U.S.C. §§ 2101(f) and 1651 and this Court's Rule 23, Philip Esformes applies to stay the mandate of the United States Court of Appeals for the Eleventh Circuit pending a decision on Mr. Esformes' forthcoming petition for a writ of certiorari. As of this filing, the Eleventh Circuit's mandate has not issued. Should the mandate issue before the Circuit Justice or the Court acts on this application, Mr. Esformes respectfully applies to recall the mandate as well.

OPINIONS BELOW

The Eleventh Circuit's decision (App.3a-37a) is reported at 60 F.4th 621. The district court's denial of the motion to dismiss the indictment or disqualify the prosecution team (App.44a-93a) and the magistrate judge's report and recommendation (App.94a-210a) are unreported but available at 2018 WL 5919517 and 2018 WL 6626233, respectively. The district court's forfeiture order (App.38a-40a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 2101(f).

STATEMENT

In this case, the Eleventh Circuit affirmed a criminal conviction tainted by flagrant prosecutorial misconduct. In the course of investigating Mr. Esformes for alleged health-care fraud, the government seized hundreds of privileged documents from his lawyer without adequate screening procedures. Despite multiple red flags that the documents were privileged, prosecutors plowed ahead, using the documents extensively in their investigation. This misconduct was so egregious that even the government now concedes that the prosecutors' behavior was "reckless," "sloppy, careless, clumsy, and ineffective." C.A. Oral Arg. Recording 12:38-13:16 (argument of government counsel).

After defense counsel discovered the government's misconduct, Mr. Esformes moved to dismiss the indictment or to disqualify the prosecutors. The district court excoriated the prosecutors for their "fail[ure] to uphold the high standards expected from … [the] Department of Justice." App.91a. But after the government agreed not to use the wrongfully obtained evidence at trial, the district court declined to dismiss the indictment and allowed the case to go forward with the same, tainted prosecutorial team.

After a jury convicted Mr. Esformes on some counts and hung on others, Mr. Esformes appealed to the Eleventh Circuit, where he garnered the support of former Justice Department leaders including Attorneys General Edwin Meese, John Ashcroft, Alberto Gonzales, and Michael Mukasey. In their amicus brief, those leaders urged the government "to confess error rather than defend this ill-gotten conviction." C.A. Former DOJ Br. 34. And they asked the Eleventh Circuit to reverse the conviction and order dismissal given "the government's wholesale, protracted, and deliberate disregard for the defendant's attorney-client privilege." *Id.* at 33-34. President Trump took notice too: He commuted Mr. Esformes' sentence after 4.5 years served, citing the ongoing prosecutorial-misconduct appeal.

The Eleventh Circuit, however, affirmed Mr. Esformes' conviction. It held that unless Mr. Esformes could demonstrate that the government's invasion of his attorney-client privilege actually prejudiced the outcome of the proceedings, he would never be entitled to dismissal of the indictment or disqualification of the prosecutors—no matter how egregious or intentional the misconduct. In so doing, the Eleventh Circuit further entrenched a

longstanding, recognized circuit split over whether a defendant challenging improper privilege violations must prove actual prejudice or whether prejudice is presumed.

This Court should intervene to stay the Eleventh Circuit's mandate. This Court is reasonably likely to grant certiorari and reverse on the prosecutorial-misconduct question. Indeed, three former Justices of this Court previously recognized the circuit split on this question as certiorari-worthy, and the split has only deepened since then. Absent this Court's prompt intervention, the government will rush to retry Mr. Esformes on the hung counts—notwithstanding its acknowledged misconduct and the President's grant of clemency. Such a trial will threaten Mr. Esformes' already declining health and will prove wholly unnecessary if this Court reverses the judgment and orders dismissal of the indictment. In these extraordinary circumstances, a stay of the mandate is warranted.

This Court's intervention is particularly warranted because this case presents a second certiorari-worthy question. The Eleventh Circuit affirmed the district court's entry of a $38.7 million "forfeiture money judgment"—an order requiring Mr. Esformes to forfeit a general sum of money, rather than specific, tainted assets. Such "extrastatutory" judgments, as Justice Kagan has rightly called them, lack any basis in the statutory text, defy forfeiture's historical focus on tainted property, and deny defendants their right to a jury trial. *See* Oral Arg. Tr. 46, *Honeycutt v. United States*, 581 U.S. 443 (2017) (No. 16-142). Indeed, the jury here found that only a handful of specific assets were tainted by wrongdoing, yet the district court made its own factual findings and then ordered forfeiture of an additional $38.7 million. This case presents the opportunity to declare such abuses unlawful once and for all.

Only this Court's prompt intervention can halt this ongoing miscarriage of justice. The Circuit Justice or the Court should stay, and if necessary recall, the Eleventh Circuit's mandate pending the disposition of Mr. Esformes' forthcoming petition for certiorari.

A. The Botched Investigation

Mr. Esformes is a businessman who operated and partially owned nursing homes and assisted-living facilities in the Miami, Florida area. On July 22, 2016, the government unsealed an indictment alleging that Mr. Esformes committed health-care fraud, money laundering, and related charges in connection with a scheme to improperly pay doctors for referrals. D. Ct. Dkt. 3, 11.

