In the Supreme Court of the United States

No. 22A970

PHILIP ESFORMES, APPLICANT

v.

UNITED STATES OF AMERICA

UNOPPOSED APPLICATION FOR A FURTHER EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable Clarence Thomas
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Eleventh Circuit

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for Philip Esformes respectfully requests a further 30-day extension of time, to and including July 31, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. The court of appeals denied rehearing en banc on March 3, 2023. App.1a. On May 3, 2023, Mr. Esformes applied to Justice Thomas for a 60-day extension of time to file a petition for a writ of certiorari. On May 5, 2023, Justice Thomas granted that application in part, extending the deadline to July 1, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). The United States does not oppose this request.

1. This case presents two important questions of criminal law.

First, the Eleventh Circuit held that, when prosecutors improperly invade a defendant's attorney-client privilege, the defendant must prove actual prejudice to obtain dismissal of the indictment or disqualification of the prosecutors. That decision conflicts with decisions by other circuits and state courts of last resort. Specifically, at least two circuits and one state supreme court irrebuttably presume prejudice for such prosecutorial privilege violations. *E.g.*, *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995); *United States v. Levy*, 577 F.2d 200, 208 (3d Cir. 1978); *State v. Quattlebaum*, 527 S.E.2d 105, 109 (S.C. 2000). And at least two circuits and one state supreme court presume prejudice, unless the government rebuts that showing. *E.g.*, *United States v. DeCologero*, 530 F.3d 36, 64 (1st Cir. 2008); *United States v. Danielson*, 325 F.3d 1054, 1072 (9th Cir. 2003) *State v. Lenarz*, 22 A.3d 536, 550 (Conn. 2011). This split is long-standing and well-recognized. *See Cutillo v. Cinelli*, 485 U.S. 1037, 1037-38 (1988) (White, J., dissenting from the denial of certiorari); *United States v. Orduno-Ramirez*, 61 F.4th 1263, 1276 n.21 (10th Cir. 2023).

Second, the Eleventh Circuit diverged from this Court's precedent by affirming the district court's imposition of a "forfeiture money judgment" against Mr. Esformes. The district court ordered Mr. Esformes to forfeit a general amount of money, not specific, tainted property. But the forfeiture statute requires specific "property … involved in [the] offense" or traceable thereto, 18 U.S.C. § 982(a)(1), and this Court has recently underscored forfeiture's "focus on tainted property," *Honeycutt v. United States*, 581 U.S. 443, 453 (2017). The judgment here lacked that required focus. Forfeiture money judgments also violate the Sixth Amendment's requirement that juries, not judges, find facts required to increase the penalty for a crime. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Absent a fact-finding that specific property was tainted by the crime, the maximum forfeiture authorized by statute is $0. Yet, under the Eleventh Circuit's rule, a district court may impose a multi-million-dollar forfeiture money judgment without any jury finding as to those funds.

2. In this case, the government charged Mr. Esformes with alleged health-care fraud and related changes. The government's investigation, however, was marred by serious, repeated privilege violations—conduct the government described below as "reckless," "sloppy, careless, clumsy, and ineffective." C.A. Oral Argument Recording 12:38-13:16. After a July 2016 search that the district court called "clumsy and border-line incompetent," prosecutors obtained hundreds of privileged documents from the office of Mr. Esformes' civil attorney. *United States v. Esformes*, 2018 WL 5919517, at *23 (S.D. Fla. Nov. 13, 2018). Prosecutors then used certain of those documents against Mr. Esformes repeatedly during the investigation. *Id.* at *25-*30.

After the government's misconduct came to light, Mr. Esformes moved to dismiss the indictment or disqualify the prosecutors. Following a nine-day hearing, a magistrate judge issued a lengthy report and recommendation, finding that the government committed sustained "improper conduct." *United States v. Esformes*, 2018 WL 6626233, at *62 (S.D. Fla. Aug. 10, 2018). The magistrate judge also found that prosecutors engaged in a "deplorable" "attempt to obfuscate the evidentiary record" by changing their explanation for why they used the privileged documents. *Id.* However, because Mr. Esformes had not demonstrated that the government's misconduct would actually prejudice the outcome of

the proceeding, the magistrate judge recommended denying Mr. Esformes' request for dismissal or disqualification. *Id.* at *63.