That same day, the government searched an office suite at one of Mr. Esformes' assisted-living facilities. App.72a. The government knew that one of Mr. Esformes' civil attorneys had an office there. App.72a. Indeed, Mr. Esformes' criminal-defense attorney showed up the morning of the search, warned the agents about the likely presence of privileged documents in the office, and expressly alerted the lead prosecutor that agents were "seizing attorney-client privileged materials." App.72a-73a. The attorney made clear: "These are privileged files. We are not waiving any privilege." App.73a.

Given the presence of privileged documents, the government had prepared a so-called "taint protocol" before the search. App.72a. Law-enforcement agents and prosecutors unconnected to the investigation were supposed to conduct the search and segregate and review potentially privileged materials before transmitting them to the prosecution team. App.72a. But that protocol was fundamentally flawed in design and execution, as the government now admits. Among other failures:

- No one told the taint agents the names of Mr. Esformes' attorneys or their firms. App.73a.

- To the contrary, case agents told the agent leading the search that the lawyer whose office they were searching was just Mr. Esformes' "business associate." "[N]obody ever told us anything about him being his lawyer." App.104a.

- Taint agents put "[h]undreds of documents, clearly prepared by law firms," with markings like "privileged and confidential" or "attorney/client privilege" in non-taint boxes and sent those directly to the prosecution team. App.73a.

- One seized document, apparently placed in a non-taint box, was titled "Outline of potential defenses"—"Memo protected by attorney/client privilege." App.103a.

- Entire boxes of "non-taint" material were labeled "legal," "court documents," or marked with the name of Mr. Esformes' defense firm. App.100a.

- Taint agents sent seized hard drives directly to the prosecution team "with no review at all." App.201a-202a.

- Many of the taint agents had participated in related investigations, "some in a significant way." App.72a.

- Taint agents later became "actively involved" in the investigation. App.72a. A month after the search, the lead prosecutor even "encouraged" taint team members to contact witnesses. App.110a.

Following execution of the warrant, the prosecution team promptly began reviewing the seized materials, which were replete with privileged documents. App.77a. One set of privileged documents became especially significant. The lead prosecutor removed these documents from a purportedly "non-taint" box, photocopied them, and placed them back in a different, "non-taint" box that was somehow excluded from the scanned set of seized documents shared with defense counsel. App.77a, 202a n.51. These privileged documents included printouts of spreadsheets prepared by the legal assistant to Mr. Esformes' civil attorney as well as the legal assistant's notes about the project. App.79a. On the printouts

were the attorney's handwritten notes. App.79a. This work product was prepared to assist Mr. Esformes' criminal-defense attorney. App.79a.

As a magistrate judge later found, prosecutors used these privileged documents "extensively" in their investigation of Mr. Esformes. App.202a. In September 2016, they presented the documents to Mr. Esformes' civil attorney in an effort to persuade him to cooperate. App.80a. And in September and October 2016, prosecutors engaged in "exhaustive questioning" of the legal assistant about the documents. App.204a. The legal assistant's attorney immediately warned prosecutors that the documents might be privileged. App.77a. Undeterred, prosecutors continued using the documents, even after the legal assistant had identified the attorney's handwriting. App.82a. In November 2016, the civil attorney's lawyer also raised the privilege issue. App.77a. Despite initially acknowledging that these attorneys had asserted privilege over the "notes" (plural), the lead prosecutor later claimed that she thought the assertion covered only one bullet point in the legal assistant's notes. App.86a.

The appearance of privileged material in the supposedly "non-taint" boxes did not dissuade the lead prosecutor from continuing to review those boxes. App.77a. Only in December 2016, over two months after first being told about the privilege problem, did she stop reviewing these boxes after coming across yet another privileged document. App.77a. At that point, she brought in a different team of prosecutors to review the documents. App.77a. But she failed to inform either the court or Mr. Esformes about the privilege violation. App.77a. Mr. Esformes' defense team did not discover the violation until February 2017, when they reviewed the prosecutors' hard-copy files. App.77a.

B. Proceedings Below

1. In April 2017, Mr. Esformes moved to dismiss the indictment or disqualify the prosecution team in light of these and other privilege violations. App.94a. The motion was referred to a magistrate judge, who heard nine days of testimony from 18 witnesses. App.95a, 99a. In August 2018, the magistrate judge issued a 117-page report and recommendation detailing the government's misconduct. App.94a-210a.

The magistrate judge found that the government's taint protocol "was both inadequate and ineffective" and that prosecutors "improperly reviewed" unscreened materials. App.201a. The magistrate judge took particular issue with prosecutors' new claim that only one bullet point in the legal assistant's notes might be privileged. The judge found that the prosecutors' new explanation was "not credible" and "facially inconsistent with the[ir] prior sworn narratives" indicating that the privilege claim "extended to the entirety of the … notes." App.203a. The judge gave "no credibility to the prosecution team's 'new' narrative," which made "no logical sense." App.203a.

Ultimately, the magistrate judge found that "the government's disregard for the attorney client and work product privileges has not been limited to a single instance or event." App.207a. And she condemned the prosecutors' "deplorable" "attempt to obfuscate the evidentiary record" by changing their story. App.207a. But the magistrate judge read Eleventh Circuit precedent to require a showing of actual prejudice for dismissal or disqualification. App.96a-97a. Because she found that Mr. Esformes had not adequately shown prejudice, she recommended "the less drastic remedy of suppression" of evidence obtained in violation of privilege. App.207a-208a.

2. Mr. Esformes objected to the magistrate judge's suppression-only remedy, and the government objected to the adverse findings and the scope of suppression. App.45a-46a. The prosecutors hired private counsel to represent them at the district court's hearing. D. Ct. Dkt. 948, 961, 969. Counsel for the lead prosecutor warned that the magistrate judge's findings "could seriously jeopardize her career in public service." D. Ct. Dkt. 961, at 3. At oral argument, the district court claimed a "moral burden" to consider "the career of a prosecutor" and asked the prosecutors' private lawyers what "specific wording" they wanted changed in magistrate judge's report. D. Ct. Dkt. 974, at 217-19.

In November 2018, the district court adopted the magistrate judge's report and recommendation in part. The district court agreed with the magistrate judge "that the prosecutors and agents in this case failed to uphold the high standards expected from federal agents and prosecutors." App.91a. The search was "clumsy and border-line incompetent." App.76a. And the court chastised the prosecutors for their "sloppy, careless, clumsy, [and] ineffective" behavior "clouded by their stubborn refusal to be sufficiently sensitive to issues impacting the attorney client privilege." App.92a.

The district court nonetheless held that, because Mr. Esformes "ha[d] not sufficiently demonstrated that he was prejudiced," it was "unnecessary" to adopt the magistrate's "conclusion that the prosecutors acted in bad faith," "particularly given the adverse consequences of such findings to the careers of the prosecutors." App.87a-88a, 92a. The court alternatively found that prosecutors acted "in good faith," theorizing that their "inconsistent recollections" resulted from "differences in memories and from misunderstandings." App.88a, 92a. The court thus declined to dismiss the indictment or disqualify the

prosecution team. App.92a. Because the government agreed not to use the seized privileged materials at trial, the court deemed suppression of those materials moot. App.92a.

3. The case proceeded to trial. A jury found Mr. Esformes guilty of conspiracy to defraud the United States, obstruction of justice, and other kickback, bribery, and money-laundering counts. App.12a. The jury hung on six other counts, including the lead health-care-fraud conspiracy charge. App.12a. The district court sentenced Mr. Esformes to a term of imprisonment of 20 years. App.12a.

The district court retained the jury to make forfeiture findings for the money-laundering convictions. The government sought forfeiture of 19 bank accounts, Mr. Esformes' share of 29 health-care companies, four pieces of real property, a wristwatch, and a purse. D. Ct. Dkt. 1263. The jury found by a preponderance of evidence that seven of the companies were "involved in" the offense or "traceable to such property," but otherwise declined the government's forfeiture requests. *Id.* The district court ordered Mr. Esformes to forfeit his interests in those companies. D. Ct. Dkt. 1456.

On the government's motion, the district court also entered an additional "forfeiture money judgment" for $38,700,795. App.39a. That amount reflected the government's calculation of Mr. Esformes' revenue from his health-care facilities over seven years, not the value of tainted assets identified the jury. App.39a. To satisfy that judgment, the district court ordered the forfeiture of "substitute property," including 11 of the bank accounts and all of the real property the jury had declined to award. D. Ct. Dkt. 1583.

4. In December 2020, President Trump commuted Mr. Esformes' term of imprisonment after 4.5 years served but left intact the remaining aspects of his sentence, including

the forfeiture order. The President's press release cited Mr. Esformes' "declining health," the ongoing prosecutorial-misconduct appeal, and the support of former Attorneys General Meese, Ashcroft, Gonzales, and Mukasey. *Statement from the Press Secretary Regarding Executive Grants of Clemency* (Dec. 22, 2020), https://bit.ly/3LTG3tl.

Before the commutation, the government had informed the district court that it would "dismiss the hung counts if the defendant's appeal is dismissed." D. Ct. Dkt. 1460, at 61. But in April 2021, after the President's grant of clemency, the government announced that it would seek to retry Mr. Esformes on the hung counts, whatever happened on appeal. D. Ct. Dkt. 1565, at 4.

5. In January 2023, the Eleventh Circuit affirmed the judgment of conviction. As relevant here, the court held that Mr. Esformes could not obtain dismissal or disqualification for "even the most egregious prosecutorial misconduct" absent "demonstrable prejudice." App.16a (citation omitted). The court explicitly rejected Ninth Circuit caselaw presuming prejudice for deliberate privilege violations as "foreclosed by [Eleventh Circuit] precedent." App.17a. Because Mr. Esformes had not demonstrated actual prejudice, the court held that "the issue of bad faith … cannot affect our disposition of this appeal." App.18a.

The Eleventh Circuit also affirmed the forfeiture money judgment. App.29a. The court did not specifically address Mr. Esformes' argument that Congress has authorized forfeiture only of specific tainted property, not entry of general money judgments. C.A. Br. 55. But the court held that the district court had "followed Rule 32.2," which purports to authorize such judgments, "to the letter." App.31a. The Eleventh Circuit also rejected Mr.

Esformes' Sixth Amendment challenge to the forfeiture order, holding that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment[]." App.32a (quoting *Libretti v. United States*, 516 U.S. 29, 49 (1995)).

The Eleventh Circuit subsequently denied Mr. Esformes' petition for rehearing en banc and his motion to stay the mandate. App.1a-2a. As of this filing, the Eleventh Circuit has yet to issue the mandate.