In November 2018, the district court adopted the magistrate judge's report in part. The district court agreed that the prosecutors had "failed to uphold the high standards expected from … [the] Department of Justice." 2018 WL 5919517, at *34. But the court declined to adopt the magistrate judge's "bad faith" finding. *Id.* at *31, *34. And because Mr. Esformes had not sufficiently demonstrated actual prejudice, the court declined to impose disqualification or dismissal as remedies, holding that the government's promise not to use the tainted evidence at trial sufficed. *Id.* at *34-*35.

The case proceeded to trial where a jury convicted Mr. Esformes of conspiracy to defraud the United States, money laundering, and certain related charges. App.11a. The jury, however, hung on six other counts, including the lead health-care-fraud conspiracy charge. App.11a. The district court sentenced Mr. Esformes to a term of imprisonment of 20 years. App.11a.

The government sought the forfeiture of 54 assets it alleged were tainted by money laundering. D. Ct. Dkt. 1263. The jury, however, found that only seven assets were so tainted. *Id.* The district court ordered Mr. Esformes to forfeit those specific assets. D. Ct. Dkt. 1456. On the government's motion, the district court also entered a "forfeiture money judgment" for an additional $38.7 million. D. Ct. Dkt. 1455, 1456. To satisfy that money judgment, the district court ordered Mr. Esformes to forfeit certain "substitute property," including many of the same assets the jury had declined to award. D. Ct. Dkt. 1583.

3. Supported by amici, including four former U.S. Attorneys General, Mr. Esformes appealed to the Eleventh Circuit. While the appeal was pending, the President commuted Mr. Esformes' term of imprisonment after 4.5 years served but left in place the remaining aspects of his sentence, including the forfeiture order. The President's press release cited the former Attorneys General's support and the prosecutorial-misconduct appeal. *Statement from the Press Secretary Regarding Executive Grants of Clemency* (Dec. 22, 2020), https://bit.ly/3LTG3tl.

In January 2023, the Eleventh Circuit affirmed Mr. Esformes' 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.15a (citation omitted). The court explicitly rejected Ninth Circuit caselaw presuming prejudice for deliberate privilege violations as "foreclosed by [Eleventh Circuit] precedent." App.16a.

The Eleventh Circuit also affirmed the forfeiture money judgment. App.28a. The court held that the district court had followed Federal Rule of Criminal Procedure 32.2, which purports to authorize such judgments, "to the letter." App.30a. And the Eleventh Circuit rejected Mr. Esformes' Sixth Amendment challenge, holding that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment[]." App.31a (quoting *Libretti v. United States*, 516 U.S. 29, 49 (1995)).

The Eleventh Circuit subsequently denied Mr. Esformes' petition for rehearing en banc. App.1a. Thereafter, Justice Thomas denied Mr. Esformes' request for a stay pending the disposition of his forthcoming petition for certiorari.

4. Counsel for applicant respectfully requests a further 30-day extension of time to and including July 31, 2023, within which to file a petition for a writ of certiorari. Undersigned counsel was retained only after the Eleventh Circuit denied Mr. Esformes' motion to stay the mandate, three weeks after the denial of rehearing en banc. And the application for a stay consumed a portion of the certiorari window.

The undersigned counsel of record also has significant prior commitments in other matters, including a motion to dismiss due June 15, 2023, and out-of-town travel for depositions from June 26-29, 2023; July 10-14, 2023; and July 24-28, 2023. Undersigned co-counsel also have several proximate briefing deadlines including: (1) a brief for appellee in *Blasket Renewable Investments LLC v. Kingdom of Spain*, No. 23-7038, due June 29, 2023 in the U.S. Court of Appeals for the D.C. Circuit; (2) a brief for appellee in *KPH Healthcare Services v. Mylan*, No. 23-3014, due June 30, 2023 in the U.S. Court of Appeals for the Tenth Circuit; (3) a petition for certiorari in *AstraZeneca UK Ltd. v. Atchley*, due July 3, 2023 in this Court; (4) a reply brief for appellant in *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 23-7032, due July 20, 2023 in the U.S. Court of Appeals for the D.C. Circuit. Other trial and appellate co-counsel, who have their own prior commitments, will also require time to review the draft petition, as will Mr. Esformes. Additional time is therefore needed to prepare and print the petition in this case.

5. Undersigned counsel conferred with counsel for the government, which does not oppose this request.

Respectfully submitted,

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