ARGUMENT

This case amply satisfies the criteria for a stay pending the disposition of a petition for certiorari. A Circuit Justice or the Court will grant such a stay where an applicant shows: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). This case presents two meritorious, certiorari-worthy questions. And, on these exceptional facts, retrial would amount to irreparable harm justifying a stay.

I. There Is a Reasonable Probability the Court Will Grant Certiorari and a Fair Prospect of Reversal on the Prosecutorial-Misconduct Issue

The Eleventh Circuit's prosecutorial-misconduct holding presents a classic case for certiorari. That court held that defendants must demonstrate actual prejudice before courts will even consider dismissing an indictment or disqualifying prosecutors for pervasive attorney-client-privilege violations. In doing so, the Eleventh Circuit further solidified an entrenched, well-recognized split over whether a defendant must prove actual prejudice

or whether such prejudice is rebuttably or irrebuttably presumed where prosecutors improperly violate privilege. The actual-prejudice standard is irreconcilable with this Court's precedent that a "substantial threat" of prejudice can justify dismissal, *United States v. Morrison*, 449 U.S. 361, 365 (1981), as well as cases recognizing that some errors are too fundamental for ordinary prejudice analysis.

A. There Is a Reasonable Probability of Certiorari on This Issue

1. The circuits are intractably divided over whether a defendant must prove actual prejudice when prosecutors improperly violate attorney-client privilege. In demanding proof of actual prejudice, the Eleventh Circuit acknowledged its divergence from the Ninth Circuit, where courts presume prejudice if prosecutors deliberately violate privilege. App.17a (citing *United States v. Danielson*, 325 F.3d 1054, 1072 (9th Cir. 2003)).

The circuit split runs well beyond those two circuits. In dissenting from denial of certiorari in 1988, three Justices outlined a three-way split over the showing required where the government obtains "confidential defense strategy information." *Cutillo v. Cinelli*, 485 U.S. 1037, 1037-38 (1988) (White, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting). That "hopeless conflict among the circuits" persists today. *State v. Quattlebaum*, 527 S.E.2d 105, 108 (S.C. 2000); *accord United States v. Orduno-Ramirez*, 61 F.4th 1263, 1276 n.21 (10th Cir. 2023); *People v. Ervine*, 220 P.3d 820, 840 (Cal. 2009). At least two circuits and one state supreme court apply an irrebuttable presumption of prejudice where the government improperly violates privilege. At least two circuits and one state supreme court presume prejudice, but permit the government to rebut that showing. At least two circuits, including the Eleventh, fall at the other end of the spectrum, requiring the defendant to demonstrate that the prosecution's abuse of privilege actually prejudiced the outcome.

The Third and Tenth Circuits, joined by the South Carolina Supreme Court, hold that a defendant need not prove he was actually prejudiced by prosecutorial violations of attorney-client privilege in order to obtain the remedies of dismissal or disqualification, as such prejudice is *irrebuttably presumed*. The Third Circuit holds that where the government makes "a knowing invasion of the attorney-client relationship" there is no need to "weigh[] how prejudicial to the defense the disclosure is." *United States v. Levy*, 577 F.2d 200, 208 (3d Cir. 1978). And where, as here, "the trial has already taken place … dismissal of the indictment is the only appropriate remedy." *Id.* at 210; *accord United States v. Costanzo*, 625 F.2d 465, 469 (3d Cir. 1980).

Similarly, the Tenth Circuit holds that, absent a countervailing state interest, "a prosecutor's intentional intrusion into the attorney-client relationship" is "a *per se* violation of the Sixth Amendment." *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995). That presumption of prejudice "is conclusive—the court must accept that the defendant suffered prejudice even if the government presents evidence to the contrary." *Orduno-Ramirez*, 61 F.4th at 1269. And where pervasive violations "taint the entire proceeding," "retrial by a new prosecutor" or "dismissal of the indictment" are appropriate remedies. *Shillinger*, 70 F.3d at 1143. The South Carolina Supreme Court agrees: "Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice." *Quattlebaum*, 527 S.E.2d at 109. That court thus disqualified an entire prosecutor's office after an attorney intentionally violated attorney-client privilege. *Id.*

The First and Ninth Circuits and the Connecticut Supreme Court take an intermediate approach, presuming prejudice but permitting the government to rebut that presumption. In the First Circuit, once a defendant shows that prosecutors obtained confidential communications, "[t]he burden then shifts to the government to show that the defendant was not prejudiced; that burden is a demanding one." *United States v. DeCologero*, 530 F.3d 36, 64 (1st Cir. 2008); *accord United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984). The Ninth Circuit too puts a "heavy burden" on prosecutors to show no prejudice when they affirmatively obtain privileged defense trial strategy. *Danielson*, 325 F.3d at 1072. And Connecticut imposes a rebuttable "presumption of prejudice when trial strategy has been disclosed to the prosecutor." *State v. Lenarz*, 22 A.3d 536, 550 (Conn. 2011). In Connecticut, if the government fails to prove the absence of prejudice, the default remedy is dismissal of the indictment unless the government can "prove by clear and convincing evidence" that some lesser remedy "such as the appointment of a new prosecutor" will suffice. *Id.* at 553.

At the other end of the spectrum, the Eleventh Circuit below held that defendants must demonstrate actual prejudice before dismissal or disqualification are even on the table. App.17a. The Sixth Circuit has likewise stated that "prejudice to the defendant must be shown before any remedy is granted." *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984).

In at least four of the above circuits, Mr. Esformes would have had a strong argument for dismissal or disqualification, either because the prosecutors' misconduct was *per se* prejudicial or because the government would have faced a heavy burden to explain how

the significant privilege violations here did not taint the case. The Eleventh Circuit, however, demanded the impossible, asking Mr. Esformes to peer inside prosecutors' minds to demonstrate how their ill-gotten knowledge did *not* affect the outcome. In 1988, three Justices voted to resolve this split. *Cutillo*, 485 U.S. at 1037. The case for certiorari has only strengthened since then. Thus, at the very least, there is a reasonable probability four Justices will grant today.

2. This question presented is exceptionally important and warrants this Court's review. Rare is the case where four former U.S. Attorneys General file in support of a criminal defendant. Yet privilege violations by federal prosecutors are unfortunately recurrent, as the longstanding circuit split illustrates.

Taint teams in particular, like the one the government bungled here, "present inevitable, and reasonably foreseeable, risks to privilege." *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006). Because "the government's fox is left in charge of the … henhouse," the disclosure of even "obviously protected" documents is inevitable. *Id.*; *accord In re Search Warrant*, 942 F.3d 159, 177-78 (4th Cir. 2019). Privilege violations by taint teams are common and well documented. *See* Law Profs. Br. 10-21, *Korf v. United States*, 143 S. Ct. 88 (2022) (No. 21-1364) (collecting examples). Yet the Justice Department has plowed ahead, recently appointing an entire new bureaucracy to oversee this process. Sheena Foye & James R. Wyrsch, *DOJ Creates Special Unit to Handle Privileged Documents*, ABA (Oct. 29, 2020), https://bit.ly/3TL8YBR.

The Eleventh Circuit's holding will only invite further abuses involving taint teams. Under the Eleventh Circuit's actual-prejudice rule, all the government has to do when

caught with its hand in the privileged cookie jar is put aside the wrongfully seized documents and carry on. That standard—which ignores the reality that prosecutors cannot unsee privileged documents—offers cold comfort to the victims of governmental overreach.

This case is an optimal vehicle to decide this issue. There is no dispute that the government engaged in serious misconduct. App.16a. Even the government concedes its actions were "reckless." C.A. Oral Arg. Recording 13:11-13:21. Moreover, the Eleventh Circuit resolved the prosecutorial-misconduct issue exclusively on the ground that Mr. Esformes could not prove actual prejudice, holding that it would deny relief regardless of whether prosecutors acted in bad faith. App.18a.

B. There Is a Fair Prospect of Reversal on This Issue

Turning to the second condition for a stay, there is a fair prospect of reversal on the prosecutorial-misconduct issue because the Eleventh Circuit's actual-prejudice standard is irreconcilable with this Court's decision in *Morrison*, 449 U.S. 361. There, this Court held that dismissal is not an appropriate remedy for Sixth Amendment violations by the government "absent demonstrable prejudice, *or substantial threat thereof*." *Id.* at 365 (emphasis added). And this Court recognized that, even standing alone, "a pattern of recurring violations … might warrant the imposition of a more extreme remedy in order to deter further lawlessness." *Id.* at 365 n.2. In adopting an actual-prejudice requirement, the Eleventh Circuit cited *Morrison* but simply ignored its "substantial threat" and "recurring violations" language. *See United States v. Ofshe*, 817 F.2d 1508, 1515 (11th Cir. 1987). Pervasive privilege violations at minimum present a "substantial threat" of prejudice, even where the defendant cannot pinpoint how exactly the prosecution used its ill-gotten evidence against him.

Indeed, an actual-prejudice standard makes little sense for improper privilege violations. As the Ninth Circuit has explained, "the government and the defendant will have unequal access to knowledge. The prosecution team knows what it did and why. The defendant can only guess." *Danielson*, 325 F.3d at 1070. Where prosecutors invade privilege, defendants will rarely be able to reconstruct how that knowledge shaped prosecutors' strategy. That disadvantage is particularly pronounced where, as the magistrate judge (but not the district court) found here, prosecutors engage in an ongoing, "deplorable" campaign "to obfuscate the evidentiary record." App.207a. Nor can defendants readily determine how prosecutors without such a career-threatening, bad-faith finding hanging over their heads might have handled the case.

Pervasive privilege violations thus fall into the category of structural errors where "[i]t is impossible to know what different choices" would have been made and "to quantify the impact of those different choices on the outcome of the proceeding." *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). When "the effects of the error are simply too hard to measure," the error will "not be deemed harmless." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907-08 (2017). The same is true where "the error always results in fundamental unfairness." *Id.* at 1908. Prosecutors' disregard of their "duty to refrain from improper methods" falls into that category. *See Connick v. Thompson*, 563 U.S. 51, 71 (2011) (citation omitted). When the government consistently refuses to turn square corners, a defendant's liberty should not turn on the fortuity of identifying a specific instance where those shortcuts altered the trial.

II. There Is a Reasonable Probability the Court Will Grant Certiorari and a Fair Prospect of Reversal on the Criminal-Forfeiture Issue

The Eleventh Circuit's holding that district courts can impose criminal forfeiture via personal money judgments untethered to specific assets independently meets the criteria for review and reversal. By its plain terms, the criminal-forfeiture statute requires the government to identify specific, tainted "property" to be forfeited. 18 U.S.C. § 982(a)(1). That text coincides with forfeiture's historically *in rem* nature. And that text preserves juries' constitutionally mandated fact-finding role, demanding a factual nexus that juries must determine.

Yet for decades, the circuits have ignored this language, permitting courts alone to impose free-floating money judgments that have no relationship to specific property tainted by the offense. Bound by circuit precedent, the circuits have carried on, never mind this Court's repeated pronouncements that forfeiture is limited to tainted property and that juries, not judges, must find facts that enhance criminal sentences.

1. There is a reasonable probability this Court will grant certiorari on this issue and a fair prospect this Court will reverse given the total disconnect between personal money judgments and the statutory text, precedent, and history.

a. As the Ninth Circuit has observed, there is no "textual basis for imposing a personal money judgment." *United States v. Nejad*, 933 F.3d 1162, 1165 (9th Cir. 2019). The forfeiture statute applicable here applies only to "*property*, real or personal, involved in [the] offense, or any *property* traceable to such property." 18 U.S.C. § 982(a)(1) (emphases added). Personal money judgments do not seek such "property"; they put defendants on the hook for a general sum of money, regardless of whether identifiable property was

tainted by the crime. Indeed, lower courts have endorsed forfeiture money judgments where defendants do not have "any property at all." *United States v. Misla-Aldarondo*, 478 F.3d 52, 75 (1st Cir. 2007); *accord United States v. Casey*, 444 F.3d 1071, 1077 (9th Cir. 2006). The district court's order in this case makes abundantly clear that specific property is not at issue. The court described the forfeited $38.7 million as "a sum of money *equal in value to the property* traceable to the property involved in the Defendant's money laundering offenses." App.39a (emphasis added). Section 982(a)(1) authorizes the forfeiture of "property," not "money equal in value to the property."

The statute's focus on specific, tainted property tracks forfeiture's historical roots. "[T]he common law drew a clear line between tainted and untainted assets." *Luis v. United States*, 578 U.S. 5, 29 (2016) (Thomas, J., concurring in judgment). Forfeiture was traditionally an *in rem* "action against the tainted property itself." *Honeycutt*, 581 U.S. at 453. Congress roundly rejected *in personam* forfeitures before 1970. *United States v. Bajakajian*, 524 U.S. 321, 332 & n.7 (1998). Yet even modern *in personam* forfeiture statutes "maintain[] traditional *in rem* forfeiture's focus on tainted property unless" the substitute-asset provision, 21 U.S.C. § 853(p),[1] discussed below applies. *Honeycutt*, 581 U.S. at 453. Personal money judgments put the cart before the horse, ordering the defendant to forfeit an amount of money, not specific property.

Contextual clues confirm that personal money judgments are *ultra vires*. As this Court has noted, the substitute-assets provision, 21 U.S.C. § 853(p), is "the sole provision

[1] While 21 U.S.C. § 853 is the forfeiture provision for drug crimes, Congress has incorporated that section's procedures into other forfeiture statutes, including 18 U.S.C. § 982(a)(1). *See id.* § 982(b)(1).

of § 853 that permits the Government to confiscate property untainted by the crime." *Honeycutt*, 581 U.S. at 451. Under that provision, the government can obtain untainted property only when the forfeited, tainted "property" is unavailable due to the "act or omission of the defendant." 21 U.S.C. § 853(p). That provision makes no sense as applied to free-floating money judgments. Here, for example, the district court ordered the forfeiture of substitute assets because "the property involved in Defendant's money laundering crimes" or "traceable" thereto was unavailable. D. Ct. Dkt. 1583, at 5. But the money judgment had not ordered forfeiture of the "property involved in" or "traceable" to the offense; it ordered the forfeiture of "a sum of money *equal in value to* th[at] property." App.39a (emphasis added). In other words, the district court purported to substitute untainted assets for tainted assets that had never been forfeited in the first place. That disconnect makes a hash of Congress's careful scheme.

Had Congress wanted to authorize personal money judgments, it easily could have done so. For certain currency-smuggling offenses, Congress has authorized the forfeiture of property involved in or traceable to the offense. 31 U.S.C. § 5332(b)(2). Yet for those offenses, unlike here, Congress *also* authorized "a personal money judgment against the defendant for the amount that would be subject to forfeiture." *Id.* § 5332(b)(4). That language perfectly describes what the government seeks here. If forfeiture already permitted personal money judgments, Congress had no need to enact that alternative.

Personal money judgments also contradict forfeiture's principal aim: "separating a criminal from his ill-gotten gains." *Honeycutt*, 581 U.S. at 447 (citation omitted). Congress has other tools, like fines, to impose ongoing consequences on defendants, whether or not

specific assets are tainted. For the money-laundering offenses here, for example, the government could have sought a fine up to double "the value of the property involved in the transaction." 18 U.S.C. § 1956(a). But for forfeiture, the government needs to identify specific, "tainted property," *Honeycutt*, 581 U.S. at 449—something the government failed to do for the $38.7 million judgment here.

b. The courts of appeals have primarily justified personal money judgments using rank purposivism. Courts fear that a prescient defendant might "rid[] himself of his ill-gotten gains to avoid the forfeiture sanction," contravening Congress's "policy rationale." *E.g.*, *United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006). But if the defendant has no ill-gotten gains left to forfeit, the government is free to seek a fine or restitution. Some courts bolster the point by citing 21 U.S.C. § 853(o), which instructs that section 853 "shall be liberally construed to effectuate its remedial purposes." *E.g.*, *Casey*, 444 F.3d at 1073. But even if section 853(o) is relevant here, it is no license to ignore the "plain text." *See Honeycutt*, 581 U.S. at 454 n.2.

The Eleventh Circuit justified the money judgment below by cursorily citing Federal Rule of Criminal Procedure 32.2(b)(1)(A). App.31a. That Rule purports to authorize the "forfeiture of specific property" (with a right to jury trial) or "a personal money judgment" (with no jury right). But the Federal Rules may "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. The government cannot obtain by rule what Congress has not granted by statute. If anything, Rule 32.2 underscores the problem with the government's theory. The Rule recognizes that "a personal money judgment" and "specific property" are two different things. Yet Congress authorized forfeiture of only the latter in

18 U.S.C. § 982(a)(1). Indeed, in proposing Rule 32.2, the Advisory Committee noted the lower-court cases blessing money judgments but took "no position on the[ir] correctness." Fed. R. Crim. P. 32.2 note on 2000 rule.

Ultimately, the circuits' reasoning boils down to the notion that "[n]othing in the relevant statutes suggests that money judgments are *forbidden*." *United States v. Day*, 524 F.3d 1361, 1377 (D.C. Cir. 2008). That gets the separation of powers precisely backwards. Congress alone has the power "to prescribe the punishments to be imposed upon those found guilty" of federal crimes. *Whalen v. United States*, 445 U.S. 684, 689 (1980). The circuits' ongoing disregard of text, history, and structure cries out for this Court's intervention.

2. This Court is likely to grant certiorari and reverse for an additional reason: The government's use of personal money judgments to evade jury fact-finding blatantly violates the Sixth Amendment. Under *Apprendi v. New Jersey*, "[o]ther than the fact of a prior conviction, any fact that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). That rule applies to fines as well as prison sentences. *S. Union Co. v. United States*, 567 U.S. 343, 360 (2012).

Nothing justifies a different result for forfeiture. The forfeiture statute requires a nexus between the property and the offense. 18 U.S.C. § 982(a)(1). That nexus is a question of fact. *See Libretti*, 516 U.S. at 44 (describing "factual nexus requirement"). Without that fact-finding, "the jury's verdict alone does not allow" the forfeiture. *See S. Union*, 567 U.S.

at 348 (citation omitted). The Sixth Amendment therefore requires juries, not judges, to determine those facts.

As Justice Gorsuch has explained in the similar context of restitution, "allowing judges, rather than juries, to decide the facts necessary to support [such] orders isn't well-harmonized with this Court's Sixth Amendment decisions." *Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari) (citation omitted). Before this Court applied *Apprendi* to criminal fines, the government warned that doing so might require jury findings for forfeiture. Oral Arg. Tr. 37, *S. Union*, 567 U.S. 343 (No. 11-94). In the words of the Deputy Solicitor General, "a mathematically, geometrically accurate application of the rule stated in *Apprendi*" might well compel that result. *Id.* That concession was spot on.

This case vividly illustrates the absurdity of permitting the government to use personal money judgments to skirt the Sixth Amendment. For forfeiture of specific property, the Federal Rules affirm defendants' right to a jury finding on "the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(5)(B). Mr. Esformes exercised that right and the jury identified only seven assets (out of 54 requested by the government) involved in the offense. D. Ct. Dkt. 1263. But for personal money judgments, Rule 32.2 cuts out juries, letting district courts alone determine "the amount of money that the defendant will be ordered to pay." Fed. R. Crim. P. 32.2(b)(1)(A). Thus, the government here requested, and the district court entered, an *additional* judgment of $38.7 million that led to the forfeiture of many of the same assets that the jury declined to award. *Supra* p. 9. That heads-you-lose-tails-I-win scheme makes a mockery of the Sixth Amendment.

The courts of appeals have justified this topsy-turvy result by reference to this Court's 1995 remark in *Libretti* that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." 516 U.S. at 49. *Libretti* relied on older cases holding that "[t]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.* (citing, *e.g.*, *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986)). Those decisions have now been "expressly overruled." *United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (plurality opinion). Pre-*Apprendi* caselaw cannot justify the continued denial of defendants' Sixth Amendment rights in forfeiture proceedings.

Some courts have also argued that forfeiture orders can never violate the Sixth Amendment "because no statutory or other maximum limits the amount of forfeiture." *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012) (cleaned up). But as Justice Gorsuch has explained in the restitution context, without a fact-finding, the statutory maximum "is usually *zero*, because a court can't award *any* [money] without finding additional facts." *Hester*, 139 S. Ct. at 510. Similarly, the government's power to pursue forfeiture of *unlimited* sums of money does not somehow diminish defendants' Sixth Amendment rights.

3. This issue's importance and recurring nature underscore the reasonable probability of certiorari. Indeed, two Justices have already stated that the analogous Sixth Amendment question in the restitution context "is worthy of [this Court's] review." *Id.* The same is true of forfeiture. Criminal forfeiture is now "a routine part of criminal law enforcement in federal cases." Stefan D. Cassella, *Criminal Forfeiture Procedure*, 32 Am. J. Crim. L. 55, 56 (2004). Forfeiture money judgments allow the government to impose eye-popping

penalties that may far exceed the defendant's current assets. *E.g.*, *Honeycutt*, 581 U.S. at 446 (government sought $269,752 from hardware-store clerk); *United States v. Waked Hatum*, 969 F.3d 1156, 1160-61 (11th Cir. 2020) ($20,852,000 from money-laundering defendant who had already repaid victim in full with interest); *United States v. Awad*, 598 F.3d 76, 78 (2d Cir. 2010) ($10,000,000 from khat distributor); *Hall*, 434 F.3d at 58 ($511,321 from marijuana dealer). These penalties can be "financially ruinous," especially for "indigent defendants." Mara Boersch, *Forfeiture Money Judgments: Will the Supreme Court Clamp Down on These Unconstitutional Judicial Punishments?*, 45 Champion 38, 38 (June 2021).

After *Apprendi* and *Honeycutt*, courts of appeals have recognized the tension between their decisions and this Court's pronouncements. *E.g.*, *Nejad*, 933 F.3d at 1165-66. Commentators too have noted that the government's approach violates the Sixth Amendment, Wayne R. LaFave et al., *Criminal Procedure* § 26.6(d) (4th ed. Nov. 2022 update) (collecting authority), and that personal "money judgments are not currently authorized by statute," Matthew L. Allison, Comment, *To Curb or Not to Curb: Applying* Honeycutt *to the Judicial Overreach of Money Judgment Forfeitures*, 48 U. Balt. L. Rev. 271, 289 (2019); *accord* Boersch, *supra*, at 39.

In case after case, however, the courts of appeals have declared their hands tied by circuit precedent. *E.g.*, *Waked Hatum*, 969 F.3d at 1163; *Nejad*, 933 F.3d at 1165; *United States v. Groski*, 880 F.3d 27, 40-41 (1st Cir. 2018). On the Sixth Amendment in particular, circuits have held that *Libretti* remains binding on them, notwithstanding *Apprendi*. *E.g.*, *United States v. Bradley*, 969 F.3d 585, 591 (6th Cir. 2020); *United States v. Stevenson*, 834 F.3d 80, 85-86 (2d Cir. 2016); *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012).

Mr. Esformes' forthcoming certiorari petition will present the Court with the opportunity to finally break the logjam.

III. A Stay Would Avert Irreparable Harm and Is Supported by the Equities

Absent a stay, Mr. Esformes faces irreparable harm. The government previously represented to the district court that it would "dismiss the hung counts" if the Eleventh Circuit affirmed Mr. Esformes' conviction. D. Ct. Dkt. 1460, at 61. But after President Trump commuted Mr. Esformes' sentence, the government changed course and announced in April 2021 that it would retry Mr. Esformes on the hung counts regardless of the outcome on appeal. D. Ct. Dkt. 1565, at 4. Even then, the government asserted "that we should wait until the appeal runs its course in the interest of justice" before "proceed[ing] forward" on the hung counts. *Id.* More recently, however, the government opposed Mr. Esformes' request to stay the mandate and informed his attorneys via email that it wants to move up the next status conference in the district court (scheduled for May 5, 2023), thereby *accelerating* the proceedings below.

In commuting Mr. Esformes' sentence after 4.5 years in prison, President Trump noted his "declining health." *Statement from the Press Secretary*, *supra*. Immediate retrial will further strain Mr. Esformes' health by subjecting him to another bout with the same prosecutors that committed misconduct against him in the first place. Given that the first trial took 39 days, these burdens will be substantial.

"In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms." *Hollingsworth*, 558 U.S. at 190. To the extent the Court views this case as close, the equities manifestly favor a stay. The government faces no harm from awaiting this Court's decision on certiorari. The government has tried this case once and

has its evidence lined up. The government has already seized the entire $38.7 million forfeiture judgment—money neither Congress nor a jury ever authorized the government to claim. Mr. Esformes is not a flight risk. He has surrendered his passport and submitted a $50 million bond co-signed by his aging father and three children. D. Ct. Dkt. 1595. If anything, immediate retrial would harm the public interest, wasting resources on another potentially month-long trial that might soon be obviated by this Court's decision. As the government itself noted when it agreed to wait on the Eleventh Circuit appeal, a decision in Mr. Esformes' favor "could make any such trial moot" at the cost of "judicial economy." D. Ct. Dkt. 1565, at 4.

Retrial during the pendency of Mr. Esformes' certiorari petition also risks a procedural morass. *Cf. Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (granting stay barring retrial given mootness concerns). If the government obtains a new conviction, but this Court later reverses the original conviction, the lower courts would have to untangle those conflicting judgments. A decision from this Court dismissing the indictment would presumably wipe out the new conviction too. So would an order disqualifying the prosecutors that continue to lead the government's trial team. But what if the Court reverses the Eleventh Circuit's actual-prejudice holding but remands on the remedy? And how would reversal of the original forfeiture order affect any future forfeiture order that may involve the same assets? This Court ordinarily seeks to avoid such "piecemeal litigation." *See Microsoft Corp. v. Baker*, 582 U.S. 23, 39 (2017).

The stay of a criminal retrial may be unusual. But the circumstances of this case are extraordinary, as the President's clemency and the intervention of four former Attorneys General make clear.

CONCLUSION

The Court should grant the application to stay, and if necessary recall, the mandate pending a petition for a writ of certiorari.

Respectfully submitted,

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